
**United States Department of Agriculture**

**Forest Service**

**Rocky Mountain Regional Office**

# Response to Objections on the Village at Wolf Creek Access Project, Rio Grande National Forest

**November 2018**

# Contents

## Issue 1: The village proposal expands impacts of the federally permitted ski area development

Objectors allege that the Forest Service violated the National Environmental Policy Act (NEPA) and that the analysis in the Final Environmental Impact Statement (FEIS) is deficient because it failed to include the potential development of the Village at Wolf Creek as a direct effect.

### Analysis

The agency decision is to determine how to provide the landowner with their statutory right of access, and what, if any, conditions would apply to that access. The intent of the applicant is to develop the Village at Wolf Creek. However, the future development of the Village at Wolf Creek is not a part of the purpose and need or the federal proposed action; it is a potential private action. NEPA regulations (40 C.F.R. 1508.23) define a proposal subject to NEPA as when an agency has a goal and is actively preparing to make a decision to accomplish that goal. The Village at Wolf Creek is not an agency goal nor will the agency actively prepare a decision to accomplish the proposed development. Further, as indicated in Section 2.4 of the FEIS (p. 2-6) and the Draft Record of Decision (Draft ROD), the Forest Service lacks sufficient authority to approve or deny a specific level of development on private lands.

Objectors contend the agency failed to take a hard look at the direct impacts of the development. However, development of the private lands by the applicant is considered a "connected action," and is analyzed as an indirect effect of approving either action alternative (FEIS p. 1-29). As defined in 40 CFR 1508.8, environmental effects include: 1) direct effects, which are caused by the action and occur at the same time and place; and (2) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Chapter 4 of the DEIS and FEIS includes detailed analysis of the direct, indirect, and cumulative environmental effects of Alternatives 1, 2, and 3, including conceptual Low, Moderate, and Maximum development scenarios for the Village at Wolf Creek under Alternatives 2 and 3 (action alternatives). Maximum development represents the "full development" scenario, and was thoroughly analyzed in the FEIS for each action alternative. Most of the analysis deals with "indirect effects," including development of the Village at Wolf Creek. Thus, the argument that those effects were not considered, or were scrutinized less because they were considered indirect effects, is not supported by the record.

As stated in the draft ROD (p. 15), the "analysis would not have been different if the EIS treated the Village as part of the federal action and therefore classified its impacts as direct effects rather than indirect effects." The draft ROD goes on to state "We would have still used the same reasonable range of development scenarios to capture the impacts of the Village (p. 16)."

Furthermore, Forest Service Manual (FSM) direction "concerning the granting of rights-of-ways for roads and trails across National Forest System lands is to provide access as promptly as feasible to requesters, consistent with Forest land and resource management plans and applicable laws and regulations" and to "avoid regulation of private lands when considering and authorizing access to those private lands" (FSM 2730.3). Forest Service Manual direction for private property rights states "except as authorized by law, order, or regulation, Forest Service policies, practices, and procedures shall avoid regulating private property use" (FSM 5403.3).

### Conclusion

Based on my review of the FEIS, Draft ROD, and project record, I find that the responsible official described and analyzed direct, indirect, and cumulative effects appropriately as required by NEPA.

However, even if the private land effects are properly described as "direct" effects, the FEIS took a hard look at those effects and informed the public and the decision-maker of the likely significant environmental impacts. NEPA requires no more. 40 C.F.R. 1500.3.

## Issue 2: Judicial orders preclude reliance on FEIS

Objectors claim that the Forest Service cannot make a new decision based on the FEIS, as it has been ruled unlawful.

a) Objectors allege that, because the Forest Service withdrew from the pending appeal, the land exchange must be unwound and there must be a new analysis on a clean slate.

b) Objectors allege that the Draft ROD relies on an invalidated ROD, FEIS, and Endangered Species Act (ESA) consultation and that the Forest Service did not participate in the Circuit mediation.

c) Objectors allege that the court's ruling invalidated the land exchange alternative for purposes of comparison with the Alaska National Interest Lands Conservation Act (ANILCA) alternative and that a host of other alternatives must now be considered even though the court made no ruling regarding the range of alternatives.

d) Finally, objectors allege the draft ROD "knowingly and willfully" ignored a judicial order.

### Analysis

a) Objectors misunderstood the status quo during the appeal. The land exchange was consummated subject to being unwound by judicial order, or with the agreement of Leavell-McCombs Joint Venture (LMJV). LMJV is pursuing its appeal rather than unwinding the land exchange. The Forest Service does not currently own the land where the access would be granted and this is why the Draft ROD is contingent on the land exchange being unwound.

b) The Draft ROD does not rely on the invalidated Final ROD but states its own rationale responding to concerns raised in the district court's two rulings. The Draft ROD does not simply rely on the existing FEIS. A Supplemental Information Report was conducted and concluded that the existing FEIS need not be supplemented. The Draft ROD does not rely on the prior ESA consultation but has begun a new consultation with a new Biological Assessment. The district court's May 19, 2017, ruling at page 21 notes that the ROD and Biological Opinion require relief under the Administrative Procedures Act. The opinion goes on at page 40 to set aside only the Final ROD. The district court ruling was based on three points that were not clear in the Final ROD, which was set aside. First, that the Forest Service misunderstood and underestimated its own authority to regulate the private development. Second, that the scenic easement and the history of the 1987 land exchange demonstrate that the Forest Service does have actual power to control the private development. Third, that the Forest Service refused to even consider imposing deed restrictions under 36 CFR 254.3(h) because it concluded that ANILCA prevented it from doing so.

   The Draft ROD clarifies all of these points. First, the Forest Service used an unfortunate turn of phrase in stating that it had no authority to regulate the "degree or density" of development on private land and in stating that it had no "jurisdiction" on private land. A better statement would have been that the Forest Service lacks sufficient authority to regulate the "degree or density" of development on private land, but some authority to veto uses was reserved in the scenic

easement and some authority to negotiate for authority to regulate private land exists in the land exchange regulations. However, neither the FEIS nor Final ROD went so far as to say that the Forest Service has no authority to enforce the scenic easement or to seek other deed restrictions in a land exchange. Second, the Draft ROD clarifies that the Forest Service holds a scenic easement which gives it limited authority to disapprove specific aspects of a proposed private development. But the scenic easement does not give the Forest Service actual control of the private development and a very substantial all-season resort can be built and remain compatible with the scenic easement. Third, the draft ROD clarifies that the Forest Service did not interpret ANILCA as preventing it from asserting its authority to impose deed restrictions on the federal exchange parcel by the authority of 36 CFR 254.3(h). On the contrary, the Forest Service recognized that it had this authority and made specific findings in the objection response that deed restrictions were neither needed to protect the public interest nor appropriate. Unfortunately, neither the Final ROD nor the FEIS clearly stated this interpretation and the court did not address the objection response.

Finally, the Forest Service did participate in the first mediation call on Friday, November 17, 2017, at 2:00 p.m. where the mediator had all parties on separate lines. The Forest Service made clear that its participation was in the capacity of enabling any mediated settlement that could be achieved between Rocky Mountain Wild and LMJV. The mediator advised the Forest Service that it need not be involved in subsequent negotiations unless a deal was reached. The Forest Service participation in mediation is a matter of record in the court's files.

c) With regard to alternatives, the court did not state that the range of alternatives was inadequate or that the land exchange alternative, without deed restrictions, was not a "lawful" alternative. The rationale for selecting the alternative failed to pass judicial muster but that does not render the alternative itself "unlawful."

Courts apply a "rule of reason" to consideration of alternatives. That rule specifically takes into account the objectives of a private applicant and recognizes that an alternative that would be unacceptable to the applicant is not a feasible alternative. While the court found the original rationale for selecting the land exchange alternative unconvincing, the alternative remains part of the reasonable range of alternatives. The comparison between the land exchange *without* deed restrictions and the ANILCA alternative *with* deed restrictions presents the decision-maker with the opportunity to select a hybrid alterative within the range analyzed – a land exchange with deed restrictions.

While the Draft ROD makes the policy choice to select the ANILCA alternative due to a statutory obligation to grant access, the land exchange is still the desired outcome in the future. The Forest Service selected the land exchange alternative after determining that it was in the public interest and finding that deed restrictions were not needed to protect the public interest. If Rocky Mountain Wild and LMJV could agree on a set of deed restrictions, the Forest Supervisor could select a deed restricted alternative in the Final ROD. Nevertheless, the "rule of reason" does not require the Forest Service to analyze a speculative set of alternative land exchanges with a variety of deed restrictions absent any indication LMJV would accept those restrictions. No "rule of reason" would require the Forest Service to consider a variety of "deed restriction" alternatives when it has already determined that the land exchange without any deed restrictions is in the public interest and that no additional deed restrictions are "appropriate" or needed to "protect" the public interest in the language of 36 CFR 254.3(h).

Objectors assert that ANILCA does not require access sufficient for a year-round resort. The Forest Service determined that ANILCA does require access which will enable a year-round resort to be developed on the existing parcel. The Forest Service expressly found the land exchange to be in the public interest compared to substantial development on the existing parcel. The district court did not reach the question of whether the land exchange alternative was in the public interest without deed restrictions but assumed the Forest Service failed to even consider whether deed restrictions were needed to protect the public interest. Based on the Forest Service determination that a year-round resort can be built on the existing parcel, its determination that the land exchange is in the public interest is imminently reasonable. The district court assumed ANILCA requires the Forest Service to grant all-season access sufficient to a year-round resort (May 1, 2017 decision at page 26). If objectors are correct that ANILCA requires no additional access, then the Forest Service will go back to the drawing board and determine what NEPA's "rule of reason" requires.

Objectors request consideration of 10 additional alternatives. That range of alternatives is not reasonable if LMJV has a statutory right to develop a year-round resort on its existing parcel. The Supreme Court has established that no rule of reason "worthy of the name" would require an analysis that cannot inform a decision the agency has the discretion to make. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). The federal district court in Colorado recently observed that a remand "would put [an agency] in the awkward position of evaluating the impacts of and developing alternatives to [an action] that it has no ability to influence or stop." *Zeppelin v. Federal Highway Administration*, 305 F.Supp.3d 1189, 1202 (2018). So, the ANILCA question must be settled in order to determine whether a new NEPA analysis is needed under the "rule of reason."

The 10 alternatives objectors assert "must be examined" would not inform the choice of how to meet the statutory requirement to grant year-round access to the inholding.

a. Objectors request consideration of using shared access on National Forest System Road 391 for a 208 unit base lodge, but the Forest Service has no authority to limit the development to 208 units, state law requires year-round access for a planned unit development (PUD), and the FEIS eliminated National Forest System Road 391 from detailed consideration due to impacts to the ski area if it is plowed.

b. Objectors request consideration of only LMJV being given access via National Forest System Road 391 for minimal development, but the Forest Service has previously determined that such access does not meet the ANILCA statutory obligation.

c. Objectors request consideration of "enhanced" shared use of National Forest System Road 391 and over-the-snow commercial access, but the Forest Service has previously determined that over-the-snow access does not meet the ANILCA statutory obligation.

d. Objectors request consideration of a single grade-separated interchange shared by LMJV, the Forest Service, and the Ski Area, but the Colorado Department of Transportation has found that an at-grade access is acceptable and the Draft ROD clarified that ANILCA does not guarantee unlimited access or require a grade-separated interchange. LMJV has not sought a grade-separated access, and if such an access becomes necessary, it will be discretionary and could be denied.

e. Objectors request consideration of the Snowshed Road and one other access. Objectors do not clarify whether they mean to distinguish the alignment of Alternative 3 from the alignment that was denominated the "Snowshed Road" in the 2005 FEIS. If objectors seek the same alignment as Alternative 3, that was covered in the 2015 FEIS. If objectors seek the 2005 alignment, that was covered in the 2005 FEIS.

f. Objectors request consideration of Tranquility Road and one other access. This is Alternative 3, and scoping did not identify any other route for the access that would reduce environmental effects. Failure to identify such a route is likely because the environmental effects of any reasonable access route are minor and the FEIS reasonably focused on the significant effects of the private development.

g. Objectors request consideration of extension of only Tranquility Road but, as they note, this alternative was eliminated from detailed consideration.

h. Objectors request consideration of access based on "the undisclosed terms of the 2008" settlement agreement, but the district court rejected getting into that settlement.

i. Objectors request consideration of exchanging the LMJV parcel for Forest Service lands elsewhere, but LMJV has rejected that alternative.

j. Objectors request consideration of purchasing or condemning LMJV's parcel, but LMJV will not sell and the parcel does not meet the criteria for condemnation.

k. Finally, objectors appear to request consideration of imposing "terms and conditions" that would "scale" the development, but the Draft ROD explains that the Forest Service does not have that authority under ANILCA, the scenic easement, or the land exchange regulations (because land exchanges are consensual transactions and LMJV does not have to accept any "terms and conditions").

d) From the foregoing discussion, and the discussion of the district court's rulings in the Draft ROD itself, it is clear that the Draft ROD did not "knowingly and willfully" ignore a judicial order. Quite to the contrary, the Draft ROD was crafted to respond to the judicial order by addressing the statutory and regulatory framework with the intention of more clearly explaining the "path" the agency took in making the new decision. The Forest Supervisor attempted to be very clear about what the extent of his authority is and to express his hope that a future land exchange can be approved. But, right now, ANILCA demands that access be granted, not a land exchange.

## Conclusion

Based on my review of the two district court rulings, the responsible official reasonably chose to: 1) evaluate the FEIS to see if it needed to be supplemented; 2) craft a Draft ROD explaining his authority, the fact that a land exchange is a discretionary transaction, and his decision to move to the ANILCA alternative in the interim while remaining open to a future land exchange; and 3) reinitiate consultation based on a new Biological Assessment. I emphasize that the Forest Supervisor *did not* ignore a judicial order and the judicial orders do not preclude relying on the FEIS.

## Issue 3: The Forest Service has never made Leavell-McCombs Joint Venture's proposal (ANILCA alternative) available for review by the public or other local, State, and Federal agencies with jurisdiction and control over the Wolf Creek Ski Area complex

Objectors claim that the Forest Service violated NEPA by not making LMJV's proposal available for public review.

### Analysis

Some Objectors state that the letter from LMJV dated January 12, 2018, is a proposal or application for ANILCA access. The Forest Service treated this correspondence as a letter reflective of LMJV's thoughts and opinions. The Draft ROD approves Alternative 3 as analyzed in the FEIS.

Regulations at 40 CFR 1506.6(f) state "Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552)." The public may submit a FOIA request for documents. Objectors sought LMJV correspondence from the Forest Service and were provided a copy of the January 12th letter and attachments on June 4, 2018.

The January 12, 2018, letter from LMJV requested year-round access to the private inholding. A Supplemental Information Report was prepared on June 28, 2018, to determine whether any new information or changed circumstances would present a significantly different picture of the environmental effects warranting a supplement to the 2014 FEIS. The determination was made that a supplemental EIS was not required. The objector states that "LMJV's January 12, 2018, ANILCA proposal, which deviates from the proposal considered in the FEIS by LMJV's own admissions, was never considered in an FEIS." That is true, but the Draft ROD approves the alternative analyzed in the 2014 FEIS (p. 8, section 4.2 of draft ROD and Chapter 2, p. 2-3, section 2.2.3 of the FEIS), not the LMJV January 12, 2018, letter.

### Conclusion

Based on my review of the FEIS, Draft ROD, and project record, I find no violation of law, regulation, or policy with regards to the Forest Service not making the January 12, 2018, letter from LMJV available for public review.

## Issue 4: The purpose and need and designation of the NEPA "Federal Action" are invalid

The thrust of the objectors claim is that the real federal action here was the development of a year-round resort on private land adjacent to the ski area. They state that the purpose and need was narrowed to focus solely on access to the private parcel when it should have been expanded to using federal authorities to minimize environmental effects from the "federalized" resort development.

### Analysis

While it is not completely clear, objectors appear to break their assertion of federal authority to control the private development into four categories: ANILCA; "additional" easements for the infiltration gallery, raw water pipeline, ski area access, etc.; scenic easement; and 36 CFR 254.3(h).

ANILCA – Objectors claim that ANILCA empowers the Forest Service to determine the reasonable use and enjoyment of the private property and therefore the authority to impose development restrictions to ensure that the development does not exceed the level of development deemed reasonable by the Forest Service. Objectors cite a preliminary injunction order on a 2005 ROD authorizing access to the LMJV parcel. In that order, the judge emphasized that ANILCA requires the Forest Service to determine the reasonable use and enjoyment of the private parcel and that access is only required to allow that use. The Draft ROD clearly makes the determination that the reasonable use and enjoyment of the private parcel is as a year-round resort including commercial and residential properties. It notes that such a year-round resort can be operated using an at-grade access and finds that LMJV is not entitled to a grade-separated access.

The Draft ROD also rejects over-the-snow and seasonal access and finds that year-round snowplowed access is required. Objectors contend that the district court rejected the "false premise" of the purpose and need, which assumes that there is a duty to provide additional access beyond what was granted in the 1987 land exchange. This is a mischaracterization of the district court's May 19, 2017, ruling which recognized the Forest Service had made the determination that the reasonable use of the private property was as a year-round resort and the court assumed ANILCA required the Forest Service to grant all-season access. The court did not rule that no additional access was required by ANILCA. The Draft ROD also emphasizes that the Forest Service has, since 1991, interpreted ANILCA as not allowing it to tell a landowner what use may be made of private land. Thus, the Draft ROD clearly establishes that ANILCA does not give the Forest Service the authority that objectors assert.

Additional Easements – Objectors claim that additional easements were ignored in the purpose and need that might have provided additional federal control over the private development. Objectors specifically mention the Village Ditch Infiltration Gallery and the raw water pipeline, which are located on the private property and would have been reserved in the land exchange alternative but remain located on private land in Alternative 3. Objectors also mention the ski area access road, the easement underlying Highway 160, and allude to some potential easement regarding the benzene plume. It is not clear how the infiltration gallery and raw water pipeline, which exist on private land, or the CDOT easement for Highway 160, or the existence of a benzene plume on federal land outside the federal exchange parcel could provide federal control over the private inholding. Objectors do not make the case for how a permit allowing access from the private land to the ski area parking lot or allowing placement of utilities within the road corridor would "federalize" the private development. Presumably, objectors suggest that the permit be used as a bargaining chip to get LMJV to grant development restrictions on the private land. However, Forest Service statutory authorities do not grant it the authority to regulate private property. Therefore, it would be a violation of the Administrative Procedure Act for the Forest Service to make a decision based on factors Congress did not intend for it to consider and the Forest Service would be forbidden to rely on the effects of private development as a justification for denying a permit. Sierra Club v. FERC, 2017 WL 3597014 (D.C. Cir. 2017).

Scenic Easement – Objectors claim that the scenic easement empowers the Forest Service to impose terms and conditions in order to reduce environmental impacts. The Draft ROD clearly rejects this argument showing that the scenic easement defers general land use regulation to Mineral County, allows uses "typical to an all-season resort village" (which the FEIS determined would allow a resort with more than 1,900 units), and allows the Forest Service to object to certain non-conforming uses of the private property. The scenic easement only allows the Forest Service to object to development plans based on "non-compliance with the terms of this easement" and the easement provides no authority to impose terms and conditions in order to reduce environmental impacts. Moreover, any

objection goes to mandatory arbitration and the Forest Service does not have final veto power, only the arbitrators have that authority.

36 CFR 254.3(h) – Objectors claim that this regulation granted the Forest Service the "power to impose 'reservations and restrictions' . . . as are needed to protect the public interest . . . or otherwise . . . as appropriate." The Draft ROD agrees that the Forest Service would have the authority to propose such deed restrictions but has no power to impose such restrictions because land exchanges are voluntary transactions and LMJV could simply decline the land exchange and insist on access pursuant to ANILCA.

### Conclusion

Review of the Draft ROD and project record demonstrates that the Forest Service lacked the actual authority to control the private development and therefore did not "federalize" the private development. The real federal action was not the development of the private resort but the authorization of access pursuant to ANILCA, and the purpose and need remains valid.

## Issue 5: The FEIS perpetuates the same structural flaws addressed by the previous injunction and settlement

In addition to "structural flaws," objectors allege "bias" and failure to maintain an adequate administrative record.

### Analysis

The district court found that the Forest Service erred in its decision but did not attribute that failure to bias or influence from LMJV. The district court attributed the failure to a misunderstanding by the Forest Service of its authority. Accordingly, the Draft ROD directly addresses Forest Service authority. The court did not invalidate the central legal determinations underlying the Draft ROD.

The Forest Service determined that the reasonable use and enjoyment of the private parcel is use as a winter resort and therefore ANILCA requires year-round snowplowed access. The district court assumed this was correct but made no finding that it was correct or incorrect. The Forest Service also determined that neither ANILCA, the scenic easement, nor 36 CFR 254.3(h), give the Forest Service the actual power to control the private development. The district court did not directly address whether ANILCA provides authority to control private development. The district court assumed that the scenic easement and 36 CFR 254.3(h) do grant authority to control private development. The Draft ROD explains why the scenic easement does not grant authority to control the private development and explains that, while 36 CFR 254.3(h) does grant the authority to request deed restrictions, land exchanges remain consensual transactions and LMJV can simply turn down any land exchange with a deed restriction that LMJV is unwilling to accept. The Draft ROD provides the rationale that the prior ROD was missing and allows for judicial review.

Objectors also allege that the administrative record is defective. However, the district court rejected that claim. The new documents added to the record at this point are the Supplemental Information Report, the new Biological Assessment, and the Draft ROD. The January 12, 2018, letter from LMJV was also considered, but the Draft ROD clearly states that the LMJV proposal was rejected because the Forest Service cannot grant an ANILCA easement until the existing land exchange is unwound. Therefore the Draft ROD selected Alternative 3 as analyzed in the FEIS. Neither LMJV nor any contractor had input on the SIR, the BA, or the Draft ROD.

### Conclusion

The objectors' claim of bias is not supported by the project record. I find the legal interpretations in the Draft ROD to be well supported and the administrative record to be adequate.

## Issue 6: The range of alternatives considered is inappropriately narrow

Objectors include several points under this section that apply to specific alternatives considered in the FEIS but not to the broader range of alternatives challenge. These are detailed below.

### Analysis

**Issue 6 (a):** Objectors state that the Forest Service violated NEPA (40 C.F.R. § 1502.14(a)) by dismissing an alternative addressing acquisition (or "fee purchase") of the private land. A purchase alternative would require a willing buyer (the United States Government) and a willing seller (LMJV). These types of land transactions are generally initiated by a proponent. LMJV, as the project proponent, requested year-round access to their property, not a willingness to sell their property. The FEIS states, "Historically, the Forest Service has acquired critical non-Federal parcels through a congressional appropriation from the Land and Water Conservation Fund (LWCF)" and goes on to say, "This alternative was rejected because it does not meet the Purpose and Need, LMJV is not willing to sell, and there would not likely be funding available for the purchase of the inholding." (FEIS, vol. 1, p. 2-5)

Recognition of LMJV's objectives is consistent with Council on Environmental Quality (CEQ) guidance, which states there is "no need to disregard the Applicant's purposes and needs and the common sense realities of a given situation . . ." (48 FR 34263). The Forest Service is analyzing action alternatives that would allow LMJV year-round access to their private property (FEIS, vol. 1, pp. 1-2 to 1-3, FEIS, vol. 1, Section 2.2). An alternative that ignores a statutory right of access is not the same as analyzing a *reasonable* alternative that is outside the jurisdiction of the lead agency. A reasonable alternative must meet the purpose and need (40 CFR 1502.13, 1502.14(c)). The purpose and need stated in the FEIS is "…to allow the non-Federal party to access its property to secure reasonable use and enjoyment thereof as provided in ANILCA and Forest Service regulations, while minimizing environmental effects to natural resources within the project area." (FEIS, vol. 1, p. 1-3).

Purchase of the private property does not meet the purpose and need. The responsible official did consider and dismissed the objector's fee purchase alternative and cited the reasons why it was not being considered (FEIS, vol. 1, p. 2-5) in compliance with the requirements of NEPA (40 CFR 1502.14(a)). There is no requirement in NEPA to analyze alternatives in detail that do not meet the purpose and need of a project other than a no-action alternative.

**Issue 6 (b):** Objectors allege that the Forest Service violated NEPA (40 CFR 1502.14(a)) by not analyzing construction and operations limited to the existing access.

The purpose and need for the action is to grant LMJV access to their private land for "reasonable use and enjoyment" under ANILCA (FEIS, vol. 1, pp. 1-27, 1-29). The responsible official evaluated the project in the context of Section 3210 of ANILCA, and determined that existing, seasonal access was inadequate (FEIS, vol. 1, Section 1.10; Draft ROD Section 5.0). Winter access on National Forest System Road 391 is further constrained by the ski area operations (FEIS, vol. 1, p. 2-5 within Section 2.3.3). Objectors takes the position that the effects of a *status quo* access alternative would differ from the effects of the no-action alternative because some limited development could occur. The Forest

Service analyzed the no-action alternative as a no-development alternative. Because a *status quo* access alternative does not meet the purpose and need, it was appropriate under NEPA (40 CFR 1502.13) for the Forest Supervisor not to analyze this alternative.

### Conclusion

The acquisition alternative was appropriately dismissed from detailed consideration because it does not meet the purpose and need. The *status quo* access alternative (to the extent that it may differ from the no-action alternative) need not be analyzed for the same reason. The range of alternatives is judged by a "rule of reason" and the choice not to analyze these alternatives did not unreasonably narrow the range of alternatives. See responses to Issues 2 and 4.

## Issue 7: Alternatives involving mitigation measures and ANILCA terms and conditions were not analyzed

Objectors state that the FEIS contains no analysis of the Forest Service's ability under ANILCA to provide only so much access as ANILCA requires nor how terms and conditions might have been imposed under ANILCA to minimize environmental effects.

### Analysis

Regarding mitigation measures for potential impacts on federal lands, NEPA does not require the agency to impose a full mitigation plan (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 322, at 352-3 (1989)), and the ANILCA regulations provide no authority to regulate private property by imposing mitigation as a condition of access (36 CFR 251.111 (definition of adequate access), 36 CFR 251.114(a) and (f)(2)). All references to minimizing effects are strictly limited to effects on federal or National Forest System lands and resources.

The FEIS addresses a strategy for development of mitigation measures and best management practices for potential impacts on federal land (FEIS, vol. 1, Section 2.7), consistent with 40 CFR §1502.14(f)). The potential effects of construction and operation of access roads and associated utilities are disclosed throughout Chapter 4 of the FEIS.

Within the Rocky Mountain Region, water protection measures applied to such projects are adopted from Forest Service Handbook 2509.25 (Water Conservation Practices Handbook), and it is within this handbook that the effectiveness of such measures are reviewed and discussed.

Conservation measures for potential impacts to lynx were developed during the consultation process with the U.S. Fish and Wildlife Service (USFWS). They are briefly summarized in Section 2.7.2 of the FEIS, and an expanded explanation of these measures is provided in Appendix B (FEIS, vol. 2). Appendix B includes detailed explanations of the eight conservation measures, as well as discussions about enforcement and efficacy of the overall lynx conservation strategy. The Draft ROD confirms that compliance with these conservation measures will be required, and that they will be formalized with the proponent (p. 3-4).

Additionally, the Draft ROD clearly states that the decision would require LMJV to obtain all required permits and hence comply with the mitigation and monitoring requirements of those permits. The Forest Service legal instrument likely to be used in granting a special use authorization for ANILCA access across National Forest System lands (Form FS-2700-9j) includes a standard clause wherein the grantee is compelled to comply with all Federal and State law and State standards "for public health

and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes." This provision is required under agency regulations (36 CFR 251.56(a)(1) and (2)), and ensures that the grantee is still responsible for adhering to any regulatory requirements for resource protection that are not specified in the FEIS.

Regarding mitigation measures for potential impacts on non-federal or private lands, the Forest Service does not regulate development on private land, and has no authority under ANILCA to regulate development on private land. Responsibility to protect environmental resources on private lands rests with other Federal or State agencies and local governments.

Additionally, Forest Service policies explicitly caution agency decision-makers to refrain from engaging in *de facto* regulation of the use and development of private property:

*Except as authorized by law, order, or regulation, Forest Service policies, practices, and procedures shall avoid regulating private property use. (FSM 5403.3)*

*Avoid regulation of private lands when considering and authorizing access to those private lands. (FSM 2730.3)*

The FEIS considers impacts of three distinct conceptual development densities (low, moderate, maximum) for both Alternative 2 and Alternative 3. These impacts are disclosed in detail throughout FEIS Chapters 2 and 4. Specific mitigation measures for actions occurring on private lands were not considered in the analysis because a site-specific proposal has yet to be developed. Water quality and storm water mitigation will be determined through the National Pollutant Discharge Elimination System permitting process (FEIS, Section 4.1). As stated in the Response to Comments (FEIS vol. 2, p. 125), wetland mitigations for private land development would be determined during the Clean Water Act – Section 404 wetland permitting process.

Comments on mitigation measures and best management practices are disclosed in the response to comments in the FEIS vol. 2, Appendix I, Section 06 (Surface Water), Section 10 (Climate and Air Quality), and Section 12 (Wetlands and Waters of the United States). The size and type of wetland mitigation that may be required would be determined by the U.S. Army Corps of Engineers as part of the Clean Water Act 404 wetland permitting process when LMJV applies for development of the parcel with Mineral County. The response to comments also explains that the Forest Service does not regulate development on private land, but is responsible for protecting resources on National Forest System land. It is the proponent's responsibility to comply with all Federal, State and Mineral County regulations.

## Conclusion

Based on the analysis and associated documentation in the project record, I find that the responsible official's actions are consistent with relevant provisions of the National Environmental Policy Act (40 CFR 1500.2, 1502.14, 1505.3, and 1508.20), the Alaska National Interest Lands Conservation Act (36 CFR 251.110(a) and (d), 251.111, 251.113), and the Federal Land Policy and Management Act (36 CFR 251.56(1)). The Draft ROD emphasizes that the Forest Service has, since 1991, interpreted ANILCA as not allowing it to tell a landowner what use may be made of private land. Thus, the Draft ROD clearly establishes that ANILCA does not give the Forest Service the authority that the objector asserts. See also responses to Issues 2 and 4.

## Issue 8: The no-action alternative is inappropriately dismissed

Objectors claim that Forest Service failure to consider a true "no-action" alternative, which does not allow any access or development on private land, is a violation of NEPA. Objectors state that "a true no action alternative is properly set out as no federal approvals and therefore no construction." The objector further states that "enhanced" access is not required by ANILCA in the no-action alternative.

### Analysis

Under the no-action alternative there would not be "enhanced" access to the private parcel. The no-action alternative maintains existing seasonal access with no changes to land management and assumes no development.

As directed by NEPA and the interpreting direction of the CEQ (Council on Environmental Quality – 40 Most Asked Questions), the Forest Service must address the no-action alternative when preparing an EIS to provide a benchmark, enabling decision-makers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency that must be analyzed (40 CFR 1502.14(c)). The FEIS considers the CEQ interpretations of the existing no-action alternative, representing a continuation of existing land ownership on the 288-acre private parcel and seasonal use of National Forest System Road 391 to access the property (FEIS, vol.1, p. 2-1).

The responsible official did not select the existing no-action alternative because it did not meet the purpose and need of allowing LMJV access to its property to secure "reasonable use and enjoyment" thereof as provided in ANILCA and Forest Service regulations while minimizing environmental effects to natural resources within the project area (FEIS, vol. 1, p. 1-29, FEIS, vol. 2, Appendix I, pp. 73 and 91).

### Conclusion

Based on my review of the FEIS, Draft ROD, and documentation in the project record, I find the responsible official's treatment of the no-action alternative is consistent with NEPA direction and regulations.

## Issue 9: The Forest Service failed to incorporate the input of several key cooperating agencies

Objectors claim that the Forest Service violated NEPA (44 U.S.C. §§4331-4332) and the CEQ implementing regulations 40 CFR 1501.6 by not having a formal cooperating agency agreement (per 40 CFR 1501.6).

### Analysis

Objectors state "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," which they equate with a formal cooperating agency agreement between agencies. This equivalency is incorrect. A Federal agency has the discretion to determine whether or not to invite other agencies to participate as a cooperating agency, and CEQ guidance provides factors to consider when deciding to invite, decline, or end cooperating agency status. "Once cooperating agency status has been extended and accepted,

circumstances may arise when it is appropriate for either the lead or cooperating agency to consider ending cooperating agency status" (CEQ Memorandum, January 30, 2002, Attachment 1).

Objectors believe that there is a "'one EIS' requirement," but no such requirement for "one EIS" exists in law or implementing regulations.

On May 4, 2011, the Forest Service invited numerous local, State, and Federal agencies to participate in a cooperating agency meeting in South Fork, Colorado, to solicit their input to the NEPA process. The USFWS and the U.S. Army Corps of Engineers later accepted the Forest Service's invitation to be cooperating agencies for the project EIS. Per CEQ guidance above, following consideration of timelines, scheduling needs, and critical project milestones, the Forest Service as the lead agency (40 CFR Part 1501.5), decided not to have cooperating agencies (40 CFR Part 1501.6).

Nevertheless, the Forest Service coordinated closely and consulted with local, State, and Federal agencies throughout the NEPA process, and considered and addressed other agency concerns and comments, including those of the USFWS and the U.S. Army Corps of Engineers. The FEIS documents agency involvement in the NEPA process (Section 1.5, p. 1-6), agency consultation and coordination (Chapter 6), and other coordination with agencies that have jurisdiction over specific resources, including wetlands (e.g., Army Corps of Engineers) (see Section 6.0, 01 Surface Water, Response 3. p. 70; and Section 6.0, 01 Surface Water, Response 5. pp. 71-72).

While there was not a formal cooperating agency agreement, the Forest Service coordinated and consulted with local, State, and Federal agencies throughout the NEPA process.

### Conclusion

Based on my review of the FEIS, Draft ROD, and project record, I find no violation of the NEPA guidance on cooperating agencies (40 CFR 1501.6). The responsible official engaged with other agencies appropriately as required by NEPA.

## Issue 10: ANILCA and existing Forest Service regulations do not require enhanced road access be provided to the federally encumbered Leavell-McCombs Joint Venture parcels

Objectors allege that the Forest Service's 2014 FEIS is based on the arbitrary contention that the Forest Service has no choice but to offer "improved" year-round commercial access via ANILCA or a land exchange.

### Analysis

ANILCA is intended to ensure adequate access to non-federally owned land within the boundaries of the National Forest System in order to secure to the owner the reasonable use and enjoyment thereof, provided such owner complies with rules and regulations applicable to ingress and egress to or from National Forest System land. Determining the agency's obligations under ANILCA requires a clear understanding of the terms "adequate access," "reasonable use and enjoyment," and "similarly situated lands."

**Adequate access** to an inholding is defined by Forest Service regulations as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System land and resources" (36 CFR 251.111).

**Reasonable use and enjoyment** of the lands is based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria (36 CFR 251.111).

**Similarly situated lands** is not a defined term in Forest Service regulations or policies, which is precisely why case law confirms that the Forest Service is vested with considerable discretion in determining the particular properties that should be taken into account for a similarly situated lands determination (*High Country Citizens Alliance v. United States Forest Service* (10th Cir. 2000)).

ANILCA, similarly situated lands, adequate access, and reasonable use and enjoyment determinations were discussed in the FEIS, vol.1, pp. 1-17 through 1-28, Section 1.10 in its entirety; FEIS vol. 2, Appendix I, Section 6.0, 02 Purpose and Need, pp. 72-78; and Draft ROD Section 3, pp. 11-12.

The FEIS Section 1.10 provides a detailed analysis of ANILCA and related Forest Service regulations as they pertain to the Wolf Creek Access Project, including:

Adequate Access

"Adequate access" to an inholding is defined by 36 CFR 251.111 as "a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources." Furthermore, the authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.

Similarly Situated Lands

The defining characteristics of LMJV's inholding are its size, proximity to a snowplowed public road, and its proximity to an existing winter recreational development/attraction. The responsible official conducted a search for similarly situated non-Federal lands on the Divide Ranger District (the district upon which LMJV is seeking access to their inholding by crossing National Forest System land). Recognizing that the Wolf Creek Ski Area was the only existing winter recreational development on the Divide Ranger District, the responsible official began the search utilizing the two remaining important characteristics of the LMJV inholding to determine if any of the properties located on the Divide Ranger District were similarly situated. Although these two characteristics present important factors for determining similarly situated lands, further analysis was used to ensure a thorough evaluation. The two evaluation characteristics included:

- Size of parcel
- Lands located within one mile of a snowplowed public road.

The similarly situated analysis in the 2014 FEIS (Section 1.10.2, pp. 1-19 through 1-27) shows that access has been requested and granted to a number of different private properties of varying sizes with a variety of uses; the responsible official could not discern a clear pattern in the uses or sizes of the parcels with regard to reasonable use or mode of access. This process resulted in the determination that none of the 19 properties evaluated on the Divide Ranger District were similarly situated, and the responsible official did not find that these properties compelled him to grant or deny snowplowed access to the LMJV parcel. Moreover, none of the 19 properties were in close proximity to a winter recreational development such as a ski area.

The responsible official then expanded the search statewide within Colorado but focused on inholdings associated with ski areas to determine whether commercial or residential uses were being conducted with or without snowplowed access. The responsible official identified 34 private inholdings

associated with ski areas in Colorado. In addition to expanding the search statewide within Colorado, winter sports managers in the Forest Service's Rocky Mountain Regional Office were tapped to help identify additional potential similarly situated lands outside of the state. One additional potential property at a Utah ski area that had sought winter access was added to the evaluation. None of the 35 properties located in close proximity to a ski area were considered "similarly situated" for determining the reasonable use and enjoyment of the LMJV inholding.

Reasonable Use and Enjoyment

As no property was found to be "similarly situated" to the LMJV inholding after the extensive search described above, "other relevant criteria" were considered as required by agency regulations (36 CFR 251.114).

The history of the LMJV parcel shows that the property is indeed uncommonly situated. The original intent of the Forest Service in authorizing the 1987 land exchange that created the parcel was to facilitate commercial and residential development associated with the Wolf Creek Ski Area. The 1986 Environmental Assessment assumed development of a winter resort with 208 residential units, two restaurants, two day lodges, and six retail shops. While access was not expressly granted at that time, ANILCA was in effect and the development scenario disclosed in the 1987 exchange informs the reasonable use and enjoyment of the parcel.

Furthermore, agency policy explicitly cautions decision-makers to refrain from regulating private property:

*Except as authorized by law, order, or regulation, Forest Service policies, practices, and procedures shall avoid regulating private property use. (FSM 5403.3)*

*Avoid regulation of private lands when considering and authorizing access to those private lands. (FSM 2730.3)*

It is essential not to confuse or conflate terms used in the two distinct processes being described in this analysis: comparing properties for appraisal purposes versus comparing properties for ANILCA similarly situated lands purposes. It is important to separate appraisal terms from ANILCA terms.

Common terms used to determine market value during the appraisal process include "highest and best use," "seasonal and over snow access." These terms are specific to the appraisal process and not associated with ANILCA determinations for "reasonable use and enjoyment," "similarly situated properties," or "adequate access." Additionally, the appraisal is not used to justify a land exchange or a grant of road access. Rather, the appraisal is needed to meet the "Federal Land Policy and Management Act of 1976 [requirement] that the value of the non-Federal and Federal lands be equal, or if they are not equal, the values shall be equalized by the payment of money not to exceed 25 per centum of the value of the Federal land" (Federal Land Policy and Management Act of 1976, 43 USC 1701 et seq. (FLPMA)).

The Supplemental Report to Appraisal of Real Property (September 12, 2014) utilizes a sales comparison approach wherein parcels that sold were compared to the 177-acre non-Federal parcel included in the exchange proposal. Differences between the 177-acre subject property and properties that previously sold were considered. The contract appraiser determined that relevant elements of comparison were: property rights conveyed, financing terms, conditions of sale, market conditions (time), location, ski area influence, access, adjacent land uses, utility availability, natural features, topography, views/exposure, property size, and zoning/land use. By considering these differences in the appraisal, defensible conclusions were reached regarding appraised values. However, the elements

used in the comparison, which describe current conditions and characteristics, are not applicable to an ANILCA similarly situated lands analysis, which instead is used to determine whether a proposed future use of the property is reasonable.

### Conclusion

Based on my review of the FEIS, Draft ROD, and associated documentation in the project record, the responsible official's actions are consistent with relevant provisions of the Alaska National Interest Lands Conservation Act and implementing regulations (36 CFR 251 Subpart D). The analysis shows that ANILCA does require "enhanced" snowplowed access.

## Issue 11: New information and stale (dated) analysis requires new NEPA process

Objectors raise several points under this heading, detailed below. However, the new information provided for consideration is limited.

**Issue 11 (a):** Objectors allege that the Forest Service failed to meet the NEPA standard for supplementation in its review of the new information contained in the Supplemental Information Report. The standard is found at 40 CFR § 1502.9(c)(1)(i)-(ii) and courts have characterized this standard as requiring the agency to determine whether the new information or changed circumstances present a seriously different picture of the environmental effects than presented in the FEIS. Objectors state, "No effort is made to assess the significance of any of the impacts listed in the Supplemental Information Report. Each alone, and taken together, involves significant new circumstance and information related to the environmental concerns…." As noted by objectors, the Forest Service shall prepare a supplemental NEPA document "if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR § 1502.9(c)(1)(i)-(ii). Objectors bring up a few examples of what they believe are changed circumstances, including the 2013 *Rio Grande Cutthroat Trout (Oncorhynchus clarkii virginalis) Conservation Strategy*, and further indicate they "are not required to demonstrate certain harm to trigger Forest Service NEPA duties." However, objectors do not provide the requisite information on how the new circumstances or information are relevant to their environmental concerns or have bearing on the alternatives considered or impacts described in the FEIS.

### Analysis

Regarding Rio Grande cutthroat trout, it should be noted that Colorado Parks and Wildlife is a member of the Conservation Team and that they also manage the populations of Rio Grande cutthroat trout in the vicinity. The FEIS (pp. 3-63 to 3-63, 3-86 to 3-87, 3-103, 4-98 to 4-106 and 4-128 to 4-144) and Biological Evaluation (pp. 65-76) address the species, maintaining water flow (various discussions of instream flow), and water quality, which are habitat requirements for the species and concerns of climate change. The 2013 Conservation Strategy specified is not new information as it was published prior to the 2014 FEIS. Further, Rio Grande cutthroat trout is not a threatened or endangered species that would be addressed in the revised Biological Assessment (it is, however, addressed in the existing September 2013 Biological Evaluation (BE)). Similar concerns mentioned by objectors, including the effects of climate change and water use and quality on other species, do not provide additional materials for consideration or how those concerns are related to the analysis (i.e., September 2013 BE at p. 134 says there is no yellow-billed cuckoo habitat present in the project area and therefore the project would have "no effect" on the species).

Objectors also suggest that LMJV's January 12, 2018, letter presents new information requiring a supplemental EIS, but the Forest Service did not accept that letter as a proposal and the Draft ROD selects Alternative 3, not LMJV's January 12, 2018, letter.

### Conclusion

Based on information contained in the project record, I find the responsible official previously addressed concerns related to Rio Grande cutthroat trout and other species, and I find there are no changes in the effects analysis as a result of the Conservation Strategy. Therefore supplementation of the FEIS is not required under 40 CFR 1502.9(c)(1)(i)-(ii) and Forest Service Handbook FSH 1909.15 Section 18. The responsible official complied with the requirements of NEPA.

**Issue 11 (b):** Objectors claim that the Forest Service cannot rely on the FEIS because of the 2017 court order. In his May 19, 2017, order Judge Matsch, "ordered that the Record of Decision dated May 21, 2015, is set aside" (Order at 40).

### Analysis/Conclusion

Judge Matsch's order expressly addresses the 2015 Final ROD and does not present new environmental information or changed circumstances not considered in the FEIS. Therefore, the court decision does not present new information requiring supplementation of the FEIS. Also see response to Issue 2.

**Issue 11 (c):** Objectors allege that the Forest Service issued the Draft ROD before initiating ESA Section 7 consultation.

### Analysis

The responsible official reinitiated consultation with the USFWS with a Biological Assessment dated July 18, 2018, and is waiting on consultation completion as indicated in the Draft ROD (p. 1).

### Conclusion

There is no Forest Service or NEPA requirement regarding timing of ESA processes except that the Forest Supervisor cannot issue a Final ROD before consultation is complete. Based on my review of the project record, I find the requirements of both NEPA and ESA will be met.

## Issue 12: ANILCA as preferred alternative is not compared to other alternatives

Objectors allege that the Forest Service violated NEPA (40 CFR 1502.14(e)) by failing to identify the ANILCA Alternative (Alternative 3) as the preferred alternative.

### Analysis

The DEIS identified the land exchange as the preferred alternative (DEIS, p. 2-50). Both the 2015 Final ROD and the 2018 Draft ROD identify the no-action alternative as the preferred alternative. Also see responses to Issues 15 and 23 (wetlands).

### Conclusion

NEPA regulations only require the agency to identify the preferred alternative. They do not require the agency to select the preferred alternative. The Draft ROD identifies the no-action alternative as the environmentally preferable alternative but explains why it is selecting the ANILCA access alternative. NEPA regulations do not require more. 40 C.F.R. 1500.3.

## Issue 13: The consideration of connected actions and indirect and cumulative impacts in the DEIS is inadequate

Objectors raised several points under this heading specific to further consideration of the potential build-out options as connected actions. For clarity, these issues are further itemized and detailed below.

### Analysis

**Issue 13 (a):** Objectors claim that the Forest Service failed to assess and disclose how the power requirements of the Village at Wolf Creek would be met, without which it cannot make a reasoned determination of whether the existing power infrastructure would be adequate, or whether on-site power production (and its attendant air quality and other impacts) would be necessary, or whether power line expansion (and its attendant impacts) would be necessary. As objectors note with regard to the FEIS, San Luis Valley Rural Electric Cooperative (SLVREC) is the public utility that could provide power for the development concepts. While it is uncertain what SLVREC's methodology is in the FEIS, they are the subject matter experts.

SLVREC's projections for various development scenarios, if or when proposed, would be reflected in load scenarios and regulations administered by Colorado Department of Regulatory Agency's Public Utilities Commission (C.R.S. 723) and applicable federal regulations that govern public utilities. The responsible official consulted with SLVEC, and they responded that upgrading the existing electrical grid that supplies power to this area is in SLVEC's future plans (within the existing right-of-ways). SLVEC felt these upgrades would accommodate the potential development under Alternatives 2 or 3. The FEIS (pp. 2-7 to 2-10) discloses these findings, and points the reader toward Appendix A, Table A-3, for further information (FEIS vol. 1, pp. 2-7 through 2-10). Although some objectors acknowledge that "the Forest Service faces a challenge in correctly anticipating the true impacts of the Village at Wolf Creek, since many of those impacts will ultimately depend on the increase in skier numbers and local traffic on Highway 160 and on the Pass itself that the Village at Wolf Creek may bring…" they also claim that site-specific analysis has not been adequately completed.

All development scenarios in the FEIS are conceptual for the purpose of analysis and cannot be analyzed so site-specifically that they address any possible future development configuration on private land that may cause effects. Proposals to use designated utility corridors will be subject to site-specific environmental analysis (1996 Rio Grande National Forest Land and Resource Management Plan, p. III-38). Any proposed upgrades to existing electrical transmission lines (overhead and buried) within existing rights-of-way that service this area and cross National Forest System lands would require additional Forest Service analysis and approval (FEIS Appendix A, Table A-3, p. 5). The FEIS discloses that an on-site natural gas distribution facility would be needed under the Moderate and Maximum Density Development Concepts in Alternatives 2 and 3 (pp. 2-7 to 2-10 and Appendix A, Table A-3).

With regard to Propane, Liquefied Natural Gas (LNG), and Natural Gas Pipeline, the FEIS alludes to "Supplemental Power Options," with an explanation as to how they would be transported to the site, "that may be evaluated" at a future time. (FEIS vol. 2, Chapter 11, Appendix A, Table A-3, p. 5). As

described in the response to comments from the Environmental Protection Agency (EPA), site-specific NEPA analyses may be required during the Mineral County permitting process (FEIS, vol. 2, Appendix I, p. 84). The responsible official analyzed and disclosed potential effects of what can be reasonably assumed from conceptual development plans with the input of the subject matter expert (SLVREC).

NEPA does not require the analysis of a "worst case" scenario, which here would be to assume that the high development scenario should apply as suggested by objectors. The CEQ direction regarding worst case scenario was withdrawn in 1986 when the final rule was promulgated (Federal Register/Vol. 50, No. 154 / Friday, August 9, 1985). The 1985 proposed rule says "the Council has concluded that the "worst case analysis" requirement is an unsatisfactory approach to the analysis of potential consequences in the face of missing information. The requirement challenges the agencies to speculate on the "worst" possible consequence of a proposed action. Many respondents to the Council's Advance Notice of Proposed Rulemaking pointed to the limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse "worst case" by adding an additional variable to a hypothetical scenario." The Forest Service indicates the specific points which may require additional site-specific analysis, thereby identifying incomplete or unavailable information (40 CFR 1502.22).

**Issue 13 (b):** Objectors allege the Forest Service violated NEPA by failing to address the impacts of communication facilities (specifically utility corridors) associated with the potential development of Village at Wolf Creek. Objectors are not clear if there is adequate room to install utilities adjacent to the road within the right of way. Rio Grande National Forest forest-wide Standards and Guidelines would apply at any such time as changes to communication infrastructure that crosses National Forest System lands are considered. The FEIS (vol. 1, p. 2-8) assumes the power and communication infrastructure to be within the road corridor, and thus specifically addresses objectors' concerns regarding where communication equipment would go on National Forest System lands: "The power and communications infrastructure would extend from existing utilities in the Hwy 160 ROW south to the development via the entry road across the private property." The right-of-way would be 100 feet wide with a road width of 22-24 feet, and thus there would be ample space for the utilities.See also FEIS Appendix A, Tables A-1 and A-3. Because the disturbances would be included in the road corridor and are covered by the disturbance for the roads in the development scenarios, this issue has been addressed in response to objector's stated concern and in compliance with NEPA.

**Issue 13 (c):** Objectors claim that the FEIS fails to assess the air quality impacts of air pollution emissions (specifically particulate matter (PM), sulfur dioxide, and nitrogen oxides (NOx) affecting visibility) from up to 1,500 new wood burning stoves and fireplaces that could result from the potential development of the Village, in violation of NEPA and the Clean Air Act (42 U.S.C. §7491-Visibility protection for Federal class I areas). Particulates are the most common pollutant affecting visibility (FEIS, vol. 1, p. 3-35). The FEIS acknowledges that the "most likely sources responsible for visibility impact are wood burning…" The FEIS addresses impacts on air quality based on the maximum development scenario from 1,981 gas fireplaces assumed to be burning simultaneously (FEIS, vol. 1, Table 4.5-3) that could conceivably be installed instead of wood burning fireplaces, as it has become standard practice to install natural gas or propane fireplaces in newly constructed housing, often to comply with state efficiency standards (Colorado International Energy Conservation Code 2015) and occasionally local ordinances.

The FEIS (pp. 4-62 to 4-63) describes the methodology, summarizes modeling data for NOx and PM, and describes visibility impacts. The analysis assumes that all housing units in a maximum development scenario have fireplaces and result in inconsequential impacts to air local and regional

quality. The analysis also describes visibility impacts on the Weminuche and South San Juan Wilderness areas using the EPA VISCREEN model, which predicts no degradation to visibility (FEIS pp. 4-62 through 4-63). Even if wood burning stoves were used, they must meet EPA Phase II standards to meet air quality regulations and meet the particulate emissions limit of 4.5 grams per hour for non-catalytic, catalytic, and pellet wood heaters, which FEIS (Appendix A, Table A-3) assumptions acknowledge. Perhaps most notable among these emissions affecting visibility is the very low particulate matter, estimated to be 0.05 tons per year. Because all development scenarios are hypothetical, the FEIS analysis presents a conservative approach to address emissions from possible fireplaces to determine compliance with National Ambient Air Quality Standards and Prevention of Significant Deterioration while simultaneously meeting the hard look requirements of NEPA.

**Issue 13 (d):** Objectors allege the Forest Service violated NEPA by not addressing the impacts of on-site diesel emissions during construction on air quality. The responsible official conducted thorough analysis of the potential effects on Air Quality, and disclosed the effects of diesel engine emissions during construction (FEIS, vol. 1, pp. 4-56 through 4-72). Effects of diesel engines are expected to be controlled by best management practices (FEIS, vol. 1, pp. 4-61, 4-63, 4-64, 4-67, 4-69). Cumulative effects on Air Quality indicate that "total incremental contribution to cumulative climate and air quality impacts is not considered substantive, even in combination with the worst case alternative being evaluated in this action." (FEIS, vol. 1, p. 4-72). The responsible official addressed the effects of diesel emissions consistent with NEPA and found they do not exceed Clean Air Act standards.

**Issue 13 (e):** Objectors claim that the Forest Service declined to assess the indirect impacts of greenhouse gases from the project on climate change using the cost-benefit Social Cost of Carbon protocol. Social Cost of Carbon is used to estimate the monetized damages associated with an incremental increase in greenhouse gas emissions in a given year. Social Cost of Carbon has been used in rulemaking for Corporate Average Fuel Economy (CAFE) standards, pollution standards for future power plants, emissions guidelines for new and existing stationary sources for commercial and industrial solid waste incineration units, and other rule-making activities (Fact Sheet: Social Cost of Carbon, November 2013).

The responsible official recognizes the Social Cost of Carbon methodology, but also recognizes the limitations in applying it for this analysis. The Wolf Creek Land Exchange is not a regulatory action. The purpose of the land exchange is to secure for the land owner reasonable use and enjoyment of the private property, as provided in ANILCA. To meet the purpose and need, along with the scope, scale, and context of this project, the Forest Service determined a regional economic impact analysis (which analyzed direct, indirect and induced impacts) was an appropriate quantitative tool for the FEIS (FEIS at 4-194 to 4-237). Economic impacts, or distributional effects, include consequences to jobs and labor income within the economic study area. The economic impact analysis describes effects that agency activities may have on economic conditions, and is the basis for evaluating potential economic impacts by the Forest Service in an area (FSM, chap. 1970). The results of the regional economic impact analysis represent effects to the local economy.

A cost-benefit analysis is an approach used to determine economic efficiency by focusing on changes in social welfare by comparing whether the monetary benefits gained by people from an action/policy are sufficient in order to compensate those made worse off and still achieve net benefits (Watson et al. 2007, EPA 2010, Kotchen 2011). A cost-benefit analysis requires the identification and valuation of all the costs and benefits associated with an action/policy in a common monetary measure and is often expressed either as net benefits or as a cost-benefit ratio, which indicates the value of benefits obtained from each dollar of costs (Field 2008, EPA 2010).

The results from a regional economic impact analysis are not considered benefits or costs (Watson, Wilson, Thilmany and Winter 2007). Cost-benefit analyses and regional economic impact analyses are very different methods that are focused on quantifying or monetizing different measures (social welfare and economic activity, respectively), are based upon differing assumptions and terminology, and are not interchangeable. As such, the FEIS did not attempt to monetize the economic benefits which would be included in the benefit side of a cost-benefit analysis associated with greenhouse gas emissions resulting from heating or construction associated with the possible housing development.

Notably, the FEIS did not include the total economic benefits of electricity generation and use, expressed in terms of annual cost savings of domestic power generation. This type of information, along with the social cost of carbon estimates or other monetized costs, would be needed for a cost-benefit analysis to be meaningful to the public and the decision-maker. The absence of any economic benefit information limits the usefulness of the social cost of carbon analysis as the information would not be placed in an appropriate context (FEIS, vol. 1, pp. 4-194 through 4-198).

The Forest Service recognizes that when data on incremental changes in domestic and global greenhouse gases is available (and other comparable monetized costs and benefits are also estimated), the Social Cost of Carbon protocol can serve as a useful tool to estimate global climate change impacts in monetary terms. However, this information was not available for this project level analysis. Quantifying economic benefits (e.g., annual cost savings of domestic power generation) and costs (e.g., Social Cost of Carbon) associated with different alternatives was not feasible in this FEIS in the absence of an analysis of domestic and international energy and economic systems as a whole. In particular, if the responsible official had estimated the Social Cost of Carbon based on the assumptions in FEIS (pp. 3-33 to 3-34), it would have been a failed analysis. Not only would it have been an unbalanced analysis by presenting only costs, but it would also have been substantially flawed by using total greenhouse gas emissions associated with the project rather than the incremental domestic and global change in greenhouse gasses between the no-action and action alternatives. Therefore, the responsible official applied the best available scientific information to select greenhouse gasses as the common metric to compare effects across alternatives, using the maximum development scenario for each (FEIS, vol. 1, 4-60).

### Conclusion

Based on my review of the FEIS and the project record, I find that the responsible official complied with the requirements of NEPA (40 CFR 1501.2) by addressing social and economic factors in its analysis and by quantifying greenhouse gasses consistent with CEQ recommendations.

## Issue 14: The property appraisal confirms adequate access and comparable properties exist

Objectors allege the Forest Service constrained the appraisals, thus avoiding difficult questions and making the ANILCA approval a foregone conclusion.

## Analysis

Appraisals were prepared using the following: a. the editions of the UASFLA (Uniform Appraisal Standards for Federal Land Acquisitions) and USPAP (Uniform Standards of Professional Appraisal Practice) that were current at that time, and b. the Forest Service Statement of Work written specially for this assignment. The purpose of the appraisals is to provide an opinion of market value as defined at 36 CFR 254, Subpart A (36 CFR 254.2): "Market value is defined as the most probable price in cash, or terms equivalent to cash, which lands, or interests in lands should bring in a competitive and open market…"

Appraisals must be completed to determine if the values of the parcels proposed for exchange are equal, or may be made equal with a cash equalization payment less than 25 percent of the value of the federal parcel, as per the requirement of the FLPMA, not ANILCA. The FEIS discusses how appraisals are used as a requirement of FLPMA and that value for federal and non-federal parcels is determined by appraisal (FEIS, vol. 1, Section 1.8, pp. 1-15 through 1-16). The responsible official responded to comments regarding appraised highest and best use, and how appraisals are conducted. As part of the Supplemental Report to the Appraisal of non-Federal land (September 1, 2014), the instructions state, in part, that the contract appraiser shall "…make a detailed field inspection of the subject property and conduct as many investigations and studies as are necessary to derive sound conclusions."

The instructions do not direct a specific type of appraisal approach. Possible appraisal approaches include using comparable sales or using the development approach. However, the instructions note that the development approach should not be relied upon as the primary indicator of value when comparable sales are available; and, that if the development approach is used, the contract appraiser shall adhere to the UASFLA direction pertaining to this highly sensitive and complex method of valuation. Further, UASFLA, which the contract appraiser was instructed to comply with, states, "When a property's market value can be reliably estimated using comparable sales, the development approach should not be relied upon as a primary indicator of value, as its underlying assumptions are 'largely speculative' and 'subjective elements…enhance the risk of error'" (2016 UASFLA, Section 4.4.5.4, p. 145).

When properly developing a sales comparison approach for appraisals, differences between the subject property and properties that have sold are considered. The contract appraiser determined that relevant elements of comparison were: property rights conveyed, financing terms, conditions of sale, market conditions (time), location, ski area influence, access, adjacent land uses, utility availability, natural features, topography, views/exposure, property size, and zoning/land use. By considering these differences in the two appraisals (one each for the federal and non-federal parcels and both with effective dates of value of September 1, 2014), validity of the two sales comparison approaches was achieved.

Regarding the sales comparison approach in relation to an ANILCA similarly situated lands comparison, terms used for property comparisons related to land valuation appraisals have distinct definitions and are not to be confused with terms used for property comparisons related to ANILCA similarly situated lands comparisons. Terms used to determine market value and the appraisal process are located in 36 CFR 254.9. Standard terms used to determine market value during the appraisal process require definition of highest and best use, comparable property, and description of legal access. These terms are not associated with the ANILCA determinations for reasonable use and enjoyment, similarly situated properties, or adequate access. Importantly, this "Appraisal vs ANILCA" distinction is perhaps most evident when one considers that Forest Service policies direct appraisers to look at

existing access – including legal limitations – for current use (or non-use) (FSH 5409.12 – Sections 12.22(9) and 13.32(5)), whereas ANILCA regulations charge the agency to determine adequate access for a proposed (i.e., future) land use, once that land use is deemed reasonable by the agency (36 CFR 251.114(a)).

Additional information regarding the appraisal process, instructions, and review information are provided in the following. 1) Technical Appraisal Review Report of Kevin A. Chandler, MAI Appraisals for the federal and non-federal parcels in the Proposed Village at Wolf Creek Land Exchange (September 12, 2014), 2) the transmittal letter to the Rio Grande National Forest from the Rocky Mountain Regional Appraiser (September 15, 2014), and 3) the letter to the Director of Recreation, Lands and Minerals from the Rocky Mountain Regional Appraiser (November 19, 2014).

Appraisals are not line officer decisions subject to appeal. They are developed by trained and licensed professionals and are technically reviewed and the conclusions approved for agency use by other trained and licensed professionals.

While the two appraisals, one each for the federal and non-federal parcels, both with effective dates of value of September 1, 2014, were completed to ensure compliance with 36 CFR 254, were excluded from NEPA analysis, the conclusions reached in the appraisal process were considered in the NEPA decision. As a requirement of 36 CFR 254.3(c), the appraisals (and the review reports that approved them for agency use) are used by the responsible official when making decision, but are developed parallel and external to the NEPA process. Comments received on the appraisal during scoping for this project were provided to the contract appraiser and considered in the updated appraisal report as per the supplemental appraisal instructions. This was discussed in the response to comments in Appendix I of the FEIS (Section 6.0, p. 80).

Objections were raised regarding instructions provided by the Forest Service Review Appraiser to the appraiser wherein the appraiser was directed to apply a hypothetical condition that current encumbrances on the federal parcel currently authorized as permits (i.e., licenses) be considered as easements for the purposes of the appraisal. It is important to note that the Statement of Work within the Supplemental Appraisal Instructions (dated August 22, 2014, pp. 7-8) explains that such a hypothetical condition is necessary for an accurate appraisal because those permits would be converted to easements upon transfer of the federal parcel into non-federal ownership. It is also important to emphasize that this hypothetical condition applies to current encumbrances on the federal parcel in favor of third parties (electric and telecommunication providers), and does not speak to infrastructure/facilities on the non-federal parcel owned by LMJV or some other third party, which – if those facilities are to be retained subsequent to an exchange – would be authorized not through the issuance of a Forest Service special use authorization, but through a reservation in the deed from LMJV to the USA. Such reserved or outstanding rights typically do not require separate express authorization from the Forest Service nor an assessment of annual land use fees.

## Conclusion

The process followed for the development of appraisals for the federal and non-federal properties proposed for exchange, and the subsequent review of the appraisals by the Forest Service's Rocky Mountain Regional Appraiser, complies with applicable law, policy and appraisal standards.

Based on my review of the analysis and associated documentation in the project record, I find that the responsible official's actions are consistent with the relevant provisions of the Federal Land Policy and

Management Act (36 CFR 254.9) and the Alaska National Interest Lands Conservation Act (36 CFR 251.111 and 251.114(a)).

## Issue 15: The effects on wetlands are inadequately analyzed

Objectors claim that the FEIS and Draft ROD are deficient because they fail to adequately assess the effects to wetlands and groundwater in analyzing the scenarios considering potential development of private lands.

### Analysis

**Issue 15 (a):** The 2015 Objection Responses to issues 11c, 11d, 11e, and 11h collectively provide supporting information in the project record specific to the range of potential impacts to wetlands as a result of the alternative being considered and analyzed in the FEIS. Specifically, groundwater investigations conducted in 2005 and 2006 were focused on the Alberta Park Wetland Complex, and were designed to evaluate the potential impacts to wetlands resulting from development of the private parcel. The responsible official acknowledges that potential disruptions to groundwater hydrology of wetlands could occur, and that further investigations were not essential to a reasoned choice between the alternatives.

The FEIS contains an evaluation of potential disruptions to the groundwater hydrology of the project area as well as an acknowledgement of the lack of groundwater data for the area east of the Alberta Park Wetland Complex. The FEIS states that "the historic flow path of groundwater must be maintained to near its historic condition to mitigate effects to the wetlands" (FEIS, vol. 1, Sections 4.2.1.2.2 and 4.2.1.3.1, pp. 4-32 through 4-35).

Further, consistent with Forest Service direction found in FSM 5403, which speaks specifically to the agency's role in regulating activities on private lands, section 4.2 of the FEIS provides additional clarification of the continuing roles of the county, state, and other Federal agencies in the enforcement and conditioning of activities on private lands.

### Conclusion

Based on my review of the project record, including the FEIS and Draft ROD, I find the responsible official complied with the requirements of NEPA, CEQ regulations, the Clean Water Act, and agency regulations in FSM 2730.3 and FSM 5403 specific to authorizing access to private lands.

### Analysis

**Issue 15 (b):** Although the final size, location, and design of buildings is not known, the FEIS contains a qualitative evaluation of the potential for disruptions to groundwater hydrology of wetlands based on the general locations and sizes provided in the conceptual development plans (FEIS, vol. 1, Sections 4.2.1.2.2 and 4.2.1.3.1, pp. 4-32 through 4-35). Chapter 2.4.2 of the FEIS in the "ANILCA Road Access" alternative considered a range of potential changes to wetlands and fens based on Low, Moderate, and Maximum Density of Development scenarios. The impacts from hotel and residential housing foundations, underground parking, and the roadway underpass below the ski lift are specifically discussed for each of the density development concepts. Discussion of mitigations addressing the impacts to groundwater hydrology of wetlands is further provided in in the FEIS (Chapter 2, Section 4.7.2.2).

### Conclusion

Based on review of supporting information in the project record, the FEIS and Draft ROD comply with the requirements of NEPA, CEQ regulations, the Clean Water Act, and agency regulation.

## Issue 16: The ANILCA alternative would lead to a loss of Canada lynx habitat and reduced functioning of an important Canada lynx linkage

The objector alleges that the decision to grant an access easement, which would indirectly allow for development on private land, would fail to protect lynx habitat and further impair the Wolf Creek Pass Lynx Linkage.

### Analysis

**Issue 16 (a) -**The Southern Rockies Lynx Amendment (SRLA) updated land and resource management plans (forest plans) for seven national forests in the Southern Rockies to include measures to conserve the Canada lynx. Under the Endangered Species Act (ESA), the Forest Service, including the Rio Grande National Forest, is required to protect threatened and endangered species and complete Section 7 consultation if an action may affect a listed species or designated critical habitat.

Effects to lynx and lynx habitat are disclosed throughout the FEIS and Appendices (2014), the Biological Assessment of Alternative 2 (BA, 2013), and the Draft ROD and BA for Alternative 3 (2018). In addition, the effects to Canada lynx and their habitat were addressed for Alternative 2 in the Biological Opinion (BO) provided by the USFWS in 2013. The indirect effects identified to Canada lynx and their habitat in the analysis of Alternative 3 led to the determination that the project actions "may affect, likely to adversely affect" the species. The USFWS is currently drafting a BO for Alternative 3 in response to formal consultation initiated by the responsible official.

The loss of lynx habitat is minor on the Rio Grande National Forest, however, due to the indirect effects anticipated from any development on private land, the Forest Service, USFWS, and LMJV developed conservation measures to minimize adverse effects to lynx (Draft ROD, p. 4).

**Issue 16 (b):** The concern for reducing habitat function and connectivity was addressed in the SRLA to the forest plans of the National Forests in the southern Rockies, and is expressly the rationale for developing Lynx Analysis Units (LAUs) and Linkage Areas under the SRLA (2008). However, the Forest Service lacks jurisdiction to directly regulate private land or to regulate highways. The Draft ROD states (p. 16), "SRLA Standard ALL S1 provided that "permanent developments" and vegetation management projects must maintain habitat connectivity in an LAU and/or Linkage Area. If the Forest Service were proposing to construct a winter resort on National Forest System lands under a special use authorization, Standard ALL S1 would apply. But, Standard ALL S1 was not developed to prevent the Forest Service from authorizing access to developments on private land even where those developments have adverse impacts on connectivity. Rather, Standard ALL S1 applies only to developments on National Forest System land – where the Forest Service has jurisdiction. Thus, ALL S1 was not applicable to the Wolf Creek Village development on private land."

### Conclusion

Review of the information provided in the project record affirms that the ANILCA alternative does identify indirect, adverse effects to Canada lynx habitat and the linkage area, and is disclosed as required in an EIS and formal consultation initiated with USFWS on effects to the Canada lynx. The

Forest Service does not have jurisdiction over private land or the highway. Therefore, I find that the responsible official complied with law, regulation, and policy.

## Issue 17: The proposed decision would violate standards, guidelines, and objectives for lynx conservation

Objectors state that the decision to grant an access easement indirectly leading to the construction of a major residential and commercial development will "greatly increase" the adverse impacts to Canada lynx.

### Analysis

A consistency review of SRLA standards, guidelines, and objectives for Canada lynx conservation was completed for Alternative 3 and documented in the FEIS (2014, p. 4-120) and in the BA (2018, pp. 16-19). The SRLA Standard ALL S1 and Objective ALL O1 do not apply to private land development as summarized in the Draft ROD 2018 (p. 19), "The characterization in the 2014 FEIS that Alternative 3 is not consistent with Standard ALL S1 or Objective ALL O1 and would require a site-specific forest plan amendment was incorrect. However, the objection reviewing officer provided an instruction to address the SRLA in the plan consistency analysis. This ROD demonstrates that SRLA Standard ALL S1 and Objective ALL O1 do not apply to private land development. Therefore, Alternative 3 cannot be inconsistent with ALL S1 or ALL O1."

ALL O1 and ALL S1 are relevant when considering Forest Service authorization for a new access road from Highway 160 to the private land and extension of the Tranquility Road, both directly on the Rio Grande National Forest. The BA (2018) concluded that there would be relatively minor effects to Canada lynx habitat effectiveness, the Canada lynx prey base and foraging functionality, diurnal security habitat and thermal cover, habitat connectivity, and home range efficacy in habitats surrounding the access road corridor as a result of its development and use.

The FEIS also addressed Human Uses Objective 6 and Guideline 6 (FEIS p. 4-120). Though the Draft ROD and BA (2018) did not explicitly cite other Human Use objectives and guidelines that may be applicable (i.e., HU O5, G7, and G9), the 2018 BA went into great detail addressing related themes of habitat connectivity for Canada lynx in relation to the Linkage Area and traffic volume. The indirect effects to Canada lynx and lynx habitat connectivity as a consequence of the private land development scenarios resulted in a determination that the proposed activities "may affect, likely to adversely affect" the Canada lynx.

Specific to the Rio Grande National Forest, the development of a new road across the Forest from Hwy 160 to accommodate access needs for the private inholding is also likely inconsistent with HU G7, which states that "New permanent roads should not be built on ridge-tops and saddles, or in areas identified as important for lynx habitat connectivity. New permanent roads and trails should be situated away from forested stringers." However, the role of guidelines is to provide information and guidance for project and activity decision-making to help achieve overall forest plan objectives. Guidelines are not mandatory, and while a forest plan amendment is not required to deviate from one, deviations should be documented and should not compromise the related plan objectives. In this case, the objectives for Canada lynx are related to management of Human Use projects, such as non-grazing special uses, recreation management, roads, highways, and mineral and energy development on the National Forest.

The Forest Service, USFWS, and LMJV developed conservation measures in response to the projected effects related to development of the private land, and aimed at minimizing adverse effects to Canada lynx and habitat connectivity in the Wolf Creek Pass Lynx Linkage (Draft ROD, p. 4; detailed in Appendix B of BA, 2018). Consequently, these conservation measures meet the overall intent of the SRLA's Human Use objectives for the Canada lynx, despite the lack of strict adherence to all of the HU guidelines.

The Biological Opinion for the SRLA states the role of the Forest Service in ameliorating the impacts of highway or private land development is limited. As stated in the Draft ROD (p. 18), *"*the SRLA imposed forest plan direction (including objectives, guidelines and standards) on seven forest plans in the Southern Rockies in 2008. However, the SRLA does not purport to grant authority to control private land within the boundary of a National Forest."

### Conclusion

In reviewing the FEIS, 2018 BA, and other information provided in the project record, I find that the SRLA standards, guidelines, and objectives for lynx conservation under Alternative 3 do not apply to private land. While HU G7 is probably not met on the Rio Grande National Forest, the lynx conservation measures developed by the agencies and proponent help ensure consistency with the overall HU objectives of the SRLA. Therefore, I find the responsible official complied with law, regulation, and policy. The Rio Grande National Forest will report the deviation from HU G7 during the next annual reporting to the FWS under requirements of the Biological Opinion for the SRLA.

## Issue 18: Spruce bark beetle impacts on lynx habitat requires additional analysis

Objectors claim that no effort has been made to account for or offset the direct loss of primary vegetation in the project area due to ongoing forest mortality.

### Analysis

To address changes to lynx habitat, the Rio Grande National Forest previously prepared a Supplemental Biological Assessment to update the baseline for the Canada lynx under ongoing bark beetle and fire-induced landscape changes to lynx habitat on the Forest (August 2013) that was included in the FEIS (2014) and final ROD (2015). More recently, a Supplemental Information Report for the Village at Wolf Creek Access Project was completed in June 2018 to assess if any substantial change in conditions or information arose between the 2014 FEIS and the 2018 Draft ROD. Several novel studies related to Canada lynx were listed in the citations of the Supplemental Information Report, the most notable being a study being conducted on the Rio Grande National Forest by John Squires of the Forest Service Rocky Mountain Research Station titled, "Lynx Habitat Ecology in Beetle-impacted Forests." The new science is incorporated into the Draft ROD and the BA (2018) includes observations that, "lynx and hares are continuing to use habitats and successfully reproduce in the disturbed forest." In addition, the Rio Grande National Forest re-mapped suitable Canada lynx habitat in 2018, and this information is incorporated into the BA (2018; p. 49, Table 3). The re-mapping displays changes in quantities of suitable and unsuitable habitat related to the extensive effects of the bark beetle on both the Rio Grande and San Juan National Forests in the Wolf Creek Pass Lynx Linkage Area and incorporated these findings into the project analyses.

### Conclusion

My review of the information provided in the project record affirms that the 2014 FEIS and 2018 Supplemental Information Report took into consideration impacts resulting from the spruce bark beetle impacts on Canada lynx habitat. I find that the responsible official complied with law, regulation, and policy.

## Issue 19: The proposed conservation measures would not be effective in reducing impacts to lynx nor promoting recovery to a full, viable population

Objectors allege that the FEIS inadequately evaluates the likelihood that conservation measures incorporated into the decision will actually help to maintain Canada lynx habitat connectivity and species viability.

### Analysis

As stated in the Draft ROD, "Due to the anticipated indirect effects resulting from development on the private land, the Forest Service, USFWS and LMJV developed conservation measures to minimize adverse effects to lynx. These conservation measures were developed during the section 7 consultation process on effects of the subject project to species and habitats listed under the ESA as specified in the November 15, 2013 Biological Opinion. The conservation measures were committed to by LMJV in writing, and would have been binding on the future developers/owners of the Village should LMJV sell, in whole or in part, the development. On April 12, 2018, LMJV sent the Forest Service a slightly revised proposed Memorandum of Understanding (MOU) which will provide a legal mechanism for enforcing these conservation measures. The original conservation measures can be found in the Biological Opinion and in an appendix to the FEIS. The proposed MOU forms the basis for a Forest Service Biological Assessment and consultation with the USFWS."

The purpose of the conservation measures is not to avoid jeopardy but to fund proactive conservation measures for Canada lynx in the Wolf Creek Pass area to reduce adverse effects to the local population, minimize incidental take, and maintain connectivity values for lynx in a key landscape in southern Colorado. Key conservation measures in the MOU (BA, p. 77) include a technical panel to provide governance, funding and to consider crossing structures, signage, training, lynx replacement importation, education, habitat acquisition, and other measures. The panel will consist of technical representatives with expertise in lynx biology, traffic, and other relevant disciplines, from the Colorado Department of Transportation, the USFWS, Colorado Parks and Wildlife, the Forest Service, and one representative of the Applicant's choosing with relevant traffic and biology expertise. If approved, the effectiveness of the conservation measures will be long-standing and evaluated regularly.

As stated previously, the conservation measures were developed in partnership with USFWS, Forest Service, and LMJV. The Forest Service has reinitiated consultation with USFWS and a Biological Opinion is being prepared based on the BA submitted for Alternative 3. The BA takes the position that the private land development would not jeopardize the Canada lynx. The November 13, 2017, status review indicated that the USFWS has determined that the lynx has recovered in the lower 48 states and that the agency is embarking on development of a proposed delisting rule currently projected for latter 2019. This additionally supports the Forest Service's conclusion in the 2018 BA that the Village at Wolf Creek private land development will not jeopardize the species.

### Conclusion

Based on review of the project record and the information provided, I find that the conservation measures are designed to be effective over the long-term in reducing impacts to and maintaining (or promoting to recovery) a viable population of Canada lynx. Therefore, I find that the responsible official complied with law, regulation, and policy.

## Issue 20: The Lynx Conservation Strategy was developed without any public involvement, in violation of NEPA

Objectors state that because the biological opinion is missing from the FEIS it has not been made available to the public for comment and review.

### Analysis

Lynx Conservation Measures were developed during the informal consultation process with the USFWS conducted pursuant to ESA Section 7, as indicated in the Biological Opinion dated November 15, 2013. Consultation under ESA Section 7, be it informal or formal, does not require public involvement. The Lynx Conservation Measures are briefly summarized in Section 2.7.2 of the FEIS, with an expanded explanation provided in Appendix B (FEIS vol. 2, p. 13). These initial conservation measures were agreed upon by the USFWS, Forest Service, and LMJV, and have been part of the NEPA process as well as the public record.

More recently, the USFWS, Forest Service, and the LMJV began negotiating a new Memorandum of Understanding (MOU) to address concerns expressed by the Court. Appendix B of the BA (pp. 77-84) includes the proposed MOU for Canada Lynx Conservation Measures. This includes detailed explanations of the conservation measures, commitment to funding, and creation of a technical panel, that will be in charge of enforcement of the conservation measures.

Additionally, the Draft ROD provides information on the conservation measures as part of the NEPA process (pp. 3-4) "Due to the anticipated indirect effects resulting from development on the private land, the Forest Service, USFWS and LMJV developed conservation measures to minimize adverse effects to lynx. These conservation measures were developed during the section 7 consultation process on effects of the subject project to species and habitats listed under the ESA as specified in the November 15, 2013 Biological Opinion. The conservation measures were committed to by LMJV in writing, and would have been binding on the future developers/owners of the Village should LMJV sell, in whole or in part, the development. On April 12, 2018, LMJV sent the Forest Service a slightly revised proposed Memorandum of Understanding (MOU) which will provide a legal mechanism for enforcing these conservation measures. The original conservation measures can be found in the Biological Opinion and in an appendix to the FEIS. The proposed MOU forms the basis for a Forest Service Biological Assessment and consultation with the USFWS." The conservation measures are addressed in FEIS and Draft ROD, are the basis for the BA (2018), and are detailed in full in Appendix B of the BA (pp. 77-84). The conservation measures have now been addressed with the public in the 2015 objection process and the 2018 objection process.

The Forest Service is responsible for initiating consultation under Section 7 of the ESA when presented with proposals to access non-federal lands, as outlined by "Application of the Endangered Species Act to proposals for access to non-federal lands across land administered by the Bureau of Land Management and Forest Service." 2003 Interagency Guidance from USFWS and NOAA. The Interagency Guidance states (p. 2), *"*a finding of "may affect, likely to adversely affect" requires

formal consultation. Formal consultation resulting in a no jeopardy conclusion may include discretionary conservation recommendations. Conservation recommendations must be limited to the proposed federal action itself – the right-of-way across federal lands."

The MOU for conservation measures (BA, Appendix B, pp. 77-84) is an agreement between the USFWS, Forest Service, and LMJV that has gone above and beyond any *discretionary* conservation recommendation that would have been *limited to the right-of-way access* across federal land.

### Conclusion

Review of the project record and associated information affirms that the 2013 version of conservation measures were included in the FEIS and were subject to the 2014/2015 objection process. The new MOU has been included in the 2018 Draft BA. I find that the responsible official has complied with the relevant law, regulation, and policy.

## Issue 21: Application of any conservation measures is at best uncertain

Objectors feel that it is the responsibility of the Forest Service to ensure connectivity of lynx habitat is maintained and lynx populations can recover to a fully viable population.

### Analysis

The USFWS, Forest Service, and LMJV are negotiating a new MOU to address concerns expressed by the Court. On April 12, 2018, LMJV sent the Forest Service a revised MOU that provides a legal mechanism for enforcing these conservation measures. The MOU for Canada Lynx Conservation Measures (BA, Appendix B, pp. 77-84) includes detailed explanations of the conservation measures, a commitment to funding, and creation of a technical panel. The technical panel will be in charge of enforcement of the conservation measures. As stated previously, the Forest Service is responsible for initiating consultation under ESA Section 7 when presented with proposals to access non-federal lands as outlined by "Application of the Endangered Species Act to proposals for access to non-federal lands across land administered by the Bureau of Land Management and Forest Service." The 2003 Interagency Guidance states (p. 2), *"*a finding of "may affect, likely to adversely affect" requires formal consultation. Formal consultation resulting in a no jeopardy conclusion may include discretionary conservation recommendations. Conservation recommendations must be limited to the proposed federal action itself – the right-of-way across federal lands." The MOU for conservation measures (BA, Appendix B, pp. 77-84) has gone above and beyond any *discretionary* conservation recommendation that would have been *limited to the right-of-way access* across federal land.

The MOU will be a legally binding document and the change of circumstances in the event of potential delisting of the Canada lynx by the USFWS have been addressed in two parts: 1) legal mechanism as stated in part 5 of the MOU (Appendix B of BA, p. 83), *"*This MOU shall be binding on LMJV, and its successors and assigns, and shall be recorded in the public land records of Mineral County, Colorado as a covenant that runs with the land which shall be binding upon subsequent purchasers of the Property to the extent unsatisfied"; and 2) change in circumstances as stated in part 6 of the MOU (Appendix B of BA, p. 84), "In the event that the Canada lynx is delisted as an endangered species in Colorado the parties agree to consult in good faith to determine whether these conservation measures should be modified in light of such delisting. However, unless otherwise agreed, these conservation measures shall remain binding notwithstanding delisting of the Canada lynx."

### Conclusion

I have reviewed the information in the BA and associated project record documents, and find that the conservation measures can be met with certainty given that the MOU is a legally binding document that will be filed in Mineral County, outlines financial commitments by LMJV, and will be enforced by the technical panel. Therefore, I find that the responsible official complied with law, regulation, and policy.

**Instruction**

The Final ROD will address the Biological Opinion and its approach to the conservation measures. The enforcement mechanism for the conservation measures may change. However, the final ROD must address the conservation measures and document their certainty.

## Issue 22: The action alternatives would harm other wildlife

The objectors allege that by limiting the scope of the analysis to just the proposed village area, the Forest Service has violated NEPA by not being aware of the true impacts to wildlife.

### Analysis

In July 2010 Western Ecological Resources was contracted to complete the assessment of wildlife species that may be affected by the proposed action. The completed assessment includes analyses for the Forest Service Rocky Mountain Region's (Region 2) sensitive species list that consists of pine marten, boreal owl, and olive-sided flycatcher, as well as the management indicator species (MIS) brown creeper, Wilson's warbler, hermit thrush, and Lincoln's sparrow. Assessments were completed for both the private parcel and federal parcels, and both of these documents are part of the project record.

In September of 2013, Western Ecological Resource prepared a wildlife biological evaluation (BE) and specialist report for Region 2 sensitive species that includes pine marten, boreal owl, olive-sided flycatcher and the MIS brown creeper, Wilson's warbler, hermit thrush, and Lincoln's sparrow. This BE and wildlife specialist report (2013) includes many other wildlife species in addition to the species listed above, and is incorporated into the FEIS. As part of the analysis (BE, p. 76), it was determined that "Alternatives 2 and 3 may impact individual American marten, northern goshawks, American peregrine falcons, boreal owls, olive-sided flycatchers, and Rio Grande cutthroat trout on the RGNF, but is not likely to result in a loss of viability on the planning area, nor cause a trend to Federal listing or a loss of species viability rangewide." For all other Region 2 sensitive species, it was determined that Alternatives 2 and 3 would have 'no impact'.

An analysis was completed for the following MIS: brown creeper, Wilson's warbler, hermit thrush, and Lincoln's sparrow, as well as elk, mule deer, Rio Grande cutthroat trout, and brook trout. It was determined there could be localized affects, but that Forest-wide MIS populations would remain stable (BE, pp. 77-132).

The responsible official analyzed in detail the effects of Alternative 3 on Region 2 sensitive species and MIS, which included big game species such as elk and deer (FEIS, vol. 1, pp. 4-139 through 4-147). Under Alternative 3, the ANILCA road would be about 1,610 feet in length and be within a 100-foot corridor with a total area of about 3.7 acres. The existing Tranquility Road would be extended east about 530 linear feet across National Forest System lands to provide access between the inholding and

Wolf Creek Ski Area, and would provide limited, restricted and seasonal access between Hwy 160 and the private land inholding. Tranquility Road would also provide a route for emergency access.

In addition, a Supplemental Information Report for the Village at Wolf Creek Access Project was completed June 28, 2018, to assess if any substantial change in conditions or information arose between the FEIS and the 2018 Draft ROD. No new information was discovered for pine marten, boreal owl, brown creeper, Wilson's warbler, hermit thrush, Lincoln's sparrow, or olive-sided flycatcher.

The analysis area on National Forest System land is small in acreage relative to the amount of detailed analysis completed.

### Conclusion

I have reviewed the relevant information in the project record, and found that potential impacts to wildlife have been identified and presented in the FEIS, BE, and wildlife specialist report (2013). I find that the responsible official complied with law, regulation, and policy.

## Issue 23: The action alternatives would reduce water quality

Objectors claim there are multiple deficiencies in the FEIS specific to water quality and other impacts to streams, which are best discussed separately as done below.

**Issue 23 (a):** Objectors believe that the FEIS must disclose how existing concentrations of all pollutants that currently exceed Instream Water Quality Standards (ISWQS) would be affected by the potential development, and not approve actions which exceed ISWQS in compliance with Section 313 of the Federal Water Pollution Control Act (33 U. S. C. 1323(a)).

### Analysis

Objector's concerns focus on possible development of private land. Any development scenario on private would occur within the context of local building ordinances and regulatory permitting requirements. Those regulatory approvals are not within the approval authority of the Forest Service. Similarly, the responsible official is not proposing to authorize a particular development scenario, but is instead disclosing effects of three possible development scenarios. In so disclosing effects, the responsible official responded directly to this comment (FEIS, Appendix I, pp. 93-94), and acknowledges that, "Regarding effluent metal concentrations associated with various levels of residential development, it is agreed that future metals PELs may be difficult to achieve, which could potentially result in the state requiring additional treatment or issuance of a type of variance." Pollutant concentrations resulting from WWTP discharge are not predicted to exceed ISWQS for the action alternatives. The analysis notes both the possible effect and the regulatory remedy in compliance with the requirements of ISWQS and NEPA.

**Issue 23 (b):** Objectors allege there is no quantitative analysis in the FEIS of how much chlorine concentrations (from road salt) in North Pass Creek might increase due to increased traffic on Highway 160 and adjacent roads that may result from the proposed action.

### Analysis

The Response to Comments (FEIS, vol. 2, Appendix I, p. 101) summarizes the analysis included in the FEIS with regard to storm water runoff that may contain road salt. A qualitative approach is used in the

analysis, which is in compliance with NEPA, to document that settling ponds (which can effectively remove 40-80% of soluble nutrients (EPA 832-F-99-048, September 1999)) and dilution factors help minimize the effects of road salt. Identifying specific effects of road salt is dependent on many speculative assumptions regarding annual run-off and quantity of road salt applied.

**Issue 23 (c):** Objectors also allege the Forest Service violated NEPA (40 C.F.R. §1503.4(a)(5) and § 1502.22) by not explaining why it failed to collect EPA's requested wetland information pursuant to 40 C.F.R. § 1502.22, which requires the agency to either collect the information or explain why it is technically impossible or cost prohibitive to collect.

### Analysis

The FEIS explains in response to EPA, "Groundwater investigations were not conducted in the area east of the Alberta Park Wetland Complex due to the lack of significant wetlands in this area. If groundwater issues are a concern for any potential development resulting from implementation of either of the action alternatives, they would be addressed during the Mineral County PUD process." (FEIS, vol. 2, Appendix I, pp. 102-103). Moreover, quantifying the impacts to wetlands requires a level of site-specificity that would reasonably be completed at the development phase. Detailed hydrologic investigations and completed development plans, including the design of building foundation drainage systems, complete storm water management plans, and snow storage plans would be necessary to quantify (calculate) the potential impacts.

**Issue 23 (d):** Objectors contend that the EPA-requested nutrient water quality monitoring at Alberta Park Reservoir should be performed because South Pass Creek, which runs through the parcel and thus would run through any future development, enters the reservoir. Objectors allege monitoring data from the vicinity should have been included in the FEIS, as should baseline nutrient monitoring in the area of the potential Village at Wolf Creek, in compliance with NEPA.

### Analysis

As objectors note, the FEIS addresses such monitoring data at several locations downstream in North and South Pass Creeks (FEIS Appendix C). Numerous Responses to Comments to the Draft EIS address the baseline and projected water quality monitoring, including those related to a waste water treatment plant (WWTP), and cite specific analysis completed (FEIS, vol. 2, Appendix I, pp. 93-97). The objectors' citation relates to impacts to fish noting (FEIS, vol. 2, Appendix I, p. 129):

> *"..any potential future WWTP would be subject to a permitting process through the Colorado Department of Public Health and Environment, and that process would consider and protect fish populations. It should also be noted that there would be no effluent discharge from a future WWTP into South Pass Creek or to Alberta Park Reservoir; therefore, the fish populations in South Pass Creek and Alberta Park Reservoir would not incur nutrient derived stress from a WWTP. There would only be effluent discharge from a WWTP into North Pass Creek. Trout display relatively high physiological tolerance to exposure from WWTP-generated nitrogen and phosphorus. Impacts of these nutrients on salmonid species (including the Rio Grande cutthroat trout and brook trout) are generally minimal and can be effectively reduced through the nutrient removal process of the treatment facility."*

Analysis documents indicate that not only was monitoring data collected, it was analyzed specific to the possible development scenarios in compliance with NEPA.

**Issue 23 (e):** Objectors state that "EPA raised a legitimate concern that development of utility lines at the Village at Wolf Creek could adversely impact water quality in the area."

## Analysis

The EPA's concern is that development of the Village at Wolf Creek could adversely impact water quality in the area. Objectors correctly state that the Forest Service has a responsibility under NEPA to respond to public comments and "explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response."

The Response to Comments to the Draft EIS cited by objectors addresses the EPA comments and says "Monitoring the water quality impacts of any development resulting from Forest Service approval of either of the Action Alternatives and subsequent Mineral County approval of a PUD is beyond the jurisdiction of the Forest Service. The PUD process with Mineral County will analyze and discuss the impact of the development on water quality based on detailed development plans. Water quality issues of the development would be resolved by the Proponent working with the Colorado Department of Public Health and Environment" (FEIS, Appendix I, p. 97). The response correctly notes that water quality monitoring may be required at the development stage, when it can be analyzed in detail, and that the Clean Water Act regulatory jurisdiction lies with CDPHE.

**Issue 23 (f):** Objectors allege that floodplain mapping should have been conducted to comply with NEPA.

## Analysis

In the Response to Comments (FEIS, Appendix I, p. 97), the responsible official describes why floodplain mapping is beyond the scope of this analysis, and how the analysis is still in compliance with NEPA and Mineral County's floodplain ordinance. See also response to Issue 25 (b).

**Issue 23 (g):** Objectors state that in order to comply with NEPA, the baseline water quality conditions should be established for the small streams that could be impacted by potential development of the Village at Wolf Creek, and that the Snowmelt Runoff Model (SRM) may not adequately characterize the stream flow during non-snow melt conditions.

## Analysis

Objectors do not explain why they believe SRM methodology is inadequate or flawed. However the FEIS described modelling (pp. 3-5) "A Snowmelt Runoff Model (SRM) was developed to calculate average monthly stream flow for North Pass Creek due to the absence of a continuous stream gage. The SRM was used to predict average runoff due to snowmelt as well as rainfall runoff. The digital model "Snowmelt Runoff Model for Windows" ver. 1.12 was selected for the simulation. The data source for the model input parameters and variables is the Wolf Creek Pass SNOTEL site (1990-2011). The spring melt curve for 2001 was selected as an average spring melt period over the 22 year record. The daily rainfall precipitation used for the model was an average over the 22 year record. The average monthly discharge predicted to have occurred over the 22 year record is shown in Graph 3.1-2. The most significant meltout was predicted to occur in May, followed by June. It should be noted that baseflow due to groundwater recharge is not included in the average values shown in Graph 3.1-2."

In addition, the FEIS (vol. 2, Appendix I, p. 100) also states "There is no stream flow data for the small streams that would potentially be impacted by development resulting from Forest Service approval of either of the action alternatives. Furthermore, there are no stream gauge records for small, nearby streams suitable for extrapolation. Therefore, the Snowmelt Runoff Model (SRM) was used to calculate the average monthly stream flow of North Pass Creek. The Forest Service believes that the SRM data accurately characterizes the hydrology of the project site. See Section 3.1.3.2 of the FEIS. Mineral County will determine the need for any baseline hydrology studies for any potential development proposed by the Proponent during the PUD permitting process."

The existing water quality data in the FEIS (vol. 2, Appendix C) reflect the baseline water quality of the small stream tributaries to North and South Pass Creeks because the project occurs close to the headwaters of both of these creeks, and the tributary streams are not significantly long. Small streams without gauging stations were modeled by using measured precipitation (including rain) as an input in a standard tool. The responsible official disclosed this methodology to determine stream flow and the resultant anticipated effects to water quality in compliance with NEPA.

### Conclusion

Other issues raised by objectors related to water such as requesting that streams be added to the 2018 Colorado 303(d) list is beyond the scope of this analysis and outside the authority of the Forest Service. Authority for the 303(d) list is delegated to the Colorado Department of Public Health and Environment (CDPHE) by the EPA. The 2018 CDPHE revision of the list occurred earlier in the year.

Based on my review of the FEIS, Draft ROD, and other analyses in the project record I find the responsible official complied with law, regulation, and policy in analyzing and disclosing the impacts to water from the proposed action.

## Issue 24: Lack of mitigation measures

Objectors claim that the FEIS and Draft ROD fail to identify and propose to enforce any specific mitigation or monitoring requirements for air, water, and climate resources other than the general statement that "[t]he implementation of these best management practices will reduce the potential impacts associated with the selected alternative." in violation of NEPA.

### Analysis

Objectors refer to the 2014 Draft ROD, and focus on the potential development of private land. Forest Service Policy dictates that the agency avoid regulating private land "Except as authorized by law, order, or regulation, Forest Service policies, practices, and procedures shall avoid regulating private property use." (FSM 5403.3) In addition the Forest Service is directed to "Avoid regulation of private lands when considering and authorizing access to those private lands." (FSM 2730.3)

As explained in the scenic easement and FEIS (vol. 1, Sections 3.10.3.2 and 4.10.1.5.1), and applicable here in the context of applying measures to private lands, the 1987 Scenic Easement, as amended, is not intended to conflict with or intrude upon the land use controls of the State of Colorado, Mineral County, or other unit of local government. The Mineral County zoning and land use regulations and planned unit development (PUD) review and approval process will apply to the development of all private lands. The Forest Service has determined that, as a Federal land management agency, it would be inappropriate to attempt to enforce additional regulations on private lands.

For actions on National Forest System lands, the best management practice and Lynx Conservation Measures (FEIS, pp. 2-48 through 2-49) would apply and have been analyzed as part of the action alternatives. The Draft ROD (2018, pp. 9-10) commits best management practices (including a Storm Water Management Plan that protects water and soils), Lynx Conservation Measures (pending completion of consultation with USFWS), construction and maintenance monitoring, and specifies additional permits, licenses, entitlements and/or consultation that is required to meet Clean Air Act (Grading Permit) and Clean Water Act (Stormwater Discharge Permit, Army Corps of Engineers Permit) requirements. See also the Preliminary Drainage Report in the project record.

### Conclusion

In my review of the FEIS, Draft ROD, and associated documents in the project record, I find that the responsible official has appropriately applied best management practices and monitoring requirements to the proposed actions, in compliance with NEPA and other law, regulation, and policy.

## Issue 25: Water supply for either action alternative may not be sufficient or reliable

Objectors raise multiple points regarding the inadequacy of water supplies and associated impacts on private lands as a result of development.

### Analysis

**Issue 25 (a):** Objectors allege that both the potential additional water supply storage on the private lands (or potentially private lands) and the water rights are inadequate for the development scenarios, and neither are fully addressed in the FEIS, contending that the Forest Service is not in compliance with NEPA and Administrative Procedures Act.

The FEIS (vol. 1, Section 2.4.2) considers a range of potential impacts associated with the Low, Moderate, Maximum Density Development scenarios and the associated water supply use and storage, as part of the potential buildout of the development arising as an indirect effect of the action alternatives. The FEIS also identifies the volume of water storage required for each of the action alternatives, and estimates the storage volume, the number of tanks required, and illustrates their general locations (FEIS Figure 2.4-2). Figure 2.4-6 illustrates the general location of the tank farm for the Maximum Density Development Concept and states that additional storage areas will be required at future stages of planning. The FEIS also incorporates references to the 2006 Hydrogeological Monitoring report for the Village at Wolf Creek which included both data and mapping results showing the shallow and deep water wells locations used to develop a groundwater contour map and its relationship to existing wetlands. The 2015 Objection Response to Issue 15(f) provides supporting citations that addresses this same concern.

### Conclusion

My review of the project record identified disclosure of potential effects to water storage and supply. I find that effects were properly disclosed and that the responsible official clearly described his jurisdiction and decision space.

## Analysis

**Issue 25 (b)** - Objectors claim the FEIS failed to analyze the possibility of, or impacts from, flooding in violation of NEPA. Three possible development scenarios were considered in the FEIS (vol. 1, p. 2-6).

Development on private land would occur within the constraints of local building ordinances. Mineral County's September 24, 1991 Floodplain Ordinance provides development regulations for structures in the 100-year floodplain which would not apply until a planned unit development (PUD) process is initiated for any potential development (FEIS, vol. 2, Appendix I, p. 97). Flooding potential is not localized to this project area and could occur at any time or place. Stream morphology was considered in the FEIS. Page 3-3 of the FEIS (vol. 1) notes that large woody debris plays "an important role in the stability of the streams in these affected reaches by influencing sediment transport and availability," addressing impacts on water quality and quantity related to flooding. This relates to other notes that flows much greater than bankfull are required for floodplain flows to occur in the incised reaches of the project area and this is not likely a flood-prone area based on FEMA insurance mapping (FEIS, vol. 1, pp. 3-13 through 3-14). Concerns related to infrastructure are addressed in the FEIS (p. 4-15). It states that when site-specific development is proposed, the design of culverts and bridges will need to pass flood events and reduce erosion potential further.

## Conclusion

Based on review of the FEIS and the project record I find the responsible official considered flooding in the analysis, in compliance with the 'hard look' requirements of NEPA.

## Analysis

**Issue 25 (c):** Objectors allege that the responsible official must complete an analysis that models relevant scenarios using the Rio Grande Decision Support System (RGDSS) and Colorado Water Division 3 data management tools to determine accurate maximum Equivalent Residential Units (EQR). This is an issue that deals with state-issued water-rights and is not in the purview of the Forest Service, as the State of Colorado is the subject matter expert on determining water allocation. The FEIS evaluated the sufficiency of water quantity based on the three development scenarios (FEIS, vol. 1, pp. 4-15, 4-20 through 4-21, 4-25 through 4-26, 4-30).

The state-issued water rights are existing Water Rights No. 87CW7, Water Division 3 (FEIS at 3-25). LMJV has an augmentation plan that considered development of more than 208 units. The development concept outlined in the water rights case is equal to 1,748 EQRs, equal to 272.7 acre feet per year, and an annual consumptive use of 30.1 acre feet. The FEIS (vol. 1, p. 3-27) evaluated a scenario in which the proponent's diversions to storage could not cause the streamflow to drop below the CWCB's instream flow right. LMJV's ability to divert streamflow was restricted in the water supply model to account for physical limiting factors associated with low flow conditions. The model required the proponent to augment stream depletions every month, except during high flow season, from onsite-storage to maintain instream flows. This would address maintaining water in the creeks sufficient to address climate change concerns (FEIS, pp. 3-27; 4-47; Appendix I, p. 109).

### Conclusion

My review of the FEIS and project record indicates analysis was conducted and documented, water use was modeled and explained, water rights were considered, and instream flow was addressed. I find the responsible official is in compliance with NEPA.

## Issue 26: In violation of NEPA, the FEIS fails to analyze the feasibility of, and the possible impacts from, a grade separated interchange at the village access road with Highway 160

Objectors contend that by failing to analyze the feasibility of a grade-separated interchange at the village access road with Highway 160, the Forest Service has violated NEPA.

### Analysis

Objectors cite the 2011 Feasibility Analysis which did state that a grade-separated interchange would be built. However, the Feasibility Analysis is a first-level screen completed before the Agreement to Initiate is signed (Forest Service Handbook 5409.13, section 32.4). It is not a decision document. The Feasibility Analysis was completed in January 2011, prior to project scoping in April 2011. The scoping notice from April 2011 identifies that "a grade separated interchange off Highway 160 capable of handling full build-out traffic estimates will be required to be built from the very beginning of development." However, following the public and internal scoping process, the Proposed Action was further refined to include Low, Moderate and Maximum Density Development Concepts. The point of identifying and analyzing a range of development density scenarios for the private land is to provide a full and transparent account of potential indirect effects that could result from authorization of a land exchange (Alternative 2) or road easement (Alternative 3). The effects are indirect.

As stated repeatedly throughout the FEIS (e.g., vol. 1, Section 2.4, p. 2-6), the Forest Service lacks sufficient authority to regulate the degree or density of development on private land. This is the jurisdiction of Mineral County, and it is unknown what development configuration or density Mineral County may approve in the future.

The Social and Economic Resources Analysis (FEIS, vol. 1, p. 4-196) indicates that implementation of the Maximum Density Development Concept would likely occur over a 30-year period. Any long-term projection for residential development of the private land carries a great deal of uncertainty, as potential economic cycles, regional demographics, societal shifts, and technology shifts result in many unknowns. Therefore, whether or not the densities assumed for the Maximum Density Development Concept would ever be achieved is purely speculative at this time.

As indicated in the FEIS, an at-grade intersection is anticipated to be sufficient for both the Low and Moderate Density Development Concepts. However, the FEIS acknowledges that CDOT may require a grade-separated intersection at some point in the future if traffic related to private land development were to reach a certain threshold. This concept is confirmed in the November 2011 memo from Felsburg Holt and Ullevig (FHU, 2012) that says "CDOT has indicated that they are open to the concept of an at-grade intersection as a preliminary access to the Village, and would allow such an access configuration up to the point where Village traffic creates poor operations at the intersection. FHU agreed to conduct an operational analysis of the intersection under increased traffic conditions to determine the peak traffic threshold where the intersection would no longer be able to safely and effectively move traffic, and would need to be replaced by a grade-separated interchange."

Therefore, the potential need for a grade-separated interchange could become a limiting factor for private land development beyond the Moderate Density Development Concept. Should such a threshold be reached at some point in the future, LMJV would be required to submit a project proposal to CDOT, and if accepted, a site-specific NEPA analysis (per FHWA regulations) would need to be prepared to analyze the direct, indirect, and cumulative impacts of a grade-separated interchange.

Ultimately, if a grade-separated interchange were to become necessary to accommodate residential development, it would likely be in the distant future. Due to the speculative nature of a grade-separated interchange resulting from development of the Village at Wolf Creek, building of the interchange does not meet the definition of a "reasonably foreseeable future action" warranting cumulative effects analysis in the FEIS (36 CFR §220.3). The Draft ROD notes that LMJV does not have a "right" to a grade-separated interchange.

### Conclusion

Based on my review of the FEIS, Draft ROD, and project record I find the responsible official complied with NEPA and is not required to analyze a grade-separated interchange.

## Issue 27: The FEIS fails to analyze the comparative impacts of expanding federal control via the scenic easement

Objectors state that the ANILCA alternative is never compared to a land exchange alternative based on the power to enforce and impose federal control.

### Analysis

The FEIS addressed the scenic easement which is the only authority the Forest Service has over the private land development. The scenic easement only allows the Forest Service to object to development plans based on "non-compliance with the terms of this easement" and the easement provides no authority to impose terms and conditions in order to reduce environmental impacts. Moreover, any objection goes to mandatory arbitration and the Forest Service does not have final veto power, only the arbitrators have that authority. The terms of the scenic easement were established in 1987 and slightly amended in 1998. The terms of the scenic easement are specific rather than elastic and they do not establish authority to "expand" federal control.

The 1998 Amended Scenic Easement was a voluntary agreement between the LMJV and Wolf Creek Ski Corporation (collectively, the Grantors), and the United States of America (the Grantee). Per the easement, the Grantors confirmed their desire to manage and develop the private land acquired via a land exchange in accordance with the 1986 Decision Notice that approved it. The scenic easement is designed to ensure that development of private lands is "compatible with and complimentary to" the Wolf Creek Ski Area. At the outset of the current analysis, the decision was made not to analyze deed restrictions on the National Forest System land that would be conveyed to the LMJV as a result of a land exchange.

Section 4.10.1.5.1 of the FEIS, titled "Scenic Easement Applicability," discusses how the existing Scenic Easement would apply to private lands under each alternative. The Scenic Easement itself (recorded legal instrument) is included in Volume 2 of the FEIS as Appendix F.

As discussed in the FEIS, the Scenic Easement only applies to existing private lands for both Alternatives 2 and 3. Thus, under Alternative 2, the 120 acres of the existing private inholding that

would remain in private ownership as a result of the proposed land exchange would still be subject to the Scenic Easement. All other lands to be acquired by the proponent (approximately 177 acres) would be subject to Mineral County land use regulations. These lands would not have Scenic Easement controls removed, because no scenic restrictions currently exist on this land beyond County regulations. Under Alternative 3, the Scenic Easement would apply to the entire (± 288-acre) private inholding.

As explained in the Scenic Easement and Sections 3.10.3.2 and 4.10.1.5.1 of the FEIS, "the easement is not intended to conflict with or intrude upon land use controls of the State of Colorado, Mineral County, or other unit of local government." The Forest Service has determined that, as a Federal land management agency, it would be inappropriate to attempt to enforce additional regulations on private lands. This position is explicitly expressed in agency policy within the Forest Service Manual.

> *Except as authorized by law, order, or regulation, Forest Service policies, practices, and procedures shall avoid regulating private property use. (FSM 5403.3)*
>
> *Avoid regulation of private lands when considering and authorizing access to those private lands. (FSM 2730.3)*

The Forest Service did consider whether to impose restrictions on the development of LMJV's land as condition of the land exchange in response to Rocky Mountain Wild's 2015 objection but ultimately found such conditions inappropriate and not needed to protect the public interest. While the Forest Service has discretion to seek restrictions on land conveyed out of federal ownership, (36 CFR 254.3(h), that discretion is to be used sparingly. As explained in the Forest Service Handbook, deed restrictions have the negative result of imposing a perpetual administrative responsibility on the Forest Service and potentially reducing the appraised value of the federal estate, "causing more Federal acreage to be conveyed to equalize the value of the non-Federal land." (Land Acquisition Handbook, U.S. Forest Service, FSH 5409.13, Ch. 33.41c.33). Therefore, "[d]eed restrictions controlling future use and development of Federal lands conveyed into non-Federal ownership *should be used only* when required by law, regulation, or Executive order, or when the intended use of the conveyed Federal land would substantially conflict with established management objectives on adjacent Federal lands." *Id.* (emphasis added). In this case, imposing development restrictions was not required by any law, regulation, or executive order, and LMJV's use of the land for ski resort is consistent with the use of the adjacent property as a ski area. The Rio Grande Land and Resource Management Plan (1996, p. IV-39) states that visitors can expect to see facilities associated with the ski area, and four-season recreation resource uses are encouraged (1996 Forest Plan p. IV-39). Per Draft ROD rationale (Section 5.0 – Part 6, p.18), it is a logical conclusion that development of private lands for a residential village would be compatible with the theme, setting, and desired conditions of Management Area 8.22 for ski-based resorts.

Thus the Forest Service reasonably opted not to assume the perpetual administrative burden of an easement, and to allow the local regulatory authorities to exercise control. The County's PUD process is the appropriate mechanism for land use control on private lands.

It is important to note that future development on the private inholding is not a component of the federal action. During the public comment process and litigation, it became clear that there is considerable confusion over the extent and source of Forest Service regulatory authority over LMJV's use of its private inholding. The Draft ROD addressed Forest Service authority under the scenic easement.

Under the scenic easement, potential development is limited to "a mix of residential, commercial, and recreational uses typical to an all-season resort village" and provides the Forest Service the ability to "veto" certain non-conforming uses of the property. But the scenic easement does not purport to give general regulatory authority to the Forest Service that would allow it to control the degree or density of the private development. As long as the development is typical of an all-season resort village, the scenic easement does not constrain the size of the development in any manner. In fact, the FEIS recognizes that Alternative 3, where the entire private inholding is constrained by the scenic easement, could still result in a residential and commercial development with 403 hotel units; 998 condominium units; 504 townhomes; 76 single family residences and 221,000 square feet of commercial space. The scenic easement also specifically recognizes that Mineral County retains general regulatory authority and expresses the intent not to "conflict with or intrude upon" that development authority. Thus nothing in the scenic easement gives the Forest Service "actual control" of the development on the private land.

### Conclusion

Objectors accurately note that the FEIS did not analyze a land exchange alternative that would have imposed deed restrictions similar to the scenic easement which was analyzed on the existing private parcel. Objectors are concerned that this analytical choice deprived the decision-maker of an opportunity to select a land exchange alternative with deed restrictions. However, the Draft ROD notes that the responsible official did consider seeking deed restrictions for the land exchange alternative. The FEIS provided a contrast between alternatives with regard to deed restrictions but the analysis showed that either action alternative could result in a substantial winter resort. Members of the public, including objectors, made clear their preference for deed restrictions in the land exchange alternative. One clear choice the responsible official could make would be to seek deed restrictions in a land exchange but it would be unrealistic to expect LMJV to agree to deed restrictions that are substantially more restrictive than those in the scenic easement. The consideration of deed restrictions in the FEIS was sufficient under the NEPA "rule of reason" as addressed in response to Issue 2.

## Issue 28: Failure to reinitiate consultation for the yellow-billed cuckoo pursuant to Section 7 of the Endangered Species Act

Objectors allege that changes in flows to North and South Pass Creeks under the action alternatives will negatively impact habitat for the yellow-billed cuckoo.

### Analysis

As stated in the Supplemental Information Report for Village at Wolf Creek Access Project (p. 3), "the yellow-billed cuckoo and their designated or proposed critical habitat still are not known to occur in the project area, nor are [yellow-billed cuckoo] expected to be affected by activities that may occur in the project area or the Rio Grande National Forest." The yellow-billed cuckoo was analyzed in the 2013 Wildlife BE for the Village at Wolf Creek Access Project (Table 6-1, pp. 33-34 and Table 9-1, p. 134). At the time of report publication (September 2013), and until November 12, 2014, the species was a candidate species for the federal list of threatened and endangered species. By Forest Service policy in Region 2, candidate species automatically carry Region 2 sensitive species status including specific analysis in Biological Evaluations (BE).

For the Village at Wolf Creek Access project, the BE concluded that Alternative 3 would have 'no impact' to the yellow-billed cuckoo or its habitat as a sensitive species because habitat does not exist

within the project area, and the project area is above the altitudinal range of the species (2013 BE, p. 134). On November 3, 2014, the western distinct population segment of the yellow-billed cuckoo was designated as federally threatened by the USFWS (79 FR 59991) and on December 2, 2014, proposed critical habitat was designated by USFWS (79 FR 71373). At the time of publishing the BE (September 2013), the new status was not formally analyzed in the project BA or BO as the species was still a candidate species when those documents were finalized.

The impact determination (for sensitive species) or effect determination (for threatened or endangered species) would have been the same no matter the status of yellow-billed cuckoo due to the lack of adequate habitat in the project area.

Moreover, the 2018 BA provided 'New Information Since the 2015 Wolf Creek ANILCA Land Exchange Decision' which included the status of the yellow-billed cuckoo (p. 30). The 2018 BA documented a query of the USFWS Information for Planning and Consultation (IPaC) on May 2, 2018 which affirmed there is no new information (p. 33). Additionally, Table 2 of the 2018 BA (p. 39), states that the yellow-billed cuckoo was dropped from further analysis because low elevation riparian habitats and critical habitats do not occur in the project area and are not expected to be affected indirectly by the proposed activities. No critical habitat has been proposed for National Forest System lands in Region 2, including Rio Grande National Forest. As stated on page 36 of the 2018 BA, "Currently proposed critical habitat for the yellow-billed cuckoo begins on the Rio Grande River, approximately four and a half river miles east and downstream of the town of South Fork (Unit 59, CO–6 Upper Rio Grande 3; 79 FR 48547), below where the augmentation flows enter the Rio Grande River. Therefore, any water depletions associated with the Proposed Action would not extend to or affect any critical habitat of the yellow-billed cuckoo. Thus, a reinitiated consultation for a species that would not be affected by the Proposed Action is not necessary to meet section 7 requirements."

### Conclusion

The information in the project record, including the BE, FEIS, and 2018 BA, affirms that re-initiation of Section 7 consultation for yellow-billed cuckoo is not necessary for Alternative 3. Therefore, I find that the responsible official complied with law, regulation, and policy.

## Issue 29: Bias and proponent control of the third party NEPA contractor was built into the contract

Objectors claim that the Forest Service violated NEPA because proponent bias and control of the third party contractor resulted in a flawed and biased NEPA process.

### Analysis

Third party NEPA contractors are under the direction of the Forest Service. However, per the terms of the MOU between the Forest Service and LMJV scheduling or billing issues could be addressed between the contractors and the proponent. The instance referenced by objectors involved conversations between the NEPA contractors and LMJV's Adam Poe.

There is no evidence that Mr. Poe interjected bias into the third party contractors work product and the Forest Service was responsible for the content of the final analysis. Some contacts between Mr. Poe and other LMJV representatives do show LMJV attempted to assert influence over the Forest Service especially regarding timing of the analysis. However, the Forest Service was able to deal with those contacts and manage the third party contractor to get a sufficient environmental analysis completed.

### Conclusion

I find no evidence of bias relating to the third party NEPA contractor. Based on review of the project record and supporting information, I find that the responsible official followed the MOU (Administrative Record 2.4 - 20110507 Signed USFS-LMJV MOU.pdf) in compliance with NEPA (40 CFR 1506.5(c)).

## Issue 30: Failure to consider new information

Objectors state that the FEIS fails to consider significant new information available on yellow-billed cuckoo, water supply, Canada lynx, boreal owl, Continental Divide National Scenic Trail Unit Plan, and other relevant information.

### Analysis

A Supplemental Information Report dated June 28, 2018, was completed for the Village at Wolf Creek Access Project to review any new information and changed circumstances that arose since the FEIS was published in November 2014. Specific to the yellow-billed cuckoo, the review determined that the effects disclosed in the 2014 FEIS remain unchanged given that their designation or proposed critical habitat are not know to occur in the project area (see response to Issue 28).

All new information related to Canada lynx disclosed consistency with the agency's understanding of lynx habitat needs and use central to the discussions and effects analyses for the alternatives considered in the FEIS. Review of the new information and changed circumstances related to Canada lynx did not change the overall characterization of impacts described in the alternatives. The FEIS summarized the analyses for the two action alternatives, which both reached a "may affect, likely to adversely affect" determination (FEIS, vol. 1, pp. 4-123, 4-139).

Although the changed circumstances and new information do not change the overall characterization of the environmental effects documented in the 2014 FEIS, several citations related to Canada lynx were referenced in the Supplemental Information Report, including a current study being conducted on the Rio Grande National Forest by John Squires of the US Forest Service Rocky Mountain Research Station titled “Lynx Habitat Ecology in Beetle-impacted Forests.” Other new scientific information related to Canada lynx has been incorporated into the Draft ROD and BA (2018) and included in the ongoing consultation with USFWS under Section 7 of the ESA regarding the selection of Alternative 3 (see response to Issue 19).

The Supplemental Information Report reviewed the effects analyses relating to water supply by updating a summary of projects in the analysis area already completed or initiated since the FEIS was completed. Only one project directly involving water was identified, addressing safety concerns with water seepage at the base of the Alberta Park Reservoir dam. Direct impacts from that project were determined to be of a short-term nature thus not directly changing the environmental effects described in the FEIS. The Supplemental Information Report also included a review of the annual groundwater monitoring reports associated with the remediation efforts at the highway maintenance facility on the north side of Highway 160, and concluded that the new information is consistent with the effects originally considered in the FEIS. The response to issue 26 above provides additional information and clarification regarding the concerns associated with water uses resulting from the potential for development on private lands.

No new information specific to the Continental Divide Scenic Trail Unit Plan was identified as part of the Supplemental Information Report. Nonetheless, the FEIS (pp. 2-35; 3-11 to 3-12; 4-70 to 4-71) considered a range of potential impacts to the trail as a result of the alternatives being considered.

### Conclusion

My review of information in the project record and the Supplemental Information Report did not identify any new information or circumstances that would change the determination of impacts disclosed in the FEIS (November 2014). Additional consideration relating to the boreal owl is included in the response to Issue 31, relating to the yellow-billed cuckoo in Issue 28, and relating to Canada lynx in Issue 18. Therefore supplementation of the FEIS is not required under 40 CFR 1502.9(c)(1)(i)-(ii) and Forest Service Handbook FSH 1909.15 Section 18. I find that the responsible official complied with NEPA by addressing new information and/or changed conditions since the FEIS was published.

## Issue 31: Failure to consider the best available science

Objectors allege the FEIS failed to incorporate the results from the most recent boreal owl survey and thus did not include the best available science.

### Analysis

As described in the Biological Evaluation (BE) prepared by Western Ecological Resources for the FEIS, boreal owls were detected in 2005 (p. 51) "No boreal owls were detected in 2004; in 2005 a single male and a male/female pair within an active nest territory were detected on lands within the current Federal exchange parcel." Due to the documented presence of a boreal owl pair, the BE goes on to state (p. 52), "The boreal owl analysis area for this project includes all areas within the estimated home range of 3,700 acres, well beyond the disturbance areas associated with Alternatives 2 and 3." The BE (p. 55) made a determination for both Alternatives that stated, "Regarding boreal owls, direct, indirect, and cumulative effects of Alternatives 2 and 3 may impact individuals, but are not likely to result in a loss of viability on the planning area, nor cause a trend to federal listing or a loss of species viability rangewide."

Objectors provided additional information on boreal owls being detected (i.e., one in Silver Creek on the east side of the SUP area, one above Wolf Creek Pass meadows on the west side of the SUP area, and one on the private parcel). This 'additional information' was documented in an email exchange between the biologist contracted to conduct the analysis and a Forest Service biologist, though no year of detection was stated. The new information is not significant because the analysis in the BE (2014) assumed that the boreal owl habitat blocks were occupied. The new information would not change the analysis.

### Conclusion

In reviewing the project record, including the BE and the FEIS, I find that best available science was considered in the effects analysis conducted for boreal owl and its habitat. Therefore, I find the responsible official complied with law, regulation, and policy.

## Issue 32: Failure to adhere to NEPA's public involvement mandates

Objectors allege that the Forest Service violated the public involvement mandates of NEPA as well as FOIA.

### Analysis

An initial administrative record for the Village at Wolf Creek Access Project was maintained and made available to the public in its entirety via the Forest Service's Planning, Appeals and Litigation System (PALS) website on November 28, 2014. The total number of documents uploaded was 399. The complete Administrative Record was also sent via DVD to two people who requested it.

Although FOIA and NEPA are interrelated, they are separate laws. There have been several FOIA requests from Rocky Mountain Wild over the history of this project. The agency response to the 2015 objections summarizes the requests received and the number of documents produced as of that date. As noted by objectors, Rocky Mountain Wild has litigated the Forest Service regarding FOIA and the Forest Service has received instructions from the court with regards to those cases. That process is ongoing and another FOIA request was submitted by Rocky Mountain Wild on July 20, 2018. It is currently being processed.

Public and agency involvement in the project under NEPA is described in Section 1.5 of the FEIS. The Forest Service initiated a scoping period that began April 15, 2011; held a comment period on the DEIS beginning August 17, 2012, which was later extended; and initiated an objection period on the FEIS and the land exchange draft ROD beginning November 21, 2014 as required by 36 CFR 218. An objection period for the second decision selecting the ANILCA access alternative began July 22, 2018.

Federal regulations govern the duration and requirements of public comment and objection periods within the NEPA process. Comments on a proposed project or activity to be documented in an EIS are accepted for a minimum of 45 days beginning on the first day after the date of publication in the Federal Register of the notice of availability of the DEIS. Computation of the comment time period involves using calendar days, including Saturdays, Sundays, and federal holidays. However, when the time period expires on a Saturday, Sunday, or federal holiday, comments are accepted until the end of the next federal working day (11:59 p.m. in the time zone of the receiving office for comments filed by electronic means such as email or facsimile) (36 CFR 218.25). Written objections including attachments must be filed with the reviewing officer within 45 days following the publication date of the legal notice of the Draft ROD in the newspaper of record, and it is the responsibility of objectors to ensure that their objection is received in a timely manner (36 CFR 218.26). These requirements for objection filing were included in the legal notice published in the newspaper of record (Valley Courier) and on the Forest Service project website on July 21, 2018.

### Conclusion

Based on my review of the FEIS, Draft ROD, and project record I find no violation of NEPA or FOIA with regard to public involvement for the proposed project. The record demonstrates that the Forest Service ensured adequate public involvement and participation in the NEPA process consistent with applicable law, regulation, and policy.

## Issue 33: Reasonable use and enjoyment that minimizes environmental effects requires an analysis of the visual effects to the congressionally designated Continental Divide National Scenic Trail

Objectors claims that the FEIS has not assessed the reasonableness of LMJV's development scenarios in terms of their impact on visual resources of the Continental Divide National Scenic Trail (CDNST). The Draft ROD cannot be based on a determination of reasonable use that never considers visual effects on a congressionally designated unit, the CDNST.

### Analysis

Objectors ask “How can the RGNF determine that any particular use is reasonable without knowing the impact on a nearby Congressionally-designated unit?” The FEIS states that “Under both Action Alternatives, modifications to the scenic environment would occur primarily on private lands and would not be specifically subject to the Forest Service’s Scenery Management System or Recreation Opportunity Spectrum classifications .... However, no comparable evaluation metric exists to analyze effects to scenic resources on private lands. Thus, for the purposes of this analysis, the Scenery Management System and Recreation Opportunity Spectrum classifications are applied to both federal and non-federal lands to provide consistent metrics for which to measure the future, indirect effects of development that could occur as a result of Forest Service approval for either a land exchange or an access road.” (Section 3.10.1, p. 3-106). The FEIS states that applying these tools in order to disclose effects “is for comparative, analytical purposes only and in no way imposes any restrictions or standards outside of the Forest Service’s jurisdiction.” (vol. 1, pp. 3-106 through 3-107)

The FEIS also notes that the section of the CDNST in the analysis area for this project is within Management Area 8.22, Roaded Natural, in the current Rio Grande National Forest Land and Resource Management Plan (forest plan, 1996). Management Area 8.22 allows for a moderate level of development (Section 3.10.3.1.1, p. 3-109). “Foreground, middleground and background views from the CDNST include Wolf Creek Ski Area, the private land parcel and National Forest System lands to the east, rolling peaks and forested ridges, the Weminuche Wilderness Area, other portions of the Rio Grande and San Juan National Forests and the Hwy 160 corridor.” (FEIS, vol. 1, p. 3-112). The forest plan states that visitors can expect to see facilities associated with the ski area and four-season recreation resource uses are encouraged in Management Area 8.22. (USDA, 1996, p. IV-39)

Objectors also claim “The FEIS has not assessed the reasonableness of LMJV's development scenarios in terms of their impact on visual resources of the CDNST. How can the RGNF determine that any particular use is reasonable without knowing the impact on a nearby Congressionally-designated unit?” Determination of the “reasonableness” of LMJV’s development scenarios is not part of the purpose and need of the FEIS because it is not within the authority of the responsible official to regulate development on private land. It is possible objectors confuse the Forest Service’s responsibility under ANILCA to determine the reasonable use and enjoyment of the private parcel for determining access needs with a determination of reasonable development scenarios. As mentioned previously in this response to objections the Draft ROD makes the determination that the reasonable use and enjoyment of the private parcel is as a winter resort including commercial and residential properties. See response to Issues 4 and 10 for discussions of reasonable use and enjoyment.

Objectors further state that “One stated rationale for need for the revised forest plan was to address changes in the management of the CDNST. The draft plan creates unit specific management direction for the CDNST. The RGNF's desired conditions for the CDNST are to maintain high scenic values

from the CDNST, that "the foreground of the trail [defined as that area less than 0.5 miles from the trail] is naturally appearing, and generally appears unaltered by human activities." The forest plan is currently undergoing revision. Until the ROD is signed adopting the revised forest plan for the Rio Grande National Forest, the current forest plan remains in effect. The revised forest plan will contain desired conditions and other plan components (i.e., goals, standards, guidelines) for management of the CDNST. However it is unlikely that management area direction for the analysis area will change drastically given the presence of the ski area and private property.

## Conclusion

Based on my review of the FEIS, Draft ROD, and project record I find the responsible official complied with law, regulation and policy.