



## COLORADO WILD PUBLIC LANDS

December 19, 2018

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RE: Comments regarding Draft Environmental Impact Statement for Berlaimont Estates Access Route

The following are the comments of Colorado Wild Public Lands on the proposed Berlaimont Estates Access Route as described in the Draft Environmental Impact Statement (DEIS) January 2018.

We appreciate that the White River National Forest staff spent time with us explaining the process and their reasoning and providing links to information. After reviewing the Draft EIS and other related documents we have prepared comments addressing the following main topics:

- The proposed 19-lot subdivision of the privately owned inholding Berlaimont Estates is not consistent with “reasonable use and enjoyment” per ANILCA rules and common case law. Furthermore, there is not sufficient information provided to show that the proposed 19-lot subdivision is physically or financially feasible or can obtain the necessary approvals to be constructed.
- The existing Forest Service road system currently provides road access to the Berlaimont Estates property. Per the DEIS, page 2, this access could potentially support the development of up to three homesites. The DEIS has not considered all reasonable alternatives.

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- There would be wide ranging irreversible negative impacts to public lands and their resources should the proposed action of construction of Alternative 3 occur. As described in DEIS Appendix B, this would be inconsistent with the Forest Plan and the Forest Plan would be required to be amended specifically for this proposed project.
- Beyond the comments provided by COWPL in this letter, there has been and continues to be overwhelming public response voicing concern about the negative impacts of this proposal on public lands and the community.

We appreciate your review and consideration of our more detailed comments, following.

## CONTENTS

- A. ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)
- B. ACCESS EXISTS THEREFORE THE PREFERRED ALTERNATIVE IS UNNECESSARY
- C. THE PROPOSED USE IS UNREASONABLE
  - 1. The DEIS incorrectly relies on Eagle County’s road variance approval to support the Agency’s finding of reasonable use.
  - 2. The DEIS improperly analyzes development along I-70 to support the Agency’s finding of reasonable use.
  - 3. The DEIS ignores commonalities shared by private inholdings to find Berlaimont’s proposal is reasonable.
- D. IS A 19-LOT SUBDIVISION REALLY ACHIEVABLE ON THIS PROPERTY?
- E. ALTERNATIVE ACCESS ROUTES TO THE PROPERTY
  - 1. Alternative 1 – No Action – Existing Forest Service Access is the Best Alternative
  - 2. Alternative 2 - Access through the Proponents Private Property is the best of the pavement alternatives
- F. AFFECTED ENVIRONMENT AND NEGATIVE ENVIRONMENTAL CONSEQUENCES
  - 1. Support for March 12, 2018, Letter from Wilderness Workshop et al
  - 2. Vegetation and Wildlife
  - 3. Connected Action of Development of Private Land and Cumulative Effects
  - 4. Inconsistency with Forest Plan and need for Amendment
  - 5. Climate Change, Wildfire and Related Safety and Economic Impacts
- G. PUBLIC COMMENT AND OPPOSITION TO DATE COMPRISE RELEVANT CRITERIA
- H. DEIS INADEQUACY PER NEPA REQUIREMENTS
- I. CONCLUSION

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## A. ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

Section 1323. (a) of ANILCA directs the Forest Service to do one thing: provide adequate access across the national forest to private lands:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, that such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

In doing so, the Forest Service has broad discretion and must exercise it to protect the public resource:

“In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. 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.” 36 C.F.R. 251.114 (a)

Courts have consistently upheld the Agency’s discretion to condition any access to private property. In *Johnson v. U.S.*, upholding an agency decision to severely limit access modes, the court held that the agency need not consider cost in its evaluation of access alternatives; “ANILCA does not guarantee the cheapest access, only adequate access”.<sup>1</sup> This holding is relevant here, as the Preferred Alternative was developed by the proponent, most likely because it is by far, the least expensive of the multi-million dollar road improvement alternatives (DEIS 123, 125, 127).

Another case relevant to this application is *Rocky Mountain Wild v. Dallas*<sup>2</sup>, referred to in the ANILCA Determination Appendix to the Berlaimont DEIS. The U.S. District Court for the District of Colorado stated:

“The Forest Service is specially charged with unique duties to consider the public interest specifically with regard to private activities affecting National Forest System lands. [The local government] has its own interests with regard to

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<sup>1</sup> *Johnson v. US*, No. CV 00-217-BLG-WRA (D. MT, April 2, 2002) at 20 *aff’d*, 93 Fed. Appx 133 (9<sup>th</sup> Cir. Mar. 12, 2004).

<sup>2</sup> *Rocky Mountain Wild v. Dallas* [2017, Civil Action No. 15-cv-01342-RPM].

permitting or regulating development. It cannot be assumed that those interests coincide.” DEIS Appendix C 5.

The guidance inferred from this ruling by the author of the Appendix document is:

“In accordance with this direction, the authorizing officer will not subordinate his independent judgment of what constitutes reasonable use of the Berlaimont property.” DEIS Appendix C 5.

In the context of the Berlaimont application, the Agency should listen to the hundreds of people and organizations who have taken the time and effort to express their opinions that the proposed use of the property is unreasonable and that therefore the Forest Service should deny the application<sup>3</sup>.

The law itself, implementing regulations (36 C.F.R. 251), and subsequent case law all support the Agency’s broad discretion regarding “reasonable use” and what is “adequate”, so much as to intertwine the two standards. The clear direction is to authorize only what is “needed for the reasonable use ... and that minimize[s] the impacts on federal resources.” As such, the DEIS on Berlaimont’s request for authorization “to improve, construct, maintain and use existing roads on National Forest System (NFS) lands” must demonstrate that the proponent’s proposed use is reasonable and that the preferred Alternative is both necessary to provide adequate access and minimizes impacts on the National Forest.

The DEIS fails to demonstrate why the proposed use of the Berlaimont property is reasonable, and ignores the overwhelming public response that the use is unreasonable. This willful oversight contrasts with the agency’s regulatory requirement to minimize impacts on the national resource. Moreover, the document is written on the basis of the proposed (unreasonable) use, rather than considering alternatives that would support less intensive (and more reasonable) uses of the private property, which the Agency has authority to do. Recognizing the Agency’s broad discretion, we emphasize that discretion is qualified by 1) the responsibility to minimize impacts, and 2) the obligation to consider the public interest (especially in public land resources like wildlife that no other agency has so much responsibility to manage and protect). Here the USFS has failed to pay attention to the qualifications on its discretion.

## **B. ACCESS EXISTS THEREFORE THE PREFERRED ALTERNATIVE IS UNNECESSARY**

According to the DEIS, the existing Forest Service road system, currently provides sufficient access for the development of up to three single family homes on the Berlaimont Estates

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<sup>3</sup> In March of 2016, the Kaibab National Forest Supervisor cited too much controversy and opposition as a reason for its denial of Tusayan resort’s application for road improvements and expansion across the national forest that would support the resort’s expansion.

property (DEIS 2). The regulations on the Agency's authority to grant access suggest that the agency's obligation is met:

“Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands.” 36 C.F.R. 251.110(g)

The existing access is over dirt roads that are closed to motorized use in the winter per the White River Forest Plan 2002 in order to protect winter wildlife habitat. However, the proponent is requesting much more impactful access to provide for their proposed plans to create a 19-lot subdivision.

ANILCA does not require the Forest Service to grant a specific type of access and there is discretion about restrictions that may be imposed on that access in order to protect Forest resources. Access may be as limited as pedestrian only, and restricted as to the type of vehicle or the time of year. Indeed, the law requires that access “minimize the impacts on Federal resources” 36 C.F.R 251.14(a)

Nor does ANILCA require the Forest Service to approve the proponent's plans; the Agency's regulations allow restrictions on private property uses “to the extent that the facilities and modes of access” across the National Forest may “limit the use and enjoyment of non-Federal land”. Final Rule, 56 Fed. Reg.27410 at 274110-12 (June 14, 1991). The courts have upheld this broad discretion regarding restrictions, even when those limit the private property use.<sup>4</sup>

As such the determination of “reasonable use” and “adequate” access become interconnected. The Agency may find a proposed use to be reasonable, thereby triggering examination of whether the access is adequate; conversely, the Agency also has the authority to deem an access to be inadequate for a proposed use, thereby rendering the use to be unreasonable. Regarding Berlaimont, the Agency has the authority to refuse the proponent's request for additional access, while still providing for development of the three residential home sites for which the existing road system is adequate.

### **C. THE PROPOSED USE IS UNREASONABLE**

Despite the existence of not one, but two access points from FSRs onto the Berlaimont property, the proponent does not consider these accesses to be adequate and has requested “authorization to improve, construct, maintain and use existing roads on National Forest System (NFS) lands and Berlaimont Estates' private property” (DEIS

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<sup>4</sup> Mountain States Legal Foundation v. Espy, 833 F. Supp 808, 817 (D. Idaho 1993) and Johnson v. US, No. CV 00-217-BLG-WRA (D. MT, April 2, 2002) at 20 aff'd, 93 Fed. Appx 133 (9<sup>th</sup> Cir. Mar. 12, 2004)

Abstract). The requested access would require the establishment of easements and special use permits, a Forest Plan amendment and consequent elimination of resource protections designed to minimize wildlife impacts, pave existing forest service roads, create a new road across the National Forest, and allow winter maintenance and travel on the affected section of the Forest Service Road system. These road improvements would serve a proposed subdivision of 19 homes plus accessory buildings on property located several miles from existing development and surrounded by National Forest. In order to grant this request, the Forest Service must demonstrate that this suburban subdivision is a reasonable use of the property and through the EIS, determine what kind of access is necessary for reasonable use. In finding that the proponent's subdivision is a reasonable use, the USFS relies heavily on two premises: Eagle County's approval of a road variance for the DEIS's preferred Alternative and other subdivisions along I-70 in Eagle County. The DEIS fails to paint the whole picture, thereby undermining the assertion that the use is reasonable.

The DEIS states:

" ... an analysis of "similarly situated" property and "other relevant criteria" show that the proposed use is: a) not a major departure from existing human activities within the I-70 corridor surrounding Vail, Avon, and Edwards; b) nor does it appear to be unusual in its proposed density of development or location of homesites and water supply infrastructure; and c) nor is the proposed development of 19 home sites on 35-acre parcels inconsistent with Colorado statutes or Eagle County zoning regulations(footnoted). As a use by right, the applicant has platted the property into 19 parcels. Eagle County zoning classification of "Resource" supports this division . . . Thus . . . the applicant's proposed use of their private property is reasonable." DEIS 5

### **1. The DEIS incorrectly relies on Eagle County's road variance approval to support the Agency's finding of reasonable use.**

However, per their letter of March 12, 2018, Eagle County does not approve of the subdivision based on their approval of a road variance. In fact, in their comments on the DEIS, Eagle County refutes all of these assertions. The letter states that the proposed development may not be consistent with county zoning, that its distance from the I-70 corridor "does distinguish the subject area from existing development", and that it would be "unusual" for water supply infrastructure to extend so far beyond the corridor. Moreover, the County goes on to state:

"the road variance approved by Eagle County should not be interpreted as approval for this type of land use as suggested in the DEIS."

Therefore the variance does not equate to a reasonable use determination.

Using the 35-acre rule is a tool to avoid Eagle County oversight through the land use process, which in this case would likely not support the proposed development. Also, consideration of the zoning alone does not provide a sufficient picture of the property's consistency with surrounding uses.

Further, the USFS arbitrarily ignores the foreseeable hurdles that have not been negotiated by the project proponents. For example, the 1041 process may pose a significant barrier to approval of this proposed use. Eagle County has already made it clear that it would be unusual for water infrastructure to extend so far as this parcel. Eagle County Letter.

The DEIS analysis disregards the effect of county land use regulations that may apply to the proposed development should they apply for new domestic water and wastewater treatment systems.

“Eagle County was not able to analyze the impacts of, nor approve the development of the subdivision (as it would through a typical subdivision process). . . Berlaimont [may] be required to apply for and obtain approval of a 1041 Permit for a new domestic water and wastewater treatment system. Many of the standards for approval of a 1041 Permit involve consideration of impacts to the quality and quantity of recreational opportunities, animal life and their habitats, plant life, and impacts on land use patterns.” Eagle County Letter.

It is not unusual for 1041 review to result in lower densities than originally proposed due to the need to locate development away from environmental resources and hazards.

Such development as proposed generates substantial and permanent impacts on the surrounding public resource. Once again, Eagle County expresses their concerns over the Forest Service's pending approval of this road application based on concern over such impacts:

“We have concerns regarding the potential environmental and social impacts of a permanent road to access the Berlaimont inholding and therefore ask that the NFS consider our concerns.”

The letter proceeds to list concerns with impacts to wildlife, water, air, view plane quality, and recreational experiences, specifically with regard to the Agency's Preferred Alternative.

Given the multitude of concerns expressed in the Eagle County letter and numerous regulatory processes that may foreclose development of this parcel as proposed, the Forest Service's reliance on a few cherry-picked criteria that fail to definitively support its reasonable use determination renders the agency's conclusion arbitrary. It is incorrect to assume the proposed use is supported by the County or that it is actually achievable. Therefore the proposed use cannot be assumed to be reasonable.

**2. The DEIS improperly analyzes development along I-70 to support the Agency’s finding of reasonable use.**

Eagle County disagrees that development along I-70 supports the Agency’s reasonable use finding. The County comments that the remote, high elevation location of the property is not “similarly situated” to and is a “departure from existing human activities in the I-70 corridor”. The essence of the letter is that the County does not consider the proposed use as reasonable.

“The proposed development of this property is different from the development of other inholdings in the County, particularly because the Berlaimont property sits outside the discrete location of the I-70 corridor, thousands of feet above and miles away from the highway and other development.”

The DEIS rests heavily on the proposed use being a reasonable enjoyment of the property based on proximity (5.3 miles of road) from I-70 and lying within the Vail valley. Yet the elevation of the project is high above the valley floor and it is entirely surrounded by National Forest Lands. There is no discussion of absence of immediate proximity to other development and that this is in fact, a remote parcel.

A review of land uses along I-70 and especially in closer proximity to the proposed project, clearly indicates that the proposal is NOT consistent with “similar development” along I-70 and therefore is not a reasonable use, see map below.



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The above extract from the Eagle County Land Ownership Map shows privately owned land in gray, Forest Service land in green and BLM land in yellow. The Berlaimont Estates property is the isolated gray wedge north of Edwards, entirely surrounded by green Forest Service land. This parcel is an anomaly in the immediately surrounding land uses and ownership. Forest Service land is undeveloped and its mission is "To sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations."

The developed private land around Edwards, Wolcott and Avon, is connected to other private land and/or within Town boundaries. While private land near Edwards to the south of I-70 is developed, there is only a narrow strip of developed private land on the north of the highway, beyond which there is undeveloped Forest Service land. This change is accentuated along, and east of the north-south boundary line of Forest Service land. East of the Highway 24 intersection, Forest Service lands extend almost all the way to I-70 on both sides. There are a few other private inholdings near the Eagle's Nest Wilderness that are primarily undeveloped land.

Not only is the Berlaimont Estates property differentiated from the other private properties by its remote location surrounded by Forest Service lands, but additionally, as part of a land exchange, the Forest Service recently acquired a State land parcel above I-70 near to the Berlaimont Estates parcel, to consolidate and manage valuable wildlife habitat.

A proposed 19-lot subdivision would not be consistent with the zero density residential development on surrounding Forest Service land.

### **3. The DEIS ignores commonalities shared by private inholdings to find Berlaimont's proposal is reasonable.**

The DEIS provides 23 examples of what is described as similarly situated lands. Appendix C, Addendum B - Table for Analysis of Similarly Situated Lands. Addendum B does not support the agency's conclusion. The Forest Service ignores commonalities between all of the inholdings considered, and the Agency relies largely on parcels that are not similarly situated at all. For example, of the 23 parcels, only 10 are true inholdings that rely on access from USFS roads. 13 of the parcels are not even inholdings, meaning that no public land access was required to develop the parcels. Those 13 parcels are not similarly situated. Their inclusion in the analysis undermines the USFS's conclusions and renders its finding arbitrary and capricious.

Of those remaining 10 parcels, none are accessed by paved road (they are all accessed on dirt roads), as proposed by the DEIS preferred Alternative 3 for the Berlaimont Property, and only two provide year round access. One of those is referred to as Montezuma Heights, a cluster of patents that are accessed from Webster Pass Road, a through route out of the town of Montezuma. The other is Taylor Gulch, a cluster of mining claims partly developed

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with cabins (less than 3,000 square feet) accessed via a USFS road that is less than one mile from HS 24.

Of those properties listed in Addendum B that are accessed via USFS road, only four are for multiple residences. Two of those four are discussed above. The third is the Fulford inholding, a 1980's subdivision of a patent, consisting of 64 small lots, some of which have been developed with small backcountry cabins of 1,500 square feet or smaller. Access is via a dirt road with snowmobile access in the winter. The fourth is referred to as Muddy Pass. This is the property that is most similar to Berlaimont, with a roughly 75% match of the criteria selected by the USFS for this analysis. Like Berlaimont, Muddy Pass is a true inholding, accessed by a USFS road, and subdivided into 18 lots. Again, this property is accessed on a dirt USFS road, 3/4 mile in length (to the Agnes Lake subdivision).

The table also includes two properties that secured access through ANILCA. However, in both cases, that access is over dirt road which does not permit plowing in the winter, and serves only a single residence. The USFS could condition access to Berlaimont similarly, and doing so would help to minimize impacts on other values.

The DEIS concludes that Addendum B does not provide truly similar properties, and states that therefore, because of the uniqueness of the property, the full development of 19 residences with 9 accessory dwelling units is a reasonable use. However, what the table at Addendum B actually demonstrates is that Forest Service inholdings are consistently accessed via dirt roads, and wintertime access via plowed road is not a foregone conclusion. Addendum B also clearly shows that there is no precedent or justification for providing paved access to this inholding. In sum, the USFS's analysis failed to support the agency's conclusion that Berlaimont should be provided year round, paved access across these sensitive public lands.

#### **D. IS A 19-LOT SUBDIVISION REALLY ACHIEVABLE ON THIS PROPERTY?**

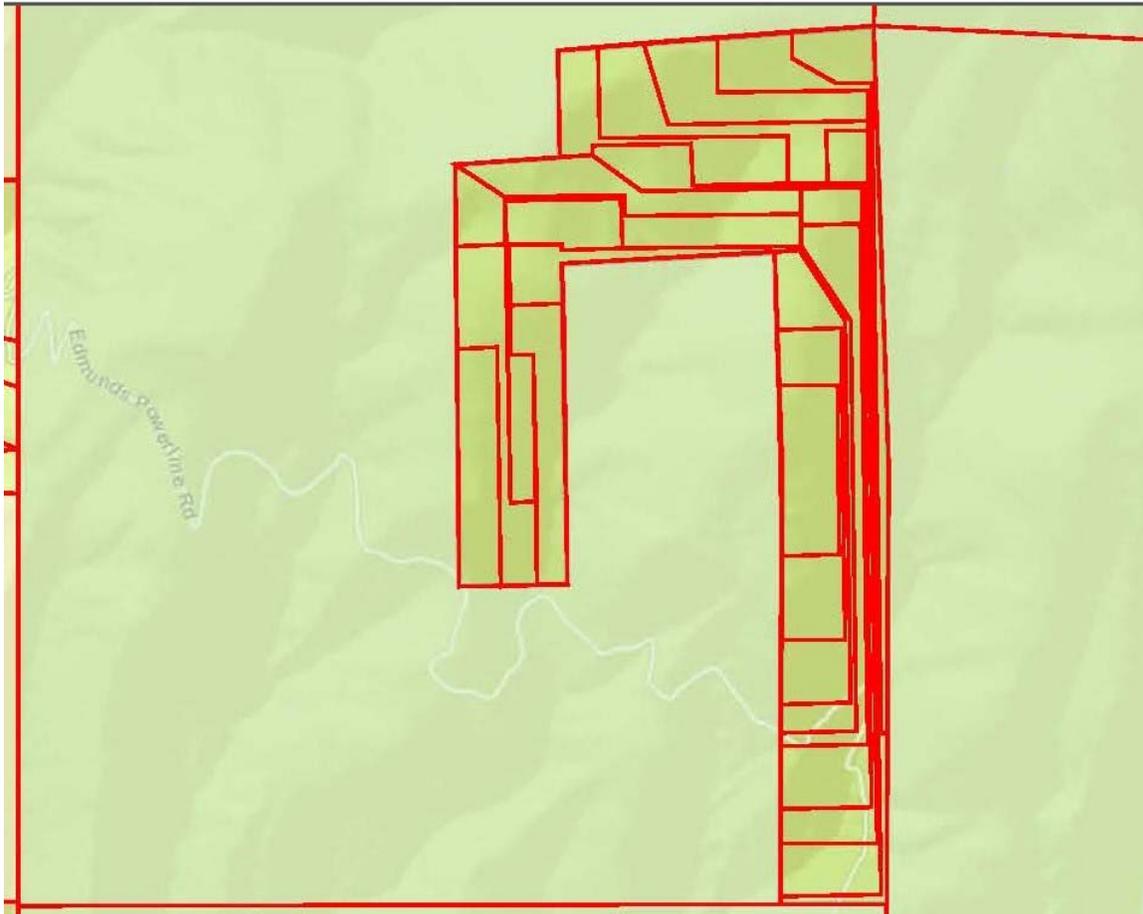
The DEIS does NOT show, that even with appropriate access, the development of this land into 19 35-acre lots is feasible.

The DEIS and the ANILCA determination (Appendix C) do not fully address the fact that the project will be required to go through more reviews and approvals and may not be approved as proposed. The DEIS, Section L 25, lists the following possible jurisdictions/permittees: U.S. Fish and Wildlife Service (USFWS), Endangered Species Act (ESA) Section 7 Consultation, U.S. Army Corps of Engineers (USACE), CWA Section 404, State of Colorado, Stormwater Management Plan, CDPHE Air Permit, and Eagle County Land Use Regulations. Per the letter from Eagle County, additional review will be required based on water and sewer supply needs that would trigger a 1041 review process (see

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previous section). The outcome could be a project that is neither approved nor constructed as currently proposed.

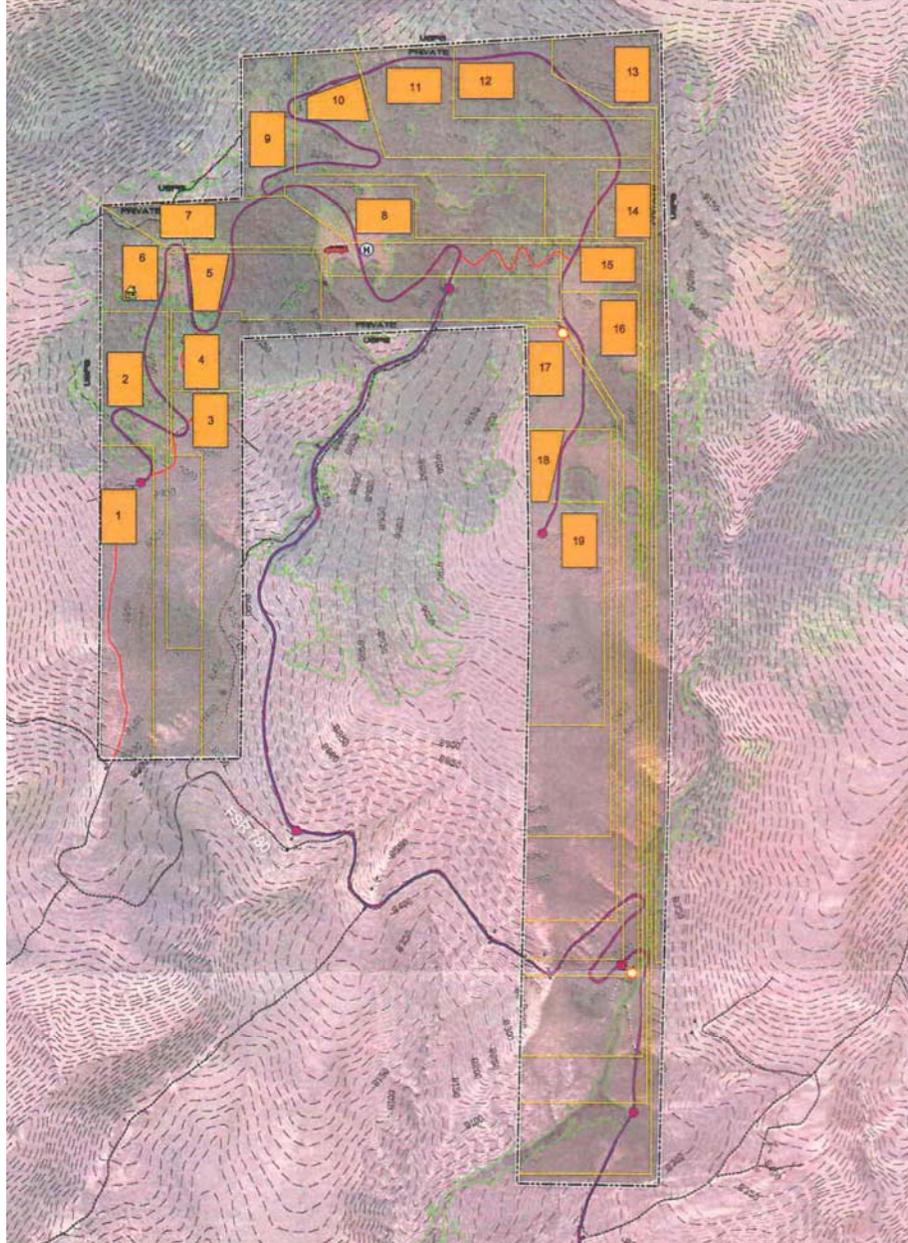
The DEIS showed “building sites (for analysis only)”, DEIS Figures 4, 5 and 6. Yet the plat, as shown on Eagle County GIS, below, could provide for a different configuration of homesites on the property.



Buildings could potentially be developed on the eastern leg of the property proximate to the location of DEIS access Alternative 2 and further south on the western leg.

In fact, Berlaimont’s Variance Application document (2013) contains several plans that indicate different configurations of building envelopes, as well as additional proposed roads and facilities, (e.g. fire-fighting water storage ponds and a helipad) that are not considered in the DEIS. The following plan is an extract from the document’s Berlaimont Road Design, July 2013.

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Another factor that requires further analysis is the financial feasibility of a 19-lot subdivision and the infrastructure it requires, including ongoing maintenance. By comparison, a three homesite project could use existing FS roads (see DEIS) and would require much less investment in water and sewer infrastructure compared to a 19-lot subdivision. There are also additional expenses related to fire safety requirements, including special building construction, water storage (and pumping), creating defensible space and extra internal access routes, per the Greater Eagle Fire Protection District. In fact, with appropriate study, the proponent may find that a three homesite project is more

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reasonable and financially feasible especially due to the high land values associated with large private lots.

It seems premature for the Forest Service to be considering analysis and construction of an access road to meet the owner-expressed needs of what at this time is just a proposal and may not ever be built as described. Wouldn't three homesites be more reasonable and more feasible economically? Isn't that something that the USFS should consider rather than just proceeding under the assumption that the proponent's plan is good to go?

## **E. ALTERNATIVE ACCESS ROUTES TO THE PROPERTY**

### **1. Alternative 1 – No Action – Existing Forest Service Access is the Best Alternative**

As discussed above in Section A, the Forest Service's obligation to the property owner is already met with not just one access, but two – FSRs 780 and 783; and the DEIS Summary describes that the status quo is adequate for the development of three homes, thus allowing the proponent a reasonable use and enjoyment of their property.

This use and enjoyment is limited in scope and season of use due to the winter closure of the road under the existing Forest Plan; however, as also discussed in Section A, the courts have held that such limitations are permissible at the Agency's discretion. Additionally, such restrictions are not uncommon to more remote subdivisions in mountain communities in the central Rockies. People in communities like Marble, Irwin, Pitkin and even the backside of Aspen Mountain commute to work using snowmobiles (such winter access would require a special use permit and minor Forest Plan amendment under the current Forest Plan) or skis. Inholdings are frequently accessed via snowmobiles or other oversnow transport during winter months. As discussed above, the USFS couldn't find a single one with paved, year-round plowed access. Per ANILCA's regulatory direction to "minimize impacts to the Federal resource", this alternative allows "reasonable use and enjoyment" while meeting the need for access with the fewest impacts.

### **2. Alternative 2- Access through the Proponents Private Property is the best of the pavement alternatives**

Had the DEIS made the case for the proponent's proposal being a reasonable use of the property, Alternative 2 would be the most consistent of the pavement alternatives based on ANILCA's direction to minimize impacts on the Federal resource. Alternative 2 would create the shortest distance of pavement on the FSR system and put the vast majority of disturbance on the proponent's property, not on the National Forest.

“This Alternative was carried forward by the WRNF because it maximizes use of existing FSRs while minimizing the distance traveled across NFS lands.” DEIS S-2

Under Alternative 2, the total disturbed acreage for development and accompanying road construction would be 70.4 acres, 33.2 acres of which would occur on public lands; compared with the preferred Alternative 3, under which there would be a slight reduction in total disturbed acreage (64.9 acres), but the vast majority of that disturbance would occur on public land. (DEIS 30, 34). Selection of Alternative 3 seems to be against the regulatory direction to “minimize the impact on the Federal resource”.

Alternative 2 is more consistent with the regulatory direction regarding existing access than the preferred Alternative:

“Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands.” 36 C.F.R. 251.110(g)

Alternative 2 would maximize the use of private resources, and minimize the use of public ones, making appropriate improvements without building new roads across the national forest.

Additionally, Alternative 2 would require fewer Forest Plan amendments, two, as opposed to three for the preferred alternative. The Forest Plan amendments required for this proposal would remove or lessen restrictions included in the Forest Plan for the protection of wildlife resources. All three of the pavement alternatives would require amendments to forest-wide wildlife standards #1 and #4, a prohibition on winter motorized travel and a temporal restriction on certain activities to protect sensitive avian species respectively; however, the impacts of the proposed plan amendments are less for Alternative 2 than for 3 and 4 because there would be less road over the forest in Alternative 2 and because the point where the FSR system meets the private property is lower in elevation, thereby protecting sensitive higher elevation wildlife habitat.

## **F. AFFECTED ENVIRONMENT AND NEGATIVE ENVIRONMENTAL CONSEQUENCES**

Per above, there are convincing reasons for the Forest Service to NOT provide for any further improvements to existing roads beyond FS maintenance. However, since the DEIS has been published and is under consideration, COWPL submits the following:

### **1. Support for March 12, 2018, Letter from Wilderness Workshop et al**

COWPL supports the comments from the Wilderness Workshop et al, in their letter dated March 12, 2018, including discussion of the many negative impacts of the proposed project

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and proposed access route alternatives to: fish and wildlife, scenery resources, water and wetlands and other natural resources.

## 2. Vegetation and Wildlife

Various sections of this letter describe impacts to vegetation and wildlife. Two additional areas of impact are noted, as follows:

DEIS 203 details impacts to Harrington Penstemon, a Forest Service and BLM designated sensitive plant species. The species exists in areas that would be disturbed by the Berlaimont proposal. COWPL has analyzed three BLM NEPA documents recommending approval of projects that would impact Harrington Penstemon populations<sup>5</sup>; the combination of these approvals has a cumulative impact on the species and none of these documents address this impact.

DEIS Table 2-7, states that for Alternatives 2 through 4

“Considering all anticipated effects to threatened and endangered species a determination of “likely to adversely affect” was reached for the four big river fish; and “not likely to adversely affect” for greenback cutthroat trout and Canada Lynx.”

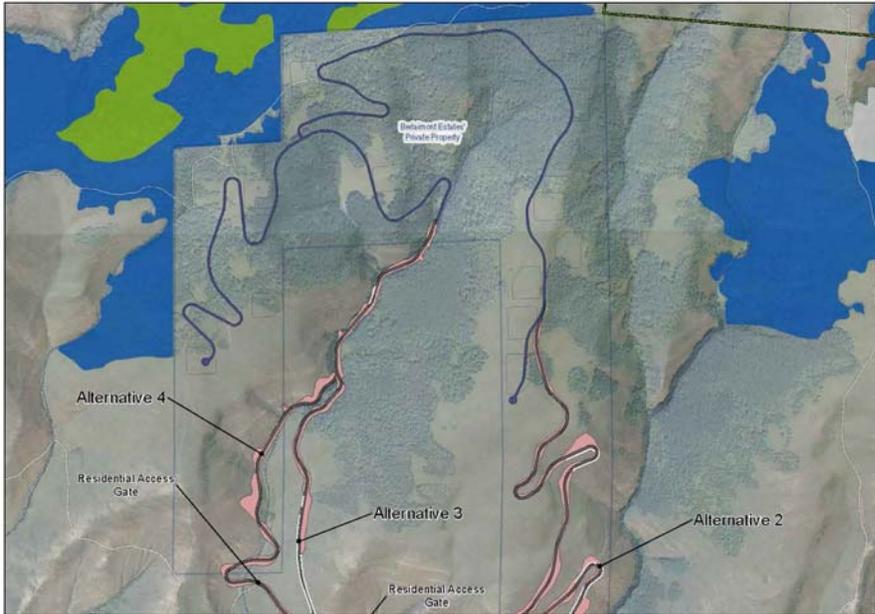
However it appears (looking at the Center for Biological Diversity mapping [https://www.biologicaldiversity.org/programs/population\\_and\\_sustainability/T\\_and\\_E\\_map/](https://www.biologicaldiversity.org/programs/population_and_sustainability/T_and_E_map/)) that the property is in Canada lynx habitat. The DEIS states that lynx habitat types are not mapped on the non-Forest Service lands:

“Figure 17 – Lynx Habitat shows non-field validated lynx habitat in the vicinity of the Berlaimont Estates project area, provided by the Forest Service. Lynx habitat types are not mapped on non-NFS lands on the WRNF...” DEIS 216

Below, an extract from DEIS Figure 17 shows primary lynx habitat in green and secondary habitat in blue. Further information north of the property is not shown. Both primary and secondary habitat areas are shown up to the boundaries of the private land. Further analysis of lynx habitat on the private land is required to determine the likelihood of adverse effects on Canada Lynx.

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<sup>5</sup>These documents are the Sutey Ranch Land Exchange EA, the Buffalo Horn Land Exchange draft EA and the Blue Valley Land Exchange draft EA.



### **3. Connected Action of Development of Private Land and Cumulative Effects**

The DEIS does not address cumulative impacts of the Forest Plan amendments, nor does it properly address the connected action of development on the proposed 19-lots as a result of the proposed access road improvements. This development could include up to 19 new homes plus accessory buildings, a proposed helicopter landing site and helicopter use (Road Variance Request), water and sewer infrastructure, power supply, significant improvements necessary for fire protection, new easement agreements and special use permits, financial commitments and private maintenance requirements. It also does not address potential precedent setting cumulative effects.

### **4. Inconsistency with Forest Plan and Need for Amendment**

This letter has presented many reasons why the Forest Service should approve Alternative 1 – No Action and not consider using any of the other Alternatives. Perhaps one of the most important reasons is the need generated by all the proposed action alternatives (Alternatives 2 through 4) to amend the White River National Forest Land and Resource Management Plan 2002 Revision (Forest Plan).

The location of the Berlaimont property, though private, essentially places it in the middle of forest management areas that currently benefit from restrictions on use in order to protect wildlife habitat. Management Area 5.41 includes the “inside of the Berlaimont U” part of the National Forest which Alternatives 3 and 4 would bisect. It benefits from specific measures to:

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“protect wintering wildlife from disturbance, winter recreation use, both motorized and nonmotorized, is generally confined to designated travel routes or use corridors. Road systems and trails are relatively undeveloped. Camping is restricted during the winter.” DEIS 99

Some of the wildlife species the DEIS identifies as present in the area are:

Deer, elk, bears, two species of agency designated sensitive species of cutthroat trout, multiple sensitive avian species, and two sensitive mammal species – Townsend’s big-eared bat and Canada Lynx. DEIS 212-233.

Most of these species benefit from large tracts of intact habitat and minimal human incursions into their homes, at least at the critical times of year that being the purpose of the restrictions in the Forest Plan.

Alternatives 2, 3, and 4 would all require Forest Plan amendments exempting the new road from the suitably restrictive Forest Plan directives. Not only, would these actions dilute the integrity of the forest management planning process, but they will generate far-reaching and permanent impacts on the habitat of these sensitive species by allowing a substantial increase in human incursion into these habitats. Such impacts would include more year-round recreation in the area, adverse effects from the presence of dogs, alterations in migration patterns due to new roads and residences, residential pollution (chemicals from road maintenance, landscaping, possible septic failures), decreases in stream flows, noise and light pollution.

The DEIS fails to provide sound argument that the proposed development is a reasonable use and enjoyment since it demands altering Forest Plan’s wildlife objectives that are currently in the public's interest.

Moreover, the proposed Forest Plan amendments required to support the Berlaimont project will have ongoing impacts through their possible use as comparables to justify future projects. The proposed project-specific plan amendments will be used in the future, to make the case for the reasonableness of proposed similar actions in the National Forest, thereby further degrading the integrity of the habitat that the Forest Plan is intended to protect.

## **5. Climate Change, Wildfire and Related Safety and Economic Impacts**

Per the Aspen Times, October 21, 2018.

“Firefighting costs for Lake Christine, others in White River forest topped \$40M” ...

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“The big unknown is whether this summer was an aberration on the White River National Forest or a new normal for conditions.”

"We know droughts like this go more than one year," Fitzwilliams said. "That's worrisome."

In recent years, changing climate conditions have resulted in increased wildfires. In 2018, the White River National Forest experienced at least 35 wildfires, and California has experienced fires (e.g. Paradise Fire) resulting in enormous losses of structures and human lives. The economic impacts of the wildfires are extensive too, with increasing public funds being spent on fighting the fires.

Berlaimont is located in an area of moderate to high wildfire hazard and is surrounded by undeveloped, naturally vegetated National Forest land. The Greater Eagle Fire Protection District has placed extensive requirements for fire hazard mitigation on the proposed project and access road, as part of the road variance review and approval. These include the requirements for large water storage ponds that can be used by helicopters, a large capacity water storage tank, a staging area, a helipad and many specific requirements for building construction techniques and creating outdoor defensible space. In addition, they require additional access roads through the property to assist with fire-fighting access.

The DEIS has not addressed the impacts of these requirements, including how the water rights will be acquired, where water will be taken from, and how the water will be moved and stored. The requirements for additional internal access roads need to be analyzed in relation to alternate access routes. Meeting the requirements of the Fire District will add to the impacts that will be created by the proposed development and access road.

#### **G. PUBLIC COMMENT AND OPPOSITION TO DATE COMPRISE RELEVANT CRITERIA**

The Forest Service is charged with “considering any other relevant criteria” in their determination of reasonableness. Public opinion constitutes relevant criteria, especially as this relates to decisions made regarding Public Lands.

There has been enormous public opposition to the proposed DEIS recommended Alternative 3. Opposition has been documented in hundreds of letters and comments both in the scoping process and in response to the DEIS, see also Section A, above.

Opposition has sparked news commentary such on March 8, 2018 CBS:  
<https://denver.cbslocal.com/2018/03/08/edwards-berlaimont-paved-road/>

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Letters continue to be published regularly in the Vail Daily News, the following are just a few to date:

March 1, 2018, Peter Hart  
August 31, 2018, Andy Wiessner  
September 18, 2018, Jacci McKenna  
October 17, 2018, Mark Stephens  
November 22, 2018, Doss Malone  
December 1, 2018, Howard Leavitt  
December 7 2018, Anne Essen

A petition in opposition to the DEIS Preferred Alternative has been submitted to the Forest Service and currently has at least 2400 signatures. Vail Daily December 15, 2018 (<https://www.vaildaily.com/news/more-than-2400-petition-signatures-oppose-berlaimont-plan-north-of-edwards/>).

### **H. DEIS INADEQUACY PER NEPA REQUIREMENTS**

NEPA provides standards and requirements for preparing an Environmental Impact Statement. The following are areas that have not been fully addressed in this DEIS.

The stated Purpose and Need is too narrow.

“The purpose of the proposed project is to provide an improved road to Berlaimont Estates’ private property.” DEIS 3

“The need for the proposed project is that Berlaimont Estates desires to develop single-family residences on their property. The current maintenance level and condition of the existing FSRs are not at the level desired by Berlaimont Estates to meet their objectives.” DEIS 3

By limiting the purpose of the proposed action to providing “an improved road to Berlaimont” which is needed because “current maintenance and condition of the existing FSRs are not at the level desired by [the proponent]”, the Forest Service ensures that only the proposed action could possibly fulfill the stated purpose and need. The courts have frowned on purpose and need statements that were similarly too narrow. The Seventh Circuit has stated:

No decision is more important than that delimiting what these "reasonable alternatives" are ... One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence) ... If the agency

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constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.<sup>6</sup>

The need for the DEIS is not that Berlaimont wants to have a better road for their subdivision, it is to evaluate the potential impacts of the level of development and necessitated infrastructure on the National Forest. Using this approach, the DEIS would have described the purpose as “to evaluate possible access routes”. The overly narrow and inaccurate statement of purpose and need also serve to obscure impacts by focusing on the road and not the actual development.

The purpose and need of the project should be to provide for adequate access as required by ANILCA. As discussed above, the Forest Service’s presupposition that an improved road is necessary for adequate access predetermines the outcome in a way that is not allowed pursuant to NEPA.

The DEIS does not consider the cumulative impacts of the proposal’s disturbance of Harrington Penstemon populations. Federal management agencies have multiple on-going NEPA processes which would result in impacts to this Sensitive Species (designation per both the Forest Service and the BLM); each of these analyses treats the impacts from the individual proposals in isolation, without analyzing the cumulative impacts of the multiple projects. (See Section V (F) for more detail.)

The DEIS does not consider a viable alternative. The most plausible alternative is Alternative 1, combined with Forest Plan amendments that would allow winter motorized travel to Berlaimont residents only, making it an action alternative. This would allow the proponent a reasonable use of the property over existing roads, require no additional review from the county, have far fewer impacts and probably be more financially feasible, given the multi-million dollar estimates for road construction associated with the large scale development proposal.

The DEIS does not adequately analyze connected actions. One of the connected actions is construction and existence of multiple residences and roads on private land as well as the additional manmade infrastructure required as a condition of the approval of the road variance. The denizens of the forest do not recognize property lines and development of the proposed size will have significant, long term impacts on the area. The DEIS has not adequately analyzed the combined, long-term impacts of residences, roads and infrastructure.

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<sup>6</sup> Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 660 (7th Cir. 1997).

Another connected action is the consideration of Forest Plan amendments and the consequent separate NEPA process. The two NEPA analyses should occur together as they are interconnected; the amendment allows the road and the road necessitates the amendment. The potential habitat and wildlife impacts of weakening the area restrictions that protect these resources should be analyzed and included in the DEIS. These impacts include fragmentation of habitat on sensitive species, increased year-round human incursion, and the potential that the approval will be relied upon to support future similar requests.

## I. CONCLUSION

Alternative 1, No Action, is the best alternative. It would still allow reasonable use and enjoyment of the Berlaimont property through the development of three houses with far fewer impacts than the DEIS proposed project.

Allowing improved access over the National Forest is not in the public interest. Moreover, statute and case law say that this new, improved access is not necessary under ANILCA as access to the property already exists; it would require multiple forest plan amendments; and, it is not in the public interest as the proposal is far too controversial.

Sincerely,



Anne Rickenbaugh

With Hawk Greenway, Jean Perry, Franz Froelicher, and James Katzenberger  
Board of Directors  
**Colorado Wild Public Lands**

cc. Aaron Mayville, District Ranger