



File Code: 1570-1

Date: July 14, 2010

Route To:

Subject: Discretionary Review Decision -- Crested Butte Mountain Resort Expansion

To: Rick D. Cables, Regional Forester, Rocky Mountain Region

Pursuant to Title 36, Code of Federal Regulations (CFR), Section 251.100, I have completed my discretionary review of Appeal Reviewing Officer (ARO) Jim Peña's decision, dated May 6, 2010, regarding an appeal filed by Crested Butte, LLC, and CNL Income, LLC, on behalf of Crested Butte Mountain Resort (CBMR). The subject of the ARO's appeal review was a decision issued by Forest Supervisor Charles S. Richmond rejecting a master development plan (MDP) and site-specific proposal for expansion of CBMR onto Snodgrass Mountain. Both CBMR and Snodgrass Mountain are located in the Gunnison Ranger District and the Grand Mesa, Uncompaghre, and Gunnison (GMUG) National Forests.

Background

On November 5, 2009, GMUG Forest Supervisor Charles Richmond rejected an MDP and site-specific proposal for development of Snodgrass Mountain submitted by CBMR under Forest Service special uses screening regulations at 36 CFR 251.54(e). Snodgrass Mountain is included in CBMR's special use permit and is allocated to downhill skiing in the GMUG National Forests Land and Resource Management Plan (Forest Plan). On December 18, 2009, CBMR filed an administrative appeal of the Forest Supervisor's decision under 36 CFR Part 251, Subpart C. On May 6, 2010, the ARO affirmed the Forest Supervisor's decision with specific instructions regarding the disposition of Snodgrass Mountain in the Forest Plan. On June 14, 2010, I decided to undertake discretionary review of the ARO's decision pursuant to 36 CFR 251.100. The review was made on the existing record (closed by the ARO on April 9, 2010) and the ARO's appeal decision. This letter documents my discretionary review and decision, and concludes the Agency's administrative appeal process.

Decision

I am affirming the ARO's appeal decision. However, I determined that for some of the appeal issues it would be helpful to expand upon several points that were included in his decision. Additionally, I am clarifying his instruction to the Forest Supervisor regarding the GMUG Forest Plan.

The ARO's decision addressed the following six appeal issues:

Issue 1 – Was Forest Supervisor Richmond's decision appealable?



- Issue 2 – Did Forest Supervisor Richmond fail to follow the screening regulations and the 2005 Memorandum of Understanding (MOU)?
- Issue 3 – Did Forest Supervisor Richmond fail to evaluate CBMR’s proposal in the same way as other proposed ski area expansions on National Forest System lands?
- Issue 4 – Was Forest Supervisor Richmond’s decision supported by substantial evidence?
- Issue 5 – Was Forest Supervisor Richmond required to initiate the NEPA (National Environmental Policy Act) process to support his decision?
- Issue 6 – Did Forest Supervisor Richmond’s decision amend the GMUG Forest Land and Resource Management Plan?

In conducting the discretionary review, I determined that the ARO’s evaluation and findings regarding issues 2, 3, 4, and 5 could benefit from some clarification or additional examination of the record. The additional analysis for issue 3 is included in this letter and for issues 2, 4, and 5 is found in Attachment 1 to this letter. Issues 1 and 6 require no further response, although I will clarify the instructions associated with Issue 6 that are contained in the ARO’s appeal decision.

Issue 1 – Was Forest Supervisor Richmond’s decision appealable?

I agree with the ARO’s conclusion that this issue is moot.

Issue 2 – Did Forest Supervisor Richmond fail to follow the screening regulations and the 2005 Memorandum of Understanding (MOU)?

Issue 5 – Was Forest Supervisor Richmond required to initiate the NEPA process to support his decision?

I concur with the ARO’s finding that application of the screening criteria in 36 CFR 251.54(e) is the process the Forest Service uses to determine whether to accept a proposal as an application and that execution of a multi-year MOU by CBMR and the Forest Service to facilitate preparation of CBMR’s proposal does not constitute acceptance of an application under applicable regulations and Forest Service directives.

I also affirm the findings in the appeal decision that the Forest Supervisor properly applied the screening criteria in 36 CFR 251.54(e) and Forest Service Handbook (FSH) 2709.11, sections 11 and 12, to CBMR’s proposal and that the Forest Supervisor was not required to conduct environmental analysis to support his decision.

Additional analysis concerning these two appeal issues and resulting from the discretionary review is found in Attachment 1.

Issue 3 – Did Forest Supervisor Richmond fail to evaluate CBMR’s proposal in the same way as other proposed ski area expansions on National Forest System lands?

Forest Service regulations and directives require the Agency to evaluate each special use proposal on its merits (36 CFR 251.54(e); FSH 2709.11, sec. 11). Specifically, the regulations and directives require the Forest Service to evaluate each proposal based on the initial and second-level screening criteria. Therefore, evaluation of other ski area proposals is immaterial to

evaluation of CBMR's proposal and I affirm the appeal decision with respect to the treatment of various other ski area proposals.

Issue 4 – Was Forest Supervisor Richmond's decision supported by substantial evidence?

As the ARO noted in his decision, the Forest Supervisor rejected CBMR's proposal on the basis of direction at 36 CFR 251.54(e)(5)(ii) that requires the rejection of any proposal where the proposed use would not be in the public interest. The ARO also correctly explained that the public interest standard is not defined in regulation and consequently the exact factors considered and the level of confidence needed is appropriately left to the discretion of the authorizing officer.

The ARO stated that the Forest Supervisor's decision demonstrated "a broad and balanced examination of the issues," that these considerations were "relevant to the determination of the public interest," and that none of the "statements and evaluations are unfounded" (Appeal Decision, p. 16). In making this determination the ARO cited both the Forest Supervisor's November 5, 2009, decision and responsive statement. Under the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), an authorized officer must examine the relevant data and articulate a rational connection between the facts found and a decision made based on those facts.

Based on my initial review, I was unable to determine whether a sufficient factual basis existed to support the ARO's decision under the APA. Accordingly, I undertook a more in-depth examination of the record as it pertained to the rationale cited in the Forest Supervisor's denial letter. The results of this review are detailed in Attachment 1. In consideration of this information, I concur with the ARO that the Forest Supervisor had substantial evidence for APA purposes to support his decision.

Issue 6 – Did Forest Supervisor Richmond's decision amend the GMUG Forest Land and Resource Management Plan?

As I explained above, I have determined the ARO's analysis for Issue 6 is sufficient and I agree with his conclusion that the Forest Supervisor did not amend the GMUG Forest Plan when making his decision to reject the proposal to expand lift-served skiing onto Snodgrass Mountain. However, I am troubled by the Forest Supervisor's finding in his decision letter that "it is not in the public interest to continue to consider development on Snodgrass Mountain any further." The finding as stated appears to reflect a conclusion about the suitability of Snodgrass Mountain for any skiing development, rather than just for the proposal made by CBMR. The analysis in this appeal record, which appropriately addressed only the proposal under consideration, does not adequately support a suitability determination for any downhill skiing on Snodgrass Mountain. Such a determination should only be made through the land management planning process.

The ARO's instruction associated with this issue generally addresses my concern, but also includes an error that I must correct. In his decision, the ARO included the following instruction:

I am also requiring Forest Supervisor Richmond to provide guidance to the Appellant on how it [sic] should submit a proposal to provide downhill skiing in the context of LRMP [Land

and Resource Management Plan] direction that the authorized officer would find acceptable as required by 36 CFR 251.54(e)(3), *Guidance and Information to Proponents*. In the alternative, if any downhill skiing is no longer acceptable to the authorized officer, the GMUG NF [National Forest] is required to initiate a Forest Plan Revision, modifying the management prescription boundaries.

The instruction to initiate a Forest Plan Revision for the purpose of modifying management prescription boundaries, if a determination is made that downhill skiing is no longer a suitable use for Snodgrass Mountain, appears to be based on the premise that such a change requires a Forest Plan Revision. This premise is not accurate.

Land management plan decisions guide or limit uses of National Forest System resources, but generally do not commit resources or mandate specific actions. (See 36 CFR 219.7 (74 FR 67065, Dec. 18, 2009.)) Therefore, a management emphasis on downhill skiing for Snodgrass Mountain in the GMUG Forest Plan does not obligate the Forest Service to provide that opportunity. If changes in physical, social, or economic conditions lead to a reassessment of suitability for a particular resource or opportunity, it is the responsibility of the unit supervisor (the Forest Supervisor in this case) to prepare an amendment to the Forest Plan (FSM 1926.04b and 1926.5).

Revisions of land management plans are generally scheduled at least every 15 years, although a plan may be revised sooner when conditions have changed sufficiently to affect overall goals or uses for the entire unit (FSM 1926.6). The Agency's current schedule for land management plan revisions calls for the GMUG to update a notice of intent to prepare a forest plan revision in fiscal year 2012 and to complete the revision by fiscal year 2014 (<http://www.fs.fed.us/emc/nfma/includes/LRMPschedule.pdf>). The change to the boundary of Management Area 1B that was the subject of the ARO's instruction could be included as part of the scheduled GMUG Forest Plan Revision, but does not itself warrant initiation of a revision because it does not affect overall goals or uses for the entire National Forest.

I am amending the instruction to the GMUG Forest Supervisor to state:

I am instructing Forest Supervisor Richmond to fulfill the requirement of 36 CFR 251.54(e)(3) *Guidance and Information to Proponents* by providing guidance to the Appellant on how they should submit a proposal to provide downhill skiing on Snodgrass Mountain that the authorized officer would find acceptable and consistent with the Forest Plan. If no such alternative exists for downhill skiing on Snodgrass Mountain that is consistent with the Forest Plan, the GMUG Forest Supervisor is instructed to apply the direction in FSM 1926.5 and 1926.6 to consider whether a change to the Forest Plan is needed to reflect current suitability determinations for Snodgrass Mountain and, if so, to determine the most appropriate time and means for changing Forest Plan guidance. The method for changing Forest Plan guidance must be fully consistent with the NEPA, the Council on Environmental Quality implementing regulations, and the Forest Service's environmental policies and procedures in 36 CFR Part 220, FSM 1950, and FSH 1909.15.

This decision is the final administrative determination of the United States Department of Agriculture regarding this appeal (36 CFR 251.100). Appellant will be sent a copy of this decision.

/s/ Gloria Manning
GLORIA MANNING
Reviewing Officer for the Chief

cc: Jim Pena
Jim Bedwell