

Appeal 10-02-00-0013
Crested Butte, LLC, CNL Income Crested Butte, LLC Appeal
of
November 5, 2009 Decision by Charles S. Richmond
Regarding Crested Butte Mountain Resort
Master Development Plan
and
Snodgrass Mountain Proposal

FOREST SUPERVISOR'S RESPONSIVE STATEMENT
PURSUANT TO 36 CFR 251.81 and 36 CFR 251.94.

March 2, 2010

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List of Forest Service Exhibits

<i>Exhibit</i>	<i>Description</i>
00	CBMR 2009 Snodgrass Mountain Proposal, and 2009 Resort Master Development Plan
0	Copy of 71 page Appeal with Issues Highlighted and Cross Referenced
1	November 5, 2009 Decision
2	November 4, 2009 Review and Recommendations to the Forest Supervisor Related to CBMR and Snodgrass Proposals
3	Sequence of Correspondence 1995 to 2009, Wherein CBMR is Apprised of Forest Service Reservations/Concerns about the Development of Snodgrass Mountain
4	Chronologies, including Forest Service Timeline of Major Events Related to Snodgrass Mountain, and Crested Butte Mountain Resort
5	Memorandum of Understanding (2005), Modification No. 1 (2007), Modification No. 2 (2009)
6	Preliminary Comments on Master Development Plan and Snodgrass Proposal
7	Planning Triangle, Forest Plan Implementation Course 1900-01, US Department of Agriculture, July 30, 2001; and Power point for use of 251 Regulations
8	Content Summary of Letters Received from 2007 to 2009 Expressing Opinion On/Offering Analysis of Proposals for Development of Snodgrass Mountain
9	Synthesis of Criticism of November 5 Decision Letter to CBMR from Letters Received since the Decision
10	Letters of Particular Interest Critical of Decision
11	Synthesis of Support For November 5, 2009 Decision Letter to CBMR From Letters Received Since the Decision
12	Letters of Particular Interest in Support of Decision
13	Selected Editorials from Local Newspaper
14	Status of Forest Service Review of Crested Butte Submittals..... July 17, 2009
15	CBMR Presentation, Snodgrass Light, Crested Butte Mountain Resort, June 2008
16	Purpose and Need Studies/Letters from FOSM, Goettge

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- 17 List of Geologic Hazard Studies and Mapping focusing on Geologic Hazard on Snodgrass Mountain, 1976 to Present
- 18 Review Comments on McCalpin March 2008 Report on Geology and Slope Stability, Snodgrass Mountain, November 2008
- 19 Rationale by Staff Supporting Decision to Remove Portions Of Snodgrass From Consideration, December 18, 2008
- 20 Summary of Disagreement among Avalanche Reports in the Record
- 21 Discussion of Boundary Management Concerns Specific to Avalanche
- 22 2010-2009 Roadless Area Conservation Policy Chronology, The Wilderness Society, May 28, 2009
- 23 Forest Service Special Use Regulations at 36 CFR 251
- 24 Selected pages from Crested Butte Mountain Resort 2009 Snodgrass Mountain Proposal and MDP
- 25 Studies of Terrain Offered by Snodgrass Mountain, by Goettge, FOSM and others
- 26 Opportunities for public input
- 27 63 Fed. Reg. 65950, 65953-65954 (Nov 30, 1998)
- 28 Master Development Planning A Presentation to CBMR in 2008
- 29 Web Pages of CBMR and Friends of Snodgrass Mountain
- 30 Charles Richmond August 24, 2009 letter to Gunnison County, County reply October 20, 2009
- 31 Overview Of Forest Planning And Project Level Decision-Making, USDA Office of the General Counsel Natural Resources Division, June 2002
- 32 CBMR Special Use Permits of 2004 and 2008
- 33 R-2 Guidance: Ski Area Planning and ESA Section 7
- 34 Letters and Emails Received Prior to the Decision
- 35 Letters and Emails Received After the Decision

ORGANIZATION OF THE APPEAL

The CBMR appeal is 71 pages of argument organized in accordance with an outline provided as Table of Contents at pages i and ii of the appeal.

We have identified and numbered “issues” in the appeal we believe to be in need of response. See full copy of the 71 page appeal at Forest Service Exhibit 0. Issues are highlighted in yellow, and numbered in margin text boxes. We refer to these numbered issues throughout our Responsive Statement.

Numbering convention is “Page number, alphabetical identifier.” For example Issue 7A is the first issue on page 7 of the appeal.

ORGANIZATION OF THIS RESPONSIVE STATEMENT

We believe it is important that no issue be left unanswered in our response. However, to reply, tit for tat, to each item would make the answers difficult to discern. Hence, we have reviewed the appeal with care and find that the following issues are raised:

- Is the Decision appealable?
- 251 Forest Service commitment/obligation, MOU ,screening, NEPA
 - Does CBMR hold a right or entitlement?
 - Did the Forest Service commit in a 2005 MOU to do NEPA?
 - Did the Forest Service otherwise commit to proceed?
 - Was the “pre NEPA process legal?
 - Were special use screens appropriately applied?
 - Was the pre-application process sufficient to constitute a “proposal” for a major federal action under 40 C.F.R. § 1508.23, thus triggering a requirement to prepare an environmental impact statement (EIS)? Is NEPA Required?
- Need for Snodgrass Expansion
- Gunnison County
- Community support
- Opportunity to comment
- Geologic hazard issues
- Avalanche/boundary management
- Recreation
- Lynx
- Roadless
- Access
- Off-Site Impacts

We have organized our response accordingly (see Responsive Statement Table of Contents). We offer consolidated responses to these substantial issues, with citations to the numbered issues in the appeal they address. Forest Service Exhibit 0 is a copy of the 71 page appeal, with cross references by page number to where each numbered issue is addressed in our response.

**Forest Supervisor's Responsive Statement – Appeal 10-02-00-0013
Crested Butte Mountain Resort**

INTRODUCTION

This is the Forest Supervisor's Responsive Statement, per 36 CFR 251.81 and 36 CFR 251.94, to the appeal of his November 5,

SEE FOREST SERVICE EXHIBIT 4 FOR A TIMELINE OF MAJOR EVENTS RELATED TO SNODGRASS MOUNTAIN AND LEADING TO THE DECISION BEING APPEALED.

2009 letter “not accepting” the Master Development Plan submitted May 20, 2009, and “rejecting” the 2009 Snodgrass Mountain Proposal. The November 5, 2009 letter will hereinafter be called the Decision. The appeal was filed by legal representatives of Crested Butte, LLC and CNL Income Crested Butte, LLC, owners of Crested Butte Mountain Resort (CBMR throughout this statement).

On May 20, 2009, CBMR submitted to the Forest Service a “Master Development Plan, Crested Butte Mountain Resort” (MDP). On June 18, 2009, CBMR followed up with a submittal of a “2009 Snodgrass Mountain Proposal.” See both at Forest Service Exhibit 00 bound as submitted by CBMR, or Appellants Exhibits 3 and 4.

These submittals were consistent with an agreement between the Forest Service and CBMR (see January 29, 2009 letter, Forest Service Exhibit 3) in which the Forest Service agreed to review both the MDP and the “proposal” concurrently. The proposal was expressly submitted in accordance with the “Terms and Conditions of(CBMR's) ... Forest Service-issued Special Use Permit (SUP)” (see June 18, 2009 cover letter to Proposal, Forest Service Exhibit 00) administered under Forest Service Special Use Regulations at 36 CFR 251. See Forest Service Exhibit 23 for copy of Special Use regulations.

Submittal of the 2009 Snodgrass Mountain Proposal was the culmination of a long dialogue with CBMR about the development of Snodgrass Mountain. It represented the formal request for authorization for use and occupancy of National Forest System lands within the CBMR permit on Snodgrass Mountain for lift served skiing. It is important to note that, although there had been a number of presentations, draft plans, and potential designs discussed among CBMR and Forest Service representatives, the June 18, 2009 Snodgrass Mountain Proposal was the formal submittal which triggered review and consideration under procedures dictated by 36 CFR 251.54, “Proposal and application requirements and procedures.”

On November 5, 2009, Forest Supervisor Charles S. Richmond made a decision, documented in an official letter to Crested Butte Mountain Resort (CBMR) of the same date, informing CBMR of the following:

“First, I am not accepting your Master Development Plan which includes a proposal to develop Snodgrass Mountain for lift-served skiing. A revised MDP, excluding the proposed lift-served skiing on Snodgrass Mountain, will need to be submitted in accordance with the requirements of your permit.”

Second, your site-specific proposal to build and operate lift-served ski facilities on Snodgrass Mountain is rejected.

These conclusions will not affect the current Forest Plan allocation of Snodgrass Mountain to downhill skiing (Management Prescription 1B) and your Special Use Permit boundary. However; both may be reexamined at such time as the Forest Land and Resource Management Plan is revised.”

(See Forest Service Exhibit 1 for full text of the letter.)

In direct response to Issue 3A, Forest Supervisor Charles S. Richmond made the Decision. As is routine in the agency, he consulted with staff and line in the Regional Office. It is entirely appropriate for the Forest Supervisor to consult with staff at all levels, and with his superiors, on issues of this importance. However, the authority to make this decision is delegated to Forest Supervisor Richmond and he made the Decision.

The Decision, announced in advance privately to the executives of CBMR, but publicly with no other notice, was a surprise to all parties with any interest. It generated a substantial response. We have received over 600 letters and emails. News coverage was extensive. The entire community, and beyond was affected. A campaign of influence to overturn the Decision was immediately launched by CBMR and its supporters, while those opposed to development on Snodgrass were quietly thankful. As the voices of objectors were raised, those in support of the Decision began also to engage in a campaign of influence in hopes of preserving the Decision.

Nearly every person, entity, group, organization, elected body or representative with any interest in Snodgrass Mountain, or the upper East River Valley has weighed in.

The history of consideration of Snodgrass Mountain is long and convoluted. There are various “chronologies” that have been prepared, one by CBMR, one by Friends of Snodgrass Mountain, and one by us, all seen at Forest Service Exhibit 4. Each may represent some bias in the way events are portrayed, included or omitted.

We Believe We Did the Right Thing

Since the November 5 Decision, and in preparing this Responsive Statement, we have considered all aspects of the Decision. We cite the following key documents: the November 5, 2009 Decision letter, (Forest Service Exhibit 1), the November 4, 2009 Staff Paper leading to and supporting the Decision (Forest Service Exhibit 2), Synthesis of Criticism of November 5 Decision Letter to CBMR from Letters Received Since the Decision (Forest Service Exhibit 9), Synthesis of Support for November 5 Decision

Letter to CBMR from Letters Received Since the Decision (Forest Service Exhibit 11), the CBMR Appeal itself, and all aspects of this Responsive Statement.

It is our view that the negatives, for the use of Snodgrass Mountain for lift served skiing, outweigh the positives. We believe that an objective review of these analyses/ discussions/opinions, point for point, and considered cumulatively would lead an objective reviewer to the same conclusion. We emphasize that, while no single factor or concern leads us to reject the proposal, the accumulation of negatives considered altogether, does.

We reaffirm the reasoning with respect to each of the “factors” discussed in the Decision. We believe this position is fully supported, and even augmented with additional factors which bear on the decision to authorize lift served skiing on Snodgrass Mountain, in the record. We further believe that a review of public comments even further supports our reasoning to reject the proposal to develop lift served skiing on Snodgrass Mountain.

We believe the decision published November 5, 2009 is reasonable and appropriate.

We Believe We Did It Right

NEPA is not intended to be the mechanism for making a determination as to whether to accept and process a proposal, be it a new proposal by a new proponent, or a proposal by an established permit holder such as CBMR. The proposal to develop Snodgrass is a “proposal”, in the context of the 36 CFR 251.54 regulations, and was considered as such. In accordance with the 251 regulations, as made clear in the November 5 Decision letter, application of special use screens from those regulations is the point in the required process to determine whether to accept or to reject a proposal. NEPA is entered only if all screening criteria are met and a proposal is accepted as an application (36 CFR 251.54).

Special Use regulations at 36 CFR 251.54 are clear that before any proposal submitted to the agency is considered under NEPA, it first must pass the two levels of screening laid out in the regulations. (See Forest Service Exhibit 23 for copy of 36 CFR 251.54.) Under those screening criteria, a project or proposal must be determined to be “in the public interest” to be carried forward.

This process is designed to screen the hundreds of proposals seen by the agency every year that do not warrant further consideration, time, or expense. In the case of Snodgrass Mountain, coming to this determination was much more complex than for most proposals. Procedurally, all laws, regulations and policies were followed. NEPA does not and did not apply, and would, in our view, produce no better answer than we already have. A perpetuation of the debate for several years would serve only to

deepen division in the community. A long, expensive NEPA process is unnecessary. Investment by CMBR in such a process would give them an even greater sense of entitlement.

At Issues 6C, 67A and 68A appellants' assertion that "the Forest Service only wanted to start the NEPA process once it made the decision to approve Snodgrass" is totally incorrect. Further, the statement by appellants that "the Forest Supervisor repeatedly stated that, once the Forest Service begins the NEPA process, its job is to "defend" the proposal – not analyze, seek public input on, consider alternatives, or review the proposal" is equally false.

The Forest Service and specifically the Grand Mesa, Uncompahgre, and Gunnison National Forests is especially proud of the high standards of NEPA analysis that has been demonstrate on numerous projects over the years. All of these NEPA documents, however, started with a good Federal proposed action that we could then support, analyze, and make adjustments to as the process evolved. CMBR did not present us with a proposal that we were willing to accept as an application under 36 CFR 251.54, and then as a Federal proposed action and consequently NEPA does not apply.

The Forest Supervisor operated within his discretion under delegated authorities, did so in compliance with established law, regulation and policies, and in fact met his responsibility under these to manage the National Forest System lands in the public interest. We argue this in much greater detail under the heading of "Process Issues" in pages that follow.

Public Comment was not Solicited

A criticism we received was that we did not ask the public for their comment before making the Decision. While there is no public comment opportunity required in the 251 Special Use Screening process, we did receive, and we have considered, numerous "public comments", both before the Decision, and after. Considering these comments is consistent with determining public interest, one of the second level screening criteria at 36 CFR 251.54(e)(5).

CBMR was repeatedly urged by the Forest Service to meet with and work with all segments of the community, including those who opposed development plans. They did not.

CBMR did in fact hold several public meetings at our request. Forest Service representatives attended several of these meetings to listen to the public discussion.

The response that was provoked by issuance of the Decision, as CBMR argues on pages 22 to 23 of their appeal, was substantial. We received letters and emails from nearly every party that could possibly have an interest in this issue. We have heard from political entities, organizations for or against,

residents and visitors, retired and out of the area participants in the Snodgrass issue over the years. It would be difficult to design a more thorough solicitation for public comment and opinion. Results, in terms of the public response, are summarized in the Syntheses documents at Forest Service Exhibits 9 and 11. All letters and emails that were received prior to the Decision are included in Forest Service Exhibit 34; all letters and emails received after the Decision are included in Forest Service Exhibit 35. It is not possible to consider these two exhibits and claim that the public did not have an opportunity to comment, or were not heard. (Note: Selected letters of particular interest, both critical of, and in support of the Decision, are Forest Service Exhibits 10 and 12.)

Public response served to reinforce positions taken in the Decision. The community is clearly divided; environmental issues are real, and even understated in the Forest Supervisor's Decision letter; the accumulation of negative concerns is even greater than we understood at the time we issued Decision.

We are aware that CBMR had good cause to hope to proceed. Dialogue between CBMR and the Forest Service in the "Pre-NEPA phase", up until the submittal and actual review of their proposal did convey a clear impression that the Forest Service was intending to proceed into NEPA. It was our review of the proposal in specific, and the special use screening that was triggered, that lead us to the reconsideration of our position, in light of the analysis and rationale referred to above. As we point out in the more detailed discussion of process and history below, CBMR was apprised repeatedly, and consistently, in writing, of the reservations we had about Snodgrass, and the reservation of ultimate judgment we were holding. The Forest Service has been very clear with CBMR that development of lift served skiing on Snodgrass Mountain is fraught with concerns and resource issues and that the decision to move into the NEPA process would only be made after a review of the MDP and specific Snodgrass proposal.

At this point we believe we have done our best to meet the public trust.

IS THE DECISION APPEALABLE?

Appellants, at pages 24 through 28 of their appeal, argue that the Decision is appealable under provisions of 36 CFR 251 Subpart C.

Record References: The Decision, Forest Service Exhibit 1, page 5;
Appeal Correspondence, December 16, 2009 Letter to Appellants.

RESPONSE: The November 5, 2009 Decision (Appellant's Exhibit 1, or Forest Service Exhibit 1, page 5) states":

"Rejection of your proposal is not subject to administrative appeal. Forest Service Handbook 2709.11.12.4 states, "Denial of unsolicited proposals is not subject to administrative appeal under 36 CFR part 215 or part 251, subpart C, and does not constitute a proposed action pursuant to 36 CFR 251.54(e)(6) and the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4347)."

In a letter dated December 16, 2009, Forest Supervisor Charles Richmond said:

"Dear Mr. Mueller and Ms. Quinlan:

Last month we met to discuss my rejection, based on FSH.2209.11.12.4, of your Master Development Plan for Crested Butte Mountain Resort and your site-specific proposal for lift-served skiing development on Snodgrass Mountain. Since that time, the Forest Service has received numerous public comments—both in support of and opposed to the rejection.

Tim, I know you strongly believe that the Agency should provide a higher level review of my public interest determination. Some of the public comments we have received have advocated the same. While I firmly believe in the rationale used to make the public interest determination I would also welcome a review. I have asked the Regional Forester to provide an opportunity for you to appeal my public interest determination under 36 CFR 251.86 (b). He has agreed to my request.

As this letter supplements my November 5, 2009 determination, you now have the opportunity to file an appeal. Your appeal must be postmarked within 45 calendar days of the date of this letter and sent to: USDA Forest Service, Rocky Mountain Region, Attn: Appeals Officer, 740 Simms Street, Golden, CO. 80401-4720. Your appeal request must meet the appeal content requirements of 36 CFR 251.90."

Hence, we offer no response to arguments about whether the Decision is/was subject to appeal.

PROCESS ISSUES: 251 FOREST SERVICE COMMITMENT/OBLIGATION, MOU, SCREENING, NEPA

Fundamental to this appeal is the simple question that follows:

Does CBMR have any right, by virtue of any previous commitment by the Forest Service, previous representations by the Forest Service, investments to date by CBMR in the “Pre-NEPA” process, or just simply legal requirement, to enter the NEPA process with their proposal for Snodgrass as the proposed action?

CBMR argues in the affirmative throughout its appeal. CBMR argues that by commitments made in a 2005 Memorandum of Understanding (MOU), the Forest Service is obligated to proceed into NEPA (Appeal Issues about MOU: 4B, 29A, 31A, 31B, 32B, 33A); that had we followed requirements of “Screening Regulations” at 36 CFR 251.54, we would be obligated to go into NEPA (Appeal Issues about screening: 7C, 8A, 29C, 31A, 31B, 31C, 32A, 32C, 32D, 33A, 33B, 33C, 34A); and that NEPA itself requires use of prescribed (NEPA) processes to make a decision such as was made in the November 5, 2009 Decision. Appeal issues about requirements of NEPA and apparent intent of Forest Service to enter NEPA: 4C, 6A, 6B, 6C, 6D, 7A, 7B, 7C, 8A, 8B, 20B, 21A, 21B, 22B, 22C, 29B, 29C, 29D, 29E, 33D, 33E, 43A, 45C, 46A, 57B, 58A, 58B, 59A, 59B, 61A, 61B, 61C, 62A, 64A, 65B, 65C, 66A, 66C, 67A, 68A, 69A, 69B, 69C. Appeal issues about unfair treatment of CBMR in comparison with other ski areas: 36A, 36B.

RESPONSE: NEPA is not warranted in this instance.

Our rationale, in addition to the position taken in the November 5, 2009 Decision letter (Forest Service Exhibit 1), and addressed in part in the November 4, 2009 Staff Paper (Forest Service Exhibit 2), is further addressed below.

Does CBMR hold a right or entitlement?

Record References: Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 26-29;
Sequence of Correspondence 1995 to 2009, Wherein CBMR is Apprised of
Forest Service Reservations/Concerns about the Development of
Snodgrass Mountain, Forest Service Exhibit 3.
CBMR Special Use Permit, Forest Service Exhibit 32.

RESPONSE: Use of National Forest System lands for the purposes of private development is a privilege, not a right. The Forest Service is granted by Congress the authority and responsibility to make decisions, such as the November 5, 2009 Decision, to manage lands in our trust for the benefit and interest of the entire American public. We are careful not to, we may not, delegate away these authorities. No proponent for the private use of National Forest System lands may force its use onto public lands. No applicant, whether it be a holder of a special use permit or not, may compel the Forest Service to accept a proposal, and to make that proposal a proposed action for consideration under NEPA, or to authorize occupancy and use of National Forest System lands against the will of the agency.

The Forest Service has the authority to say no to a proposed use of National Forest System lands, even absent the requirements of 36 CFR 251. The permit held by CBMR expressly reserves the authority to grant permission for any improvements. From Forest Service Exhibit 32, page 2 of the Permit under “A. Permission”:

“A. Permission. Nothing in this permit shall be construed to imply permission to build or maintain any improvement not specifically named in the Master Development Plan and approved in the annual operating plan, or further authorized in writing by the authorized officer.”

No formal written commitment has been made to CBMR to enter NEPA. On the contrary, the record of correspondence between CBMR and Forest Service is replete with warnings to CBMR of the reservations held by the Forest Service. The Forest Service, up until the delivery of the Decision of November 5, 2009, expressly reserved ultimate decision authority, and its judgment, as to whether a proposal for the development of Snodgrass Mountain would be accepted. This is substantially evidenced at Forest Service Exhibit 3, “Sequence of Correspondence 1995 to 2009, Wherein CBMR is Apprised of Forest Service Reservations/Concerns about the Development of Snodgrass Mountain.”

As relates to comparison with other ski area decisions, (Issues 36 A, 36B) we applied the regulations at 36 CFR 251.54 considering the specific proposal and the site-specific circumstances of Snodgrass Mountain and the greater Crested Butte community. Every ski area, ski area community, and proposal is different, and each proposal must be evaluated on its own merits.

The Snodgrass Mountain proposal and the community of Crested Butte are unique. Snodgrass Mountain's unique characteristics follow.

First, few ski areas have a long history of questionable development. For over 30 years there have been challenges and questions raised regarding the development potential of Snodgrass Mountain for downhill skiing. (See Timeline of Major Events Related to Snodgrass Mountain, in Forest Service Exhibit 4.)

The challenges and questions arise in part because of the geographic separation of Snodgrass Mountain from Crested Butte Mountain where skiing occurs today. Such separation calls into question the availability and ease of public access.

Challenges and questions also arise because of the inherent limitations of Snodgrass Mountain itself. Such limitations include the geology, slope and terrain, avalanche potential, likely boundary management challenges due to proximity to existing and planned communities, roadless designation, lynx habitat and potential conflicts with existing recreational use – all considered and addressed in the November 5, 2009 Decision.

Also of concern is the potential for adverse impacts to the Rocky Mountain Biological Laboratory (RMBL), at Gothic, not far from Snodgrass Mountain. This concern has been raised not only by RMBL but also by the community.

There are no proposals for the ski area expansions that do not present environmental issues. We never said, however, that we would not proceed into NEPA until all controversial issues were resolved. The threshold established by the Forest Supervisor was identified early and has been communicated clearly and consistently: resolution of geologic concerns and development of community support. However, as is documented in the decision itself and work leading to and supporting the Decision, the accumulation of these challenges and questions and environmental and social factors led the Forest Supervisor to his finding.

While we cannot comment specifically on the ski area expansions identified by the appellant, we note that as many as four of the examples cited in the table on page 37 of the appeal were initiated prior to the promulgation of regulations at 36 CFR 251, wherein the screening processes became required.

In addition, we are aware of several ski area expansions that were denied prior to initiation of NEPA. Adams Rib, on the White River National Forest, was approved as a ski area in 1982 and a

ski area permit was issued in 1983. Upon review, subsequent to an MDP submitted in 1993, numerous issues were raised regarding need, community impacts, wetlands, and “skiability” of the proposal. The permit was terminated in 1998 at the holder’s request based on community input and a Forest Service Skiability Analysis.

Lolo Peak, on the Bitterroot National Forest, was allocated by the Forest Plan for downhill skiing yet upon further consideration, a Forest Service Needs Assessment indicated lack of demand for the proposal and the proposal failed to pass the second level screening at 36 CFR 251.54.

More recently, Winter Park Ski Resort, on the Arapaho National Forest, proposed to expand into the Zero Creek Basin. During the two-year pre-NEPA process, Zero Creek was removed from the ski area’s proposal because the Forest Service would not accept it with Zero Creek for various reasons.

Numerous recreation special-use proposals are denied by the agency as a result of screening. These include proposals made by owners of lodges, organization camps, marinas and other permitted uses that involve substantial capital investment of infrastructure on National Forests System lands.

Did the Forest Service Commit, in a 2005 MOU, to do NEPA?

Assertions are made at Issues 4B 15A,15D, 29A, 31A, 31B, 32B, 33A in the appeal about “commitments made in the MOU of 2005”, asserting that the proposal was “screened” at that time.

Record References: Memorandum of Understanding between the USDA Forest Service.....
and Crested Butte, LLC, dated 5/27/05 (see Appellant’s Exhibit 11,
or Forest Service Exhibit 5);
October 13, 2006 letter to CBMR, Forest Service Exhibit 3.

RESPONSE: In point of fact, no commitment could have been made at that time, and no screening could be done at that time as it was not until June 18, 2009 that a formal and (according to CBMR) detailed proposal was submitted. The agency cannot/could not ‘screen’, or act on, a proposal that had not even been submitted. A review of correspondence at Forest Service Exhibit 3, and the MOU itself at Forest Service Exhibit 5, reveals that a “proposal” for Forest consideration was pending and yet to be submitted during the entire “Pre-NEPA” process. Presentations and/or discussions about “Snodgrass Light “ proposals, such as Forest

Service Exhibit 15, were informal discussions, and proposals continued to evolve. There was no formal proposal before the agency until June of 2009.

As a matter of practice, the Forest Service has been encouraging agency project managers to conduct “front-end loading” of ski area project-level proposals. The objective of front-end loading, also referred to as “front loading” and “pre-NEPA,” is to smooth the way for projects once NEPA is initiated (see Exhibit 28 for agency power point presentations on Master Development Planning, dated 2007, but presented to CBMR in 2008).

Early discussions with the public on project concepts help to develop the proposal such that, when accepted by the agency, it is more likely to address issues, mitigate environmental impacts, and address off-site impacts (those of most concern regarding ski area expansions). This practice is also used in large-scale vegetation management proposals (e.g., forest restoration), developing Forest Plans, and other complex projects.

One issue for the agency in conducting front-end loading is whether there are sufficient resources (i.e., personnel) to guide, participate in, and review the process and process outcomes. If the Forest does not have the resources available at the time the proponent wishes to initiate front-end loading, the Forest typically provides two options to the ski area: (1) wait until subsequent fiscal years when the Forest's resources would be budgeted and available, or (2) the ski company provide additional funding to the Forest such that it can still meet its current commitments.

Should the proponent choose the second option, the Forest will develop a Memorandum of Understanding (MOU) to define the purpose for agreement, the mutual interests and benefits, the points of agreement, and the roles and responsibilities of involved parties. Once the MOU is executed, a collection agreement (CA) is developed that identifies the funds necessary to meet the agreements in the MOU.

CBMR willingly entered into a Memorandum of Understanding and Collection Agreement for this purpose. The plain language of the MOU is clear that “... *The role of the Proponent is the same as it would be if the process were being entirely performed by Forest Service personnel, with no Proponent financing.*” (Page 9 of the 2005 MOU, Section F.3 of Forest Service Exhibit 5) Investment of financing in this manner by CBMR does not purchase any right, entitlement, or specific decision.

CBMR argues: “The Forest Service notified CBMR in 2005 that it would prepare an environmental impact statement (“EIS”) under NEPA to decide whether to authorize a MDP amendment proposal for Snodgrass Mountain” (Their Issue 4B.)

This is not a true statement. The reference in this argument is to the Memorandum of Understanding between the USDA Forest Service..... and Crested Butte, LLC, dated 5/27/05 (see Forest Service Exhibit 5).

The ARO is referred to the language of the first page of this MOU. From the MOU, second paragraph of Section B:

“The Forest Service is required to accept and approve a Master Development Plan before any development can proceed, and as part of this project approval process, the Forest Service must comply with the National Environmental Policy Act of 1969 (NEPA), the National Forest Management Act of 1976, the Forest Service special-use permit regulations in 36 CFR 251, and other applicable statutes, regulations, Executive Orders, and the Forest Service Manual and Handbook direction (collectively, the applicable legal requirements).”

This provision of the MOU clearly reserves to the Forest Service its authority to subject any MDP and project proposal to the very review process that was applied in coming to the November 5, 2009 Decision. See in this Responsive Statement, just below our description of the screening and decision process that was applied. It would be incongruous with these authorities, and an abrogation of the Forest Supervisor’s responsibility under them, to commit at this point to the acceptance of an MDP and/or project proposal which had not even been submitted yet... in fact not even fully developed. Reference to the use of the NEPA process in the MOU describes a process in event that, but does not assure that, the MDP, and the project proposal would be accepted by the Forest Service and advanced to that stage.

We note that, in our October 13, 2006 letter to CBMR, more than a year AFTER this MOU was signed, the Forest Supervisor informed CBMR:

“I and my staff will review any proposal that is developed in light of the findings and information in this report. The Forest Service will determine at that time whether to accept the proposal as a Federal proposed action” see Forest Service Exhibit 3, page for full context of this letter.

This single piece of correspondence, and the absence of any reaction to it from CBMR, defeats the CBMR's argument that the 2005 MOU constituted a "screening and acceptance" of any proposal for Snodgrass. If there was no proposal in 2006 then there could not have been one in 2005 for which to screen.

The Forest Supervisor, in a letter dated June 5, 2008 (seen at Forest Service Exhibit 3), stated that he would allow CBMR to submit their MDP and Snodgrass proposal at the same time. He also stated that "I have not come to a clear determination ... but I will at the time I decide whether to proceed into NEPA with your proposal." Again, if there was no proposal in 2008 then there could not have been one in 2005 for which to screen.

The Forest Supervisor, in a letter to CBMR dated January 29, 2009 (seen at Forest Service Exhibit 3), stated that he was "... providing guidance to you in this letter that may be of assistance as you develop your proposal for development of [Snodgrass] mountain for downhill skiing." He closed the letter saying, "If your proposal is accepted as an application and we proceed into NEPA"

The record is clear that no proposal had been submitted until June 18, 2009 (see also at Forest Service Exhibit 3) and, therefore, the MOU (a document executed four years previously) could not have screened a proposal.

The MDP, and the Snodgrass proposal, once formally submitted, were reviewed under the authorities cited above, and were not accepted; hence the provisions of the MOU related to NEPA are moot.

We note that, in accordance with two provisions of the MOU, the Forest Supervisor, at his discretion, may terminate the agreement, not subject to any obligation to proceed with NEPA, and that the Forest Service is not committed by the terms of this agreement to undertake NEPA but, rather, has only agreed to follow the process laid out in the MOU if the MDP and project proposal were to be accepted.

These two provisions are:

1. Section F.9., page 10, "*Either party, in writing, may terminate the MOU in whole, or in part, at any time before the date of expiration,*" and the conditions in event of termination are listed, none of which provide any guarantee of NEPA.

2. Section F.14., page 10, “... expires no later than December 31, 2009 at which time it is subject to review and renewal, or expiration.”

We note that the MOU has now expired.

While there was an appearance of intent to proceed through all phases of the analysis reflected in this MOU, this did not constitute a commitment, or an obligation on the part of the Forest Service, to proceed with NEPA on a project proposal that we had not even seen as yet. Instead, it laid out a process to be followed presuming each step lead to the next. We address in more detail, immediately below, this general appearance of intent on the part of the Forest Service to proceed into NEPA, and the reversal the November Decision represents.

Did the Forest Service Otherwise Commit to Proceed?

Questions are also raised in the appeal about the appearance, on the part of the Forest Service, of a willingness to accept a proposal and to initiate NEPA. Appeal Issues: 4B, 8A, 8B, 16B, 20A, 20B, 21A, 21B, 29A, 32D, 33A, 35A, 39B.

Record References: The Decision, Forest Service Exhibit 1;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2;
October 13, 2006 letter to CBMR, Forest Service Exhibit 3;
January 29, 2009 letter to CBMR, Forest Service Exhibit 3.

RESPONSE: The Forest Service has a goal to assist proponents, especially existing permittees, to develop successful proposals. That willingness and desire to assist does not transmit to decisions to accept proposals.

The Forest Service did give indications to CBMR that, pending resolution of certain issues, a NEPA process would be initiated. These indications took the form of informal discussions on monthly phone calls, email correspondence, the discussions about establishing a Forest Service project manager position, offering a coordinated MDP and Proposal review, the October 6, 2009 letter cited in CBMR's Issue 16A, the January 29, 2009 letter to CBMR, and other informal communications.

In particular, CBMR argues that in the January 29, 2009 letter a commitment was made in the language:

“While I would prefer broader support for what you have presented to the community, I do not find cause at this point to deny a proposal, presuming little changes by the time you submit it.” See Forest Service Exhibit 3, for full context of this letter.

Rationale for our assessment of this very statement, and for our reversal, is laid out in the Decision itself (Forest Service Exhibit 1), in the Staff Paper at Forest Service Exhibit 2, and in this Responsive Statement. For specific discussion of our response to this particular citation of the January 29, 2009 letter, see the Decision page 2, under Community Support, and pages 20-22 of the Staff paper at Forest Exhibit 2. Changes did occur.

We argue that it was our focused consideration of a formal proposal, in light of these changes, and in view of all other factors, which lead to the Decision. At the time the formal proposal was submitted we were required, by regulation at 36 CFR 251.54, and by common prudence, to freshly consider all factors. Our deliberations are documented in the Decision letter and in the Staff Paper leading to the Decision letter. The result was that all previous discussions were fully reconsidered. It was clearly within our authority to do so; it was clearly our responsibility.

Was the “Pre NEPA” Process legal?

Appeal Issues: 4C, 6C, 6D, 7C, 7D, 8A, 29A, 33B, 57B.

Record References: 1900—1 Planning Triangle” for illustration Forest Service Exhibit 7
Selected Correspondence Between Forest Service and Crested Butte Mountain
Resort, Forest Service Exhibit 3.

RESPONSE: Up until the point of submittal of a specific proposal, CBMR and the Forest Service were engaged in what is referred to as the “Pre-NEPA process.” Pre-NEPA is not intended to substitute for or serve as “screening” under the 36 CFR 251 regulations. Rather, it is a process by which proponents may work with the Forest Service to develop acceptable proposals, which are then subjected to “screening.” We do not agree that the MOU constituted, or documented the screening process.

As a matter of practice and partnership with permittees such as CBMR, the Forest Services makes every effort to be facilitative in the development of legitimate proposals for use of National Forest System lands, so that most issues are resolved by the proponent before a proposal is submitted to the agency. We have learned through experience that carefully developed proposals, with built in mitigations of anticipated effects, and well thought out

designs lead to proposals more likely to be accepted by the Forest Service under special use screens at 36 CFR 251.54, and more likely to be efficiently considered under NEPA. The concept of “Pre-NEPA” is taught as part of Forest Service training. (See “1900—1 Planning Triangle” for illustration, Forest Service Exhibit 7.)

This Pre-NEPA dialogue is not a form of entitlement, or of implicit acceptance of Snodgrass as having “passed” all 251.54 screens. Review of the formal June 18, 2009 submittal is the basis for the application of these screening criteria, and for the November 5, 2009 Decision.

In the case of CBMR's proposals for the development of Snodgrass Mountain, there is a long history of dialogue between CBMR and the Forest Service. We refer the reader, once again to the “Sequence of Correspondence 1995 to 2009, Wherein CBMR is Apprised of Forest Service Reservations/Concerns about the Development of Snodgrass Mountain.” (Forest Service Exhibit 3).

We find it telling that even CBMR executives acknowledged the validity of the “Pre NEPA” process. John Norton, then representing CBMR as CEO stated January 13, 2005, in the Gunnison Country Times:

“The Forest Service has a new way of doing things...they've become unwilling to study bad plans from ski areas ... the USFS' [previous] willingness to accept bad plans for study led to disruption in the life of a local community, years of wasted work and wasted resources, and a shaken partnership with the ski area...So the USFS said, 'enough.' We will accept no more plans into the public process that are Dead On Arrival. We will not waste time and resources on bad plans.”

Nothing in law, regulation, or policy prevented the Forest Service from working in cooperation with CBMR in the attempt to develop acceptable proposals, before subjecting them to the formal 36 CFR 251.54 review and screening.

There is no violation of law, regulation, or policy in terms of the application of required process for the consideration of the proposed use of Snodgrass Mountain. The Forest Service was cooperative with CBMR in the “Pre-NEPA” phase, advising and assisting in the development of an acceptable proposal. CBMR informally requested multiple extensions of time to submit any proposal pending further studies to respond to concerns clearly and consistently expressed by the Forest Service. Concern about the length of Pre-NEPA was anticipated and addressed in the November 4, 2009 Staff Paper (Forest Service Exhibit 2, pages 26-29).

Consistently throughout the “Pre NEPA” process with CBMR the Forest Service expressed reservations and concerns about the development of Snodgrass , and CBMR requested to be allowed to continue to resolve these issues, at its own expense, rather than to have us say no. Each extension of time and commitment of expense was at the behest of CBMR, in order to perpetuate the possibility of development. At each point, the Forest Service expressly reserved the authority to, and even made clear the possibility it would, say no. The Forest Service did not postpone the NEPA process; rather, it repeatedly deferred its decision to accommodate CBMR. See record created by “Sequence of Correspondence 1995 to 2009 Wherein CBMR is Apprised of Forest Service Reservations/Concerns about the Development of Snodgrass Mountain” (Forest Service Exhibit 3).

Using geologic studies as example, from “Rationale by staff supporting decision to remove portions of Snodgrass from consideration 12/18/2008” (Forest Service Exhibit 19):

“With each successive study, we have deferred making a final decision at the request of CBMR, pending more detailed and careful study. Each successive study has, in more detail, and with more real data, confirmed, rather than refuted, the fundamental concerns of risk of failure

The pre-NEPA phase took longer than expected for several reasons. First, the geologic hazard analysis turned out to be more complex than expected. The Forest Service geologist, Michael Burke, after working on it for about 21 months, unexpectedly retired. Burke volunteered to complete his report while retired. After allowing him eight additional months, the Forest contracted with an engineering consulting firm to help him complete the report, which took about four months. At that time the Forest had a geologic hazard report that was sufficient for its needs.

CBMR requested to have their consulting geologist, Jim McCalpin, who they had retained for 18 months by that point, to complete their own geology report. The Forest agreed. McCalpin took an additional seven months to complete his report.

With two geology reports in hand, the Forest determined it needed an unbiased third party to review both. The Forest opted to have U.S. Geological Survey (USGS) geologist and well know expert on geologic hazard, Rex Baum review them. This review took an additional eight months.

CBMR's desire to have their geologic hazard study, then, extended the pre-NEPA time frame by 15 months and probably contributed significantly to CBMR's financial outlay during this period.

It took CBMR an additional five months to submit their Snodgrass Mountain proposal from the time the Forest Supervisor provided his December 18, 2008 guidance as a result of the geologic hazard studies. So while there is no argument the pre-NEPA process took longer than anyone planned or expected, CBMR's contribution to that was at least 20 months.

Were Special Use Screens Appropriately Applied?

Appeal Issues: 5A,7C, 8A, 29C, 31A, 31B, 31C, 32A, 32B 32C, 33A, 32D, 33B, 33C, 33D, 33E, 34A

Record References: Preliminary Review Comment on MDP and Proposal at Forest Service Exhibit 6
The Decision, Forest Service Exhibit 1;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2;
Preliminary Review Comments on MDP and Proposal at Forest Service Exhibit 6
Forest Service Planning Triangle, Forest Service Exhibit 7,
Status of Forest Service Review of Crested Butte Submittals..... July 17, 2009,
Forest Service Exhibit 14.

RESPONSE: Upon receipt of the Snodgrass Proposal and MDP, our first action was to begin to review both documents in substance.

See in particular Forest Service Exhibit 14, entitled "Status of Forest Service Review of Crested Butte Submittals..... July 17, 2009 " This was prepared by Forest Staff to guide the review process in context of established law regulation and policy. It established the parameters of the review, citing appropriate authorities and process to be followed. It should be pointed out that on the last page of this paper, staff does indicate our inclination to proceed into NEPA. This represented the staff (vs. line officer) thinking at that time, as reflected at various other places in the record. However, that was before our formal review of submittals had been conducted. The formal position of the Forest Supervisor was reflected in his Decision following our review of submittals.

The formal submittals of May and June 2009 were sufficiently detailed for us to consider the broader question of whether such development would be in the public interest; in other words whether permanent dedication of these National Forest System lands to this use, as we now understood the proposed use, as we now understood the inherent limitations of the lands and resources themselves, and as we understood the predictable social and environmental impacts, was the right thing to do. Very quickly our attention turned to the evaluation of these questions.

At that point the Forest Supervisor commissioned his staff to review the very extensive record of past environmental studies, public communications, and current level of community support, and to document for the decision maker's consideration a discussion of each key concern. That effort produced a Staff Paper (Forest Service Exhibit 2) that was considered by the Forest Supervisor.

The November 5, 2009 Decision letter itself is the Forest Supervisor's documentation of the step by step application of required processes.

It was our conclusion that an extended NEPA process would not provide a basis for any better, or different, decision. As appellants point out at Issue 32C, the purpose of a decision at this point is to prevent any further investment in a NEPA process that is not needed.

Appellants specifically argue at Issue 35A "The Proposal is in the Public Interest."

We disagree. The Forest Supervisor's public interest determination was made based on the social, economic and environmental issues addressed in the November 5, 2009 Decision. Since the Decision, response from the public has served to reinforce, and support this determination.

The support indicated by the appellant to "move forward" has been to move into the NEPA process, which does not indicate, to the Forest Supervisor, support for the proposal.

The assertion of the critical need for the expansion to CBMR and the area's economy is addressed under "Need for Snodgrass Expansion" below.

Does the Pre-application Process to Constitute a "Proposal" for a Major Federal Action under 40 C.F.R. § 1508.23, thus Triggering a Requirement to Prepare an Environmental Impact Statement (EIS)? Was NEPA Required?

Appeal Issues: 6B, 7C, 61A, 61B, 61C, 62A, 63A, 63B, 64A, 65A, 66A

Record References: The Decision, Forest Service Exhibit 1, page 1, para 3;
63 Fed.Reg. 65950, 65953 -65954 (Nov 30, 1998), Forest Service Exhibit 27;
Forest Service Special Use Regulations, Forest Service Exhibit 23;
Forest Service 1900-1 Planning process, Forest Service Exhibit 7;
Letters of Particular Interest in Support of Decision, Forest Service Exhibit 12.

RESPONSE: The appellants have not provided and cannot provide any legal authority supporting his assertion that the Forest Service's pre-application process is sufficient to trigger a "proposal"

for a major federal action under the National Environmental Policy Act (NEPA). Indeed, the preamble to the final rule adopting 36 C.F.R. § 251.54 suggests the opposite. 63 Fed.Reg. 65950, 65953 -65954 (November 30, 1998). See, Bradshaw v. USDA, et al. at page 8, CV-0916-PCT-PGR (District of Arizona, 2006).

Note: Appellants, at Issue 7C , refer to 63 Fed.Reg. 65950, 65953 -65954 (November 30, 1998), but did not include any exhibit containing this. We have included it as Forest Service Exhibit 27.

The requirement, or “right”, to NEPA received a great deal of coverage in the press and discussion locally. CBMR consistently has misrepresented what we believe to be requirements of law, regulation, and policy in this regard. We were struck by the resonance of two letters from the public in particular. The ARO is referred to letters by Owen and Parenteau (email from Andy Stahl) in Forest Service Exhibit 12. CBMR's op ed reply to the Owen letter is attached there also.

A proposal “exists at that stage in the development of an action where an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.” 40 C.F.R. § 1508.23. While the appellants suggest⁴re that the Forest Service has a goal of providing for skiing on Snodgrass Mountain, the Forest Service's actions are in direct conflict with that proposition. Looking to the language of 40 C.F.R. § 1508.23, had skiing on Snodgrass Mountain been a “goal,” the Forest Service's only decisional options would have been in choosing between the most appropriate ways to achieve that goal. In other words, the Forest Service would be deciding the extent and location of skiing on Snodgrass Mountain. Contrary to this notion, the Forest Service rejected CMBR's master development plan and proposal, clearly undermining the argument that skiing was in fact a goal. Without such a goal the Forest Service's actions do not amount to a proposal under 40 C.F.R. § 1508.23. Until there has been a proposal and until there has been a report or recommendation on that proposal there is no requirement for an EIS. Save Barton Creek Association v. Federal Highway Administration, 950 F.2d 1129, 1136 (5th Cir. 1992). Further, early coordination and planning activities, including early compliance with eligibility requirements such as pre-application information gathering, are not *per se* indicative of a proposal for a major federal action. Id. 1136 - 7.

NEPA is not triggered by the submittal of a proposal by a proponent, or a holder of a Special Use Permit. NEPA is not the process established either by law, regulation or policy to determine

whether a proposal should be accepted by the agency and considered further. A reading of the plain language of 36 CFR 251.54 makes this clear. (See Forest Service Exhibit 23 copy of Special Use Regulations.) Fundamental to this process is the early exercise of judgment as to which proposals presented to the agency deserve further consideration. The regulations expressly authorize the agency to deny proposals which do not pass initial and second level screening criteria.

In addition, the Forest Service's Special Use Regulations explicitly state that an environmental analysis under NEPA is not required until a special use proposal has met two levels of screening criteria. 36 C.F.R. § 251.54(e)(6), (g)(1), (g)(2). It further states that until those two levels of screening have been met, a special use application does not constitute a proposal under 40 C.F.R. 1508.23. Id. at § 251.54(e)(6).

Lastly, as the appellant states in his appeal, actions that maintain the status quo do not trigger NEPA. Alliance for Bio Integrity v. Shalala, 116 F.Supp. 2d 166, 177 (D.C. Cir. 2000); Utah v. Babbitt, 137 F.3d 1193, 1214 (10th Cir. 1998); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1114 (9th Cir. 2002) (NEPA “does not apply to federal actions that maintain the environmental status quo.”). The Forest Service's rejection of CMBR's master development plan proposal clearly preserved the status quo.

SIDE NOTE: Even if a proposal were to be accepted by the agency, and NEPA initiated, there is nothing in law regulation or policy that compels the agency to complete the NEPA process, should it find good cause to cancel its consideration of the project. See procedures at Forest Service Handbook 1909.15 Chapter 21.3 Withdrawal of a Notice of Intent. Completion of the NEPA process is required only when an action will be taken. NEPA is not intended as a decision mechanism for determining whether or not to proceed with a questionable action. NEPA is expressly not required until a proposal is accepted, as argued immediately below.

Having come to the conclusion that the proposal did not pass the special use screens, provisions at 36 CFR 251.54(e)(5)(II), specifically that “the proposed use would not be in the public interest”, the provisions at 36 CFR 251.54(e)(6) are triggered:

“36 CFR 251.54(e)(6) NEPA compliance for second-level screening process. A request for a special use authorization that does not meet the criteria established in paragraphs (e)(5)(i) through (e)(5)(v) of this section does not constitute an agency proposal as defined in 40 CFR 1508.23 and, therefore, does not require environmental analysis and documentation.”

This view is further confirmed in Forest Service NEPA regulations promulgated July 24, 2008:

“36 CFR 220.4(i) Applicants. The responsible official shall make policies or staff available to advise potential applicants of studies or other information foreseeably required for acceptance of their application. Upon acceptance of an application as provided by 36 CFR 251.54(g) the responsible official shall initiate the NEPA process.”

Allocation of Snodgrass Mountain in the Forest Plan, inclusion in the Permit, and even earlier approvals (1982), do not represent a goal towards which the agency is moving. Only if the Forest Service had accepted the proposal as an agency proposed action would this be the case. The very decision being appealed is the decision point for determining whether this proposal, with its need, was the goal of the agency.

Further, inclusion of Snodgrass Mountain in CBMR's permit and in the Forest Plan does not guarantee that any proposal put forth by them would be evaluated in NEPA.

Also, if, at the time of issuance of the new permit in 2004, and 2008, the Forest Service had taken Snodgrass out of the permit, it would have been an appealable decision, and would have been premature in the context of the “Pre-NEPA” dialogue that was going on with CBMR. At each point where we might have said no, and taken Snodgrass out of the permit, or removed it from consideration, CBMR has, as it is now, pleaded with us to allow it to continue to be considered.

Forest plans are permissive in what they allow, not directive for what must be implemented. Courts have long upheld the staged decision-making of forest plans and projects. In *Swan View Coalition v. Turner* the court noted the nature of forest plans: the GMUG Forest Plan is a broad framework for the management of a National Forest which does not directly commit to development. Allowing for additional review at each subsequent stage of development recognizes both the managerial purpose of a forest plan to provide mechanisms for monitoring and regulating future development as well as its inherent limitations in predicting what development will actually occur. See Forest Service Exhibit 31, “Overview Of Forest Planning And Project Level Decision-Making, USDA Office of the General Counsel Natural Resources Division, June 2002”

Submittal by CBMR of a formal proposal June 18, 2009 (Forest Service Exhibit 00) triggered review under 36 CFR 251. The proposal failed. In accordance with the plain language at 36 CFR 36 CFR 251.54(e)(6), and our discussion above, no NEPA is required. Prior to this formal

submittal, all discussion with Forest Service (Pre-NEPA) was consistent with Forest Service practice of cooperative assistance to CBMR in attempting to come up with a well designed proposal, consistent with inherent suitability/constraints of the mountain, and in the public interest.

The Forest Service may employ any level of analysis to the consideration of special use screens it considers appropriate. The language of the regulation cited by appellant is intended to indicate what may ordinarily occur for the multitude of small proposals the agency sees, but in no way imposes a restriction on the Forest Service for the amount of information we consider as we determine whether a proposal warrants acceptance as an agency proposed action. It would be unreasonable to somehow restrict how much information we are allowed to consider as we decide whether a proposal is accepted as that of the agency. See, again, quote from 36 CFR 220.4(i) on the page above.

The basic suitability of an area for a given (proposed) use, as well as public interest needs, and environmental factors are considered in the Pre-NEPA, left side of the NEPA triangle (see Forest Service Exhibit 7), process. This is a concept established to ensure that only appropriate proposals receive the investment of limited time and resources of the Forest Service. For a primer on the application of 251 regulations see second half of Forest Service Exhibit 7, Power point for use of 251 regulations.

The decision maker, the Forest Supervisor in this case, has broad discretion, and has a serious responsibility, in the determination of public interest. This is plainly acknowledged in the Decision itself. (See Decision at Appellant's and Forest Service Exhibit 1, page 1, para 3.) The duly delegated authority, and the responsibility, for this decision resides with the Forest Supervisor.

NEED FOR SNODGRASS EXPANSION

Issue 4A. Appellants allege that "The Forest Service agrees that CBMR has a convincing need to expand onto Snodgrass Mountain." Issue 4F. "Decision is devastating because Snodgrass ... is critical to long term viability of CBMR." Issue 10A. Need for Additional Ski Terrain at CBMR. Issue 13A. The lack of sufficient terrain has led CBMR to experience a marked decline in destination skier visits since the mid-

1980s. Issue 15A. Forest Service Agreed With the Need For Snodgrass,..... Issue 16A. In October 2006, Forest Supervisor Charlie Richmond agreed that there is a need for the Snodgrass expansion.

Record References: Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 14-17;
Purpose and need studies/letter from FOSM, Goettge, Forest Service Exhibit 16;
Public comments at Forest Service Exhibits 9 through 12.

RESPONSE: For discussion of need for Snodgrass expansion, prepared in advance of the November 5, 2009 Decision, from the agency perspective, and considering more recent information about it, see November 4, 2009 Staff Paper (Forest Service Exhibit 2, pages 14-17).

The ARO is referred to the specific language of our letter (Dated October 13, 2006, Forest Service Exhibit 3) to CBMR.

“..You have presented to us a convincing argument supporting a need for more intermediate terrain at Crested Butte. I concur with that need and am willing to entertain a proposal for the development of the terrain on Snodgrass Mountain, subject to the constraints and limitations in the report, and those that preceded it.”

.....

I and my staff will review any proposal that is developed in light of the findings and information in the report. The Forest Service will determine at that time whether to accept the proposal as a Federal proposed action and to begin the environmental analysis process under the National Environmental Policy Act (NEPA).”

At the time of the October 13, 2006 letter, CBMR had made repeated presentations arguing for the need for more intermediate terrain to respond to that segment of the market. The Forest Service agreed that the ski company had a clear need to supplement that aspect of their product. Since that time, it has become clear through various analyses that Snodgrass does not offer the intermediate terrain presumed in the 2005 discussions.

There is some doubt by the Forest Service and the community about the need for Snodgrass considering the small amount of intermediate terrain it would offer. In particular the ARO is referred to the extensive work done by both Robert Goettge and James Sharpe and Friends of Snodgrass Mountain (Forest Service Exhibit 25). Both of these entities present strong arguments with regard to the opportunities presented by Snodgrass to provide intermediate terrain, and the true need for the proposal.

These studies document careful analyses, and present logical conclusions based on those analysis. They raise legitimate questions about how much intermediate skiing terrain is on Snodgrass Mountain. We note that even representations by CBMR at various times as to the amount of intermediate terrain to be found on Snodgrass has changed. See FOSM table in their December 24, 2009 email to us at Forest Service Exhibit 25. Goettge, at Forest Service Exhibit 25 also, concludes that as little as 47 acres of true intermediate terrain is to be found on Snodgrass. In the face of these reviews, we observe that the stated need in the actual Snodgrass Proposal and MDP has been considerably expanded, as shown below, from its representations in 2006. Quoting from the June 18, 2009 Snodgrass Mountain Proposal itself, under “Aspects of Goals and Objectives for Development of Snodgrass Mountain”:

“As discussed in Chapter 1 of the 2009 MDP, we have identified three substantial constraints with the existing ski area:

- 1. CBMR’s current developed terrain network lacks the variety of experiences and terrain diversity expected by regional and national visitors. This has dramatically affected annual visitation and the resort’s ability to attract discerning destination guests.*
- 2. CBMR lacks a sufficient amount of intermediate terrain.*
- 3. CBMR lacks a sufficient amount of “traditional,” developed Expert terrain (excluding Extreme Limits terrain, which is not always open and is not skied by all Expert level guests). “*

Numbers 1 and 3, from just above, are additions to representations of need which have evolved over time, and in the face, it would appear, of better understanding of limitations of Snodgrass Mountain’s inherent limitations to providing intermediate terrain. They go well beyond the “need” described and agreed to at the time of the October 13, 2006 letter.

Our letter of October 13, 2006 recorded an interim view, but did not represent a formal finding, or adoption of the CBMR’s stated need for Snodgrass expansion as that of the agency. It also appears that the true purposes for development of Snodgrass Mountain extend well beyond “intermediate terrain.”

If intermediate terrain is the limiting factor in why the ski area has consistently experienced a decline in skier visits, then the small amount of intermediate terrain offered by Snodgrass will

likely not provide the increased numbers they claim. In fact Friends of Snodgrass Mountain and others in the community have consistently argued that the development of Snodgrass Mountain is unlikely to produce the increased visits CBMR claims, based upon the history of other Colorado ski areas. See FOSM letters at Forest Service Exhibit 34. CBMR argues to the contrary.

In addition, it has been argued by many that there are a number of factors which could cause loss of market share. This includes investment in infrastructure, lift ticket prices (see Mark Reaman 2/24/10 Editorial, at Forest Service Exhibit 13), location in terms of air access, transportation, and even the fact that Crested Butte has a very cold winter climate.

Had CBMR implemented all projects already considered through NEPA and approved on the existing Mountain, visitation trends may not be as shown on page 12 of their appeal. See Chapter 5 of the submitted MDP for a "Summary of Previously approved/unimplemented Projects". Consideration of this list with the Upgrading Plan of Chapter 6 reveals that there are a number of significant projects involving the development of intermediate terrain which CBMR has chosen to defer in favor of developing Snodgrass Mountain. These include New Resurrection Spur Trail, East River Glading, West Side Aspen Glading, Smith Hill/Mineral Point, Horseshoe Springs Glading.

Finally, while we will not speculate as to whether Snodgrass is "critical to the long term viability of CBMR," the substantial outcry from the business community asserting the need for Snodgrass to heal an ailing local economy does not appear to rely on factual information. See Synthesis of Support for the Decision, at Forest Service Exhibit 11, and Letters of Particular Interest in Support of the Decision, at Forest Service Exhibit 12, for many of these arguments. In short, if the local economy is struggling with the existing mountain, expanding onto a fundamentally unsuitable mountain may not be the answer. If NEPA were undertaken at this time, it would be reasonable to expect the process leading to any authorization (if granted) would take three to five years, litigation would likely ensue, and actual construction of any authorized improvements would take several years after that. As others have said, Snodgrass may not be the solution to an ailing economy.

Investment in the product of the existing mountain may lead to more immediate return in terms of stated need.

GUNNISON COUNTY

Issue 42A. County of Gunnison. The Forest Supervisor found it relevant that “Gunnison County is unable to submit a letter of support or opposition.” Ex. 1 at 2. But Gunnison County explained the reason for its silence. The County sent a letter to the Forest Supervisor days before the Decision explaining that it must be neutral and cannot comment because it may be required to review Snodgrass under what they consider to be their authorities. Appellant's Exhibit 20.

Issue 56A. The Forest Service did not try to cooperate with Gunnison County.

Issue 56B. The Forest Service has made counties and local municipalities cooperating agencies for similar projects.

Issue 56C. The Forest Service's claim that coordination with Gunnison County may be difficult has no persuasive force because it did not even invite Gunnison County to participate.

Issue 57A. ... the Forest Supervisor's Decision allows the mere concern that the County will not cooperate to veto the proposal.

Record References: The Decision, Forest Service Exhibit 1, page 2;
 Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 25-26;
 Letter dated August 24, 2009 to Gunnison County Board of County
 Commissioners from Forest Supervisor regarding proposed Special
 Development Regulations, Forest Service Exhibit 30;
 Letter from Gunnison County Commissioners Swenson and Channell, October
 20, 2009, Appellant's Exhibit 20.

RESPONSE: The Forest Service routinely communicates with counties in the Pre-NEPA process to determine likely issues and/or to gauge the county commissioners' opinions and support for various projects within their County. Counties wishing to do so, in the appropriate circumstances, may have a role as cooperating agencies under NEPA. This kind of involvement occurs on proposed projects throughout the United States and is considered routine business. The GMUG Forest Supervisor met informally with individual Gunnison County Commissioners on several occasions since 2004. These discussions involved updates about the status of the Pre-NEPA process, community support, and timelines for the process. The County Commissioners made it clear during these discussions that the County could not and would not officially comment on any expansion proposal. The Supervisor informed the commissioners during all of these meetings about the difficult position that the County was putting the Forest Service in by

not alerting us to their desires or by pointing out any particular issues they had with the expansion. The Forest Service repeatedly coordinated and communicated with the County over a 4-5 year period.

In 2009 Gunnison County approved Special Development Project Regulations asserting procedural and substantive authorities over projects on National Forest System lands. The Forest Service believes that portions of the regulations, if implemented, could exceed the County's authorities to regulate activities and projects on Federal lands. See Forest Service Exhibit 30 for the Forest Supervisor's August 2009 letter to the County.

In October, 2009, the Forest Supervisor met with Paula Swenson (Commission Chairperson) to discuss the Snodgrass proposal. The Forest Supervisor relayed to Ms. Swenson that the Forest Service was close to making a decision on the Snodgrass proposal and asked if the Commissioners had an opinion on the project. Ms. Swenson stated that because of the County's Special Development Project Regulations that the Commissioners could not formally comment. This meeting prompted Gunnison County to issue a letter (Forest Service Exhibit 30) to the Forest Service stating this neutral position.

The Forest Service did coordinate throughout the Pre-NEPA process with the County as specified in the preceding paragraphs. We rightfully did not invite the County to be a cooperating agency because we never accepted the Snodgrass proposal. Asking the County to be a cooperating agency prior to accepting the Snodgrass proposal would have been inappropriate. The fact that we did not talk with the County about cooperating agency status is another indication that the NEPA process was uncertain. And for a county to be a cooperating agency, they would need to be willing to cooperate.

While CBMR disagrees with the County's neutral status being used as partial rationale for the Decision, it was entirely appropriate that we did so. From the Forest Service perspective, approving a proposal and beginning a lengthy, expensive, and contentious NEPA process without any prior input from the County, no indication of the County's support or opposition, and in the face of the County asserting rights to regulate National Forest System lands is another of the many factors that make this project not in the public's interest. The November 5, 2009 Decision was clear that this issue alone did not "veto" the Snodgrass proposal as the appellants allege, but when combined with the many other social and environmental problems, it reinforced that lift served ski development on Snodgrass was not in the public interest.

COMMUNITY SUPPORT

Community support Issues: Issues 4E, 5B, 5C, 16B, 18A, 19A, 20A, 20B, 22A, 22C, 38B, 39A, 39B, 39C, 41A, 58B, 69B, 69C, from the appeal.

Appellants argue that we misjudged the amount of community support that exists for: 1) going into NEPA, and 2) lift served skiing on Snodgrass Mountain, and that we should be compelled to go into NEPA on the basis of this show of support. Appellants disagree with findings regarding Community Support at page 2 of the November 5, 2009 Decision.

Record References: The Decision, Forest Service Exhibit 1, page 2;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 19-22;
January 29, 2009 Forest Service letter to CBMR, Forest Service Exhibit 3;
Syntheses of comments received since the Decision, Forest Service Exhibits 9
and 11;
Selected Editorials and news coverage from local Newspaper(s), and Ski
Magazine, Forest Service Exhibit 13;
Copies of web pages from SnodgrassFacts.com, and Friends of Snodgrass,
Forest Service Exhibit 29;
Club 20 letter of December 14, Forest Service Exhibit 10;
Opportunities for Public Input, Forest Service Exhibit 26;
Selected Letters of Particular Interest in Support of Decision, Forest
Service Exhibit 12.

RESPONSE: The November 5, 2009 Decision addresses the consideration of community support. See “Community Support” on page 2 of the Decision (Forest Service Exhibit 1, page 2). Consideration of public opinion was discussed in much more detail in the November 4, 2009 Staff Paper (Forest Service Exhibit 2, pages 19-22). In response to Issue 20A in particular see Decision page 2, para 6-7, Staff Paper at Exhibit 2, pages 19-22.

The Forest Service repeatedly and consistently advised CBMR that we would not proceed into NEPA without community support. This message was delivered by the Regional Forester, the Forest Supervisor, the Forest Staff, the District Ranger and his staff. CBMR concedes this even in the arguments of their appeal. See Decision page two where we acknowledge the difficulty in gauging public support.

While the Forest Service paid attention to the various viewpoints of individuals and groups (as noted throughout this section) we made it clear to CBMR numerous times in the past few years

that support for their proposal from the 3 local governments (Town of Crested Butte, Town of Mt. Crested Butte, and the Gunnison County Commissioners) would be used as the standard to assess overall public support. We made it clear that CBMR was responsible for developing support from these local government entities.

Forest Supervisor met with Tim Mueller on January 20, 2006. Talking points for that meeting, seen as part of Forest Service Exhibit 3, included the following:

Bob Storch, my predecessor, and Rick Cables, the Regional Forester, told John Norton and I told you both that we would need to ensure that there is community support for Snodgrass before moving forward and that the key measure for support is the County Commissioners and local towns.

At the time of the November 5, 2009 Decision, CBMR had not delivered this support and in fact Crested Butte was opposed to the proposal; the Town of Mt. Crested Butte was in favor of the proposal; and, Gunnison County took a neutral stance. We note that in response to the Decision, in letters from each of these three entities, Mt. Crested Butte favors consideration of Snodgrass and the development proposal itself; Crested Butte and the County are neutral.

Like the general population in the upper Gunnison Valley, the local municipalities were, and are, divided on their support for CBMRs proposal. It is difficult to imagine accepting a private development proposal, with the significant impacts on local communities, as a federal proposed action when the local governments affected do not support the proposal.

The appellants allege (Issue 18A) that asking them to provide community support in the Pre-NEPA process was inappropriate. The Forest Service disagrees. As stated in the November 5, 2009 Decision letter, ski area developments have the potential to change communities perhaps more than anything else the Forest Service authorizes. It is imperative that these proposals be supported by local governments, and have general agreement from local residents. Beginning a NEPA process with a divided and polarized community, in addition to the many environmental concerns with Snodgrass Mountain, was clearly not in the public interest.

While there is no formal requirement for solicitation of public comment, public opinion is most decidedly part of the whole "Public Interest" determination. The request to CBMR to solicit and obtain the support of these three entities, as representatives of their electorate, was appropriate in preparation for the Forest Supervisor's public interest determination, as part of the screening process.

In the appeal, CBMR argues there is "overwhelming support", both before the Decision, and as reflected in the reaction to the Decision. We find to the contrary. "Polls" conducted are

unscientific and not reliable. This is reasonably argued in letters to us. (See February 15, 2010 Goettge letter at Forest Service Exhibit 12.) The sharp reaction on both sides, provoked by the Decision, and the community discussion that ensued, revealed even deeper division than we understood. Yes, the amount of support for CBMR was surprising, however, the outpouring of thanks to us for the decision made, and even substantive support for that decision, was substantial.

Before the Decision, in response to urging from BOTH sides, the Forest Service received over 500 individual letters and emails, the Friends of Snodgrass Mountain petition, several hundred form cards, as well as phone calls and personal contacts, expressing people's views with regard to Snodgrass. See the section below entitled "Opportunity to Comment." These letters and emails represented a range of public opinion, and served as one source of our understanding of the level of public support. Views expressed are summarized at Forest Service Exhibit 8, Content Summary of Letters Received from 2007 to 2009 Expressing Opinion On /Offering Analysis of Proposals from Development of Snodgrass Mountain. This information was considered and referred to in the Decision itself (Forest Service Exhibit 1, page 2.) See ALL letters and email received prior to the Decision at Forest Service Exhibit 34.

Since the Decision we have received upwards of six hundred letters, emails, and phone messages. We have heard from political entities, organizations for or against, residents and visitors, retired and out of the area participants in the Snodgrass issue over the years. It would be difficult to design a more thorough solicitation for public comment and opinion. Forest Service Exhibits 9 and 11 are Syntheses of the content of these. Forest Service Exhibits 10 and 12 are letters or emails of particular interest, sampling of letters we received either in support of, or criticizing the Decision. See letters and emails received since the Decision at Forest Service Exhibits 35.

All objective reviewers observe, since the Decision, that the community is deeply, sharply, divided. Here are just some of the things that have come to our attention:

- Club 20 letter of December 14: "We are very aware of the disparate and controversial opinions regarding this proposal" Forest Service Exhibit 10.
- Board of County Commissioners December 18, 2009 letter to Cables and Richmond: "It is clear to us that the upper Gunnison valley community is quite passionate regarding

the proposal to expand lift-served skiing onto Snodgrass Mountain, that the community is divided in its opinions of the proposal.....” Forest Service Exhibit 10.

- In 12/8/2009 BOCC Meeting (notes taken by Cathy Mask), David Baumgarten, “There is very significant support and opposition. It’s very divisive.”
- Editorial and news coverage, replete with reference to the division in the community (See Forest Service Exhibit 13).
- Orchestrated campaigns of influence have been launched on both sides. Web sites from both sides urging supports of each side to weigh in. Forest Service Exhibit 29.
- February 3, 2010 letter, and town council meeting notes, from Town of Crested Butte: “For the record, the current Crested Butte Town Council, as body, has not taken a formal position on CBMR’s Master Development plan or its lift-served skiing development proposal. “

CBMR continues to argue that community support is somehow a voting process even though we told them for years that this was not a voting process, but rather a process for them to work with the community.

Having reconsidered the information that was before us at the time of the Decision, and having considered what has come to us since, in the form of letters/emails/phone messages, news coverage, and our own observations in the community, and the appeal itself, we remain convinced that the Crested Butte/Upper East River/Gunnison River Valley community is deeply divided over this issue. This was the Forest Supervisor’s conclusion as he made his Decision, and was one of the several factors upon which he based his decision. We believe no law regulation or policy was violated or disregarded, we believe we were well within our authority and discretion in the manner in which we came to our determination, and we find our determination amply reinforced by the information presented to us since the Decision.

Hazards (Forest Service Ex 3);
USGS, Rex Baum Review of Burke and McCalpin Studies, January 8, 2009;
Review Comments On McCalpin March 2008 Report On Geology & Slope
Stability, Snodgrass Mountain, Co, Forest Service Exhibit 18;
Rationale by staff supporting decision to remove portions of Snodgrass from
consideration, 12/18/2008, Forest Service Exhibit 19;
Studies of the terrain offered by mountain by Goettge and others, Forest
Service Exhibit 25;
Comment letter from Ed Ryberg, former Rocky Mountain Region Winter Sports
Program Manager, Forest Service Exhibit 12.

Note to ARO: The question of geologic hazard is addressed under Issues 4D, 16C, 17A, 17B, 17C, 34A, 46B, 47A, 47B, 47C, 47D, 48A, AND 48B.

RESPONSE: Geologic Hazard concerns was one of the issues specifically addressed in the November 5, 2009 Decision (page 3 of that Decision, Forest Service Exhibit 1) and in much more detail in the Staff paper which supported the decision. See pages 5 – 8, of November 4, 2009 Staff Paper, Forest Service Exhibit 2.

We disagree with appellants' assertion. CBMR did not resolve the issue of geologic stability. The very letter referred to at Appellants' Ex 19, was expressly clear that the issue of geologic stability had not been resolved.

From that letter, *"While I have identified these two areas (those areas completely removed from consideration – see last full paragraph of page 1 of the January 29, 2009 letter, and maps at Forest Service Exhibit 3) as having significant geologic concerns, it doesn't mean that the other areas have no geologic concerns. "They may well be suitable for ski area development with specific mitigation measures in place, as may be derived from existing studies or future ones."* (emphasis ours).

They were resolved only in so far as the Forest Supervisor was willing to receive and consider a MDP and proposal consistent with limitations imposed in the January 29, 2009 letter. It is clear that the Forest Supervisor still had reservations with regard to the geologic stability of areas beyond those removed from consideration, and reserved to himself the decision with regard to those areas. This neither "resolves the issue of geologic stability", nor does it declare "Snodgrass Mountain as sufficiently stable for developed skiing" (Issue 17B, below).

Issue 16C. Appellants allege that the Forest Service, CBMR, and others questioned the reliability of the Burke Report, because Mr. Burke did not himself collect or evaluate direct data about Snodgrass Mountain. Corey Wong E-mail to Michael Kraatz, Ex. 23.

RESPONSE: We do not interpret the referenced email to mean the Forest Service questioned the reliability of the Burke Report. We find nothing in the record that anyone is critical of Burke's work other than CBMR. The Burke report recommended avoidance of landslide prone areas. CBMR asked to be allowed to have their own consultant conduct more extensive, additional study. All parties were frustrated with the time Mr. Burke took to produce a report.

Issue 17A. The Forest Service encouraged CBMR to retain a geologist to prepare an independent study.

RESPONSE: See, also, response to Issue 16C. CBMR disagreed with the recommendations of the Burke/Forest Service report, and asked to be allowed to provide their own geology study and report. To characterize a consultant hired by CBMR as "independent" does not seem factual. Dr. McCalpin's objective was to attempt to provide information to allow design of a ski proposal using the limited stable terrain he could find on the mountain.

Forest Supervisor and his staff agreed to (conceded to) defer any decision on whether to accept a proposal for Snodgrass to allow CBMR to retain their own geologist consultant, Jim McCalpin to do further study. This action, this expense and this time was entirely at the request of CBMR.

Issue 17B. Dr. McCalpin concluded that Snodgrass Mountain is sufficiently stable for developed skiing, and that mitigation could be used to diminish the risk of slope movement.

RESPONSE: Dr. McCalpin drew no such conclusion.

In fact, Dr. McCalpin failed entirely to demonstrate that the mountain was sufficiently stable for developed skiing, but rather to the contrary. Consistent with a high standard of professionalism, Dr. McCalpin's report assiduously avoids any such conclusion or recommendation. A careful review of his report, both by USGS Rex Baum, and by Forest Service staff, found it provided the Forest Service with sufficient basis upon which to deny a proposal to develop lift served skiing on portions of Snodgrass that were studied.

From USGS Rex Baum review report January 8, 2009 (with our emphasis added):

"Conclusions

The two reports (USDA Forest Service, 2006; GEO-HAZ Consulting, Inc., 2008) contribute substantially to what is known about the geology and slope stability of Snodgrass Mountain.

Both reports demonstrate that the potential exists for reactivation of certain landslides. Depending on the level of risk that is acceptable to the USDA Forest Service, information in the reports may or may not be adequate for making a decision. If USDA Forest Service thresholds for unacceptable outcomes with regard to life safety and resource damage are low (small landslide with minor chance of injury or moderate chance of resource damage) then the information constitutes an adequate basis for denying the permit. If the thresholds are higher, additional studies to reduce uncertainty in the factor of safety calculations, assess the potential for debris flows, design comprehensive surface drainage measures, and demonstrate the effectiveness of subsurface drainage measures will be necessary for decision making. While I agree that surface and subsurface drainage is the best option for improving slope stability at the site, the proposed design appears to be inadequate and more drainage measures may be needed. Engineering calculations and field tests to demonstrate the effectiveness of the proposed subsurface drainage in the clay-rich surficial deposits and weathered shale present on Snodgrass Mountain are lacking. Additional borehole, shear strength, inclinometer, and piezometer data are needed along with more and improved slope stability analyses to demonstrate the effects of melting of artificial snow and drainage measures on future slope stability.”

From Forest Service staff review of McCalpin report (date citation in the record).

“The McCalpin report purports to “describe(s) the location and characteristics of 57 individual landslides, and assess(es) their stability in the existing condition (pre-development).” (page 2, Executive Summary). The purpose of the study is to “form a basis for designing a “slope-stability-neutral” development plan for the proposed ski area development.”(page 1, Introduction). The report falls short. “

From Rationale by staff supporting decision to remove portions of Snodgrass from consideration. 12/18/2008 (Forest Service Exhibit 19)

Even the McCalpin (CBMR's consultant) report is replete with reference to the existence of substantial hazard and to the need for mitigation, to the likelihood of re-initiation of earth movement, and to the uncertainty of the effectiveness of mitigation.

Issue 17C. The Forest Service notified CBMR that the vast majority of Snodgrass “may well be suitable for ski area development.” Ex. 19 at 2.

RESPONSE: This quote is taken out of context, and misrepresents the Forest Supervisor's position. In full context, the letter said:

“While I have identified these two areas as having significant geologic concerns, it doesn’t mean that the other areas have no geologic concerns. They may well be suitable for ski area development with specific mitigation measures in place, as may be derived from existing studies or future ones.

Should you wish to submit a proposal consistent with the information provided in this letter, please also ensure your MDP reflects the same. As mentioned to you previously, we are willing to consider your MDP and a Snodgrass proposal concurrently.

If your proposal is accepted as an application and we proceed into NEPA, I will have high expectations and requirements for public involvement.” Forest Service Exhibit 3.

Issue 34A. 4) Environmental Review of the Proposal. The Forest Service violated Forest Service policy that “[n]o environmental analysis is conducted of the proposed use until it passes initial and second level screening.” Forest Service Handbook 2709, Ch. 10.11.25 The Forest Service requested and evaluated two reports on the geology of Snodgrass, and commissioned and reviewed a third report by the USGS. See, e.g., Ex. 19 at 1. The Forest Service also evaluated environmental issues such as lynx, including by consulting with the Fish and Wildlife Service. Ex. 1 at 4; Mueller Declaration, Ex. 5 ¶ 43. These efforts are not appropriate for screening as described by the Forest Service because they should occur in the NEPA process. 63 Fed. Reg. at 65,963. These actions are incompatible with the screening process.

RESPONSE: Appellant appears to mistake the language of the handbook to be a restriction on the level of consideration that maybe devoted to Pre-NEPA, and special uses screening. This language does not prohibit that agency from incorporating the results on environmental studies into its thinking as it reviews and considers proposals. A proposal of the magnitude of Snodgrass Mountain very reasonably can be subject of “preliminary environmental analyses”, as taught in the Forest Service NEPA course 1900-1. See materials for the incorporation of preliminary environmental effects analysis in the “left side of the triangle” (Pre-NEPA) at Forest Service Exhibit 7.

Issue 46B. Geology.

The Forest Service determined that the geological suitability of Snodgrass Mountain for developed skiing should be evaluated before entering the NEPA process. Two separate geological studies were prepared, and a third report was prepared by the USGS in January 2009. Ex. 19 at 1. Based on these studies, the

Forest Service identified two limited areas of the mountain to avoid, but notified CBMR on January 29, 2009 that the vast majority of Snodgrass “may well be suitable for ski area development.” Ex. 19 at 2. CBMR submitted a revised plan in June 2009 that avoided the two areas.

RESPONSE: See responses to Issues 4A, page 29, and 34A just above.

Issue 47A and B. First, the Forest Service did not allow public review and comment on the geological studies, nor did the Forest Service respond to comments on the studies. Issue 47B. Although he requested an opportunity to respond to the findings, the Forest Service denied Dr. McCalpin the opportunity to comment, and refused to respond to comments. Ex 23.

RESPONSE: There have been at least seven different studies of the geologic hazard presented by Snodgrass Mountain, all in association with proposed use by the ski company for lift served skiing. See Exhibit 17 for a list of these studies.

Review of the chronology of these studies reveals a clear pattern of disagreement between the objective experts commissioned by the Forest Service and consultants retained by the ski company to refute our findings and to reassert that geologic hazard is resolved (latest instance in this very appeal). Geologic studies by Burke/Forest Service (the 5th detailed study of Snodgrass Mountain), then McCalpin (the 6th detailed study of Snodgrass Mountain) , and then review by Baum (specifically retained and the most objective, and best qualified expert for such review) were posted on the GMUG web site.

Requests by CBMR to have Dr. McCalpin review and comment on the draft of the Rex Baum report were not welcomed by USGS. See Wong email at Forest Service Exhibit 18. It was a technical report prepared in accordance with USGS procedures. The objectivity of the report was preserved in this manner.

Geologic hazard is not resolved. Contrary to the claim in this appeal, even the ski area's own expert failed to demonstrate that. See Response to Issue 17B above. A careful review of his report finds no such claim, but rather provides the Forest Service with further basis upon which to deny the application. See Rex Baum Conclusions above under discussion of Issue 17B.

Finally, even those areas which were not eliminated from further consideration in the January 29, 2009 letter and map (Forest Service Ex 3) have geologic hazard concerns. Specifically from the Baum report, see quoted sections above under Issue 17A.

Several, but not all, of these factors are discussed in the November 4 Staff Paper which supported the November 5, 2009 Decision, Forest Service Exhibit 2, pages 4-7. All of these reports and their conclusions were before the decision maker as he came to the November 5, 2009 Decision.

We contend that our statement in the November 5, 2009 Decision with regard to concerns about geologic hazard is well founded, supported in abundance in the record, and correct.

Further, the consideration of the very foundations (literally) of suitability of the mountain at this stage of screening and decision making is entirely appropriate. We did not need an EIS, or public comment to come the determination made in the Forest Supervisor's letter about geologic hazard.

Issue 47C. The Forest Supervisor notes that uncertainty regarding geology remains. He states that "measures to address these unstable slopes are uncertain" and that "areas would require further study." Ex. 1 at 3. This uncertainty indicates the Forest Service should analyze the issue under NEPA. See 40 C.F.R. § 1502.22 (NEPA standards for addressing uncertainty and incomplete information); 40 C.F.R. § 1508.27(b)(4). And NEPA does not require certainty before the Forest Service can act.

RESPONSE: This is NOT the circumstance in which Provisions of 40 CFR 1202.22 apply. These provisions address the procedural question as to whether an EIS is required, or an environmental assessment (or even a Categorical Exclusion) may be used to meet the documentation requirements of NEPA, for a proposed action which has been accepted by the agency and is being considered under NEPA. This mention of uncertainty does not trigger these requirements, but rather refers to one more, of a number of factors which cast doubt on the wisdom of lift served skiing on Snodgrass, and which lead towards rejection of the proposal.

Issue 47D. The Forest Supervisor's failure to explain his departure from his January 2009 conclusion that geology was no impediment is arbitrary and capricious.

RESPONSE: See response to Issue 4A, page 29.

Issue 48A. The Decision states that new terrain "would likely require substantial alteration to construct and maintain ski trails. That terrain grading may further alter slope stability and hydrologic function . . . any mitigation measures will have uncertain success." Ex. 1 at 3. This statement is perplexing because the Forest Service is not required to prove that mitigation is guaranteed. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

RESPONSE: Cited case law related to the certainty of mitigation is not applicable in the current instance. The uncertainty referred to comes directly from the multiple studies of geologic hazard, and may certainly be a reasonable consideration as the Forest Service deliberates about the inherent suitability of the mountain for proposed development, and the prudence to further consideration of such a proposal.

Issue 48B. And these conclusory statements are speculative and arbitrary because the Forest Service has not provided any supporting analysis. e.g., *Olenhouse*, 42 F.3d at 1580 (“mere conclusion” does not amount to “substantial” evidence necessary to support an agency decision).

RESPONSE: We believe these statements are amply supported in the record. Seven geologic studies universally identify geologic hazards on Snodgrass Mountain. Many warn of the risk of disturbance of existing slopes, and the risk of triggered landslides, alteration of hydrology. CBMR’s own consultant’s studies and report does the very best job of describing the complexity of the hydrology on the mountain, leading to uncertainty as to where water goes through the soil mantle and underlying geology. McCalpin Report is part of the “whole record”, but not included in this Appeal Record. It may be viewed at <http://www.fs.fed.us/r2/gmug/policy/#ski>.

Further, studies by Goettge and others, of the terrain offered by the mountain, suggest that substantial terrain modification would be required to develop ski trails. See Forest Service Exhibit 25. See also comment letter from Ed Ryberg, former Rocky Mountain Region Winter Sports Program Manager. See Forest Service Exhibit 12.

AVALANCHE/BOUNDARY MANAGEMENT

Record References: The Decision, Forest Service Exhibit 1, page 3, para. 7;
 Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 8-9;
 Summary of Disagreement Among Avalanche Reports In The Record, Forest
 Service Exhibit 20;
 Discussion Of Boundary Management Concerns Specific To Avalanche On The
 Gothic Side Of Snodgrass Mountain From All Experts, Forest Service
 Exhibit 21.

Issue 49A. The Forest Supervisor’s conclusion that the proposal will cause increased avalanche concerns is not supported by substantial evidence.

RESPONSE: Next to geologic hazard, avalanche hazard is the next most studied concern on Snodgrass Mountain. There are six studies, or evaluations, of avalanche hazard on Snodgrass Mountain documented in our files. They are Mears 1986, Mears 1995, FitzGerald 1995, Hackett and Highberger 1996, and Hartman and Mears 2005, Hartman or Mears 2009. In addition, there have been personal communications among ski company employees, with real expertise in avalanche, and the Forest Service.

For discussion of avalanche concerns supporting the November 5, 2009 Decision see November 4, 2009 Staff Paper, page 8-9, (Forest Service Exhibit 2)

For a Summary of Disagreement Among Avalanche Reports In The Record, see Forest Service Exhibit 20.

Issue 49B. The Decision notes that the proposal would increase backcountry access into known avalanche areas, and that boundary management efforts may be uncertain. Ex. 1 at 3. Boundary management is an issue at every ski area and is successfully managed with signage and ski patrol.

RESPONSE: Snodgrass Mountain is unique in that skiers who would have to off load the mountain using an inconvenient series of lifts down. This is not usual for ski resorts in Colorado. Further, every snow management and ski area management expert that commented on avalanche on the Gothic side of Snodgrass offered cautions about the boundary that would be created by lift service to the top of Snodgrass Mountain; every one of them, all unprompted and unsolicited. For discussion of boundary management concerns specific to avalanche on the Gothic side of Snodgrass Mountain from all experts see Forest Service Exhibit 21.

Liam FitzGerald was at that time the Director of Snow Safety at Snowbird Ski Resort, Mears is a world renowned ski/snow expert, Highberger and Hackett were both Forest Service Snow Rangers with their own reputations. Mears and Hartman's report appears to focus on this almost entirely. And we had numerous similar comments from the public, from people who appear to know skiing. They all concur. We do not know how you could get any clearer, or more objective, support of the position that the avalanche/boundary management problems would be induced with lift service to the top of Snodgrass are significant and extraordinary.

RECREATION

Issue 45A. The Forest Supervisor claims that the proposal will adversely affect existing recreational uses of the Mountain. Ex. 1 at 3. This conclusion is speculative because the Forest Supervisor has not analyzed the effect of the development on summer uses such as mountain biking and hiking in an EIS like the agency does at other ski areas.

Record References: The Decision, Forest Service Exhibit 1, page 3, para. 1;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, page 9, para 2,
page 18, para 5.

RESPONSE: There can be little doubt that the recreation opportunities and setting on Snodgrass Mountain would be substantially altered by development. A detailed analysis is not needed to draw this conclusion.

A recurrent message in the many letters and emails, both before and after the Decision, was that Snodgrass Mountain is a popular year-round local recreation area in a semi-primitive setting, and would be altered by ski lifts and runs. See comment letters at Forest Service Exhibits 11 and 12.

LYNX

Issue 34A. 4) Environmental Review of the Proposal. The Forest Service violated Forest Service policy that “[n]o environmental analysis is conducted of the proposed use until it passes initial and second level screening.” Forest Service Handbook 2709, Ch. 10.11.25. The Forest Service requested and evaluated two reports on the geology of Snodgrass, and commissioned and reviewed a third report by the USGS. See, e.g., Ex. 19 at 1. The Forest Service also evaluated environmental issues such as lynx, including consulting with the Fish and Wildlife Service. Ex. 1 at 4; Mueller Declaration, Ex. 5 ¶ 43. These efforts are not appropriate for screening as described by the Forest Service because they should occur in the NEPA process. 63 Fed. Reg. at 65,963. These actions are incompatible with the screening process.

Record References: The Decision, Forest Service Exhibit 1, page 4, para. 4;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, page 18, para 4;
Forest Service Planning Triangle, Forest Service Exhibit 7.

RESPONSE: Appellant appears to mistake the language of the handbook to be a restriction on the level of consideration that maybe devoted to Pre-NEPA, and special uses screening. This language does not prohibit that agency from incorporating the results of environmental studies into its thinking as it reviews and considers proposals. A proposal of the magnitude of Snodgrass Mountain very reasonably can be subject of “preliminary environmental analyses”, as taught in the Forest Service NEPA course 1900-1. See materials for the incorporation of preliminary environmental effects analysis in the “left side of the triangle” (Pre-NEPA), at Forest Service Exhibit 7.

The Forest Service has not completed informal or formal consultation on the effects of the proposed Snodgrass expansion on threatened, endangered or candidate species, including lynx. Consistent with R-2 Guidance: Ski Area Planning and ESA Section 7 (Forest Service Exhibit 33), the Forest Service has engaged in conferencing with Fish and Wildlife Service (FWS) to identify potential issues arising from the development of Snodgrass on T&E species. During these discussions, personnel from the Forest Service and FWS agreed that expansion of a ski area in suitable lynx habitat would alter their habitat or affect other factors regulating lynx populations. While a detailed analysis has not been completed, both agencies believe these effects will be great enough to be measureable. By definition, a measureable affect is not: discountable, insignificant or solely beneficial and therefore is “likely to adversely affect “Canada lynx. If the proposal did proceed and were analyzed through NEPA, a Biological Assessment (BA) would be prepared, providing a thorough analysis of effects. The analysis would include design criteria or mitigation measures to avoid or reduce potential effects to the species. Upon completion and acceptance of the BA, the Forest would enter into consultation with FWS which would result in either issuance of a concurrence letter or a Biological Opinion. Management direction provided by the Southern Rockies Lynx Amendment Record of Decision (signed October 28, 2008) related to ski resort expansion and operations would be the primary basis directing Forest Service management.

The appellant is correct that the effects on lynx habitat do not preclude development of lift served skiing on Snodgrass Mountain. These effects, however, are just one of the many reasons the Forest Supervisor decided the Snodgrass proposal is not in the public interest. The effects of this proposal on lynx (federally threatened/Colorado endangered species) are of concern. The

issue is not if the mountain can be developed....but should it be developed? with the multitude of social and environmental issues, such as lynx.

Issue 53A. The Decision states that development of Snodgrass would lead to effects that the Forest Service believes could “be measurable, leading to an adverse effect on Canada lynx and possibly result in a ‘take’ to the species.” It is speculative and unfounded for the Forest Service to make a sweeping conclusion about Canada lynx and skiing on Snodgrass Mountain without following the mandatory procedures required by federal law to reach such a conclusion.

RESPONSE: See response to comment 34a, just above.

Issue 53B. The Forest Service's lynx statements are also utterly contrary to formal Forest Service lynx management direction and the official position of the United States Fish and Wildlife Service. The Forest Service determined that lynx management direction may be satisfied by designing ski area expansions to meet lynx standards and guidelines in site-specific NEPA documents. The Forest Service adopted the Southern Rockies Lynx Amendment Record of Decision (“ROD”) on October 28, 2008. The ROD amended the GMUG Forest Plan to include lynx management direction set forth in the ROD. See UNITED STATES FOREST SERVICE, SOUTHERN ROCKIES LYNX AMENDMENT, RECORD OF DECISION (Oct. 28, 2008). The ROD sets forth management objectives, standards, and guidelines for Canada lynx at developed ski areas. Id. attachment 1-1, 1-6 – 1-7. The management direction is to be applied at the project level based on site specific conditions. Id. In June 2009, the Forest Service clarified that applicable lynx management direction is not intended to preclude the development or expansion of ski areas. See U.S. FOREST SERVICE, SOUTHERN ROCKIES LYNX AMENDMENT – IMPLEMENTATION, FILE CODE 1570-1/1920-2/2670 (Jun. 2009). The Forest Service explained that applicable standards and objectives could be met for developed ski areas through the application of site specific design features and mitigation. Id.

RESPONSE: The Southern Rockies Lynx Amendment sets forth objectives, standards and guidelines for Canada lynx for development and operation of ski areas. If Snodgrass expansion were to proceed through NEPA, it would be subject to this direction. The Forest Service never stated that the potential effects of the expansion would “preclude the development or expansion of ski areas,” simply that the expansion could result in an adverse effect and possibly “take” to Canada lynx.

From the November 4, 2009 Staff Paper, prepared in support on the Decision (Forest Service Exhibit 2):

Lynx: Canada Lynx (*Lynx canadensis*) could be adversely affected as a result of the Snodgrass Mountain expansion proposal. Snodgrass Mountain falls within the Gothic Lynx Analysis Unit which is 68,058 acres in size and contains 30,615 acres of lynx habitat. Currently less than 100 acres is considered unsuitable lynx habitat due to past or ongoing human influences. Habitat potentially affected by the Snodgrass expansion includes multi-storied spruce-fir stands which are desirable denning habitat. Effects to lynx could include habitat alteration from construction of ski runs and facilities, increased snow compaction allowing other predators to access suitable foraging areas and deplete the number of snowshoe hare available to lynx, and indirect effects from increased development on private land and associated human uses. Permanent loss of suitable lynx habitat will occur as a result of the proposal. While no analysis has been completed to date, effects are expected to be measurable, leading to an adverse effect to Canada lynx and possibly result in “take” to the species (concurrence with Kurt Broderdorp of U.S. Fish & Wildlife Service on 10/13/2009).

ROADLESS

Issue 51A. The Decision states: “It is very reasonable to expect; however, that any decision to develop Snodgrass Mountain will be challenged based upon consistency with both the intent and ecological values of roadless areas.” Ex. 1 at 4. This reason cannot be an obstacle because no existing or proposed roadless rule poses a limitation for the Snodgrass Mountain proposal.

Record References: The Decision, Forest Service Exhibit 1, page 4, para. 3;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 17-18
Wilderness Society, 2001 –2009 Roadless Area Conservation Policy
Chronology, Forest Service Exhibit 22.

RESPONSE: For discussion of roadless concerns supporting the November 5, 2009 Decision see November 4, 2009 Staff Paper.(Forest Service Exhibit 2)

The main issue, as relates to roadless, revolves around the uncertainty and controversy of future roadless policy and legal management framework. For a chronology of events, legal and other wise, related to roadless policies, and the agency position see the “Wilderness Society, 2001 –2009 Roadless Area Conservation Policy Chronology” at Forest Service Exhibit 22. Even a cursory review of this suggests a great deal of uncertainty as relates to roadless area management and direction, and also makes clear the likelihood of legal challenge of any decision which would affect the roadless character of the Gothic Inventoried Roadless Area.

The Forest Service has a roadless area protection position. Just because "no existing or proposed roadless rule poses a limitation for the Snodgrass Mountain proposal..." does not mean a future or final rule or policy will not pose a limitation. The area in question has not been irretrievably or irreversibly altered to the point of eliminating the opportunity to emphasize management for roadless values.

This is one of the most controversial and confusing issues of the past decade(s); thus, increasing the likelihood of litigation on roadless protection "intent." However, the roadless characteristics and values to be debated go beyond just "ecological."

The conversion of what is now a semi-primitive roadless area to a developed ski area would be a significant change and would bring objection and controversy that would extend well beyond the Crested Butte community, and would enlist the engagement of national level conservation interests.

In short, any decision related that would authorize develop lift served skiing within the Gothic Roadless Area is certain to bring objection and likely litigation, adding complexity to the consideration of Snodgrass. This is just one of the factors leading to our determination that the proposal was not in the public interest.

ACCESS

Issue 50A. The Forest Service claims that access to the Snodgrass Mountain base "would be difficult to establish." Ex. 1 at 4. This is incorrect. First, access to Snodgrass could be achieved via either a gondola ride from the main mountain, or via bus service from Mountaineer Square. See Ex. 4, at Attachment 1, Page 1. This arrangement is similar to Breckenridge Resort.

Record References: The Decision, Forest Service Exhibit 1, page 4, para. 1;
Forest Service 11/04/09 Staff Paper, Forest Service Exhibit 2, pages 9-10;
Synthesis Of Support For November 5 Decision Letter To CBMR From Letters
Received Since The Decision", page 2. Forest Service Exhibit 11.
Selected pages from CBMR Proposal and MDP, Forest Service Exhibit 24.

RESPONSE: ACCESS: In addition to the Decision itself, at page 4, para 1, for discussion of access to Snodgrass Mountain concerns supporting the November 5, 2009 Decision see November 4, 2009 Staff Paper, pages 10-11.(Forest Service Exhibit 2)

See, also, “Synthesis Of Support For November 5 Decision Letter To CBMR From Letters Received Since The Decision”, page 2. Forest Service Exhibit 11.

“Then, how would an intermediate skier get to Snodgrass? On a series of lifts and tramways which would probably involve a good half-hour, not to mention the time involved in getting home again.

Snodgrass is inherently flawed with respect to its potential to provide quality lift served skiing complementary to the existing Crested Butte Ski Area. As you point out, even with substantial alteration and grading, public access would be inconvenient and time consuming resulting in a marginal skiing experience.”

Access to the proposed base of Snodgrass is inherently difficult. The only way to get there is on a two-lane road which passes through the heart of the municipality of Mount Crested Butte, or by lifts and ski runs on the existing mountain. Proposed access to Snodgrass Mountain for the general public, other than residents and visitors to real estate at North Village, would be by a series of lifts and runs originating at the existing mountain base. See pages 103 to 105 of the submitted MDP (see MDP itself, or Forest Service Exhibit 24). Off loading of Snodgrass would take the same course, in reverse. See descriptions of CMBR's proposed access to Snodgrass Mountain, at Forest Service Exhibit 24. Note that this is described on page 1 of the Snodgrass Mountain Proposal, and that bus service is described there as “likely” hardly a firm proposal or plan.

Issue 50B. It is arbitrary for the Forest Service to assert access as a reason to reject the Snodgrass proposal given its record of authorizing ski area expansions with similar access issues.

RESPONSE: We believe that consideration of the design and function of a proposed ski area, as it integrates with surrounding community and infrastructure, and inherent fit on the land is a very reasonable consideration, and is a key component of master development planning. This was one reason we agreed to review both the MDP and the Snodgrass Proposal at the same time. As is said in the Decision itself (Appellant's Ex 1, page 4, last para) and repeatedly in this responsive statement, this was one of the many factors which, considered together, lead to the conclusion of the public interest determination of the November 5, 2009 Decision.

OFF-SITE IMPACTS

Issue 44A: The Decision completely ignores the significant work the Town of Mt. Crested Butte has done to manage off-site impacts.

RESPONSE: We are well aware of these discussions. See letters from Town of Mt Crested Butte at Exhibit 34. We observe that the MDP and the 2009 Snodgrass Mountain Proposal are silent with regard to what CBMR would propose in this regard. One of the express purposes of Pre-NEPA is to allow a ski company to, as part of their proposal, to share in responsibility for mitigation of such impacts. This was a substantial deficiency in the both submittals. See Forest Service preliminary comments at Forest Service Exhibit 6.

The Town of Mt. Crested Butte cannot speak for, or represent, either the town of Crested Butte, the County, the city of Gunnison, or in fact, any other entity than themselves. They cannot assert, for these other entities, that, “Guidelines already established for all of the municipalities as well as the county allow for adequate controls....”

We see no evidence in appellants appeal or exhibits, and we see no suggestion in correspondence from/discussion with these other entities that provide social/medical/emergency services, infrastructure, and the various other services demanded by increased visitation, that they are prepared for such an influx of people to the valley as is anticipated and hoped for by CBMR.

CONCLUSION

Developing lift served skiing on Snodgrass Mountain has had a 30 year plus history of debate and controversy. This long history is proof in itself of the many problems associated with the Mountain. It is understandable that CBMR is upset about my denial of their Snodgrass Mountain Proposal. The appellants however have a high level of burden to prove that the Forest Service violated law, regulation, policy, or that my decision was arbitrary and capricious. **They have not provided this proof.** This appeal is about my rejection of a private ski company's efforts to force the Forest Service to undergo a lengthy and contentious NEPA process on a bad proposal, and then to ultimately approve their development on the National Forest.