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Department of
Agriculture

Forest
Service

Pacific
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File Code: 1570-1
Appeal No.: 10-02-00-0013
Date: May 6, 2010

Ezekiel J. Williams
Ducker, Montgomery, Aronstein & Bess, P.C.
1560 Broadway, Suite 1400
Denver, CO 80202

CERTIFIED - RETURN
RECEIPT REQUESTED

Dear Mr. Williams:

This letter responds to the December 18, 2009 appeal filed on behalf of Crested Butte LLC and CNL Income Crested Butte LLC (Appellant) of a November 5, 2009 decision (Decision) by Charles S. Richmond, Forest Supervisor, Grand Mesa, Uncompahgre and Gunnison National Forests (GMUG). The Decision rejected Crested Butte Mountain Resort's (CBMR) Master Development Plan submission which included a proposal to develop Snodgrass Mountain for lift-served skiing (Plan) and CMBR's site-specific proposal to build and operate lift-served facilities on the mountain (Proposal).

APPEAL BACKGROUND

Forest Supervisor Richmond stated in his November 5, 2009 Decision that the decision was not subject to administrative appeal. In a subsequent December 16, 2009 letter to Timothy Mueller and Tammie Quinlan, he supplemented his November 5 letter and provided an opportunity to file an appeal with the Regional Forester, USDA Forest Service, Rocky Mountain Region within 45 calendar days of his December 16 letter. Such an appeal was received by the Regional Forester, Rocky Mountain Region on December 18, 2009 and considered timely.

I, James Pena, USDA Forest Service, Pacific Southwest Region, Deputy Regional Forester, was delegated the authority by the Chief, USDA Forest Service to serve as the appeal reviewing officer on January 15, 2010, in lieu of the Regional Forester, Rocky Mountain Region.

Three organizations filed requests for intervener status. They were the Friends of Snodgrass Mountain, the Colorado Ski Industry Association, and the Rocky Mountain Biological Laboratory. I denied all three requests, using the criteria mandated by 36 C.F.R. § 251.96.

You requested the opportunity for an oral presentation. Your request was granted and the oral presentation was held at USDA Forest Service, Pacific Southwest Regional Office Headquarters in Vallejo, CA on April 2, 2010. I closed the official record on April 9, 2010.



RELIEF REQUESTED

In your appeal you requested that the appeal reviewing officer set aside the Decision and direct Forest Supervisor Richmond to immediately begin a good faith evaluation of the Snodgrass Mountain proposal in an objective and public National Environmental Policy Act (NEPA) process (Appeal, Page 70) specifically through an Environmental Impact Statement (EIS).

ADMINISTRATIVE APPEAL REVIEW RECORD

I have reviewed the entire administrative appeal record which includes:

The Appeal dated December 18, 2009 from Ezekiel J. Williams and Steven K. Imig, Attorneys for Crested Butte, LLC and CNL Income Crested Butte, LLC along with the following exhibits:

<u>Exhibit</u>	<u>Description</u>
1	November 5, 2009 Snodgrass Decision.
2	2008 CBMR/CNL Income Ski Area Term Special Use Permit.
3	2009 CBMR Master Development Plan.
4	2009 Project Proposal Letter.
5	Declaration of Timothy T. Mueller.
6	1982 Snodgrass Environmental Assessment.
7	1982 Snodgrass Decision Notice and Finding of No Significant Impact.
8	1983 GMUG Forest Plan Environmental Impact Statement (excerpts).
9	1983 GMUG Forest Plan (excerpts).
10	2007 GMUG Draft Forest Plan (excerpts).
11	June 2005 Memorandum of Understanding.
12	Charles Richmond's October 13, 2006 Letter to Tim Mueller.
13	Town of Mt. Crested Butte's April 15, 2008 Letter to Charles Richmond.
14	Town of Crested Butte's May 19, 2008 Letters to Charles Richmond.
15	Charles Richmond's June 5, 2008 Letter to Tim Mueller.
16	City of Gunnison's June 12, 2008 Letter to Charles Richmond.
17	Crested Butte South's July 1, 2008 Letter to Charles Richmond.
18	Meridian Lake Meadows' August 20, 2008 Letter to Charles Richmond.
19	Charles Richmond's January 29, 2009 Letter to Tim Mueller.
20	Gunnison County's October 20, 2009 Letter to Charles Richmond.
21	Letter of Support for the Snodgrass Expansion Signed by Over 500 Residents, Published April 11, 2008 in the Crested Butte News.

- 22 Letter of Support for the Snodgrass Expansion Signed by Over 280 Local Businesses, Published November 27, 2009 in the Crested Butte News.
- 23 Corey Wong's August 15, 2009 E-mail to Michael Kraatz.
- 24 Written Comments of Kai Allen (March 19, 2009) and Ken Kowynia (March 3, 2009) on CBMR's Draft Master Development Plan.
- 25 Crested Butte Chamber of Commerce, November 2009 Snodgrass Mountain Survey Results.
- 26 Mark Reaman, Forest Service's Charlie Richmond Well Aware of Snodgrass Outcry, CRESTED BUTTE NEWS, Nov. 25, 2009.
- 27 Mark Reaman, Seth Mensing and Mike Horn, Snodgrass: Reactions in the Valley . . . Shock and Awe, CRESTED BUTTE NEWS, Nov. 11, 2009.
- 28 Mark Reaman, Forest Service Rejects Snodgrass, CRESTED BUTTE NEWS, Nov. 11, 2009.
- 29 Mark Reaman, Wow, CRESTED BUTTE NEWS, Nov. 11, 2009.
- 30 Telluride Ski Area Expansion Final Environmental Impact Statement (Feb. 1996) (Excerpts)
- 31 GMUG National Forests, Crested Butte Main Mountain Improvements Plan Environmental Assessment (Nov. 2007).
- 32 Vail Category III Environmental Impact Statement (Aug. 1996) (excerpts).
- 33 Charles Richmond's August 24, 2009 Letter to Gunnison County.
- 34 Mt. Crested Butte's November 17, 2009 Letter to Charles Richmond and Rick Cables.
- 35 Gunnison Country Times Poll Conducted the Week of November 16, 2009 – Results.
- 36 Arapahoe Basin 2006 Improvement Plan Environmental Impact Statement (Dec. 2006) (excerpts).
- 37 Will Shoemaker, Outcry Ensues Over Snodgrass Decision, GUNNISON COUNTRY TIMES (Nov. 19 2006).
- 38 Seth Mensing and Mark Reaman, Politicians Jump in Over Snodgrass Controversy, CRESTED BUTTE NEWS (Dec. 9, 2006).
- 39 Mike Horn, Protesters March on Elk to Protest Snodgrass Decision, CRESTED BUTTE NEWS (Dec. 9, 2006).

- 40 Mark Reaman, Town Council Agrees to Public Request; Snodgrass Back on Agenda, CRESTED BUTTE NEWS (Dec. 9, 2009).
- 41 Charles Richmond's December 16, 2009 Letter to Tim Mueller.
- 42 Colorado Ski Country USA's December 8, 2009 Letter to Forest Service Chief Tom Tidwell.

The Responsive Statement to the Appeal dated March 2, 2010 from Charles Richmond, Forest Supervisor, GMUG along with the following exhibits:

<u>Exhibit</u>	<u>Description</u>
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.
- 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. 65953-65954 (November 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.

The Reply to Responsive Statement dated March 24, 2010 from Ezekiel J. Williams and Steven K. Imig, Attorneys for Crested Butte, LLC and CNL Income Crested Butte, LLC along with the following exhibits:

<u>Exhibit</u>	<u>Description</u>
1	July 30, 2009 GMUG Decision to Start the NEPA Process.
2	October 15, 2009 Extension of Snodgrass Funding Agreement.
3	William Jackson's July 14, 2009 E-mail to Jeff Burch.
4	GMUG's August 10, 2009 Briefing Paper for the Regional Office.
5	Town of Crested Butte's February 3, 2010 Letter to Charles Richmond.
6	Mt. Crested Butte's February 16, 2010 Letter to James Peña.
7	Mike Horn, Crested Butte South Supports Going into NEPA, CRESTED BUTTE NEWS, Feb. 12, 2010.
8	Letters of Support from State Senator Gail Schwartz and State Representative Kathleen Curry.
9	Letters of Support from Senator Patrick Leahy, Representative Peter Welch, and Senator Mark Udall.
10	Gunnison County's December 18, 2009 Letter to Charles Richmond and Rick Cables.
11	Club 20's December 14, 2009 Letter to Charles Richmond and Rick Cables.
12	CBMR's November 17, 2009 Request for Information to the U.S. Forest Service Under the Freedom of Information Act and Responses.
13	CBMR's February 23, 2010 Appeal of Region 2 Freedom of Information Act Response and Related Documents.
14	Dr. James McCalpin's March 6, 2010 Review of GMUG Responsive Statement.
15	Forest Service Response Brief in The Ark Initiative v. U.S. Forest Service, 06-CV-02418 (filed Nov. 16, 2007) (excerpts).
16	CBMR's February 12, 2010 Request for Information to the U.S. Fish and Wildlife Service Under the Freedom of Information Act and Response.
17	Project Proposal Letters and Notice's of Intent to Prepare an EIS for Breckenridge Peak 6 Expansion and Arapahoe Ski Area Montezuma Bowl Expansion.
18	Jason Blevins, Ski Area's Setback Sends Chills, DENVER POST, Mar. 16, 2010.
19	Forest Service and Federal Policies Encouraging Cooperation With Local Governments.

- 20 Forest Service Policies Requiring Regional Office Approval of Projects in a Roadless Area.
- 21 GMUG Communications Regarding Need For Regional Office Approval of Snodgrass Proposal.
- 22 Forest Service Rocky Mountain Region Winter Sports Guidebook (excerpts).
- 23 Friends of Ski Lifts on Snodgrass and Coalition for Lifts on Snodgrass Webpages and Mission Statement.
- 24 John Dzenitis, Ski Town Brings Protest to Delta, KREXTV, Jan. 8, 2010.
- 25 SE GROUP'S Response to GMUG Forest Supervisor's Responsive Statement.
- 26 Agriculture Secretary Tom Vilsack Remarks – Seattle, Washington, August 14, 2009.
- 27 Perry Backus, Forest Service Rejects Lolo Peak Ski Area Idea, MISSOULIAN, May 2, 2006.
- 28 2008/09 Survey Research – Final Report prepared by RRC Associates (Jul. 2009) (excerpts).
- 29 March 2010 Letters to Chief Tom Tidwell from the Colorado Association of Ski Towns and the Town of Fraser, Colorado.
- 30 Pictures From Protests at Forest Service Regional Office and Downtown Crested Butte.

Additional documents provided by Ezekiel J. Williams, Attorney for Crested Butte, LLC and CNL Income Crested Butte, LLC at the April 2, 2010 oral presentation to Jim Pena:

<u>Exhibit</u>	<u>Description</u>
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|---|---|
| 1 | Evidence of Public Support – bound copy containing 32 tabs. |
| 2 | Key Documents from the Record – bound copy containing 8 tabs. |

ISSUES AND RESPONSES

In reviewing the official record I note that there is a long history of the relationship between the Forest Service and Crested Butte Resort dating back to 1961 and specifically, study of expansion to Snodgrass Mountain since 1981 (Responsive Statement, Exhibit 4). I also note that the appeal record is extensive, and replete with conflicting evidence concerning the merits of the Proposal and the expectations of the parties.

I do not believe it would be possible or practical to attempt to settle each and every discrepancy in the record or the parties' perceptions thereof in this appeal decision, and I decline to do so. Instead I confine myself to the major arguments put forward by the Appellant, and those germane to the request for remedy. In framing the issues for this appeal decision I thoroughly considered the entire appeal record. From the information in the appeal record, I have determined the following 6 issues are germane with respect to the remedy requested:

1. Was Forest Supervisor Richmond's Decision appealable?
2. Did Forest Supervisor Richmond fail to follow the screening regulations and the 2005 Memorandum of Understanding (MOU)?
3. Did Forest Supervisor Richmond fail to evaluate the Snodgrass Mountain proposal the same way as other Forest Service ski area expansions?
4. Was Forest Supervisor Richmond's Decision supported by substantial evidence?
5. Was Forest Supervisor Richmond required to initiate the NEPA process to support his Decision?
6. Did Forest Supervisor Richmond's Decision amend the GMUG Forest Land and Resource Management Plan (LRMP)?

Issues 1-5 were developed in direct response to the "Argument" section of the appeal (Appeal, Pages i, ii, 29-69). Issue 6 specifically addresses the EIS argument, made in support of the remedy requested, as presented in your March 24, 2010 reply to the responsive statement and April 2, 2010, oral presentation.

I recognize that there are other issues raised in the appeal record pertaining to Snodgrass Mountain. However, I have determined by addressing these 6 key issues, I will satisfy the requirements of 36 CFR 251.99 Appeal Decision given the facts and circumstances of this appeal.

Issue 1:

Was Forest Supervisor Richmond's Decision appealable?

Response to Issue 1:

As noted above, in a December 16, 2009 letter to Timothy Mueller and Tammie Quinlan, Forest Supervisor Richmond supplemented his November 5, 2009 letter and provided Appellants with the opportunity to file an appeal with the Regional Forester, USDA Forest Service, Rocky Mountain Region within 45 calendar days of his December 16 letter. Appellant's appeal was received by the Regional Forester, Rocky Mountain Region on December 18, 2009 and considered timely. Because this Appeal hearing and my decision are the only relief that could be requested by Appellants in response to Forest Supervisor Richmond's assertion that his decision was not administratively appealable, and both have now been granted, I find this issue to be moot.

Issue 2:

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

Response to Issue 2:

Appellant contends that Forest Supervisor Richmond failed to follow the screening regulations established by 36 CFR 251.54. (Appeal P. 31-34) Specifically, appellant contends that the Proposal had been previously accepted as an application due to the agency's participation in a multi-year MOU. (Appeal P. 32-34) In the alternative, Appellant contends that the Proposal was accepted as an application due to the Forest Service's course of conduct between the 2005 MOU and the 2009 Decision (Appeal P. 32-33).

Forest Supervisor Richmond contends that he appropriately applied the screening regulations upon receipt of the Proposal (Responsive Statement, Page 25-25). Furthermore, Forest Supervisor Richmond contends the 2005 MOU described the process by which the Forest Service worked with the Appellant to develop the proposal such that, if accepted by the authorized officer it is, "...more likely to address issues, mitigate environmental impacts, and address off-site impacts..." (Responsive Statement, Page 17).

A review of the record, as well as the regulations that govern the screening of proposals, and the issuance of Special Use Authorizations shows that the Appellant's arguments are unavailing. Initial and second-level screening, established by 36 CFR 251.54, is the process by which the Forest Service determines whether to accept a proposal for use of National Forest lands or resources as an application for a Special Use Authorization for the use of those lands or resources. The regulations recognize that the development of proposals and applications is an iterative process, with the goal being to develop a comprehensive understanding of the requested use, and to provide the Forest Service authorized officer with all relevant information to decide on whether the use is an acceptable one. For example:

- 36 CFR 251.54(d)(4) states, "...a proponent must provide a project description, including maps and appropriate resource information, in sufficient detail to enable the authorized officer to determine the feasibility of a proposed project or activity, any benefits to be provided to the public, the safety of the proposal, the lands to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders."
- 36 CFR 251.54(d)(5) states, "The authorized officer may require any other information and data necessary to determine the feasibility of a project or activity proposed; compliance with applicable laws, regulations, and orders; compliance with requirements associated clearances, certificates, permits, or licenses; and suitable terms and conditions to be included in the authorization..."
- 36 CFR 251.54(e)(5) states, "the authorized officer may request additional information to obtain a full description of the proposed use and its effects."

Only the authorized officer may determine when a description of the proposed use and its effects is adequate to move from the proposal stage to become an application. 36 CFR 251.54 does not establish a timeframe by which the authorized officer must accept the proposal as an application. Development and administration of ski areas is complex. Long-term environmental and socio-economic impacts to the land and resources are significant. Development requires substantial commitment of time and resources by both the Forest Service and the permit holder. It also requires considerable substantial capital investment by the holder. Based on these complexities and the major effort it entails, it is reasonable for the authorized officer to require extensive information, on a variety of topics to make his decision.

The Forest Service expects ski area development to be a lengthy process. In fact, the Ski Area Term Special Use Permit is the longest duration special use authorization for use and occupancy of National Forest System lands. The permit may be issued for up to 40 years. In light of this, it is not unreasonable for the initial planning for a proposal to take some years. The length of time and effort expended here, which Appellant asserts was unduly burdensome, I do not find to be atypical given the size and complexity of the proposed use.

Specifically, I note that the Appellant's special use permit (Appeal, Exhibit 2) at I.D. envisions a 5 year process to prepare the Master Development Plan. Specifically, the permit at I.D. Term states, "This authorization is for a term of 5 years to provide for the holder to prepare a Master Development Plan." Given the fact that Forest Supervisor Richmond allowed the Appellant to submit the MDP and site specific proposal concurrently, it is reasonable to expect that, taken together, both may take 5 years or longer to prepare.

Only a proposal that passes initial and second-level screening may be accepted as an application (36 CFR 251.54(e)(5)). There is no indication in the appeal record that the Proposal was accepted as an application prior to the November 5, 2009 Decision to deny, either through the MOU or by any later document. Although the appellant contends that the Form for Roadless Project Evaluation dated July 30, 2009 constitutes acceptance of the Proposal as an application, I find the Form constitutes neither a decision document nor documentation of acceptance. As such, the screening regulations established by 36 CFR 251.54 were the correct standard by which to deny the Proposal.

The appeal record indicates that the Forest Service was working with CBMR to refine their Proposal and satisfy the screening regulations. However, the Forest Service had neither accepted the Proposal as an application, nor as a Forest Service proposed action. On this point, the record is clear. The 2005 MOU states:

- "The purpose of this MOU is to articulate the working arrangement for the proposed expansion onto Snodgrass Mountain...inclusive of a pre-NEPA pre-application process ..." (Part A, Page 1).
- "...the Proponent will identify issues in a front end, or pre-NEPA process, to formulate a well-thought out formal proposal..." (Part B, Page 1).

- “It is understood by the Proponent and the Forest Service that the Proponent will use a pre-NEPA process prior to proposal submittal.” (Part C, Page 2).
- ”The purpose of this pre-NEPA work is to incorporate identified issues and concerns into the proposal design(s), and to formulate a well-thought out formal proposal designed to move efficiently through the NEPA process.” (Part C, Page 2).

These statements indicate to me that the MOU did not satisfy the screening regulations and that the Proposal had not been accepted as an application. Based on these statements, I find that the MOU had been established to satisfy the requirements of 36 CFR 251.54(e)(5); specifically, a full description of the proposed use and its effects as determined necessary by the authorized officer.

I recognize that the MOU additionally described the working arrangement by which the Forest Service might process the application, participate in a subsequent NEPA analysis, record of decision, and implementation. However, those aspects of the MOU are not relevant until a formal proposal has been developed and accepted as an application by the authorized officer. In this case, CBMR finalized submission of its Proposal on June 18, 2009 and the decision to deny the Proposal was made on November 5, 2009.

Furthermore, participation in the MOU has neither an effect on Forest Supervisor Richmond’s ability to deny the Proposal under the screening regulations established by 36 CFR 251.54, nor constitutes formal acceptance of the Proposal as an application. Rather, participation in the MOU is indicative of the fact that development of ski area master development plans and ski area development proposals can be a complicated and lengthy process.

Also, after the MOU was signed, the appeal record indicates Forest Supervisor Richmond sent three separate letters to CBMR notifying them that their Proposal had not been accepted as an application. Those letters included the following statements:

- “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 and to begin the environmental analysis process under the National Environmental Policy Act (NEPA).” (Letter to Timothy Mueller from Forest Supervisor Richmond, October 13, 2006).
- “In reviewing both the MDP and Snodgrass proposal together, we would make it clear to the public that, even though the Forest Service would be evaluating both simultaneously, we have not accepted the Snodgrass proposal as a Forest Service proposed action under NEPA.” (Letter to Timothy Mueller from Forest Supervisor Richmond, June 5, 2008).
- “If your proposal is accepted as an application and we proceed into NEPA, I will have high expectations and requirements for public involvement.” (Letter to Timothy Mueller from Forest Supervisor Richmond, January 29, 2009).

I find these statements to indicate, at no time, did Forest Supervisor Richmond accept the Proposal as an application prior to his November 5, 2009 Decision to deny. Further, such an understanding was communicated to the Appellant, and at no time prior to the appeal was it suggested that this interpretation was incorrect.

Also, the Proposal submitted by CBMR on June 18, 2009, included the following statement, "...the timely acceptance of the proposal would be most appreciated, as we would like very much to discuss the steps and strategies necessary for initiation of the NEPA review." I find this statement to indicate CBMR understood that the Proposal had not been accepted as an application by Forest Supervisor Richmond.

It should be noted that even if the Proposal had been accepted as an application prior to Forest Supervisor Richmond's November 5, 2009 Decision to deny, the relevant regulations indicate that it may still be subsequently denied. Specifically, 36 CFR 251.54(g) *Application Processing Response* acknowledges that it is within the authorized officer's authority to subsequently deny applications prior to the initiation of NEPA. Thus even if there was some procedural defect to the posture under which Forest Supervisor Richmond characterized his decision this would not necessitate the remedy the Appellant requests. Proposals that survive screening and become applications may still be subsequently denied. Nothing in the regulations indicates this necessitates a NEPA analysis.

- 36 CFR 251.54(g)(1) states, "Except for proposals for noncommercial group uses, if a request does not meet the criteria of both screening processes or [emphasis added] is subsequently denied, the proponent must be notified with a written explanation of the rejection or denial and any written proposal returned to the proponent."
- 36 CFR 251.54 (g)(4) states, "Based on evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use..."

Taken together, 36 CFR 251.54(g)(1) and 36 CFR 251.54(g)(4) indicate that the denial of a proposal may come as a result of either failing to meet both initial or second-level screening or as a result of subsequent denial. The denial may be based on information from the applicant and other relevant information. This may include the screening criteria established by 36 CFR 251.54 or other relevant information as determined by the authorized officer.

Furthermore, even if CBMR had submitted their Proposal as a modification of their existing special use permit under 36 CFR 251.61 *Modifications*, Forest Supervisor Richmond still had the broad discretionary authority to make the decision to deny, and could do so without resorting to a NEPA analysis. The regulations make clear that such requests for modification may be denied: 36 CFR 251.61(a)(1) indicates: "In approving or denying changes or modifications. . ." Further, 36 CFR 251.61(c) states, "A holder shall obtain prior approval from the authorized officer for modifications to approved uses that involve any activity impacting the environment, other uses, or the public." The regulations clearly notify holders that requests for modification may be rejected, and nothing therein indicates that a NEPA analysis must be performed. Had CBMR

submitted an application under 36 CFR 251.61, the authorized officer would have then procedurally applied both 36 CFR 251.54(g)(1) *Acceptance of Applications* and 36 CFR 251.54(g)(2) *Processing Applications*, and may deny an application based on information from the applicant and other relevant information. It's reasonable to assume that relevant information may include, but not be limited to, the screening criteria established by 36 CFR 251.54. Thus there is nothing fatal to the Forest Supervisor's application of the screening procedures to a request for modification.

I note the Proposal was not filed as a new or amended application for a special use authorization as required by 36 CFR 251.61(a) as evidenced by appellant's statements in their June 18, 2009 letter to Forest Supervisor Richmond, and elsewhere in the appeal record. Specifically, "We have structured this Proposal Letter to be consistent with information presented in our recently-submitted 2009 MDP." (Letter to Forest Supervisor Richmond from Michael Kraatz, June 18, 2009). However, in any case, even if the Appellant had pursued an alternative course, there is nothing to suggest the outcome would have been any different.

Issue 3:

Did Forest Supervisor Richmond fail to evaluate the Snodgrass Mountain proposal the same way as other Forest Service ski area expansions?

Response to Issue 3:

Appellant contends that Forest Supervisor Richmond evaluated the Snodgrass proposal in a different way and required CMBR to meet a different standard than has been applied to other ski areas (Appeal P. 36-38). Appellant provided a table describing recent ski area expansion proposals, the controversies they involved, and contends that in each instance the Forest Service addressed controversial issues in a public NEPA process (Appeal, Page 37).

Forest Supervisor Richmond contends that he applied the regulations at 36 CFR 251.54 considering the specific proposal and the site-specific circumstances of Snodgrass Mountain and the Crested Butte Community (Responsive Statement, Page. 14). Further, that every ski area community and proposal is different and each proposal must be evaluated on its own merits. He also provides specific examples of ski areas that had expansion proposals denied at the screening level (Responsive Statement, Page 15-16).

I am persuaded by Forest Supervisor Richmond's contention that he properly applied the regulations at 36 CFR 251.54 considering the specific proposal and site-specific circumstances of Snodgrass Mountain and the surrounding community (see my Responses to Issues 2 and 4). In addition, the table that the appellant supplied does not provide any level of detail on the procedures taken to implement the described actions. However, even if I take the table at face value, it does not change the fact that this specific proposal, at this specific ski area had neither been accepted by the Forest Supervisor as an application nor as a Forest Service proposed action. Rather, the table simply illustrates that other Forest Supervisors had accepted ski areas proposals as applications and had initiated NEPA.

Contrary to appellant's contention that controversial decisions should only be resolved through the NEPA process, it is often to the direct benefit of ski areas that controversy is not solely resolved in the NEPA process. If NEPA were required for acceptance of a proposal as an application, it would expose ski areas to environmental analysis costs for any proposal with any controversial issues.

In any case the outcome at other ski areas is not dispositive of the outcome in evaluating this proposal which is left to the discretion of the authorizing officer. While many proposals eventually become applications and federally proposed actions subject to NEPA analysis, even more do not. In my experience, many proposed activities for National Forest lands and resources, even proposed activities put forward by permit holders, even proposed activities put forward by those holding ski resort permits are denied further processing based on the screening criteria. Every proposal should be considered on its own merits, and Appellants selection of a series of successful ski area expansions does nothing to suggest that it has been treated differently than the regulations demand, or differently than the plethora of other proposals that have been subject to the screening regulations.

Issue 4:

Was Forest Supervisor Richmond's Decision supported by substantial evidence?

Response to Issue 4:

Appellant contends the Decision is not supported by substantial evidence and points to such examples as public polling, the lack of coordination with local government, and the ability to explore alternatives and mitigation measures only under NEPA (Appeal, Page 38-58).

Forest Supervisor Richmond contends that the factors he considered, taken together, lead to a finding that it is not in the public interest to continue to consider development on Snodgrass Mountain. Furthermore, Forest Supervisor Richmond contends that he is not obligated to accept a proposal (Decision, Page 4-5, Responsive Statement, Page 8-9).

Forest Supervisor Richmond's Decision was to deny the Proposal based on 36 C.F.R. 251.54(e)(5)(ii) which requires the authorized officer to reject a proposal if it is found "the proposed use would not be in the public interest." The public interest standard is not further defined in the regulations, nor is the level of evidence required to reach the conclusion spelled out. The exact factors considered, and the level of confidence needed is left to the discretion of the authorizing officer, as it must be, given the great breadth of proposals for uses of Forest Service land and resources covered by the Special Uses regulations. The authorized officer's task is to consider all the information available to him, both provided by the applicant and available from other sources, in deciding holistically whether the proposed use is an appropriate use of National Forest lands and resources, and to articulate the reasons for the decision. Certainly, given this task, the authorized officer should broadly consider issues such as: socio-economic impacts; environmental/land use concerns; or adverse affects to existing recreational uses as well as many others, in considering the public interest.

As for the particular critiques of his decision presented by Appellant, I believe the record clearly indicates that Forest Supervisor Richmond understood the issues of public opinion and the role of local government as part and parcel of determining the public interest. Further, nothing compels the authorized officer to consider alternatives and mitigation solely through a NEPA process.

The evidence in the appeal record indicates that Forest Supervisor Richmond made his Decision with full access and understanding of the issues surrounding the public's view of the Proposal, as he may do under 36 CFR 251.54(e)(5). Forest Service Exhibit 34 contains hundreds of correspondences from the public received prior to the November 5, 2009 Decision to deny, and that these correspondences represent a range of public opinion.

Forest Supervisor Richmond's Decision indicates he knew and understood the complexity of making the Decision with varying degrees of public support. In the November 5, 2009 Decision letter, Forest Supervisor Richmond states the "serious responsibility" this decision places on him and that "total agreement for the project may never be possible." (Decision, Page 2). While Forest Supervisor Richmond is not required by 36 CFR 251.54(e)(5) to base his decision to approve a proposal and initiate a NEPA process based on public polling, the appeal record clearly indicates that he considered the diversity of public opinion on the Proposal when he made his Decision. I agree with Forest Supervisor Richmond that 36 CFR 251.54 does not establish a level of evidence or conviction by which he was obligated to accept a proposal other than that which he determines necessary.

Also, while 36 CFR 251.54(e)(5) does not require Forest Supervisor Richmond to base his Decision on the position of local government, the appeal record indicates he considered the position of the Town of Crested Butte, the Town of Mt. Crested Butte, and Gunnison County when making his Decision (Decision, Page 2; Responsive Statement, Page 36).

The appeal record supports Forest Supervisor Richmond's contention that he made his Decision with understanding and acknowledgement of the issues surrounding the proposal. Those issues raised by the appellant and specifically considered by Forest Supervisor Richmond include:

- Community/Social/Economic and Recreation: "While we are aware of the economic benefits that ski areas bring to communities, there are also economic and social costs." (Decision, Page 2).
- Land Use Issues: "Development of Snodgrass Mountain would place long-term pressure on the adjacent and nearby private lands to shift from ranching towards commercial ski base and housing development both in the Washington Gulch and Upper East River areas. Based on comments received and my knowledge, these shifts in land use would generally be undesired by land owners or those who frequent these areas." (Decision, Page 3).

- Suitability of Snodgrass Mountain for Lift Served Ski Development: "...I have significant concerns about the limitations of Snodgrass Mountain for lift-served skiing development based on the numerous studies and environmental issues that have been identified over the years." (Decision, Page 3). Forest Supervisor Richmond goes on to specifically identify geologic hazard, slope/terrain, avalanche, boundary management.
- Public Access: "I find that such access would be difficult to establish and see that in your proposal." (Decision, Page 4).
- Roadless: "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." (Decision, Page 4).
- Lynx: "Effects would, we believe, be measurable, leading to an adverse effect to Canada lynx and possibly result in "take" to the species." (Decision, Page 4).

Forest Supervisor Richmond's decision shows a broad and balanced examination of the issues, as is to be expected in considering a proposal for such a substantial undertaking. All of the issues considered are relevant to the determination of the public interest, and none of Forest Supervisor Richmond's statements and evaluations are unfounded. Based on the same information, I recognize that an authorized officer could have made a different decision, and advanced the Proposal to be an application for further processing. The appeal record contains conflicting evidence on the suitability of the Proposal. However, 36 CFR 251.54 neither establishes a level of evidence or conviction by which an authorized officer is obligated to accept a proposal other than that which he determines necessary, nor renders Forest Supervisor Richmond's Decision contrary to law, regulation, or Forest Service policy. A simple reading of Forest Supervisor Richmond's Decision shows it was based on information he determined necessary. Such a determination is within his broad discretionary authority, and I decline to reverse it, or to impose some higher standard on the level of evidence necessary than that found in the regulations.

Issue 5:

Was Forest Supervisor Richmond required to initiate the NEPA process to support his Decision?

Response to Issue 5:

Ultimately, all Appellant's arguments are bent upon this point. While Appellant asserts a number of procedural, practical and substantive difficulties with Forest Supervisor Richmond's Decision, the only relief requested for each and every one of these purported deficiencies is for the Forest Service to perform an EIS on the proposed use of Snodgrass Mountain for lift served skiing in the current form of the proposal put forward by CBMR.

As discussed more thoroughly above in my response to Issue 2, I find the appeal record indicates that Forest Supervisor Richmond was working with CBMR to refine its Proposal and satisfy the screening regulations. The appeal record indicates Forest Supervisor Richmond notified CBMR that its Proposal had not been accepted as an application (Letter(s)) to Timothy Mueller from Forest Supervisor Richmond dated October 13, 2006, June 5, 2008, and January 29, 2009).

Forest Supervisor Richmond's Decision to deny the Proposal clearly does not require an environmental analysis under NEPA, by the clear language of the applicable regulations. 36 CFR 251.54(e)(6) *NEPA Compliance for Second-level Screening Process* states, "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."

CBMR finalized submission of its Proposal on June 18, 2009, and the decision that the Proposal did not meet the established criteria established by 36 CFR 251.54 was made on November 5, 2009. Therefore, by regulation, the Proposal neither constitutes an agency proposal as defined in 40 CFR 1508.23, nor requires Forest Supervisor Richmond to initiate the NEPA process to support his Decision. This does not mean the Decision was not supported, or reasoned (See my Response to Issue 4 above). It simply means by regulation the NEPA process is not required.

Even if Appellant were able to convince me that its submission was not a proposal, but an application, either because it had already passed the screening criteria and had been accepted by the Forest Service, or because it was submitted as a modification by the holder of an existing authorization under 36 CFR 251.61 and thus did not require screening, two arguments I considered and rejected above, this would not avail them. Nothing in the regulations compels the Forest Service to enter a NEPA analysis on every application. Rather, the regulations, at 36 CFR 251.54(g)(1) as well as 36 CFR 251.61, explicitly account for applications to be denied subsequent to the initial screening process.

- 36 CFR 251.54(g)(1) states, "...if a request does not meet the criteria of both screening processes **or** [emphasis added] is subsequently denied..."
- 36 CFR 251.61(a)(1) states, "In approving or denying changes or modifications, the authorized officer shall consider among other things, the findings or recommendations of other involved agencies and whether the terms and conditions of the existing authorization may be continued or revised, or a new authorization issued."

Nothing in the regulations on applications suggests that these denials may only be made on the basis of an environmental analysis done in compliance with NEPA. While the regulations indicate that impacts to the environment are to be considered, there is no language in the regulations that compels an authorized officer to resolve environmental issues solely through the NEPA process. Thus even if the Forest Service accepted the proposed action as an application, there would be no reason to initiate an EIS in order to deny allowing the development.

The contrary position espoused by the Appellant not only finds no support in the regulations, but it would be eminently impractical. The Forest Service cannot be compelled to perform a NEPA analysis simply to turn down a proposal for development, even a well-developed proposal, even a proposal put forward by a current permit holder. An EIS, in particular is an involved undertaking requiring the commitment of significant time and resources on the part of the agency undertaking it. Thus the law requires it, only when the agency is proposing an action with the potential to significantly affect the human environment. On this point the Appellant continually stumbles—while it had every desire to undertake the project, at no point did the Forest Service

decide to adopt the Appellant's vision. Unless and until the Forest Service decides to undertake an action, no NEPA analysis is required. Even then, there is nothing to say the Agency cannot withdraw its decision prior to completing the NEPA analysis. In short, NEPA is required for federal action, but it is not required to justify the sort of federal inaction we have in this case: the refusal to undertake development of an undeveloped area. To grant the Appellant's requested remedy would be to waste the time, effort, energy, and funds of both the Forest Service and the ski resort. As I noted above in my Response to Issue 2, development of ski areas is a complex undertaking and requires a substantial commitment of time and resources by both the Forest Service and the permit holder. It also requires considerable capital investment by the holder. In my experience, when an authorized officer makes a decision to initiate NEPA on a proposed action, and to develop alternatives in response to the stated purpose and need, it is based on the premise that there is likelihood that a preferred alternative will be achievable. Only the authorized officer may determine, based on a thorough review of the site specific circumstances of each application, if there is likelihood that a preferred alternative will be achievable. I find that Forest Supervisor Richmond came to this conclusion after a thorough review of all the issues and that nothing in law or regulation compels him to move forward with the NEPA process.

Issue 6:

Did Forest Supervisor Richmond's Decision amend the GMUG Forest Land and Resource Management Plan (LRMP)?

Response to Issue 6:

Appellant contends that Snodgrass Mountain has been allocated for developed skiing in Management Area 1B in the GMUG Forest Plan since 1979 and that decision was made in a public NEPA process. In addition, Management 1B is the Forest Service's determination that Snodgrass Mountain is suitable for the expansion of lift-served skiing at CMBR rather than management as open space (Appeal, Appeal Exhibit 9, Page III-94; Reply to Responsive Statement, Page 44-46; and Oral Presentation). Further, that the GMUG Forest Plan can be amended but that procedures mandated by NFMA and agency regulations must be followed (Reply to Responsive Statement, Page 44-46). Appellant argues then that Forest Supervisor Richmond's November 5, 2009 Decision amended the plan without any process or public involvement in contravention of law, regulation and Forest Service policy.

In his Decision (Decision, Page 1), Forest Supervisor Richmond states that his conclusions do not affect the current Forest Plan allocation of Snodgrass Mountain to downhill skiing (Management Prescription 1B) or the special use permit boundary. GMUG Forest Plan Management Prescription 1B at III-94 states, "Management emphasis provides for downhill skiing on existing sites and maintains selected inventoried sites for future downhill skiing recreation opportunities." (Appeal, Exhibit 9, III-94).

The language of the decision is clear that Forest Supervisor Richmond did not change the Forest Plan explicitly or implicitly. Forest Supervisor Richmond states, "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.” (Decision, Page 1). Furthermore, Forest Supervisor Richmond states, “I am hopeful that we can maintain a productive dialogue about the future of CBMR and find ways to enhance the ski area offerings in ways that are more acceptable to the community and the environment.” (Decision, Page 5).

I note that Management Prescription 1B does not require lift-served access as the means by which to accomplish downhill skiing opportunities, nor does the Forest Plan require downhill skiing on every acre of National Forest System lands within Management Prescription 1B.

Forest Supervisor Richmond’s Decision also stated, “...it is not in the public interest to continue to consider development on the Snodgrass Mountain any further.” Given the fact that Snodgrass Mountain is within lands prescribed for downhill skiing, and that Snodgrass Mountain is within the ski area special use permit boundary, Forest Supervisor Richmond’s statement needs clarification. Neither the statement, nor the Decision itself, conveys guidance on how the appellant might submit a proposal to provide downhill skiing in the context of Forest Plan direction, and if doing so would be acceptable to the authorized officer. Such guidance is required by 36 CFR 251.54(e)(3) *Guidance and Information to Proponents*.

APPEAL DECISION

I have thoroughly reviewed the appeal record and have considered all of the appeal issues. I note the appeal record contains much contradictory evidence regarding the merits of appellant’s Proposal.

Based on my review of the appeal record, I affirm Forest Supervisor Richmond’s Decision of November 5, 2009 to reject the appellant’s master development plan which includes a proposal to develop Snodgrass Mountain for lift-served skiing. I also affirm Forest Supervisor Richmond’s Decision of November 5, 2009 to reject appellant’s site-specific proposal to build and operate lift-served ski facilities on the mountain.

Although another authorized officer might have made a different decision, I find that Forest Supervisor Richmond’s Decision indicated that he thoroughly examined the relevant issues. His decision did not violate law, regulation, or agency policy nor was it arbitrary or capricious, and was fully within his broad discretionary authority.

In making my decision, I emphasize that it is related only to the appellant’s current master development plan and site-specific proposals. I am also requiring Forest Supervisor Richmond to provide guidance to the Appellant on how it should submit a proposal to provide downhill skiing in the context of LRMP direction that the authorized officer would find acceptable as required by 36 CFR 251.54(e)(3) *Guidance and Information to Proponents*. In the alternative, if any downhill skiing is no longer acceptable to the authorized officer, the GMUG NF is required to initiate a Forest Plan Revision, modifying the management prescription boundaries.

ADMINISTRATIVE REVIEW

This is the final administrative decision of the United States Department of Agriculture, unless the Chief of the Forest Service, on his own initiative, elects to review the decision per 36 CFR 251.87(e) (1), 251.99(f), and 251.100(c).

Sincerely,

/s/ James M. Peña

JAMES M. PEÑA

Appeal Deciding Officer

Deputy Regional Forester

cc: Charles S Richmond, Rick D Cables, Jim Bedwell, Joel Holtrop, Jeff Burch, Sharon Friedman