

**APPEAL TO THE REGIONAL FORESTER
ROCKY MOUNTAIN REGION
UNITED STATES FOREST SERVICE**

In the Matter of the November 5, 2009 Decision
of Forest Supervisor Charles S. Richmond of the Grand Mesa
Uncompahgre and Gunnison National Forests
Regarding Crested Butte Mountain Resort

**NOTICE OF APPEAL PURSUANT TO 36 C.F.R. PART 251, SUBPART C
BY CRESTED BUTTE, LLC AND CNL INCOME CRESTED BUTTE, LLC**

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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.

<u>Exhibit</u>	<u>Description</u>
21	Letter of Support for the Snodgrass Expansion Signed by Over 500 Residents, Published April 11, 2008 in the <i>Crested Butte News</i> .
22	Letter of Support for the Snodgrass Expansion Signed by Over 280 Local Businesses, Published November 27, 2009 in the <i>Crested Butte News</i> .
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, <i>Forest Service's Charlie Richmond Well Aware of Snodgrass Outcry</i> , CRESTED BUTTE NEWS, Nov. 25, 2009.
27	Mark Reaman, Seth Mensing and Mike Horn, <i>Snodgrass: Reactions in the Valley . . . Shock and Awe</i> , CRESTED BUTTE NEWS, Nov. 11, 2009.
28	Mark Reaman, <i>Forest Service Rejects Snodgrass</i> , CRESTED BUTTE NEWS, Nov. 11, 2009.
29	Mark Reaman, <i>Wow</i> , 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.

<u>Exhibit</u>	<u>Description</u>
36	Arapahoe Basin 2006 Improvement Plan Environmental Impact Statement (Dec. 2006) (excerpts).
37	Will Shoemaker, <i>Outcry Ensues Over Snodgrass Decision</i> , GUNNISON COUNTRY TIMES (Nov. 19 2006).
38	Seth Mensing and Mark Reaman, <i>Politicians Jump in Over Snodgrass Controversy</i> , CRESTED BUTTE NEWS (Dec. 9, 2006).
39	Mike Horn, <i>Protesters March on Elk to Protest Snodgrass Decision</i> , CRESTED BUTTE NEWS (Dec. 9, 2006).
40	Mark Reaman, <i>Town Council Agrees to Public Request; Snodgrass Back on Agenda</i> , 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.

I. INTRODUCTION

Crested Butte, LLC and CNL Income Crested Butte, LLC, respectively the operator and permittee of Crested Butte Mountain Resort (collectively, “CBMR”), appeal the November 5, 2009 decision signed by Grand Mesa, Uncompahgre and Gunnison (“GMUG”) National Forest Supervisor Charles S. Richmond (the “Decision”) pursuant to 36 C.F.R. Part 251, subpart C. See Ex. 1. CBMR holds a special use permit to occupy and use National Forest System lands issued December 5, 2008 under the Ski Area Permit Act, 16 U.S.C. § 497b, and Forest Service regulations at 36 C.F.R. Part 251, subpart B. See Ex. 2. The Decision rejected CBMR's proposal to expand lift-served skiing onto Snodgrass Mountain, an area that has been inside the special use permit and designated for skiing in the GMUG Forest Plan for over twenty-five years.

The Reviewing Officer should reverse the Decision because it is arbitrary and capricious, contrary to law, and offensive to the public interest for the reasons identified in this appeal. The Decision will not stand the “thorough, probing, in-depth review” that a federal court will undertake. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). The Reviewing Officer should direct the Deciding Officer to accept CBMR's master development plan and initiate the public environmental review process under the National Environmental Policy Act (“NEPA”) to consider the Snodgrass Mountain proposal.

Representatives of CBMR met with the Forest Supervisor and other Forest Service representatives on November 3, 2009 to discuss the Decision, but were unable to resolve the issue. This appeal is timely because it is filed with the Regional Forester within 45 days of the

date of the Decision. 36 C.F.R. § 251.88. CBMR requests an oral presentation to the appeal Reviewing Officer under 36 C.F.R. § 251.97. CBMR would like to explore with the Deciding Officer whether the issues on appeal may be resolved by means other than a decision on the appeal as provided by 36 C.F.R. § 251.93(b).

The Decision states that it is not subject to appeal. Ex. 1 at 5. That determination is wrong as a matter of law for the reasons stated below on pages 24-28. Briefly, CBMR may appeal the Decision under the procedures of 36 C.F.R. Part 251, subpart C because those regulations authorize a “holder of a written authorization to occupy and use National Forest System land” such as CBMR to “seek[] relief from a written decision related to that authorization.” 36 C.F.R. § 251.86(b). CBMR may appeal a written decision “related to ... administration of” a ski area permit that was “issued under 36 C.F.R. Part 251, subpart B.” 36 C.F.R. § 251.82(a)(8). The claim that the Decision is not appealable is deeply troubling because Forest Service regulations expressly provide for appeal of decisions that, as here, determine the future of a ski area and the community that depends on it.

On December 16, 2009, Forest Supervisor Richmond notified CBMR that “you now have the opportunity to file an appeal” because “the Regional Forester . . . has agreed to” allow an appeal. Ex. 41. CBMR’s right to appeal the Decision is guaranteed by federal law. 36 C.F.R. Part 251, subpart C. It does not arise because the Regional Forester agrees to allow it.

Forest Supervisor Charles Richmond signed the Decision. Ex. 1 at 5. CBMR has filed this appeal with the Regional Forester because the administrative appeal regulations provide that a Forest Supervisor decision may be appealed to the Regional Forester. 36 C.F.R. §

251.87(b)(1). Based on statements made by the Forest Supervisor, and other information, CBMR believes that the “whole record” associated with the Decision within the meaning of 5 U.S.C. § 706, and the “appeal record” within the meaning of 36 C.F.R. § 251.81, will show that Regional Forester Cables made the Decision in conjunction with Forest Supervisor Richmond. E.g., Ex. 5 ¶ 34. The appeal regulations require the Deciding Officer and Reviewing Officer to be different people; the person who makes a decision cannot also resolve the appeal of it. See 36 C.F.R. § 251.87. That requirement ensures that the appeal process “offer[s] appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding” special use permits. Id. § 251.80(b). To meet that standard here, and so that the Regional Forester is not put in the awkward position of resolving the appeal of a decision he helped make, CBMR respectfully requests that the Regional Forester transmit this appeal to the Chief of the Forest Service for resolution because the Chief resolves appeals of decisions made by the Regional Forester. Id. § 251.87(b)(2).

II. ADVERSE EFFECTS OF THE DECISION AND SUMMARY OF THE APPEAL

CBMR appeals the Forest Service's rejection of CBMR's master development plan proposal to expand lift-served skiing and snowboarding onto Snodgrass Mountain, and refusal to begin a public environmental review process under NEPA to consider the proposal. CBMR is the recreational and economic heart of the East River Valley in Gunnison County, Colorado. 1983 Forest Plan EIS, Ex. 8 at III-17 – III-18. The communities of Mt. Crested Butte, Crested Butte, Crested Butte South, and Gunnison depend on skiing at CBMR. Snodgrass Mountain lies to the north of Crested Butte Mountain. It has been inside the special use permit for CBMR

since 1982, and allocated for developed skiing in the Forest Plan since 1979. Ex. 6 at 4; Ex. 7 at 1.

The Decision is devastating to CBMR because it has a need to expand onto Snodgrass Mountain that is critical to the long term viability of CBMR in the competitive environment for destination skiers. CBMR does not offer sufficient terrain variety and extent, particularly intermediate and developed expert terrain, to compete in the destination resort market. See Ex. 3 at ES-2. This shortcoming has significantly limited CBMR's ability to attract visitors and adversely affected the economies of the local communities that depend on skiing on public lands at CBMR. CBMR has seen its market share continually decline since the 1980s. If the Decision stands, CBMR will increasingly become less competitive as a destination resort and the economies of the local communities will suffer.

The Forest Service agrees that CBMR has a convincing need to expand onto Snodgrass Mountain. Ex. 12 at 1. 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. Ex. 11 at 1. Before starting the NEPA process, the Forest Service required CBMR to work through an undefined four year “Pre NEPA” process between 2004 and 2009. Mueller Declaration, Ex. 5 ¶ 39. CBMR resolved the threshold issue of geological stability at Snodgrass Mountain and demonstrated substantial public support for the proposal in 2008 and 2009. Ex. 19 at 1-2. In January 2009, after CBMR spent over \$1.8 million in the Pre NEPA process, the Forest Service notified CBMR that it was ready to consider a MDP amendment for Snodgrass Mountain. Ex. 19 at 2.

CBMR submitted a detailed MDP amendment for Snodgrass Mountain in May 2009. Ex. 3. The MDP amendment is designed to remedy the shortcomings of the resort by expanding the developed terrain network to include 276 acres on Snodgrass Mountain within the existing special use permit. Ex. 4 at 3. CBMR requested the Forest Service to begin the public environmental review process under NEPA. Ex. 4 at 1.

The Forest Service rejected the proposal on November 5, 2009. Among other things, Forest Supervisor Richmond stated in the Decision that “public support for this proposal did not exist” and “it is not in the public interest to continue to consider development on Snodgrass Mountain any further.” Ex. 1 at 2, 5. The Decision is arbitrary and capricious and should be reversed.

First, substantial public support exists for the proposal. The swift reaction to the Decision demonstrates that the Forest Supervisor grossly miscalculated public opinion. The Town of Mt. Crested Butte, City of Gunnison, Crested Butte South Property Owners Association, and Meridian Lake Meadows Homeowners Association sent formal letters to the Forest Service in 2008 requesting that it begin the NEPA process. Exs. 13, 16, 17, 18. The Town of Crested Butte sent a letter in May 2008 requesting the ability to participate in a “collaborative” NEPA process. Ex. 14. Multiple polls have demonstrated overwhelming support for beginning the NEPA process – a rational position that indicates both general support for the project and a desire to see the details, reasonable alternatives, and potential effects identified in an open and fair process. The Forest Supervisor dismissed this support because he

unreasonably demanded proof of support for the final development, not support for reviewing the proposal under NEPA. See, e.g., Ex. 15 at 2.

Second, the Forest Supervisor made a watershed decision about the future of CBMR and the communities that depend on it without the formal opportunity for public notice or comment. The Decision purports to “fairly and deliberately” determine “what is in the public interest” based “on comments received.” Ex. 1 at 2-4. That claim is preposterous because the Forest Service never asked for comments, never identified a Snodgrass Mountain proposal to the public for comment, and never notified the public that it was going to make the decision on the proposal without a public environmental review. This is a terrible way for the Forest Service to make a decision that adversely affects communities that depend on skiing on public lands. The Forest Service should use the public NEPA process to make the decision with notice and comment on a draft and final EIS and extensive public participation.

Third, the Pre NEPA process applied here compromised the Forest Service’s obligation to comply with NEPA. CBMR recognizes that some Pre NEPA refinement may be appropriate for the Forest Service to commence an efficient NEPA process. But a primary goal of the Pre NEPA process conducted by the GMUG National Forest was to avoid starting the public environmental review process unless the Forest Service had decided to authorize the development. The GMUG National Forest allowed the private and subjective Pre NEPA process to displace the public and objective NEPA process. That is arbitrary and capricious because NEPA requires the Forest Service to prepare an EIS “early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or

justify decisions already made.” 40 C.F.R. § 1502.5. The Forest Service spent years avoiding complying with NEPA. It decided the future of a ski town based on a closed, piecemeal, and rudderless review of the proposal. This Pre NEPA process violated the letter and spirit of NEPA because the GMUG National Forest used it to make a decision on major federal action without first preparing an EIS and requesting public comments. The November 5, 2009 Decision violates NEPA because it is a “recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment” prepared without the “detailed” EIS required by the statute. 42 U.S.C. § 4332(c).

Fourth, the Forest Service stated that it followed its special use permit screening regulations in issuing the Decision. It did not. The screening regulations at 36 C.F.R. § 251.54 do not describe or authorize the Pre NEPA process applied at CBMR. Forest Service policy states that screening is intended to be a quick and “very simple” review that does “not require a lengthy analysis,” does not require “detailed evaluation of the proposed use,” and does not include “an analysis of impacts to the environment.” 63 Fed. Reg. 65,950, 65,963 (Nov. 30, 1998). The screening regulations do not even mention “Pre NEPA.” The regulations do not authorize the four year Pre NEPA process invented by the GMUG National Forest in which the agency required multiple environmental studies, identified and rejected reasonable alternatives, required CBMR to prove consensus public support, required CBMR to prove local government support, and demanded that CBMR resolve all issues before starting the NEPA process. The GMUG National Forest made up the process applied at CBMR; it was not “screening” within the meaning of 36 C.F.R. § 251.54. It is highly arbitrary for the Forest Service to lead CBMR down

a vague, subjective, and undefined Pre NEPA path at great expense to CBMR and then claim after over four years that the proposal fails a threshold “screening” test.

Fifth, the Forest Service treated CBMR differently than other ski areas where it has used the public NEPA process rather than a private multi-year Pre NEPA screening process to decide whether to authorize terrain expansions. CBMR does not contend that the Forest Service must initiate NEPA review every time it receives a proposal for the use of federal lands. But the Forest Service should and must use the public NEPA process to make the decision here because the agency agrees with the purpose and need for the proposal, has reviewed that proposal in fine detail for years, has determined that none of the Pre NEPA issues are obstacles, and a critical mass of citizens and local governments have asked the Forest Service to begin the NEPA process. CBMR and the community deserve the same public NEPA process applied at other ski areas, not the self-described “unappealable” public interest decision made by Forest Supervisor Richmond behind closed doors, without objective studies, and without public involvement.

Sixth, the stated rationale for the Decision is not supported by either facts or law. Every one of the “kitchen sink” reasons listed in the Decision for rejecting the proposal is factually wrong, legally wrong, or simply an issue for analysis in a NEPA process rather than an obstacle to the proposal. The Forest Supervisor’s conclusion that the Snodgrass proposal would not be in the public interest is not credible because his rationale does not withstand the scrutiny it will be subject to under federal law. E.g., 5 U.S.C. § 706; Citizens to Preserve Overton Park, 401 U.S. at 415.

The appeal Reviewing Officer should reverse the Decision and direct the Forest Supervisor to review the proposal under NEPA so that the public and CBMR receive the benefit of an objective NEPA process conducted with integrity. The Forest Service can do far better than it did here. The community depends on skiing on public lands at CBMR. It deserves a NEPA process the Forest Service can be proud of, not the unprecedented, insular, and arbitrary process invented by the GMUG National Forest.

III. FACTS

A. History of Planning for Lift-Served Skiing on Snodgrass Mountain.

The Forest Service has planned for the expansion of lift-served skiing onto Snodgrass Mountain for decades. The Forest Service completed the first feasibility study for skiing on Snodgrass Mountain in 1976. Forest Plans prepared with public notice and comment have designated Snodgrass Mountain for expansion of CBMR since 1979, including the draft GMUG Forest Plan published in 2007. 2007 Proposed Forest Plan, Ex. 10 at Map 16; 1982 Snodgrass EA, Ex. 6 at 4.

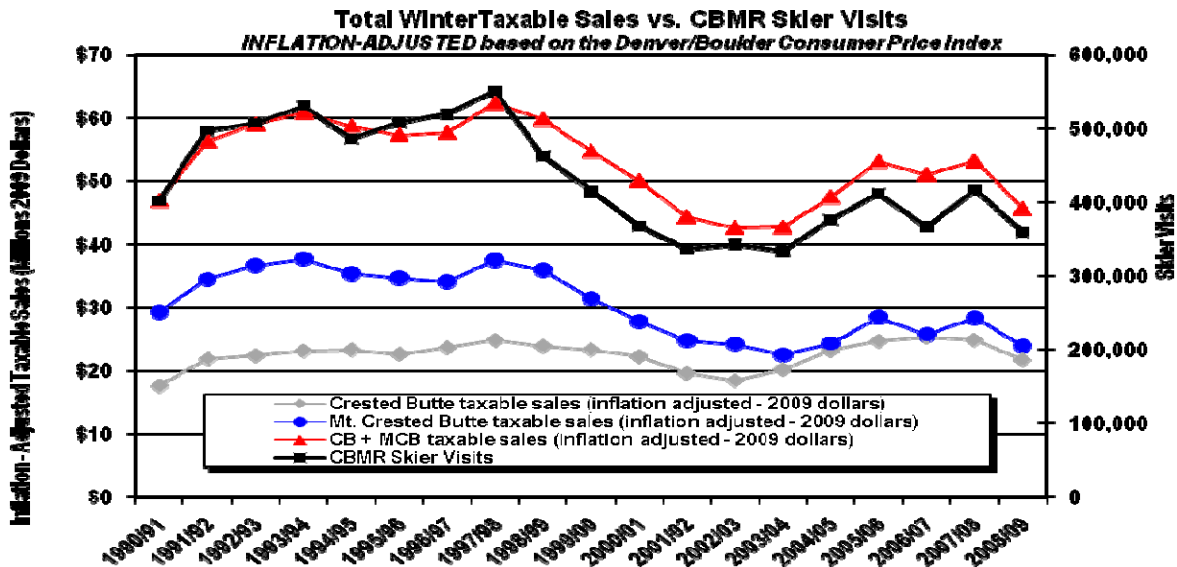
In 1982, the Forest Service authorized the expansion of lift-served skiing onto Snodgrass Mountain. Ex. 7 at 1. The agency conducted a public environmental review under NEPA, added Snodgrass Mountain to the special use permit of CBMR, and authorized the ski area to expand. Ex 6; Ex. 7 at 1. The ski area constructed a road to the top of Snodgrass Mountain but did not implement the expansion due to financial constraints. Ex. 5 ¶ 6.

The Forest Service kept Snodgrass Mountain inside CBMR's special use permit. The Forest Service reissued the permit multiple times since 1982 when the resort was purchased,

most recently in 2008. Ex. 2 at Exhibit A. Each time the Forest Service included Snodgrass Mountain.

B. Need for Additional Ski Terrain at CBMR.

The economy of the East River Valley in Gunnison County, Colorado centered on mining and ranching until the mid-twentieth century. Since then tourism, recreation, and skiing at CBMR have become the “economic base” for the area. 1983 Forest Plan EIS, Ex. 8 at III-17. Tourism, construction, retail trade, real estate sales/rentals and arts/recreation comprise 55% of the employment sector in Gunnison County today.¹ CBMR is the polestar of the social, recreational, and economic life of the East River Valley. As goes the ski area, so goes the economy of the valley. Sales tax revenues of the towns of Crested Butte and Mt. Crested Butte are directly correlated with skier visits at CBMR:



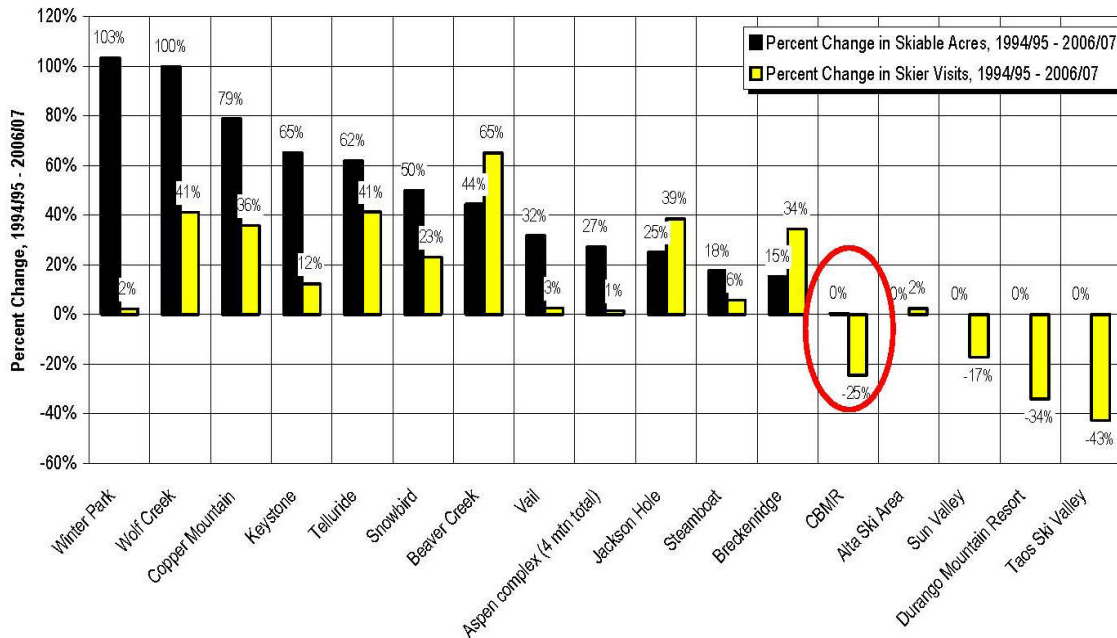
¹ HEADWATER ECONOMICS, A SOCIO-ECONOMIC PROFILE OF GUNNISON COUNTY 29 (2009).

CBMR is a four-season destination resort, not a day-use ski area. 1983 Forest Plan EIS, Ex. 8 at IV-118 (the “Forest has two destination ski areas, Crested Butte and Telluride and one day-use ski area, Powderhorn”). It draws visitors from across Colorado, throughout the United States, and from international locations. Ex. 3 at 10. Destination visitors spend more than one day in the local community. They ski or snowboard for multiple days, stay in locally-owned hotels, eat in locally-owned restaurants, shop in locally-owned stores, and contribute to the economic well-being of the East River Valley. The graph set forth above documents the dramatic positive effect destination visitors have on local businesses. Between 60 and 70 cents of every dollar spent by a skier or snowboarder in Colorado goes to businesses in the community other than the ski area. Ex. 42 at 1-2.

As a destination resort, CBMR must offer the terrain variety and extent that guests look for in selecting a winter vacation destination. The market has evolved with the introduction of high-speed lifts, improved equipment, and changing demographics. The Forest Service has authorized other destination resorts to expand to offer additional terrain to meet the expectations of guests in selecting a resort for a multiple day vacation. Those communities have benefitted. Notable examples include Telluride Ski Resort, Copper Mountain Resort, Breckenridge Resort, Snowbird Resort, Vail Mountain Resort, Beaver Creek Resort, Keystone Resort, and Snowmass Resort.² See, e.g., Ex. 3 at 12-13. The Forest Service authorized each of those expansions, even in the face of opposition and controversy. The terrain expansions have helped those resorts and communities retain market share and in some instances even grow visitation. Ex. 3 at 13. Ski

² See page 36-38 below for additional information on recent ski area expansions permitted by the Forest Service.

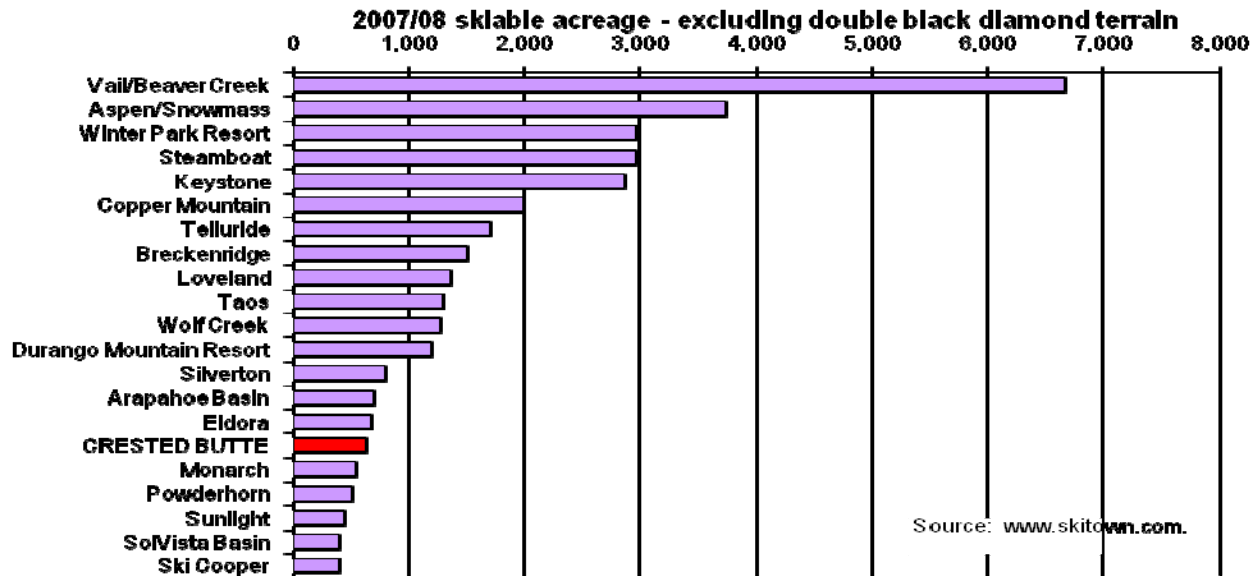
areas that have not kept pace with the evolving destination resort market have not retained market share, and their visitation has declined. Ex. 3 at 14.



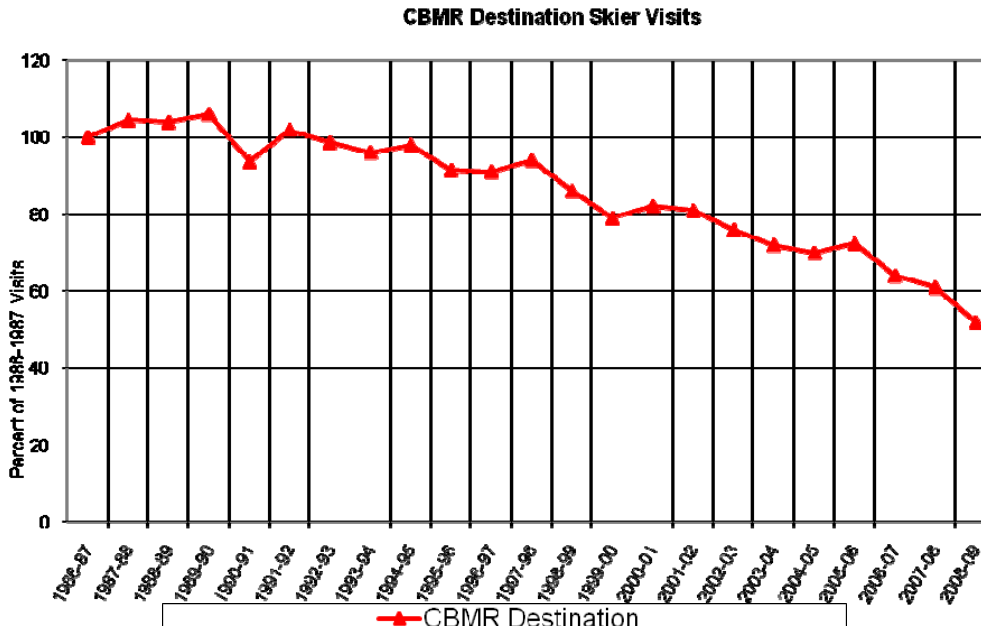
CBMR’s overall managed terrain network is limited when compared to other destination resorts. The ski area is known for its “double black diamond” extreme ski terrain. Ex. 3 at ES-2. But CBMR has limited intermediate and developed expert³ terrain. Id. Intermediate and developed expert terrain is a key factor in attracting destination skiers and the economic benefits they provide. Compared with other destination ski resorts – such as Telluride, Copper Mountain, Park City, Beaver Creek, and Durango Mountain Resort – CBMR has a shortage of this key

³ “Developed expert” terrain refers to trails which are regularly groomed and maintained for use by the majority of the ski area’s guests. It excludes the more aggressive “non-traditional” expert terrain such as hike-to areas, open bowls, trees, and steeps. CBMR’s limited amount of developed expert of terrain is often overlooked due to its reputation for its quantity and quality of “Extreme Limits” terrain. Ex. 3 at ES-2.

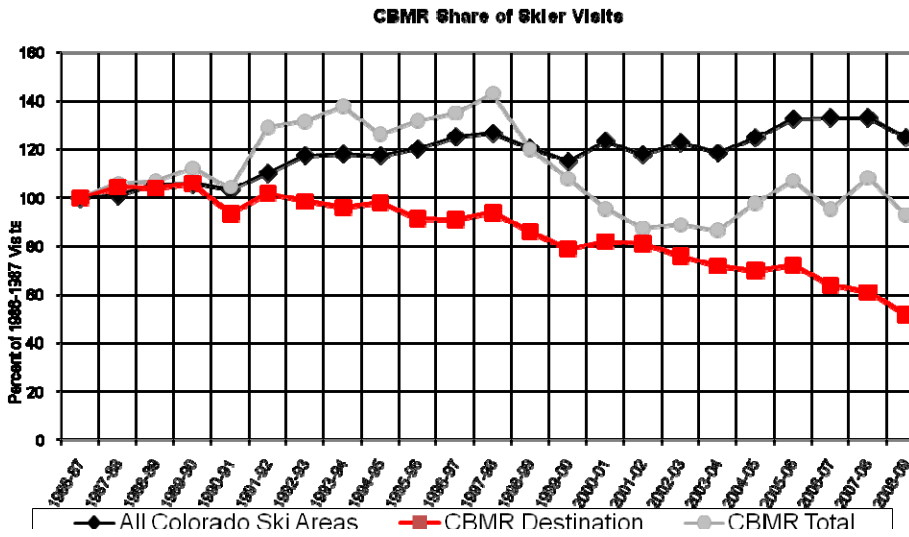
terrain. Excluding “double black diamond” terrain, CBMR’s skiable acreage is among the lowest in the state:



This requires CBMR and the local community to “fight above their weight.” They must compete for destination visitors against resorts and communities like Telluride, Steamboat, and Breckenridge with traditional developed terrain similar to Eldora. The lack of sufficient terrain has led CBMR to experience a marked decline in destination skier visits since the mid-1980s:



CBMR's share of Colorado skier visits has similarly declined dramatically:



C. The Forest Service Agreed With the Need For Snodgrass, Screened the Proposal in 2005, and Determined it Would Review the Expansion Under NEPA.

CBMR was acquired by Tim and Diane Mueller in March 2004. Mueller Declaration, Ex. 5 ¶ 3. Shortly after, the Forest Service and the Muellers discussed the expansion of lift-serviced skiing and snowboarding onto Snodgrass Mountain. Mueller Declaration, Ex. 5 ¶ 5. The Forest Service decided in 2005 to evaluate the proposed expansion in a NEPA process. In June 2005, CBMR and the Forest Service entered into a Memorandum of Understanding (the “MOU”) to guide the NEPA process for Snodgrass Mountain. This MOU has never been terminated and is in effect. Ex. 11 ¶ F.14. The MOU states:

Based upon a project description and other information provided by the Proponent, and an initial assessment of the Project, the Forest Service has determined that the Project will be addressed in an Environmental Impact Statement (EIS).

Ex. 11 at 1 (emphasis added).

The Forest Service requested CBMR to undertake a one year Pre NEPA process to review the geology of the mountain. Mueller Declaration, Ex. 5 ¶ 11. As the phrase “Pre NEPA” suggests, the purpose was to provide an introduction to the NEPA process. The MOU states: “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.” Ex. 11 at 2 (emphasis added). “Pre NEPA” was not the stage where the Forest Service would decide to start the NEPA process; the MOU states that the Forest Service had already made the decision “that the Project will be addressed in an Environmental Impact Statement.” Ex. 11 at 1.

In October 2006, Forest Supervisor Charlie Richmond agreed that there is a need for the Snodgrass expansion. He wrote:

You have presented us with a convincing argument supporting a need for more intermediate ski 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 .
...

Ex. 12 at 1.

D. The Pre NEPA Process Applied by the GMUG National Forest.

The Forest Service identified two issues for CBMR to resolve in Pre NEPA: (1) the geological stability of Snodgrass Mountain; and (2) whether sufficient public support exists to consider the Snodgrass Mountain proposal in the NEPA process. The Forest Service determined in January 2009 that CBMR resolved both issues. Ex. 19 at 1-2.

1. CBMR Resolved the Geology Question.

The Forest Service determined that it would decide in the Pre NEPA process whether Snodgrass Mountain is sufficiently geologically stable for developed skiing and snowboarding. Michael Burke, a retired Forest Service employee, began to prepare a report on the geology of Snodgrass Mountain in 2004. He never completed it. The Forest Service obtained his working papers in 2006 and hired a consulting firm to complete the Burke Report.⁴ The Burke Report questioned the suitability of Snodgrass Mountain for skiing. But the Forest Service, CBMR, and others questioned the reliability of the Burke Report, including because Mr. Burke did not

⁴ GMUG AND SAN JUAN NATIONAL FORESTS, SNODGRASS MOUNTAIN GEOLOGIC HAZARDS AND ASSESSMENT OF POTENTIAL EFFECTS OF SKI AREA DEVELOPMENT ON SLOPE STABILITY: TECHNICAL REPORT 1 (2006), *available at* <http://www.fs.fed.us/r2/gmug/policy/#ski> (hereinafter “2006 Technical Report”).

himself collect or evaluate direct data about Snodgrass Mountain. Corey Wong E-mail to Michael Kraatz, Ex. 23.

The Forest Service encouraged CBMR to retain a geologist to prepare an independent study. CBMR hired Jim McCalpin, a geologist with an international reputation for determining geological stability for siting nuclear power plants and other facilities. Dr. McCalpin collected extensive data about the hydrology, groundwater, and geology of Snodgrass Mountain in 2006, 2007, and 2008, and prepared an evaluative report. 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.⁵

The Forest Service requested Rex Baum with the United States Geological Survey (“USGS”) to prepare a report evaluating the Burke Report and the McCalpin Report. The Forest Service released the Baum Report in January 2009.⁶ The Forest Service refused to allow Dr. McCalpin to discuss the issues with Rex Baum nor did the Forest Service accept or respond to comments on the Baum Report. Ex. 23. Based on the Baum Report, the Forest Service identified two limited areas on Snodgrass Mountain for CBMR to avoid. Ex. 19 at 2. The Forest Service notified CBMR that the vast majority of Snodgrass “may well be suitable for ski area development.” Ex. 19 at 2. CBMR submitted a master development plan in June 2009 that avoided both areas. Ex. 3 at 96 (“Two areas of geologic concern were identified . . . and no

⁵ JIM MCCALPIN, GEOLOGY AND SLOPE STABILITY OF THE “SNODGRASS MOUNTAIN SKI AREA”, CRESTED BUTTE, COLORADO Ch. 9, Page 1 (2008), *available at* <http://www.fs.fed.us/r2/gmug/policy/#ski> (hereinafter “McCalpin Report”).

⁶ REX L. BAUM, U.S. GEOLOGICAL SURVEY, REVIEW OF RECENT SLOPE STABILITY STUDIES AT SNODGRASS MOUNTAIN, COLORADO (2009), *available at* <http://www.fs.fed.us/r2/gmug/policy/#ski>.

clearing, grading, road construction, trenching, lift terminals or snowmaking would occur in these areas.”).

2. CBMR Demonstrated Public Support.

Forest Supervisor Richmond requested CBMR in early 2008 to demonstrate public support for Snodgrass before the Forest Service would start NEPA review. He “suggested meeting with the two town councils, the county commissioners, RMBL [Rocky Mountain Biological Laboratory], HCCA [High Country Citizens Alliance], and Friends of Snodgrass Mountain.” Ex. 15 at 2. He stated: “People feel strongly that they should have a say about the future of the valley and the Forest Service agrees.” Ex. 15 at 2.⁷ The Forest Supervisor asked CBMR to demonstrate support for actual development, not support for beginning the NEPA process. Ex. 15 at 2.

CBMR does not believe that the Forest Service’s requirement to demonstrate public support for a proposal at the Pre NEPA stage is appropriate. It is unreasonable for the Forest Service to require proof of public support for the ski area expansion before the NEPA process starts because that support should be measured in the NEPA process with formal public notice and comment. See 40 C.F.R. § 1500.1(b) (“NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”). But CBMR fulfilled the Forest Supervisor’s request. CBMR conducted a public outreach campaign starting in summer 2008, hosted 11 presentations and work sessions,

⁷ The Forest Supervisor's comment is ironic because the Forest Service never itself requested public input on CBMR's Snodgrass Mountain proposal, never held a public comment period, and never made a proposal available for public review.

and held scores of meetings with individuals, elected officials, administrative agencies, and other interested parties. Ex. 4 at 9-11; Mueller Declaration, Ex. 5 ¶ 22.

Polls showed overwhelming public support. An April 2008 Gunnison Times poll revealed 85% of respondents supported the Snodgrass expansion. Ex. 4 at 9. In June 2008, 88% of respondents to a similar poll stated that they wanted the City Council to ask the Forest Service to start the NEPA review. Ex. 4 at 9. In April 2008, 585 local residents signed a letter of support for expansion. Ex. 21.

Mt. Crested Butte (population 700), Crested Butte South (population 1,500), the Meridian Lakes Meadows Homeowners Association (56 homes/lots abutting Snodgrass Mountain), and the City of Gunnison (population 5,400) urged the Forest Service to evaluate the proposal in a fair and open NEPA process. See Exs. 13, 16, 17, 18. The Town of Crested Butte (population 1,500) stated in May 2008 that it did not believe there was enough public support yet to actually authorize the project, but asked:

Please forward additional information about the upcoming public involvement, lead agency and cooperating agency involvement in the process and the role anticipated for the Town in this process. We urge the Forest Service to implement a collaborative NEPA process, if necessary, that includes Town staff, elected officials and community residents.

Ex. 14 at 1.

Gunnison County determined that it must be neutral and cannot comment on the proposal because it may review the proposal under County regulations. The County explained:

Gunnison County Board of County Commissioners cannot submit a letter of support or opposition regarding this application. Nor should the US Forest Service construe the lack of such letter as lack of support or deny the application to move forward based on the County's inability to weigh in. Please do not use

this inability on the County's part as cause for any U.S. Forest Service decision that is yours to make.

Ex. 20 at 2.

On January 29, 2009, the Forest Service determined that public support was not "cause at this point to deny a proposal, presuming little changes by the time you submit it." Ex. 19 at 1.

3. The Regional Forester Requested CBMR to Demonstrate Local Government Support.

At an August 16, 2009 meeting with CBMR representatives, Regional Forester Rick Cables and Deputy Regional Forester Maribeth Gustafson requested CBMR to convene a working group of local government representatives and to resolve their issues before the Forest Service would start NEPA review. Mueller Declaration, Ex. 5 ¶ 34. CBMR expended substantial resources in September and October 2009 to organize and launch the collaborative discussions, including by interviewing potential facilitators. *Id.* at ¶ 35. Deputy Regional Forester Maribeth Gustafson and Forest Supervisor Charles Richmond approved CBMR's written outline of the proposed local government discussions on September 11, 2009. *Id.* at ¶ 37.

E. Throughout the Pre NEPA Process, the Forest Service Indicated That It Would Evaluate the Snodgrass Proposal In a NEPA Process.

CBMR worked diligently throughout the Pre NEPA process between 2005 and 2009 to resolve every topic the Forest Service identified, expending over four years and \$1.8 million. Mueller Declaration, Ex. 5 ¶ 40. CBMR's objective was to get to the public NEPA process that the Forest Service committed to start in the MOU. CBMR refined the proposal in response to Forest Service direction. CBMR met with Forest Service representatives in Gunnison on April 24, 2008 and presented a proposed outline for a Master Development Plan. *Id.* at ¶ 23. CBMR

provided a draft plan to the Forest Service the first week of February, 2009. Id. at ¶ 25. The Forest Service reviewed the draft and met with CBMR representatives on March 5, 2009 to discuss the document. Id. at ¶ 27. The MDP was revised in response to both oral and written comments submitted by the Forest Service. Id. at ¶¶ 27-30. GMUG Snow Ranger and Wilderness Manager Kai Allen alone submitted 160 detailed written comments to CBMR on March 19, 2009, and additional written comments were submitted by Winter Sports Specialist Ken Kowynia. Ex. 24; Mueller Declaration, Ex. 5 ¶¶ 28-29. In May 2009 CBMR jointly submitted a final MDP amendment for both Crested Butte Mountain and Snodgrass Mountain that was based on Forest Service input, and in June 2009 submitted a formal Project Proposal Letter for the Snodgrass Mountain expansion. Exs. 3, 4.

CBMR's work in the Pre NEPA process was driven by the Forest Service's repeated statements that the proposal would be evaluated in an objective and public NEPA process. For instance, in June 2009, the Forest Service notified CBMR that it planned to hire a Project Coordinator to manage the NEPA process, and listed four ways it could fill the position. Mueller Declaration, Ex. 5 ¶ 31. In July 2009, the Forest Service told CBMR that it had published the Project Coordinator position internally. Id. at ¶ 32. The same month, the Forest Service told CBMR that it was ready to move forward with a funding agreement for CBMR to pay costs of the NEPA process. The Pre NEPA process was long, expensive, and continually expanding. But all signs pointed to the commencement of NEPA review.

F. The Forest Supervisor Rejected the Snodgrass Proposal.

On November 5, 2009, the Forest Supervisor abruptly notified CBMR that he had rejected CBMR's master development plan proposal for Snodgrass and that he would not start the NEPA process. The Forest Supervisor said he made the "determination as to what is in the 'public interest,' fairly and deliberately, and considering all factors at my disposal." Ex. 1 at 2. The Forest Supervisor said he made his decision based on public "comments." Ex. 1 at 2-3.

First, the Forest Supervisor pointed to matters of public and local interest including community support, social and economic effects, and land use changes. Ex. 1 at 2. The Forest Supervisor contended that there is "opposition from the Town of Crested Butte" and that "public support for the proposal did not exist." Id. Second, the Forest Supervisor pointed to matters involving the mountain – including geology, boundary management, adequacy of the terrain, and avalanche issues. Id. at 3-4. Third, the Forest Supervisor noted concerns with coordination with Gunnison County. Id. at 4. Fourth, he pointed to Snodgrass's location in an inventoried roadless area and the possible presence of lynx habitat. Id. at 4.

The Forest Supervisor claimed that his Decision is not subject to administrative appeal because he rejected an "unsolicited proposal." Id. at 5.

G. Public Reaction to the Decision.

The Forest Service made a "public interest" determination that decides the fate of the East River Valley without ever asking the public for input in a formal public process. The reaction to the Decision was overwhelmingly negative and demonstrates significant support for skiing on Snodgrass Mountain and the NEPA process:

- A November 2009 poll of over 1,000 people by the Crested Butte Chamber of Commerce revealed 83% of respondents favored beginning the NEPA process. This included 72% of Crested Butte residents, 86% of Mt. Crested Butte residents, and 89% of Crested Butte South residents. Ex. 25.
- 300 area residents attended a pro-expansion rally in Crested Butte on November 13, 2009. Ex. 37.
- A group of nearly 100 residents traveled nearly ten hours roundtrip to protest the Decision at the Forest Service Regional Headquarters in Golden, Colorado on November 20, 2009. Mueller Declaration, Ex. 5 ¶ 48. Town of Mt. Crested Butte Mayor William Buck attended and spoke at this protest. Id.
- A Gunnison Country Times poll the week of November 16, 2009 determined that of 761 people, 86% did not support the Forest Service’s decision to refuse to start the NEPA process. Ex. 35.
- In two weeks in November 2009, over 1,200 people joined a newly formed online group to “support the expansion of Crested Butte Mountain Resort onto Snodgrass Mountain.”⁸
- Hundreds of people wrote letters to the Forest Service and the Colorado Congressional Delegation complaining of the Decision. The Forest Supervisor said: “I would say we have received many more letters from people who are against my decision.” Crested Butte News, *Forest Service’s Charlie Richmond Well Aware of Snodgrass Outcry*, Ex. 26.
- Mt. Crested Butte wrote the Forest Supervisor and Regional Forester reasserting its “unanimous” support for the proposal, expressing “outrage” at the decision not to start the NEPA process, and stating that the denial “is filled with inconsistencies and contradictions.” Ex. 34 at 1-2.
- Over 250 people marched in Crested Butte on December 7, 2009 to protest the Decision. Ex. 5 ¶ 49.

The Decision cites lack of support from local governments, including Gunnison County and the Town of Crested Butte. Ex. 1 at 2, 4. The reaction of those governments confirms that the Forest Service misjudged their position. Gunnison County Commission Chairperson Paula Swenson stated: “I always thought the reason we have public processes like NEPA is to flesh out

⁸See <http://www.facebook.com/#/pages/Crested-Butte-CO/Friends-of-Ski-Lifts-on-Snodgrass-because-guess-what-Were-a-SKI-TOWN/190819711016?ref=nf>.

the public perspective on things, so I'm disappointed that we've stopped the process before it ever started." Crested Butte News, *Reactions in the Valley*, Ex. 27 at 3. See also Ex. 38. Mayor of Crested Butte Leah Williams stated: "The town shouldn't be the scapegoat on this. I understand why CBMR is upset and to not even get to NEPA is strange." Id. at 2. The Decision was issued on the same day as Crested Butte Town council elections. Each candidate who was vocally anti-expansion lost, and the candidate who was the most vocal supporter of the Snodgrass expansion received the most votes. See, e.g., Crested Butte News, *Wow*, Ex. 29 ("the most vocal anti-Snodgrass candidates in the Crested Butte election didn't get elected, while those who expressed support or ambivalence will soon sit on the board.")

IV. THE DECISION IS APPEALABLE

The Decision 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 . . .'" Ex. 1 at 5. That determination is wrong.

CBMR did not apply for a new special use permit. It seeks to expand on lands that have been within CBMR's permit for over 25 years. The Decision is appealable under the Forest Service special use permit appeal regulations at 36 C.F.R. Part 251, subpart C which provide rules that "offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands." 36 C.F.R. § 251.80(b). The "unsolicited proposal" exception identified by the Forest Supervisor applies to applicants for new permits, not holders

of existing permits. 36 C.F.R. § 251.86(a). Even under that exception, the Decision is appealable because CBMR submitted the Snodgrass proposal in response to repeated “written solicitation or other notice” by the Forest Service. See 36 C.F.R. § 251.86(a).⁹

On December 16, 2009, the Forest Supervisor notified CBMR that it could appeal because the Regional Forester “has agreed” to allow it. Ex. 41. CBMR has an absolute right to appeal under federal law. That right does not arise because the Regional Forester decides to grant it.

A. The Decision is Appealable Because it is a Determination Regarding the Administration of an Existing Special Use Authorization.

Forest Service regulations at 36 C.F.R. Part 251, subpart C make decisions regarding the administration of CBMR’s special use permit appealable. 36 C.F.R. § 251.82(a)(8) defines as “appealable”: “written decisions of Forest Service line officers related to issuance, denial, or *administration* of . . . Special use authorizations issued under 36 CFR part 251, subpart B.” (emphasis added). Ski area special use permits are issued under 36 C.F.R. Part 251, subpart B. See 36 C.F.R. § 251.53(n). “The signatory(ies) or holder(s) of a written authorization to use National Forest System land” may appeal to “seek[] relief from a written decision related to that authorization.” 36 C.F.R. § 251.86(b).

Snodgrass Mountain is within CBMR’s existing special use permit. Ex. 2 at Exhibit A. CBMR is the holder and signatory of that permit. Id. at 1. The Decision relates to the

⁹ As described on page 2-3, CBMR believes the Regional Forester and the Forest Supervisor are both appeal Deciding Officers for the Decision within the meaning of 36 C.F.R. § 251.81. Although this appeal has been filed with the Regional Forester pursuant to 36 C.F.R. § 251.87(b), CBMR believes the Chief of the Forest Service is the appropriate person to resolve this appeal in the first instance. 36 C.F.R. § 251.87(b)(2).

administration of that permit because it rejects the MDP amendment and refuses “to consider development on Snodgrass Mountain any further.” Ex. 1 at 5. The Decision is appealable under 36 C.F.R. Part 251, subpart C, and as holder of the permit, CBMR may appeal to “seek[] relief from a written decision related to that authorization.” 36 C.F.R. §§ 251.82(a)(8), 251.86(b).¹⁰

B. The Unsolicited Proposal Exception Applies Only to Applications for New Permits.

The Decision claims that it is not appealable under the Forest Service Handbook because “Denial of unsolicited proposals is not subject to administrative appeal under 36 CFR part 215 or part 251, subpart C” Ex. 1 at 5 (quoting Forest Service Handbook 2709.11.12.4). The Forest Supervisor takes this statement out of context, misapplies the Handbook, and ignores the unambiguous language of the appeal regulations. Whether a proposal was solicited or not is relevant only to appeals regarding the issuance or denial of *new* special use permits, and does not apply to CBMR's proposal to expand within its existing permit.

36 C.F.R. § 251.86 identifies who may appeal. That regulation distinguishes between appeals by applicants for new special use permits, and appeals by holders of existing special use permits. For decisions on applications for *new* special use permits, the regulation allows appeal by:

An applicant who, in response to a prospectus or written solicitation or other notice by the Forest Service, files a formal written request for a written authorization to occupy and use National Forest System land . . . and (1) was denied the authorization, or (2) was offered an authorization subject to terms and condition that the applicant finds unreasonable or impracticable.

¹⁰ CBMR’s special use permit confirms that determinations regarding the administration of the permit are appealable under 36 C.F.R. Part 251, subpart C. See Ex. 2 at 15 ¶ M (“Appeal of any provision of this authorization or any requirements thereof shall be subject to the appeal regulations at 36 C.F.R. Part 251, Subpart C . . .”).

36 C.F.R. § 251.86(a). The Handbook provision cited by the Forest Service applies to appeals by applicants for new permits. For decisions regarding *existing* special use permits, the regulation allows appeal by:

The signatory(ies) or holder(s) of a written authorization to occupy and use National Forest System land . . . who seeks relief from a written decision related to that authorization.

Id. § 251.86(b). Whether a proposal was “solicited” is relevant only when applicants for new permits seek to appeal; it does not apply to appeals by holders of existing permits.¹¹

CBMR is the “holder” of an existing “written authorization to occupy and use National Forest System land” under 36 C.F.R. § 251.86(b). Ex. 2. CBMR is not “an applicant . . . for a written authorization to occupy and use National Forest System land” under 36 C.F.R. § 251.86(a). CBMR is entitled to appeal a decision that rejects a MDP amendment and the use of part of the special use permit area for skiing because it is a “written decision[] . . . related to . . . administration of” a ski area special use permit “issued under 36 C.F.R. Part 251, subpart B.” 36 C.F.R. § 251.82(a)(8). The appealability of the Decision does not turn on whether the proposal was solicited.

The Forest Service is usually entitled to judicial deference in interpreting its own regulations. That deference does not apply where the Forest Service interprets its Handbook to deny the holder of an existing special use permit the right to appeal “a written decision related to

¹¹ The preamble to the regulation states: “Appellants would be limited to a holder of a written instrument or authorization or to applicants who are applying for an authorization in response to a solicitation by the Forest Service and who either are denied the authorization or object to terms and conditions being offered.” 53 Fed. Reg. 17,310, 17,315 (May 16, 1988).

that authorization” provided by the unambiguous language of the appeal regulations. 36 C.F.R. § 251.82(a)(8); Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (stating that no deference shall be given to an agency’s regulatory interpretation that is “plainly erroneous or inconsistent with the regulation.”).

C. The Snodgrass Proposal was Submitted in Response to Repeated Written Solicitations and Other Notice By the Forest Service.

The Decision claims that it is not appealable under the Forest Service Handbook because “Denial of unsolicited proposals is not subject to administrative appeal under 36 CFR part 215 or part 251, subpart C” Ex. 1 at 5. Even if CBMR must meet the “solicited proposal” requirement for a new permit applicant, it easily satisfies it. The trigger is broader than a “solicited” proposal. The regulations allow appeals by applicants for new permits who apply “in response to a prospectus or written solicitation or other notice by the Forest Service.” 36 C.F.R. § 251.86(a) (emphasis added).

The Forest Service repeatedly invited CBMR to submit the Snodgrass proposal.

Examples of Forest Service “notice” to CBMR inviting it to submit the proposal include:

- 2005 MOU. The Forest Service committed to work with CBMR on “a pre-NEPA process prior to proposal submittal” to help CBMR “formulate a well-thought out formal proposal designed to move efficiently through the NEPA process.” Ex. 11, ¶ C.1. See also id. ¶¶ 2, 4.
- October 2006 Letter from Charles Richmond. “I . . . am willing to entertain a proposal for the development of this terrain on Snodgrass Mountain.” Ex. 12 at 1.
- June 2008 Letter from Charles Richmond. The Forest Supervisor committed to make a determination about whether to proceed to NEPA after “first considering your specific and detailed proposals for Snodgrass Mountain.” Ex. 15 at 2.

- January 2009 Letter from Charles Richmond. “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 MPD and a Snodgrass proposal concurrently.” Ex. 19 at 2.

The record shows that the Forest Service encouraged CBMR to submit the Snodgrass proposal multiple times.

V. ARGUMENT

The Decision should be reversed. The process followed, and the rationale stated, defy the law and facts and are arbitrary and capricious. The Forest Service committed to prepare an EIS. It then allowed a subjective and private four year Pre NEPA process to displace the objective and public preparation of that EIS. The Forest Supervisor’s attempt to shoehorn that process into the “screening” regulations is a post hoc “square peg into a round hole” justification.

The Decision violates NEPA. The Forest Service purposefully delayed beginning the NEPA process so that it could review and decide the future of the East River Valley without formal public input, without preparing objective studies in a draft and final EIS, and without responding to comments. The Forest Service compromised the integrity and objectivity of the agency’s compliance with NEPA, the nation’s principal charter for the consideration of public opinion and environmental effects in federal decisions. The Forest Service viewed its obligation to comply with NEPA as a charade designed to justify and defend decisions already made in “Pre NEPA.”

The process followed here is a terrible model for public lands decision-making. The Forest Service excluded the public, avoided complying with NEPA, and issued an “unappealable” decision that claimed to divine the public interest. This is a sharp break from

past practice, where the Forest Service has analyzed and decided questions about the future of ski areas in objective and open NEPA processes. The failure to follow the proper procedures led to a bad decision. That decision is deeply offensive to public participation in public lands decisions.

The Forest Service is capable of running a great NEPA process for Snodgrass Mountain. It can do better than this. It owes it to the people whom the Forest Service serves. The Forest Service should reverse the Decision and begin a good faith NEPA process with integrity.

A. Legal Standard

Agency decisions that are arbitrary and capricious, abuse agency discretion, or are not in accordance with the law must be set aside, either on administrative appeal within the agency, or by a federal court. See 5 U.S.C. § 706(2)(a). Agency decisions must “be supported by the facts in the record” and those facts must form “substantial evidence” to support the agency’s decision. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994); see also Ass’n of Data Processing v. Bd. of Governors, 745 F.2d 677, 683 (D.C. Cir. 1984). “Isolated bits of evidence, taken out of context and overwhelmed by other evidence, will not support an affirmance of agency action.” Olenhouse, 42 F.3d at 1578; see also Ellison v. Sullivan, 929 F.2d 534, 536 (10th Cir. 1990). “Evidence is not substantial if it . . . constitutes mere conclusion.” Olenhouse, 42 F.3d at 1580; accord Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989).

An agency must follow its own regulations, including regulations that provide procedural requirements for decision-making. Service v. Dulles, 354 U.S. 363, 388 (1957) (holding that once an agency establishes procedures governing its actions, the agency “could not, so long as

the Regulations remained unchanged, proceed without regard to them.”).¹² An agency must not deviate from past decisions without reasoned explanation. It is a bedrock principle of administrative law that “[a]n agency changing its course . . . is obligated to supply a reasoned analysis for the change.” Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). “For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.” Louisiana Pub. Serv. Comm’n v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999).

B. The Forest Service Failed to Follow the Screening Regulations and MOU.

The Forest Supervisor stated that he “applied both the Initial and Second-level Screening criteria as outlined in 36 Code of Federal Regulations (CFR) . . . and in the Forest Service Handbook . . .” Ex. 1 at 1. Applicability of screening regulations after years of analysis of the proposal, and years after the proposal was previously screened, is contrary to the regulations, is arbitrary and capricious, and violates the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.

Screening is a brief review based on basic information. Screening is a quick and efficient way to determine whether a proposed use of National Forest System lands is suitable or unsuitable. The Forest Service applies the initial and second-level screening criteria “[u]pon receipt of a request for any proposed use other than for noncommercial group use.” 36 C.F.R. § 251.54(e). Screening should be completed within 60 days of receiving a proposal. Forest Service Handbook 2709, Ch. 10.10.3.1. The preamble to the screening regulations states: “The

¹² See also Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 642 (10th Cir. 1990) (“The failure of an agency to follow its own regulations is challengeable under the APA.”); Community Action of Laramie County, Inc. v. Bowen, 866 F.2d 347, 353 (10th Cir. 1989) (Agency “failure to follow its own regulations . . . may be challenged under the APA.”).

screening process would require only a very simple abstract of the proposed use and would not require a lengthy analysis by the authorized officer. The purpose of the screening is to eliminate those proposed uses which are obviously unsuitable on National Forest System (NFS) lands.”

63 Fed. Reg. 65,950, 65,954 (Nov. 30, 1998) (emphasis added).

Screening does not provide for environmental analysis. Screening may not be used to analyze or study a proposed use in detail. Prior to second-level screening, the Forest Service “may request such additional information as necessary to obtain a full description of the proposed use and its effects.” 36 C.F.R. § 251.54(e)(5). But “[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 may only conduct environmental review of a project *after* screening has been completed. See, e.g., id. (“Once the proposed use passes initial and second-level screening, the authorized officer shall conduct the appropriate level of environmental analysis . . .”). The Forest Service emphasized when it issued the screening regulations that “screening a proposed use will permit review of the proposal before the proponent invests time and expense in providing detailed information to accompany the application or the Forest Service invests time and expense in performing a detailed evaluation of the proposed use, including an analysis of the impacts on the environment.” 63 Fed. Reg. at 65,963.

1. The Forest Service Screened the Proposal in 2005.

The Forest Service screened the proposal in 2005. The MOU states: “Based upon a project description and other information provided by the Proponent, and an initial assessment of

the Project, the Forest Service has determined that the Project will be addressed in an Environmental Impact Statement.” Ex. 11 at 1. This single sentence describes the screening process exactly: (1) CBMR submitted a project description; (2) CBMR submitted “additional information” as necessary; (3) the Forest Service conducted “an initial assessment” of the project; and (4) the Forest Service decided to move past screening and conduct environmental review under NEPA. The MOU states that the Forest Service screened the proposal and determined that it would prepare an EIS. Ex. 11 at 1. It is arbitrary for the Forest Supervisor to claim now that the proposal fails second-level screening. Motor Vehicle Mfrs. Ass’n, 463 U.S. at 42.

2. The Forest Service’s Multiple Year Review of the Snodgrass Proposal Did Not Follow the Screening Regulations.

The Forest Service’s Pre NEPA review of Snodgrass went far beyond, and encompassed elements that were incompatible with, the Forest Service special use permit screening process. The Pre NEPA process applied to the proposal is incompatible with multiple components of the screening process:

- 1) Length of Review. The Forest Service reviewed the Proposal for over four years, orders of magnitude longer than the 60 days stated in Forest Service policy. Forest Service Handbook 2709, Ch. 10.10.3.1.
- 2) Detail of the Proposal. The Forest Service required far more than “a very simple abstract of the proposed use.” 63 Fed. Reg. 65,950, 65,954 (Nov. 30, 1998). The Forest Service requested and reviewed both a 150 page Master Development Plan and a 20 page Project Proposal Letter that describe the proposal in fine detail. See Exs. 3, 4. Those documents were prepared after years of analysis and study of prior proposals for Snodgrass.
- 3) Depth of Forest Service Analysis. The Forest Service conducted “a lengthy analysis by the authorized officer,” in violation of established policy. 63 Fed. Reg. 65950, 65954 (Nov. 30, 1998). The Forest Service requested CBMR to demonstrate public support for the proposal, weighed public comments, and analyzed off-site issues.

See, e.g., Ex. 1 at 2-3. None of these requests are authorized by the screening regulations.

- 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. Reliance on the “screening” regulations to deny the proposal after years of analysis and review, and after the proposal has been screened, is an arbitrary application of the regulations and should be reversed. Thomas Brooks Chartered, 920 F.2d at 642 (ruling that the failure of an agency to follow its own regulations is arbitrary and capricious).

3. The Proposal is in the Public Interest.

The Forest Supervisor claims that he determined the “proposed use would not be in the public interest,” and denied the proposal pursuant to Forest Service screening regulations. Ex. 1 at 2. That determination is plainly erroneous. The Forest Service has determined the expansion is in the public interest by designating Snodgrass for developed skiing for over 25 years in the Forest Plan after formal notice and comment and in CBMR’s special use permit. Exs. 2 at Exhibit A, 9 at Management Area Map 4. Multiple governmental entities have urged the Forest Service to move forward. Exs. 13, 16, 17, 18. Polling shows overwhelming public support. Exs. 25, 35. The expansion is critical not just to CBMR, but to the economy of the area. See pages 9-15. This easily satisfies the public interest standard to move into NEPA.

As described on pages 38 to 59, the Forest Supervisor's stated rationale is plainly erroneous. The process applied by the Forest Service to other ski area expansions shows that the public interest threshold does not require CBMR to resolve every issue, or demonstrate consensus support, before the Forest Service will start the NEPA process. Forest Service policy provides: "The authorized officer may reconsider proposals denied after second-level screening . . ." Forest Service Handbook 2709.11 Ch. 10.12.4. The Forest Supervisor's public interest determination is erroneous and should be vacated and the NEPA process commenced.

4. The Forest Service Should Initiate the NEPA Process.

Where, as here, a proposed use of National Forest System lands has passed screening, the proposal should be subjected to appropriate review under NEPA. Once a proposal has passed screening, "the authorized officer *shall* notify the proponent that the agency is prepared to accept a written formal application for a special use authorization . . ." 36 C.F.R. § 251.54(g)(1) (emphasis added). "Upon acceptance of an application for a special use authorization other than a planning permit, the authorized officer shall evaluate the proposed use for the requested site, including effects on the environment." *Id.* § 251.54(g)(2)(i). For uses that may have significant environmental effects, the agency must prepare an EIS. 42 U.S.C. § 4332(2)(C). "Federal, State, and local government agencies and the public shall receive adequate notice and an opportunity to comment upon a special use proposal accepted as a formal application in accordance with Forest Service NEPA procedures." 36 C.F.R. § 251.54(g)(2)(ii).

The Forest Service failed to follow its own regulations. The Forest Service screened the proposal, and correctly determined in 2005 that it would evaluate the proposal in an EIS. Ex. 11

at 1. But the Forest Service never began the public NEPA process. It never provided government agencies and the public with formal notice and an opportunity to comment upon the proposal. It instead evaluated, analyzed, and made a decision on Snodgrass in a Pre NEPA process void of rules, structure, or public participation.

The Forest Service's application of screening regulations, and failure to begin the NEPA process after the proposal had been screened, violated Forest Service regulations and was arbitrary. The Decision should be set aside. E.g. Service v. Dulles, 354 U.S. 363, 388 (1957).

C. The Forest Service Failed, Without Explanation, to Evaluate the Snodgrass Proposal the Same Way it Evaluated Other Ski Area Expansions.

The Decision should be reversed because the Forest Service evaluated the Snodgrass proposal in a different way, and required CBMR to meet a different standard, than it applied at other ski areas. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 42 (“An agency changing its course . . . is obligated to supply a reasoned analysis for the change.”)

Ski area expansions may involve land use, environmental, and off-site issues. Cf. Forest Supervisor January 2009 Letter, Ex. 19 at 1 (stating: “It is not uncommon for significant decisions about the use of National Forest, such as this, to be controversial.”). For every other recent proposal for ski area development or expansion, the Forest Service made a decision only after considering the issues in a public NEPA process. The following table describes recent ski area expansion proposals, the controversies they involved, and demonstrates in each instance that the Forest Service addresses controversial issues in a public NEPA process:

Ski Area & NEPA Document	Controversy in NEPA Process	Result
Telluride Ski Area, Prospect Bowl Terrain Expansion, 2001. EIS.	Public opposition, wildlife, old growth forest, air quality, traffic, quality of life, private lands development.	Forest Service prepared a supplemental EIS in response to an administrative appeal and authorized the expansion. Telluride added >400 acres of terrain since 2004. 63 Fed. Reg. 25,197 (May 7, 1998).
Breckenridge Resort, Peak 6 Terrain Expansion, Draft EIS due in 2010.	Public opposition, traffic, quality of life, Canada lynx, wildlife, private lands development, affordable housing.	Forest Service is allowing NEPA process to continue. Expansion is 450 acres. 73 Fed. Reg. 3,449 (Jan. 18, 2008).
Breckenridge Resort, Peak 8 Summit Lift, 2005. EA.	Lynx habitat, wildlife, private lands development, wetlands	Forest Service decision upheld in administrative appeal. Breckenridge added new lift to top of mountain. <i>Peak 8 Summit Lift and Chair 6 Replacement, Environmental Assessment</i> , April 2005.
Arapahoe Basin Ski Area, Montezuma Bowl Terrain Expansion 2007, Snowmaking, 2003. EIS.	Public opposition, roadless area, water quality.	Forest Service decision upheld. <i>Colorado Wild v. Forest Service</i> , 122 F. Supp.2d 1190 (D. Colo. 2000). Expansion nearly doubled ski area size.
Vail Resort, Blue Sky Basin Terrain Expansion, 2000. EIS.	Public opposition, Canada lynx habitat, wildlife, private lands development.	Forest Service decision upheld. <i>Colorado Environmental Coalition v. Dombeck</i> , 185 F.3d 1162 (10th Cir. 1999). Expansion added over 525 acres.
White Pass Ski Area, Hogback Basin Terrain Expansion, 2009. EIS.	Public opposition, roadless area, wildlife.	Forest Service decision upheld. <i>Hogback Basin Preservation Assoc. v. Forest Service</i> , 577 F. Supp.2d 1139 (W.D. Wa. 2008). 90 acres of terrain added.
Snowbird Resort, Mineral Basin Expansion and Hidden Peak Development, 2002. EIS.	Public opposition, wildlife, backcountry use, socioeconomics.	Forest Service decision upheld. <i>Citizens' Committee to Save our Canyons v. Forest Service</i> , 297 F.3d 1012 (10th Cir. 2002).
Loveland Ski Area, Chair 9 and Ridge Expansion, 2003. EIS, EA.	Wildlife, Canada lynx.	Forest Service decision upheld. <i>Hannon v. Clarke</i> , No. 02-1348 (10th Cir. 2003).

The Forest Service treated CBMR differently. The Forest Service demanded that CBMR demonstrate public support, provide analysis, and resolve issues before the NEPA process. Ex. 15 at 1-2. Those requirements are arbitrary and unfair because the purpose of the NEPA process is to provide them. Other ski areas have not been subjected to the same test. The Forest Service never identified how much public support is necessary to start NEPA review at CBMR. The Forest Service has not explained why it has treated CBMR differently than other ski areas. The Forest Service uses the public NEPA process to decide the future of other ski areas. It rejected the NEPA process at CBMR and made the decision in private, without public notice or comment, with no rules or accountability. That decision should be set aside. Motor Vehicle Mfrs. Ass'n., 463 U.S. at 42; Louisiana Pub. Serv. Comm'n., 184 F.3d at 897.

D. The Decision is Not Supported by Substantial Evidence.

The Decision must be reversed because it is not supported by substantial evidence. Olenhouse, 42 F.3d at 1575. The Forest Supervisor listed multiple reasons why he rejected the proposal. Each identified issue is factually wrong, legally incorrect, or simply a topic appropriate for a hard look in an EIS.

1. Community Support Tips Sharply In Favor of Snodgrass.

The Forest Supervisor's findings regarding community support are arbitrary and capricious and not supported by substantial evidence. The Forest Supervisor claims that he must find "a clear indication of general support" for the expansion to move into the NEPA process.

Ex. 1 at 2. He states that:

- The "community is deeply divided over the proposed development of Snodgrass Mountain." Id.

- “In my letter of January 9, 2009, I expressed my view that public support for this proposal did not exist.” Id.
- Since January 2009 “polarization in the community has increased and organized opposition to development of Snodgrass has intensified.” Id.
- “There is opposition from the Town of Crested Butte.” Id.
- “Gunnison County is unable to submit a letter of support or opposition.” Id.

There are differences of opinion about Snodgrass, just as there are differences of opinion about every ski area expansion authorized by the Forest Service. As the Forest Supervisor recognized in his Decision, gauging public support is an imprecise process. Ex. 1 at 2. But the Forest Supervisor's Decision turned an imprecise process into a rigged one. The Forest Supervisor overlooked his prior findings, misjudged public sentiment, and appears to be blind to the facts. The Forest Supervisor determined in January 2009 that public support was not “cause at this point to deny a proposal, presuming little changes by the time you submit it.” Ex. 19 at 1. Since that time, support has grown.

Multiple polls in 2008 showed overwhelming public support. Ex. 4 at 9. And the Mt. Crested Butte, Crested Butte South, the Meridian Lakes Homeowners Association, and the City of Gunnison sent letters urging the Forest Service to evaluate the proposal in public NEPA process. Exs. 13, 16, 17, 18. Both the local citizenry and local governments have expressed increasing support for the proposal since the Forest Supervisor determined that public support was sufficient to move forward.

Public Reaction. The reaction to the Decision demonstrates that the Forest Supervisor grossly misjudged public sentiment:

- Three hundred citizens rallied in Crested Butte on November 13, 2009 to support NEPA review of the proposal. Mueller Declaration, Ex. 5 ¶ 47; Ex. 37.

- A group of nearly 100 residents travelled nearly 400 miles roundtrip to protest the Decision at the Forest Service Regional Headquarters in Golden, Colorado on November 20, 2009. Mueller Declaration, Ex. 5 ¶ 48. Town of Mt. Crested Butte Mayor William Buck attended and spoke at this protest. Id.
- An online group supporting the proposal and lift-served skiing on Snodgrass Mountain was established after the Decision and gained over 1,200 members in two weeks.¹³
- Hundreds of people have written passionate letters to Forest Service representatives, and members of Colorado’s Congressional delegation, urging that the Decision be overturned. See, e.g., Crested Butte News, *Forest Service’s Charlie Richmond well aware of Snodgrass outcry*, Ex. 26 (the Forest Supervisor stated that “we have received many more letters from people who are against my decision.”).
- 280 local businesses publicly declared their support for “Lifts on Snodgrass and the Reversal of the Decision Made by the U.S.F.S.” in a full page advertisement in the local paper. Crested Butte News, November 27, 2009, Ex. 22.
- Over 250 people marched down Elk Avenue in downtown Crested Butte to protest the Forest Service’s decision on December 7, 2009. Mueller Declaration, Ex. 5 ¶ 49; Exs. 39, 40. The march ended at the Crested Butte Town Council meeting, where the Council agreed to consider drafting a letter of support for the expansion at the Council’s December 21, 2009 meeting. Exs. 39, 40.
- Over 100 residents rallied in the City of Gunnison on December 11, 2009 to protest the Decision. Mueller Declaration, Ex. 5 ¶ 50.

Public Polling. Polls conducted since the Decision show overwhelming support for beginning the NEPA process:

- A November 2009 poll of over 1,000 people by the local Chamber of Commerce revealed 83% of respondents were in favor of beginning the NEPA process, including 72% of Crested Butte residents, 86% of Mt. Crested Butte residents, and 89% of Crested Butte South residents. Ex. 25.
- A Gunnison Country Times poll of 761 people, conducted the week of November 16, 2009, found 86% of respondents did not support the Forest Service’s decision to refuse to start the NEPA process. Ex. 35.

¹³ See <http://www.facebook.com/#/pages/Crested-Butte-CO/Friends-of-Ski-Lifts-on-Snodgrass-because-guess-what-Were-a-SKI-TOWN/190819711016?ref=nf>.

It is irrational to conclude, as the Forest Supervisor has in the Decision, that there is wholesale public opposition to skiing on Snodgrass Mountain given this level of clamoring for the Forest Service initiate a formal public review of the proposal. The Forest Service's claim that opposition to the proposal has intensified ignores the facts, and should be set aside because it "runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n., 463 U.S. at 43.

Local Governments. The Forest Supervisor stated: (1) "There is opposition from the Town of Crested Butte"; and (2) "Gunnison County is unable to submit a letter of support or opposition." Ex. 1 at 2. Both statements distort the facts and are misleading, including because the Forest Supervisor did not recognize that the Town of Mt. Crested Butte, City of Gunnison, and two large associations of citizens in unincorporated areas of Gunnison County have requested the Forest Service to start the NEPA process. Exs. 13, 16, 17, 18. And the Forest Supervisor does not explain how local government sentiment influenced his decision to reverse the January 2009 determination when, if anything, that sentiment has grown *more* favorable to the expansion since that time.

Town of Crested Butte. The Town of Crested Butte has not taken an official position on the Snodgrass Expansion since May 2008 – before Crested Butte conducted an intensive public outreach campaign. At that time, the Town stated that "the majority of the Town Council finds there is not enough community support for this project." Ex. 14 at 4. In a separate letter sent the same day, the Town requested the right to participate as a cooperating agency in a "collaborative NEPA process" if the Forest Service started NEPA. Ex. 14 at 1. The Forest Supervisor's conclusion is arbitrary and capricious because it ignores the Town's request to participate as a

cooperating agency in a NEPA process, and does not follow official Forest Service policy that favors giving the Town cooperating agency status. See Forest Service File Code 1950, State, Local, and Tribal Governments as Cooperating Agencies Under NEPA, Enclosure 1-1 (Sep. 14 1998).

The most recent poll revealed that 72% of Town of Crested Butte residents support initiating NEPA review for Snodgrass. Ex. 25. A Town of Crested Butte mayoral and town council race was held on November 3, 2009 – just days before the Decision was issued. The two candidates in the council elections that openly opposed Snodgrass – Brian Kilkelly and Jay Harris – were soundly defeated, while each of the candidates who were elected either openly supported the expansion or believed it should be evaluated in a NEPA process. See, e.g., Crested Butte News, *Wow*, Ex. 29. Newly elected mayor Leah Williams never opposed Snodgrass, and takes the position that the town should participate in the NEPA process. Crested Butte News, *Reactions in the Valley*, Ex. 27 (“I wanted the town to be part of the negotiating process. We sent a letter to that effect to the Forest Service.”). Ms. Williams said shortly after the Decision: “The town shouldn’t be the scapegoat on this. I understand why CBMR is upset and to not even get to NEPA is strange.” Id.

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 the Snodgrass

proposal. The County requested that the Forest Service not “construe the lack of such letter as lack of support and deny the application to move forward based on the County’s inability to weigh in.” Ex. 20 at 2. Gunnison County Commissioner Paula Swenson said after the Decision: “I always thought the reason we have public processes like NEPA is to flesh out the public perspective on things, so I’m disappointed that we’ve stopped the process before it ever started.” Crested Butte News, *Reactions in the Valley*, Ex. 27. County Commissioner Hap Channel stated “My first problem with all of this is Mr. Richmond’s letter that calls out the county’s position and hinted that that might be part of the reason he came to his conclusion We had specifically told him not to do that. It was his decision independent of us and he ignored that. So I really have a problem with that.” Ex. 38. The Decision’s reliance on the positions of the Town of Crested Butte and the County of Gunnison to deny the proposal is arbitrary.

The positions of local governments and the general public show that significant public support for the Snodgrass proposal exists. The Forest Supervisor determined in January 2009 that sufficient public support exists. Ex. 19. Since that time public support has increased. Ex. 5 ¶¶ 47-50. The Decision’s 180 degree reversal in the face of this evidence is arbitrary and not supported by substantial evidence. Ass’n of Data Processing, 745 F.2d at 683; Ellison, 929 F.2d at 536 (an agency decision that is “overwhelmed” by contrary evidence will be set aside).

2. Community/Social/Economic Effects Should Be Evaluated in an EIS.

a. Public Services.

The Forest Supervisor states that impacts to transportation infrastructure and other public services such as housing, schools, fire, police, water, and sewers as rationale will be negative.

Ex. 1 at 2-3. But the Forest Supervisor never asked the entities involved what those impacts would be. Discussions to cover such issues were in the planning stages when the Forest Service issued the Decision. Mueller Declaration, Ex. 5 at ¶ 38. Local governments have advocated for, and were prepared to participate in, a NEPA process that would have addressed these off-site effects. Exs. 13, 16, 17, 18.

The Forest Service cannot know what the impacts will be because it never prepared an EIS to take a hard look at those effects and never asked the entities involved to comment. The Forest Service's conclusory assumptions were made without consulting the entities involved or taking a hard look at the issues in a NEPA process as the Forest Service does at other ski areas. See, e.g., Telluride Ski Area Expansion EIS, Ex. 30 at III-ii, IV-iii; Vail Category III Expansion EIS, Ex 32 at 3-ii; 4-ii.

The Decision completely ignores the significant work the Town of Mt. Crested Butte has done to manage off-site impacts. The Town conducted a county wide outreach program. Ex. 34 at 1. As the Town explained: "Guidelines already established for all of the municipalities as well as the County allow for adequate controls for handling the impacts of additional residents and guests to the area." Id. The Forest Service's conclusory claim that off-site impacts to public services will be negative is arbitrary given that the entities responsible for providing those services say they are prepared to handle the additional residents and guests. Olenhouse, 42 F.3d at 1580 ("mere conclusion" does not amount to "substantial" evidence necessary to support an agency decision).

b. Recreational Opportunities.

The Forest Supervisor claims that the proposal will adversely affect existing recreational uses of the Mountain. Ex. 1 at 3. He claims the development will alter or potentially displace hiking, mountain biking, and backcountry skiing on the Mountain. Id. 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. See, e.g., Telluride Ski Area Expansion EIS, Ex. 30 at III-I, IV-I; Vail Category III Expansion EIS, Ex 32 at 3-ii; 4-ii. The Forest Supervisor never weighed potential positive benefits such as additional trails and lift serviced biking against perceived detriments. The Forest Supervisor never looked at the adequacy of alternative locations for these types of activities.

The Forest Supervisor appears to base his Decision on “the hundreds of comments that I have received opposed to CBMR’s proposal.” Ex. 1 at 3. This shortchanged the public because the Forest Service never asked the public to submit comments, and never provided the public with an analysis of the effect of the proposal on summer and winter recreational opportunities. This cannot support the Decision because “[e]vidence is not substantial if it . . . constitutes mere conclusion.” Olenhouse, 42 F.3d at 1580.

3. Land Use Issues Should Be Analyzed Under NEPA.

The Forest Supervisor claims that the proposal “would place long-term pressure on the adjacent and nearby private land” and that “these shifts in land use would generally be undesired by land owners.” Ex. 1 at 3. These statements are conclusory and arbitrary. First, land use

issues are appropriate for analysis in an EIS for Snodgrass Mountain. See 40 C.F.R. § 1508.8(b) (“indirect effects” analyzed in an EIS should include “growth inducing effects and other effects related to induced changes in the pattern of land use.”) That EIS would take into account issues such as conservation easements, public ownership of nearby lands, and possible mitigation measures. 40 C.F.R. § 1502.16(h). Second, both the Meridian Lakes Homeowners Association (the adjoining property owners) and the Town of Mt. Crested Butte (the municipality at the base of the Mountain), support the expansion of lift served skiing onto Snodgrass. Exs. 13, 18. The Forest Supervisor’s conclusion that land use changes would cause adverse effects is without support and cannot support the Decision. Olenhouse, 42 F.3d at 1580; Bowen, 865 F.2d at 224.

4. The Suitability of Snodgrass Mountain for Lift-Served Ski Development Should Be Addressed in an EIS.

a. 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.

Having conducted the initial Pre NEPA evaluation of geologic suitability, and determined that the majority of Snodgrass Mountain “may well be suitable” for developed skiing, it is

irrational for the Forest Supervisor to refuse to evaluate this issue under NEPA. The Forest Service's evaluation of geology outside a NEPA process was deficient in important respects.

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. For instance, the Forest Service utilized the USGS to review the two geological reports. One of the reports was prepared by geologist Jim McCalpin. Dr. McCalpin took issue with several of the USGS's findings. 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.

Second, 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. Indiana Forest Alliance, Inc. v. United States Forest Service, 325 F.3d 851, 861 (7th Cir. 2003). Making a decision on such an important issue based upon a Pre NEPA review without public notice, opportunity to comment, and responding to comments on the geologic studies caused a key decision about the future of the East River Valley to be made based on incomplete analysis and facts. The Forest Supervisor's failure to explain his departure from his January 2009 conclusion that geology was no impediment is arbitrary and capricious. Motor Vehicle Mfrs. Ass'n., 463 U.S. at 42.

b. Slope/Terrain.

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). 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). The site-specific effects of trail development are appropriate for evaluation in the NEPA process as the Forest Service has at CBMR and other ski areas; the presence of the issue is not reason to refuse to prepare an EIS. 2007 Main Mountain EA, Ex. 31 at 15-21; Telluride Ski Area Expansion EIS, Ex. 30 at II-i, III-I, IV-iii.

c. Avalanche.

The Decision states: “There continues to be uncertainty over the potential for the increase of avalanche frequency and severity along Gothic Road.” Ex. 1 at 3. Gothic Road runs along the northern boundary of the mountain. Although past proposals for expansion onto Snodgrass have included runs on the north side of the mountain, CBMR's current proposal completely avoids this area. In fact, CBMR proposes to *remove* acreage on the north side of the mountain from the special use permit. Ex. 4 at 7. CBMR proposed the reduction in response to views

“received regarding the possibility of changes to avalanche patterns on the north facing side of Snodgrass Mountain.” Ex. 4 at 7. The Decision ignores this fact.

The Decision states the Forest Supervisor received comments from “knowledgeable locals” and that there have been “three commissioned studies.” Ex. 1 at 3. The Forest Supervisor does not explain whether these comments and studies take into account that the proposal will not alter the north side of the mountain. The Forest Supervisor does not explain why this issue is not subject to objective analysis and public comment in a NEPA process like the Forest Service has done at CBMR and other ski areas. Telluride Ski Area Expansion EIS, Ex. 30 at III-ii - III-iii, IV-iv; Vail Category III Ski Area Expansion EIS, Ex. 32 at 3-84, 4-130. The Forest Supervisor’s conclusion that the proposal will cause increased avalanche concerns is not supported by substantial evidence. Ass’n of Data Processing, 745 F.2d at 683.

d. Boundary Management Issues.

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. For example, when the Forest Service permitted Vail to expand in 1996 it stated that “[a]ll action alternatives would . . . create the potential for skiers to leave the managed ski area” but that “[s]pecific boundary management actions and closures are typically dealt with in the Boundary Management Plan prepared by [Vail] and the Forest Service.” Vail Category III Ski Area Expansion EIS, Ex. 32 at 4-130. See also Arapahoe Basin Ski Area Expansion EIS, Ex. 36 at 3-20. CBMR’s Special Use Permit similarly requires it to prepare and annually revise an

Operating Plan that addresses boundary management. Ex. 2 at 3-4. The Forest Service's speculative assertions about boundary management are unpersuasive because the issue is successfully managed at CBMR and other ski areas, and is not treated as an obstacle at other ski areas. See Olenhouse, 42 F.3d at 1580; Ellison, 929 F.2d at 534 (“Evidence is not substantial . . . if it is actually mere conclusion.”).

5. Public Access to Snodgrass Mountain Exists and Should Be Explored in EIS Alternatives.

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, Keystone Resort, Vail Resort, Beaver Creek Resort, Snowmass Resort, Telluride Resort, Loveland Ski Area, and other ski areas where sequential lifts or gondolas provide access to certain parts of the resort. Bus or gondola transportation from the main parking area to certain base areas is common at Colorado resorts (for example, Copper Mountain, Winter Park, Beaver Creek, and Breckenridge all utilize either a bus, gondola, or both for transport from satellite parking to base areas). Access is an issue to be addressed through project design and options in a NEPA process. See, e.g., Vail Category III Ski Area Expansion EIS, Ex. 32 at 3-82 (“A concern expressed during scoping is whether the CAT III area is too far from the base area to be practically accessed and supported by existing ski area infrastructure, particularly lifts.”) 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. E.g., Motor Vehicle Mfrs. Ass’n.

463 U.S. at 42 (“An agency changing its course . . . is obligated to supply a reasoned analysis for the change.”) The access issue is appropriate for the alternatives analysis in the NEPA process; it is not grounds to reject the proposal. See 40 C.F.R. § 1502.14.

6. Roadless Area Regulation Is Not an Obstacle.

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.

First, the Snodgrass Mountain proposal is exempt from the 2001 Roadless Rule. Snodgrass Mountain has been continually allocated to CBMR’s special use permit area since 1982. Special use permit authorizations made prior to 2001 are grandfathered under the 2001 Roadless Rule. See 36 C.F.R. § 294.14(a) (2002) (providing that the rule “does not revoke, suspend, or modify any permit, contract, or other legal instrument authorizing the occupancy and use of National Forest System land issued prior to January 12, 2001); see also U.S. FOREST SERVICE, ROADLESS AREA CONSERVATION FINAL RULE, QUESTIONS AND ANSWERS (2001) at 10 (stating that the rule will “allow for expansion of ski areas, resorts, and other recreation developments in inventoried roadless areas. . . if special use permits are in existence prior to the publication date of the Final Rule”).

Second, even if the 2001 Roadless Rule did apply, the Forest Service has the authority to authorize timber removal and ski area development within a Roadless Area under the 2001 Rule. See 36 C.F.R. § 294.13(b)(2) (2001); 66 Fed. Reg. 3,241, 3,258 (Jan. 12, 2001); Hogback Basin

Pres. Ass'n v. U.S. Forest Serv., 577 F. Supp.2d 1139, 1154-55 (W.D. Wash. 2008) (ruling that the Forest Service properly authorized development of skiing, timber removal, construction of a parking lot, development of ski runs, installation of lifts, and construction of ski area facilities in inventoried roadless area subject to 2001 Rule); Arapahoe Basin Montezuma Bowl Appeal Decision, Region 2 Forest Service, File Code 1570 (2007-02-15-0013) at p. 2 (Feb. 9, 2007) (determining that the Forest Service may authorize timber removal for ski runs and installation of ski lift within roadless area under 2001 Rule).

Third, the Forest Service is considering adopting a Colorado-specific Roadless Rule. Under the proposed Colorado Roadless Rule, the portions of the Gothic Inventoried Roadless Area that are within CBMR's special use permit boundary will be removed from Roadless status entirely. See 73 Fed. Reg. 43,544, 43,545-43546, Table 2 (Jul. 25, 2008).¹⁴

Fourth, on May 28, 2009, Secretary of Agriculture Thomas Vilsack reserved to himself the final decision-making authority over certain activities in inventoried roadless areas. This memorandum does not prevent the Snodgrass Mountain expansion because it only affects the authorization process. It does not "alter or prescribe any substantive standards for the management of such areas." See UNITED STATES DEPARTMENT OF AGRICULTURE, SECRETARY'S MEMORANDUM 1042-134 (May 28, 2009). On August 3, 2009, the Forest Service clarified that it had received re-delegation of authority to authorize timber cutting and removal where, as would be the case at Snodgrass, the cutting is incidental to the implementation of an existing special use

¹⁴ See also COLORADO DEPARTMENT OF NATURAL RESOURCES, GRAND MESA, UNCOMPAHGRE & GUNNISON NATIONAL FORESTS, DRAFT COLORADO ROADLESS AREAS MAP, *available at* <http://www.dnr.state.co.us/roadlessrule>.

authorization. UNITED STATES FOREST SERVICE MEMORANDUM, ACTIVITIES IN INVENTORIED ROADLESS AREAS (Aug. 3, 2009). Under this re-delegation, the Forest Service may authorize the Snodgrass Mountain expansion without Secretary approval.

Because no existing or proposed Roadless Area rule precludes the Forest Service from authorizing the Snodgrass Mountain expansion, Roadless Area management does not impede the Forest Service's ability to authorize the project. The Decision is arbitrary because it overlooks these facts. E.g., Ellison, 929 F.2d at 536.

7. Forest Service Lynx Policy Allows Ski Area Expansions in Lynx Habitat.

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." Ex. 1 at 4. The Forest Service has not prepared a biological assessment concerning Canada lynx at Snodgrass Mountain under 50 C.F.R § 402.12, nor has the United States Fish and Wildlife Service prepared a biological opinion concerning the proposed action under the Endangered Species Act, 16 U.S.C. § 1536(b)(3)(A). 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. See, e.g., Bennet v. Spear, 520 U.S. 154, 175 (1997).

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. For example, the Forest Service wrote that the intention of standards and objectives regarding tree removal, “is not to prohibit all tree removal within existing permitted ski area boundaries. Rather it is intended that project design features or mitigation . . . should be incorporated into project decisions as needed.” Id. The Forest Service also stated that each Forest Service human use objective could be met for developed ski areas “if ski area projects are designed in accordance with [applicable guidelines].” The Forest Service determined that lynx management direction provides design criteria which, if applied at the site specific stage, allow ski area development to meet applicable management direction.

The presence of possible Canada lynx habitat is not a barrier to the Snodgrass Mountain proposal. The proposal may need to be modified to meet Forest Service lynx management direction in the Southern Rockies Lynx Amendment Record of Decision. But that management direction is not an obstacle; it is guidance on how to design the proposal in a site-specific NEPA process to accommodate lynx conservation objectives. See U.S. FOREST SERVICE, SOUTHERN ROCKIES LYNX AMENDMENT – IMPLEMENTATION, FILE CODE 1570-1/1920-2/2670 (Jun. 2009). To determine there will be an adverse effect on lynx without addressing the proposal in a site-specific NEPA document is contrary to the policy.

The United States Fish and Wildlife Service prepared a 2008 Biological Opinion in connection with the Southern Rockies Lynx Amendment Record of Decision. The Fish and Wildlife Service determined that adherence to the lynx management direction set forth in the ROD in project-level Forest Service decisions is likely to comply with the requirements of the Endangered Species Act. See UNITED STATES FOREST SERVICE, SOUTHERN ROCKIES LYNX AMENDMENT, RECORD OF DECISION at 27 (Oct. 28, 2008). The Forest Service’s determination that there is likely to be an adverse effect, and possibly a “take” of lynx, if the Snodgrass proposal is implemented is contrary to established lynx policy and the position of the Fish and Wildlife Service. That conclusion is arbitrary and provides no support for the Decision. Olenhouse, 42 F.3d at 1578 (a conclusion that is “overwhelmed by other evidence, will not support an affirmance of agency action.”).

8. The Forest Service Did Not Try to Cooperate With Gunnison County.

The Decision states that Gunnison County's Special Development Project ("SDP") Regulations "are at odds with cooperative planning of large projects on National Forest lands" and cites difficulties coordinating with the County as rationale for the Decision. Ex. 1 at 5. That conclusion overlooks established Forest Service policy and improperly cedes Forest Service control over federal lands.

First, the Forest Service never invited the County to participate in the NEPA process as a cooperating agency yet claims coordination will be difficult. Forest Service policy encourages the GMUG National Forest to invite Gunnison County to participate in NEPA processes as a cooperating agency to foster "closer cooperation during the environmental analysis process." Forest Service File Code 1950, State, Local, and Tribal Governments as Cooperating Agencies Under NEPA, Enclosure 1-1 (Sep. 14 1998); see also 40 C.F.R. § 1506.2(b) (stating that agencies should cooperate with local governments "to reduce duplication between NEPA and state and local requirements."); Forest Service Handbook 1909.15, Ch. 10 §§ 11.31-11.32a (directing the Forest Service to follow the NEPA regulations regarding cooperating agencies). The Forest Service has made counties and local municipalities cooperating agencies for other similar projects. See, e.g., Telluride Ski Area Expansion EIS, Ex. 30 at i (listing San Miguel County and the Town of Telluride as cooperating agencies). 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.

Second, the Forest Service recognizes that county regulatory authority over Snodgrass is limited, yet effectively cedes that authority to the county. Gunnison County may not veto development on Snodgrass that the Forest Service has authorized, South Dakota Mining Ass'n v. Lawrence County, 155 F.3d 1005, 1011 (8th Cir. 1998), nor does the County possess land use authority at Snodgrass Mountain, California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 580 (1987). The Forest Supervisor notified the County in August 2009 that the County has limited authority over federal lands. Ex. 34 at 1-2. But the Forest Supervisor's Decision allows the mere concern that the County will not cooperate to veto the proposal. That conclusion is poor policy, and does not follow official agency policy encouraging the Forest Service to invite the County to participate as a cooperating agency in the NEPA process.

9. The NEPA Process Is a Benefit Not a Burden.

The Decision cites perceived negative impacts that will result from NEPA review. Ex. 1 at 4. The Decision states that the NEPA process would: (1) "require a large commitment of both our resources and yours"; (2) require interested parties to "expend time and energy"; (3) "further deepen the division that exists in the community"; and (4) "likely uncover additional environmental concerns." Ex. 1 at 4. This bizarre reasoning reveals the same hostility to NEPA that caused the Forest Service to review, analyze, and decide the fate of Snodgrass and the community in the vague and subjective Pre NEPA process.

First, the Forest Service's aversion to committing analytical resources to NEPA rings hollow given its willingness to require both CBMR and the Forest Service to commit significant resources to Pre NEPA review. The Forest Service caused CBMR to spend \$1.8 million and four

years in the agency's Pre NEPA analysis. The Forest Service similarly expended significant resources, including through consultation with sister agencies, review of studies and analyses, and review of "comments" that were never formally requested. Ex. 1 at 2-4; Mueller Declaration, Ex. 5 ¶ 43. CBMR simply requests that the Forest Service do what NEPA requires, and review Snodgrass in a structured process with formal methods of public participation. NEPA is not intended to be simple; it is intended to lead to better decisions. 40 C.F.R. § 1502.1.

Second, interested parties *would* spend time and energy in the NEPA process. That is not a negative; it is a core purpose of NEPA to promote public involvement in agency decisions. Robertson, 490 U.S. at 349 (NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.") The NEPA process would provide a structure for that public effort and channel it in a meaningful way. E.g., 40 C.F.R. § 1503.1(a)(4). To date, the public has been officially excluded from the Forest Service decision-making process, and citizens have not been invited to participate in the undefined, insular, and private Forest Service Pre NEPA process.

Third, the Forest Service should take responsibility for much of the division that it perceives in the community. Because the Forest Service failed to give Snodgrass a formal review with opportunities for public participation in the public NEPA process, debate has been pushed outside the established channels of governance. It has become a shouting match with some participants attempting to convince the Forest Service that their voice is loudest. The

NEPA process would provide an orderly structure for the public to provide its input. E.g., 40 C.F.R. § 1503.1(a)(4). It would not be a catalyst for increased division.

Fourth, the NEPA analysis may indeed uncover additional environmental issues. That is the law's purpose. 40 C.F.R. § 1500.1(b) (NEPA's purpose is to "insure that environmental information is available to public officials and citizens"); Utahns for Better Transp. v. Department of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002) (NEPA requires federal agencies to "take a 'hard look' at the environmental consequences" of their proposed actions.). The NEPA process will help the Forest Service better understand those issues. The Decision is riddled with uncertainty: How will lynx management be implemented? How does the proposed design affect avalanche frequency to the north? What are the off-site benefits and costs associated with the project? Uncertainty and controversy are two express grounds for using the NEPA process, not avoiding it. 40 C.F.R. § 1508.27(b)(4),(5). The Decision left these questions unanswered. NEPA is designed to uncover and address questions like these. That is a good, not a bad, thing.

Because the rationale given for the Decision is arbitrary, capricious, and not supported by substantial evidence, the Forest Service violated the Administrative Procedure Act, 5 U.S.C. §§ 702, 706. The Forest Service should reverse the Decision, and evaluate the Snodgrass proposal in an objective and public NEPA process. E.g., Olenhouse, 42 F.3d at 1575.

E. The Forest Service Avoided NEPA, Excluded the Public, and Compromised the Integrity of the NEPA Process.

NEPA commands agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of

the proposed action” 42 U.S.C. § 4332(C). That statement must take a “hard look” at the direct, indirect, and cumulative effects of the action, including reasonable alternatives. Utahns for Better Transp., 305 F.3d at 1163 (10th Cir. 2002). An agency’s compliance with NEPA will be set aside where it is arbitrary, capricious, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(a).

Preparation of an EIS is meant to fulfill NEPA’s “two purposes”: (1) “[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information regarding significant environmental impacts”; and (2) it “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” Department of Transp. v. Public Citizens Council, 541 U.S. 752, 768 (2004) (*quoting* Robertson, 490 U.S. at 349). To fulfill these objectives, the agency must prepare an EIS early in the decision-making process – “before decisions are made.” 40 C.F.R. § 1500.1(b).

The timing of the preparation of an EIS is critical. An agency is required to prepare an EIS when it is making a decision on a proposal for major federal action that may significantly affect the human environment. 42 U.S.C. § 4332(2)(C). The EIS “shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5; *see also* Andrus v. Sierra Club, 442 U.S. 347, 351-352 (1979); Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000) (stating that the NEPA process cannot be “a subterfuge designed to rationalize a decision already made”). The agency “shall commence preparation of an [EIS]

as close as possible to the time the agency is developing or is presented with a proposal” 40 C.F.R. § 1502.5. The agency may not eliminate alternatives before it starts the NEPA process that would have achieved the purpose and need for the project. See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 812-813 (9th Cir. 1999) (ruling that the Forest Service violated NEPA because it eliminated a reasonable alternative without complying with NEPA).

1. The Forest Service Made a Decision on a Proposal for Major Federal Action Without Preparing an EIS.

The Forest Supervisor’s Decision violates NEPA because he made a decision on a proposal for major federal action without preparing an EIS. 42 U.S.C. § 4332(C). No applicable regulation describes or even mentions “Pre NEPA.”¹⁵ But the Forest Supervisor treated it as the mechanism to evaluate and make his decision on the proposal. This violates NEPA because an agency may not make a decision on a proposal for major federal action that may have significant environmental impacts without preparing an EIS. 42 U.S.C. § 4332(C); 40 C.F.R. § 1500.1(b); Robertson, 490 U.S. 348-349.

a. The Snodgrass Proposal is a “Proposal” Under NEPA.

The Snodgrass proposal is a “proposal” subject to NEPA. A proposal “exists at that stage in the development of an action when 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

¹⁵ CBMR recognizes that some level of “Pre NEPA” review of projects by the Forest Service may be necessary and appropriate to prepare a proposal for efficient review in the NEPA process. But CBMR challenges the “Pre NEPA” process conducted by the GMUG National Forest because it displaced the NEPA process, excluded the public from a critical decision about public lands, and violated the Forest Service’s screening regulations at 36 C.F.R. § 251.54. CBMR believes that additional definition of the appropriate scope of the Forest Service “Pre NEPA” process is necessary and warranted.

the effects can be meaningfully evaluated.” 40 C.F.R. § 1508.23; accord 36 C.F.R. § 220.4(a)(1). The Forest Service: (1) had a goal of providing for developed skiing on Snodgrass Mountain; and (2) actively prepared to make a decision, and ultimately did make a decision, on one or more alternative means of accomplishing that goal. Id. § 220.4(a)(1). The failure to prepare an EIS violates NEPA. 42 U.S.C. § 4332(c).

(1) The Forest Service Had a Goal of Providing for Developed Skiing on Snodgrass.

There can be no dispute that the Forest Service had a goal of providing for skiing on Snodgrass Mountain under 40 C.F.R. § 1508.23. The governing Forest Plan, adopted after formal public notice and an opportunity for comment, provides that the management of Snodgrass Mountain should emphasize “future downhill skiing recreation opportunities,” and should integrate “ski area development and use with other resource management” GMUG Forest Plan, Ex. 9 at III-94. The Forest Service’s goal is shown by: (1) the decision to allocate Snodgrass to the permit of CBMR, Exs. 2, 7; (2) the decision, made after formal public notice and comment, to allocate Snodgrass Mountain to the ski area management area designation in the GMUG Forest Plan, Ex. 9 at Management Area Map 4; (3) the decision, made after public notice and comment, to authorize expansion of CBMR onto Snodgrass in 1982, Ex. 7 at 1; (4) the decision to prepare an EIS to consider the proposal to expand skiing onto Snodgrass Mountain in the 2005 MOU, Ex. 11 at 1; and (5) and years of effort in evaluating specific issues about skiing on Snodgrass Mountain, Ex. 12 at 1, Ex. 19 at 1-2.

(2) The Forest Service Made a Decision on a Proposal Without Complying With NEPA.

NEPA is triggered when an agency “is actively preparing to make a decision on one or more alternative means of accomplishing that goal.” 40 C.F.R. § 1508.23; 36 C.F.R. § 220.4(a). The Forest Service here treated the Pre NEPA process as its “decision on one or more alternative means of accomplishing” the goal of providing skiing on Snodgrass Mountain. It evaluated environmental and social aspects of the Snodgrass proposal. It conducted an extensive geological analysis of Snodgrass. It consulted with other agencies. It required CBMR to demonstrate public support and to resolve issues with local governments. It spent years reviewing the proposal. Ex. 15 at 2. These actions traveled far beyond appropriate refinement of the proposal during Pre NEPA that was called for in the MOU. That the Forest Supervisor devoted five single-spaced pages to explaining the Decision confirms that the Forest Service was making its decision on the proposal without preparing an EIS. That violates NEPA. 40 C.F.R. § 1508.23; 36 C.F.R. § 220.4(a).

b. The Decision is at War With the Principles of NEPA.

The Forest Service believes it has absolute discretion to delay compliance with NEPA until it states that it has “accepted” a proposal as its own and declares its intent to prepare an EIS. Ex. 1 at 2. This view relies on the distinction between an “accepted” proposal and an “unaccepted” proposal. That distinction does not appear in the CEQ regulations. See 40 C.F.R. Part 1500. The CEQ regulations support the opposite conclusion: “[a] proposal may exist in fact as well as by agency declaration that one exists.” 40 C.F.R. § 1508.23. That is the case here: the Snodgrass proposal amounted to a “proposal” under 40 C.F.R. § 1508.23 even though the agency

had not declared that it had “accepted” it. The Forest Service’s belief that it may delay preparation of an EIS for years while it makes decisions on a proposal that it has not yet “accepted” is at odds with NEPA itself. A key principle of NEPA is that preparation of an EIS must be timed so that it provides the decision maker and the public with vital information regarding the proposal before a decision is made:

- “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).
- “An environmental impact statement is more than just a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.” Id. § 1502.1.
- “Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” Id. § 1502.2(g).
- “Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.” Id. § 1502.4(b).
- “The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to justify decisions already made.” Id. § 1502.5.
- “For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.” Id. § 1502.5(b).

The GMUG National Forest’s Pre NEPA process defies the CEQ’s repeated direction to “apply NEPA early in the process.” 40 C.F.R. § 1501.2. The CEQ regulations are entitled to “significant deference.” Andrus, 442 U.S. at 358. The GMUG National Forest sought to delay

NEPA until the very end of the process. That policy is at war with the principles of NEPA as articulated by the CEQ.

c. The Forest Service Triggered the Obligation to Comply with NEPA.

The Forest Service's statutory obligation to comply with NEPA is triggered by a decision on a proposal for major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. Ordinarily actions that maintain the status quo do not trigger NEPA. Alliance for Bio Integrity v. Shalala, 116 F.Supp. 2d 166, 174 (D.C. Cir. 2000). Simply contemplating an action generally does not trigger NEPA. Kleppe v. Sierra Club, 427 U.S. 390, 403-405 (1976). But when agencies contemplate authorizing private actions, they trigger NEPA at the point they undertake some "overt act" toward that authorization. Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1244 (D.C.Cir. 1980); Shalala, 116 F.Supp. 2d at 166. NEPA applies "to decisions which the agency anticipates will lead to actions." Defenders of Wildlife, 627 F.2d at 1244.

Here, the Forest Service anticipated its decisions would lead to actions, and was required to prepare an EIS prior to making those decisions. 42 U.S.C. § 4332(c). That is why it entered into an MOU with CBMR that stated that the proposal "will be addressed in an Environmental Impact Statement." Ex. 11 at 1. The Forest Service took numerous overt acts toward that authorization: it evaluated environmental, social, and off-site issues; considered and rejected alternatives; attempted to gauge local government support; and even reviewed and evaluated public comments that it did not itself request. This is not a situation where the Forest Service was merely "contemplating" a proposed use of Forest Service lands. It treated the Pre NEPA

process as its decision on the proposal within the meaning of 42 U.S.C. § 4332(C) and 40 C.F.R. § 1502.3.

The Decision issued on November 5, 2009 violates NEPA at the most fundamental level because it is a “recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment” made without preparing the “detailed statement by the responsible official” required by the statute. 42 U.S.C. § 4332(C). The Forest Service cannot avoid complying with NEPA where it evaluates a ski area master development plan proposal for years, requires significant analysis, and demands the ski area to prove public support. The Forest Service cannot claim under these facts that its Decision on the master plan amendment was a preliminary “acceptance” decision.

In litigation pending in federal court, the Forest Service has asserted that its decision on the Snowmass Resort master development plan “does not trigger environmental analysis” under NEPA “because it did not mark the consummation of the agency’s decision making process.” The Ark Initiative v. United States Forest Service, No. 06-CV-02418-PSF-MJW (D. Colo. 2007), Def.’s Memo. In Response to Pl.’s Olenhouse Motion at 8, 16 (filed Nov. 16, 2007). That is not the case here. The Forest Service crossed the line. It treated the Decision on the CBMR master development plan as far more than a mere “acceptance” decision. The Decision triggered the obligation to comply with NEPA because it is a “recommendation or report on proposals ... for major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. The GMUG National Forest violated NEPA because it made the decision whether to authorize the Snodgrass proposal without preparing an EIS. The fact that it denied the proposal

after making its decision does not allow the GMUG National Forest to avoid complying with the statute because NEPA applies to the decision on the proposal, not merely decisions that actually authorize action. Id.

2. The Process Used at Snodgrass Renders NEPA a Paper Exercise Used to Justify and Defend Decisions Made by the Forest Service Behind Closed Doors.

The Forest Service only wanted to start the NEPA process once it made the decision to approve Snodgrass, so the Forest Service undertook actions appropriate for a NEPA process without preparing an EIS. The Forest Service evaluated the geological suitability of Snodgrass through the preparation of three separate studies, and eliminated reasonable alternatives based on the results. Ex. 19 at 1-2. That is improper. See Muckleshoot, 177 F.3d at 812-813 (ruling that the Forest Service violated NEPA because it eliminated reasonable alternatives without analyzing them in a NEPA document). And the Forest Supervisor stated he evaluated “hundreds of comments that I have received opposed to CBMR’s proposal,” even though the Forest Service never published a proposal for public review and never asked for public comments. See Ex. 1 at 2.

The Forest Service must conduct its review of proposals so as not to “compromise the objectivity and integrity of the NEPA process.” Ass’n Working for Aurora’s Residential Env’t v. Colo. Dept. of Transp., 153 F.3d 1122, 1129 (10th Cir. 1998). The Forest Service failed to do so here. The Forest Service treated NEPA at Snodgrass as a paper exercise to be undertaken only to defend and justify a decision to authorize the proposed action. Forest Service representative Jeff Burch told CBMR that once NEPA is initiated, the Forest Service presumes

that the outcome will be approval of the proposed action and that the other alternatives, including the “no action” alternative, are just “legal requirements” that are not seriously considered.

Mueller Declaration, Ex. 5 ¶ 44.

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:

- Mr. Richmond told CBMR representatives that for the Forest Service to begin the NEPA process, the Forest Service must believe in a proposal and defend it “against all odds.” Mueller Declaration, Ex. 5 ¶ 45.
- Mr. Richmond stated: “I wasn’t willing to take this on as a Forest Service project and defend it in the NEPA process.” The Crested Butte News, *Forest Service Rejects Snodgrass*, Ex. 28. (emphasis added).
- Mr. Richmond stated: “If something is controversial, we want it pretty much solved before bringing it to us. We don’t want the Forest Service to be the punching bag.” The Crested Butte News, *Forest Service’s Charlie Richmond well aware of Snodgrass outcry*, Ex. 26. (emphasis added).

The view of NEPA as a paper exercise should concern the Forest Service. It is contrary to the statutory directive that “to the fullest extent possible ... the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in” NEPA. 42 U.S.C. § 4332. When it proposed agency-specific NEPA regulations in 2007, the Forest Service noted that “the EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making.” 72 Fed. Reg. 45998, 45999 (Aug. 16, 2007). The Forest Service noted that the public felt that “when they are invited to a formal scoping meeting to discuss a well-developed project about which they have heard little, they may feel they have been invited too late in the process.” *Id.* The Forest

Service's treatment of NEPA at Snodgrass proves that the public's frustration is valid. Mr. Richmond stated that review of the Snodgrass proposal in NEPA "wasn't something I wanted to spend the next five to seven years doing." Ex. 26. The GMUG National Forest's grudging and reluctant attitude toward the use of public NEPA review to make decisions about public lands at CBMR compromises the integrity of the Forest Service's compliance with the statute.

3. The Forest Supervisor Inappropriately Dismisses The Opinion of the Majority of People Who Called for a Fair and Open NEPA Process.

The Forest Supervisor bizarrely dismisses public sentiment that supports evaluating the proposal under NEPA. The Forest Supervisor stated: "We were looking for support for the concept of lifts on Snodgrass. Not support to move to NEPA." Crested Butte News, *Wow*, Ex. 29. In 2008, he wrote "While I am hearing some support for entering NEPA, that may not be the same as support for the development of Snodgrass Mountain." Ex. 15 at 2. Public support for consideration of the Snodgrass proposal in a NEPA process is overwhelming. Exs. 4 at 9-11, 13, 16, 17, 18. The Forest Supervisor's requirement that people approve a proposed development before the NEPA process to review that development has even started is unreasonable because it is contrary to NEPA itself. E.g., 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.")

An overwhelming majority of the public expressed that they support the concept of skiing on Snodgrass Mountain, while reasonably desiring the details of the proposal to be analyzed, studied, and modified if necessary in a NEPA process. This view conforms to NEPA. E.g., 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available

to public officials and citizens before decisions are made and before actions are taken.”) These people understood that it would be irresponsible for the Forest Service to make a decision on such a critical issue without identifying the proposal, exploring reasonable alternatives, analyzing the effects, and responding to public comments. That the Forest Supervisor does not have the same understanding is disappointing, and contrary to the spirit of NEPA itself.

VI. CONCLUSION.

For these reasons, Crested Butte, LLC and CNL Income Crested Butte, LLC respectfully request the Forest Service appeal Reviewing Officer to set aside the Decision and direct Forest Supervisor Charlie Richmond to immediately begin a good faith evaluation of the Snodgrass Mountain proposal in an objective and public NEPA process.

Respectfully submitted this 18th day of December 2009,

/s/ Ezekiel J. Williams

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CERTIFICATE OF SERVICE

I certify that on this 18th day of December, a true and correct copy of the foregoing was deposited in overnight mail, postage prepaid, addressed to the following:

Charles S. Richmond
Forest Supervisor
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/s Jaime Woods

Jaime Woods