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

CRESTED BUTTE, LLC AND CNL INCOME CRESTED BUTTE, LLC'S REPLY IN SUPPORT OF THE NOTICE OF APPEAL PURSUANT TO 36 C.F.R. § 251.94

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TABLE OF CONTENTS

EXHIBITS

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

Exhibit	Description
18	Jason Blevins, *Ski Area's Setback Sends Chills*, DENVER POST, Mar. 16, 2010.
19	Forest Service and Federal Policies Encouraging Cooperation With Local Governments.
20	Forest Service Policies Requiring Regional Office Approval of Projects in a Roadless Area.
21	GMUG Communications Regarding Need For Regional Office Approval of Snodgrass Proposal.
22	Forest Service Rocky Mountain Region Winter Sports Guidebook (excerpts).
23	Friends of Ski Lifts on Snodgrass and Coalition for Lifts on Snodgrass Webpages and Mission Statement.
24	John Dzenitis, *Ski Town Brings Protest to Delta*, KREXTV, Jan. 8, 2010.
25	SE GROUP'S Response to GMUG Forest Supervisor's Responsive Statement.
26	Agriculture Secretary Tom Vilsack Remarks – Seattle, Washington, August 14, 2009.
27	Perry Backus, *Forest Service Rejects Lolo Peak Ski Area Idea*, MISSOULIAN, May 2, 2006.
28	2008/09 Survey Research – Final Report prepared by RRC Associates (Jul. 2009) (excerpts).
29	March 2010 Letters to Chief Tom Tidwell from the Colorado Association of Ski Towns and the Town of Fraser, Colorado.
30	Pictures From Protests at Forest Service Regional Office and Downtown Crested Butte.

I. Introduction and Summary

Forest Service Chief Tom Tidwell has entrusted Reviewing Officer Jim Peña with the extraordinary responsibility to decide the future of a ski resort that is the heart of a Colorado mountain valley whose economy is bound to skiing on Forest Service lands. This appeal will also decide whether the Forest Service will uphold the process applied by Grand Mesa, Uncompahgre and Gunnison ("GMUG") National Forest Supervisor Charles Richmond to decide whether a ski area can expand. This appeal is not about whether a ski area can force the Forest Service into the National Environmental Policy Act ("NEPA") process against its will. It is about whether the GMUG Forest Supervisor fairly followed applicable federal law, and Forest Service rules, regulations, and policies.

The appeal regulations direct the Reviewing Officer to make a decision that is fundamentally "fair and deliberate." 36 C.F.R. § 251.80(b). The decision on appeal is fundamentally unfair because the GMUG Forest Supervisor played bait and switch with CBMR. Before the November 5, 2009 Decision ("November Decision"), the Forest Supervisor consistently told CBMR throughout a four-year Pre NEPA process that he would start the public review process under NEPA if CBMR addressed two issues: geology and public support. See, e.g., Ex. 1 at 1-2.[1] CBMR expended over $1.8 million to address those two issues to the satisfaction of the Forest Supervisor so that the Forest Service would begin the NEPA process. Appeal Ex. 5 ¶¶ 39, 40. Forest Supervisor Richmond officially determined on July 30, 2009:

[1] Throughout this Reply, CBMR's December 18, 2009 Appeal is referred to as the "Appeal." Exhibits attached to the Appeal are cited as "Appeal Ex. __." The GMUG Forest Supervisor's March 2, 2010 Responsive Statement is referred to as the "GMUG Response." Exhibits attached to the Response are cited as "Response Ex. __." Exhibits to this Reply are cited as "Ex. __."

"We are satisfied with the resolution of these issues." Ex. 1 at 2 (the "July Decision"). Forest Supervisor Richmond notified the Regional Office that "we believe there is sufficient support for the development of Snodgrass to warrant further review under NEPA." Ex. 1 at 2.

Then the Forest Supervisor moved the goal line. He rejected the Snodgrass proposal in the November Decision because he decided that he was uncertain how other issues, never identified to CBMR, would be resolved. Appeal Ex. 1 at 1-5. The Forest Supervisor now claims CBMR submitted a "bad proposal" because those issues were not addressed in the Pre NEPA process. In the Forest Supervisor's view, unaddressed issues make "the negatives, for the use of Snodgrass Mountain for lift served skiing, outweigh the positives." GMUG Response at 9. That claim is preposterous. Snodgrass is not a bad proposal because issues the Forest Supervisor never identified to CBMR were not addressed before the NEPA process. Given an open, objective, and fair review, each issue can be addressed – just as they are addressed in the NEPA process for every other ski area expansion authorized by the Forest Service on National Forest System lands. It is profoundly unfair for Forest Supervisor Richmond to abruptly refuse to commence the NEPA process after CBMR spent over $1.8 million and four years addressing the two issues identified by the Forest Supervisor in the Pre NEPA process.

Forest Supervisor Richmond contends this appeal is about CBMR's effort "to force the Forest Service to undergo a lengthy and contentious NEPA process on a bad proposal, and then to ultimately approve their development on the National Forest." GMUG Response at 54. It is not. This appeal is about the fundamentally unfair decision made by the Forest Supervisor and

the private and subjective process he used to decide the future of CBMR and the community that depends on it.

The Forest Supervisor made his decision based on a new ski area expansion test that is impossible to meet: NEPA review of a ski area development proposal is appropriate only if uncertainty as to each issue is eliminated (without formal public involvement) before starting the NEPA process to review those issues. The Forest Service does not apply that test at other ski areas. It is doubtful that any ski area expansion authorized by the Forest Service in the last decade could meet that test. But that is the test that the GMUG Forest Supervisor applied in his November Decision. The Forest Supervisor refused to start the NEPA process based on uncertainty surrounding lynx, roadless areas, boundary management, avalanche risks, transportation, and other issues that Supervisor Richmond never asked CBMR to address. See November Decision at 1-5. GMUG Forest Supervisor Richmond defended the test in his cover letter to Reviewing Officer Peña on the grounds that:

> "It is simply not reasonable to expect that the Forest Service should incur years of costly debate, analysis, criticism, and litigation over a NEPA proposal that has an unlikely path to success."

Richmond Cover Letter at 1. Forest Supervisor Richmond may believe it reasonable that the GMUG only conduct a NEPA process if the outcome is known before it starts. But that is not the law. NEPA requires Forest Supervisor Richmond to prepare an EIS "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. Forest Supervisor Richmond's desire to commence a NEPA process only if all issues are resolved before the NEPA

process misses the entire point of NEPA. The Supervisor's demand for certainty up front turns the NEPA process itself into a charade rather than a process in which "environmental information is available to public officials and citizens before decisions are made." 40 C.F.R. § 1500.1(b) (emphasis added).

Snodgrass Mountain is allocated to skiing in the GMUG Forest Plan and is inside CBMR's special use permit. Appeal Exs. 2, 9. The Forest Service previously authorized CBMR to expand skiing onto Snodgrass Mountain. Appeal Ex. 6, 7. Those decisions were made after conducting NEPA processes with public involvement and with notice and comment. Appeal Exs. 6, 7, 8, 9. Forest Supervisor Richmond reversed those decisions without any public involvement when he issued the November Decision and determined "that it is not in the public interest to continue to consider development on Snodgrass Mountain any further." Appeal Ex. 1 at 5. He states in his cover letter that he decided "to have Snodgrass stay in its undeveloped character." Richmond Cover Letter at 1. Forest Supervisor Richmond made a Forest Plan-level decision in an internal and subjective process without following the law.

With the stroke of a pen Supervisor Richmond decided the future of a community that depends on skiing on Forest Service lands without notice, comment, or any public process. Any Forest Supervisor should make a decision of this magnitude in a public process with meaningful public involvement and with notice and comment. But Forest Supervisor Richmond claims that the fact that he received letters about Snodgrass means the public had a meaningful chance to participate in his decision, and that "it would be difficult to design a more thorough solicitation for public comment and opinion." See GMUG Response at 11. In Supervisor Richmond's view,

the public was involved because he has a box full of letters. The Forest Service should not uphold that argument. It mocks notice, comment, and public process. The Forest Service owes the public more. Forest Supervisor Richmond is out of step with the Forest Service's good record of providing meaningful public involvement prior to making decisions that, like this, determine the future of Forest Service lands and the communities that rely upon them.

The record shows considerable public opposition to Forest Supervisor Richmond's decision, and support for skiing on Snodgrass Mountain. Citizens have protested the Forest Supervisor's decision in Delta, Denver, Crested Butte, and Gunnison. Appeal Ex. 5 ¶¶ 39, 48; Appeal Ex. 37; Ex. 24. Pictures are in the record. See Ex. 30. Multiple polls, surveys, grass roots citizen groups, and letters show compelling support for the NEPA process and skiing on Snodgrass Mountain. Appeal Ex. 4 at 9; Appeal Ex. 25; Appeal Ex. 35; Exs. 7, 23; GMUG Response Exs. 34-35. Elected officials have called on the Forest Service to commence the NEPA process. Exs. 8, 9.

Providing lift served skiing on Snodgrass Mountain is critical to the long-term viability of CBMR. Despite investing approximately $20 million in on-mountain improvements in the past five years, CBMR continues to see skier visits decline. See Appeal at 12-14. CBMR is a destination ski area, meaning it must offer sufficient terrain diversity and extent to hold a guest's interest over a multiple day visit. CBMR is currently among the smallest resorts in Colorado. See Appeal at 13. When asked to identify "which improvement at CBMR would be most important to you," the largest share of CBMR visitors in a 2008/09 on-mountain survey identified "add new terrain." Ex. 28 at 42. Expansion of CBMR to include an additional 276

acres of terrain on a second mountain would enhance the skiing experience, and increase the variety of winter recreational opportunities provided. A common purpose of contemporary ski area expansions authorized by the Forest Service at Telluride, Vail, Arapahoe Basin, and other ski areas is to improve the qualitative experience for destination guests. See Appeal Exs. 30, 32, 36; Ex. 17. CBMR seeks to do the same.

Forest Supervisor Richmond may believe he has the legal authority to decide internally without any public involvement whether future lift-served skiing on Snodgrass Mountain is in the public interest. But why should he? The November Decision is the preliminary, tentative position of the Department of Agriculture on CBMR's proposal for lift-served skiing on Snodgrass Mountain. See 36 C.F.R. § 251.99(f). It is not the final decision of the Forest Service or the Department of Agriculture. Id. §§ 251.99(f), 251.101. The Reviewing Officer has the opportunity and the obligation to review that preliminary position fresh, based on the extensive record and the applicable law.

CBMR demonstrated in its appeal that Forest Supervisor Richmond's November Decision is arbitrary, capricious, and violates federal law. 5 U.S.C. §§ 702, 706. But that is not the standard for the Reviewing Officer's decision. The standard is fairness. 36 C.F.R. §§ 251.80(b), 251.95(a). The Reviewing Officer must make a "fair and deliberate decision," based on the "appeal record and applicable laws, regulations, orders, policies, and procedures." Id. §§ 251.80(b), 251.99(a). The Reviewing Officer's job is to correctly decide the issues based on that record, not to affirm – or defer to – Forest Supervisor Richmond's November Decision. Id. The Reviewing Officer may reverse the Forest Supervisor's Decision if that is the "fair and

deliberate" result even if the Reviewing Officer does not conclude that the Forest Supervisor's Decision is arbitrary and capricious. See id. § 251.80.

The Reviewing Officer has the benefit of an extensive record, including documents and developments that have arisen since the November Decision. The "appeal record" upon which the Reviewing Officer must make his decision includes all the documents submitted by CBMR and the Forest Supervisor. 36 C.F.R. § 251.81. Information arising after November 5, 2009 may be considered by the Reviewing Officer to determine whether to reverse the November Decision. Id. §§ 251.81, 251.99(a).

CBMR is hopeful the Reviewing Officer will review the whole record because the Forest Supervisor in his Response rewrites history to support his decision. The Response mischaracterizes geological studies and terrain distribution analyses. The Forest Supervisor does not explain his abrupt reversal of his July Decision to start the NEPA process. And he repeatedly contradicts his past positions on issues like access, public support and outreach, resolution of threshold issues, and statements to CBMR leading to reasonable expectations that the NEPA process would be commenced.

CBMR trusts that the Reviewing Officer will do what is right, fair, and legally required and grant CBMR, the community, and the Department of Agriculture the full, open, and fair evaluation that the Snodgrass proposal deserves in an environmental impact statement prepared under NEPA.

II. The Decision Process Applied by Forest Supervisor Richmond Was Fundamentally Flawed and Unfair.

The Forest Supervisor attempts to reframe this appeal as about whether CBMR holds a "right or entitlement" to develop Snodgrass Mountain for lift-served skiing. E.g., GMUG Response at 13. That misses the point. This appeal is about whether the Forest Supervisor fairly and faithfully executed his duties under federal law, regulations, and Forest Service policy. He did not. CBMR met every requirement the Forest Supervisor asked it to meet. But the Forest Supervisor then invented a new, impossible ski area expansion standard at the last minute without ever telling CBMR. Doing so was unprecedented, inequitable, and raises questions about how and why the Forest Supervisor came to the conclusion that he did.

A. The Forest Supervisor Made the July Decision to Begin NEPA Review, Requested the Regional Office to Review the Decision, and Then Invented a New, Impossible Test.

CBMR fulfilled every threshold requirement the Forest Supervisor asked it to fulfill. The Forest Supervisor repeatedly asked CBMR to address two issues in "Pre NEPA": (1) geology; and (2) public support. See, e.g., Appeal Ex. 15 (the Forest Supervisor wrote CBMR and said: "I have been consistent in emphasizing that there are two major concerns with regard to the development of Snodgrass"). The Forest Supervisor told CBMR and the public that if these two issues were addressed, he would begin NEPA review. Ex. 4 at 1 (the "Forest Supervisor has said both to CBMR and publicly, that if 2 issues resolved, we would begin NEPA."). The Forest Supervisor admits in his Response: "The threshold established by the Forest Supervisor was identified early and has been communicated clearly and consistently: resolution of geologic concerns and development of community support." GMUG Response at 15.

The record proves that CBMR addressed these two issues to the satisfaction of the Forest Supervisor. See, e.g., Appeal Ex. 19 (Forest Supervisor letter to CBMR stating that two issues were sufficiently addressed). When the Forest Supervisor made the determination to remove two areas of Snodgrass from further consideration because of geological concerns, he said: "If CBMR can develop a proposal which would utilize the remaining terrain, I will consider it through the NEPA process." GMUG Response Ex. 19 at 3. In a July 17, 2009 briefing paper, the GMUG states:

> The Forest Service is satisfied that the geologic hazard issue is sufficiently mitigated through avoidance to at least advance to the NEPA phase of review. . . . we believe there is sufficient support for the development of Snodgrass to warrant further review under NEPA. The NEPA process includes opportunity for much more public involvement, and we will continue to listen.

GMUG Response Ex. 14 at 5 (emphasis added).

On July 30, 2009, the GMUG Forest Supervisor made the written decision that, because the two threshold issues were resolved, it was appropriate to start the NEPA process. See Ex. 1.[2] Consistent with established Forest Service policy, the Forest Supervisor submitted his July Decision to the Regional Office for approval on a "Roadless Project Evaluation" form. See Ex. 1; Ex. 21. The Forest Supervisor's July Decision states:

> Crested Butte Mountain Resort Owners were put on clear notice (2720 Memo dated January 29, 2009 from Charles Richmond to Timothy Mueller) that issues related to geologic hazard and public support would need to be resolved before we would accept and take in to NEPA a proposal for development of Snodgrass. Clearly implied was that if these issues were resolved to our satisfaction, a proposal would be accepted and the NEPA process begun. We are satisfied with the resolution of these issues.

[2] CBMR had not been provided with the July Decision when it filed its appeal. The July Decision was included in the GMUG's January 25, 2010 response to a request for information submitted by CBMR under the Freedom of Information Act. See Ex. 13.

Id. at 1 (emphasis added).

The Forest Supervisor admits that he "clearly and consistently" told CBMR there were two issues to address in Pre NEPA. GMUG Response at 15. CBMR resolved those two threshold issues. The Forest Supervisor decided CBMR resolved those issues. Ex. 1. The Forest Supervisor transmitted the July Decision to start the NEPA process to the Regional Office. Id.

Then the Forest Supervisor moved the goal line. The Forest Supervisor based the November Decision on a new ski area expansion test. First, he determined, despite his own multiple conclusions to the contrary (see Ex. 1), that geology and public support were not sufficiently addressed to move into NEPA review. Appeal Ex. 1 at 2-3. Second, the Supervisor determined that other issues that he never identified to CBMR, and which would be addressed in any ski area NEPA process, were reasons not to begin the NEPA process. Id. at 1-5. Changing the rules like that is unfair, arbitrary, and bad policy. The Forest Supervisor refused to start the NEPA process because the Pre NEPA process did not resolve issues that he never identified to CBMR.

The Forest Supervisor's November Decision is a strikingly unfair way to make a decision whether to start a NEPA process for a ski area expansion. He applies an impossible catch-22: NEPA review of a ski area development proposal is appropriate only if uncertainty as to each issue is eliminated (without any public involvement) before starting the NEPA process to review those issues. This principle may make work easier for GMUG staff because they will only conduct a NEPA process if the outcome is known before it starts. But the Forest Supervisor's

demand for certainty turns the NEPA process into a charade to defend a decision already made rather than a process in which "environmental information is available to public officials and citizens before decisions are made." 40 C.F.R. § 1500.1(b).

B. The Forest Supervisor Has Not Explained Why He Reversed the July Decision.

The drastic change between the Forest Supervisor's July Decision that he submitted to the Regional Office and the November Decision he released to the public raises serious questions about how Forest Supervisor made his decision. The Forest Supervisor fails to address these questions. The Forest Supervisor claims only that:

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

GMUG Response at 8.

CBMR agrees that it is appropriate for the Forest Supervisor to consult with his superiors on issues of the magnitude of the Snodgrass proposal. But the Forest Supervisor is not disclosing the entire record of how he made the November Decision, and the involvement by the Regional Office and Regional Forester Rick Cables. For example, the Forest Supervisor nowhere mentions his July Decision to start the NEPA process for Snodgrass. Ex. 1. Documents submitted in response to a Freedom of Information Act ("FOIA") request by CBMR, and not disclosed by the Forest Supervisor in his Response, show that the Supervisor presented his July Decision to Regional Forester Rick Cables for regulatory approval, and briefed the Regional Forester on the issues during the summer of 2009. Exs. 1, 4, 21.

Regional Forester Cables' review and approval of the July Decision was required because the Snodgrass proposal involves timber removal inside CBMR's permit which is partially within an inventoried roadless area. Since 2001, the Forest Service has required Regional Foresters to review and approve the decision to prepare an EIS that, like the anticipated EIS for Snodgrass Mountain, considers timber removal in a roadless area.[3]

Forest Supervisor Richmond submitted his July Decision to the Regional Office for approval on July 30, 2009. See Ex. 1. Ten days later, the GMUG submitted a briefing paper to the Regional Office. Ex. 4. In late summer Forest Supervisor Richmond told CBMR President Tim Mueller that he would not make a decision that Rick Cables did not agree with, and arranged for Mr. Mueller to meet with Regional Forester Cables on August 16, 2009. Appeal Ex. 5 ¶ 33.

[3] For example, on August 22, 2001, the Forest Service published in the Federal Register a Forest Service Manual provision that directs Regional Foresters "[p]rior to the publication of a Notice of Intent to prepare an environmental impact statement that considers timber harvest in an inventoried roadless area, review and agree to the purpose and need statements." 66 Fed. Reg. 44,111, 44,113 (Aug. 22, 2001), attached as Ex. 20. That Forest Service Manual Provision was later moved to Forest Service Manual Chapter 1925.04b.3 which was in effect until 2003. Forest Service Manual Chapter 1925.04b.3 provides "It is the responsibility of the Regional Forester to ...[f]or road construction, reconstruction, and timber management projects in inventoried roadless areas where it has been determined that an environmental impact statement (EIS) is required, review and agree to the purpose and need statements for the notice of intent to prepare an EIS." Ex. 20. In 2006, the Forest Service revised Forest Service Manual Chapter 1925 to establish "a reserved code for management of inventoried roadless areas for issuance of an interim directive or field supplementation." Ex. 20. In 2008 and 2009, the Regional Office of the Rocky Mountain Region circulated a draft policy, followed by the GMUG in reviewing the Snodgrass proposal, which, according to GMUG staff, requires Forest Supervisors to submit proposals "to the Regional Office" for approval for "any project that involves NEPA" in a roadless area. Ex. 21. The GMUG did not provide the actual policy in response to CBMR's FOIA request.

Something happened. Forest Supervisor Richmond moved the goal line and adopted the new, impossible test *after* Regional Forester Rick Cables reviewed the Supervisor's July Decision. These facts call into question the rationale Supervisor Richmond stated to the public in the November Decision and the GMUG Response. The July Decision shows that Forest Supervisor Richmond decided to start the NEPA process. Ex. 1. The Supervisor reversed himself after requesting Rick Cables to approve his July Decision.

C. The New Test Applied by the Forest Supervisor is Inappropriate and Impossible to Meet.

Forest Supervisor Richmond applied a test that is impossible for any ski area to meet.

1. The Forest Supervisor Demanded Resolution of All Significant Issues Prior to NEPA Review, Not Just the Two Threshold Issues.

The logic the Forest Supervisor applied in his November Decision and the Response shows that the Supervisor demanded that all significant issues be resolved prior to NEPA review. Supervisor Richmond says in his Response: "We never said, however, that we would not proceed into NEPA until all controversial issues were resolved." GMUG Response at 15. The Supervisor is right. He never said before he released the November Decision that he would not begin the NEPA process until CBMR resolved all issues. But that is exactly the test Supervisor Richmond applied in his November Decision, and asserted in his Response. For example:

- The Forest Supervisor refused to start the NEPA process because CBMR did not provide express, unequivocal written support for the *project itself* from local governments *before* the NEPA process to consider the project. GMUG Response at 35-36.

- The Supervisor refused to start the NEPA process because CBMR did not resolve off-site social, transportation, and economic issues in its Master Development Plan ("MDP"), even though a MDP is conceptual plan and "vision document"

rather than a detailed development proposal. GMUG Response at 54; Jim Dawson letter to Tim Mueller, GMUG Response Ex. 3.

- The Supervisor refused to start the NEPA process because CBMR stated in its proposal that bus access to the base is "likely" rather than guaranteed. GMUG Response at 53.

- The Supervisor refused to start the NEPA process because of "*uncertainty* over the potential for the increase of avalanche frequency." Appeal Ex. 1 at 3 (emphasis added).

- The Supervisor refused to start the NEPA process because of the current "*uncertainty* of success of boundary management efforts." Appeal Ex. 1 at 3 (emphasis added).

- The Supervisor refused to start the NEPA process because of *uncertainty* regarding future management of roadless areas, even though every current rule and policy expressly permits the Snodgrass expansion. Appeal Ex. 1 at 4.

- The Supervisor refused to start the NEPA process because of *uncertainty* about Canada lynx habitat even though no actual analysis has occurred. Appeal Ex. 1 at 4; GMUG Response at 49; Ex. 16.

The Forest Supervisor's demand for resolution of every significant issue at the preliminary Pre NEPA stage is a sea change. CBMR's appeal lists nine separate recent ski area expansions authorized by the Forest Service that, like the Snodgrass proposal, involved significant issues. Appeal at 37. Had the Forest Service applied the test applied by Forest Supervisor Richmond, none of those proposals would have even begun the NEPA process. Id. It is an impossible test! It is profoundly unfair because the Forest Supervisor never communicated the test to CBMR and the Forest Service does not apply the test at other ski areas.

It is unknown why the Forest Supervisor applied the onerous test at CBMR. It may be because the Forest Supervisor views the decision whether to begin the NEPA process as the decision whether to authorize the development. The GMUG staff paper upon which the Forest

Supervisor relies states: "The NEPA process is not intended to be the vehicle for deciding whether or not to undertake a project such as the development of Snodgrass." GMUG Response Ex. 2 at 29. The GMUG staff paper further states that the NEPA process is not "the appropriate vehicle for the yes or no decision." Id.

The GMUG staff paper's view of NEPA is wrong as a matter of law. The NEPA process is the vehicle for the yes or no decision. NEPA review is required before a decision is made, not after. 40 C.F.R. §§ 1500.1(b), 1501.2, 1502.5. An EIS must be prepared "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions *already made*." Andrus v. Sierra Club, 442 U.S. 347, 351-352 (1979) (emphasis added); see also Metcalf v. Daly, 214 F.3d 1135, 1142 (9th Cir. 2000). NEPA requires review of not only the proposed action, but also meaningful analysis of alternatives – including the "no action" alternative (the alternative of not doing the project at all). 40 C.F.R. § 1502.14. The Forest Supervisor's belief that the decision to take a proposed action should come *before* the NEPA process is even commenced is simply wrong.

The Forest Supervisor expressly relied on the GMUG staff paper. GMUG Response at 9. The staff paper comments, as well as the logic applied by the Forest Supervisor, show that the Forest Supervisor viewed the decision to begin the NEPA process as the decision to approve the proposed action. That is why the Forest Supervisor demanded local government support for the actual project before he would start the NEPA process. GMUG Response at 25, 35-36. He viewed the NEPA process as a paperwork exercise to implement a decision already made; or in

the words of Forest Supervisor Richmond, a process used to "defend it as our own." Richmond Cover Letter at 1.

2. The New Tests for the Two Threshold Issues Are Impossible to Meet.

After determining multiple times that the threshold issues of geology and public support were sufficiently addressed to proceed to NEPA review, the Forest Supervisor reversed course and invented new impossible tests.

a. There is Overwhelming Public Support for the Proposal.

The Forest Supervisor argues that CMBR must deliver unequivocal written support from three local governments for the GMUG to begin the NEPA process. GMUG Response at 35-36. This is an unreasonable and unprecedented test. It requires local governments to adopt the GMUG's view that they must express written support for the proposed ski area development before the Forest Service will begin the process to consider the development, its impacts, and reasonable alternatives to the proposal. This unreasonable test also ignores substantial evidence of public support.

The GMUG Response Invents a New Test. The Forest Supervisor claims: "we made it clear to CBMR numerous times in the past few years that support for their proposal from the 3 local governments (Town of Crested Butte, Town of Mt. Crested Butte, and the Gunnison County Commissioners) would be used as the standard to assess overall public support." GMUG Response at 36 This statement misrepresents the facts. The Forest Supervisor requested CBMR to work with local governments, and CBMR did so. Ex. 1 at 1; Appeal Ex. 5 ¶ 22. But the Forest Supervisor never told CBMR that unequivocal support of three local governments for the

development of the project is the threshold test for entering NEPA review. To the contrary, the Record demonstrates the Forest Supervisor invented a new test, raised for the first time in his Response.

The Forest Supervisor repeatedly determined that public support was sufficient when local government positions were identical to what they are today. For example:

- On January 29, 2009, the Forest Supervisor wrote to CBMR to say that, while the proposal was "controversial," the state of public support was not "cause at this point to deny a proposal, presuming little changes by the time you submit it." Appeal Ex. 19 at 1.

- On July 17, 2009, the Forest Supervisor wrote: "we believe there is sufficient support for the development of Snodgrass to warrant further review under NEPA." GMUG Response Ex. 14 at 5.

- In the July Decision, Forest Supervisor Richmond told the Regional Office: "we believe there is sufficient support for the development of Snodgrass to warrant further review under NEPA." Ex. 1 at 1-2.

In January and July 2009, Gunnison County was officially neutral. The Town of Crested Butte had not yet clarified its neutrality (see Ex. 5), and the Forest Supervisor interpreted the Town's position as "opposition." Appeal Ex. 1 at 2. Yet the Forest Supervisor decided at both of these points that public support was sufficient to start the NEPA process. Ex. 1; GMUG Response Ex. 14 at 5. If the Forest Supervisor truly has been consistent, he would not have come to these conclusions. But he has not been consistent.

The New Test is Not Forest Service Policy. No provision of the special use permit regulations at 36 C.F.R. Part 251 or other agency law or policy require a ski area permittee to prove written local government support for a proposal before the Forest Service will evaluate the proposal and alternatives to it under NEPA. That is an extraordinarily high standard to meet as a

condition to start a multiple year NEPA process whose outcome is unknown. Where is that standard adopted in Forest Service policy? Is the agency planning to require it elsewhere? The Forest Supervisor has not identified any Forest Service policy that directs him to require unequivocal local government support for the ultimate development of a project before he will review the project in a NEPA process.

The Forest Supervisor's test for public support is a fatally flawed policy that:

1. requires the towns and Gunnison County to support the project prior to knowing exactly what is in the proposal;

2. requires the towns and county to support a project before they or the GMUG analyze or study the project in a formal process or identify reasonable alternatives to it;

3. requires Gunnison County to approve the project before it completes its own permitting process;

4. gives local governments a veto right over federal land uses by simply withholding support before the NEPA process. The Forest Service should not relinquish decision-making authority over federal lands to local municipalities.

The New Test is Contrary to Multiple Federal Laws. The Forest Supervisor claims that local governments must state express written support for the Snodgrass proposal before he will begin a NEPA process to consider the proposal. GMUG Response at 35-36. That policy position is at odds with considerable federal and Forest Service law and policy which direct the Forest Supervisor to cooperate with, coordinate with, and facilitate meaningful participation by local governments in the NEPA process. See 42 U.S.C. § 4331 (federal agencies shall implement NEPA "in cooperation with state and local governments"); Executive Order 13352, Facilitation of Cooperative Conservation, 69 Fed. Reg. 52,989 (Aug. 30, 2004) (directing the

Department of Agriculture to facilitate "collaborative activity" with local governments and "appropriate inclusions of local participation in federal decisionmaking"); USDA Policy Memorandum on State, Local and Tribal Governments in Cooperating Agencies Under NEPA (Sept. 14, 2009). It is unreasonable, and contrary to the cited policies, for the GMUG to demand written support from local governments for the outcome of a NEPA process before the GMUG will start the NEPA review because local governments are supposed to be included as meaningful participants in the NEPA process. See Ex. 19 (copies of Forest Service policies encouraging cooperation with local governments).

The New Test Ignores Substantial Evidence. The Forest Supervisor ignores and discounts substantial evidence of public support for the proposal. The Forest Supervisor repeatedly claims that public opinion is "divided." See, e.g., GMUG Response at 11, 36-38. The Forest Supervisor never explains what he means by "divided" – a word that could equally be used if 90%, 80%, 65%, 50% or 10% of the population support the expansion.[4] But the Forest Supervisor's repeated use of the word "divided" is telling. The Forest Supervisor has never claimed that even a simple majority of citizens oppose the Snodgrass expansion because such a statement would be untrue. The evidence points to a community with a strong majority in favor of the Snodgrass proposal.

1. Polls. The Forest Supervisor dismisses, in two sentences, five polls conducted since 2008 that have consistently shown support for the proposal between 75% and 85%. GMUG

[4] When CBMR Representatives met with Forest Supervisor Charles Richmond to discuss this appeal on February 5, 2010, they asked Mr. Richmond what he meant when he said the community was "divided." Mr. Richmond did not define the meaning.

Response at 36-37. See Appeal Ex. 4 at 9; Appeal Ex. 25; Appeal Ex. 35; Ex. 7. The Supervisor's conclusion that these polls are "unreliable" is based on a single letter written by an individual with no demonstrated expertise in polling. GMUG Response at 37. The Forest Supervisor claims that "a campaign of influence" has been waged by opponents and CBMR. GMUG Response at 8. Why does the Forest Supervisor believe it appropriate to refuse to consider polls and surveys of thousands of citizens based on the opinion of a single partisan opponent of skiing on Snodgrass Mountain? CBMR does not claim that these polls are "scientific." But these multiple snapshots of public opinion show significant majorities support CBMR's proposal. It is irrational and unfair for the Forest Supervisor to refuse to consider that evidence.

2. Other Governments. The Forest Supervisor does not mention that the City of Gunnison (population 5,400) and Crested Butte South Property Owners Association (part of unincorporated Gunnison County, population 1,500) have both expressed written support for the proposal. Appeal Ex. 16, 17. Do these members of the public count less?

3. Public Officials. Multiple public officials have urged the Forest Supervisor to conduct a NEPA review. Senator Mark Udall requested such a process in November 2009. Ex. 7. Senator Patrick Leahy and Representative Peter Welch made a similar request on January 12, 2010. Id. The State Senator and Representative representing the East River Valley called for a NEPA process on January 28, 2010 and December 14, 2009 respectively. Ex. 8. These elected officials have expressed the views of their constituents. Their insight into public opinion should not be ignored.

4. Public Reaction to the Decision. The Forest Supervisor's November Decision triggered an extraordinary outpouring of public support for lift-served skiing on Snodgrass Mountain. Appeal at 22-24. Rallies in support of CBMR and against the Forest Supervisor's Decision have occurred at the Regional Office in Denver, the City of Gunnison, the Town of Crested Butte, and the Forest Supervisor's office in Delta. Appeal Ex. 5 ¶¶ 39, 48; Appeal Ex. 37; Ex. 24. Photos are attached at Exhibit 30. Citizens have written numerous letters. See, e.g., GMUG Response Ex. 35. By all public accounts the vast majority of the letters received by the local municipalities, the County, and the GMUG favor Snodgrass proceeding into the NEPA process. Grassroots opposition to the decision formed in a nearly 1,500 strong online community, and then formally organized as the "Coalition for Lifts on Snodgrass." Ex. 23.

The Forest Supervisor claims that the "sharp reaction on both sides" to the November Decision reinforces the Supervisor's belief that public support was insufficient. GMUG Response at 37. But this "sharp reaction" was provoked by dismay that the public was shut out of the Supervisor's watershed decision that future lift-served skiing on Snodgrass Mountain is not in the public interest. Many letters criticize the Forest Supervisor's failure to provide public input opportunities. See GMUG Response Ex. 35. The debate has become a shouting match because the Forest Supervisor never provided an orderly process for public involvement, and based his rationale on his subjective determination of public interest. That shouting match demonstrates that the process used by the Forest Supervisor was inadequate, not that public support is inadequate. The Forest Supervisor should take responsibility for his failure to give the

public a voice, not point to public outcry to justify that failure. The public criticism of the November Decision expresses real, grassroots opinions that should not be ignored.

The New Test Dismisses Substantial Support for the NEPA Process. The Forest Supervisor has repeatedly claimed that the only measure of public support he will accept is clear, unequivocal support for development of Snodgrass for skiing; support for reviewing the proposal under NEPA is not enough. See, e.g., Appeal at 69; Appeal Ex. 15; Appeal Ex. 29. The Supervisor states: "The support indicated by the appellant to 'move forward' has been to move into the NEPA process, which does not indicate, to the Forest Supervisor, support for the proposal." GMUG Response at 25. The Forest Supervisor's position is irrational and arbitrary.

NEPA requires the Forest Service "to the fullest extent possible … [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d). Citizens and local governments that state their support for the NEPA process for Snodgrass Mountain seek the meaningful analysis of the proposal, identification of alternatives, and disclosure of environmental effects that NEPA review would provide. A person would not request that the project be reviewed in the NEPA process if he was opposed to the expansion in any form. To claim this support does not even "indicate" support for the proposal is absurd.

The Forest Supervisor wanted to make his decision to approve or deny the Snodgrass expansion before the NEPA process. Some members of the public and local governments like Gunnison County wanted to make that decision only after the NEPA process, after reviewing alternatives, and after commenting on a draft environmental impact statement. Their position is

reasonable. The Forest Supervisor's use of that position to reject the proposal reveals the Supervisor's troubling view of NEPA as merely a vehicle to "support and defend" a decision already made. See, e.g., Richmond Cover Letter at 1.

b. Snodgrass Mountain is Geologically Suitable For Skiing.

The Forest Supervisor has adopted a geological risk threshold so low that not only did Snodgrass fail it, but most major existing ski areas in Colorado would fail it as well. The Forest Supervisor argues that Dr. McCalpin's geologic study supports the November Decision. The Supervisor states:

- "Dr. McCalpin failed entirely to demonstrate that the mountain was sufficiently stable for developed skiing, but rather to the contrary...." Id.
- "A careful review of his report, both by USGS Rex Baum, and by Forest Service staff, found it provided the Forest Service with sufficient basis upon which to deny a proposal to develop lift served skiing on portions of Snodgrass that were studied." Id.

Dr. McCalpin believes the Forest Supervisor grossly mischaracterized his report. See Ex. 14. Dr. McCalpin concluded, based on his "20 years of experience on ski areas in other National Forests," that Snodgrass *is* geologically suitable for skiing. Ex. 14 at 1. He states:

- "I can say that, compared to other Colorado ski areas I have worked in, the Factors of Safety at Snodgrass are not unusual and do not appear to me to be significant threats to developed skiing." Ex. 14 at 1 (emphasis added).
- "This example, and many others of which I am aware, indicate that slow creeping landslide movement of the style typical in the Mancos Shale, does not constitute a significant hazard to developed skiing." Id. at 1.
- "[T]he Superintendent alleges that Rex Baum and the USFS 'found it [GEO-HAZ, 2008] provided the Forest Service with sufficient basis upon which to deny a proposal to develop lift served skiing on portions of Snodgrass that were studied.' That statement is incorrect and misleading …. Dr. Baum indicated that the Factors of Safety measured on

Snodgrass could be used to argue for either denial or approval of the Snodgrass project, depending on GMUG's 'tolerance for risk.'" Id. at 1-2.

- The GMUG has "decided to adopt the extreme of 'low risk acceptance' as the Forest's criterion for approval of ski area projects. This risk level is so low, that not only can Snodgrass proposal not pass it, but in my experience no other Colorado ski area could either." Id. at 2.

Dr. McCalpin's job was to assess geologic risk. The Forest Supervisor admits that Dr. McCalpin's "report does the very best job of describing the complexity of the hydrology on the mountain." GMUG Response at 46. Dr. McCalpin concluded that the risk at Snodgrass Mountain is extremely low, and consistent with risks at other ski areas.

The Forest Supervisor adopted an unprecedented and impossible test. Had his test been applied to other ski areas in Colorado, most of them – including CBMR's main mountain – would not exist. Dr. McCalpin concludes:

> Based on my long experience with other Colorado ski areas, and their slope stability situations, I can safely say that if such a low risk tolerance for slope movement had been applied to all other existing Colorado ski areas, including the Crested Butte ski area, none of them would ever have been permitted. The Colorado ski industry would never have developed. I am actually surprised that the Forest Service would let such a precedent be established by the Superintendent of a National Forest that has little experience in ski area management, as compared to other Forests (such as the White River National Forest) which has decades more experience, but has never adopted such a stringent acceptable risk criterion.

Ex. 14 at 2.

The Forest Supervisor decided in January and July 2009 that Snodgrass was sufficiently stable to warrant NEPA review. Appeal Ex. 19; Ex. 1. After consulting with the Regional Office, see Ex. 1, the Forest Supervisor set a new standard. The new test is unprecedented, and impossible to meet. It requires CBMR to meet a test for geological risk *before* the NEPA

process that most existing ski areas could not have met *after* the NEPA process. Ex. 14 at 2. The Reviewing Officer should not endorse the policy adopted by the Forest Supervisor.

D. Snodgrass is not a "Bad Proposal" Because Issues Are Unresolved Before NEPA Review; it is a Good Proposal that Deserves a Fair Review.

The Forest Supervisor claims that CBMR submitted a "bad proposal" because there are unresolved issues that CBMR was never asked to address at this preliminary stage. See, e.g., GMUG Response at 15. Those issues do not make Snodgrass a bad proposal. They are common issues that are addressed in every ski area expansion EIS. (Ski area expansion EIS's addressing many of the issues raised by the Forest Supervisor for Snodgrass are attached at Appeal Exhibits 30, 32 and 36). Given a fair NEPA process, these issues can be addressed at Snodgrass too. See Appeal at 38-58. CBMR planners have and can address challenges if they know the Forest Supervisor's questions. They cannot, and should not at the preliminary Pre NEPA stage, be required to completely resolve numerous issues that the Supervisor never raised to CBMR as threshold questions.

The Forest Supervisor implies that he repeatedly communicated to CBMR that he believed Snodgrass was a "bad proposal," that the decades long history indicates it has always been a "bad proposal," and that CBMR knew that the Supervisor was likely to reject it. See, e.g., GMUG Response at 11 ("The Forest Service has been very clear with CBMR that development of lift served skiing on Snodgrass Mountain is fraught with concerns and resource issues"). The Supervisor states that GMUG Response Exhibit 3 demonstrates a "record of correspondence 1995 to 2009, Wherein CBMR is Appraised of Forest Service Reservations/Concerns about the Development of Snodgrass Mountain." The Supervisor also claims that GMUG Response

Exhibit 3 demonstrates that the Pre NEPA process was extended at the request of CBMR. GMUG Response at 23.

CBMR respectfully submits that Forest Supervisor Richmond is rewriting history to support his November Decision. GMUG Response Exhibit 3 proves only that the Supervisor raised two threshold issues in Pre NEPA, and that those two issues were resolved to the satisfaction of the Supervisor. The following bullets are highlights from GMUG Response Exhibit 3:

- In a September 2003 letter to former CBMR President and CEO John Norton shortly before the Muellers bought the resort, Forest Supervisor Robert Storch stated: "You have clearly established the importance of additional intermediate skiing terrain to the future success of CBMR and the importance of Snodgrass Mountain serving that need …. We look forward to discussing how best to consider a Snodgrass expansion with the new owners." GMUG Response Ex. 3.

- On October 13, 2006, Forest Supervisor Richmond wrote to Tim Mueller: "I concur with that need and am willing to entertain a proposal for the development of this terrain on Snodgrass Mountain …." Id.

- On December 11, 2006, District Ranger Jim Dawson wrote to Tim Mueller to explain the GMUG's "expectations for a Master Development Plan." He explained "the MDP is the mechanism by which Crested Butte Mountain Resort (CBMR) outlines its vision for resort development." Id.

- In an undated letter, Corey Wong wrote John Norton regarding the timeline for a NEPA analysis of Snodgrass. Mr. Wong explains that the proposal would require preparation of an EIS, and that predicting how long the NEPA process would take is "impossible." Id.

- On June 5, 2008, Forest Supervisor Richmond wrote Tim Mueller to explain the review process the Snodgrass proposal will go through, to explain that geology and public support are threshold issues, and that "CBMR has some significant work to do to address public concerns if you want the Forest Service to accept an application and begin NEPA for this project." Id.

- On December 3, 2008, the Forest Service approved CNL's application for a Ski Area Term Special Use Permit. Id.

- On January 29, 2009, Forest Supervisor Richmond wrote Tim Mueller, stating that public support was "not cause at this point to deny a proposal, presuming little changes by the time you submit it." He also identified two areas to avoid because of geology, and invited CBMR to submit a proposal consistent with the information provided to CBMR. Id.

These quotations show that GMUG Response Exhibit 3 does not establish a record "replete with warnings to CBMR." GMUG Response at 14. Correspondence in the record demonstrates only that the Forest Supervisor identified two threshold issues. GMUG Response Ex. 3. The only documents in GMUG Response Exhibit 3 that arguably support the GMUG's contention are internal "talking points" never provided to CBMR. And Exhibit 3 does not contain: (1) the 2005 Memorandum of Understanding ("MOU") in which the GMUG stated it "has determined that the Project will be addressed in an Environmental Impact Statement (EIS)" (Appeal Ex. 11) or (2) the 2005 funding agreement, most recently extended weeks before the November Decision, whereby CBMR agreed to fund the GMUG's NEPA review of Snodgrass. Ex. 2.

The Forest Supervisor claims in his Response that he has been consistent throughout the process. The record does not support that claim. The Forest Supervisor moved the goal line at the last minute without ever telling CBMR or the public. It did so after the Regional Office reviewed the Supervisor's July Decision. Ex. 1.

E. The Forest Supervisor Mischaracterizes the Need for the Project and Contradicts Past Statements.

CBMR's early discussions with the GMUG focused on CBMR's need for more intermediate terrain. GMUG Response at 30-31. The Forest Supervisor attacks the need for the expansion by citing the analysis of two individuals with no demonstrated ski area design

experience who oppose the expansion and who question the amount of "true" intermediate terrain Snodgrass would provide. GMUG Response at 30-31, Ex. 25 at 1-2. Forest Supervisor Richmond disowns his October 13, 2006 concurrence with the need for Snodgrass because the need now "go[es] well beyond the 'need' described and agreed to at the time of the October 13, 2006 letter.[5] GMUG Response at 31. The Forest Supervisor's argument rejecting the need for the expansion is arbitrary, based on incorrect analysis, and is utterly inconsistent with the record of his position before he released the Response.

First, as described in detail in on pages 42 to 43 below and Exhibit 25, the Supervisor's conclusion is based on a report prepared by two individuals opposed to the proposal with no experience in ski area planning or design that "did not apply accepted industry planning and analysis techniques." Ex. 25 at 1-2. The Forest Supervisor described the efforts of known partisans as "a campaign of influence" yet he adopted their biased and demonstrably wrong conclusions as his own. See GMUG Response at 8, 30-31; Ex. 25. In fact, Snodgrass would increase CBMR's intermediate terrain by 45%. Ex. 25 at 6. The most reputable ski resort planning and design firm in North America concludes that the Snodgrass proposal will support 123 acres of quality additional intermediate terrain, not the 45 acres stated by the Forest Supervisor based on the biased report he adopted. Ex. 25 at 2.

But even more troubling is the Forest Supervisor's criticism that the proposal has evolved and expanded during the five year review process. GMUG Response at 31. Expanded

[5] The Supervisor's October 13, 2006 letter stated: "You have presented us a convincing argument supporting a need for more intermediate terrain at Crested Butte. I concur with that need and am willing to entertain a proposal for the development of the terrain on Snodgrass Mountain …." Appeal Ex. 12.

intermediate terrain is a key aspect of the Snodgrass proposal, but not the only purpose of it. GMUG Response at 31. The expansion will complement the main mountain, diversify and increase terrain offerings, provide a quality winter recreation experience, and promote the long-term viability of the ski area. Appeal Ex. 4 at 2. The Supervisor has consistently acknowledged the evolution of the project and accepted the broader purpose and need. In the July Decision, Supervisor Richmond determined:

> The fundamental National Forest purpose and need to which the proposal responds is the provision of improved downhill skiing opportunities at an established resort. Expansion of additional diverse terrain enhances the experience of visitors to the resort, thereby providing opportunities through the partnerships we have with ski companies such as CBMR. It is our objective, in part, for them to be successful. Expansion of new terrain will also help CBMR attract more return visitation, and provide a 3 to 5 day ski package experience, instead of the 2 to 3 day experience they now offer.

Ex. 1 at 2. Even the November 4, 2009 GMUG staff paper upon which the Supervisor relies concludes: "the newly stated purposes and need for Snodgrass development are not inconsistent with National Forest purposes. Expanded opportunity, more diverse terrain, new ski pods and a new mountain, while not filling in the market demand for just more intermediate skiing, are still legitimate purposes." GMUG Response Ex. 2 at 16-17.

The Forest Supervisor has recognized that the need has appropriately evolved, consistent with formal Forest Service policy recognizing the need for MDPs to evolve to reflect changing market conditions. Ex. 22 at 3. Why does the Supervisor now demand that the objectives of the MDP remain static contrary to Forest Service policy? Ex. 22 at 3. The Supervisor's conclusions are based on factual errors from biased sources and contradict his consistent written acceptance of CBMR's need for lift-served skiing on Snodgrass Mountain.

III. The Forest Supervisor's Unprecedented Standard is Bad Policy.

The Forest Supervisor claims "We Did it Right." GMUG Response at 9. He asserts throughout his Response that he followed the established Forest Service process for evaluation of ski resort proposals. See, e.g., GMUG Response at 9. These claims overlook that he has created an unprecedented test, and applied Forest Service policies in ways that far exceed anything that has been done before.

A. The Forest Supervisor Did Not Follow Established Procedures.

The Forest Supervisor points to three other proposed ski area development projects – Lolo Peak, Adams Rib, and Zero Creek Basin at Winter Park – to support his claim that his review was consistent with Forest Service policy. GMUG Response at 16. Those examples do not support the Supervisor. The Adams Rib proposal, by the Supervisor's own admission, "was terminated in 1998 at the holder's request …." Id. The Lolo Peak proposal involved an application for a *new* ski area special use permit for an area that was no longer allocated for developed skiing in the governing Lolo and Bitterroot National Forest Plans. Ex. 27. Zero Creek Basin was removed from a proposal to expand Winter Park Ski Area *as part of the NEPA process* – akin to removing the Snodgrass north side area from CBMR's special use permit as proposed by CBMR in its project proposal letter. Appeal Ex. 4 at 7. These examples do not provide any support for either the four-year "bait and switch" Pre NEPA process followed by the Forest Supervisor, or for the impossible test he applied in his decision whether to begin the NEPA process for Snodgrass Mountain. The process followed, and the standard applied by Forest Supervisor Richmond, are unprecedented.

1. The "Screening" Process Applied by the Forest Supervisor Is Without Precedent.

Forest Supervisor Richmond claims: "The Forest Service may employ any level of analysis to the consideration of special use screens it considers appropriate." GMUG Response at 29. As CBMR demonstrated in its appeal, this statement violates both the letter and spirit of the "quick and efficient" process called for in the screening regulations. Appeal at 31-35. But even if the Supervisor's statement was true, the Supervisor tread far into uncharted territory with this screening process.

The screening record in front of the Reviewing Officer is many thousands of pages. CBMR submitted a request under the FOIA for the screening decisions made by five separate National Forests for nine recent ski area expansion proposals. Ex. 12. The Forest Service provided only one single-page document that refers to the 36 C.F.R. Part 251 screening process for one ski area. It is attached at Exhibit 12. If the screening process Forest Supervisor Richmond applied at Snodgrass truly reflects the process the Forest Service applies at other ski areas, why did the Forest Service produce only one page that references screening for only one of nine ski area expansions? Forest Supervisor Richmond travelled far beyond screening.

2. Forest Supervisor Richmond's Demand for Complete Issue Resolution at this Preliminary Stage is Contrary to the Established Policy of the Forest Service and the GMUG.

The Forest Supervisor's demand for resolution of issues at this preliminary stage is out of step with Forest Service policy and the Supervisor's own statements. It is profoundly unfair for Forest Supervisor Richmond to apply a materially different test to CBMR than the Forest Service applies to other ski areas.

a. A MDP is a Conceptual Document.

The Forest Supervisor rejected CBMR's Master Development Plan ("MDP") and refused to start the NEPA process because the MDP did not eliminate all uncertainty about certain issues – such as off-site impacts, avalanche safety, boundary management, and access. Appeal Ex. 1. The Forest Supervisor criticizes the MDP for failing to provide "evidence" from "entities that provide social/medical/emergency services, infrastructure, and the various other services demanded by increased visitation, that they are prepared for such an influx of people." GMUG Response at 54. Such information is appropriate in a NEPA process. 42 U.S.C. § 4331(a); 40 C.F.R. §§ 1501.6, 1502.19(a). The demand for resolution of these issues at this preliminary MDP stage is unprecedented and unfair because Forest Service policy, the Forest Service's litigation position, and the GMUG's own statements all require a MDP to be an entirely "conceptual" document.

(1) Forest Service Policy.

A MDP is a requirement of the Ski Area Term Special Use Permit. Appeal Ex. 2 at 2. Once accepted by the Forest Service it becomes part of the permit. Id. at 1. A MDP is "[a] tool for identifying the location, nature, scope and timing of development of facilities at current and potential permitted resorts." Response Ex. 7 at 2. The Forest Service Rocky Mountain Region Winter Sports Guidebook explains: "The plan is a conceptual blueprint for development and operation of the resort." Ex. 22 at 2. "[M]aster development plans should also be dynamic and should be capable of being changed in response to changing management concerns and market opportunities." Id. at 3. A MDP is the big picture "conceptual blueprint" of the ski area's plans

for the future. The GMUG's demand that this conceptual blueprint resolve all significant issues is inconsistent with Forest Service policy.

(2) Forest Service Litigation Position.

The Ark Initiative v. U.S. Forest Service is an ongoing case in federal district court in which an environmental group plaintiff challenged the Forest Service's acceptance of a MDP for the Aspen Skiing Company. The Forest Service has argued in that case that a MDP is "an entirely conceptual document." Brief in 06-cv-02418 (D. Colo filed Nov. 16, 2007), excerpted at Ex. 15 at 1. The Forest Service explains: "Because resort operations must be dynamic in order to respond to change, the Forest Service has directed that MDPs also should be dynamic and capable of change, to reflect changing management concerns and market opportunities." Brief at 10. The level of detail demanded by the Forest Supervisor is contrary to the agency's official position in litigation.

(3) GMUG's Statements to CBMR.

On December 11, 2006, the GMUG's Jim Dawson wrote to CBMR to explain the GMUG's expectations for a MDP:

> The Forest Service recognizes the dynamic nature of the ski industry. Master Development Plans are designed to be flexible and responsive to the needs of the particular resort and the general public we serve. The MDP is best considered as a systematic 'vision document'. The various projects under the vision are best planned and authorized in a logical and sequential process.

GMUG Response Ex. 3. A "flexible and responsive" and "visionary" MDP is inconsistent with the Supervisor's current demand for a document that resolves all significant issues associated with the proposal to develop Snodgrass Mountain.

b. The Snodgrass Proposal Letter Exceeds Forest Service Standards.

The Forest Supervisor criticizes the Snodgrass proposal letter.[6] Attached at Exhibit 17 are proposal letters for two recent ski area expansion proposals in Colorado – the Breckenridge Ski Resort Peak 6 expansion and the Arapahoe Basin Ski Area Montezuma Bowl expansion. The Forest Service accepted both into the NEPA process. Ex. 17. The CBMR Snodgrass proposal letter exceeds the level of detail contained in either the Breckenridge or Arapahoe Basin proposals. See Ex. 17 (the Breckenridge letter is a single page; the Arapahoe Basin letter is three pages). The Forest Supervisor's demand for even greater detail and issue resolution is out of step with Forest Service practice and policy and is unfair.

c. The CBMR Submittals Were Subject to Detailed Comment by the GMUG and Are Among the Most Detailed Accepted by the Forest Service.

The Forest Supervisor suggests that CBMR's MDP and project proposal lacked sufficient detail. See, e.g., GMUG Response at 16. This implication is wrong.

First, the GMUG reviewed and submitted comprehensive comments on multiple drafts of CBMR's MDP. See Appeal Ex. 24. Forest Service Snow Ranger Kai Allen reviewed the second draft, and stated that he "went through the document with a high level of detail. Twice." Id. at 1. Mr. Allen noted "the hard work that has obviously gone into it." Id. Mr. Allen submitted 160 individual detailed comments on the MDP. Id. Ken Kowynia submitted 38 additional individual comments. Id. CBMR revised the MDP to incorporate the direction provided by the Forest

[6] For example, the Forest Supervisor faults the letter's description of access to the mountain because "bus service is described there as 'likely' … hardly a firm proposal or plan." GMUG Response at 53.

Service. Preparation of the MDP was a collaborative process between the GMUG and CBMR. It is wrong for the Forest Supervisor to claim the MDP is deficient.

Second, CBMR's MDP and project proposal letter exceeded the Forest Service standard for detail and issue resolution. SE Group is a ski area planning and design firm founded in 1958. Ex. 25 at 3. SE Group prepared the 2009 CBMR MDP and over 115 other MDPs since 1995 alone. SE Group concludes that CBMR's MDP "is among the most detailed of master plans we have produced in over a half century of ski area planning." Ex. 25 at 3. With its extensive experience preparing MDPs, SE Group has "not seen a master plan subject to this level of scrutiny in the acceptance phase …." Id. The Forest Supervisor's demands at the preliminary MDP stage exceed Forest Service policy or practice. It is unfair for the Forest Supervisor to apply a materially more difficult test to CBMR than the Forest Service applies to other ski areas.

B. Forest Supervisor Richmond's Failure to Involve the Public Undermined the Public Trust.

The Forest Service made the decisions to allocate Snodgrass Mountain to skiing in the GMUG Forest Plan and to CBMR's special use permit after conducting NEPA processes with public involvement and notice and comment. Appeal Exs. 6, 7, 8, 9. Forest Supervisor Richmond reversed those decisions in private with no public process. Appeal Ex. 1 at 5.

Forest Supervisor Richmond contradicts himself. He asserts that "it is not possible to ... claim that the public did not have the opportunity to comment." GMUG Response at 11. Yet he admits that "public comment was not solicited." GMUG Response at 10. The truth is Forest Supervisor Richmond decided the future of a community that depends on skiing on Forest Service lands without notice, comment, or any public process. Supervisor Richmond argues this

failure was harmless because "it would be difficult to design a more thorough scoping, or opportunity to comment from the community than has spontaneously occurred both before the Decision, and since." GMUG Response at 39. If Forest Supervisor Richmond truly believes this, it is disappointing because meaningful public involvement requires much more than what he provided.

1. The Fact That People Wrote the Forest Supervisor After the Decision Does Not Mean the Public Was Involved in the Decision.

Forest Supervisor Richmond claims the public was adequately involved because they could criticize or praise his November Decision after he made it. See, e.g., GMUG Response at 8. The Supervisor repeatedly points to comments received *after* he made the November Decision to demonstrate that "[n]early every person, entity, group, organization, elected body or representative with any interest in Snodgrass Mountain, or the upper East River Valley has weighed in." GMUG Response at 8. See also GMUG Response at 11, 37 and 39.

Forest Supervisor Richmond's claim that the public was given an adequate opportunity to comment because they could criticize his decision after he made it is irrational. The opportunity to comment must come "while the decision maker is still receptive to information and argument." Sharon Steel v. Envtl. Prot. Agency, 597 F.2d 377, 381 (3d Cir. 1980); see also Grand Canyon Air Tours v. F.A.A., 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them."). Scores of the post-decisional letters the Supervisor cites as *support* for his process *criticize* the Supervisor for failing to provide an adequate opportunity for public

involvement. GMUG Response Ex. 35. Supervisor Richmond's claim that those letters demonstrate an adequate public process is bizarre.

2. Meaningful Public Involvement Requires Notice, an Opportunity to Comment, and a Meaningful Response – None of Which the Forest Supervisor Provided.

The Forest Supervisor's claim of "no harm no foul" assumes the public was adequately involved because a person could choose to write him a letter. But a meaningful public input process requires more: (1) notice that the Forest Supervisor is preparing to make the decision whether any future lift-served skiing on Snodgrass is in the public interest; (2) an opportunity to comment based on the notice before a decision is made; and (3) a meaningful response by the Forest Supervisor to comments received. E.g., 40 C.F.R. §§ 1501.7, 1502.19, 1503.4, 1505.2. The Forest Supervisor provided none of those things. Comment without notice forces the public to guess. Comment without response shirks accountability. What occurred here was not enough.

Notice. The Forest Supervisor forgets the "notice" in "notice and comment." Adequate notice that the agency is prepared to make a decision is necessary "to allow for meaningful commentary so that 'a genuine interchange' occurs rather than 'allow[ing] an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs." American Radio League, Inc. v. F.C.C., 524 F.2d 227, 237 (D.C. Cir. 2008) (quoting Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d, 525, 530-31 (D.C. Cir. 2006). Of course, notice that an agency decision may be made is the constitutional bedrock of procedural due process. See, e.g., Jacob v. Roberts, 223 U.S. 261, 265 (1912). The Forest Supervisor's utter failure to give any public notice that he was going to determine whether future lift-served skiing is in the public interest prevented meaningful public input.

Comment. The Forest Supervisor repeatedly characterizes the letters he received as "comments." See, e.g., GMUG Response at 39. But the opportunity for meaningful comment requires more than the ability to write letters; it requires something meaningful to comment on. For example, when a federal agency publishes a notice of intent to prepare an EIS in the Federal Register, it identifies the proposed action, specific issues, and asks the public to comment on those issues and others the agency may have overlooked. See, e.g., Ex. 17. The Forest Supervisor did not provide an opportunity to comment because he did not identify that he was going to decide, as he informed his staff, whether future lift-served skiing is in the public interest. GMUG Response Ex. 2 at 1. He never asked for comments. It is profoundly misleading for the Forest Supervisor to even characterize the unsolicited letters he received as "comments."

Response to Comment. The Forest Supervisor forgets that meaningful public participation requires the agency to respond meaningfully to comments. 40 C.F.R. § 1503.4. "[A] dialogue is a two way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." Home Box Office v. F.C.C., 567 F.2d 9, 35 (D.C. Cir. 1977). When making its decision on the proposal, the Forest Supervisor was "obliged to provide a 'meaningful reference' to all reasonable opposing viewpoints concerning the agency's proposed decision." California v. Block, 690 F.2d 753, 773 (9th Cir. 1982) (overturning a Forest Service decision for failure to adequately respond to comments). The response must contain "good faith, reasoned analysis …." Id. (quoting Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973)). For the Forest Supervisor to claim that a comment opportunity is meaningful, he

must "demonstrate the rationality of [his] decision-making process by responding to those comments that are relevant and significant." Grand Canyon Air, 165 F.3d at 468. The Forest Supervisor's failure to respond to letters has left many, including CBMR, questioning the basis for the Supervisor's November Decision.

Forest Supervisor Richmond claims "no harm no foul" because: "Nearly every person, entity, organization, elected body or representative with any interest in Snodgrass Mountain, or the upper East River Valley has weighed in." GMUG Response at 8. But the ability to write letters is not enough. For the public to have a meaningful opportunity to participate the agency must give notice it is preparing to make a decision, it must provide a meaningful opportunity to comment on identified issues *before* the decision is made, and it must respond to comments in a meaningful way. 40 C.F.R. § 1501.7, 1502.19, 1503.4, 1505.2. None of that happened here. The public is upset because Forest Supervisor Richmond decided that any future lift-served skiing is not in the public interest without any meaningful public involvement. Forest Supervisor Richmond claims that it "would be difficult to design a more thorough solicitation for public comment and opinion." GMUG Response at 11. But designing and following a materially better process is quite simple: just follow the procedures for public involvement and notice and comment that are laid out in federal law.

C. The November Decision is Out of Step With Department of Agriculture Policy.

In an August 14, 2009, speech in Seattle, Washington, Secretary of Agriculture Tom Vilsack announced that management of national forests should be structured so that it "conserves our forests and the vital resources important to our survival while wisely respecting the need for

a forest economy that creates jobs and vibrant rural communities." Ex. 26 at 4. The Forest Supervisor recognizes that CBMR is the economic heart of the East River Valley. GMUG Response Ex. 2 ("CBMR is no doubt the economic engine of the East River Valley."). Both CBMR and much of the community believe that the Snodgrass proposal is critical to supporting the vitality of the local economy. See Appeal at 10-14; GMUG Response Ex. 34-35. But the Supervisor decided to deny the proposal without even conducting a public review. That decision is inconsistent with Secretary Vilsack's direction to balance forest conservation with the need for economic growth and job creation.

IV. Forest Supervisor Richmond Relies On Multiple Factual Errors, Omissions and Misrepresentations.

CBMR demonstrated in its appeal that every rationale identified in the November Decision is factually wrong, legally incorrect, or simply a topic appropriate for a hard look in an EIS. Appeal at 38-59. CBMR will not repeat those arguments here, but rather will address only the new factual errors and contradictions contained in the Forest Supervisor's Response.

A. The Forest Supervisor Contradicts His Past Positions and Statements.

Supervisor Richmond's Response repeatedly contradicts prior GMUG statements and positions. By improperly focusing on whether CBMR holds a "right or entitlement" to develop Snodgrass, the Forest Supervisor has overlooked his own obligation to explain himself when he changes his position in such a drastic manner.

Issue	GMUG Response	Contradictory Record
Public Outreach	"CBMR was repeatedly urged by the Forest Service to meet with and work with all segments of the community, including those who opposed	"CBMR has actively engaged the community." Ex. 1 at 1. "CBMR did in fact hold several public

Issue	GMUG Response	Contradictory Record
	development plans. They did not." GMUG Response at 10.	meetings at our request." GMUG Response at 10.
NEPA Threshold	"The Forest Service has been very clear with CBMR that development of lift served skiing on Snodgrass Mountain is fraught with concerns and resource issues." GMUG Response at 11.	"Clearly implied was that if [geology and public support] were resolved to our satisfaction, a proposal would be accepted and the NEPA process begun. We are satisfied with the resolution of these issues." Ex. 1 at 2.
GMUG's Role in NEPA	"[T]he statement by appellants that 'the Forest Supervisor repeatedly stated that, once the Forest Service begins the NEPA process, its job is to 'defend' the proposal . . . is equally false." GMUG Response at 10.	Supervisor Richmond's cover letter again states that the GMUG's job is to ensure that "the Forest Service believes in the proposed action and can support and defend it as our own." Richmond Cover Letter at 1.
Access to Snodgrass	"Access to the proposed base of Snodgrass is inherently difficult." GMUG Response at 53.	"[B]us service would be available from the base area/town of CB/Mt. CB to Snodgrass/North Village. That's pretty common." July 2009 Jackson E-mail to Burch, Ex. 3.
Public Support Threshold	"It is difficult to imagine accepting a private development proposal, with the significant impacts on local communities, as a federal proposed action when the local governments affected do not support the proposal." GMUG Response at 36.	• Public support was "not cause at this point to deny a proposal…." Appeal Ex. 19 at 1. • "[T]here is sufficient support for the development of Snodgrass to warrant further review under NEPA." Ex. 1 at 1-2.
Norton Comments on Pre NEPA	The GMUG claims John Norton made comments about Pre NEPA in 2005 as CBMR's "CEO." GMUG Response at 22.	John Norton resigned from CBMR in 2004.
Avalanche Risk	"We do not know how you could get any clearer, or more objective, support of the position that the avalanche/boundary management problems . . . are significant and extraordinary." Response at 47.	"There continues to be substantial disagreement among experts [in avalanche potential] …. We recognize that management of the problem is not insurmountable." GMUG Response Ex. 2 at 8-9.
Lynx	"[T]he Forest Service has engaged in conferencing with Fish and Wildlife Service (FWS) to identify potential issues arising from the development	A FOIA request for documents reflecting these discussions received a "no records" response. Ex. 16.

Issue	GMUG Response	Contradictory Record
	of Snodgrass as T&E species." GMUG Response at 49.	

B. The Forest Supervisor's Intermediate Terrain Statements Are Wrong.

Supervisor Richmond questions the need for the Snodgrass expansion because of claimed uncertainty about the amount of intermediate terrain the proposal will provide[7]:

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

GMUG Response at 30. Supervisor Richmond's conclusion that Snodgrass will do a poor job providing intermediate terrain is troubling because it contradicts his prior conclusions regarding intermediate terrain at Snodgrass and the conclusion of nationally recognized ski area designers. Supervisor Richmond's new position is grounded exclusively on letters submitted by "Robert Goettge and James Sharpe and Friends of Snodgrass Mountain," all of whom oppose the project and have no demonstrated experience in ski area design. GMUG Response at 30-31; Ex. 25 at 30.

The Forest Supervisor's reliance on the analysis conducted by Mr. Goettge and Mr. Sharpe is arbitrary because their conclusions are demonstrably wrong. These errors by Forest Supervisor Richmond would have been avoided if he had submitted their analysis to comment. SE Group concludes that the Goettge and Sharpe analysis "did not use accepted industry

[7] As explained above, the narrow focus on intermediate terrain is inappropriate. Intermediate terrain is an important component of the proposal, but the need is appropriately broader than that.

planning methodologies and analysis techniques." Ex. 25 at 3. The Goettge and Sharpe analysis:

- Concludes Snodgrass Mountain will only provide 45 acres of Intermediate terrain – an "untrue" statement "based on incorrect calculations." Ex. 25 at 6. In fact, Snodgrass Mountain will provide 123 acres of intermediate terrain. Ex. 25 at 6.

- Compares "apples and oranges" by mixing numbers from a prior 2008 Mountain Improvement Plan with numbers from the 2009 MDP. Ex. 25 at 3.

- Utilizes topographic maps with 40 foot contour intervals, "which does not meet the needs for industry mapping resolution." Ex. 25 at 4.

- Assumes the MDP uses a 50 percent maximum slope gradient for intermediate trails when it in fact uses 45 percent. Ex. 25 at 4.

- Claims substantial grading will be required when in fact "the amount of earthwork required to develop skiing on Snodgrass Mountain is quite typical …." Ex. 25 at 4.

- Claims the "Z" shape of Snodgrass would result in poor quality intermediate terrain when in fact: "This 'Z' profile on Intermediate terrain is very common, desirable to many skiers, and can be found at all of the nation's most popular resorts …." Ex. 25 at 7.

Supervisor Richmond's conclusions regarding intermediate terrain at Snodgrass are wrong because he selectively adopted the assertions submitted by biased individuals who oppose the proposal.

C. The Region Has Already Successfully Hosted the Skier Visits Anticipated for Snodgrass Mountain.

Supervisor Richmond claims that CBMR has provided "no evidence" that the region is prepared for the "influx of people to the valley as is anticipated and hoped for by CBMR." GMUG Response at 54. This overlooks that the region has already hosted many more annual skier visits during the mid to late 1990s than it has in recent years. See Appeal at 10-11. As the

Town of Mt. Crested Butte explained, the town is prepared to handle many more residents and guests than it currently hosts. Appeal Ex. 34 at 1.

V. Forest Supervisor Richmond Amended the Forest Plan Without Following the Law.

Forest Supervisor Richmond states that his job was to determine "whether permanent dedication of these National Forest System lands to this use . . . was the right thing to do." GMUG Response at 24. Forest Supervisor Richmond states in his cover letter that "[b]alancing the needs for continued economic development with the values of open space and environmental conservation is never easy." Richmond Cover Letter at 1. Supervisor Richmond fails to realize that the decision about whether Snodgrass is suitable for skiing has already been made in a public NEPA process. In choosing "open space and environmental conservation" as the use for Snodgrass Mountain, Supervisor Richmond amended the Forest Plan without following the procedures mandated by the National Forest Management Act ("NFMA") and agency regulations.

Snodgrass Mountain has been allocated for developed skiing in Management Area 1B in the GMUG Forest Plan since 1979. Appeal Exs. 7 at 1, 9 at III-94. That decision was made in a public NEPA process. See, e.g., Appeal Ex. 8, 9. Management Area 1B is the Forest Service's determination that Snodgrass Mountain is suitable for the expansion of lift-served skiing at CBMR rather than management as open space. Appeal Ex. 9 at III-94, Map 4. Management Area 1B provides: "Management integrates ski area development and use with other resource management to provide healthy tree stands, vegetative diversity, forage production for wildlife

and livestock, and opportunities for non-motorized recreation. ... Facilities may dominate, but harmonize and blend with the natural setting." Appeal Ex. 9 at III-94.

Supervisor Richmond stated in his November Decision that he did not amend the Forest Plan. Appeal Ex. 1 at 1. But that is exactly what Forest Supervisor Richmond did without any process or public involvement. Forest Supervisor Richmond determined: "it is my finding that it is not in the public interest to continue to consider development on Snodgrass Mountain any further." Appeal Ex. 1 at 5 (emphasis added). Forest Supervisor Richmond's cover letter makes clear that he determined how Snodgrass Mountain should be managed, thereby amending the Forest Plan: "I made my decision to have Snodgrass stay in its undeveloped character for the variety of reasons cited in my November 5, 2009 letter." Richmond Cover Letter at 1 (emphasis added). That decision rejected Snodgrass Mountain for the use provided by the Forest Plan – "ski area development" – and dedicated it to another use – "undeveloped character."

Of course Forest Supervisor Richmond can amend the Forest Plan. But he must follow the procedures mandated by NFMA and agency regulations. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.10(f). Making the November Decision with no public involvement was improper, particularly because the economy of the East River Valley is bound to developed skiing on Forest Service lands. For a significant amendment such as this, the Forest Supervisor must "follow the same procedure as that required for development and approval of a Forest Plan." 36 C.F.R. § 219.10(f). This requires, among other things, preparation of a "draft and final environmental impact statement." Id. § 219.10(b). Even for an insignificant amendment, the Forest Supervisor still must ensure "appropriate public notification" and "satisfactory completion

of NEPA procedures." Id. "NFMA requires public notice for any amendment, significant or otherwise." Citizens' Committee to Save Our Canyons v. U.S. Forest Service, 297 F.3d 1012, 1033 (10th Cir. 2002); see also 16 U.S.C. § 1604(f)(4). In reviewing actions in the Helena National Forest ("HNF"), the Ninth Circuit stated: "If the Forest Service thinks any provision of the 1986 HNF Plan is no longer relevant, the agency should propose amendments to the HNF Plan altering its standards, in a process complying with NEPA and NFMA ...." Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953, 961 (9th Cir. 2005).

Forest Supervisor Richmond removed Snodgrass Mountain from Management Area 1B by determining that it should "stay in its undeveloped character." Richmond Cover Letter at 1. Supervisor Richmond violated NFMA and agency regulations because he did not follow the procedures required to amend the Forest Plan. 16 U.S.C. § 1604(f)(4); Citizens' Committee to Save Our Canyons, 297 F.3d at 1033.

VI. The Forest Supervisor Does Not Explain the GMUG's Commitment to Prepare an EIS in the Memorandum of Understanding.

In 2005, CBMR and the Forest Service signed a Memorandum of Understanding ("MOU") that 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).

Appeal Ex. 11 (emphasis added). Supervisor Richmond cannot explain why the MOU does not mean what it says: that the GMUG determined in 2005 that the Snodgrass Proposal would be "addressed in an EIS." Supervisor Richmond devotes five pages to say that such a determination "could not have been made at that time." GMUG Response at 16. If Supervisor Richmond

believed in 2005 that agency policies did not permit him to "determine[] that the Project will be addressed in an Environmental Impact Statement" he should not have said so in the MOU – a document in which CBMR agreed to spend significant amounts of money to fund the GMUG's review and preparation for the NEPA process. CBMR spent close to $2 million as a result of reliance on the MOU. Appeal Ex. 5 ¶ 40.

VII. Forest Supervisor Richmond Cannot Use Forest Service Regulations or Policy to Exempt Himself From NEPA.

The Forest Supervisor's entire argument that he did not violate NEPA is premised on the assumption that, because the screening regulations state that the Supervisor is supposed to start NEPA after the screening process, nothing the Supervisor does before he decides he is done screening a proposal can trigger NEPA. GMUG Response at 29. That argument is wrong.

This appeal is about the Forest Supervisor's obligations, not CBMR's "entitlement." The Forest Supervisor attempts to deflect attention from his own duties under federal law. He claims he has no obligation to conduct a NEPA process because: "No proponent for the private use of National Forest System lands may force its use onto public lands." GMUG Response at 14, 54. The Supervisor asks: "Does CBMR hold a right or entitlement?" Id. at 13. The Supervisor misses the point and changes the test for triggering NEPA. CBMR does not contend it can force the GMUG to allow it to develop Snodgrass Mountain. Id. at 14. Nor is this appeal about whether CBMR holds a "right or entitlement" to expand onto Snodgrass Mountain. Id. at 13. This appeal is about whether Forest Supervisor Richmond followed appropriate Forest Service policy, regulations, and federal law in reviewing the proposal. He did not.

The Supervisor's interpretation of Pre NEPA and screening cannot trump federal law. The Supervisor's claims that the Forest Service Pre NEPA process (GMUG Response at 16-17) and the Forest Service special use permit screening regulations (GMUG Response at 27) permit the Forest Supervisor to indefinitely delay beginning NEPA review on a proposal until he tells a proponent he is prepared to review "the formal proposal" and until he has formally "accepted" the proposal. GMUG Response at 21, 27, 29. The Supervisor believes that he may "employ any level of analysis" he deems proper before he begins the NEPA process. GMUG Response at 29. But refusing to comply with NEPA until the Supervisor stamps "accepted" on a proposal is not an exception that appears in NEPA.

The "will of Congress as unambiguously expressed in a properly enacted statute cannot be amended or altered by regulation." Diersen v. Chicago Car Exchange, 110 F.3d 481, 486 (7th Cir. 1997). "[W]here a regulation conflicts with a statute, the statute controls." U.S. v. Marte, 356 F.3d 1336, 1341 (11th Cir. 2004). The Supervisor's interpretation and application of the Forest Service Pre NEPA and screening processes do not allow him to avoid doing what NEPA requires. Neither the Pre NEPA training PowerPoint slides in GMUG Response Exhibit 7 nor the Supervisor's flawed interpretation of the screening regulations allow him to make a decision on a recommendation or report on major federal action without complying with NEPA. 42 U.S.C. § 4332(C).

The Forest Supervisor triggered the obligation to prepare an EIS.[8] NEPA commands agencies to "include in every recommendation or report on proposals for legislation and other

[8] See Appeal at 59-69 for additional explanation of Forest Supervisor Richmond's NEPA violations.

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). Forest Supervisor Richmond does not get to make the decision, in his sole discretion, about when a "proposal" exists. "A proposal may exist in fact as well as by agency declaration that one exists." 40 C.F.R. § 1508.23; see also Forest Service Employees for Envtl. Ethics v. U.S. Forest Service, 397 F.Supp.2d 1241, 1253 -1254 (D. Mont. 2005) (reversing decision not to prepare EIS for fire retardant use).

That Forest Supervisor Richmond made a decision on a proposal for major federal action without complying with NEPA is demonstrated by: (1) the extensive review conducted by the GMUG; (2) the 31 page "Review and Recommendations" on the Snodgrass proposal prepared by GMUG staff at the Forest Supervisor's request to address "all issues related to a decision by the Forest Service to consider Snodgrass Mountain any further for lift-served skiing." (GMUG Response Ex. 2); (3) the view that NEPA is not the "vehicle for deciding whether or not to undertake a project" because the GMUG makes the "yes or no" decision before NEPA (id. at 29); (4) the demand that the public and local governments express written support for actual development prior to NEPA review and prior to any local permitting process; and (5) the numerous issues addressed in the November Decision (Appeal Ex. 1). Forest Supervisor Richmond cannot avoid his obligation to comply with NEPA before making the November Decision based on a Pre NEPA training PowerPoint slide. GMUG Response at 16-17, 27.

CBMR does not challenge Pre NEPA or screening in general; only how they were applied here. The Pre NEPA process can be a useful tool to identify threshold issues early, and

to facilitate an efficient NEPA process. As the GMUG and CBMR agreed in 2005: "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." Appeal Ex. 11 at 2.

CBMR agrees that the screening process is a useful tool to permit an efficient initial review of a 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 …." 63 Fed. Reg. 65,950, 65,953 (Nov. 30 1998). CBMR challenges how these two procedures were applied here.

Forest Supervisor Richmond crossed the Rubicon. He made the decision that "it is not in the public interest to continue to consider development of Snodgrass Mountain any further." Appeal Ex. 1 at 5. That decision was major federal action because it changed the status quo for Snodgrass Mountain from suitable for ski area development to dedication as undeveloped land. Forest Supervisor Richmond turned appropriate Pre NEPA refinement and screening of a proposal into a process for making a decision on a recommendation or report for major federal action without preparing the EIS required by the statute. 42 U.S.C. § 4332. Remedying that violation will not allow any private proponent to "force" the Forest Service to do anything; it will restore the Pre NEPA and screening processes to their proper roles in the process.

VIII. Forest Supervisor Richmond's Assertion That He Would Make the Same Decision After NEPA Review is Offensive.

Forest Supervisor Richmond argues that the Reviewing Officer should not order a NEPA process because NEPA "would, in our view, produce no better answer than we already have." GMUG Response at 9. This conclusory assertion is not credible.

First, the Supervisor's November Decision is filled with unanswered questions. He cites *uncertainty* regarding boundary management, avalanche, transportation and public services, geology, terrain, access, coordination with Gunnison County, and other issues. See Appeal Ex. 1. The Supervisor's claim that a NEPA process that would address each of these unanswered questions would produce "no better result" is unconvincing.

Second, Forest Supervisor Richmond has an obligation to follow procedures required by law. Allowing him to shirk that obligation because he believes following the proper procedures would make no difference is inappropriate. An agency could always avoid its obligations by claiming that following the law would not change its mind. When alleging a violation of NEPA procedures, "a plaintiff need not establish that the ultimate agency decision would change upon National Environmental Policy Act compliance." Comm. To Save the Rio Hondo v. Lucero, 102 F.3d 445, 452 (10th Cir. 1996). In a challenge to the Forest Service's failure to prepare an EIS for summertime operations at a ski area, the Tenth Circuit Court of Appeals ruled: "That the Forest Service may not change its decision to allow summertime operations at the Ski Area after preparing an environmental impact statement is immaterial." Id. The Forest Supervisor's claim that he believes conducting the appropriate NEPA review would not change his decision is self serving and unpersuasive.

IX. Conducting a NEPA Process is the Fair Thing to Do.

Forest Supervisor Richmond violated NEPA. He made a decision on a proposal for major federal action without complying with the statute. 42 U.S.C. § 4332(c). His decision that it is not in the public interest to consider lift-served skiing on Snodgrass in the future changed the status quo without any public involvement. The Reviewing Officer should require a NEPA process for Snodgrass because it is the "fair and deliberate" thing to do. 36 C.F.R. § 251.80(b).

Whether CBMR should be permitted to expand onto Snodgrass Mountain is one of the single biggest issues facing the East River Valley in Colorado. The November Decision, and the concern that it foretells new Forest Service policy, is front page news in the Denver Post – a paper with a weekday circulation of over 250,000 people. Ex. 18.

After deciding to address these critical issues in a public NEPA process in the July Decision, Forest Supervisor Richmond reversed himself, invented a new test, and decided not to move forward. Supervisor Richmond made the November Decision behind closed doors without involving the public. His decision appears to have been influenced by the Regional Office. The bait and switch Pre NEPA process conducted by Supervisor Richmond, and the impossible test he applied in the November Decision, raise many questions. The GMUG has not answered those questions.

A NEPA process would help answer those questions in a balanced, impartial, and objective way. A NEPA process would provide a constructive public process. Why would the Forest Service not want such a process? CBMR recognizes that the NEPA review will require time and energy. But our country has decided that this time and energy are worth it because questions regarding significant federal actions like the Snodgrass proposal should be answered in

a measured way with meaningful opportunities for public involvement. The Reviewing Officer should require Forest Supervisor Richmond to review the Snodgrass proposal in an open and objective NEPA process because that is the "fair and deliberate" thing to do.

X. Conclusion.

Forest Supervisor Richmond states that: "The Forest Service, way too often, gets puts in the position of being the arbitrator for deep seated issues related to private development proposals on National Forest lands." Richmond Cover Letter at 2. CBMR recognizes that this is a complicated and controversial issue. But it is the Forest Service's mission. The Forest Service is capable of doing better. It is capable of running a fair, open, and objective NEPA process that addresses hard issues in a meaningful way and serves the people.

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 Richmond to immediately begin a good faith evaluation of the Snodgrass Mountain proposal in an objective and public NEPA process.

Respectfully submitted this 25th day of March 2010,

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CERTIFICATE OF SERVICE

I certify that on this 25th day of March, a true and correct copy of the foregoing was deposited in overnight mail, postage prepaid, addressed to the following:

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/s Jaime Woods
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