

**APPEAL TO THE REGIONAL FORESTER
USDA FOREST SERVICE REGION 6**

**FRIENDS OF MT. HOOD, THE HOOD
RIVER VALLYEY RESIDENTS
COMMITTEE, NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,
AND THE OREGON NATURAL
RESOURCES COUNCIL,**

Appellants,

vs.

**KIM TITUS, District Ranger, Hood River
Ranger District, Mt. Hood National Forest,
Deciding Officer,**

Appellee.

**APPEAL OF THE DECISION NOTICE,
FINDING OF NO SIGNIFICANT
IMPACT AND ENVIRONMENTAL
ASSESSMENT FOR LIFT 21 ON THE
HOOD RIVER RANGER DISTRICT OF
THE MT. HOOD NATIONAL FOREST**

NOTICE OF APPEAL

On December 18, 2001, Kim Titus, Hood River District Ranger, issued a Decision Notice (“DN”) and Finding of No Significant Impact (“FONSI”) for Environmental Assessment for Lift 21 at MHM Ski Resort (the “EA”). Notice is hereby given pursuant to 36 C.F.R. § 215 that the below listed groups are appealing the decision by the District Ranger to approve and implement the Lift 21 DN, FONSI and EA.

Friends of Mt. Hood
Kate McCarthy
P.O. Box 203
Mt. Hood, OR 97041
541.352.6228

Hood River Valley Residents Committee
Ken Maddox
P.O. Box 100
Mt. Hood, OR 97041

Oregon Natural Resources Council
Jeremy Hall
P.O. Box 11648
Eugene, OR 97440-3848
541.344.0675

Northwest Environmental Defense Center
Mark Riskedahl
10015 Northwest Terwilliger Blvd.
Portland, OR 97219
503.768.6673

The Appellants believe that the District Ranger's decision of December 18, 2001 is in error and not in accordance with the legal requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq. The Appellants have a specific interest in the Lift 21 project. Appellants have previously indicated their interest in this project by commenting throughout the planning process and continued involvement in decisions regarding the operations of MHM within the boundaries of the Mt. Hood National Forest. Appellants' continued interest and involvement in this project creates standing to appeal this decision according to 36 C.F.R. § 215.11(a)(2).

The Lift 21 project directly and significantly affects the members, volunteers, staff members and board members of the Friends of Mt. Hood, the Hood River Valley Residents Committee, the Oregon Natural Resources Council and the Northwest Environmental Defense Center. The members, volunteers, staff members and board members of appellants regularly use the MHM Permit Area and the surrounding area for work, outdoor recreation, wildlife observation and other forest-related activities. Implementation of the Lift 21 project would adversely affect these interests, because the proposed project could result in degradation of natural resources in and around the MHM Permit Area without adequate analysis and public disclosure as required under NEPA.

Appellants hereby reference and fully incorporate all material submitted in conjunction with the administrative appeal of the 1997 DSEIS. We have attached certain selections from that appeal for the convenience of the Appeal Reviewing and Deciding Officers. We also encourage them to review the remainder of the record submitted in conjunction with the 1997 DSEIS, as it

is a part of this document as well. The Forest Service has that information on file, and we are happy to provide another copy of that material at the expense of the Forest Service.

In addressing the merits of this appeal, please direct all correspondence to counsel for appellants:

Christopher Winter, OSB # 98435
Cascade Resources Advocacy Group
3024 SE 26th Avenue
Portland, OR 97202
Tel: (503) 235-9703
Fax: (503) 235-9703

REQUESTED RELIEF

Appellants request the following relief:

- (1) That the Forest Service withdraw the Decision Notice for the Lift 21 project;
- (2) That the Forest Service withdraw the Finding of No Significant Impact for the Lift 21 Project;
- (3) That the Forest Service prepare an Environmental Impact Statement for the Lift 21 project; and
- (4) That the Forest Service stay the Lift 21 project until the merits of this Appeal may be decided.

STATEMENT OF REASONS

The EA approved by the District Ranger does not meet the requirements of NEPA, and the Forest Service must prepare an EIS for the Lift 21 project. The Appellants have many years of experience monitoring the development of the MHM ski area as well as the oversight practices of the Forest Service. The Lift 21 project is another example of the District Ranger refusing to provide the public with adequate information to assess and analyze the environmental impacts of the proposed actions. Appellants also have years of experience witnessing the fact that on-the-ground impacts often differ dramatically from the impacts predicted by the District Ranger in the NEPA planning documents for the MHM Permit Area. Until the District Ranger provides adequate information to the public and fulfills the requirements of NEPA, our "broad

national commitment to protecting and promoting environmental quality,” Appellants will continue to demand adequate public disclosure and analysis before authorizing development activities that have proven negative impacts on the ecosystem of Oregon’s alpine masterpiece.

More specifically, the DN, FONSI and EA fail to meet NEPA’s requirements for the following reasons: (1) the District Ranger failed to consider the cumulative impacts of reasonably foreseeable future development included in the 1997 Master Plan, (2) the District Ranger failed to adequately discuss and analyze the mitigation measures, including measures designed to avoid erosion and sedimentation as well as the required monitoring plan, (3) the District Ranger failed to adequately analyze the environmental impacts of excavating and spreading or filling more than 8000 cubic yards of soil, and (4) the District Ranger refused to consider a reasonable range of alternatives in providing facilities for beginner and novice riders.

I. The EA Fails to Adequately Consider Site-Specific Cumulative Impacts Resulting from Reasonably Foreseeable Future Development Pursuant to the 1997 Master Plan.

In determining whether a project will have a significant impact on the environment, an agency must consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” Id. The CEQ regulations define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . .” 40 C.F.R. § 1508.7 (emphasis added). Cumulative impacts may result from “individually minor but collectively significant impacts taking place over a period of time.” Id. “If several actions have a cumulative environmental effect, ‘this consequence must be considered in an EIS.’” Blue Mountains, 161 F.3d at 1214 (quoting Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1378 (9th Cir. 1998)).

Lift 21 threatens to have a significant cumulative impact on the vegetation, soil resources, water quality, hydrology and wildlife habitat within the MHM Permit Area when viewed and analyzed in conjunction with the other development proposals approved in the 1997 Master Plan. As an example, the EA addresses impacts to the fragile and unique alpine pincushion vegetation communities, claiming that “[w]hile impacts from soil disturbances (tower sites, road construction/road use) are likely to remain localized, they will probably persist in those delicate, slow to re-vegetate communities.” EA at 28. The District Ranger, however, bases this conclusion on the assumption that “[s]uch effects are likely to remain tightly localized unless, contrary to projections, summer use increases dramatically.” *Id.* (emphasis added)

The Master Plan provides for and projects a 1000% increase in summertime PAOT, but the District Ranger explicitly refused to consider these cumulative impacts in the Lift 21 EA, because MHM has not yet submitted a site-specific proposal for summer use. Moreover, it is likely that Lift 21, as a high-speed quad located at the base area, would be a likely means of transporting visitors to the high-alpine ecosystems.

The declaration of Joy Belsky, Ph.D. establishes that the human impacts to the high alpine ecosystem have been well documented in scientific studies. Dr. Belsky concludes that scientific research shows “that only about twenty passes by an average sized man in a subalpine meadow were sufficient to create a new trail with compacted soils and altered plant composition.” Exhibit A at p. 7. Furthermore, “[a] large number of studies have demonstrated the difficulty of restoring trampled alpine communities.” *Id.* at 8.

The Forest Service admits that increased summer use may combine with the effects of Lift 21 in impacting these high alpine communities. The scientific evidence clearly establishes that human access to these areas will likely cause significant and irreparable damage. MHM has already proposed a dramatic increase in summer usage in the 1997 Master Plan. Yet, despite these facts, the District Ranger somehow concludes that she need not consider the cumulative

impacts of summer use and Lift 21 on the sensitive high-alpine pincushion communities, because summer use is not “reasonably foreseeable.”

The District Ranger’s rather strange theory is that MHM has not yet made a specific proposal, and, therefore, summer use is not “reasonably foreseeable.” See DN, Appendix B, p. 7. The District Ranger’s rationale blatantly ignores the decision from the Ninth Circuit Court of Appeals in the litigation surrounding the Gulch lift. 1000 Friends of Oregon v. U.S. Forest Service, 1993 U.S. LEXIS 24704 (9th Cir. 1993). In that case, the plaintiffs also argued that the Forest Service had to consider the cumulative impacts of reasonably foreseeable future development. The Ninth Circuit disagreed, specifically because “the regional forester reversed approval of the 1991 Forest Plan and no new Master Plan for the area has been proposed. The Forest Service cannot reasonably foresee which components of the reversed Forest Plan, which envisions multiple ski lifts, ski trails, housing units, and base expansion, might be proposed in a future master plan.” Id. at *16 (emphasis added).¹

The Forest Service now has a Master Plan in place (apart from the transportation issues subject to the injunction issued by Judge King), and yet the District Ranger still claims that she cannot reasonably foresee future development. The location of ski lifts, the type and extent of summer use, and the base area expansion are all set forth in the Master Plan. MHM has now begun implementing those projects with Lift 21. It is absolutely “reasonable” to “foresee” MHM following through with the remainder of the projects approved in the 1997 Master Plan. While MHM could admittedly delay or alter the projects, the language of the NEPA regulations does not require such detailed specificity before the Forest Service is required to analyze the

¹ The Forest Service cannot rely upon the assertion that Lift 21 has independent utility. The cumulative impacts must be considered regardless of whether those impacts accrue as part of one project or a number of different projects each with their own independent utility. The language on “independent utility” arises when a plaintiff attempts to claim a proposal is really part of a larger project that should be considered in a single planning document. See, e.g. 40 C.F.R. § 1508.27(b)(7); 1000 Friends, 1993 U.S. App. LEXIS 24704, *17-18. Appellants in this case do not claim that the Forest Service is breaking a larger project down into smaller component parts. Appellants do claim that the Forest Service has failed to consider the cumulative impacts from reasonably foreseeable future development.

cumulative impacts. The CEQ could have easily determined that the Forest Service only had to analyze the cumulative impacts of a project in conjunction with other “pending projects” or other projects “currently being implemented.” CEQ chose not to use such restrictive language, and therefore, the District Ranger has arbitrarily restricted the reach of NEPA’s action-forcing requirements.

Furthermore, the District Ranger’s position on this issue is simply poor planning policy. The requirement to consider the cumulative impacts of “reasonably foreseeable” projects, and indeed NEPA’s entire scheme, is designed to force the agency to consider the environmental impacts before the project occurs. When will the Forest Service determine the cumulative impacts of this project in conjunction with the other components of the Master Plan? Under the Forest Service’s current approach, the agency will not consider these impacts until after Lift 21 is in place. That result directly contradicts the logic, spirit and purpose of NEPA and the advance planning requirements.

Plaintiffs are also concerned about cumulative impacts to the white bark pine, Clark’s nutcracker and high-alpine krummholz communities. The Declaration of Anthony Bouthard, M.F., submitted in conjunction with the administrative appeal of the 1997 Master Plan (attached at Exhibit B) describes the problems in great detail. Mr. Bouthard, a graduate of the Yale School of Forestry, concluded that the analysis in the Draft EIS at III-35 “is clearly inaccurate.” He asserts that the level of “disturbed/recovering” krummholz stringers “needs to be identified by comparison of aerial photographs of the permit area pre- and post-development.” The photographs included in Mr. Bouthard’s declaration clearly document the extent of the damage to the krummholz communities and white bark pines. “Disturbances leave a mark on the land for decades, and the process of recolonization and succession is not well documented.” Id. at p. 4.

Furthermore, Mr. Bouthard also discusses the impacts from reasonably foreseeable future development. He states that “ski area development in the alpine portion of the ski area has already had a significant effect upon the krummholz, and further development, specifically the construction of Lift 23, will expand the detrimental effects.” *Id.* at p. 2 (emphasis added). MHM has specifically included the Lift 23 project in the Master Plan, and Mr. Bouthard was able to determine from the Master Plan that Lift 23 would have cumulative impacts to the krummholz, high-alpine vegetative communities. Yet, the District Ranger still insists that these impacts are not “reasonably foreseeable” as that language is used in the CEQ regulations. Once again, this interpretation blatantly ignores the plain language of the Ninth Circuit Opinion in the 1000 Friends of Oregon decision and, perhaps worse, the common sense of the interested public that has been involved in this process for several years. We have also attached several other photographs to Mr. Bouthard’s declaration that document the damage done to the high-alpine krummholz by grooming machines as well as the extent of damage resulting from clearing ski runs.

The impacts discussed by appellants are not hypothetical or conjectural injuries. The degraded conditions of the high-alpine ecosystem within the permit area have been well documented by numerous scientific experts who have called for better documentation and analysis by the Forest Service. These conditions have also been well documented by the photographs included with this appeal. Now the Forest Service refuses to do the required analysis simply because MHM is going to implement its 1997 Master Plan in steps over a drawn out period of time. This management philosophy is shortsighted and illegal. The District Ranger has a clear legal obligation to provide the public with information regarding the cumulative impacts to the public resources of the MHM permit area, and the District Ranger must provide

this information before the projects are implemented. As our land management official, the District Ranger has failed in her duty to provide adequate information, and this blatant disregard of the public's interest in these issues results in the persistent and costly litigation.

II. The EA Fails to Adequately Discuss and Analyze the Mitigation Measures.

The Forest Service has an obligation to set forth the mitigation measures relied upon to avoid significant impacts in the EA. "The proposed mitigation measures must be 'developed to a reasonable degree.'" National Parks Conservation Association v. Babbitt, 241 F.3d 722, 734 (9th Cir. 2001) (citations omitted). "A 'perfunctory description' or 'mere listing' of mitigation measures, without supporting analytical data is insufficient to support a finding of no significant impacts." Id. (citations omitted).

A. The EA Provides No Data on How Effective Mitigation Measures are in Preventing Erosion and Sedimentation.

The District Ranger in this case repeatedly relied upon the mitigation measures to minimize the significant adverse environmental impacts from excavation within riparian areas, soil spreading of more than 8000 cubic yards of material and construction of a new road in a high alpine ecosystem. The Forest Service states that it will simply prevent the erosion that can be expected from these types of activities by using "[e]rosion cloth/wattles and seed used to cover bare ground" and by using "[e]xcess soil from the two riparian reserve towers . . . as restoration fill on the temporary road." EA at 12. The EA also claims that the "previous road obliteration was effective with its lack of erosion, and the new obliteration should follow the same process." Id. at 13. The District Ranger has provided no data to support the conclusion that the proposed mitigation measures will prevent erosion and sedimentation in a sensitive ecosystem. The District Ranger simply asserts that they will work without any supporting evidence.

In fact, the FAILURE of these mitigation measures has been well documented. First, the District Ranger is misleading the public when she states that the “previous road obliteration was effective with its lack of erosion.” EA at 13. Please find attached as Exhibit C an e-mail from Doug Jones, the current USFS District employee assigned as the permit administrator, to Dave Riley, MHM General Manager, dated September 13, 2001. In that e-mail, Mr. Jones states with regards to the “temporary” road above Daisy:

“The old Cascade construction road above Daisy has lost soil over time ‘tho (sic) the vegetation is starting to come back in. Knowing that you’ll want to plow the snow off the area in the spring to dry it out faster for lift construction, I’d like to get waterbars built there now. That way, when the snow is melting off the road, we won’t channel runoff to create unnecessary erosion.”

Exhibit C. How can the District Ranger represent to the public that the previous road obliteration (a mitigation measure) was effective with its lack of erosion when the Forest Service permit administrator admits to MHM that there is an erosion problem (i.e. “loss of soil over time”)?² This is exactly the type of double-talk that enrages the public when it attempts to gain accurate information about the condition of the public resource. Why is the Forest Service intentionally giving the public INACCURATE information?

In fact, please refer to the attached Exhibits D and E regarding the “temporary” road built in conjunction with construction of the Gulch lift. Exhibit D is the declaration of Martha Hall in which she states that the Forest Service represented that it had dropped the planned construction road above Daisy when. Exhibit D, p. 2. Exhibit E is the denial of the administrative appeal by the Forest Service. In that document, Michael Edrington also represents to the public that “[s]oil

² We would also remind MHM and the Forest Service that discharging a pollutant such as sediment from a ditch (e.g. a water bar) without an NPDES permit is an unpermitted point source in violation of the Clean Water Act.

disturbance has been further minimized by eliminating the road that was part of the original proposal.” Exhibit E, p. 1.

The Forest Service has continually and repeatedly misled the public. First it claimed that the road would not be built. MHM built the road. Now the Forest Service tells the public that there are no erosion problems, yet the photos submitted with our comments and the e-mail from Doug Jones clearly establish that there are real erosion problems at the site. The mitigation measures undertaken by the Forest Service over the years have FAILED, and the District Ranger has misled the public about these failures.

The failures of the mitigation measures have also been well documented by the expert scientists that have personally walked and reviewed the site. Dr. Belsky concluded in her Declaration the following:

“Although MHM Ltd. is supposed to mitigate damage to soils, waters and biotic communities, it is obvious that they are not. Besides the ruts caused by heavy equipment (mentioned above), there are bare, eroding areas in several locations, including the return trails from lifts at the Main Base and at Shooting Star. I have heard that attempts at reseeding these areas have not been successful. Erosion netting was also not working on some slopes, where gullies are expanding **beneath** the nets. Work needs to be done before major new disturbances are created. **If mitigation can be no more successful that (sic) what I observed, new disturbances should not be allowed.**”

Exhibit A (emphasis added). Dr. Belsky’s statements clearly establish that mitigation measures such as the use of erosion cloths and reseeding have not been effective. Despite these proven deficiencies, the District Ranger has provided the public with no data that the mitigation will, in fact, reduce erosion as claimed by the Forest Service.

Please refer as well to the declaration of Martha Hall, Appendix #15 (Attached as Exhibit F). In that declaration, Ms. Hall documents years of failed mitigation projects. Water bars,

erosion cloths, reseeding efforts, road obliterations and straw bales have all FAILED to mitigate or prevent significant impacts to the environment as documented in the photographs. Yet the District Ranger still insists on telling the public that the Forest Service is using “[t]ime-tested and proven products and techniques described in the mitigation measures ... to reduce the risk of erosion.” DN at 15. The mitigation measures may have been tested by time, but they clearly failed the test. The Forest Service has provided no data to document that the mitigation measures will, in fact, be effective, and yet all the evidence provided by appellants, including photographic evidence and testimony from scientific experts, documents that the mitigation measures have failed.

Please refer as well to the photographs attached at Exhibit G taken by Kate McCarthy. These photos were taken in 1999 and 2000. They document erosion at Shooting Star, where there has been constant revegetation problems, erosion under plastic barriers, erosion from roads into surface water, and clearly documented failures of the mitigation measures. We have also included a number of photographs from recent construction operations at the main base area. Those photographs clearly document that the straw bales, barriers and erosion cloths do not prevent the movement of topsoil from a construction site.

Finally, please refer to exhibit H, a letter from the Oregon Department of Fish and Wildlife dated June 19, 1995. The letter was written by Jim Torland, District Wildlife Biologist, and Steve Pribyl, Asst. District Fish Biologist. The state with respect to the proposed Heather Canyon chair:

“The mitigation measures proposed for Water Resources on page 38 also cause us some concern. **We have observed only dismal failures with MHM erosion control.** We’ve seen mulching, irrigation, fertilization and seeding. The results have been significant erosion and not much vegetative recovery.”

Exhibit H (emphasis added). In fact, please refer to Exhibit G, in which Kate McCarthy has documented erosion problems resulting from construction of the Heather Canyon lift.

The conclusions of the general public (e.g., Ms. Hall and Ms. McCarthy) have been confirmed by an independent scientist (Dr. Belsky) as well as ODFW. At least three of the recent lift constructions (Gulch/Cascade, Shooting State and Heather Canyon) have all resulted in erosion because of the failed mitigation measures. How much more information does the District Ranger need before realizing that she must provide more information to the public on whether these measures are, in fact, effective?

The standard issued by the Ninth Circuit is also clear. The District Ranger must provide more than a “mere listing” of mitigation measures. She must provide to the public “analytic data” to support the conclusions regarding the mitigation measures. 241 F.3d at 734. In the National Parks & Conservation Association case, the federal agency claimed that it could mitigate the effects of boat traffic on marine mammals and other marine species. The Ninth Circuit rejected these assertions, stating that the agency “did not conduct a study of the anticipated effects of the mitigation measures nor did it provide criteria for an ongoing examination of them or for taking any needed corrective action (except for the plan to conduct “studies”). As with the rest of its proposal, it planned to act first and study later.” Id.³

The same can be said in this case. The interested public, state agencies and even the Forest Service has documented the failure of the District Ranger’s previous mitigation measures, yet once again the District Ranger intends to proceed in the complete absence of any supporting

³ The evidence presented by Appellants also establish that the Lift 21 project is likely to have highly controversial or uncertain impacts, and, therefore, the Forest Service must prepare an EIS for the project. See, e.g., 40 C.F.R. § 1508.27 (discussing the criteria for determining whether impacts are significant); National Parks Conservation Ass’n v. Babbitt, 241 F.3d 722 (9th Cir 2001); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir 1998).

data. There is no data in the EA that supports the conclusion that the mitigation measures are effective or even fully implemented by MHM. The public is simply ordered to accept the conclusions of the agency despite the extensive evidentiary record that contradicts the agency's assumptions. This type of "public involvement" plainly violates NEPA, and the EA contains an inadequate discussion of mitigation measures.

B. The EA Fails to Include any Monitoring Program in Violation of the Mitigation Measures Set Forth in the ROD for the 1997 Master Plan.

The ROD for the 1997 Master Plan clearly sets forth as one of the mitigation measures that "[a] monitoring program, which includes coordination with the Confederated Tribes of the Warm Springs and appropriate public agencies, will be developed as part of the environmental assessment required for each phase of development." ROD at A-2 (emphasis added). The EA does not list any proposed monitoring plan. There is simply no system in place to assure the public that the mitigation measures are being implemented and effective.

The NEPA regulations clearly state that when the agency decides to implement a mitigation measure, the agency "shall: (a) include appropriate conditions in grants, permits or other approvals." 40 C.F.R. § 1505.3; see also Tyler v. Cisneros, 136 F.3d 603, 608 (9th Cir. 1998). Furthermore, CEQ has stated that:

"agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein."

46 Fed Reg 18026 (March 23, 2981). The District Ranger clearly has a legal obligation to implement the monitoring measures set forth in the ROD for the 1997 Master Plan, yet the EA for Lift 21 contains no monitoring program.

The need for a monitoring plan is further underscored by the correspondence from Doug Jones attached as Exhibit I. In his e-mail of April 19, 2000, Mr. Jones states that "I am the only one that monitors the ski area. The ID Team seldom visits the area unless there are new projects to assess. They don't often go watch a lift under construction or other similar work ... relying on me for feedback about the projects." Mr. Jones clearly states that there is very little monitoring that goes on within the MHM Permit Area, and perhaps the Forest Service had this issue in mind when it specifically required a monitoring plan as part of the 1997 Master Plan.

The District Ranger committed to implementing a monitoring plan before implementation of any phases of development under the 1997 Master Plan. The only discussion in the EA states that "[m]onitoring will occur during and after project implementation. A monitoring report will be field at the District and Headquarters officers." EA at 7. This discussion falls far short of the mitigation measures required in the ROD. The Forest Service committed to developing a monitoring program with the input of the Warm Springs tribe and appropriate public agencies (e.g. state agencies with the expertise to monitor impacts to wildlife, fish and water quality). The information in the EA does not provide any programmatic criteria. There is no specificity on how often the monitoring will take place, who will perform the monitoring, where the monitoring will occur and what it will consist of (e.g. monitoring of turbidity or monitoring of the mitigation measures during rain events). The District Ranger simply says it will happen and again refuses to provide the public with any details regarding how or when these activities will occur.

The well-documented failures of previous mitigation measures only underscore the importance of implementing an effective monitoring program. For instance, where was the monitoring program when MHM was supposed to drop plans to construct the road above Daisy? Why doesn't the Forest Service have data on site-specific impacts from past construction operations? How is the Forest Service or the public to determine whether the mitigation measures are adequate as we move forward with other development projects under the 1997 Master Plan? The Forest Service and the public need a specific, detailed and well thought-out monitoring program that provides the most basic data on the impacts resulting from site-specific projects. The District Ranger committed to providing the public this information in approving the 1997 Master Plan, and she must now implement that commitment.

The NEPA regulations and CEQ guidance clearly state that the agency must adhere to and fulfill those obligations and that the public has a right to enforce those obligations. The District Ranger has decided to move forward with Lift 21 without a monitoring plan, and that decision is arbitrary and capricious.

III. The EA Fails to Adequately Describe Impacts to the Environment Resulting from Spreading More than 8000 Cubic Yards of Soil Throughout the Permit Area.

NEPA is an environmental full disclosure law. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). NEPA serves two purposes. First, it provides "decision-makers with environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences." Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir 1974). Second, it makes "available to the public, information on the proposed project's environmental impact and encourages public participation in the development of that information." Id. at 1283. The

“NEPA procedures must insure that environmental information is available to public officials and citizens before decision are made and before actions are taken.” 40 C.F.R. § 1500.1(b). The government must disclose and take a “hard look” at the foreseeable environmental consequences of its decision. Kleppe v. Sierra Club, 427 U.S. 390, 410 b. 21 (1976); 40 C.F.R. § 1502.16.

The EA in this case has failed to consider the environmental impacts of the soil spreading activities. The District Ranger has failed to provide the decision-maker with adequate information, and once again the District Ranger has provided the public with inadequate information.

The Forest Service estimates that the Lift 21 project will require the excavation and relocation of 8,200 cubic yards of material. EA at 6. An average dump truck has a capacity of between 10-20 cubic yards. See, e.g., <http://iyp.uswestdex.com/deserttrucking/Page2.html> (viewed January 25, 2002). MHM plans to excavate between 400-800 dump trucks worth of material! Where will it all go?

The Forest Service claims that the material will be “used for fill or spread around and seeded.” EA at 6. Exactly where in a fragile, high-alpine ecosystem will MHM “fill” or “spread around” 400-800 dump trucks worth of dirt?! The Forest Service can’t answer that question. Our public land managers simply conclude that “[t]hese details will be in final construction plans.” DN at 15.

That discussion is simply inadequate. How can the District Ranger or the public take a “hard look” at the environmental consequences of the proposed action without knowing the location of the “fill” or dirt “spreading?” Will the dirt be placed on the temporary road cited by Doug Jones as an erosion problem in his e-mail to Dave Riley? Does the District Ranger even recognize the sensitive nature of the high-alpine ecosystem? Can we at least agree that the

permit area consists of riparian areas, wetlands, habitat for *Calamagrotis brewewii*, steep grades, sensitive pincushion vegetation communities and clearcuts? Does that not suggest that some planning should go into determining exactly where to locate 400-800 dump trucks worth of dirt? Isn't it impossible to determine the environmental consequences of those activities in such a delicate environment without discussing the exact location of the fill or spreading? These are not "details" to be worked out behind the closed doors of the Forest Service and MHM's contractors. These are the variables that play the most critical role in determining the environmental impacts of the project, and, by law, they are to be worked out in the EA with public input and review.

At bare minimum, the Forest Service needs to provide the public with maps and drawings documenting the location and extent of the fills and spreading activities in relation to the sensitive areas listed above. This is basic information developed in conjunction with any standard construction project involving the excavation and relocation of such a significant amount of material. A responsible project manager would never excavate 8000 cubic yards from an industrial site without specific plans for how the material was going to be placed and regraded so as not to have a negative impact on future uses, stormwater runoff concerns and personal safety. Why does the Forest Service think it can approve this type of project on public land in a sensitive ecosystem without providing the public with the same type of information? Furthermore, the fact that the EA has failed to provide any data in support of the mitigation measures as discussed above only reinforces the need to carefully analyze the location and methods involved in relocating so much material.

Please see attached as Exhibit J, a memo from Mr. John Dodd, Hood River District Soil Scientist. Mr. Dodd monitored the placement of soil in the annex parking lot during the late summer of 2000. He concludes:

“While work was proceeding at a fast pace, it is not going to meet the as drawn plan Stuart and I put together. * * * 10,000 cubic meters of material is going to completely fill the area, almost to overflowing. As a result, there will be no topographic buffer (a small, natural ridge) that would have separated the fill zone from the slope leading down to Mitchell Creek. This makes the erosion control effectiveness imperative (sic), since we obviously do not want any material eroding into the creek. * * * Due to the amount of material, erosiveness, and proximity to sensitive areas (ie the creek and meadow), this project makes me nervous. We will employ every erosion control technique at our disposal to ensure this material remains in place. However, this is after all an area where the weather plays a major roll in how effective erosion control can be, and there is no absolute guarantee that nothing will escape the site.”

Exhibit J.

The comments by Mr. Dodd establish that the placement of the material is a critical component of determining the environmental impacts resulting from the operation. Furthermore, his comments also establish that there is no guarantee that the mitigation measures will reduce or eliminate erosion, which directly contradicts the conclusions of the District Ranger. Again, all this information establishes that the District Ranger and the general public cannot take a “hard look” at the environmental impacts of the proposed project unless the District Ranger tells the public exactly where and how much the 8,000 cubic yards of material will be placed, spread or filled.

IV. The EA Has Failed to Adequately Analyze a Reasonable Range of Alternatives to Meet the Growing Demand of Beginner and Novice Skiers.

NEPA provides that government agencies shall, to the fullest extent possible, “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). The alternatives analysis is the heart of the agency’s environmental analysis. 40 C.F.R. § 1502.14. The agency must “use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(e). “The existence of a viable but unexamined alternative renders” the agency’s analysis inadequate. Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995). “The goal of the statute is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values. The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers have before them and take into proper account all possible approaches to a particular project . . .” Id. at 729 (citing Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988)).

The Forest Service states that the purpose of the project is to relieve the crowded conditions in the Buttercup/Red areas where beginner and novice riders are presently restricted. The apparent solution is to build a high-speed quad that will provide access to a single beginner run. Furthermore, the Memo from Doug Jones dated October 18, 2001 states that the capacity of the existing terrain is only pushed on holidays and the busy weekends. The EA also states that Lift 21 will only run 60-70% of the time. Assuming that the Red/Buttercup area is over-crowded maybe one day per week on average (14% of the time) and that Lift 21 will run between 60-70% of the days due to weather concerns, Lift 21 will only serve to alleviate overcrowding from 8.5% to 10% of the days during an average season at MHM. The Forest Service has approved an alternative that meets the stated need, at the maximum, only 10% of the time! And how much longer will it be before the number of beginner again outpaces this limited increase in capacity?

In fact, there is a whole range of other alternatives for addressing the need to alleviate congestion in the base area for beginners and novices. MHM could offer mid-week specials designed to attract these customers during off-peak hours. MHM could limit the number of classes it teaches on certain busy holidays and weekends. Perhaps the design of the ski area suggests that it has reached its potential carrying capacity for beginner and novice skiers. The Forest Service simply didn't consider the option of limiting the number of skiers. Furthermore, MHM has recently purchased Cooper Spur Ski Area. In fact, Cooper Spur Ski Area has only beginner and intermediate terrain and is a perfect location to teach beginner and novice riders. MHM and the Forest Service never considered the option of teaching some of MHM's beginners at Cooper Spur on the busiest days of the year.

The failure to consider a reasonable range of alternative reflects the Forest Service's faulty assumption that it can simply continue to expand MHM to meet an arguably growing demand. When will the Forest Service consider the possibility that the natural resources and design of the Permit Area can't handle any more people or growth? What if the demand for beginners continues to grow after Lift 21? When will the Forest Service consider this option? Why not now?

The Forest Service also cannot rely upon the simple need to get beginners up above tree line to see the views. There are many options to getting skiers and non-skiers alike above the tree line as demonstrated by numerous ski areas throughout the country. Part of the benefit of a detachable quad is that it provides for easy downhill transportation. Why didn't the Forest Service consider the option of simply transporting people who want to see the views up and down the mountain on lifts such as Cascade? Why can't MHM provide for guided snowshoe hikes through the permit area up to the higher ridges? Maybe this just isn't the best solution to the problem of introducing beginner skiers to the often brutal conditions of the Oregon alpine environment above tree line. Perhaps they should be required to learn the minimal skills

required to ski down groomed intermediate terrain before being unleashed on a dangerous mountain.

The Forest Service did not consider a full range of alternatives. In fact, the Forest Service did not consider any alternatives other than building Lift 21 and not building Lift 21. Please refer to the e-mail sent by Doug Jones attached as Exhibit K. In that e-mail, dated March 27, 2000 (during project scoping), he writes to Ken Maddox of the Hood River Valley Residents Committee, “[p]lease remember that we are not open to discussing IF [Lift 21] will be built, we are now looking at how to get it done.” It is clear that the District Ranger did not use the EA as a means of determining how to address the need but simply a means of justifying the construction of Lift 21. Is the public to believe that there are NO other reasonable alternatives to alleviating the congestion that poses a problem 14% of the days? The fact of the matter is that the Forest Service did not use the EA as a document to investigate and select an appropriate alternative. The Forest Service used the EA as justification for a project it had already selected at the request of MHM. That approach fundamentally violates the spirit and purpose of NEPA, which is to include the public in the decision-making process and to force the agency to consider a full range of alternatives. This approach also raises the significant concern that Lift 21 is not designed to meet the stated purpose and need but rather to simply expand the uphill capacity of the ski area as a whole while pushing closer to the White River drainage. The EA is legally inadequate.

CONCLUSION

The EA prepared by the Forest Service violates the requirements of NEPA. More importantly, it demonstrates that the Forest Service is unwilling to provide the public with adequate information to monitor the activities and decision-making processes of our public land management agency. The Forest Service has misled the public, has refused to provide the public

with adequate information and has refused to engage the public in a reasonable discourse about proper management activities.

The MHM Permit Area DOES NOT BELONG to MHM Ltd. It belongs to the public, and the public has documented the significant environmental impacts that MHM has inflicted on this public resource. The District Ranger, as the public employee responsible for proper management of this area, has the legal obligation to adequately analyze and disclose to the public the expected impacts from yet another massive project. The District Ranger has again failed in her responsibilities. Yet it is not the Forest Service that will suffer the repercussions, because the injuries will come to bear upon the natural resources of Mt. Hood and the people that care about her.

Appellants respectfully request that the Forest Service withdraw the Decision Notice and Finding of No Significant Impacts for the Lift 21 project on the flanks of Mt. Hood.

Dated this 31st day of January, 2002

Christopher G. Winter
Counsel for Appellants