that the Club was formed to serve only the ski area and at the request of the Forest Service and knowing it does nothing but provide volunteers and raise money for a Forest Service facility, would think that it looks like unauthorized use for the Forest Service to permit the Club to raffle off a night at the cabin? Unfortunately, given the strained interpretations of Mr. Fisher that were so zealously seized upon by Supervisor Myers and crew, I point out that the question is rhetorical.

Because the club has come up with alternatives, the use of the cabin is not now an issue. The point is brought up only to illustrate how Mr. Fisher is stretching application of Federal ethical regulations to fit situations for which they were not designed and to which they should not be applied. The violations might, if you squint just right, violate the letter of the regulations but they are nowhere near the spirit of the regulations.

This stretching is perhaps nowhere more apparent than in Mr. Fisher’s next concern, which was that the Club’s flyer for its annual fundraising extravaganza could lead someone “to the conclusion that the agency endorses the club’s activities/views/enterprise.” Does the Forest Service really need to worry that some latter day Mrs. Grundy might get the (apparently mistaken) impression that Forest Service employees endorse the “activities/views/enterprise” of a Club created at the urging of the Forest Service and that has no purpose but to provide volunteers and raise funds for a Forest Service facility? Fisher cites 5 C.F.R. 2635.702 for the proposition that such an appearance of endorsement is a violation of Federal ethics regulations. The title of that regulation is “Use of public office for private gain.” It states:

An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.

Note the cited regulation applies to “employee(s).” How that applies, or could possibly jeopardize a Forest Service employee when the flyer is made by a group of volunteers is a mystery.
But what is really interesting is that Mr. Fisher’s point seems to be that, simply by creating a flyer, the Club could cause Forest Service employees to be guilty of using their public office for private gain. There are no paid positions in the Club and it doesn’t have business relations with anyone other than the Forest Service. Nor are any of the employees in question an officer or member of the Club. So there doesn’t appear to be any way that a Forest Service employee could do anything with regards to the Club that would constitute “use of public office for private gain.” It is hard to even say that there might be a violation of the letter of the law, here. It is simply ridiculous to suggest that any court would find it reasonable to apply a regulation forbidding use of public office for private gain to this situation.

Mr. Fisher doesn’t stop there, however. He next turns to the allotment to the Club of 60 nights at the cabin each winter. According to him, this apparently violates 5 C.F.R. 2635.101(b) and 5 C.F.R. 2635.501. The former does say, “Employees shall act impartially and not give preferential treatment to any private organization or individual,” which is as close as Fisher ever gets to identifying a regulation that a person might say the Forest Service’s arrangement with the Club violated. The second regulation illuminates what the first is meant to protect against, though:

(a) This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.

(b) Under § 2635.503, an employee who has received an extraordinary severance or other payment from a former
employer prior to entering Government service is subject, in
the absence of a waiver, to a two-year period of
disqualification from participation in particular matters in
which that former employer is or represents a party.
5 C.F.R. 2635.50t.

Again, this is a regulation designed to prevent Federal employees
from using their position to their own advantage or the advantage of their
friends, business associates and family. Applying these regulations to a
twelve-year-old agreement between the Forest Service and a group of
volunteers that is not enriching anyone other than the Forest Service is
beyond reaching, it is patently absurd.

Now Mr. Fisher's role (as explained by the USDA Office of
Ethic’s newsletter) is to make USDA employees aware of any possible
violation of ethical regulations. So, thanks for the warning Mr. Fisher;
you have managed to find some far-fetched possibilities for regulations
that technically might, just might, be said to be violated by the
arrangement between the Club and the Forest Service.

You have overlooked one big problem, though. The regulations
you say *might* be violated here govern the conduct of individual
employees, not agencies. The Club does not have any agreements with
any individual employees. Their agreements, both formal and informal,
have always been with the agency and employees signing in a
representative capacity. For a valid regulatory violation there has to be a
finding that an individual Forest Service employee has been enriched.
This point cannot be emphasized enough: there is no agreement between
the Club and any individual Federal employee or group of Federal
employees. All agreements have been between the Club and the Forest
Service as an agency. Federal ethical regulations do not regulate agency
agreements, only the conduct of individual employees.

This is enormously significant. Why? Because it means that Mr.
Fisher was the wrong guy to ask whether an agreement between the
Forest Service, *as an agency*, and a group of its volunteers was
permissible. The appropriate authority on the matter would presumably
be the USDA Office of General Counsel (OGC). The OGC provides legal
advice and services to all USDA agencies. An agency that really wanted
to know if a long-standing agreement it had with a group of its volunteers
was in some way illegal, would go to the OGC to find out if the agreement was permissible or not, not to an ethics officer whose job it is to tell you if your personal life and professional life are mixing in unethical ways.

OK, but a Forest Service official could not simply ignore an opinion from the USDA Office of Ethics, could they? Actually, they could. As the Office of Ethics says of itself: “Sadly, we are advisors; we cannot tell you to take any given action. The choice is yours.” This means that the Forest Service is not bound by Fisher’s creative ideas about the applicability of Federal ethics regulations. This contradicts what the Forest Service has implied, which is that there is just no way it could possibly let things stand as they are given that doing so would violate ethics regulations.

Let’s be absolutely clear about this, though: those regulations do not apply to this situation and Fisher’s opinion that they do, is not binding on the Forest Service. If you have any lingering doubts about the applicability of the regulations Fisher cites to the relationship between the Bitterroot Ski Club and the Forest Service, look at the instances in which citations have been issued for violation of the regulations Fisher cites:

These are representative of how the regulations Fisher cites are meant to be applied. Nowhere will you find these regulations being applied to an agreement between a Federal agency and a group of volunteers that exists solely to help the agency fulfill its obligations to the public through donated labor and materials.

Where does this put us? It means the Forest Service has asked the wrong office to review its agreement with a group of volunteers, used a shaky, if not outright bogus opinion issued by the wrong office, and is using this shaky opinion from the wrong office as an excuse to radically alter an arrangement that has functioned smoothly for over a decade. Worse, the Forest Service is acting as though it has no choice but to follow this ridiculous, non-binding opinion that is clearly inapplicable to the situation in the first place.

In other words, Supervisor Myers acting for the Forest Service, is using the sham opinion as cover so he can characterize its relationship with the Club as broken to justify his changes. In other words he has the perfect excuse of the bureaucrat to do what he wants to do: The-lawyer's-making-me-do-this. The key point I am making is that Supervisor Myers is not required by rule or regulation, much less law, to make the decisions he is making.

Although my key point is that Myers' actions are in no way required by rule or regulation, I am not going to leave this matter without commenting on the bad faith exhibited by the Forest Service and what I see as their motives. The initial understanding between the Club and the Forest Service was that the cabin would only be built if the Forest Service would allow it to remain free to the public. The Club backed off on the Forest Service's desire to charge the public to stay in the cabin during the summer because the Club built the cabin primarily for cross country skiers and because people staying there over the summer don't have to do all the chores that a person hosting in the winter does. The point is that all the volunteer efforts to start, operate and maintain the area and cabin was done and is done with the expectation that winter use be free to the public.
But now the Forest Service wants to charge in the winter too, and make sure that the number of nights it does not charge for (the Club’s allotted nights) are cut to a minimum. That will certainly raise money for the Forest Service which is the most likely motivation for Myer’s actions. In fact the Forest Service will make out like a bandit since the heavy lifting of creating the area and the cabin was done by volunteers. It does not matter to the Forest Service that this breaks faith with those who volunteer so the public can use their lands for free and mocks their contributions. No, turning the cabin, and then the ski area, into a pay for play area means it is almost pure profit for the Forest Service since almost all the work was done by volunteers.

In addition to making a mockery of the concept of volunteering, there is no doubt that the Forest Service is motivated to charge the public for the use of their national forest as shown by a look at the Forest Service’s track record on the issue of fees. In 1996, the Forest Service began the Fee Demo Program that charged people for forest access. The program expired in 2005 and was replaced with the Recreation Enhancement Act passed by Congress. In the Act, the Forest Service was given authority to charge the public for using sites designated as High Impact Recreation Areas that had certain required amenities.

Almost immediately the Forest Service abused its authority by charging fees for everything under the sun. Fortunately, people in several states, fed up with the agency’s overreaching and abuse of power sued the Forest Service when the Forest Service tried to charge them a site use fee for doing things like pulling over onto the side of the road and eating a sandwich. 4 In February of 2012, the Ninth Circuit Federal Court of Appeals ruled that the Forest Service had overstepped its authority and was violating the Recreation Enhancement Act with some of the fees it was charging. The Forest Service’s response? Ignore the Court’s ruling and continue charging illegal fees. 5 That’s right, the Forest Service chose to simply ignore a binding Federal court ruling telling it, in no uncertain terms, that it is violating the law.

4 “Controversial Forest Service Fees Struck Down by Court” http://www.adventure-journal.com/2012/02/controversial-forest-service-fees-struck-down-by-court/ 
5 “Forest Service Defies Federal Court” http://www.kvsun.com/articles/2012/03/03/news/update/doc4f511573f1348034447599.txt
Compare the current situation between the Club and the Forest Service with the Recreation Enhancement Act situation. The Forest Service will actively and openly defy a Federal appeals court order but it could not possibly ignore a far-fetched, non-binding opinion from an ethics specialist opining about matters outside the scope of his responsibilities. No, Supervisor Myers and the Forest Service have no choice but to throw sand in the eyes of a group of volunteers it has worked closely and smoothly with for 22 years and set about fixing what ain’t broke by charging money for something that it did not create and was always meant to be free to the public.

Finally, and irrespective of the Forest Service’s motives, our Congressional Delegation should find it appalling that the Forest Service would willingly use a bogus legal opinion to bludgeon a group of volunteers in order to upset an arrangement that has worked so well for the public for almost a quarter of a century. There is no legal reason for any change in the status quo with the club. Supervisor Myer should be directed by his boss to maintain the status quo at Chief Joseph Pass and quit wasting volunteer time that could be better spent working on the trails, the cabin and stocking wood for the winter.

George Corn

(I have practiced in Ravalli County for 30 years, 20 as Ravalli County Attorney. At Gordon Reese's prodding, I attended his first meeting with the representatives of all three National Forests which occurred at Lost Trail Area, I believe, in 1988. This was before the club was formed. I have been taking folks skiing in the Chief Joseph Pass area since 1981. Until now it has been my good fortune to avoid the Byzantine intricacies of Federal administrative law.)