

NATIONAL
SKI AREAS
ASSOCIATION



May 10, 2013

Attn: USDA Forest Service
skiareawaterrights@fs.fed.us

Dear U.S. Forest Service:

I am writing on behalf of the National Ski Areas Association (NSAA) to submit comments into the record on the agency's development of a new ski area water clause. NSAA represents over 90 percent of the ski industry nationally, including 121 member ski areas that operate on National Forest System lands under a special use permit from the US Forest Service. These 121 public land resorts accommodate the majority of skier visits in the U.S. and are located in 13 states.

At the outset, ski areas would like to emphasize that we greatly value our model, public/private partnership with the United States Forest Service. Given the importance of water to ski area operations, resorts are pleased to see the agency engage in a formal public process for developing a ski area water rights policy and clause. We approach this public process with renewed enthusiasm and hope that the Forest Service will develop a new water policy and clause that respect state water laws and private property rights.

New Concepts for a Ski Area Water Clause

Ski areas support the goal of sustaining ski areas in the long term and in turn, the communities dependent on them. In the ski industry's view, this goal can be accomplished without a water clause that takes ski area water rights. To that end, ski areas are willing to take two major steps to address Forest Service concerns about sufficiency of water for the future. These suggestions are elaborated upon below and are offered as a basis for a new water clause:

1. Project-Based Water Sufficiency

Ski areas will demonstrate for future projects which require water for implementation that sufficient water is available to support the projects. During the term of a ski area permit, as a condition of USFS approval of a future ski area project which requires water for its implementation, the ski area would be required to demonstrate that it has, or will obtain, sufficient water to support the new project. If the resort does not already have (through ownership, lease or contract) the amount of water necessary for the new project, project implementation will be conditioned upon obtaining it. The same third party who provides the

NEPA analysis and documentation can make the assessment of sufficiency of water required and available for the project.

2. End of Permit Water Sufficiency/Option

Upon sale of a ski area, resorts would provide an option to purchase sufficient water to reasonably run the ski area to a successor ski area owner. If the successor ski area declines to exercise such option, the ski area would offer it to the local government, and then in turn to the Forest Service. This provision would not apply in the case of permit renewal or in any case where the agency revoked a ski area permit and indicated an intention to change the use of the acreage to a non-ski area use. If the option were not exercised within a given time frame, the ski area may sell, retain, or transfer the water in any way it sees fit. Additionally:

- The end of permit water sufficiency determination and the fair market value determination would be made by a third party with substantial experience in ski area operations and water right appraisals, mutually agreed upon between holder and party exercising the option. The holder and optionee would split the costs of the sufficiency and appraisal analyses equally.
- Fair market value would be determined by appraisal method. Payment of fair market value to holder would be due in cash or certified funds within 30 days of the determination of fair market value by the appraiser, unless the ski area agrees to another time frame in its sole discretion.
- The sufficiency determination shall include consideration of the current operations of the mountain resort, including four-season operations. The sufficiency determination shall not include phases of the ski area's MDP that have yet to be implemented. The responsibility for demonstrating sufficient water for future proposals, even if they are mentioned in an existing MDP, is the responsibility of the buyer/subsequent permit holder on a project by project basis.
- Under no circumstances shall the selling ski area be required to obtain additional water rights as a term of the option or the sufficiency determination. Water subject to the option to purchase is limited to water already owned by the ski area in an amount deemed sufficient to reasonably operate the resort.
- A ski area shall not be required to sell all of its water rights under the option provision, only the amount of water that is reasonably sufficient to operate the mountain resort.

As a condition of supporting this new two-part approach to a ski area water clause, all previous USFS ski area water clauses must be expressly declared unenforceable, superseded, null and void, and must be removed from every ski area permit.

A New Water Clause Should Not Devalue or Take Ski area Assets and Must Respect Property Rights and State Law

Water is critical to the operation of ski areas on Forest Service lands. Ski areas require water for snowmaking, domestic use, and other purposes. Ski areas collectively hold water rights

worth hundreds of millions of dollars. These water rights were obtained at significant expense, under state law, and are subject to legal protection under state law. Ski areas have been excellent stewards of these water resources and are in the best position to manage and protect these water rights.

A water clause that demands transfer of ownership of ski area water rights to the United States or restricts transfer of ski area water rights would substantially impair the value of these ski area investments. This type of clause would hinder the growth and expansion that help fuel job creation in rural and mountain economies. It would hinder a ski area's ability to obtain access to capital for growth and expansion in the future by lowering the valuation of the ski area's assets and creating uncertainty with respect to a resort's ability to make adequate snow and operate successfully in the future. It would provide a disincentive for ski areas to acquire more water rights in the future as the value of those assets will be lost when the U.S. seizes them. All of these adverse impacts would actually undermine the agency's stated goal of sustaining ski areas and the mountain communities dependent on them.

The new water clause should not demand that ski areas transfer or acquire water rights in the name of the United States, as the Forest Service lacks legal authority to require transfer of water rights from ski areas as a permit condition. None of the governing federal statutes delegate such authority to the Forest Service, including the 1897 Organic Act, §505 of FLPMA, NFMA (16 U.S.C. §1604(i)), or the Ski Area Permit Act of 1986 (16 U.S.C. 497b). In fact, FLPMA and NFMA provide for the protection of valid existing rights and FLPMA requires that water is to be allocated in accordance with water rights established under state law.

A new water clause that demands transfer of ownership of water rights to the United States would be invalid on its face because implementation would result in an unlawful taking under the United States Constitution. Water rights established under State law are property rights for purposes of the Fifth Amendment to the Constitution. Because Congress severed water from the public lands and allowed third parties to obtain vested rights in and to the continued use of water derived from public lands, absent an explicit grant of authority by Congress, the Forest Service may not use land management authority to reallocate or otherwise obtain for federal use, without the payment of just compensation, water that has been appropriated by or on behalf of non-federal parties. The Property Clause of the U.S. Constitution likewise does not provide the Forest Service this authority. Requiring ski areas to transfer ownership or limit the sale of water rights without compensation is no different than the government forcing a transfer of ownership of gondolas or chairlifts, snow cats, or snowmobiles, or even exercising eminent domain without any compensation.

The new water clause must respect the principle that water right allocation is a matter of state law. Rather than unlawfully taking property from private entities as a permit condition to use or occupy National Forest System lands, the agency must acquire and exercise federal water rights on its own in priority in accordance with state laws. In the future, the agency should not issue clauses that purport to allow the federal government to use its permitting authority as an end run around State water law.

The Agency Must Rescind Past Water Clauses at the Start of this New Public Process

In conjunction with this new public process on ski area water rights, the agency should affirmatively declare that all past ski area water clauses are rescinded and withdrawn and will not be enforced by the agency. All past USFS ski area water clauses are legally invalid because

they were adopted without any public process. In National Ski Areas Association, Inc. v. U.S. Forest Service, No. 12-CV-00048-WJM, 2012 WL 6618263 (D. Colo. Dec. 19, 2012), the court nationally enjoined USFS Water Clause D-30 because it was adopted without public process in violation of the Administrative Procedure Act, the National Forest Management Act, and the Regulatory Flexibility Act. From the 1980s to the present, with the exception of the public process currently underway, the Forest Service has not engaged in *any* public process in adopting new water clauses, resulting in violations of the Administrative Procedure Act, the National Forest Management Act, and the Regulatory Flexibility Act. In keeping with the court's ruling in *NSAA v. USFS*, the agency should take advantage of this opportunity to start over and announce that it is rescinding and withdrawing all previous ski area water clauses.

In a similar fashion, the agency should announce at the start of this public process that it is also rescinding and withdrawing all previous water policies and clauses that apply outside of ski area permit areas that were not subject to the required public process. The agency adopted Clauses D-24 to D-27 effective April 15, 2011, for example, without any public process. Just as Clause D-30 was nationally enjoined by the court in *NSAA v. USFS*, Clauses D-24 to D-27 should be rescinded and withdrawn by the agency at the start of this public process. The agency should affirmatively declare that past water clauses applicable outside ski area permit areas will not be enforced by the agency, and that the agency will begin anew with a public process to develop new water clauses that respect state water laws and private property rights.

Thank you for your consideration of these comments.

Geraldine Link

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Director of Public Policy
NSAA