**Testimony of the National Ski Areas Association,
Eagle River Water & Sanitation District, Upper Eagle Regional Water Authority,
the Clinton Ditch & Reservoir Company and the Eagle Park Reservoir Company
to the Interim Water Resources Review Committee**

Glenn Porzak, Water Attorney
August 21, 2013

Thank you for the opportunity to testify today on behalf of the National Ski Areas Association (NSAA), the Eagle River Water & Sanitation District, the Upper Eagle Regional Water Authority, the Clinton Ditch & Reservoir Company and the Eagle Park Reservoir Company.

Let me first discuss the NSAA. The NSAA represents 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. Twenty-two of these public land ski areas are located in Colorado. The ski industry generates $12.2 billion in economic activity annually.

Collectively, ski areas invest hundreds of millions of dollars on water rights to support and enhance their operations. Ski areas use water for snowmaking, lodging facilities, restrooms, culinary purposes and irrigation. Water is crucial to ski area operations and water rights are considered valuable assets to ski area owners. All of these water rights are obtained by the ski areas under State law.

In 2012, the Forest Service unilaterally imposed a new water clause that requires the ski areas to transfer exclusive ownership of many types of water rights to the federal government. **These are valuable private property rights which the Forest Service now wants for free.**

Not only would ski areas *not* be compensated for these valuable water rights, they would also lose the ability to control the future uses of this water. If these water rights are owned by the U.S. government, the ski area would have no guarantee that the water will continue to be used for ski area purposes as the Forest Service refused to commit itself to continue the ski area uses of these water rights. To the contrary, the Forest Service insisted on the right to determine in its sole discretion whether the water was needed by the ski areas.

Moreover, the new water clause would also prohibit ski areas from selling or transferring ownership of certain other water rights that were purchased or developed by the ski areas entirely on private or non Forest Service federal lands. No compensation was offered for this restriction and this restriction would have a significant adverse effect on the value of these ski area assets.

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 all of the ski area infrastructure and inventory or even exercising eminent domain without any compensation. The Forest Service action is unprecedented.

But this is not just a ski area issue.

All water right owners, not just ski areas, should be concerned about this precedent. Because of the significant percentage of water that originates on National Forest System lands, this change in policy poses a threat to the current system of state allocation and administration of water rights. This is particularly true in Colorado and the other western states.

Thus, this issue potentially affects and impacts all entities that have water rights associated with any National Forest System lands. This includes cities and counties, owners of recreation residences and summer resorts, ranchers, agricultural interests, grazing, and the mining and utility industries. That is why I am also appearing on behalf of the Eagle River Water & Sanitation District and Upper Eagle Regional Water Authority (which are co-managed with an integrated system that serves the 60,000 customers from Vail to Wolcott and constitutes the second largest municipal water provider on Colorado's west slope), and the Clinton and Eagle Park Reservoir Companies that include and provide storage water to virtually all of the towns and ski areas in Summit, Grand and Eagle Counties in Colorado.

This concern is apparently well founded as it was discovered that the Forest Service quietly adopted a policy in April 2011 (Forest Service Amendment No. 2709.11-2011-5), without notice or an opportunity to comment, that directs the Forest Service to insert in every new special use permit for water diversion or storage facilities (not just ski area permits) a clause that requires the permit holder to obtain the water rights in the name of the United States.

As you are well aware, 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. Simply put, the federal government is seeking to use its permitting authority as an end run around State law in Colorado and the other western states.

Congress has not delegated to the Forest Service the authority to require the ski areas to transfer ownership of water rights to the U.S. as a permit condition. Likewise, the Property Clause of the U.S. Constitution does not give the agency the authority to use permitting conditions as a basis to obtain federal ownership of privately owned water rights without the payment of fair compensation. Moreover, the Forest Service has violated the Administrative Procedures Act and other federal laws in unilaterally imposing these new requirements without any public notice or an opportunity for the public to comment.

That is why the NSAA filed suit in the Federal District Court in Colorado to enjoin the new water right permit clause. It should be noted that a number of water entities in Colorado joined as amicus parties in this case in support of the NSAA. These entities include the Colorado River Water Conservation District, the Ute Water Conservancy District (the largest municipal water provider on Colorado's western slope that serves the Grand Junction and surrounding area), the Eagle River Water & Sanitation District, the Upper Eagle Regional Water Authority and the Clinton and Eagle Park Reservoir Companies.

In December 2012, Federal District Court Judge William Martinez issued an Order and Judgment that ruled in favor of the ski industry and all water users. While the Judge did not address the substantive claims of whether the Forest Service had the authority to issue the 2012 water right permit clause, he vacated the clause and enjoined "nationwide" the enforcement of that clause because he held that the Forest Service violated (1) the Administrative Procedures Act; (2) the Small Business Act (RFA); and (3) the National Forest Management Act in adopting the water right permit clause. In so ruling, Judge Martinez held that the violations of these acts by the Forest Service were "severe."

The Judge also held that the 2012 water right permit clause was not a mere clarification of the 2004 permit clause as the Forest Service claimed; rather, the 2012 clause was legislative in nature because it created "binding legal obligations," and it created new policy, rather than interpreting prior policy.

Notwithstanding, the Forest Service has recently announced its decision to resurrect its attempt to secure ownership of water rights on federal lands by commencing a public hearing process that will address its procedural violations and likely re-impose the 2012 clause. In response, the Colorado State House of Representatives unanimously passed House Resolution 13-1009, which indicated its opposition to the Forest Service actions. It clearly expresses its opposition to the Forest Service effort to use its permitting authority as a means of circumventing state water law. But now the Colorado State Legislature needs to go further. It needs to pass legislation that would prevent the Forest Service and any federal agency from requiring the transfer of private state water rights to the federal government as a permit condition.

The legal authority for this Resolution and future potential state legislation are well founded in federal law and U.S. Supreme Court rulings. Specifically, two major acts of Congress, the Mining Act of 1866 (30 U.S.C. § 51) and the Mining Act of 1870 (30 U.S.C. § 52), clarified and reaffirmed that public land disposition for private purposes did not confer water rights which, according to the express language in both acts, were subject to possession and use according to "local customs and law." The Supreme Court considered the effect of the 1866 and 1870 Acts, together with the effect of the 1872 Mining Act (30 U.S.C. § 22 *et. seq.*), and held that in those acts Congress three times affirmed its view that private water rights on federal lands were to be governed by "local customs and law." *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 613 (1978).

With the passage of the Desert Land Act of 1877 (43 U.S.C. § 321), Congress again recognized a state's plenary control over non-navigable water:

> What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or common-law rule in respect of riparian rights should obtain.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935). By this language, Congress "effected a severance of all water upon the public domain, not theretofore appropriated, from the land itself." *Id.* at 158. The water on the public domain thereby severed was "reserved for the use of the public under the laws of the states and territories." *Id.* at 162; *see also California*, 438 U.S. at 657-59.

The creation of the National Forest System, and the reservation of any particular tract of public domain as Forest Service land, did not alter the foregoing principles. In fact, the Supreme Court explained that Congress intended national forests to be reserved from the public domain for only two primary purposes – to furnish a continuous supply of timber for the people, and to "conserve water flows" for appropriation by private parties. *United States v. New Mexico*, 438 U.S. 696, 707 (1978). In the words of the Court, the "very purpose" of the creation of the forest system was "as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *Id.* at 711-13.

The effect of the foregoing statutes and case law is to allow private ownership of water rights on federal land where such ownership is allowed by state law. State law throughout the arid western region of the United States allows private ownership of water rights for diversion and use on federal land. Therefore, there is no authority to support an assertion of U.S. ownership over water rights owned by private parties such as ski areas or municipal water providers.

Moreover, the Forest Service does not have Congressional authority to use federal permitting to require that owners of existing water supply facilities on National Forest lands relinquish all or part of their ownership or transfer ownership in that water supply to the United States. In other words, Congress has not delegated authority to the agency to use its federal land use authority to reallocate water rights owned by non-federal entities to National Forest purposes.

None of the governing federal statutes delegate such authority to the Forest Service, including the Organic Administration Act of 1897 (16 U.S.C. § 475, 481, & 526), § 505 of the Federal Land Policy and Management Act of 1976 ("FLPMA") (43 U.S.C. § 1765), 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. *See* § 701(g) and (h) of FLPMA (43 U.S.C. § 1701, note re: Savings Provisions, Pub.L. 94-579); § 505 of FLPMA (43 U.S.C. § 1765); and NFMA, 16 U.S.C. § 1604(i).

In 1996, Congress created a Federal Water Rights Task Force, P.L. 104-127 § 389(d)(3), in response to a controversy in Colorado over the attempt by the Forest Service to require permit holders to relinquish part of their water supply for secondary National Forest purposes as a permit condition. In its August 25, 1997 Report, the Federal Water Rights Task Force concluded that "Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits. . . ." The Task Force further concluded that "[u]nless Congress explicitly granted to the Forest Service the authority to use permitting authority to require bypass flows or the transfer of title to the United

States, the Forest Service must respect and protect non-federal water rights in its planning and decisions, and it must attain National Forest purposes through the acquisition and exercise of federal water rights in priority." (Part VI, Paragraph 1).

The Task Force also stated that the Forest Service must recognize that:

> water rights established under State law are property rights for purposes of the Fifth Amendment to the United States Constitution [and that] 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 authority of the Forest Service derived from the Property Clause of the United States Constitution and land management statutes does not include the ability to 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. (Part VII B, Paragraph 2).

For the same reasons detailed by the Task Force Report, the Forest Service's efforts to gain control over water rights are invalid because they exceed the Forest Service's legal authority and the implementation would result in an unlawful taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution. Thus, Colorado House Resolution 13-1009 complies with and is supported by both federal constitutional and state law. Similar State resolutions and statutes would likewise be supported by federal constitutional and State law.

Thank you for the opportunity to address your Committee on this issue and we would be happy to answer any questions.