



USDA Forest Service  
Rocky Mountain Region

*Topic:* Water Resources Review Committee of the State Legislature – Update on the Development of Draft U.S. Forest Service Water Rights Directive – Jim Peña’s Remarks

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**Location:** Denver, Colorado – Colorado State Capital

**Date:** Thursday, September 26, 2013

### **Introduction & Purpose**

- Thank you for providing the Forest Service a second opportunity to come before this committee with an update on the development of a new Forest Service Water Rights clause.
- My colleague Leslie Weldon, Deputy Chief for the National Forest System, spoke to you in August.
- Like her, I understand that this is an important issue nationally and here in Colorado.
- We recognize and respect the interests of the State Legislature and stakeholders gathered here today, and welcome your constructive suggestions during the upcoming public comment period.

### **Importance of Ski Industry for Colorado**

- Ski areas are key economic drivers in Colorado and the foundation of many communities throughout the state. They are a large part of the Colorado outdoor recreation tourism engine that generates \$10 to \$15 billion dollars of revenue annually.
- We greatly value our strong and ongoing relationship with the ski industry as well as state, county, and local governments who are vital partners in sustaining skiing opportunities on our National Forests.

### **Forest Service Long-Term Obligation to Provide Ski Opportunities**

- Sustaining skiing opportunities in the long-term is exactly our interest in developing a new ski area water rights clause.
- Because many of the ski areas in Colorado are on National Forests, the Forest Service has a responsibility to perpetuate and sustain public skiing opportunities via the ski industry.
- There is a long-term investment of public resources the Forest Service makes when it allocates public land for ski areas.
- Water is critical to ski area operations. We need to consider:
  - Water for snowmaking and other consumptive uses at ski areas.
  - Long-term needs of ski areas and the local communities in counties where they operate.
- We issue ski area permits for 40-year terms and stipulate certain conditions of operations to protect the public interest by making them safe and sustainable over the long-term.

- Water is becoming more valuable. Demand for water has increased over the last 30 years for many reasons. Simply put more people require more water and climate conditions impact the availability of that water. We are aiming to manage the risk of water being repurposed within the confines of the permit.

### **Forest Service Interest**

- It is not the Forest Service's interest or policy to take private water rights. The Forest Service supports a variety of uses on National Forest System (NFS) lands and respects private property rights. Our only interest in developing the new ski area water rights clause is to make sure that sufficient water remains with permitted uses and is available to future permit holders to support local industries and economies.
- Western states and their water courts have recognized the public interest in keeping water with permitted uses on public lands. Colorado, Idaho, Montana, South Dakota, Utah, Arizona, New Mexico, and Wyoming all have similar policies aimed at keeping water with permitted uses on public lands.
- The Forest Service respects the role and interest of States to allocate water rights. Requiring that the U.S. have an ownership interest in water rights used to support activities on NFS lands is a matter of the agency's permitting authorities and is not a water rights allocation issue. Any water rights acquired in the name of the U.S. are done through State allocation processes.
- Under the Property Clause of the Constitution, various Federal laws including the 1986 Ski Area Permit Act, and Forest Service regulations (36 CFR 251), the Forest Service has broad discretion to include terms and conditions in special use authorizations.
- Since 1980 the Forest Service has had national policy requiring that special use authorizations include provisions that water rights used to support NFS land uses should be obtained in the name of the U.S. Similar provisions are included in other special use authorizations the Forest Service issues for other land uses on NFS lands.
- Our interest in these water rights is not for fish but to keep the water available for the activity for which it was developed. We have other means to ensure the aquatic ecosystem is healthy. We already have broad authority to regulate and condition the use and occupancy of NFS lands under the Term Permit Act of 1915, which authorizes the Forest Service to permit use and occupancy of national forest land "upon such terms and conditions as he may deem proper".

### **Water Rights Clause**

- Among these conditions is a permit clause pertaining to water rights; the Forest Service has had a water rights clause in ski area permits for over 30 years.
- The National Headquarters of the Forest Service is making progress in developing an updated water rights clause for inclusion into the terms and conditions of the Ski Area Term Special Use Permit, following the court ruling on the 2011/2012 clause.

- We will ensure that the clause is consistent with and respects state water laws.
- The Federal Register will be the primary avenue for public comment on this issue of local and national importance.
- The clause that will be published in the Federal Register will only relate to ski area permits. It will not apply to range or other permitted activities on NFS lands. Permits for access to NFS lands for water infrastructure are many and very diverse, and are not included in this effort.

### **Public Listening Sessions and Open Houses**

- In preparation for drafting the Federal Register notice, the national office conducted four group listening sessions and three open houses in April 2013 to identify concerns of diverse stakeholders regarding the revised water rights clause for ski areas. Two of these meetings were held in Denver, where we gathered valuable input.
- We held an open house directly after the listening session which was open to the public. Invitees included several State Legislators and County Commissioners, Executive Directors of Colorado Association of Ski Towns key state agencies, and other stakeholders.
- We appreciate that the National Ski Area Association has provided some specific proposals and language for consideration in an updated water rights clause. These and other comments and input received during the listening sessions were used in developing the draft water rights clause that will soon be out for public comment.

### **Next Steps – Public Comments**

- The Federal Register Notice will include a 60-day public comment period and a concurrent 120-day tribal consultation.
- We will get the word out to Committee members and key stakeholders that the opportunity to review and comment on the updated clause is available.
- It is critical that people read the Federal Register Notice and provide substantive, focused comments to make sure the ultimate clause is clear and addresses the concerns raised.