

Comments of Summit County Board of Commissioners
Concerning the Water Rights Clause in Ski Area Permits
To: skiareawaterights@fs.fed.us

These comments are submitted by the Board of County Commissioners of Summit County, Colorado. Summit County appreciates the opportunity to provide input to the Forest Service on this important issue.

Background

Summit County is the home of four major ski areas that are located in whole or in part on National Forest System lands: Copper Mountain, Breckenridge, Keystone, and Arapahoe Basin. Together, these areas account for approximately 33% of the annual skier visits at all ski areas in Colorado. Downhill skiing and snowboarding and the associated lodging, restaurant, retail, and other related business activity represent a very significant portion of the economic base in the County. Ensuring the long-term viability of Summit County's recreational economy, including the use of public lands for winter sports, is a high priority for the County Government.

Snowmaking is an important element of ski area operations and is likely to become even more critical with increased temperatures and changes in the form and timing of precipitation at high elevations in Colorado. For example, the Bureau of Reclamation's December, 2012 Colorado River Basin Water Supply and Demand Study notes that "[p]rojected changes in climate and hydrologic processes include continued warming across the Basin, a trend towards drying (although precipitation patterns continue to be spatially and temporally complex) increased evapotranspiration and decreased snowpack as a higher percentage of precipitation falls as rain rather than snow and warmer temperatures cause earlier melt." According to the Kottke National End of Season Survey 2011/12 Final Report, the Rocky Mountain resorts reported a decline of 39% in average snowfall in the 2011/2012 season. Rocky Mountain resorts noted an 8.5% decrease in skier visits while Colorado visits fell 9.8%. Summit County's ski resorts have enabled their businesses to withstand dry spells by increasing their snowmaking capability, thereby maintaining a stable base throughout the winter.

In Colorado, snowmaking requires not only a significant capital investment in physical facilities, but also sufficient water rights to enable diversions from rivers and streams in the low-flow seasons of the year. The Summit County ski areas depend on a highly complex combination of water rights that were purchased and/or appropriated under state law, plans for augmentation and exchange to meet the demands of senior downstream water rights, and sophisticated agreements with other water users and governmental agencies, including the U.S. Bureau of Reclamation, State of Colorado, Denver Water Department, Colorado Springs Utilities, Summit County Government, and local jurisdictions within the County. Releases from storage are an important aspect of these operations. In many cases, the storage facilities are located far from the snowmaking facilities, are owned by third parties, and are operated under contractual agreements that have taken years to negotiate and implement. Management and protection of these rights requires diligent and proactive efforts. For example, Clinton Gulch Reservoir, which is central to snowmaking operations in Summit County, is owned by the Clinton Ditch & Reservoir

Company, in which Summit County Government is a shareholder. The affairs of the Company are managed by a board of directors with over twenty years of experience in water rights issues in the Blue River basin.

General Principles

Summit County Government would like the opportunity to participate in the development of a new or revised ski area water rights clause and to comment on proposals that are put forth by the Forest Service, the ski industry, or other entities and individuals. For the purpose of these initial comments, the County requests the Forest Service to consider the following general principles:

1. Sufficient water, water rights, storage and diversion facilities, and related inter-governmental and private contractual agreements for snowmaking, domestic, sanitation, and other water uses associated with ski areas operating on public land (collectively, "ski area water rights") are essential to the long-term viability of the ski industry in Colorado.
2. Sufficient ski area water rights should continue to be available to both current and future holders of ski area term special use permits in order to protect both the individual business operations and the local recreation economy.
3. It would be very difficult, if not impossible, for a new permit holder to replicate the complex legal and contractual arrangements and acquire the ski area water rights on which snowmaking and other water uses at any of the Summit County ski areas currently depend. Acquisition of the existing ski area water rights is the most practical option for a new permittee.
4. Ski area water rights are property rights under Colorado State law and are entitled to protection under the United States and Colorado Constitutions.
5. The ski industry has historically been able to acquire sufficient ski area water rights, enhance those rights to account for changed conditions, and protect those rights against competing claims for water. The Forest Service should give careful consideration to the consequences of any federal regulations that would create disincentives for private investment in ski area water rights.
6. Ski area water rights represent a capital investment in the operations that are permitted by the United States on public land and in many respects are similar to other capital investments that support the operations, such as snowmaking equipment, lifts, and other on-mountain facilities. However, ski area water rights are often located on private or other non-federal land, and there are legal and practical differences between ski area water rights that are located within and outside of the permit area. The Forest Service may wish to consider comparable treatment of physical facilities and ski area water rights that are located within the permit area, while recognizing the separate issues that are presented by off-site water rights.
7. Ski area permittees have traditionally negotiated the sale of capital investments, including ski area water rights, to new permit holders as part of the sale of the ongoing business operations

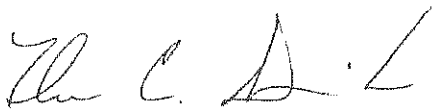
and termination and reissuance of the term special use permit. To the extent that this practice continues in the future, the viability of the ski areas will be maintained as a logical outcome of these market transactions. The Forest Service should give careful consideration to the consequences of creating obstacles to arms-length business transactions that would otherwise result in the transfer of sufficient ski area water rights to the new permittee.

8. There are significant differences in the laws governing the acquisition, use, and disposition of ski area water rights among the many jurisdictions in which ski areas on Forest Service lands are located. It may not be possible for the Forest Service to adopt a uniform ski area water rights clause that will be effective in every jurisdiction.

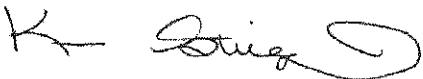
9. Ownership of ski area water rights by the Forest Service or other governmental agencies may in some cases be inconsistent with the foregoing principles.

10. There is a concern that a ski area permittee might dispose of ski area water rights that are necessary for continued operations, either during the term of the permit or in the event of termination of the permit. The County is not aware of any instances in which this has occurred. During the term of the permit, requirements to continue to operate snowmaking and other facilities in accordance with the approved master plan may be sufficient. The principal risk of an unfavorable outcome may be limited to situations in which an existing permit expires or is terminated and the new permittee (if any) has not acquired sufficient ski area water rights. It is conceivable that the existing permittee could retain or sell water rights that have historically been used at the ski area. This could, for example, become an issue in the case of a single operator that has the ability to allocate water among multiple resorts. An independent determination by the Forest Service of whether the ski area water rights proposed to be acquired by a new permittee are sufficient for future operations may have value as a condition of approval of the new permit.

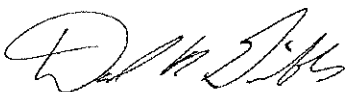
Summit County is interested in working with the Forest Service and the ski industry to examine the need for new or revised ski area water rights clauses and craft solutions that are consistent with the foregoing principles.



Thomas Davidson, Chairman



Karn Stiegelmeier, Commissioner



Dan Gibbs, Commissioner