Testimony of Glenn Porzak and Geraldine Link

Thank you for the opportunity to testify today on behalf of the National Ski Areas Association (NSAA).

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. Twenty-two of these ski areas are located in Colorado.

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.

The ski industry and the Association have worked collaboratively and in partnership with the Forest Service over the past decade to address the interests of both the industry and the Forest Service on water matters. Specifically, the parties reached a consensus water clause in 2004 that has been in effect for the past eight years. Unfortunately, The Forest Service recently abandoned this consensus clause, despite the fact that there have been no problems with the 2004 clause.

The 2004 clause provided for exclusive ski area ownership of water rights that arise **off** of the ski area permit area, and co-ownership by the ski areas and Forest Service of certain water rights that arise **on** the special use permit area.

The Forest Service unilaterally imposed in 2012 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.

Moreover, the new water clause would also prohibit ski areas in perpetuity 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 is 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 gondolas or chairlifts, snowcats, or snowmobiles, or even exercising eminent domain without any compensation. The Forest Service action is unprecedented.

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 more than just ski areas – it could impact 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, and other businesses such as ranching, mining, or utilities.

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.

As we mentioned, ski areas have developed water rights at great expense and effort. Resort owners have invested hundreds of millions of dollars in acquiring water rights to enhance their operations and the experience of their guests.

It is important to note that the ski areas have been excellent stewards of these resources and are in the best position to protect these water rights as they have the expertise, staffing and resources necessary to maintain them.

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 Colorado Senators Udall and Bennett and Congressmen Tipton and Polis, as well as Republican and Democratic senators and congressmen from other western states all asked the Forest Service not to impose this water right permit clause.

And that is why the NSAA filed suit in the Federal District Court in Colorado to enjoin the new water right permit clause.

That case has now been fully briefed and will likely have oral argument in the coming months.

It should also be noted that a number of water entities in Colorado have 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 and Upper Eagle Regional Water Authority (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 reservoir companies that include and provide storage water to virtually all of the towns and ski areas in Summit, Grand and Eagle Counties.

Our only disappointment is that the State of Colorado did not join as an amicus party as the Forest Service action is a direct threat to our State water law.

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

STATE OF COLORADO

OFFICE OF THE GOVERNOR
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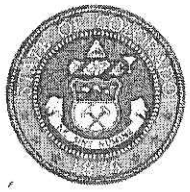

John W. Hickenlooper
Governor

December 5, 2011

Mr. Tom Tidwell
Chief, U.S. Forest Service
201 14th Street, S.W.
Washington, DC 20024

Dear Tom Tidwell:

We understand that you have received a letter from a number of U.S. Senators urging that the Forest Service delay the implementation of a new policy regarding water right ownership related to ski area permits.

We want to express our support for delaying the implementation of this policy so that concerns can be addressed and resolved.

As you know, Colorado enjoys a vibrant ski industry and many of the areas offering skiing opportunities are located on Forest Service land under permits. Many of these areas rely upon water rights to provide snowmaking and other services. Not only are these water rights an integral part of the ski area operations, they are also an essential part of the financing that these areas need to operate. In addition, these water rights have been secured under the state appropriation system. As a result, any change in policy by the Forest Service related to these rights can have serious implications for the operation and viability of ski areas. Granting a delay would also allow us and the Forest Service to examine the consistency of this new policy with fundamental principles of state water law.

We hope that the Forest Service will take the time to evaluate these issues so that we can maintain a world class ski industry providing recreational opportunities and economic vitality to the state and nation.

Sincerely,

John Hickenlooper
Governor

United States Senate

WASHINGTON, DC 20510

December 1, 2011

Chief Tom Tidwell
U.S. Forest Service
201 14th Street, S.W.
Washington, D.C. 20024

Dear Chief Tidwell:

We write to urge you to place a moratorium on the implementation of the water clause released November 8, 2011.

Collectively, we have heard concerns from ski area constituents in our three states regarding the Forest Service's new water clause for ski area permittees released on November 8, 2011. The concerns raised have focused on the immediate and practical implications of the 2011 clause on ski area operations and the significant differences between the previous 2004 water clause and the new 2011 clause. Additionally, the ski areas have raised concerns about the complexity of the 2011 clause and how it will be applied in the field. Without going into the merits of the water clause itself, it is apparent to us that a careful review of the practical implications of the clause to ski area operations and the changes that would occur under this new clause would prove beneficial to all parties involved.

We would recommend that the agency consider issuing a moratorium on the implementation of this water clause in the field until further review and analysis can be completed. Such a moratorium would provide the agency the opportunity to assess the practical impacts of this clause, allow ski areas to avoid immediate impacts to water rights until the review is completed, and undoubtedly benefit your longstanding and model public-private partnership with the ski industry.

We hope that you will give serious consideration to our suggestion of a moratorium and further review. The health and success of the ski industry is important to our respective states, as are the natural resources that support the public's continued recreational use of the National Forests. Thank you for your consideration.

Sincerely,

Mark Udall
U.S. Senator

John Barrasso
U.S. Senator

James Risch
U.S. Senator

Michael F. Bennet
U.S. Senator

JARED POLIS
2ND DISTRICT, COLORADO

REGIONAL WHIP

COMMITTEES:
COMMITTEE ON RULES

STEERING AND POLICY

Congress of the United States
House of Representatives

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December 7, 2011

Tom Tidwell
Chief, U.S. Forest Service
201 14th St., S.W.
Washington, DC 20024

Dear Chief Tidwell:

I am writing today to urge you to consider placing a moratorium on implementation of new language related to water rights for USFS permit holders, released 11/8/11.

Colorado's tourism industry – a $9 billion source of economic activity for our state – depends in large part on the economic viability of our ski resorts, including the iconic ones located in the second congressional district. These resorts have not only been economic drivers for our state and region, but in many cases strong advocates for and users of conservation strategies, in both the energy and water arenas. In short, the resorts are excellent business citizens of our state, and an important contributor to their sustained viability is the water rights they have acquired under the previous agreement with USFS, signed only seven years ago.

The changes suggested to the current system of water rights for ski areas are troublingly ambiguous, and I worry have the potential to lead to confusion or misinterpretation. Furthermore, we find the potential benefit of the language to the citizens of the United States hard to identify, let alone quantify. In this context, I believe a moratorium would be an excellent policy choice, as this would allow the USFS to conduct a thorough review of potential impacts of the language, and allow congressional representatives to weigh in on its desirability.

I hope that you will give full and serious consideration to this request for moratorium and review, which is consistent with the recent requests of our two United States Senators and Governor Hickenlooper. Thank you very much.

Sincerely,

Jared Polis
Member of Congress

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SCOTT R. TIPTON
3rd District, Colorado

AGRICULTURE
NATURAL RESOURCES
SMALL BUSINESS

[illegible] Cannon House Office Building
202/225-4761

Congress of the United States
House of Representatives
Washington, DC 20515–0603

October 27, 2011

The Honorable Tom Vilsack
USDA Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

I have heard concerns from constituents with permits to use and occupy National Forest System lands, including ski areas and grazing interests, that the Forest Service is requiring the transfer of ownership of privately held water rights to the name of the United States as a permit condition. I have concerns with this requirement and the policies that underlie it, particularly to the extent that the requirement applies to waters originating off of the special permit area, in the case of ski areas, and to the extent that such water rights predate the creation of the Forest Service, in the case of grazing permits.

Water rights established under state law are property rights for purposes of the Fifth Amendment to the United States Constitution. Congress has not delegated to the Forest Service the authority to require permittees to transfer ownership of water rights to the United States as a permit condition.[1] Specifically, the Report of the Federal Water Rights Task Force created pursuant to Section 389(D)(3) of P.L. 104-127 expressly 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."

Likewise, the Property Clause does not give the agency the authority to use permitting conditions to obtain federal ownership of water rights that have been developed or acquired by private parties. In the absence of such authority, the agency cannot demand

[1] Federal statutes do not delegate such authority to the Forest Service, including the 1897 Organic Act, §505 of FLPMA, or NFMA (16 U.S.C. §1604(i)). 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.

such a transfer of ownership without just compensation. Rather than unlawfully taking property from private entities, the agency must acquire and exercise water rights in priority in accordance with state laws.

It has been a long-standing policy of the Department and the Forest Service to ensure that private property rights, including water rights, will be recognized and protected in the course of special use permitting decisions for water supply facilities. Secretary Madigan and Secretary Glickman provided assurances to Congress in the 1990s to recognize and respect the role of the States in water allocation and administration, as did Under-Secretary Rey in 2005. I have serious concerns that the agency intends to depart from this longstanding policy by virtue of its recent permitting decisions and related policies. Because of the significant percentage of water that originates on National Forest System lands in the West, such a change in policy would pose a threat to the current system of state allocation and administration of water rights.

My constituents have presented excellent arguments against the federal government's actions to take ownership of their water rights. First, these private entities have developed their water rights at great expense and effort. In the case of ski areas, resort owners have invested hundreds of millions of dollars in acquiring water rights to support their operations and those with grazing interests have also expended considerable sums to acquire water rights for ranching. Furthermore, they have been excellent stewards of these resources. These permittees have the expertise, intimate familiarity, staffing and resources necessary to maintain and protect these water rights.

Moreover, these permittees have voiced valid concerns that if their water rights are required to be owned by the United States, the ski areas and the ranchers will have no guarantee that the U.S. will continue to use the water for the purposes for which it was developed. For example, as owners, the agency could decide to change the use of the water and apply it for the protection of species or aesthetic purposes or any other number of purposes other than for snowmaking or stock watering purposes. Even if the agency desired to maintain the water rights for existing purposes, potential lawsuits could challenge the current use for other applications. The permittee then has no way of protecting its significant investment and would lack any certainty that the water will be applied for the benefit of their business or operation in the future. The assertion by the Forest Service that use permits will maintain the priority of the permit holder's primary use of the water is of little value against a potential future agency directive requiring a contrary use. The uncertainty generated by this arrangement is unacceptable for businesses, especially when there is the likelihood that it comes about not as a result of any fault of the permittee, but instead as a result of shifting political winds. The federal government's interference with these property interests and the operations that they support simply cannot be justified on legal or practical grounds.

I request that the agency refrain from interfering in such private property rights in the future, and that the agency review its current permit clauses and policies in light of the concerns and interests identified here. Please respond in writing at your earliest convenience to articulate the manner in which the Department will take action to ensure that the interests of constituents will be protected and state laws regarding water rights will be honored.

Sincerely,

Scott Tipton
Member of Congress

Congress of the United States
Washington, DC 20515

December 16, 2011

Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

We write to urge you to place a moratorium on the implementation of the water clause released on November 8, 2011 for use in ski area permits on Forest Service lands.

We have heard concerns from ski area constituents across the West regarding language in the new water clause requiring the relinquishment of water rights as a permit condition. The concerns raised include immediate and practical consequences for this year's ski season as well as concerns regarding the long term stability of the ski industry and the jobs it provides for local communities. Affected ski areas note the significant departure of the 2011 clause from the previous 2004 clause which was crafted with industry and Forest Service consensus.

A November, 15th hearing in the Parks, Forests, and Public Lands Subcommittee of the House Committee on Natural Resources revealed the considerable consequences the implementation of this clause could have on ski areas, jobs, and state water law. Among those implications are the ability of the ski areas to gain access to financing to maintain their facilities and provide jobs and the deviation this clause takes from long standing federal deference to state law on water issues in the West. All water rights holders in the western states rely on the complex and diverse water systems and state laws through which water is appropriated and applied to beneficial use on Forest Service lands and are impacted by any departure from existing law. Federal treatment of water rights in this way impacts not only ski areas, but could also be brought to bear on grazing interests and others who rely on private water rights for the livelihood of their operations.

We recommend that the agency issue a moratorium on the implementation of this water clause until the clause can be reviewed in further detail. We also urge the Forest Service to work with ski areas as the agency has in the past to ensure that a clause is adopted which respects state laws and takes into account the impact that clause language can have on the stability of the industry and the many jobs connected to it. A collaborative approach to the development of water rights regulations on Forest Service lands will help ensure the success of the ski industry and the health of the natural resources that support it.

Sincerely,

Doc Hastings
Chairman
House Natural Resources Committee

Frank Lucas
Chairman
House Committee on Agriculture

Mike Simpson
Chairman
House Interior and Environment
Appropriations Subcommittee

Jack Kingston
Chairman
Subcommittee on Agriculture, Rural
Development, Food and Drug Administration,
and Related Agencies

Scott Tipton
Member of Congress