



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596-AD14

Ski Area Water Rights on National Forest System Lands

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed directive; request for public comment.

SUMMARY: The U.S. Forest Service (Forest Service or Agency) is proposing to amend its internal directives for ski area concessions by adding two clauses to the Special Uses Handbook, FSH 2709.11, chapter 50, to address water rights necessary for and that primarily support operation of ski areas on National Forest System (NFS) lands. A revised water rights clause for ski area permits is needed because the current water rights clause cannot be implemented as intended in many States and because the current clause does not ensure that sufficient water is available for operation of ski areas on NFS lands. Implementation of a revised water rights clause would ensure that water will be available for ski areas on NFS lands. Additionally, there would be greater consistency and accountability in authorization of water uses and ownership of water rights for ski areas.

DATES: Comments must be submitted in writing by **[insert date 60 days from date of publication in the FEDERAL REGISTER]**.

ADDRESSES: Send comments electronically by following the instructions at the Federal eRulemaking portal at <http://www.regulations.gov>. Comments also may be submitted by mail to USDA Forest Service, Attn: Carolyn Holbrook, Recreation, Heritage, and Volunteer Resources staff, Ski Area Water Rights Comments, 1400 Independence Avenue, SW, Stop 1125,

Washington, D.C. 20250-1125. Comments may also be submitted electronically to skiareawaterrights@fs.fed.us. If comments are sent electronically, duplicate comments should not be sent by mail. Hand-delivered comments will not be accepted. All comments, including names and addresses when provided, will be placed in the record and will be made available for public review and copying. Those wishing to review comments should call Carolyn Holbrook at (202) 205-1426 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Carolyn Holbrook, Recreation, Heritage, and Volunteer Resources staff, 202-205-1426, or Jean Thomas, Watershed, Fish, Wildlife, Air, and Rare Plants staff, 202-205-1172.

SUPPLEMENTARY INFORMATION:

1. Background and Need for the Proposed Directive

The Forest Service is proposing a revised clause to address water rights utilized in support of ski areas on NFS lands. One of the statutory duties of the Forest Service is to administer National Forest System (NFS) lands to provide outdoor recreation to the American public on a sustainable basis. Water for snowmaking and domestic uses is critical to the continuation of resort-based skiing on NFS lands. Because of this, the Forest Service requires ownership by the United States, either solely or in narrow circumstances jointly with the permit holder, of water rights developed on NFS lands to support operation of ski areas. This policy was adopted due to concern that if water rights used to support ski area operations are severed from a ski area the Forest Service will lose the ability to offer the area to the public for skiing. An example of this is when water rights are sold for other purposes.

It has long been the policy of the Forest Service that permit holders must acquire water rights in the name of the United States for water diverted from and used on NFS lands pursuant

to special use authorizations in furtherance of the Agency's congressionally mandated multiple-use objectives through the Multiple-Use Sustained-Yield Act (MUSYA) of 1960, which include range, watershed, timber, fish and wildlife, and outdoor recreation. The reason for this policy is straightforward: Congress has directed the Agency to manage National Forests to provide for specified multiple uses, including outdoor recreation, "in perpetuity" (16 U.S.C. 531(b)), and water is of critical importance to the Agency's ability to meet that mandate. Without water for snowmaking and domestic uses, ski areas on NFS lands would not be able to operate. However, the Forest Service does not require United States ownership of water rights for reservoirs, pipelines, or other water storage or conveyance infrastructure that is for water use on private or non-Forest Service land, such as water used by municipalities, irrigation districts, and private industries. The use of NFS lands for these infrastructures merely involve access to NFS lands through a Special Use Authorization.

To effectuate the policy, the Forest Service Manual (FSM) included directives since 1982 that require the United States to own water rights for water diverted from and used on NFS lands as a condition of issuance of special use authorizations for activities that further MUSYA objectives. For example, a 1982 permit clause for ski areas in the Forest Service's Rocky Mountain Region required that "[a]ll water rights obtained by the permittee for use on the area must be acquired in the name of the United States"; a 1989 ski area permit clause in that Region provided that water rights "shall be acquired in the name of or transferred to the United States"; and a 1997 national clause for recreation uses authorized under term permits required that "all water rights obtained by the holder for use on the area authorized must be acquired in the name of the United States."

In 2004, after extensive discussion with the National Ski Areas Association (NSAA), the

Forest Service adopted a new water rights clause for inclusion in ski area permits. In a significant departure from prior policy, the 2004 clause provided that after June 2004, rights to water diverted from and used on NFS lands inside the permit area would be jointly held by the United States and the permit holder. The 2004 clause did not address ownership of water rights that were acquired before June 2004, water rights for diversions from NFS lands, or private lands outside the permit boundary.

As the Forest Service began utilizing the 2004 clause, it became apparent that it did not operate to effectuate co-ownership of a 100 percent interest in NFS ski area water rights as intended and there were substantial misunderstandings as to its meaning with regard to application of the Forest Service's water rights policy to NFS ski area water rights. Based on these concerns, the Agency decided to revise the 2004 Clause.

On November 8, 2011, the Forest Service issued an interim directive replacing the 2004 Clause with a revised water rights clause (2011 Clause). In contrast to the 2004 Clause, the 2011 Clause addressed the different types of water rights associated with ski areas, the need to ensure that ski area water rights remain available to support the ski area, and the ability of the United States to effectuate the provisions of the clause.

The 2011 Clause identified three categories of water rights associated with ski areas: (1) water rights for water diverted from and used on NFS lands in the permit area; (2) water rights for water diverted from NFS lands outside the permit area for use on NFS lands inside the permit area; and (3) water rights for water purchased or leased by the holder and water rights for water diverted from non-NFS lands.

Consistent with the 2004 Clause, the 2011 Clause provided that water rights for water diverted from and used on NFS lands in the permit area that were acquired after the effective

date of the 2004 Clause must be jointly owned. For clarity, the 2011 Clause included provisions expressly effectuating a joint tenancy with a right of survivorship for jointly held water rights. Water rights in this category that were acquired prior to the effective date of the 2004 Clause were governed by the terms of the permit under which they were acquired. The United States had to exercise its joint ownership of ski area water rights only in support of the authorized ski area. Likewise, the permit holder could not sever its joint ownership from the ski area.

The 2011 Clause provided that water rights for water diverted from NFS lands outside the permit area for use on NFS lands inside the permit area had to be authorized by a separate permit, and addressed ownership of these water rights based on when they were acquired. Water rights in this category that were acquired after the effective date of the 2011 Clause had to be acquired in the name of the United States. Ownership of water rights in this category that were acquired prior to adoption of the 2011 Clause was governed by the permit terms under which the water rights were acquired. Under the 2011 Clause, the holder could not sever these water rights from the ski area.

The 2011 Clause also made clear that water rights purchased or leased by the permit holder could be solely owned by the holder even if they were changed or exchanged to a point of diversion and use on NFS lands in the permit area (changed or exchanged water rights). The 2011 Clause provided that changed or exchanged water rights and water rights for water diverted from non-NFS lands for use on NFS lands in the permit area that were acquired after issuance of the 2011 Clause could not be divided or transferred or severed from the ski area.

The 2011 Clause provided that upon termination or revocation of the permit, the holder had to transfer to any succeeding permit holder its interest in water rights for water diverted from and used on NFS lands within the permit area; water rights for water diverted from non-NFS

lands for use on NFS lands in the permit area that were acquired after the effective date of the 2011 Clause; and water rights that were changed or exchanged after the effective date of the 2011 Clause. If the ski area was not reauthorized, the permit holder's interest in jointly held water rights had to be transferred to the United States. For water rights owned solely by the holder, the holder had the option of removing the diversion structures and water use off NFS lands or transferring the water rights to the United States.

The 2011 Clause included a provision granting limited power of attorney to the United States to execute documents on behalf of the holder as necessary to ensure that water rights were acquired and transferred as required by the 2011 Clause. The 2011 Clause also obligated the holder to waive any claims against the United States for compensation in connection with application of the 2011 Clause.

On March 6 2012, the Forest Service issued an interim directive clarifying and modifying the 2011 Clause (2012 Clause). The 2012 Clause modified the 2011 Clause in several respects. First, the Agency clarified that the Forest Service would not take any action with respect to its water rights that would adversely affect the availability of water for operation of the authorized ski area unless necessary to fulfill legal requirements. Second, the Agency clarified that for water rights for water diverted from NFS lands, the ski area could divide or transfer its ownership interest or sever its ownership interest from the ski area with the consent of the Forest Service. Third, the Agency removed any restrictions on the holder's ability to sever water rights for water diverted from non-NFS lands for use on NFS lands in the permit area.

The NSAA filed a lawsuit in the United States District Court for the District of Colorado on March 12, 2012, opposing use of the 2011 and 2012 Clauses. On December 19, 2012, the court ruled that the Forest Service failed to comply with the Administrative Procedure Act and the

National Forest Management Act by not providing an opportunity for public notice and comment on the 2011 and 2012 interim directives and that the Agency needed to conduct a Regulatory Flexibility Act analysis of the impact of the directives on small business entities that hold ski area permits. The court did not rule on the substance of the interim directives. The court vacated the interim directives and enjoined enforcement of the 2011 and 2012 Clauses in permits that contained them.¹

Publishing this proposed directive for public comment corrects procedural deficiencies associated with the 2011 and 2012 ski area water rights clauses that were identified by the court and allows those who would be affected by the proposed directive to participate in its development.

The Forest Service reached out to stakeholders by conducting four listening sessions and three open houses in April 2013 to identify interests and views from a diverse group of stakeholders regarding a revised water rights clause for ski areas (78 FR 21343, Apr. 10, 2013). Two listening sessions were held in Washington, DC; one was held in Denver, Colorado; and one was held in the Lake Tahoe area in California. Approximately 21 people attended the listening sessions. Open houses were held in Denver, Colorado; Salt Lake City, Utah; and the Lake Tahoe area in California. To generate discussion, stakeholders were presented with four themes at the meetings: the role of ski areas in ensuring natural resource sustainability, availability of water to support ski are improvements, economic sustainability, and ensuring long-term commitment of water for use at ski areas

Approximately 40 people attended the open houses. Additionally, participants were invited to submit comments electronically by May 10, 2013. Fourteen comments were received.

¹ *National Ski Areas Association, Inc. v. United States Forest Service*, 910 F. Supp. 2d 1269 (D. Colo. 2012).

The input from these listening sessions and open houses (hereinafter “stakeholder recommendations”) was considered in the development of this proposed directive. A summary of the stakeholder recommendations follows.

Stakeholder Recommendations:

General Recommendations

- Do not issue a ski area water rights clause. The United States should apply for water rights in its own name and participate in State proceedings.
- Follow applicable State water law and pertinent Supreme Court decisions.
- Conduct a negotiated rulemaking to establish a new ski area water rights clause and obtain an outside facilitator.
- All previous ski area water rights clauses must be declared null and void.
- Rescind water rights clauses for other types of special uses.
- Intergovernmental and private contractual agreements regarding water rights are essential in Colorado and are difficult to replicate. It would be difficult for a new permit holder to duplicate the complex water rights agreements that currently support ski areas.

Analysis Recommendations

- Assess the sufficiency of water during project analysis, including consideration of current operations.
- Assess impacts of proposals on water quality and downstream water needs.
- Assure that sufficient water is available for both current and future ski area needs to protect business operations and local recreation economies.

- Determinations of water sufficiency and fair market value should be made by a third party with substantial experience in ski area operations and water right appraisals.
- The applicable Forest plan should establish whether winter use is appropriate and how much water is available for winter use. Ski area modifications, additions, or expansions that require water could be limited to the scope of winter use and water for winter use contemplated by the applicable Forest plan.
- Requirements to operate snowmaking and other facilities in accordance with the applicable master development plan may be adequate to ensure sufficient water for ski area operations.
- Do not be short-sighted about the use of resources to benefit for-profit business versus the future of natural resources.

Clause Recommendations

- Require that water rights associated with all water necessary to operate a ski area be committed to that use in perpetuity.
- Do not allow ski areas to own water rights on leased land.
- The water should remain tied to the land.
- Require a deed restriction to ensure that privately owned water rights are not severed from NFS lands.
- Create procedures that safeguard against severance of water rights from ski areas.
- Ski areas should commit to retaining water rights with the land over the term of the permit.

- Add a provision stating that a water rights clause that reduces the availability of water on or to NFS lands may injure resources and therefore is presumed to be contrary to the public interest.
- A concern regarding adequacy of water may arise if a prospective permit holder has not acquired sufficient water rights, and the current permit holder retains or sells water rights that have been historically used at the ski area.
- It may be helpful to require the Agency to make a determination of whether a prospective permit holder has acquired sufficient water rights for future ski area operations.
- The permit needs to describe the ground rules or responsibilities for the ski area when acting as the agent of the Forest Service with respect to water rights.
- Specify how compliance with the water rights clause will be measured.
- Factor the value of water rights into ski area permit fees.
- Forest Service ownership of water rights would create a disincentive for private investment.
- A clause that requires transfer of ownership to the United States or that restricts transfer of ski area water rights would substantially impair the value of ski area investments.
- The Forest Service does not need to assure long-term economic health of the ski industry.
- Ski areas have proven experience with water rights; the Forest Service has uneven knowledge of water rights.
- Water rights are an asset like a ski lift that needs to be managed by the ski area.
- Water rights are private property rights, not publicly owned resources.
- Distinguish between newly acquired water rights and existing water rights.

- Do not require change of ownership of existing, privately owned water rights.
- Do not require transfer of privately owned water rights to the United States without compensation; that would constitute a taking.
- Do not require joint ownership of water rights; that could constitute a taking.
- There are legal differences between ski area water rights located inside and ski area water rights located outside the permitted area.
- Water rights on private and other non-Federal land should not be treated the same as water rights on NFS lands within a ski area permit boundary.
- Recognize different requirements for water rights and water use in different jurisdictions.
- Do not establish terms that conflict with municipal water rights and associated agreements between suppliers and ski areas.
- Require ski area permit holders to provide written notice in advance of any water right application, including notice of filings to change a point of diversion or beneficial use.
- Provide an initial option to a subsequent ski area owner to purchase the water rights necessary to operate the ski area; provide a second option to local government to purchase those water rights; and provide a third option to the Forest Service to purchase those water rights.
- Condition the quantity rather than the ownership of water rights, for example, require ski areas to maintain a specific quantity of water rights.

These comments are addressed in the section-by-section analysis of the proposed directive to the extent they were utilized in the development of the proposed directive.

Public Notice and Comment

Establishing terms that govern water rights associated with a ski area permit is necessary to communicate clear expectations and to achieve consistency in administration of special uses among Forest Service administrative units. Pursuant to the court order in *National Ski Areas Association v. United States Forest Service*, the Forest Service is providing an opportunity for public comment in revising the water rights clause for ski areas. Comments received during the public comment period will be assessed in developing the final directive. The scope of this proposed directive is water rights clauses for ski area permits. Water rights clauses for other types of special uses are not addressed.

2. Background on the Forest Service’s Regulatory Authority for Special Uses

The Forest Service’s authority to manage lands under its jurisdiction derives from the Property Clause of the United States Constitution, which empowers Congress to “make all needful Rules and Regulations respecting the . . . Property belonging to the United States.”² The Supreme Court has emphasized that Congressional authority over Federal lands is “without limitations.”³ In turn, Congress entrusted the Forest Service with authority to “make such rules and regulations and establish such service as will insure the objects of the [national forests], namely to regulate their occupancy and use and to preserve the forests thereon from destruction.”⁴ The Organic Administration Act constitutes an “extraordinarily broad” delegation to the Forest Service to regulate use of NFS lands and “will support Forest Service regulations and management . . . unless some specific statute limits Forest Service powers.”⁵⁶ In the Organic

² U.S. Const. art. IV, sec. 3, cl. 2.

³ *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

⁴ Organic Administration Act of 1897 (16 U.S.C. 551).

⁵ Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* 59 (1987).

⁶ *Wyoming Timber Indus. Ass’n v. United States Forest Serv.*, 80 F. Supp. 2d 1245, 1258-59 (D. Wyo. 2000).

Administration Act, Congress explicitly recognized that Forest Service regulations may impact the use of water on NFS lands (16 U.S.C. 481) (water on NFS lands may be used “under the laws of the United States and the rules and regulations established thereunder”).

The Forest Service has broad authority to regulate and condition the use and occupancy of NFS lands under the Term Permit Act of 1915 (16 U.S.C. 497), which authorizes the Secretary of Agriculture to permit use and occupancy of National Forest land “upon such terms and conditions as he may deem proper”; the Multiple Use □ Sustained Yield Act (MUSYA) (16 U.S.C. 529), which authorizes the Secretary of Agriculture to develop and administer the surface resources of the National Forests; and the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1765), which authorizes the Secretary of Agriculture to impose terms and conditions of rights-of-way on Federal land. In 1986, Congress directly addressed the Forest Service’s authority to regulate development of ski areas on NFS lands. In the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b), Congress explicitly provided that permits are to be issued “subject to such reasonable terms and conditions as the Secretary deems appropriate” (16 U.S.C. 497(b)(7)).

Special Use Authorizations

Consistent with its constitutional and statutory authority, the Forest Service regulates the occupancy and use of NFS lands, including ski area operations, through issuance of special use permits and other authorizations (36 CFR part 251, subpart B). The Forest Service must include in special use authorizations terms and conditions that the Forest Service deems necessary to protect Federal property and economic interests (36 CFR 251.56(a)(ii)(A)); manage efficiently the lands subject to and adjacent to the use (36 CFR 251.56(a)(ii)(B)); protect the interests of individuals living in the general area of the use who rely on resources of the area (36 CFR

251.56(a)(ii)(E)); and otherwise protect the public interest (36 CFR 251.56(a)(ii)(G)).

The Forest Service's Directive System

By regulation, the Forest Service has also established the Directive System, through which the Chief and specified Line Officers can issue directives setting forth the Agency's administrative policy, procedure, and guidance (36 CFR 200.4(b)(1)). The Directive System consists of the Forest Service Manual (FSM) and a series of Forest Service Handbooks (FSHs), which serve as the primary source of administrative direction to Forest Service employees. The Special Uses Handbook, FSH 2709.11, governs special uses, including ski areas on NFS lands.

Proposed Water Rights Clause for Prior Appropriation States

The proposed water rights clause for prior appropriation States would modify the Forest Service's approach to accomplishing the objective of long-term availability of water to sustain ski area uses. Unlike water rights diverted from and used on NFS lands by holders of other types of special use authorizations, water rights for water diverted from and used on NFS lands for ski area purposes involve long-term capital expenditures. In States like Colorado and New Mexico, holders of ski area permits may have to purchase senior water rights at considerable expense to meet current requirements for snowmaking to maintain viability. Holders of ski area permits need to show the value of these water rights as business assets, particularly during refinancing or sale of a ski area. The value of these water rights is commensurate with the significant investment in privately owned improvements at ski areas. These investments were recognized by Congress in enactment of the National Forest Ski Area Permit Act, which authorizes permit terms of up to 40 years. 16 U.S.C. 497b(b)(1). In addition to these financial issues, the land ownership patterns at ski areas—particularly the larger ones—often involves a mix of NFS and private lands both inside and outside the ski area permit boundary, making it difficult to

implement a policy of sole Federal ownership for NFS ski area water rights. Much of the development at ski areas is located on private lands at the base of the mountains. As a result, water diverted and used on NFS lands in the ski area permit boundary is sometimes used on private land, either inside or outside the permit boundary.

Therefore, the Forest Service is proposing to require non-severability, rather than United States ownership, of NFS ski area water rights. In the context of the proposed clause, non-severability means that a privately owned water right could not be sold separately from other ski area assets (e.g. improvements such as lifts and lodges). Non-severability would prevent ski area permit holders from taking any action during the term of the permit that would adversely affect the availability of applicable water rights to support operation of the ski area. By providing for non-severability of NFS ski area water rights, the Agency will be able to ensure continued availability of water to support ski area operations, so that the Agency can fulfill its mandate to provide for recreational use of NFS lands.

The proposed directive would have no effect on water rights clauses in existing ski area permits that predate the 2011 and 2012 clauses. In addition, other aspects of the Forest Service's water rights policy, such as approval of water facilities, would remain the same for ski areas as it is for other types of special uses. Furthermore, the proposed directive would have no effect on the Forest Service's water rights policy for other multiple uses since water rights for those uses would continue to be owned and administered in accordance with applicable directives and permit clauses.

3. Section-by-Section Analysis of Proposed Changes

The Forest Service is proposing to add two clauses for ski area water rights to FSH 2709.11, section 52.4: Clause D-30 would be used in States that follow prior appropriation

law for managing water rights, and Clause D-31 would be used in States that follow riparian law for managing water rights. Under a prior appropriation system, water rights may be severed from the land in some States. Under a riparian system, water rights are appurtenant to the land. This approach responds to the recommendation that a water rights clause should recognize different requirements for different jurisdictions. The chart below identifies which clause would be used for ski area permits in various states.

D-30 Clause – Prior Appropriation	D-31 Clause - Riparian
Arizona	Michigan
California	New Hampshire
Colorado	Vermont
Idaho	
Montana	
Nevada	
New Mexico	
Oregon	
Utah	
Washington	
Wyoming	

Clause D-30. Water Facilities and Water Rights – Ski Areas in Prior Appropriation States.

Instructions for the Prior Appropriations Water Rights Clause.

The first paragraph of the instructions would provide direction to permit administrators on when to use the prior appropriation clause. The first paragraph would limit clause D-30 to ski

areas in prior appropriation States; provide that clause D-30 supersedes existing national and regional ski area water rights clauses in the Directive System in prior appropriation States; and provide for inclusion of the clause when a ski area permit is reissued or modified per 36 CFR 251.61 in a prior appropriation State.

The second paragraph would instruct that before issuing a new or modified permit in a prior appropriation State, Authorized Officers shall: ensure that the holder is in compliance with all water facility and water use requirements in clause D-30; inventory ski area water rights; classify the ski area's water rights consistent with the tables in clause D-30; and ensure that the water rights inventory in paragraph 8 of clause D-30 is approved in writing by the Regional Forester prior to issuance or amendment of a ski area permit.

The third paragraph would provide for amending the permit to update the water rights inventory, as appropriate.

The fourth paragraph would limit water rights and water developments under a ski area permit to those that are necessary for and that primarily support the operation of the ski area; would provide that all water facilities and water rights that meet these criteria, regardless of whether they are for diversions on NFS lands inside or outside the permit boundary, should be included in the ski area permit; and would define what it means to be necessary for and primarily support the operation of a ski area.

The fifth paragraph would provide instructions for use of an optional provision when restrictions on water withdrawal are required by a regulation or policy, an adjudication, or a settlement agreement or are based on a decision document supported by environmental analysis; provide instructions for use of an additional provision in California, which has a riparian system in addition to a prior appropriation system; and require an analysis of water sufficiency prior to

authorizing a permit amendment for a new water development.

The sixth paragraph would provide that prior to authorizing a permit amendment for a new water facility at a ski area, the Authorized Officer shall ensure that sufficient water is available to operate the water facility.

The last paragraph would provide that when bonding is required, direction in FSM 6560 applies and standard forms for bonding should be utilized.

These instructions on when and how to use clause D-30 are being added to FSH 2709.11, sec.52.4, to provide direction to permit administrators to enhance consistency and accountability in authorization of water uses and ownership of water rights for ski areas. The instructions incorporate several focus group recommendations, including providing a water rights clause for prior appropriation States and a water rights clause for riparian States to recognize differences among jurisdictions; providing for the proposed clause to supersede existing water rights clauses in the Directive System; and requiring that a determination of whether sufficient water is available be made prior to authorizing new water developments.

Paragraph F □ *Water Facilities and Water Rights.* Paragraph F would define “*necessary*” and “*primarily supports*” in relation to a water facility or water right.

Paragraph 1 □ *Water Facilities.* This paragraph contains subparagraphs a through h. Paragraph 1a would explain what constitutes a water facility; paragraph 1b would require that water facilities on NFS lands must be expressly authorized in a permit; paragraph 1c would provide that the United States can place conditions on water facilities deemed necessary to protect public property, public safety, and natural resources on NFS lands; paragraph 1d would provide that only water facilities that are necessary for and that primarily support the operation of a ski area on NFS lands be included in a ski area permit; paragraph 1e would provide that any

change in water facilities must be expressly authorized by amendment to a permit; paragraph 1f would provide that a separate special use authorization is required for water facilities on NFS lands if they do not primarily support operation of the ski area; paragraph 1g would be incorporated as needed and would document restrictions on withdrawal and use of water when applicable; and paragraph 1h would be added for ski areas in California, which has both prior appropriation and riparian systems, and would provide that a ski area permit does not extinguish or otherwise effect a transfer of rights, title, or interests of the United States as a riparian or littoral landowner.

These requirements for water facilities would be added to clarify the meaning of terms; provide for the imposition of terms and conditions that the Forest Service deems necessary to protect public property, public safety, and natural resources; clarify what may and what may not be authorized by a ski area permit; and expressly require approval of changes to water facilities by the Authorized Officer and documentation of that approval through amendment to the permit.

Paragraphs 1b, d, and f would limit the scope of water facilities that could be authorized under a ski area permit. These requirements are consistent with several focus group recommendations, including recognizing differences between water facilities on and off NFS lands and water facilities inside and outside the permit boundary, requiring advance notice of changes in authorized water facilities, and imposing terms that will protect public resources.

Paragraph 1g would document any water withdrawal restrictions required by a regulation or policy, an adjudication, or a settlement agreement or based on a decision document and is consistent with the recommendation to recognize impacts on other water use or users.

Paragraph 1h, which addresses the dual water systems in California, is consistent with the recommendation to recognize different requirements in different jurisdictions.

Paragraph 2 □ *Water Rights*. Paragraph 2 clarifies that the term “water right” means a right to use water that is recognized under State law under the prior appropriation doctrine.

Paragraph 3 □ *Acquisition and Maintenance of Water Rights*. Paragraph 3a would define the term “NFS ski area water right” to mean a water right that is for water facilities that would divert or pump water from sources located on NFS lands, either inside or outside the permit boundary, for use that primarily supports operation of the ski area.

Paragraph 3b would provide that NFS ski area water rights shall be acquired in accordance with applicable State law; that the holder shall maintain NFS ski area water rights, including federally owned NFS ski area water rights, for the term of the permit and any subsequent permit; that the holder shall have the responsibility to submit water rights applications and filings that are necessary to protect NFS ski area water rights in accordance with State law; and that the holder shall bear the cost of acquiring, maintaining, and perfecting NFS ski area water rights, including federally owned NFS ski area water rights.

Paragraph 3c would provide that NFS ski area water rights that are jointly or solely owned by the United States shall remain in Federal ownership. Additionally, paragraph 3c would provide that if the holder’s ski area permit utilizes NFS ski area water rights acquired in the name of or transferred to the United States or held jointly with the United States, the holder shall have the responsibility to submit any applications or other filings that are necessary to protect those water rights as the agent of the United States in accordance with State law. Furthermore, paragraph 3c would provide that notwithstanding the holder’s obligation to maintain federally owned NFS ski area water rights, the United States reserves the right to take any action necessary to maintain and protect those water rights, including submitting any applications or other filings that may be necessary to protect those water rights.

Paragraph 3d would provide that if a water facility corresponding to an NFS ski area water right was or is initiated, developed, certified, permitted, or adjudicated by the holder without a special use authorization, then the water facility is in trespass; that the owner of the NFS ski area water right shall apply for authorization of the water facility; and that if the application is denied, the owner shall promptly remove the water facility and petition in accordance with State law to remove the point of diversion and water use from NFS lands or abandon the NFS ski area water right.

Under paragraph 3, NFS ski area water rights that are not owned by the United States could be owned by the holder, provided that ownership by the holder is consistent with applicable State law as it applies to other parties within the State. In contrast to the 2012 clause, paragraph 3 would not require transfer of water rights to the United States under the terms of prior permits. Paragraph 3 responds to several focus group recommendations regarding transfer of water rights to the United States.

Paragraph 4 □ *Non-Severability of Certain Water Rights.* Paragraph 4a would provide that when the United States owns any NFS ski area water rights, the Forest Service shall not take action during the term of the permit that would adversely affect availability of those water rights to support the operation of the ski area unless deemed necessary by the Forest Service to satisfy legal requirements. Paragraph 4a would commit the Forest Service for the term of the permit to utilizing any NFS ski area water rights obtained in the name of the United States for ski area operations. Paragraph 4a would address concerns raised by NSAA regarding the 2011 ski area water rights clause that the Agency must assure continued availability of ski area water rights owned solely by the United States.

Paragraph 4b would provide that when the holder has an interest in any NFS ski area

water rights, or water rights that the holder has purchased or leased from a party other than a prior holder that are changed or exchanged to provide for diversion from sources on NFS lands within the permit boundary for use that primarily supports operation of the ski area authorized by this permit (“changed or exchanged water rights”), the holder shall not take any action during the term of the permit that would adversely affect availability of those water rights to support the operation of the ski area unless approved in writing in advance by the Authorized Officer.

Paragraph 4b would commit the holder to utilizing any changed or exchanged water rights and NFS ski area water rights owned by the holder for ski area operations. Paragraph 4b addresses focus group recommendations that water rights needed for ski area operations be committed to that use for the long term. Furthermore, non-severability is necessary to meet the objective of sustained use under MUSYA and is necessary to ensure the long-term viability of ski areas.

Without the requisite water rights and associated water facilities, ski areas cannot operate.

Paragraph 5 □ *Transfer of Certain Water Rights.* Paragraph 5a would provide that upon termination or revocation of the permit, the holder shall transfer the holder’s interest in any NFS ski area and changed or exchanged water rights to a subsequent holder and that the current holder shall retain the full amount of any consideration paid for those water rights. Paragraph 5b would provide that if the ski area is not reauthorized, the holder shall promptly petition in accordance with State law to remove the point of diversion and water use from NFS lands for any changed or exchanged water rights or NFS ski area water rights owned solely by the holder or shall relinquish those water rights. Paragraph 5b would further provide that in the case of any water rights owned jointly by the holder and the United States, the holder shall relinquish its ownership interest to the United States.

The restrictions in paragraph 5 help ensure that water remains available to fulfill the MUSYA purpose of providing the recreational opportunity of skiing to the American public. It is a reasonable exercise of the Agency's power over use and occupancy of NFS lands and of its mandate to provide sustainable recreation opportunities to require that water rights developed on NFS lands for ski area purposes be transferred to subsequent ski area owners through the sale of the ski area. While water rights are granted by the State agencies or courts, the beneficial use and the diversion necessary to their establishment rests on the Forest Service's discretionary decision to grant a ski area permit, and the Agency's discretionary decision to allow use of NFS lands for water facilities. The Agency's authority to deny a special use permit for a ski area or a water facility is sufficiently broad to allow the Agency to condition those authorizations by requiring the holder to sell its water rights to the subsequent holder.

If the ski area is not reauthorized, it is reasonable to require the holder to remove the point of diversion and water use for water rights owned solely by the holder or, if the holder prefers, to relinquish those water rights. The basis of the Agency's authorization of ski area water facilities is facilitation of ski area operations. Once that use ends, there is no basis for leaving the point of diversion and water use on NFS lands: water facilities cannot be maintained on NFS lands without a special use permit (36 CFR 251.50(a)).

The transfer provisions in paragraph 5 treat privately owned water rights in the same manner as other privately owned assets covered by a ski area permit are treated under existing regulations and ski area permit provisions. Both privately owned water rights and privately owned improvements are tied to the ski area permit when the use is still authorized and must be removed or relinquished when the use is no longer authorized. A ski area permit terminates when the authorized improvements are sold, and the purchaser shall obtain a ski area permit to

operate them (36 CFR 251.59). A ski area permit provides that when the use is not reauthorized, the holder shall either remove the privately owned improvements or they become the property of the United States. In addition, requiring transfer of privately owned water rights to the subsequent permit holder responds to a focus group concern regarding adequacy of water rights if a prospective holder has not acquired sufficient water rights and the current holder retains or sells water rights that have been historically used at the ski area.

There were several focus group recommendations to give an initial option to the succeeding permit holder to purchase privately owned water rights, a second option to the local government to purchase these water rights, and a third option to the United States to purchase these water rights. There are several problems with this approach. It would not ensure continuation of the ski area by keeping water rights tied to the authorized use. Rather, this approach would only require the ski area to make an offer to sell, when the desired result is the transfer of water rights needed to operate the ski area. Assuming the initial option is not exercised, there is no guarantee that the local government would ensure that the water rights remain with the land, and if the second option is not exercised, that the Federal Government would have resources to purchase the water rights.

Paragraph 6 □ Documentation of Transfer. Paragraph 6 would provide that when the holder is obligated to transfer the holder's interest in any NFS ski area or changed or exchanged water rights to the holder of a subsequent permit, the holder or the holder's heirs or assigns shall execute a quit claim deed to that effect. Furthermore, this paragraph would provide that the holder grants the Authorized Officer a limited power of attorney to execute documents necessary to accomplish this purpose. The Agency has broad authority to impose terms and conditions in special use permits to protect the public interest. A limited power of attorney to effectuate

transfers of water rights is appropriate, given the history of holders acquiring and retaining water rights in their name despite permit terms to the contrary and the inability to effectuate transfers of water rights absent the limited power of attorney if the holder refuses to do so.

Paragraph 7 □ *Waiver*. Paragraph 7 would provide that the holder waives any claims for compensation against the United States for any water rights that the holder transfers, removes, or relinquishes as a result of the provisions in the proposed clause; any claims for compensation in connection with imposition of restrictions on severing any water rights; and any claims for compensation in connection with imposition of any conditions on installation, operation, maintenance, and removal of water facilities. While the Forest Service does not believe that this clause will result in a taking of private property, the waiver provision will shield the United States from claims involving implementation of the proposed clause. The waiver provision is also constitutional. Although the Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation, constitutional rights, including those protected by the Fifth Amendment, can be waived. *See, e.g., Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Bistline v. United States*, 640 F.2d 1270, 1273-75 (Ct. Cl. 1981).

Paragraph 8 □ *Inventory of Necessary Water Rights*. Paragraph 8 would require the inventory of necessary ski area water rights, including NFS ski area water rights owned solely by the United States (paragraph 8a); those owned solely by the holder (paragraph 8b); those owned jointly by the United States and the holder (paragraph 8c); changed or exchanged water rights; and water rights for diversions from non-NFS lands for use on NFS lands within the permit boundary, which are owned solely by the holder (paragraph 8d). The inventory with the above classification would support the focus group recommendation to treat water rights on NFS lands

differently from water rights off NFS lands. The inventory also supports the focus group recommendation to assess the sufficiency of water during project analysis, including consideration of current ski area operations.

Paragraph 9 □ *Performance Bond.* Paragraph 9 would require the holder to maintain a performance bond for the removal of privately owned ski area improvements when the holder solely owns NFS ski area water rights. A performance bond would comply with FSM 6560. This paragraph would provide surety for the protection of NFS lands if a ski area is not reauthorized, and the holder chooses to remove the point of diversion and water use from NFS lands for any NFS ski area water rights owned solely by the holder.

Acknowledgment of Agreement. This paragraph would be inserted at the end of the permit and would provide that the holder has read and agrees to all the terms and conditions of the permit, including the limited power of attorney to transfer water rights in paragraph 6.

Clause D-31. Water Facilities and Water Rights – Ski Areas in Riparian States.

The Forest Service is proposing a new ski area water rights clause for use in States that have a riparian system. Under the riparian water rights clause, the United States retains all rights, title, and interests as a riparian or littoral landowner.

Instructions for the Riparian Water Rights Clause. The instructions would provide direction to permit administrators on when to use the riparian water rights clause. The instructions would limit clause D-31 to ski areas in the riparian States of Michigan, New Hampshire, and Vermont; supersede all ski area water rights clauses in the Directive System in riparian States; provide for inclusion of clause D-31 when a ski area permit is reissued or modified per 36 CFR 251.61 in a riparian State; and provide that before issuing a new or modified ski area permit in a riparian State, Authorized Officers shall ensure that the holder is in

compliance with all water facility and water use requirements in clause D-31.

The instructions would provide direction on use of an optional provision when restrictions on water withdrawal are required by the following: a regulation or policy; an adjudication; a settlement agreement; or based on a decision document supported by an environmental analysis.

The instructions would provide for the following: that water facilities that are necessary for and that primarily support the operation of the ski area on NFS land may be included in a ski area permit; all water facilities that meet these criteria, regardless of whether they are for diversions on NFS lands inside or outside the permit boundary, should be included in the ski area permit; define what it means to be necessary for and primarily support the operation of a ski area; and that any other water facilities must be authorized under a separate permit.

Additionally, the instructions would provide that before authorizing a permit amendment for a new water facility at a ski area, the Authorized Officer shall assure that sufficient water is available to operate the water facility.

Paragraph 1 □ *Water Facilities.* Paragraph 1a would define “necessary” and “primarily supports” in relation to a water facility. Paragraph 1b would explain what constitutes a water facility; paragraph 1c would require that water facilities on NFS land must be expressly authorized in a permit; paragraph 1d would provide that the United States can place conditions on water facilities deemed necessary to protect public property, public safety, and natural resources on NFS lands; paragraph 1e would provide that only water facilities that are necessary for and that primarily support the operation of a ski area may be included in a ski area permit; paragraph 1f would provide that any change in water facilities must be expressly authorized by a permit amendment; and paragraph 1g would require a separate special use permit to initiate,

develop, certify, or permit any water facility on NFS lands that does not primarily support operation of the ski area. These requirements mirror the water facilities requirements in clause D-30 to the extent applicable.

Paragraph 2 □ *Water Rights.* Paragraph 2 would provide that the ski area permit does not convey, dispose of, extinguish, or otherwise effect a transfer of any right, title, or interest of the United States as a riparian or littoral landowner, and that the United States retains all rights, title, and interests it has as a riparian or littoral landowner. Paragraph 2 is appropriate for use in ski area permits in eastern States that follow riparian law, where water rights are appurtenant to the land. Paragraph 2 is also consistent with the focus group recommendation that the proposed clause recognize legal differences among jurisdictions.

Paragraph 3 □ *Water Use.* Paragraph 3 would document any restrictions on withdrawal and use of water required by a regulation or policy, an adjudication, or a settlement agreement, or based on a decision document supported by environmental analysis. Paragraph 3 is consistent with the focus group recommendation to recognize impacts on other water use or users.

FSM 6560 □ **Bonding Administration**

A definition for a performance bond for a ski area permit would be added to FSM 6560.5. A performance bond for a ski area permit would be defined as “a bond to guarantee repair of surface resource disturbance, removal of equipment, removal of any privately owned improvements, and forest restoration.”

4. Regulatory Certifications

Environmental Impact

This proposed directive would revise national Forest Service policy governing water

rights in ski area permits. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Agency has concluded that this proposed directive falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This proposed directive has been reviewed under USDA procedures and Executive Order (E.O.) 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this proposed directive is significant and therefore subject to OMB review under E.O. 12866. Consequently, as required, a Cost Benefit Analysis was prepared. However, the proposed directive is not economically significant because it would not have an annual effect of \$100 million or more on the economy, nor would it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. Moreover, the proposed directive would not alter the budgetary impact of entitlement, grant, or loan programs or the rights and obligations of beneficiaries of those programs or interfere with an action taken or planned by another agency.

The Agency has considered the proposed directive in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). Pursuant to a threshold Regulatory Flexibility Act analysis, the Agency has determined that as defined by the Act because the proposed directive would: impose modest record-keeping requirements on them; not affect their competitive position in relation to large entities; and not affect their cash flow, liquidity, or ability to remain in the market. The proposed directive would likely have a positive economic effect on current and future holders and local communities close to ski areas because the proposed directive would provide for long-

term sustainability of ski areas. The basis for this determination is enumerated in the threshold

Regulatory Flexibility Act analysis.

No Takings Implications

The Agency has analyzed the proposed directive in accordance with the principles and criteria contained in E.O.12630 and determined that the proposed directive would not pose the risk of a taking of private property. The waiver provision is constitutional, because constitutional rights, including those protected by the Fifth Amendment, can be waived. Including requirements regarding non-severability and transfer of water rights in reissued or modified permits, rather than in existing permits, does not effect a taking of private property. While the Forest Service does not believe that this clause will result in a taking of private property, the waiver provision will shield the United States from claims involving implementation of the proposed clause. The Forest Service has broad authority to include appropriate terms and conditions in ski area permits. A ski area permit is a voluntary transaction, and a holder can decline the permit and retain ownership interest in water rights or accept the permit subject to its new conditions.

Civil Justice Reform

The Agency has reviewed the proposed directive under E.O. 12988 on civil justice reform. If the proposed directive were adopted, (1) all State and local laws and regulations that conflict with the proposed directive or that would impede its full implementation would be preempted; (2) no retroactive effect would be given to the proposed directive; and (3) it would not require administrative proceedings before parties file suit in court challenging its provisions.

Federalism and Consultation and Coordination with Indian Tribal Governments

The Agency has considered the proposed directive under the requirements of E.O. 13132 on federalism and has concluded that the proposed directive conforms to the federalism principles. The proposed directive would not impose any compliance costs on the States; and have substantial direct effects on the States or the relationship between the Federal Government and the States; or the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary at this time.

The proposed directive does not have tribal implications as defined by E.O. 13175, entitled “Consultation and Coordination with Indian Tribal Governments,” and therefore advance consultation with Tribes is not required. Consultation will be concurrent with this **FEDERAL REGISTER** notice.

Energy Effects

The Agency has reviewed the proposed directive under E.O. 13211, entitled “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The Agency has determined that the proposed directive does not constitute a significant energy action as defined in the E.O.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Agency has assessed the effects of the proposed directive on State, local, and Tribal governments and the private sector. The proposed directive would not compel the expenditure of \$100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995, (44 U.S.C. 3501 et seq.), the information collection requirements included in this proposed rule have been submitted to the Office of Management and Budget.

The bonding requirement in the proposed directive would be implemented using Standard Form 25, Performance Bond, which has been approved by OMB and assigned control number 9000-0045. Use of form SF-25 Performance Bond is new for the Forest Service special uses program. Additionally, the proposed directive involves a revision to the inventory of water rights associated with operation of the ski area by adding separate charts for changed or exchanged water rights (para. d) and water rights for diversions from non-NFS lands for use on NFS lands within the permit boundary (para. e). Furthermore, there is a new requirement to document restrictions on withdrawal and use of water, if applicable. Upon approval of the final rule, the burden associated with this information collection will be incorporated into OMB control number 0596-0082, *Special Uses* for utilization of form FS-2700-5b, *Ski Area Term Special Use Permit*. However, other than the collection of information required for the bonding requirement, the inventory of water rights, and the documentation of restrictions on withdrawal and use of water, all other information collection requirements associated with special use authorizations, including the ski area term special use permit, are already covered by control number 0596-0082.

The following summarizes the information collection requirement associated with the proposed bonding requirement, the inventory of water rights, and the documentation of restrictions on the withdrawal and use of water:

OMB Control Number: 0596-NEW

Estimated Burden Per Response: 2 Hours

Type of Respondents: ski area permit holders

Estimated Annual Number of Respondents: 40

Estimated Annual Average Number of Responses Per Respondent: 1.5

Estimated Total Annual Burden on Respondents: 120 hours

Comment is invited on (1) whether this collection of information is necessary for the stated purposes and proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden for collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the package submitted to OMB for approval.

5. Access to the Proposed Directive

The Forest Service organizes its Directive System by alphanumeric codes and subject headings. The intended audience for this direction is Forest Service employees charged with issuing and administering ski area permits. To view the proposed directive, visit the Forest

Service's website at <http://www.fs.fed.us/specialuses>. Only the sections of the FSH and FSM that are the subject of this notice have been posted, i.e., FSH 2709.11, Special Uses Handbook, Chapter 50, Standard Forms and Supplemental Clauses, Section 52.4, and FSM 6560.5, Bonding Administration.

Dated: June 17, 2014.

Thomas L. Tidwell,
Chief,
U. S. Forest Service.

[FR Doc. 2014-14548 Filed 06/20/2014 at 8:45 am; Publication Date: 06/23/2014]