August 21, 2014

Ms. Carolyn Holbrook  
Recreation, Heritage and Volunteer Resources Staff  
United States Forest Service  
1400 Independence Avenue SW., Stop 1125  
Washington, D.C. 20250-1125

Re: FS_FRDOC_0001-1886 -- Ski Area Water Rights on NFS Lands

Dear Ms. Holbrook:

The U.S. Forest Service (USFS) has issued a proposed directive concerning water rights for ski areas on National Forest System (NFS) lands (79 FR 35513, June 23, 2014). This draft directive, published for public comment, is proposed for addition to the USFS Handbook. Because this directive impacts state authority to manage water, the Western Governors’ Association (WGA) submits the following comments.

STATEMENT OF INTEREST:

The Western Governors’ Association (WGA) represents the Governors of 19 Western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the western United States.

WESTERN GOVERNORS’ ANALYSIS AND RECOMMENDATIONS:

The USFS states as its purpose for this directive:

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.
State Authority over Water Management

States are the primary authority for allocating, administering, protecting and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of Western water law and hydrology. Some language within the proposed ski area directive appears to be an effort by USFS to utilize special use authorization as a means to manage water use and water rights on National Forest System lands. Any such effort must be consistent with underlying state law regarding the acquisition and transfer of water rights.

As the primary authority for the issuance and management of water rights, states have the authority and responsibility to control and manage surface water and groundwater located within their boundaries, subject to international treaties and interstate agreements and judicial decrees. Moreover, Congress recognized states as the sole authority over non-navigable waters, including groundwater, in the Desert Land Act of 1877. The United States Supreme Court reiterated the exclusive nature of the states’ authority over their water resources in California v. U.S., 438 U.S. 645 (1978), when it recognized a “…consistent thread of purposeful and continued deference to state water law by Congress.”

Greater Clarity Needed for Definitions within Proposed Directive

Certain terms within the proposed directive are undefined, creating ambiguity for states and permittees.

“Sufficient Water” – Clause D-30 states, “Prior to authorizing a permit amendment for a new water facility at a ski area, [the Service shall] ensure that sufficient water is available to operate the water facility” (Emphasis added). Though the proposed directive does not define “sufficient water,” it does define two other terms in regards to water facilities and water rights: “necessary” and “primarily supports.” It is unclear if sufficient water will include one or both of these definitions.

“Adversely Affect” – Paragraph F.4 requires the water right holder to obtain advance written approval from the USFS before water rights can be divided, transferred, or modified if such action will “adversely affect” the availability of those rights to support operation of the ski area. The term “adversely affect” is not defined nor does the paragraph explain who makes this determination. Greater clarity is needed on this point.

Recommendation: The USFS should define these terms.
Conclusion

The Western Governors’ Association thanks the USFS for the opportunity to comment on this proposed directive. Western Governors acknowledge and appreciate the significant work the Service has undertaken to incorporate public opinion in this proposed directive after facing opposition to previous iterations of the ski area water rights clause. That refinement process needs to continue: Western Governors urge USFS to continue to engage with states to make sure that the final directive respects state authority and fully addresses state concerns.

WGA urges the Forest Service to consult with states in a meaningful way prior to proposing future directives or rules. This proposed directive, like many other proposals from the USFS and other federal agencies, was developed without any state consultation of which WGA is aware. For similar proposals in the future, we invite you to consult with the states prior to publishing documents in the Federal Register. This will help the Service to identify and avoid sticking points in proposed directives and rules. We invite the USFS to work through WGA, the Western States Water Council, and their member states to facilitate dialogue on ways to improve this (and any future) proposed directive.

WGA appreciates the opportunity to submit comments on this proposed directive.

Respectfully submitted,

James D. Ogsbury
Executive Director
Western Governors’ Association