



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596-AD14

Ski Area Water Clause

AGENCY: Forest Service, USDA.

ACTION: Notice of final directive.

SUMMARY: The U.S. Forest Service (Forest Service or Agency) is amending its internal directives for ski area concessions by adding two clauses to the Special Uses Handbook, Forest Service Handbook (FSH) 2709.11, Chapter 50, addressing the sufficiency of water for operation of ski areas on National Forest System (NFS) lands. The Forest Service recognizes the importance of winter sports opportunities on NFS lands and the need to address the sufficiency of water for ski areas operating on NFS lands. By addressing this need, this final directive will promote the long-term sustainability of ski areas on NFS lands and the economies of the communities that depend on revenue from those ski areas.

DATES: This directive is effective [**INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: The final directive will be available for inspection at the office of the Director, Recreation and Heritage Resources Staff, Forest Service, USDA, 4th Floor Central, Sidney R. Yates Federal Building, 1400 Independence Avenue, SW, Washington, DC, during regular business hours (8:30 a.m. to 4:00 p.m.), Monday through Friday, except holidays. Those wishing to inspect these documents are encouraged to call ahead to facilitate access to the

building. Copies of documents in the record may be requested under the Freedom of Information Act. The final directive will be posted on the Forest Service's website at <http://www.fs.fed.us/specialuses> on the effective date. Only the sections of the FSH 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.

FOR FURTHER INFORMATION CONTACT: Sean Wetterberg, National Winter Sports Program Manager, Recreation, Heritage, and Volunteer Resources staff, 801-975-3793, or Jean Thomas, National Water Rights Program Manager, Watershed, Fish, Wildlife, Air, and Rare Plants staff, 202-205-1172. Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at 800-877-8339 between 8:00 a.m. and 8:00 p.m., eastern daylight time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

1. Background and Need for the Final Directive

Constitutional and Statutory Authority

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." U.S. Const. art. IV, sec. 3, cl. 2. The Supreme Court has emphasized that Congressional authority over Federal lands is "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). 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." Organic Administration Act of 1897 (16 U.S.C. 551). 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.” Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* 59 (1987). See also *Wyoming Timber Indus. Ass’n v. United States Forest Serv.*, 80 F. Supp. 2d 1245, 1258-59 (D. Wyo. 2000). In the Organic Administration Act, Congress explicitly recognized that Forest Service regulations may affect 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) (authorizing the Secretary of Agriculture to permit use and occupancy of National Forest land “upon such terms and conditions as he may deem proper”); Multiple Use–Sustained Yield Act (MUSYA) (16 U.S.C. 529) (authorizing the Secretary of Agriculture to develop and administer the surface resources of the National Forests); and Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1765) (authorizing 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. 497b(b)(7)).

Regulatory Authority

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 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)); efficiently manage 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)).

Purpose of the Final Directive

One of the Forest Service's statutory duties is to provide the American public with outdoor recreation opportunities on NFS lands on a sustainable basis. One of these recreation opportunities is skiing, as many ski areas are operated on NFS lands under a permit issued by the Forest Service. Because water for snowmaking and other uses is critical to the continuation of ski areas on NFS lands, the Forest Service has a strong interest in addressing the long-term availability of water to operate permitted ski areas. This final directive will promote the long-term sustainability of ski areas on NFS lands by addressing the long-term availability of water to operate ski areas before permit issuance, during the permit term, and upon permit termination or revocation. Providing for the sustainability of ski areas on NFS lands will support jobs and the local economies that depend on revenue from ski areas on Federal lands. There are 122 ski areas that encompass about 180,000 acres of lands managed by the Forest Service. Ski areas receive roughly 23 million visitors annually, who contribute \$3 billion yearly to local economies and support approximately 64,000 full- and part-time jobs in rural communities.

Additionally, the final directive will reduce administrative costs to the United States by providing for more effective administration of ski area permits. The final directive will provide Agency employees and ski area permit holders with a consistent and comprehensive understanding of how water rights and water facilities should be managed under a ski area

permit. Specifically, the final directive will provide direction related to the treatment of ski area water rights and authorization of water facilities under ski area permits, including at permit issuance, during the permit term, and upon permit termination or revocation.

Approach of the Final Directive

The final directive contains two clauses for ski area water rights, one for eastern States that follow the riparian doctrine for water rights and one for western States that follow the prior appropriation doctrine for water rights. Under a riparian doctrine system, water rights are appurtenant to the land, whereas under a prior appropriation doctrine system, water rights may be severed from the land. Most ski areas on NFS lands are in western states that adhere to the prior appropriation doctrine.

For the last 30 years, the Forest Service has required 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 in prior appropriation doctrine states. This policy was motivated by the concern that if water rights used to support ski area operations are severed from a ski area—for example, are sold for other purposes—the Forest Service would lose the ability to offer the area to the public for skiing.

The final directive does not provide for ski area water rights to be acquired in the name of the United States; instead, the final directive focuses on sufficiency of water to operate ski areas on NFS lands. This modified approach for ski areas is appropriate given the characteristics of ski area water rights and ski areas. Unlike water rights diverted from and used on NFS lands by holders of other types of special use permits, ski area water rights may involve long-term capital expenditures. In western 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 involve a mix of NFS and private lands inside and outside the ski area permit boundary, which makes it difficult to implement a policy of sole Federal ownership for ski area water rights. Much of the development at ski areas is on private land 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.

With respect to sufficiency of water for ski area operations, the final directive includes a definition for the phrase, “sufficient quantity of water to operate the ski area,” and clarifies when and how the holder must demonstrate sufficiency of water to operate the permitted ski area and new ski area water facilities; addresses availability of Federally owned ski area water rights during the permit term; and addresses availability of holder-owned ski area water rights during the permit term and upon permit revocation or termination. In particular, the final directive:

- Requires applicants for a ski area permit to submit documentation prepared by a qualified hydrologist, i.e., an individual with the requisite education (e.g., in geology, forestry, soils, or engineering), training, and experience in hydrology to address sufficiency of water, or licensed engineer demonstrating sufficiency of water to operate the permitted ski area before permit issuance;

- Requires the permit holder to submit documentation prepared by a qualified hydrologist or licensed engineer demonstrating a sufficient quantity of water to operate a ski area water facility, as defined by paragraph F.1.a and b of the final directive, before it is installed;
- Requires the permit holder to demonstrate a sufficient quantity of water to operate the ski area before transferring or repurposing original water rights (water rights with a point of diversion and use inside the ski area permit boundary that were originally established by a permit holder) during the permit term;
- Addresses the availability of Federally owned ski area water rights during the permit term;
- Provides that Federally owned original water rights remain in Federal ownership;
- Requires the holder to maintain all ski area water rights, and reserves the right of the United States to maintain Federally owned original water rights;
- Requires the holder to offer to sell the holder's interest in original water rights to the succeeding permit holder upon permit termination or revocation; and
- If the succeeding permit holder declines to purchase the holder's interest in original water rights jointly owned by the United States, requires the holder to offer to sell that interest at market value to the United States.

Water clauses for special uses other than ski areas are not affected by this final directive.

2. Response to General Comments on the Proposed Directive

Public Input

Prior to publishing the proposed directive for public comment, the Forest Service conducted 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 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. Additionally, open houses were held in Denver, Colorado; Salt Lake City, Utah; and the Lake Tahoe area in California. The Agency used input from these listening sessions and open houses in developing the proposed directive.

On June 23, 2014, the Forest Service published the proposed directive in the **Federal Register** (79 FR 35513). The proposed directive was posted online at <http://www.gpo.gov/fdsys/pkg/FR-2014-06-23/pdf/2014-14548.pdf>. The Forest Service received 12,721 letters in response to the proposed directive, of which 35 were unique. Additionally, the Agency provided a 120-day government-to-government Tribal consultation period beginning on July 28, 2014. The Agency received written responses from 5 Tribes.

Comments Generally in Favor of the Proposed Directive

Comment: More than 12,000 commenters were generally in favor of the proposed directive and offered various reasons as to why they supported the proposed directive. It was characterized as a carefully crafted directive that balanced protecting rivers and streams with commercial interests. One commenter praised the Agency for balancing the fundamental principles of Agency land management with ski industry expectations. These principles include being able to carry out the Forest Service's statutory responsibilities to manage NFS lands on behalf of the American people, to assert control over water that originates and is used on NFS lands for multiple-use purposes, and to apply conditions of use to special use authorizations. Several county or regional commenters believed the proposed directive protected the long-term

viability of skiing and winter sports in mountain communities that have tourism-based economies while preserving the economic viability of ski areas operating on Federal lands.

Response: The Forest Service agrees with these comments.

Comments Generally Opposed to the Proposed Directive

Comment: Several commenters representing the ski industry, other business interests, or water districts and municipalities were generally opposed to the proposed directive. The ski industry asserted that the proposed directive was a heavy-handed approach that would be counterproductive to the desire to maintain ski area uses over the long term. Additionally, some commenters stated that the proposed directive was overbroad and exceeded federal authority, particularly in regards to proposed Clause D-30. Some water districts or municipalities simply objected to the proposed directive as drafted and requested that it not be adopted or revised.

Response: Several important substantive modifications have been made in the final directive in response to comments the Agency received on the proposed directive. The final directive does not insert the Forest Service into day-to-day management of ski areas water rights. Rather, the final directive takes the Forest Service out of day-to-day management of ski area water rights by providing for the holder to establish, acquire, maintain, and perfect original water rights. Specific comments and responses related to proposed Clause D-30 are contained herein.

General Comments

Comment: One commenter suggested that the **Federal Register** notice for the final directive clarify that the Forest Service has not consistently required ski areas to acquire water rights in the name of the United States. This commenter believed that the **Federal Register** notice for the proposed directive was misleading in indicating that the proposed directive was a substantial change from prior policy.

Response: While there may be examples of inconsistent application of prior policy, the **Federal Register** notice for the proposed directive correctly characterizes that policy.

Comment: One commenter believed that the issues raised by the Agency could be addressed with existing mechanisms. This commenter requested that the Forest Service withdraw the proposed directive and consult with the States to address Forest Service participation in water allocation and management processes.

Response: The Agency believes that the final directive is needed to address management of water resources on NFS lands and in particular to ensure that ski areas providing public services on NFS lands will have a sufficient quantity of water to operate. The Agency has made several significant changes to the proposed directive in response to comments received. The primary change with respect to ski area water rights is a shift in emphasis from non-severability to ensuring a sufficient quantity of water to operate the ski area. The Agency believes that the public comment period provided reasonable opportunity for States and others to provide input on the proposed directive. The proposed and final directives do not affect the States' role in allocating water rights in States that follow the prior appropriation doctrine.

Comment: One commenter stated that the **Federal Register** notice for the proposed directive suggests that the Forest Service has had a uniform practice of administering special use permit clauses requiring the permit holder to acquire water rights in the name of the United States, but in many cases these clauses were not enforced. This commenter recommended clarifying in the final directive that the clauses in the final directive will displace all prior ski area water clauses, assuming that the Forest Service modifies the proposed directive to be acceptable as identified in the comments. Further, one commenter urged the Forest Service not to enforce prior ski area water clauses in prior or existing ski area permits.

Another commenter submitted that there are probably many ski area permits that have no provision for United States ownership or control of water rights. This commenter believed that holders of those permits have little incentive to request inclusion of the proposed clause in their permits. The commenter also noted that often when ski area permits are modified, the amendment addresses only the proposed change that triggered the amendment (e.g., expansion of the permit area). This commenter suggested that the Forest Service make a concerted effort to add the new clause to ski area permits when other modifications are made to the permits.

Response: Per the instructions in the final directive, once the final directive goes into effect, clauses D-30 and D-31 supersede all previous ski area water rights clauses in the Directive System. When ski area permits are issued, reissued, or modified under 36 CFR 251.61 to reflect new, changed, or additional uses or area, the appropriate new clause (D-30 or D-31) will be included in ski area permits, and any other water clauses in the permits will be removed.

Holders of existing ski area permits that are not being reissued or modified under 36 CFR 251.61 may opt to amend their permit to include the appropriate new clause within one year of the effective date of the final directive, provided they:

(1) agree to have all water facilities on NFS lands that are used primarily for operation of the ski area and that are not authorized under a separate permit:

- (a) authorized by their ski area permit;
- (b) designated on a map attached to the permit; and
- (c) included in an inventory in an appendix to the permit; and

(2) submit documentation prepared by their qualified hydrologist or licensed engineer:

(a) demonstrating that they hold or can obtain a sufficient quantity of water to operate the permitted portion of the ski area; and

(b) identifying all water sources, water rights, and water facilities necessary to demonstrate a sufficient quantity of water to operate the ski area, including all original water rights; all water facilities authorized by the ski area permit; and any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service.

These requirements, which are enumerated in paragraphs 1 and 2 of the instructions for clauses D-30 and D-31, must be met to implement the new clauses.

Per National Ski Areas Association, Inc. v. United States Forest Service, 910 F. Supp. 2d 1269 (D. Colo. 2012), the 2011 and 2012 ski area water clauses in existing permits are not enforceable. However, previous water clauses in ski area permits are valid and enforceable as long as they remain in the permit.

Comment: One commenter suggested that the Forest Service needs an effective tool to ensure ski area compliance with this directive. In this commenter's experience, ski area permit holders fight enforcement of even minor requirements that get in the way of the industry's development plans. This commenter noted that when a ski area signs a permit with the new water clause, the ski area must abide by that clause, as was the case with prior water clauses in ski area permits. The commenter further stated that the American public cannot afford future litigation on legal requirements that a ski area agrees to one day and disavows later.

Response: The Agency agrees that the terms of a ski area permit executed by the holder are binding on the holder. When the appropriate water clause in the final directive is included in a ski area permit executed by the holder and the Forest Service, it will be binding on and enforceable against the holder.

Comment: One commenter noted that the proposed directive would not change the Forest Service's policy on water rights for special uses other than ski areas. This commenter believed that the Forest Service would continue to take a possessory interest in water rights for other special uses, which would continue to affect municipal water providers, the agricultural and energy industries, and all other water users.

Response: The proposed and final directives affect only ski area permits. Changes to water clauses for other special uses are outside the scope of the proposed and final directives. The possessory interest provision in Forest Service directives applies only to water rights for Forest Service programs administered on NFS lands, i.e., to permits where both the water facility and the water use are on NFS lands. Forest Service Manual (FSM) 2541.32, para. 2. The possessory interest provision does not apply to water rights held by municipal water providers and the agricultural and energy industries, since these water rights are not associated with both a water facility and water use on NFS lands. Likewise, the possessory interest provision does not apply to water rights held by other water users that are not associated with a point of diversion and water use on NFS lands.

Comment: Commenters questioned the Agency's legal authority to manage water rights on NFS lands and included citations in support of this position. One commenter requested that the Forest Service specifically identify the statutory provisions granting the Agency authority to control water rights. Another commenter noted that Congress granted the Forest Service authority to permit the use of water rights on NFS lands, but not otherwise regulate them.

Response: Prior appropriation doctrine States adjudicate and allocate water rights for all water users, including the Federal government. The Forest Service has the authority to manage use and occupancy of NFS lands, including use of NFS lands for ski areas. The Forest Service

has broad authority to condition special use authorizations that allow use and occupancy of NFS lands, including the authority to put water clauses in permits to ensure sufficiency of water for authorized uses and to protect public property, public safety, and natural resources on NFS lands. The Agency cited numerous authorities in the **Federal Register** notice for the proposed directive and this **Federal Register** notice supporting this position. 79 FR 35516 (June 23, 2014); 16 U.S.C. 481, 497, 497b, 529, 551; 43 U.S.C. 1765; 36 CFR 251,56(a)(ii)(A), (a)(ii)(B), (a)(ii)(E), (a)(ii)(G).

Comment: One commenter cited *United States v. New Mexico* for the proposition that there is no implied Forest Service reservation of water for secondary purposes and that the United States must acquire water rights in the same manner as any other public or private appropriator. Citing the Federal Task Force Report issued pursuant to section 389(d)(3) of Public Law 104-127, this commenter asserted that the Forest Service must attain the secondary purposes of the National Forests without interfering with the diversion, storage, and use of water for non-Federal purposes.

Response: Ski area water rights do not qualify as reserved water rights. The Forest Service, like any other public or private party, must acquire water rights from prior appropriation doctrine States. These States adjudicate and allocate water rights, including water rights for the Federal government.

3. Response to Comments Relating to Specific Clauses

a. PRIOR APPROPRIATION DOCTRINE STATES – CLAUSE D-30

Proposed Instructions

Only the first, second, fourth, and sixth paragraphs in the proposed instructions for clause D-30 received comment.

Proposed Paragraph 1

Paragraph 1 of the proposed instructions provided that clause D-30 supersedes all previous ski area water rights clauses in the Directive System. Paragraph 1 also provided that clause D-30 be included in ski area permits in prior appropriation doctrine States when these permits are issued, reissued, or modified under 36 CFR 251.61 and that clause D-30 not be included in Michigan, Vermont, and New Hampshire, which are riparian doctrine States.

Comment: A concern was raised that because the instructions cited a specific version of the ski area permit and two specific interim directives, the new clause would be used only in permits with these versions of the water rights clause, rather than in all new or modified ski area permits.

Response: It was not the Agency's intent to limit the new clauses to permits containing these versions of prior clauses. To clarify this intent, the Agency has removed these references from paragraph 1 of the instructions in the final directive.

Proposed Paragraph 2

The second paragraph of the proposed instructions for clause D-30 provided that before issuing a new or modified ski area permit in a prior appropriation doctrine State, the authorized officer would have to (1) ensure that the holder is in compliance with all water facility and water use requirements in clause D-30; (2) inventory ski area water rights; (3) classify the ski area's water rights consistent with the tables in clause D-30; and (4) ensure that the water rights inventory in paragraph 8 of clause D-30 is approved in writing by the Regional Forester.

Comment: There was a general concern regarding the increased magnitude of work involved in implementing these instructions. One commenter suggested that it is unnecessary for Regional Foresters to approve water rights inventories in writing.

Response: The Agency agrees with the concern regarding the potential magnitude of work involved in implementing these instructions. Therefore, the Agency has revised paragraph 2 of the instructions for clause D-30 in the final directive to address authorization of water facilities that are used primarily for operation of the ski area under the ski area permit and designation of those water facilities on a map. Additionally, the inventory in this paragraph is limited to water facilities on NFS lands that are used primarily for operation of the ski area and that are authorized by this permit. The final directive recognizes that there may be existing water facilities used primarily for operation of the ski area that are authorized by a separate, valid special use permit and that those water facilities may remain under that separate authorization, including upon reissuance, if eligible. The Forest Service will determine eligibility based on the primary use of that water facility and applicable statutory authority at the time of reissuance.

The Agency has added a provision to the instructions requiring the applicant for a new or modified ski area permit to submit documentation prepared by the applicant's qualified hydrologist or licensed engineer demonstrating that the applicant holds or can obtain a sufficient quantity of water to operate the permitted portion of the ski area. The documentation submitted must identify all water sources, water rights, and water facilities necessary to demonstrate a sufficient quantity of water to operate the ski area, including all original water rights; all water facilities to be authorized by the ski area permit; and any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. This provision is consistent with the conceptual shift in the final directive from non-severability of ski area water rights to sufficiency of water to operate the ski area.

The Agency agrees that it is unnecessary for Regional Foresters to approve inventories in writing and therefore has removed that requirement from the instructions in the final directive.

Proposed Paragraph 4

Paragraph 4 of the proposed instructions for clause D-30 provided that only water facilities and water rights that are necessary for and that primarily support operation of the ski area being authorized may be included in the ski area permit. Comments received on the terms “necessary” and “primarily support” are addressed in the response to comments on proposed paragraph F. The standard for determining which water facilities should be included under a ski area permit is addressed in the response to comments on proposed paragraph F.1.d.

Proposed Paragraph 6

Paragraph 6 of the proposed instructions for clause D-30 provided that, prior to authorizing a permit amendment for a new water facility at a ski area, the authorized officer would have to ensure that sufficient water is available to operate the water facility. The comments received on the standard for determining sufficiency of water in this context are addressed in the response to comments on proposed paragraph F.

The remaining paragraphs in the proposed instructions for clause D-30 (paragraphs 3, 5, and 7) did not receive specific comment.

Proposed Paragraph F – Water Facilities and Water Rights

Proposed paragraph F provided that “necessary,” in relation to a water facility or water right, means that without that water facility or water right, the ski area would not be able to operate. Proposed paragraph F provided that “primarily supports” in relation to a water facility or water right means that the water facility or water right serves the ski area improvements on NFS lands significantly more than any other use.

Comment: Several commenters believed that the definitions of “necessary” and “primarily supports” in the proposed clause were so broad that they could include water rights located off NFS lands used to support the operation of ski area improvements and could even include the water rights of municipal water providers that are used in connection with ski areas. These commenters believed such expansive coverage overreaches and should be narrowed to apply only to water rights that are necessary for operation of a ski area and to exclude any other water rights, such as water rights on non-NFS lands or water acquired from municipalities. Additionally, some commenters stated that, as proposed, the term “necessary” implied a determination of whether an individual water right or water facility is essential to the viability of the entire ski area. There was a concern that if considered individually, a water right might not be deemed necessary, whereas in total, a ski area’s portfolio of water rights would be necessary for operation of the ski area. Several commenters recommended either redefining “necessary” to recognize the cumulative necessity of water rights or deleting the term “necessary” because the term “primarily supports” is adequate.

Some commenters stated that to determine whether a water right “primarily supports” a ski area, a comparison would be made between water associated with a ski area use and any other use. Since water at ski areas is used for a wide assortment of purposes, these commenters believed it would be difficult to determine whether the water primarily supports a ski area. For example, water may be used inside or outside the ski area permit boundary on either NFS or private land for condominiums, golf courses, retail shops, and restaurants. These commenters also believed it would be difficult to determine whether a particular water right “primarily supports” ski area use because there are seasonal changes in the use of a particular water right. For example, snowmaking in the winter may change to golf course irrigation in the summer.

Commenters noted that the amount of necessary water for a ski area is dynamic and that permit holders need flexibility to manage their water rights in the best interest of ski areas.

Another commenter noted that there is variability from year to year as well as over the 40-year term of a ski area permit in the amount of water that is necessary to operate a ski area. These variations may be due to the amount of natural snowfall, levels of visitation, increases in snowmaking efficiency or other operational and technical advances in the use of water, availability of water based on seniority in appropriation, and changes in climate. This commenter stated that all these variables can result in decreases or increases in the amount of water necessary to support ski area operations.

One commenter stated that the proposed definition of “necessary” in paragraph F is too narrow because many water rights are important to the planned and approved operation of the ski area. According to this commenter, the ski area could still operate with a reduced level of service or quality of skiing experience in their absence. For example, the partial loss of snowmaking water supply during one year might not result in closing the ski area, but those snowmaking water rights should nonetheless be protected under the new clause. This commenter believed that, under the proposed directive, a “necessary” water facility or water right would be subject to the new clause only if it also “primarily supports” the ski area operation.

Another commenter believed that the combination of “necessary” and “primarily supports” was problematic and that a particular water right serving multiple purposes, such as domestic uses for condominiums and commercial operations at the base of a ski area and snowmaking inside the permit boundary, should not result in the exclusion of the entire water right from the protections of the new clause.

One commenter expressed concern that the term “sufficient water” was not defined, which would create ambiguity for States and permit holders. This commenter sought clarity as to whether water associated with water rights and water facilities that are “necessary for” and that “primarily support” a ski area would be deemed sufficient. Commenters requested that the Forest Service provide reasonable criteria and guidance for determining sufficiency of water for ski area operations because the concept is complex and could involve detailed hydrological analysis and projections of future climatic conditions. Commenters believed that establishing criteria would avoid disputes, unreasonable expense, and delay.

One commenter asserted that with respect to existing water rights, a water court has already determined sufficiency of water for ski area operations and approved water use for ski area purposes. This commenter encouraged Forest Service recognition of the water court’s or State engineer’s determinations of sufficiency of water and appropriateness of water use and acceptance of these findings. This commenter noted that the permit holder’s water rights may be used at a ski area or they may be used at the holder’s discretion to supply water for other purposes, provided that sufficient water remains to operate the ski area.

One commenter observed that the requirement for sufficient water to be available is an important tool for the Forest Service to determine whether new water facilities, such as snowmaking systems, will be able to operate in dry years. However, this requirement may not ensure that sufficient water is available to operate in dry years in every case, for example, where the facility is served by water diverted from a location off NFS lands. This commenter also stated that, as proposed, this requirement did not explicitly apply to the issuance of a permit, which would present an important opportunity to conduct a sufficiency analysis.

Another commenter was concerned that ensuring sufficient water to operate the ski area could conceivably dry up a stream and negatively affect flow-dependent resources and aquatic organisms, especially when water is withdrawn during low-flow periods in winter. This commenter recommended amending the second-to-last paragraph of the instructions to address the requirements of streamflow-dependent resources.

Response: The Agency agrees that the amount of water necessary to operate a ski area may fluctuate from year to year and that the proposed definition of the term “necessary” is problematic. The Agency has removed the term “necessary” from the final directive. The Agency has changed the phrase “primarily supports” to the phrase “used primarily for operation of the ski area.” In relation to a water facility or water right, “used primarily for operation of the ski area” means that the water facility or water right provides significantly more water for operation of the permitted portion of the ski area than for any other use. Water facilities and water rights that are used primarily for operation of a ski area are relevant to the provisions of the new clauses, including those that address sufficiency of water for ski area operations.

In addition, the Agency has added a definition for the term “sufficient quantity of water to operate the ski area.” This term means that under typical conditions, taking into account fluctuations in utilization of the authorized improvements, fluctuations in weather and climate, changes in technology, and other factors deemed appropriate by the applicant’s qualified hydrologist or licensed engineer, the applicant has sufficient water rights or access to a sufficient quantity of water to operate the permitted facilities, and to provide for the associated activities authorized under the ski area permit in accordance with the approved operating plan. This new term and definition are consistent with the shift from non-severability of water rights to sufficiency of water to operate the ski area. The definition recognizes that the quantity of water is

not static and allows for appropriate factors to be considered in the sufficiency determination. Before issuance of a new or modified ski area permit, applicants will be required to submit documentation demonstrating that they hold or can obtain a sufficient quantity of water to operate the permitted portion of the ski area. The submitted documentation will identify any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. Addressing streamflow-dependent resources generally is beyond the scope of this directive.

Proposed Paragraph F.1 – Water Facilities

Proposed Paragraph F.1.a

This provision defined the term “water facility” to mean a ditch, pipeline, reservoir, well, tank, spring, seepage, or any other facility or feature that withdraws, stores, or distributes water.

Comment: Several commenters opined that the definition of “water facility” in the proposed directive was not limited to facilities located on NFS lands and should be narrowed to apply only to those facilities.

Response: The Agency has revised the definition of “water facility” in the final directive to clarify its scope. The definition in the final directive references only human-made features and removes references to natural features such as springs and seeps. In addition, the Agency has added the following definition for “ski area water facility” in the final directive: “any water facility on NFS lands that is authorized by this permit and used primarily for operation of the ski area authorized by this permit.” This definition clarifies that only water facilities that are used primarily for operation of a ski area may be authorized by the ski area permit. The Forest Service does not authorize water facilities located on non-NFS lands.

Proposed Paragraph F.1.b

This proposed provision stated that no water facility for which the point of withdrawal, storage, or distribution is on NFS lands may be initiated, developed, certified, permitted, or adjudicated by the holder unless expressly authorized by a special use authorization.

Comment: One commenter believed that proposed paragraph F.1.b would provide for total Forest Service control over the adjudication, operation, and transfer of surface water and groundwater rights on NFS lands and that the requirement for Forest Service permission for slight changes to those water rights would constitute a taking of private property in contravention of State water law, direction from Congress, and U.S. Supreme Court rulings. Another commenter alleged that a water right appropriator does not need a landowner's permission to adjudicate water rights on the landowner's lands. Yet another commenter questioned the need for and the Agency's authority to require authorization prior to initiation or adjudication of water rights associated with a water facility on NFS lands. This commenter observed that it is common practice for water users to appropriate and adjudicate water rights on Federal land prior to obtaining a special use permit. One commenter observed that the Forest Service can impose reasonable conditions on the development of water rights located on NFS lands through its special use permit process when facilities to access those water rights are developed, but not when the water rights are acquired.

Additionally, a commenter was concerned that the proposed restrictions on taking action regarding water facilities on NFS lands without a special use authorization would apply to water facilities that do not primarily support a ski area. One commenter observed that the proposed restrictions would affect diversions of water off NFS lands and would limit exercise of the associated water rights. A commenter also expressed concern that the permitting process can

take a considerable amount of time, during which the priority date, and therefore the value of the water right, would be in jeopardy.

One commenter recommended limiting paragraph F.1.b to construction of water facilities on NFS lands and deleting the reference to “initiation, permitting, or adjudication of water rights on NFS lands.” Others suggested that the provision be revised to clarify that the appropriation and adjudication of a water right for ski area operations on NFS lands are subject to State law and are not pre-conditioned on the existence of Forest Service permission because the Forest Service has agreed to be bound by State water law.

Response: The Forest Service agrees that proposed paragraph F.1.b to a certain degree conflates acquisition of water rights from the State with Forest Service authorization of water facilities on NFS lands. In addition, paragraph F.1.b is unnecessary to the extent it provides that water facilities on NFS lands must be authorized by a special use authorization, as this requirement is already stated in applicable Forest Service regulations. Therefore, the Agency has removed proposed paragraph F.1.b from the final directive.

Proposed Paragraph F.1.c

Proposed paragraph F.1.c provided that the United States may place any conditions on installation, operation, maintenance, and removal of any water facility that are deemed necessary by the United States to protect public property, public safety, and natural resources on NFS lands. Numerous comments were received on this provision.

Comment: Some commenters interpreted proposed paragraph F.1.c as a mechanism for the Forest Service to manage water use and water rights on NFS lands. These commenters noted that the Agency’s authority to condition special use authorizations is not limitless, and that while the National Forest Ski Area Permit Act allows the Secretary to make permit changes from time

to time, those changes must be in accordance with applicable law. These commenters recommended that proposed paragraph F.1.c be revised to add “in accordance with applicable laws.”

Another commenter observed that when the Forest Service has raised the possibility of imposing a bypass flow on an existing water facility, a solution has been negotiated that protects both the water user who is seeking approval to use Federal land and the national objectives and interests of taxpayers. This commenter observed that the proposed directive provides flexibility and represents a rededication and commitment to common-sense water policies on Federal lands without jeopardizing the legitimate interests of taxpayers, ordinary citizens who use and enjoy those lands, or corporate permit applicants like ski areas. Additionally, this commenter observed that regardless of disagreement over the Forest Service authority to impose bypass flow requirements, many water rights holders with water facilities on NFS lands have found innovative ways to accommodate their water rights while meeting the water needs of other forest resources. The commenter credited the Forest Service with showing a growing willingness to accept workable alternatives to the imposition of bypass flow conditions.

Several commenters favored the ability granted by proposed paragraph F.1.c to condition use of water facilities on NFS lands to protect aquatic and other environmental resources (e.g., by imposing bypass flow requirements). These commenters believed that the Agency has the legal authority and the legal obligation to do so and that failure to do so could expose the United States to substantial litigation risk. Other commenters noted that in some cases, the imposition of certain conditions such as bypass flow requirements may be the only practical way to protect environmental resources. Commenters cited State and Federal cases and Federal statutes in support of their position.

Some commenters were concerned generally about environmental and social impacts associated with ski area water rights. One commenter requested that the Forest Service first determine how much water is needed to meet public purposes, such as instream flows for aquatic life, the movement of wood and sediment through the stream system, and seasonal inundation of floodplains, before allowing ski areas to divert and appropriate water. Another commenter requested that the Forest Service ensure that the proposed directive protect all public rights and interests in water on NFS lands, including Federal reserved water rights that date back to the establishment of the national forest reserves. This commenter wanted the Forest Service to compensate for impacts on flows due to climate change, such as impacts from rain on snow, by protecting flows during critical periods and avoiding activities that would increase peak flows. This commenter also recommended evaluating snowmaking practices to ensure that hydrology, peak flows, and water quality are not adversely affected.

Response: The Agency has modified proposed paragraph F.1.c in the final directive. The first sentence of paragraph F.1.c in the final directive provides that the authorized officer may place conditions, as necessary to protect public property, public safety, and natural resources on NFS lands, on the installation, operation, maintenance, and removal of any water facility, but only in accordance with applicable law. The Forest Service recognizes that its actions must be in accordance with applicable law and that the Agency has authority under applicable law to condition special use authorizations that allow use and occupancy of NFS lands to protect public property, public safety, and natural resources on NFS lands.

The second sentence of paragraph F.1.c in the final directive states that clause D-30 does not expand or contract the Agency's authority to place conditions on the installation, operation, maintenance, and removal of water facilities at issuance or reissuance of the permit, throughout

the permit term, or otherwise. Thus, clause D-30 does not affect the Agency's authority to place conditions on water facilities under existing legal authority.

The third sentence of paragraph F.1.c in the final directive states that the holder must comply with present and future laws, regulations and other legal requirements in accordance with section I of the ski area permit. This provision reinforces existing provisions in the ski area permit that provide protection for natural resources in connection with water facilities.

In response to concerns regarding environmental impacts associated with water facilities, the sufficiency documentation an applicant must submit before receiving a new or modified ski area permit must include any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. The Forest Service conducts environmental analysis, as appropriate, on a site-specific basis of the effects of water facilities on NFS lands. This type of site-specific analysis is beyond the scope of this notice of final directive.

Proposed Paragraph F.1.d

Proposed paragraph F.1.d provided that only water facilities that are necessary for and that primarily support operation of a ski area may be authorized by a ski area permit.

Comment: One commenter recommended that proposed paragraph F.1.d provide examples of what is and what is not considered necessary for ski area operations. This commenter suggested that snowmaking and on-mountain restaurant uses may be necessary for ski area operations, but that base area water needs for condominiums, golf courses, and other uses not authorized by the ski area permit should not be considered necessary for ski area operations.

One commenter believed this provision would impose unreasonable limitations on water facilities within the permit boundary. This commenter stated that “necessary” as proposed in paragraph F.1.d would impose an unreasonably high threshold and would include only facilities that are “mission-critical,” would create confusion at the field level, and would invite controversy and possibly third-party challenges regarding whether a proposed water facility met the applicable standard.

Response: The Agency agrees that the term “necessary” is not needed. The Agency has removed the term “necessary” from paragraph F.1.d in the final directive and has revised this provision to clarify that only water facilities which are on NFS lands and are used primarily for operation of the ski area may be authorized by the ski area permit.

Proposed Paragraph F.1.e

Proposed paragraph F.1.e provided that any change in the water facilities authorized by the permit would result in termination of the authorization for those water facilities, unless the change was expressly authorized by a permit amendment. Examples of changes to water facilities included (1) use of the water in a manner that does not primarily support operation of the ski area authorized by this permit; (2) a change in the ownership of associated water rights; or (3) a change in the beneficial use, location, or season of use of the water.

Comment: One commenter raised a concern that if unauthorized changes to water facilities resulted in termination of the authorization, it would create an incentive for the holder not to make changes to water facilities that should be made. This commenter also observed that if the penalty for a violation is merely the loss of the right to use the water facility, the holder may abandon a water facility even if it is essential to providing the current level of public service. Other commenters asserted that restrictions on the ability to make changes to water

facilities per paragraph F.1.e would impede the holder's ability to maximize the value and utility of the associated water right and would undercut the Agency's interest in sustaining ski area operations.

One commenter observed that proposed paragraph F.1.e does not clearly identify the types of actions that are prohibited without authorization and recommended specifically listing all changes to a water facility that, if not authorized by a permit amendment, would trigger termination of authorization for the water facility. Similarly, another commenter observed that it would be difficult to determine consistently which modifications require approval because States define water rights broadly and do not assign a percentage of the total water right dedicated to each use. This commenter noted that the purposes of a ski area water right might simply be listed as "commercial or domestic" or "irrigation, domestic water for condominiums and homes, restaurants, and snowmaking," and the amount of water a ski area uses for each purpose could change.

Another commenter raised a concern that this clause would impose an undue burden on permit holders by placing restrictions on holders' ability to obtain, develop, maintain, or enhance water rights and thus would create additional impediments to the development of water resources to support permitted ski areas. Additionally, this commenter noted that the requirement for Forest Service approval of changes would delay compliance with State deadlines and could result in the forfeiture of water rights or impairment of their value.

Response: The Agency agrees that clarification is needed regarding the types of changes to water facilities that, if not authorized by a permit amendment, will result in termination of authorization of the water facilities under the ski area permit. In contrast to proposed paragraph F.1.e, which provided that any unauthorized change to water facilities would result in

termination of their authorization under the ski area permit, paragraph F.1.e in the final directive provides that if, due to a change, a ski area water facility will primarily be used for purposes other than operation of the ski area, authorization for that water facility under the ski area permit will terminate. Paragraph F.1.e in the final directive gives examples of the types of changes to water facilities that would result in their being used primarily for purposes other than operation of the ski area. These examples include a change in the ownership of the water facility or the associated water rights or a change in the beneficial use, location, or season of use of the water. Other changes to ski area water facilities could also result in their ceasing to be used primarily for operation of the ski area.

Proposed Paragraph F.1.f

Proposed paragraph F.1.f provided that the holder must obtain a separate special use authorization to initiate, develop, certify, or adjudicate any water facility on NFS lands that does not primarily support operation of the ski area authorized by the ski area permit.

Comment: One commenter observed that water right adjudications do not require prior permission from the owner of the land on which the point of diversion will be located. This commenter stated that the Forest Service has agreed to be bound by State law and has no authority to use the requirement for a new special use authorization to adjudicate water rights on NFS lands.

One commenter was concerned that if a separate permit is required for water facilities on NFS lands that do not primarily support operation of the ski area, that permit would include water clauses for other special uses, which the commenter believed require transfer of water rights to the United States, or would provide for claiming a possessory interest in water rights in the name of the United States, consistent with FSM 2541.32. This commenter believed that

Agency testimony before Congress is inconsistent with claiming a possessory interest in ski area water rights as provided in FSM 2541.32 and that the Agency should clarify in the final directive that it will not require ski areas to transfer ownership of water rights to the United States in any separate permit for water facilities on NFS lands that do not primarily support operation of a ski area.

Response: The Agency has revised proposed paragraph F.1.f and consolidated it with paragraph F.1.e in the final directive. Paragraph F.1.e in the final directive provides that when authorization for a water facility under the ski area permit terminates because a change in the water facility results in its ceasing to be used primarily for operation of the ski area, a separate special use authorization is required to operate that water facility or to develop a new water facility, unless the holder has a valid existing right for the water facility to be situated on NFS lands. A valid existing right in this context is a legal right, typically a statutory right, to use and occupy NFS lands. In the absence of a valid existing right, a separate special use authorization is required under these circumstances because it is not appropriate to utilize the National Forest Ski Area Permit Act to authorize water facilities that do not primarily support operation of a ski area. 16 U.S.C. 497b(a), (b). Paragraph F.1.e in the final directive also provides that unless the holder has a valid existing right for the water facility to be situated on NFS lands, if the holder does not obtain a separate special use authorization for these water facilities, the holder must remove them from NFS lands.

The Forest Service agrees that it is inappropriate to use the words “initiate,” “develop,” “certify,” or “adjudicate” in connection with proper authorization of a new water facility and has removed these words from paragraph F.1.e in the final directive. However, it would be prudent for the permit holder to communicate with the Forest Service regarding the likelihood of

approval of a proposed water facility, regardless of whether it is used primarily for operation of the ski area, before incurring expenses in acquiring associated water rights.

Neither the proposed nor the final directive provides for the United States to claim a possessory interest in ski area water rights. The instructions for clauses D-30 and D-31 provide that the possessory interest policy in FSM 2541.32, paragraph 2, will not apply to ski area permits. Moreover, under paragraph F.1.e in the final directive, when the water facilities continue to support approved ski area operations at any time of year, the separate permit will not contain the possessory interest provision, any waiver provision, or any power of attorney provision. The Agency will develop new or modified water clauses for these permits.

Proposed Paragraph F.1.g

Proposed paragraph F.1.g provided for documentation of restrictions on withdrawal and use of water that are required by regulation or policy, an adjudication, or a settlement agreement or that are based on a decision document supported by environmental analysis.

Comment: Commenters opined that proposed paragraph F.1.g is very broad and would allow the Forest Service to limit the exercise of privately held water rights established under State law by unilaterally imposing restrictions without statutory or regulatory authority. Specifically, these commenters were concerned that a single ski area permit administrator could determine that a regulation or policy requires restrictions on withdrawals and impose those limits under the permit; that Forest Service staff is not qualified to interpret the regulations of other Federal and State agencies; that restrictions could be based on any settlement agreement with any party on any subject matter, regardless of whether the holder of the water right was a party or had notice and regardless of whether the Forest Service was a party to that settlement agreement; that restrictions based on a decision document supported by environmental analysis would not be

limited to decision documents prepared by the Forest Service and might include past or future critical habitat designations for aquatic species made by the U.S. Fish and Wildlife Service; and that allowing restriction of water rights “based on” environmental documents would leave too much discretion to the permit administrator. One commenter believed that proposed paragraph F.1.g did not accomplish the stated objective in the **Federal Register** notice for the proposed directive of ensuring the availability of water resources for ski areas and recommended deleting proposed paragraph F.1.g.

Response: The Agency believes that it is important to document existing restrictions on withdrawal and use of water from the permitted NFS lands so that permit administrators can ensure that these legal requirements are met during the typically 40-year term of the permit. However, the Agency agrees that the scope of the restrictions should be limited to those that are legally required and that it would be more appropriate to include the requirement in the instructions for the new water clauses. Consequently, the instructions for the new water clauses in the final directive require the documentation of a sufficient quantity of water submitted by an applicant prior to issuance of a new or modified ski area permit to identify any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service. Additionally, the Agency has removed the table in the water clause appendix on restrictions on withdrawal and use of water, since that information will be contained in the sufficiency documentation.

Proposed Paragraph F.2 – Water Rights

Proposed paragraph F.2 defined the term “water right” to mean a right to use water that is recognized under State law under the prior appropriation doctrine. Additionally, proposed paragraph F.2 provided that the permit does not confer any water rights.

Comment: One commenter recommended that the term “water right” be defined in a way that could be consistently applied, regardless of State definitions and processes. This commenter noted that in Colorado a conditional water decree or right establishes a priority date for the possible future grant of an absolute water right. In Colorado, an individual or entity can “use” a water right only when that individual or entity has put the water to beneficial use and has been granted an absolute water right. Treating a conditional water right as a water right in the proposed directive would in many respects be like treating an application as a water right in other prior appropriation doctrine States.

Response: The Forest Service believes that the definition of “water right” in the proposed directive is appropriate. The definition should encompass any water right that is recognized under State law, including conditional water rights in the State of Colorado. The Agency has not changed the proposed definition of “water right” in the final directive.

Proposed Paragraph F.3 – Acquisition and Maintenance of Water Rights

Proposed Paragraph F.3.a

This proposed paragraph defined “NFS ski area water right” to mean “any water right acquired by the holder or a prior holder 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 authorized by this permit.”

Comment: Commenters objected to the term “NFS ski area water right” on the grounds that it implies that these water rights belong to the United States; that the water rights are appurtenant to NFS lands; and that the Forest Service, rather than the State, grants the water rights. These commenters also objected to the term on the grounds that it could include water rights that may be unnecessary for ski area operations and recommended that the definition be

revised to apply only to water rights that are necessary for ski area operations. It was also recommended that “NFS” be removed from the term.

Response: The Agency agrees that “NFS” is unnecessary in the term “ski area water right” and may lead to confusion. Consequently, the Agency has removed “NFS” from that term in the final directive and has simplified the definition to include any water right for use of water from a point of diversion on NFS lands, either inside or outside the permit boundary, that is primarily for operation of the ski area.

In addition, the Agency has added terms and definitions for two categories of ski area water rights: “original” water rights and “acquired” water rights. Using these terms of art simplifies the wording in subsequent clauses that differentiate between these two types of ski area water rights. An “original water right” is defined as “any existing or new ski area water right with a point of diversion that was or is, at all times during its use, located within the permit boundary for this ski area and originally established under State law through an application for a decree to State water court, permitting, beneficial use, or otherwise recognized method of establishing a new water right, in each case by the holder or a prior holder of the ski area permit.” The definition further clarifies that an original water right cannot become an acquired water right by virtue of sale of the water right to a subsequent ski area permit holder.

An “acquired water right” is defined as “any ski area water right that is purchased, bartered, exchanged, leased, or contracted by the holder or by any prior holder.” The distinguishing characteristics between these two types of ski area water rights is whether they were originally acquired from the State by a ski area permit holder to be used primarily for the operation of the ski area within the ski area permit boundary.

Comment: One commenter suggested that the definition for “NFS ski area water right” be revised to limit its applicability to the holder’s interest in water facilities and water rights because it may be only a partial interest. Another commenter believed that water rights that would not constitute NFS ski area water rights, such as water rights that are used for ski area purposes but arise from a point of diversion on private land, could still be affected by the proposed directive. As an example, this commenter cited an unauthorized change in ownership of a snowmaking pipeline diverting water from a stream on private land to the permitted ski area on NFS lands, which could result in termination of authorization for that water facility. Not having authorization for use of the water facility would in turn limit exercise of the associated water right.

One commenter wanted to know the reason for treating water rights that arise from a point of diversion on NFS lands differently from water rights that arise from a point of diversion off NFS lands. This commenter also requested consideration of alternatives that would provide protection of all ski area water rights, regardless of land ownership at the point of diversion. Another commenter requested that further consideration be given to the effectiveness of the proposed directive in accomplishing its underlying policy objectives with respect to water rights for water that is stored, diverted, or pumped on non-NFS lands to support authorized ski area facilities within the permit area.

Response: Water rights that are used for ski area purposes but arise from a point of diversion located on non-NFS lands are not affected by this final directive. Consistent with the definition for “ski area water right” in the final directive, which applies to water rights that are used primarily for operation of the ski area and that arise from a point of diversion located on NFS lands, only water facilities on NFS lands that are used primarily for operation of the ski area

may be authorized under the ski area permit. The Forest Service does not authorize water facilities located on non-NFS lands. Therefore, in the example cited by the commenter, there would be no Forest Service permit, the water facility would not be subject to permit terms addressing change in ownership of the water facility, and there would be no effect on exercise of associated water rights.

Proposed Paragraph F.3.b

Proposed paragraph F.3.b provided that NFS ski area water rights must be acquired in accordance with applicable State law; that the holder must maintain NFS ski area water rights, including Federally owned NFS ski area water rights, for the term of the permit, as well as for the term of any subsequent permits that may be issued to the holder for the uses authorized by the permit; that the holder is responsible for submitting any applications or other filings that are necessary to protect those water rights in accordance with State law; and that the holder and not the United States must bear the cost of acquiring, maintaining, and perfecting NFS ski area water rights, including Federally owned NFS ski area water rights.

Comment: Some commenters sought clarity on what it means to “maintain” NFS ski area water rights. One commenter suggested that the term “maintain” lends itself to water facilities but is unclear as applied to water rights. Some commenters asked whether voluntary or court-ordered surrender of part of a conditional water right would constitute a failure to maintain the water right under proposed paragraph F.3.b. Some commenters asked whether loss of a water right due to failure to maintain it would trigger termination of the permit per proposed paragraph F.1.e.

Response: Voluntary or court-ordered surrender of part of a conditional water right would not constitute a failure to maintain the water right. Maintaining a water right means

exercising due diligence to preserve it in accordance with applicable State law, including submitting required filings. The holder, rather than the Forest Service, is responsible for submitting applications or other filings that are necessary to maintain ski area water rights and for the cost of those filings. The Agency has redesignated proposed paragraph F.3.b as paragraph F.3.c in the final directive and simplified it to provide that the holder shall bear the cost of establishing, acquiring, maintaining, and perfecting original water rights, including any original water rights owned solely or jointly by the United States. Loss of a water right due to failure to maintain it will trigger termination of authorization of the associated water facility under the ski area permit (not termination of the ski area permit) under paragraph F.1.e in the final directive only if the associated water facility ceases to be used primarily for operation of the ski area.

Comment: Several commenters requested clarification that proposed paragraph F.3.b would not apply to third-party water rights, such as water rights leased from municipalities, that are used in connection with a ski area or that are located on NFS lands.

Response: Paragraph F.3.b in the proposed directive has been moved to paragraph F.3.c in the final directive and has been clarified so that it will not apply to water rights leased from third parties and other acquired water rights as defined in the final directive. Paragraph F.3.c in the final directive applies only to original water rights as defined in the final directive, including those owned solely or jointly by the United States.

Comment: One respondent believed that the requirement to maintain NFS ski area water rights would unlawfully insert the Forest Service into the day-to-day management of ski area water rights.

Response: Paragraph F.3.c in the final directive does not insert the Forest Service into day-to-day management of ski areas water rights. Rather, this paragraph takes the Forest Service out of day-to-day management of ski area water rights by providing for the holder to establish, acquire, maintain, and perfect original water rights.

New Paragraph F.3.b

The Agency has added a new paragraph F.3.b in the final directive. This new provision requires that an inventory of all ski area water facilities and original water rights be included in an appendix to the ski area permit and that the inventory be updated by the holder upon reissuance of the permit, installation or removal of a ski area water facility, when a listed ski area water facility is no longer authorized by the ski area permit, or when an original water right is no longer used for operation of the ski area. This new paragraph is needed to administer the requirements in the new water clauses regarding ski area water facilities and original water rights.

Proposed Paragraph F.3.c

Proposed paragraph F.3.c provided that NFS ski area water rights that are jointly or solely owned by the United States must remain in Federal ownership; 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 must 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; and 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.

Comment: Some commenters suggested that the Agency lacked the authority to force a permit holder to act as an agent of the United States by requiring the holder to maintain and bear the cost of acquiring, maintaining, and perfecting Federally owned NFS ski area water rights. These commenters also stated that the Forest Service cannot delegate its legislated duty to manage NFS lands to non-Federal entities.

Response: The Forest Service has broad authority to condition special use authorizations, including the authority to require that the holder of a ski area permit establish, acquire, maintain, and perfect Federally owned original water rights and bear the cost of those actions.

Comment: One commenter believed that the requirement in proposed paragraph F.3.c that any ski area water rights owned by the United States remain in Federal ownership was inconsistent with the purpose of the proposed directive and was unfair. This commenter asserted that permit holders who complied with prior requirements in ski area water clauses to transfer ownership to the United States should be able to recover those water rights under the final directive.

Response: The final directive is not retroactive. Any water right owned solely or jointly by the United States was acquired in accordance with permit terms that were in effect at that time. Additionally, the Forest Service lacks authority to forfeit ownership of water rights to ski area permit holders. In an investigation of a land exchange in Utah conducted by the U.S. Department of Agriculture, Office of Inspector General (OIG), OIG stated that if water rights were excess to public needs, the water rights could be exchanged for properties or services of equal value. Excess water rights may also be disposed of pursuant to U.S. General Services

Administration real property procedures. The Forest Service is not aware of any authority that would allow the Agency to relinquish title to water rights other than by exchange or disposal as noted above.

In the final directive, the Agency has moved proposed paragraph F.3.c to paragraph F.3.d and revised it to state that original water rights owned solely by the United States and the United States' interest in jointly owned original water rights shall remain in Federal ownership. In addition, paragraph F.3.d in the final directive provides that notwithstanding the holder's obligation to maintain original water rights owned by the United States, 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 the water rights.

Proposed Paragraph F.3.d

Proposed paragraph F.3.d provided 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 on NFS lands without a special use authorization, then the water facility is in trespass; that the owner of the NFS ski area water right must apply for authorization of the water facility; and that if authorization is denied, the owner of the NFS ski area water right must promptly remove the point of diversion and water use from NFS lands or must abandon the NFS ski area water right.

Comment: One commenter observed that it may not be possible to determine whether existing water facilities are properly authorized or in trespass because they may not be listed in the ski area permit or identified on a map attached to the permit. This commenter stated that, in practice, ski area improvements may have been considered authorized if they were located within the permit boundary and approved in a decision document pursuant to an environmental analysis.

Several commenters asserted that the proposed directive would have retroactive effect because many water facilities for previously adjudicated ski area water rights would be found in trespass. These commenters also noted that proposed paragraph F.3.d is contrary to State laws that do not require landowner approval before adjudication of a water right. These commenters also believed that proposed paragraph F.3.d is contrary to numerous authorizations that allow development of privately owned water facilities on NFS lands and could jeopardize the availability of water for ski area operations. These commenters recommended that proposed paragraph F.3.d be revised or deleted. One commenter opined that the Agency lacks the legal authority to apply rules retroactively and suggested striking the words “was or” from proposed paragraph F.3.d.

Response: The Agency is removing proposed paragraph F.3.d from the final directive because this provision is unnecessary. Existing regulations at 36 CFR 251.50(a) require a special use authorization for water facilities on NFS lands. Moreover, per paragraph 1 in the final instructions for the new ski area water clauses, all water facilities on NFS lands that are used primarily for operation of the ski area will be authorized under the ski area permit. Existing water facilities on NFS lands which are authorized by a separate, valid special use permit may remain under that separate permit, including upon reissuance, if eligible. These water facilities will not be eligible for reissuance under a separate permit if they are used primarily for operation of the ski area and the separate permit is issued under a statute other than the National Forest Ski Area Permit Act. This Act provides for ski areas and associated facilities on NFS lands to be authorized under its provisions. 16 U.S.C. 497b(a), (b). In that case, upon termination of the separate permit, the water facilities will be authorized under the ski area permit.

In addition, under paragraph F.1.e in the final directive, when authorization for a water facility under the ski area permit terminates because a change in the water facility results in its ceasing to be used primarily for operation of the ski area, a separate special use authorization is required to operate that water facility or to develop a new water facility, unless the holder has a valid existing right for the water facility to be situated on NFS lands. A valid existing right in this context is a legal right, typically a statutory right, to use and occupy NFS lands. In the absence of a valid existing right, a separate special use authorization is required under these circumstances because it is not appropriate to utilize the National Forest Ski Area Permit Act to authorize water facilities that do not primarily support operation of a ski area. 16 U.S.C. 497b(a), (b). Paragraph F.1.e in the final directive also provides that unless the holder has a valid existing right for the water facility to be situated on NFS lands, if the holder does not obtain a separate special use authorization for these water facilities, the holder must remove them from NFS lands.

Proposed Paragraph F.4 – Non-Severability of Certain Water Rights

Proposed Paragraph F.4.a

Proposed paragraph F.4.a provided that when the United States owns any NFS ski area water rights, the Forest Service may not take any action that would adversely affect availability of those water rights to support operation of the ski area during the term of the permit, unless deemed necessary by the Forest Service to satisfy legal requirements.

Comment: Several commenters did not believe that proposed paragraph F.4.a provided enough assurance that the Forest Service would not take any action that would adversely affect the availability of Federally owned NFS ski area water rights for ski area operations during the permit term. Some commenters asserted that it was unclear what was meant by “legal

requirements” that might release the Agency from this commitment and questioned whether land management plan standards and guidelines would be deemed legal requirements. Additionally, commenters recommended narrowing the term “legal requirement” to “the Endangered Species Act” or striking the words “unless deemed necessary by the Forest Service to satisfy legal requirements” from the final directive. One commenter suggested striking proposed paragraph F.4.a entirely and addressing the Forest Service’s commitment not to take any action adversely affecting the availability of Federally owned NFS ski area water rights on a case-by-case basis. One commenter suggested that this provision be revised to give ski area permit holders the right to approve changes the Forest Service makes to Federally owned NFS ski area water rights, so that they are dedicated to ski area operations for the benefit of the subsequent holder.

Response: In the final directive, the Agency has revised paragraph F.4.a to state that the Agency shall not divide or transfer ownership of or seek any change in Federally owned water rights used by the holder that would adversely affect their availability for operation of the ski area during the term of this permit, unless required to comply with a statute or an involuntary court order that is binding on the Forest Service.

Paragraph F.1.c in the final directive states that clause D-30 does not expand or contract the Agency’s authority to place conditions on the installation, operation, maintenance, and removal of water facilities at issuance or reissuance of the permit, throughout the permit term, or otherwise. Thus, paragraph F.4.a does not expand or contract the Agency’s ability to place conditions on water facilities under existing legal authority.

Proposed Paragraph F.4.b

Proposed paragraph F.4.b provided 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 for use that primarily supports operation of the ski area authorized by the permit (“changed or exchanged water rights”), the holder may not take any action during the permit term that would adversely affect the availability of those water rights to support operation of the ski area authorized by the permit, unless approved in writing in advance by the authorized officer. Actions that require advance written approval by the authorized officer included any division or transfer of ownership of the water rights and any modification of the type, place, or season of use of the water rights.

Comment: Some commenters believed that the restriction in proposed paragraph F.4.b would inhibit ski area permit holders’ ability to manage their water rights and would substitute the permit holders’ discretion with that of the Forest Service in this context. Other commenters asserted, for example, that a permit holder may desire to sell water rights that once were necessary for ski area operations, but which the permit holder has determined are no longer necessary because of changed circumstances, such as increased efficiency. Alternatively, these commenters suggested that the permit holder may determine that it is in the best interests of the ski area to replace certain sources of necessary water with other sources, but would be unable to do so under proposed paragraph F.4.b. Some commenters believed that this provision would undermine the Forest Service’s stated objective of ensuring sustainability of ski areas by impairing the holder’s ability to develop and maintain water rights and ultimately would make less water available for successive permit holders. These commenters noted that ski area permit holders have acquired and maintained sufficient water rights at ski areas to provide outstanding recreation to the public on NFS lands at no cost to the Forest Service without a restriction on severability.

One commenter noted that the type of actions that would require approval by the authorized officer, including “any modification of the type, place, or season of use of the water rights,” would be difficult to determine consistently because frequently in decrees and certificates States define water rights very broadly or list every conceivable water use. For example, this commenter stated that a decree for one ski area might simply list the uses for a ski area water right as “commercial and domestic,” while another decree for a ski area water right might list the uses as “irrigation and domestic water for condominiums and homes, restaurants, and snowmaking.” This commenter further noted that the difficulty would be compounded by the fact that States frequently do not assign a percentage of the total water right that is dedicated to each use, which would essentially leave it to the holder to tell the Agency how much water is typically consumed for each use.

Commenters were concerned that the restriction in proposed paragraph F.4.b would apply to water rights that the holder does not own, in addition to water rights the holder has purchased or leased from a party other than a prior holder, and that the Forest Service lacks the authority to impose this restriction. One commenter noted that the Forest Service does not have sole discretion to determine whether it is legally entitled or required to interfere with a ski area water right. These commenters believed that State water administration authorities may also play a significant role in determining the appropriateness of the Forest Service’s actions related to water rights. These commenters recommended that the directive recognize the need for the Forest Service to comply with State law and coordinate with State agencies before making any legal determination regarding ski area water rights. These commenters also suggested that the directive recognize the permit holder’s right to seek judicial review of the accuracy of the Agency’s determination that interference with a water right was required by law. Some

commenters were concerned that the restriction in proposed paragraph F.4.b would have a retroactive effect because it would apply to water rights acquired many years ago.

One commenter suggested that the proposed definition for “changed or exchanged water rights” was too narrow, in that it would apply only to water rights “that the holder has purchased or leased from a party other than a prior holder.” This commenter noted that this proposed definition would not include water rights that (1) are located off NFS lands; (2) are used under a change or exchange decree to allow diversion of water on NFS lands; and (3) were originally appropriated by the current or prior holder of the ski area permit, rather than being “purchased or leased” from another party. The commenter believed there is no reason to exclude these water rights from the scope of clause D-30. Another commenter recommended reinforcing that the restriction in proposed paragraph F.4.b would apply not only to purchased or leased ski area water rights, but also to ski area water rights acquired by the holder or a prior holder through appropriation. This commenter also recommended clarifying that the directive would not apply to water purchased by a ski area permit holder from a municipality or other entity that retains ownership of the associated water right.

Response: A primary objective of the proposed and final directives is to address the long-term availability of water for ski areas on NFS lands so as to support the public recreation opportunity they provide and the economies of the local communities that depend on their revenue. The Agency believes that ensuring the long-term availability of water to operate ski areas on NFS lands can be accomplished by focusing on original water rights, i.e., water rights with a point of diversion and use inside the ski area permit boundary that were originally established by a permit holder.

In the final directive paragraph F.4.b applies only to original water rights owned solely or jointly by the holder, which are critical to addressing sufficiency of water to operate a ski area on NFS lands. In addition, in deciding whether to approve division or transfer of or a change to an original water right, the authorized officer must consider any documentation prepared by the holder's qualified hydrologist or licensed engineer demonstrating that the proposed action will not result in a lack of a sufficient quantity of water to operate the permitted portion of the ski area.

Moreover, the Agency has added paragraph F.4.c in the final directive, which states that the holder may seek to change, abandon, lease, divide, or transfer ownership of or take other actions with respect to acquired water rights at any time and solely within its discretion. Paragraph F.4.c in the final directive also provides that, following these actions, paragraph F.1.e will apply to the associated ski area water facilities. Paragraph F.1.e in the final directive addresses proper authorization, and in certain circumstances removal, of water facilities after certain changes have been made in connection with those water facilities.

Paragraph F.4.b in the final directive applies only to original water rights that are owned solely or jointly by the holder, not to water that is purchased or leased from municipalities or other entities. The concerns regarding the definition for "changed or exchanged water rights" are moot because the Agency has removed that definition from the final directive. The Forest Service's authority to include a water clause in ski area permits to address availability of water for operation of ski areas on NFS lands is separate from prior appropriation doctrine States' authority to adjudicate and allocate water rights. Paragraph F.4.b in the final directive will not have retroactive effect because it will apply to the current holder of the ski area permit.

Proposed Paragraph F.5 – Transfer of Certain Water Rights

Proposed Paragraph F.5.a

Proposed paragraph F.5.a provided that upon termination or revocation of the permit, the holder must sell the holder's interest in any NFS ski area water rights or changed or exchanged water rights to the purchaser of the ski area improvements. Proposed paragraph F.5.a also provided that the holder will retain the full amount of any consideration paid for those water rights by the purchaser of the ski area improvements, and that those water rights must continue to be used primarily in support of the ski area.

Comment: Several commenters objected to proposed paragraph F.5.a on the grounds that limiting the market for ski area water rights to one buyer would undermine that market and devalue the water rights. Commenters believed the Forest Service should recognize that the existing holder is not the sole source of water rights for a succeeding holder. These commenters noted that the succeeding holder may have purchased water rights from another source prior to applying for the ski area permit or may be able to obtain sufficient water by acquiring water rights from the State or by purchasing or leasing water from municipalities, water districts, reservoir companies, or other entities. These commenters noted that the Forest Service should not restrict the succeeding holder to acquiring water rights from the current holder.

Additionally, commenters questioned whether the Agency's concern regarding insufficiency of water rights for ski area operations was valid. These commenters believed it was unlikely that the holder would sell a viable ski area with insufficient water rights to operate because it would not be in the best interests of the holder to do so. The commenters also asserted that the Forest Service's authority under special use permit regulations at 36 CFR 251.54 and 251.59 to require that succeeding permit holders have a sufficient quantity of water to operate a

ski area before issuing a new ski area permit was adequate to address the Agency's concern in this context.

Three commenters believed that the existing permit holder should be required only to offer to sell certain types of ski area water rights at market value to the succeeding permit holder. These commenters believed that requiring the holder to offer to sell, rather than to sell, certain types of ski area water rights to the succeeding permit holder would maintain the value of the water rights while satisfying the Agency's interest in ensuring that sufficient water is available for ski area operations. The commenters believed this approach would be less likely to result in legal controversy because the approach would be more consistent with the ski area's property rights. These commenters recommended that the market value of these water rights be determined by appraisal and that the cost of the appraisal be split between the holder and the succeeding holder. Additionally, the commenters recommended that existing holders not be required to sell to the succeeding holder any water rights associated with undeveloped phases of a ski area's master development plan. Further, these commenters recommended that payment of the full price of ski area water rights purchased by the succeeding holder be due within 30 days of purchase or an otherwise agreed-upon timeframe.

Conversely, other commenters supported the transfer requirement in proposed paragraph F.5.a because the requirement is premised on the commercial reality that water rights associated with a ski area permit are customarily included in the assets that are transferred to a buyer as part of the overall asking price, and because the transfer requirement is consistent with the requirement under the special use regulations at 36 CFR 251.60(i) to remove privately owned improvements from NFS lands when they are no longer authorized. One commenter agreed that

it is appropriate for the holder to retain the full amount of the consideration paid by the succeeding holder for the holder's interest in ski area water rights.

One commenter criticized the transfer requirement in proposed paragraph F.5.a as a perpetual allocation by the Federal government of Colorado's scarce water supply to an activity that could become economically marginal, but would be perpetuated as long as an individual or entity is willing to apply for a permit. This commenter believed that tying privately held water rights to a particular use in this manner could thwart the allocation of senior water rights to new and higher-value uses that are important for Colorado's future development.

Response: The Agency believes that its concern regarding sufficiency of water for ski area operations can be addressed by requiring the holder to offer to sell, rather than to sell, the holder's interest in original water rights to the succeeding permit holder. This requirement, combined with the new requirement in the instructions for the purchaser of a ski area to submit documentation demonstrating that the purchaser holds or can obtain a sufficient quantity of water to operate the permitted portion of the ski area prior to obtaining a permit, will meet the Agency's objective of addressing sufficiency of water to operate the ski area while giving the succeeding permit holder the option to purchase the holder's interest in original water rights or obtain water from other sources. Neither the proposed nor the final directive provides for water rights to be tied perpetually to a use that may cease to be viable. Like the proposed directive, the final directive addresses disposition of ski area water rights when the ski area is not reauthorized upon termination or revocation of the permit.

Paragraph F.5.a in the final directive also provides that if the succeeding permit holder declines to purchase original water rights owned solely by the holder, the holder may transfer them to a third party. If the succeeding permit holder declines to purchase the holder's interest in

original water rights jointly held with the United States, the holder must offer to sell that interest at market value to the United States. If the United States declines to purchase that interest, the holder may abandon, divide, lease, or transfer its interest at its sole discretion.

Paragraph F.5.a in the final directive imposes no restrictions on the transfer or abandonment of acquired water rights.

Paragraph F.5.a in the final directive provides that the holder will retain the full amount of any consideration paid for the holder's interest in original or acquired water rights. Paragraph F.5.a in the final directive does not prescribe a valuation mechanism or payment timeframe, as the Agency believes these issues are more appropriately addressed by the parties to the sale.

In addition, paragraph F.5.a in the final directive provides that following transfer or abandonment of water rights under that paragraph, paragraph F.1.e will apply to the associated ski area water facilities. Paragraph F.1.e in the final directive addresses proper authorization, and in certain circumstances removal, of water facilities after certain changes have been made in connection with those water facilities.

Proposed Paragraph F.5.b

Proposed paragraph F.5.b provided that if the Forest Service does not reauthorize the ski area, the holder must 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 and NFS ski area water rights owned solely by the holder, or the holder may relinquish those water rights. Proposed paragraph F.5.b further provided that the holder must relinquish its ownership interest in any water rights owned jointly by the holder and the United States.

Comment: Some commenters objected to the requirement in proposed paragraph F.5.b to remove from NFS lands the point of diversion for any changed or exchanged water rights or NFS

ski area water rights owned solely by the holder if the ski area is not reauthorized. These commenters believed that the reason for this requirement is unclear and that it would be inconsistent with the purpose of the Supreme Court finding that the Forest Service's Organic Act reserved the National Forests primarily to provide water to western settlers. Commenters believed that changing the points of diversion for these water rights would require State proceedings, which would be administratively onerous and expensive. These commenters suggested that the Forest Service authorize those points of diversion under a separate permit and thus maintain the value of the water rights. Another commenter observed that allowing the holder to transfer water rights to different points of diversion and use if the ski area is not reauthorized is consistent with Colorado State law and would mitigate any potential for forfeiture of the holder's solely owned water rights to the United States.

One commenter was concerned that the requirement to relinquish to the United States the holder's interest in jointly owned water rights if the ski area is not reauthorized would eliminate any market for those water rights. Another commenter noted that water rights appropriated under State law in western states are not appurtenant to the land, and that the owner of these water rights can sever them from the land and transfer them to a different point of diversion and use, provided that the transfer does not impair other water rights. One commenter stated that there would be no impact on ski area recreation opportunities on NFS lands if the holder transferred its interest in jointly owned ski area water rights to a different point of diversion and use if the ski area is not reauthorized by the Forest Service.

Response: In the final directive, the Agency has revised paragraph F.5.b to allow the holder to submit a proposal to the Forest Service for a permit authorizing a different use for the ski area water facilities. If a different use is not authorized for those water facilities, the holder

must remove them from NFS lands. The Agency has replaced the requirement to relinquish the holder's interest in jointly owned ski area water rights to the United States if the ski area is not reauthorized with the requirement to offer to sell that interest to the United States at market value. Paragraph F.5.b in the final directive provides that if the United States declines to purchase that interest, the holder may abandon, divide, lease, or transfer its interest at its sole discretion. The Forest Service agrees that when a ski area is not reauthorized, there most likely would be no impact on ski area recreation opportunities on NFS lands if the holder severed its interest in jointly owned ski area water rights from the United States' interest in those water rights. Paragraph F.5.b in the final directive also clarifies that the holder may, in its sole discretion, abandon, divide, lease, or transfer any water rights solely owned by the holder.

Proposed Paragraph F.6 – Documentation of Transfer

Proposed paragraph F.6 provided that when the foregoing provisions in proposed clause D-30 require the holder to transfer the holder's interest in any NFS ski area water rights or changed or exchanged water rights to the holder of a subsequent permit, the holder or the holder's heirs and assigns must execute and properly file any documents necessary to transfer the holder's interest, including but not limited to executing a quit claim deed. Proposed paragraph F.6 also provided that by executing the permit, the holder grants a limited power of attorney to the authorized officer to execute, on behalf of the holder, any documents necessary to transfer ownership under the foregoing provisions.

Comment: Commenters objected to the limited power of attorney in proposed paragraph F.6 with regard to execution of documents necessary to transfer ownership of water rights on the grounds that it is offensive, heavy-handed, adversarial, unnecessary, and unsupported by law.

Several commenters recommended that the Agency remove the limited power of attorney provision from the final directive or provide further justification for its need.

Response: The Agency has removed proposed paragraph F.6 from the final directive, as it is not necessary to support the revised concept for addressing sufficiency of water for operation of ski areas on NFS lands. In particular, since the final directive no longer requires transfer of water rights, there is no need for a limited power of attorney on behalf of the Forest Service to ensure water rights are transferred if the holder declines to do so.

Proposed Paragraph F.7 – Waiver

Proposed paragraph F.7 provided that the holder waives any claims against the United States for compensation for any water rights the holder transfers, removes, or relinquishes as a result of the foregoing provisions in proposed clause D-30; 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 in support of the ski area authorized by the permit.

Comment: Commenters objected to proposed paragraph F.7 on the grounds that it would require waiver of their constitutional protections and that the Forest Service lacks statutory authority to require waiver of those protections. Other commenters believed that the waiver requirement was unnecessary. One commenter recommended that the Agency rely on the constitutionality of the final directive, rather than require permit holders to waive constitutional claims. Several commenters requested that proposed paragraph F.7 be removed from the final directive.

Response: The Agency does not believe that a waiver provision is necessary, since the Agency does not believe that proposed and final clause D-30 effect a taking of private property. Therefore, the Agency has removed proposed paragraph F.7 from the final directive.

Proposed Paragraph F.8 – Inventory of Necessary Water Rights

Proposed paragraph F.8 included 5 tables for recording certain information about water rights, including the state identification number; owner; purpose of use; decree, license, or certificate number; point of diversion; and point of use. Each table addressed a different category of water rights, including NFS ski area water rights that are owned solely by the United States; NFS ski area water rights that are owned solely by the holder; NFS ski area water rights that are owned jointly by the United States and the holder; changed or exchanged water rights; and water rights for points of diversion on non-NFS lands for use on NFS lands within the permit boundary.

Comment: One commenter opposed the requirement to create and maintain an inventory of ski area water rights on the grounds that it would impose an unnecessary burden on the Forest Service and could introduce a conflict between the States' or permit holder's water rights records and the Agency's inventory. Additionally, this commenter asserted that the inventory was not necessary to ensure that a succeeding permit holder had sufficient water for operation of the ski area and would impose unnecessary bureaucratic delay on permit holders and needless workload on Agency staff. Another commenter noted that the inventory was unnecessary given the Agency's lack of water rights oversight to date and the ski industry's history of using those water rights to provide outstanding recreation opportunities at no cost to the Agency.

Some commenters were concerned that inventorying water rights for points of diversion on non-NFS lands for use on NFS lands within the permit boundary per proposed paragraph F.8.e could be interpreted as imposing limitations on third-party water rights owned by entities that have no interest in the permitted ski area and that such restrictions would unreasonably interfere with the use of water that is located outside the permit area and is unrelated to the ski area. One commenter asserted that there is no connection between inventorying water rights for points of diversion on non-NFS lands and the Forest Service's interest in ensuring continuity of recreation opportunities for skiing on NFS lands and protecting water resources within the ski area permit boundary.

Some commenters generally supported inventorying NFS ski area water rights because the inventory would disclose water uses by ski areas on Federal land. One commenter requested that the final directive be revised to specify a procedure for updating the inventory of ski area water rights that primarily support operation of the ski area when a ski area permit is amended or reissued to a new holder. This commenter believed that an updated inventory would reflect any additions or deletions from the list of ski area water rights and that these changes should be subject to public notice and comment.

One commenter was concerned that focusing on ski area water rights in their entirety, rather than on the specific interest in water rights held by the permit holder for ski area purposes, would invite arguments about the scope of the inventory; risk excluding water supplies that are important to the continued operation of the ski area; and possibly create problems for third parties, such as a reservoir company and its shareholders, who also have ownership or other interests in the water rights. The commenter observed that ski area water rights in Colorado may be divided into fractional interests that are separately owned. In that case, different uses of the

same water right may be subject to separate terms and conditions for purposes of administration by the State engineer. Alternatively, ski area water rights could be owned by nonprofit corporate entities such as ditch and reservoir companies, and the interests in those water rights could be represented by shares of stock in those companies.

Response: An inventory of ski area water facilities is necessary to implement clauses D-30 and D-31 in the final directive to track water facilities that are authorized under the ski area permit, both at permit issuance and during the permit term, i.e., after changes are made in connection with water facilities that affect whether they are being used primarily for operation of the ski area. An inventory of original water rights is necessary to implement clause D-30 in the final directive to track original water rights for purposes of implementing paragraphs in clause D-30 that apply to those water rights. Per paragraph F.4.b in the final directive, the inventory will be updated by the holder upon reissuance of the ski area permit, installation or removal of a ski area water facility, when a listed ski area water facility is no longer authorized by the permit, or when an original water right is no longer used for operation of the ski area.

The Agency does not believe that maintaining an inventory of original water rights will impose an unnecessary burden on the Forest Service or pose the risk of a conflict with the States' or permit holder's water rights records. Holders have a record of their ski area water rights and can provide the requisite information to the authorized officer to ensure that the inventory is accurate and updated as needed. Maintaining the inventory in the final directive will be simpler than maintaining the inventory in the proposed directive. In the final directive, the Agency has moved the inventory tables to an appendix and has reduced the 5 tables to 2, to track only

original water rights and ski area water facilities authorized under the ski area permit. Finally, the Agency has removed the requirement for Regional Forester approval of the inventory before issuance of a new or modified ski area permit.

The Agency agrees that water rights for points of diversion off NFS lands for use on NFS lands inside the ski area permit boundary should not be tracked in the inventory. These water rights do not arise from a point of diversion on NFS lands and therefore do not meet the definition of “ski area water rights” in the final directive.

The Agency does not believe that changes to the inventory should be subject to public notice and comment. The inventory is a tracking mechanism. Prior appropriation doctrine States, not the Federal government, adjudicate and allocate water rights. Forest Service decisions regarding installation or removal of ski area water facilities will be subject to appropriate environmental analysis, including public involvement, as appropriate.

Proposed Paragraph F.9 – Performance Bond

Proposed paragraph F.9 provided that when the holder owns any changed or exchanged water rights or solely owns any NFS ski area water rights, the holder must maintain a performance bond that fully covers the cost of removing all privately owned ski area improvements and restoring the site if the use is not reauthorized. Proposed paragraph F.9 also provided for the minimum amount of the bond to be specified and for the amount of the bond to be determined by the authorized officer.

Comment: One commenter asserted that Forest Service form SF-25 is not appropriate for implementing the proposed performance bond requirement because of the form’s references to “contracts” and “contractors.” This commenter recommended that a new form be developed that is tailored specifically to the obligations under FSM 6560.5. Other commenters questioned the

need for a new performance bond requirement that would cover the cost of removing facilities and site restoration if a ski area is not reauthorized. Some commenters sought clarification as to how this performance bond compares to the existing performance bond requirements in the ski area permit. One commenter asserted that this requirement is unnecessary because of the existing performance bond clause in the ski area permit, which allows the Forest Service to require a performance bond at its discretion. One commenter asked for clarification as to whether the performance bond requirement would apply only to water facilities or to any ski area facilities. Additionally, some commenters objected to the cost of the performance bond.

Some commenters supported the performance bond requirement to ensure that the permit holder removes authorized water facilities when the permit terminates and suggested that the performance bond requirement be extended to all special use permits.

Response: The shift in focus with respect to ski area water rights from non-severability in the proposed directive to ensuring sufficiency of water for ski area operations in the final directive makes the performance bond requirement unnecessary in the final directive. Therefore, the Agency has removed proposed paragraph F.9 from the final directive. The objection to the use of form SF-25 is moot because the bonding requirement has been removed. The recommendation to expand the performance bond requirement to other types of special use permits is beyond the scope of this directive.

Acknowledgment of Terms

This provision stated that the holder has read and agrees to all terms and conditions of the permit, including the authorization provided in proposed paragraph F.6 that allows the authorized officer to act on the holder's behalf in executing all necessary documents to transfer ownership of NFS ski area water rights and changed or exchanged water rights as provided in the permit.

No comments were received on this provision. Since proposed paragraph F.6 has been removed from the final directive, the acknowledgment of terms provision is moot and has also been removed from the final directive.

b. RIPARIAN DOCTRINE STATES – CLAUSE D-31

In several respects, the comments and responses on proposed clause D-30 apply to proposed clause D-31. Consequently, where applicable, the Agency has revised clause D-31 in the final directive, including the instructions, to track the changes to clause D-30 in the final directive, including the instructions.

Proposed Paragraph F.1 – Water Facilities

Proposed Paragraph F.1.d

Proposed paragraph F.1.d provided that the United States may place conditions on installation, operation, maintenance, and removal of any water facility that are deemed necessary by the United States to protect public property, public safety, and natural resources on NFS lands.

Comment: Commenters asserted that the Forest Service does not have unfettered rights to impose any condition it sees fit on ski area water facilities as implied by proposed paragraph F.1.d. These commenters recommended that proposed paragraph F.1.d be amended in the final directive to add “in accordance with applicable laws” as required by the National Forest Ski Area Permit Act.

Response: The Forest Service has redesignated proposed paragraph F.1.d as F.1.c in the final directive and revised paragraph F.1.c to track the revisions to the corresponding paragraph in proposed clause D-30. The response to comments on the corresponding proposed paragraph in clause D-30 is incorporated here by reference.

Proposed Paragraph F.1.e

Proposed paragraph F.1.e provided that only water facilities that are necessary for and that primarily support operation of the ski area authorized by the permit may be included in the permit. No specific comments were received on proposed paragraph F.1.e in clause D-31. The Forest Service has redesignated proposed paragraph F.1.e as F.1.d and revised the paragraph to track the revisions made to the corresponding proposed paragraph in clause D-30.

New Paragraph F.1.e

The Agency has added a new paragraph F.1.e requiring an inventory of all ski area water facilities on NFS lands to be included in the appendix of the permit. The inventory must be updated by the holder upon reissuance of the ski area permit, installation or removal of a ski area water facility, or when a listed ski area water facility is no longer authorized by the ski area permit. This new paragraph corresponds to the new inventory provision in clause D-30 and is needed to track water facilities that are authorized under the ski area permit, both at permit issuance and during the permit term, i.e., after changes are made in connection with water facilities that affect whether they are being used primarily for operation of the ski area.

Proposed Paragraph F.1.f

Proposed paragraph F.1.f provided that any change in water facilities authorized by this permit will result in termination of the authorization for those water facilities, unless the change is expressly authorized by a permit amendment. As examples of this type of change, proposed paragraph F.1.f listed use of the water in a manner that does not primarily support operation of the ski area authorized by the permit and a change in the beneficial use, location, or season of use of water.

Comment: A commenter was concerned that proposed paragraph F.1.f would unreasonably restrict the maintenance and management of water resources and that greater flexibility was needed by holders in this context. For example, this commenter cited the need for flexibility to respond to changes in technology, weather conditions, or operational priorities and the need to make decisions quickly or in the case of a Federal government shutdown.

Response: In the final directive, the Agency has revised proposed paragraph F.1.f to track the revisions made to the corresponding paragraph in proposed clause D-30. The response to comments on the corresponding proposed paragraph in clause D-30 is incorporated here by reference.

Proposed Paragraph F.1.g

Proposed paragraph F.1.g provided that the holder must obtain a separate special use authorization to initiate, develop, certify, or permit any water facility on NFS lands that does not primarily support operation of the ski area authorized by the permit.

Comment: Commenters were concerned that separate permits issued under proposed paragraph F.1.g would not include the ski area water clauses, but rather would include standard water clauses for other special uses that require ownership of the water rights to be transferred to the United States.

Response: In the final directive, the Agency has combined proposed paragraph F.1.g with paragraph F.1.f. In addition, the Agency has revised proposed paragraph F.1.g to track the revisions made to the corresponding provision in proposed clause D-30. The response to comments on the corresponding proposed paragraph in clause D-30 is incorporated here by reference.

Proposed Paragraph F.2 – Water Rights

Comment: Some commenters recommended revising proposed paragraph F.2 to dedicate ski area water rights to ski area purposes to the extent the United States has any right, title, or interest in them as a riparian or littoral landowner.

Response: In riparian doctrine States, water rights are appurtenant to the land and cannot be severed from the land. Therefore, in contrast to clause D-30, there is no need for clause D-31 to address severability of water rights from the permitted NFS lands.

No Takings Implications

Comment: Several commenters were concerned that proposed clause D-30 would effect a taking of private property by the Federal government. Commenters asserted several bases for this concern, including the fact that the proposed directive would not rescind water clauses for other special uses that require transfer of ownership of water rights to the United States; would require transfer of NFS ski area water rights to a succeeding permit holder; and would require transfer of the holder's solely owned NFS ski area water rights to the United States if the holder fails to move the point of diversion and use for those water rights when a ski area is not reauthorized. In addition, these commenters cited their belief that proposed clause D-30 would establish absolute control over the adjudication and operation of ski area water rights, for example, by requiring Forest Service permission for even minor changes; would allow the Forest Service to impose unlimited restrictions on water rights; and would not rescind prior ski area water rights clauses that required transfer of ownership of water rights to the United States. Several commenters asserted that the Forest Service lacks the legal authority to require holders to relinquish water rights under the ski area permit.

Response: The Forest Service does not believe the proposed and final directives effect a taking of private property. Including requirements regarding ski area water rights in ski area

permits that are issued, reissued, or modified under 36 CFR 251.61, rather than in existing ski area permits, does not effect a taking of private property. The Forest Service has broad authority to include appropriate terms and conditions in special use permits, including ski area permits. 79 FR 35516 (June 23, 2014); 16 U.S.C. 481, 497, 497b, 529, 551; 43 U.S.C. 1765; 36 CFR 251.56(a)(ii)(A), (a)(ii)(B), (a)(ii)(E), (a)(ii)(G). A ski area permit is a voluntary transaction, and a holder can decline the permit or accept the permit subject to its new conditions.

Neither the proposed nor the final directive provides for Forest Service adjudication of water rights. The provisions governing use of water facilities have been clarified and narrowed consistent with the objectives of the final directive. When it becomes effective, the final directive will supersede prior ski area water clauses in the Forest Service's Directive System and standard ski area permit form.

Water clauses in existing ski area permits, other than the 2011 and 2012 water clauses that were invalidated by the court's order in *National Ski Areas Association, Inc. v. United States Forest Service*, remain in effect. Holders of existing permits that are not being reissued or modified under 36 CFR 251.61 may elect to have these water clauses replaced with the appropriate water clause in the final directive within one year of the effective date of the final directive, provided they:

(1) agree to have all water facilities on NFS lands that are used primarily for operation of the ski area and that are not authorized under a separate permit:

- (a) authorized by their ski area permit;
- (b) designated on a map attached to the permit; and
- (c) included in an inventory in an appendix to the permit; and

(2) submit documentation prepared by their qualified hydrologist or licensed engineer demonstrating that:

(a) they hold or can obtain a sufficient quantity of water to operate the permitted portion of the ski area; and

(b) identifying all water sources, water rights, and water facilities necessary to demonstrate a sufficient quantity of water to operate the ski area, including all original water rights; all water facilities authorized by the ski area permit; and any existing restrictions on withdrawal or diversion of water that are required to comply with a statute or an involuntary court order that is binding on the Forest Service.

Per paragraph F.3.d of the final directive, original water rights owned solely by the United States and the United States' interest in jointly owned original water rights will remain in Federal ownership.

Water clauses for special uses other than ski areas are beyond the scope of this directive.

Controlling Paperwork Burdens on the Public

Comment: One commenter recommended developing a new standard form to document the bonding requirement for removal of ski area improvements and site restoration, rather than relying on Forest Service form SF-25, which is intended to secure performance under the terms of the permit.

Response: This comment is moot, since the Agency has removed the bonding requirement from the final directive.

Federalism and Consultation and Coordination with Indian Tribal Governments

The Agency has considered the final directive under the requirements of E.O. 13132 on federalism and has concluded that the final directive conforms to the federalism principles in the

E.O. The final directive will not impose any compliance costs on the States and will not have substantial direct effects on the States, 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.

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Forest Service has assessed the impact of this policy on Indian tribes and determined that this directive does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. However, the Forest Service provided a 120-day government-to-government consultation period for recognized Tribes starting July 28, 2014. Tribes were provided the Federal Register notice for the proposed directive and proposed clauses D-30 and D-31. Tribes were encouraged to contact their local Forest Service administrative unit to engage in government-to-government consultation. Five Tribes submitted written comments in response to the request for consultation. The Hopi and Navajo Tribes acknowledged receipt of the comment opportunity, but did not provide comments.

The summaries of those Tribes that did comment and the Agency's responses follow.

Comment: The Tulalip Tribes stated that their water rights pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927), include a water right for instream flows to protect and enhance fish species and their habitat and to provide the habitat for flora and fauna harvested under the Treaty. The Tulalip Tribes want the Forest Service to ensure that water rights for ski areas in the State of Washington are held by the Federal government and are specifically limited to the term, place, and uses in the ski area permit. The Tulalip Tribes believed that this restriction would ensure that waters important for preservation of NFS lands and resources could not be transferred to other uses. The Tulalip Tribes further noted that the proposed directive addresses providing recreation opportunities, economic benefit to holders of special use permits, and protecting the public interest in water and other resources under the Agency's jurisdiction, but fails to acknowledge the Agency's legal duty to protect the Tulalip Tribes' water rights, which predate any other water rights pursuant to the Treaty of Point Elliot and an E.O. dated December 23, 1873.

Response: For the reasons stated above, the final directive modifies the Forest Service's approach to accomplishing the objective of long-term availability of water to sustain ski area uses. In particular, the final directive does not provide for ski area water rights to be acquired in the name of the United States. With respect to ski area water rights, the final directive emphasizes sufficiency of water for ski area operations. In particular, the final directive includes a definition for the term, "sufficient quantity of water to operate the ski area," and clarifies when and how the holder must demonstrate a sufficient quantity of water to operate the ski area; provides that the holder may not make changes that would adversely affect the availability of the holder's solely or jointly owned original water rights for ski area operations during the permit

term, unless approved in writing in advance by the authorized officer; requires the holder to offer to sell the holder's interest in original water rights to the succeeding permit holder; and provides that if a purchaser of the ski area declines to buy the holder's interest in jointly owned original water rights, the holder must offer to sell that interest to the United States.

The Forest Service is committed to honoring Tribal treaty and other reserved rights, including Tribal water rights. Nothing in the final directive will infringe upon these rights. Water rights acquired under State law in connection with ski area permits are subject to the valid existing water rights of other water rights holders, including valid existing Tribal treaty and other reserved water rights, if any. Reference to the water rights of specific Tribes would be outside the scope of this directive, which sets forth water clauses for ski area permits.

Comment: The Winnebago Tribe of Nebraska stated that the proposed directive may proceed, but asked to be notified if any burial sites or cultural properties are found during construction, as the Tribe has cultural properties on NFS lands. Similarly, the Ysleta Del Sur Pueblo Tribe asked to be consulted if any human remains or artifacts that fall under Native American Graves Protection and Repatriation Act (NAGPRA) guidelines are unearthed in connection with the proposal. The Ysleta Del Sur Pueblo Tribe stated that it does not have any other comments, does not object to the proposed directive, and does not believe that it would otherwise adversely affect any traditional, religious, or culturally significant sites of the Tribe.

Response: The final directive does not implement any site-specific decisions regarding the conditioning or construction of water facilities at ski areas on NFS lands. If a Tribe requests consultation on the final directive, the Forest Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress. The Forest Service will

evaluate the need for and conduct appropriate tribal consultation on such site-specific projects if and when they are proposed. Prior to any permit being issued or conditions being placed, the authorized officer must, pursuant to Executive Orders 12898 and 13175 and NFS Directives, consult with relevant populations, including tribes having a current or historical interest in the NFS lands authorized by the permit or condition. Additionally, in accordance with NAGPRA, an existing clause in the standard ski area permit form states that if the holder inadvertently discovers human remains, funerary objects, sacred objects, or objects of cultural patrimony on NFS lands, the holder must immediately cease work in the area of the discovery; make a reasonable effort to protect and secure the items; and immediately notify the authorized officer by telephone of the discovery and follow up with written confirmation of the discovery.

4. Regulatory Certifications

Environmental Impact

This final directive revises 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 final 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 final directive has been reviewed under USDA procedures and E.O. 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this final directive is significant and therefore subject to OMB review under E.O. 12866. The final directive is not economically significant because it will not have an annual effect of

\$100 million or more on the economy; it will not adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments; and it will 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 cost-benefit analysis prepared by the Agency for the final directive concludes that the benefits of the final directive to the Forest Service substantially outweigh the costs because the Agency has corrected the procedural deficiencies associated with 2011 and 2012 ski area water clauses and because the final directive will enhance treatment of ski area water rights and administration of ski area water facilities under ski area permits. The cost-benefit analysis also concludes that the costs to permit holders associated with the final directive are minimal and are substantially outweighed by the benefits of enhanced sustainability of ski areas on NFS lands and improved administration of ski area permits.

The Agency has considered the final 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 the final directive will not have a significant economic impact on a substantial number of small entities as defined by the Act because the final directive will impose only modest record-keeping requirements on them; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. The final directive will likely have a positive economic effect on current and future ski area permit holders and local communities close to ski areas because the final directive addresses long-term sustainability of ski areas. The basis for this determination is enumerated in the threshold Regulatory Flexibility Act analysis for the final directive.

No Takings Implications

The Agency has analyzed the final directive in accordance with the principles and criteria contained in E.O.12630 and has determined that the final directive will not pose the risk of a taking of private property.

Civil Justice Reform

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

Energy Effects

The Agency has reviewed the final directive under E.O. 13211, entitled “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The Agency has determined that the final 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 final directive on State, local, and Tribal governments and the private sector. The final directive will 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

The information collection associated with the final directive is different from the information collection associated with the proposed directive. In particular, rather than requiring an inventory of 5 different types of water rights, the final directive requires an inventory of only original water rights and ski area water facilities authorized by the permit. In addition, the final directive requires an applicant for a new or modified ski area permit to document a sufficient quantity of water to operate the ski area and an applicant for a new water facility to document a sufficient quantity of water to operate the proposed water facility.

Therefore, through this **Federal Register** notice, the Agency is providing an opportunity to comment on the information collection associated with the final directive during the 30-day period between the publication date and the effective date of the final directive. When this information collection has been approved for use, it will be incorporated into OMB control number 0596-0082, *Special Uses Administration*. All other information collections associated with the ski area permit are already covered by OMB control number 0596-0082.

The following summarizes the information collection associated with the final directive:

OMB Control Number: 0596-0235

Estimated Burden Per Response: 1.5 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: 90 hours

Comment is invited on (1) whether this information collection 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 associated with the information collection, 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 information collection on respondents, including automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All comments received in response to the notice of this information collection, including names and addresses when provided, will be included in the record for the final directive. The comments will be summarized and included in the package submitted to OMB for approval.

5. Access to the Final 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 final directive, visit the Forest Service's website at <http://www.fs.fed.us/specialuses>. Only the sections of the FSH 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.

Dated: December 23, 2015.

Thomas L. Tidwell
Chief,
Forest Service

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