

Forest Service to Propose Ski Area Water Rights Clause

June 27, 2013

On November 8, 2011, the Forest Service issued an interim directive in the Forest Service Handbook (FSH 2709.11-2011-3) that included a revised clause to address the ownership of water rights developed on National Forest System (NFS) lands for use by ski area permit holders. On March 6, 2012, a second interim directive (FSH 2709.11-2012-1) for the revised ski area water rights clause was issued, superseding the 2011 version.

The National Ski Areas Association filed a lawsuit in the United States District Court for the District of Colorado on March 12, 2012, opposing use of the revised clause. On December 19, 2012, the court ruled that the Forest Service had erred in not providing an opportunity for notice and comment on the interim directive and that the agency needed to conduct a Regulatory Flexibility Act analysis on the impact of the directive on small business entities that hold ski area permits. The court vacated the interim directive and enjoined enforcement of the 2011 and 2012 clauses in the permits containing them.

The Forest Service will be proposing a new water rights clause through a Federal Register Notice and will initiate tribal consultation and seek public notice and comment.