The Forest Service 2012 Directive: A Necessary Clarification in Ski Area Permit Act Water Rights Policy

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I. INTRODUCTION

In 2011 and 2012, after years of working with a poorly understood and inconsistently enforced water rights policy under the Ski Area Permit program, the United States Forest Service (Forest Service) took an initial step to develop a more coherent, consistent, and fair policy for ski resorts operating within the national forests. The amended water rights policy of the Ski Area Permit program—the 2011 and 2012 Directives—required that in select circumstances ski areas seeking Ski Area Permits on Forest Service lands must acquire water rights in the name of the United States. Such a change in policy did not go unnoticed. Soon after the release of the Directives, the National Ski Areas Association (NSAA) sued the Forest Service, claiming, among other things, that the amended policy constituted a violation of the public notice and comment provisions of the Administrative Procedure Act (APA) and that the Forest Service lacked the statutory authority to issue the 2012 Directive.[1] The United States District Court for the District of Colorado upheld the NSAA's challenge, vacated and enjoined the Forest Service from enforcing the 2012 Directive, and remanded it back to the Forest Service to reissue the 2012 Directive in a fashion that fully complied with the public comment procedures required by the APA.[2] However, the District Court stopped short of addressing the substantive violations alleged given that the 2012 Directive was vacated and not enforced.[3]

While the NSAA scored a procedural victory in the District Court, and rightly forced the Forest Service to comply with the public comment provisions of the APA, the Forest Service will likely win if a form of the 2012 Directive is challenged on its substance. The Forest Service claims that the 2012 Directive is an attempt to address shortcomings in earlier Forest Service policy, and the Forest Service arguably took a step in the right direction.[4] The 2012 Directive proposed a permit policy that addresses water rights for diversions from Forest Service land within the permit area, from Forest Service land outside the permit area, and from private lands.[5] In fine-tuning the Ski Area Permit process, the Forest Service took a needed step to spell out a policy that ensures water

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1. Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 12-cv-00048-WJM, 2012 WL 6618263, at *5 & n.7 (D. Colo. Dec. 19, 2012).

2. *Id.* at *16.

3. *Id.* at *5.

4. Defendants' Response at 4-8, *Nat'l Ski Areas Ass'n*, 2012 WL 6618263 (No. 12-cv-00048-WJM).

5. *Id.* at 9-12 (citing U.S. FOREST SERV., FOREST SERVICE HANDBOOK interim directive no. 2709.11-2012-3 (2011) [hereinafter FOREST SERVICE HANDBOOK]).

remains primarily with the public land when the diversion originates on public land and secures the water for the permit's central purpose: recreation and ski areas.

This Comment argues that while the Forest Service fell short on procedure, it came through on substance. In drafting the 2012 Directive, the Forest Service filled gaps in earlier policy and acted within its statutory authority and capacity as a sovereign proprietor. While some of the NSAA's concerns are justified, the 2012 Directive is a valid effort to rectify shortcomings in prior Ski Area Permit policy and to ensure that water rights acquired during the permit process cannot be severed from public lands. Such a policy is consistent with past Forest Service policy of ensuring water diverted from national forests remains under the ownership of the United States and is well within the statutory authority granted to the Forest Service under the Ski Area Permit Act. Water is essential to the successful operation of a ski resort, and one can understand why ski resorts would object to acquiring an essential aspect of their business in the name of the United States. However, ski resorts within national forests operate in a realm where the Forest Service has considerable discretionary authority, and the ski resorts will likely have to accept such a permit condition as a cost incidental to operating within the national forests. Ski resort operators also have much to gain from a policy that is thorough, well understood, and consistently enforced.

This Comment proceeds as follows: Part II provides a background of the National Forest Ski Area Permit Act of 1986, the impact of climate change on ski area operations, and the role of water rights in ski area operations. Part III outlines the Forest Service Directives System, the history leading up to the development of the 2012 Directive, and the rationale behind the changes made in the 2012 Directive. Part IV suggests that the 2012 Directive was within the statutory authority of the Forest Service and would withstand a substantive challenge. It also suggests that a permit could be analyzed as a contract between a permit holder and the Forest Service. In Part V, the Comment concludes by stating that the Forest Service and members of the NSAA would benefit from retaining the core aspects of the 2012 Directive because it provided the rubric for a thorough and fair policy that could be consistently enforced.

II. THE SKI AREA PERMIT PROGRAM

A majority of the largest ski resorts in the United States reside at least partly within national forests managed by the Forest Service.[6] Ski resorts must work with the Forest Service to attain the required permits to gain access to, and operate on, these public lands. This Part provides some necessary background on the Ski Area Permit Act of 1986, ski area operations, and water law.

A. History of the National Forest Ski Area Permit Act

The Forest Service derives its ski area permitting authority from the National Forest Ski Area Permit Act of 1986 (Ski Area Permit Act).[7] The Ski Area Permit Act replaced a dual permitting policy that required ski area developers to receive a "term permit" for resort lodges, operational buildings, and lift equipment and "annual permits" for the ski runs and other land necessary for resort operations.[8] Term permits were issued for a maximum of eighty acres of land and for up to thirty years.[9] In seeking a revision to the dual permitting policy, the Forest Service cited difficulty in administering a complex dual permit system and echoed concerns held by permit holders that the insecurity created by the annual permits impeded the ability to secure credit for ski area development.[10]

The Ski Area Permit Act replaced the dual permitting policy with a single "ski area permit" policy in which the Forest Service grants Ski Area Permits for maximum terms of forty years, unless public policy concerns call for a shorter term.[11] The Forest Service determines the permit acreage and makes its determinations based on the permit seekers' "needs for ski operations and appropriate ancillary facilities."[12] Renewal of a permit is within the discretionary authority of the Forest Service, and the Forest Service may cancel a permit for nonpayment of permit fees or if the permitted area is needed for "higher public purposes."[13] The Forest Service also retains the authority to impose reasonable terms and conditions and may modify the permit "to

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6. C. Wayne McKinzie, Note, *Ski Area Development After the National Forest Ski Area Permit Act of 1986: Still an Uphill Battle*, 12 VA. ENVTL. L.J. 299, 302-03 (1993).

7. 16 U.S.C. § 497b (2006).

8. McKinzie, *supra* note 6, at 308.

9. *Id.*

10. *Id.* at 309 (citing 53 Fed. Reg. 40,739 (Oct. 18, 1988)).

11. 16 U.S.C. § 497b(b)(2).

12. *Id.* § 497b(b)(3).

13. *Id.* § 497b(b)(4)-(5). The statute provides little guidance on what constitutes "higher public purposes." A determination on what this constitutes is presumably within the discretionary authority of the Forest Service.

accommodate changes in plans or operations in accordance with the provisions of applicable law."[14] The language in the statute leans towards a broad delegation of power to the Forest Service, and some scholars have questioned the benefit of providing the Forest Service with such broad discretionary authority.[15]

In 2011, Congress amended the Ski Area Permit Act to expressly allow the Forest Service to permit additional recreational uses as part of a Ski Area Permit, such as zip lines, mountain biking, and frisbee golf courses.[16] Prior to the clarification offered in the 2011 amendments, the Forest Service allowed such activities under the wide discretionary authority afforded to the agency under the Ski Area Act. The amendments are binding on any new permit granted under the Ski Area Permit Act. Sponsoring Senators and members of the ski community lauded the amendments, because the amendments presented ski resorts with an opportunity to expand the type of services available in the off-season.[17] Prior to the amendment, the Ski Area Act did not explicitly grant the Forest Service the power to issue permits for activities beyond "nordic and alpine skiing" and the facilities necessary for such activities.[18] The modern ski resort does not limit its offerings to strictly Nordic and Alpine skiing, and ski resort operators now had explicit statutory support for mountain biking, zip lines, and frisbee golf operations.[19] Commenters and legislators welcomed the new language because it provided clear Congressional guidance to the Forest Service in the permit process.[20] Additionally, the language allows ski resort operators to expand their operations in the off-season and increase year round economic opportunities in ski communities.[21]

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14. *Id.* § 497b(b)(6).

15. *See* McKinzie, *supra* note 6; Marcus F. McKindra, *The Ski Area Act: Expanding Recreational Uses on Ski Areas in Our National Forest Lands*, 2012 CARDOZO L. REV. DE NOVO 249 (2012).

16. Ski Area Recreational Opportunity Enhancement Act of 2011, Pub. L. No. 112-46, 125 Stat. 538.

17. *Udall Floats Bill Clarifying Ski Area Activities & Regs*, SUMMITDAILY.COM (Feb. 18, 2011), http://www.summitdaily.com/article/20110218/NEWS/110219764; Randy Wyrick, *Bill Aims To Grow Year-Round Resort Economy*, VAIL DAILY, May 21, 2011, at A3, *available at* http://eaglecountytimes.files.wordpress.com/2011/05/udall-opens-lands-vd-21may2011.pdf.

18. 16 U.S.C. § 497b(b) (2006).

19. 16 U.S.C.A. § 497b(b), (c)(3) (West 2012) (current version).

20. McKindra, *supra* note 15, at 258-59.

21. *See Udall Floats Bill Clarifying Ski Area Activities & Regs*, *supra* note 17.

B. Water Rights: Lifeblood of a Ski Resort

A modern ski resort cannot operate without a sufficient amount of snow. When Mother Nature cannot provide enough natural snow, ski resort operators turn to snowmaking and producing artificial snow to make up for a lack of snowfall. However, snowmaking operations are water-intensive, and ski resorts need to acquire significant amounts of water to ensure they can make enough snow to stay in business.

1. Snowmaking and Climate Change

No ski resort can operate successfully without water. Ski resorts rely on water for daily operations and, most importantly, for making artificial snow when natural snow fails to meet their needs. Approximately 75,000 gallons of water are needed to create a six-inch-deep layer of snow over a 200-by-200 foot area, and most ski area operations are capable of converting over 2000 gallons of water into snow in around one minute.[22]

A recent study of New Zealand ski seas found that climate change will lead to an increased reliance on snowmaking operations in that country's ski resorts as the climate warms and the number of natural snow days decreases.[23] Climate change may already be affecting ski resorts in the U.S.: in a 2012 survey conducted by the NSAA, 51% of the 231 resorts that responded reported opening late for the 2011 to 2012 season, and 49% ended the season early.[24] These resorts also reported a 16% drop in the number of visitors from the previous season, and the survey also found that 11 out of the 486 ski resorts operating in the United States in the 2011 to 2012 winter season are now shuttered.[25]

The industry is adapting quickly in the face of such trends. The NSAA is making a push to increase sustainable water management by its member ski resorts and to promote general principles of conservation. In the NSAA's Environmental Charter, the organization outlines voluntary environmental principles for planning and design of trails, base areas, and associated facilities and for snowmaking operations that encourage

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22. PEAKS TO PRAIRIES, GREENING YOUR SKI AREA: A POLLUTION PREVENTION HANDBOOK 11-4 (2002), *available at* http://peakstoprairies.org/p2bande/skigreen/Ch%2011%20Snowmaking.pdf.

23. *Ski Resorts Will Turn to Snow-Making Tech as Climate Warms*, CLIMATEWIRE (July 30, 2012), http://www.eenews.net/climatewire/2012/07/30/archive/10 (subscription required) (also available at http://www.climateneeds.umd.edu/climatewire-08-28-12/article-36.php).

24. John J. Fialka, *Bad Snow Year May Just Be the Start of the Ski Industry's Climate Headaches*, CLIMATEWIRE (Sept. 11, 2012), http://www.eenews.net/public/climatewire/2012/09/11/1.

25. *Id.*

the optimization of efficiency of water use, consideration of the local ecology's carrying capacity, and the protection of minimum stream flows in nearby rivers and streams.[26] Such conservation efforts will be vital as ski resorts increase their reliance on snowmaking operations and the demand for water increases.

Major ski operators like Aspen Skiing Company may be forced to extend their snowmaking operations.[27] In a typical year, snowmaking at Aspen starts on November 1 and ends before the Christmas and New Year's holidays. Without cold weather and sufficient natural snow, however, Aspen Skiing Company would have to continue snowmaking well into January.[28] Other western resorts, like Heavenly in Lake Tahoe, California, made significant investments in high-tech and energy efficient snowmaking equipment. Heavenly currently uses 155 snowmaking machines to cover 65% of its ski terrain with artificial snow.[29] Older snowmaking systems were diesel-powered and labor-intensive, but new snowmaking systems derive their power from portable compressors and energy-efficient fans.[30] The new systems also have built-in computers that allow an employee to use a computer or smartphone to remotely monitor temperature and humidity in order to determine when it is best to begin snowmaking operations.[31] While slightly more environmentally friendly than diesel-powered snow guns, such systems are not cheap: one snowmaking gun can cost up to $50,000.[32] Other resorts in the Lake Tahoe area are making the investment to ensure they can keep both snow and skiers on the mountain.[33] This drive to increase snowmaking operations invariably leads to an increase in demand for water. However, in the arid western states and mountain west, where a majority of the ski resorts in the United States are located, acquiring the legal rights to water is a complex process.

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26. NAT'L SKI AREAS ASS'N, SUSTAINABLE SLOPES: ENVIRONMENTAL CHARTER FOR SKI AREAS 7-8 (2005), *available at* http://www.nsaa.org/media/20665/charter.pdf.

27. Bob Ward, *Drought Affecting Snowfall and Snowmaking as Ski Resorts Eye Possible Weekend Storm*, ASPEN BUS. J. (Nov. 29, 2012), http://www.aspenbusinessjournal.com/article.php?id=7594.

28. *Id.*

29. Hugo Martin, *Snow-Making at Ski Resorts Goes High Tech*, L.A. TIMES (Dec. 12, 2012), http://articles.latimes.com/2012/dec/12/business/la-fi-high-tech-snowmaking-20121213.

30. *Id.*

31. *Id.*

32. *See id.*

33. *See id.* ("In the mountains above Lake Tahoe, the owners of the Squaw Valley and Alpine Meadows resorts spent $4 million on snow-making equipment last summer. The two resorts can now cover almost 30% of their skiable terrain with man-made snow.").

2. Water Law and Ski Resorts

Water rights are largely controlled by state law, and most states implement one of two types of water rights systems: the common law of riparian rights or the doctrine of prior appropriation.[34] The less arid eastern states typically follow the common law riparian system where a property owner has a right to use a portion of "the flow of a watercourse" that is adjacent to her property.[35] The property owner's interest in the water is limited to a usufructory right that allows her only to make reasonable use of the water while it flows through or by her land.[36] The arid and semi-arid regions of the United States, particularly in the mountain west, adopted the system of prior appropriation.[37] Each state's application of the prior appropriation doctrine contains its own nuances, but the general principle is that a person is granted a right to use water when he or she diverts the water from a watercourse and can prove that the water is utilized for a reasonable and beneficial use.[38] Water may only be appropriated for the stated beneficial use, and the beneficial use must be continuous to retain the right.[39] A user typically applies with a state administrative agency for the water right, and priority is given based on the date the state grants the right.[40] The priority system is unique to the prior appropriation doctrine, and rights of the water users are guided by the seniority in which the rights were granted.[41]

The federal government maintains limited control over water rights and appropriations. Traditionally, the federal government's role was restricted to the protection and promotion of navigation on navigable waters, but it later expanded to include activities like providing funds for reclamation projects.[42] In the 1970s, following the enactment of a number of environmental regulations, the federal government expanded its regulatory reach to select surface waters and wetlands to meet the environmental protection objectives of these statutes.[43] State and federal

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34. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 1:1 (2012). Some states, such as California and Nebraska, operate under a dual system and incorporate both the common law riparian and prior appropriation doctrines. *Id.*

35. *Id.* §§ 1:1, 3:8.

36. *Id.* § 3:10.

37. *Id.* § 5:1.

38. BETSY A. CODY & NICOLE T. CARTER, CONG. RESEARCH SERV., R40573, 35 YEARS OF WATER POLICY: THE 1973 NATIONAL WATER COMMISSION AND PRESENT CHALLENGES 58 (2009).

39. TARLOCK, *supra* note 34, § 5:66.

40. CODY & CARTER, *supra* note 38, at 58-59. Colorado is the exception and instead grants water rights through a state adjudicatory body. *See* TARLOCK, *supra* note 34, § 1:1.

41. Colorado v. New Mexico, 459 U.S. 176, 179 & n.4 (1982).

42. TARLOCK, *supra* note 34, § 1:1.

43. *Id.*

conflicts were inevitable as federal programs to abate water pollution or to fulfill public land management prerogatives came in conflict with state water allocation polices.[44]

Ski resort operators spend a tremendous amount of time and money navigating through this water rights system. Acquiring and utilizing water rights is essential to the viability of a ski resort and its snowmaking operations. Vail Resorts, one of the largest resort operators in North America, classifies its water rights as intangible assets with a total value of $18.3 million.[45] Given the limited control the federal government has in the allocation and granting of water rights, those seeking a Ski Area Permit must attain a water right from the state where the national forest land is located. However, even when a resort secures a water right, limitations on use arise during droughts as the resorts must comply with state laws mandating minimum stream flows. In the face of such limitations, some resorts look elsewhere for water. Keystone Resort in Colorado augmented its water stock through an agreement with Denver Water, a utility company, to allow the resort access to some of the water that is pumped down to Denver from the utility company's reservoir.[46] As ski resorts increasingly rely on snowmaking operations and demand greater quantities of water, they will benefit from a Ski Area Permit water rights policy that is consistently enforced and fair to permit holders. The amendments made in the 2011 and 2012 Directives were a step in this direction.

III. THE 2012 FOREST SERVICE DIRECTIVE: A NECESSARY CHANGE

When water is diverted from national forest land, the Forest Service has traditionally insisted that the water rights remain with the United States.[47] However, this approach to water right ownership was not consistent across federal agencies.[48] Even within the Forest Service, the traditional intent of retaining federal ownership of water diverted from national forest land has not been uniformly followed. In 2004, the Forest Service formed a water rights clause for Ski Area Permits that was a

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44. *See id.*

45. Jason Blevins, *Ski Industry Sues the Forest Service over Water Rights*, DENVERPOST.COM (Jan. 10, 2012), http://www.denverpost.com/business/ci_19713626.

46. Caddie Nath, *Water Contracts Protect Summit County Snowmaking Operations During Drought*, SUMMITDAILY.COM (Jan. 21, 2013), http://www.summitdaily.com/article/20130121/NEWS/130129990/1078&ParentProfile=1055.

47. Letter from F. Dale Robertson, U.S. Forest Serv. Chief, U.S. Forest Serv., to Regional Foresters, U.S. Forest Serv., at AR-00124, Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 1:12-cv-00048-WJM (D. Colo. Jan. 9, 2012).

48. *Id.*

significant departure from the traditional approach of the Forest Service.[49] It created ambiguities regarding the ownership of water acquired prior to 2004 and water diverted from National Forest lands outside of the permit area.[50] In 2011 and 2012, the Forest Service drafted directives to rectify flaws in the 2004 Directive and to establish an approach consistent with prior Forest Service policy of retaining federal ownership of water originating from within the national forests.[51]

A. The Forest Service Directives System

The Forest Service outlines its Ski Area Permit water rights policy through a series of directives issued by the Chief or other officers of the Forest Service. The Forest Service Directives Systems enables the Chief and field officers at the Forest Service to issue administrative policy, procedure, and guidance.[52] Such directives are typically contained in the Forest Service Manual and relevant Forest Service handbooks.[53] As a part of the Directive Systems, the Forest Service issues interim directives, which are defined as "temporary issuances that allow units to quickly issue needed direction of a continuing nature affecting more than one unit or to test new procedures and policies."[54] Such interim directives are not final agency policy, and the Forest Service Manual cautions that directives are generally "the exception, not the rule" and are intended to test a new policy or procedure that could be subject to further amendments.[55] Interim directives are also in effect for a limited period: up to eighteen months from the date of issuance.[56] The 2011 and 2012 Directives were interim directives and were drafted for inclusion in the Forest Service's Special Use Handbook, which provides the regulatory structure for the Ski Area Permit Act. Both Directives were an attempt by the Forest Service to rectify perceived faults in the Forest Service's policy regarding water rights and Ski Area Permits.

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49. Defendants' Response, *supra* note 4, at 6.
50. *Id.*
51. *Id.* at 9, 13.
52. 36 C.F.R. § 200.4(b) (2012).
53. *Id.* § 200.4(b)(1).
54. U.S. FOREST SERV., FOREST SERVICE MANUAL § 1113.3—INTERIM DIRECTIVES (2007).
55. *Id.*
56. *Id.* § 1113.32.

B. The 2004 Directive: Perceived Flaws in the Forest Service's Water Rights Policy

Prior to the implementation of the 2004 Directive, the Forest Service generally maintained a policy that the United States asserts ownership over water rights for water diverted from and used on Forest Service land.[57] Such an assertion of ownership over water rights was not the norm for other federal land management agencies, particularly the Bureau of Land Management, and led to confusion over the accepted approach to water rights ownership on federal land.[58] Even within the Forest Service, the historical application of its water rights policy was inconsistent. The current Forest Service asserts a right to ownership of water rights for water diverted from and used on National Forest Service land.[59] The rationale is that under the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),[60] Congress directed the Department of Agriculture and the Forest Service to provide for multiple uses on federal lands, and water is essential to meeting this mandate.[61]

In 2004, the Forest Service departed from its prior policies with the 2004 Directive. This directive created ambiguity in at least three aspects of a Ski Area Permit: the ownership of water rights acquired prior to the 2004 Directive, the ownership of water rights for water diverted from national forest lands outside of the permit area for use within the permit area, and the establishment of joint ownership of a water right under state law.[62] The Forest Service later discovered that joint ownership of a water right carried the potential to conflict with some states' laws.[63] One explanation offered for the change by Ed Ryberg, the head of the Forest Service's ski area program from 1992 to 2005 is that it was a by-product of a relaxed regulatory environment during the Bush Administration.[64] The former Forest Service official asserted that the NSAA utilized the lax regulatory environment to influence the drafting of a Ski Area Permits water right policy more favorable to ski resorts.[65]

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57. Defendants' Response, *supra* note 4, at 4-5.
58. *See* Letter from F. Dale Robertson to Regional Foresters, *supra* note 47.
59. Defendants' Response, *supra* note 4, at 4-5.
60. 16 U.S.C. §§ 528-531 (2006).
61. Defendants' Response, *supra* note 4, at 5 (citing 16 U.S.C. § 531(b)).
62. *Id.* at 6-8.
63. *Id.* at 6-7.
64. Bob Berwyn, *Former Forest Service Official Says Some Ski Resorts May Have Acquired Their Water Rights by 'Fraud and Deception,'* SUMMIT COUNTY CITIZENS VOICE (Jan. 10, 2012), http://www.summitcountyvoice.com/2012/01/10/former-forest-service-official-says-some-ski-resorts-may-have-acquired-their-water-rights-by-fraud-and-deception/.
65. *Id.*

There is considerable debate between the Forest Service and the NSAA as to whether the federal government may reserve a portion of a state's water to meet MUSYA objectives.[66] However, in its response brief in *National Ski Areas Ass'n v. U.S. Forest Service*, the Forest Service asserted that water is critical to meeting MUSYA objectives and that if a permittee is granted full rights to water she could conceivably sell the water right to another party, divert the water from the national forest, and foreclose any future use for the public benefit.[67] The Forest Service contends that such a severance may be prevented by providing that the water developed under Ski Area Permits to achieve MUSYA objectives belong to the United States.[68]

The Forest Service's water rights policy under the Ski Area Permit Act changed slightly over the years and was not consistently enforced. Ski Area Permits issued in the 1980s in the Forest Service's Rocky Mountain Region contained a clause providing, "[A]ll water rights obtained by the permittee for use on the area must be acquired in the name of the United States."[69] In 1997, the Forest Service applied this approach at a national level through a clause titled X-99, stating, "[A]ll water rights obtained by the holder for use on the area authorized must be acquired in the name of the United States."[70] Even with the implementation of the X-99 clause at a national level, the Forest Service's approach to water rights conferred in Ski Area Permits for water diverted from and used on national forest land was far from uniform. Of the 121 Ski Area Permits currently in use on Forest Service land, 32 do not require any U.S. ownership of water rights, 79 contain the language of the 2004 Directive, 7 require sole federal ownership of water rights, and 3 contain the language of the 2011 Directive.[71]

Even though the implementation of X-99 was not uniform, reaction to the clause was hostile. In 2004, the Forest Service met with the

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66. *See* United States v. New Mexico, 438 U.S. 696 (1978); Opening Brief for National Ski Areas Ass'n, Inc., at 9-10, Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 1:12-cv-00048-JLK, 2012 WL 6618263 (D. Colo. Dec. 19, 2012) (arguing that that the Forest Service policy runs counter to Supreme Court precedent in *United States v. New Mexico* because obtaining water rights for MUSYA purposes constitutes a secondary recreational purpose); Defendants' Response, *supra* note 4, at 42 (asserting that the Forest Service does not claim an implied reservation of water to support ski area operations, but rather that its authority stems from its regulatory authority over the use and occupancy of National Forest Service lands).

67. Defendants' Response, *supra* note 4, at 5.

68. *Id.*

69. *Id.* (citing FOREST SERVICE HANDBOOK, *supra* note 5, interim directive no. 2783.12 (1982)).

70. *Id.* at 6 (citing FOREST SERVICE HANDBOOK, *supra* note 5, amendment no. 2709.11, ch. 50 (2004)).

71. *Nat'l Ski Areas Ass'n*, 2012 WL 6618263, at *4.

NSAA in order to draft a clause that would address some of the concerns with the X-99 clause.[72] From these consultations came a new water rights clause, the 2004 Directive, which, though ideally intended for inclusion in all Ski Area Permits, the Forest Service could insert into preexisting permits at the resorts request.[73] The 2004 Clause contained language similar to the X-99 clause, requiring the permit holder to acquire water rights in the name of the United States, but the 2004 Clause provided few details on the ownership of rights acquired prior to June 2004.[74] The Forest Service claims there are ninety-seven water rights acquired prior to 2004 held solely by ski areas and that its understanding of the ownership of those rights differs from that of the NSAA.[75] The NSAA contends that the 2004 clause waives any U.S. claim to ownership over these pre-2004 rights, whereas the Forest Service states the water rights were acquired by the permit holders "as agents of the United States" and that the Forest Service gained a vested right upon acquisition of the water rights.[76] This difference in understanding can explain the varied enforcement of the 2004 Directive and why so many ski resorts still hold permits without the updated language.

The 2004 Directive also lacked details on the terms of ownership for water diverted from National Forest Service lands onto land outside of the permit area.[77] With this gap in the 2004 Directive's language, a permit holder could conceivably divert water from National Forest Service land outside of the permit area but still retain private ownership in a water right from water diverted from public land. Such diversions are allowed, but the permits are issued as part of the Federal Land Policy and Management Act of 1976 (FLPMA)[78] and the language is confined primarily to diversions for the "impoundment, storage, transportation, or distribution of water."[79] The language in the relevant statutes contains little guidance on water rights ownership for such diversions.

Another shortcoming in the 2004 Directive cited by the Forest Service is that the 2004 Directive attempted to create joint ownership in

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72. Defendants' Response, *supra* note 4, at 6, 8-9.

73. *Nat'l Ski Areas Ass'n*, 2012 WL 6618263, at *2.

74. *See* Letter from David G. Holland, Dir., Recreation, Heritage, & Wilderness Res., U.S. Forest Serv., to Regional Foresters, U.S. Forest Serv., at AR-00068, Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 1:12-cv-00048-WJM (D. Colo. Jan. 9, 2012).

75. Defendants' Response, *supra* note 4, at 7.

76. *Id.* at 7-8.

77. *See* Letter from David G. Holland to Regional Foresters, *supra* note 74.

78. 43 U.S.C. §§ 1701-1782 (2006).

79. *Id.* § 1761(a)(1); 36 C.F.R. § 251.53(*l*)(1) (2012).

the water right, which the Forest Service believed could be interpreted as a tenancy in common.[80] The Forest Service claims it intended to create a joint tenancy with rights of survivorship in water rights acquired under the 2004 Directive.[81] Under such a structure, both the Forest Service and the relevant ski area own a 100% interest in the water right, but neither side may sever its interest.[82] Furthermore, when the permit is revoked, 100% of the water right is passed to the Forest Service.[83] This structure allowed both parties to retain a stake in the water right but provided the Forest Service ultimate authority and ownership should it need to revoke the permit. However, the Forest Service later discovered that such an ownership structure ran afoul of state law in Colorado and other states.[84] A Forest Service Briefing Paper from 2010 outlines how under Colorado state law an estate in real property can only be acquired by natural persons.[85] Stripped of the ability to establish a joint tenancy, the Forest Service could only create a tenancy in common in the water right.[86] Under a tenancy in common, both parties hold a 50% ownership interest in the water right, and the United States would only retain a 50% interest should the Forest Service revoke the permit.[87] The Forest Service claimed such an outcome would run counter to the intent and language of the 2004 Clause, which states, "[I]n the event of revocation of this permit, the United States shall succeed to the sole ownership of such water rights."[88] The fear was that this could allow a ski resort holding the other 50% ownership interest to sell the water right to another party for another purpose, which would inhibit the Forest Service land from being used as a ski area in the future.[89] While the likelihood of such an outcome is rare, one can see why the Forest Service pushed for a clarification of the language to ensure that these water rights remained with the public land.

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80. Defendants' Response, *supra* note 4, at 6-7.
81. *Id.* at 6.
82. *Id.* at 6-7.
83. *Id.* at 7.
84. *Id.*
85. USDA Forest Service Briefing Paper at AR-00239, Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 1:12-cv-00048-WJM (D. Colo. Jan. 9, 2012); COLO. REV. STAT. § 38-31-101(4) (2006) ("An estate in joint tenancy in real property shall only be created in natural persons . . . .").
86. USDA Forest Service Briefing Paper, *supra* note 85.
87. *Id.*
88. Defendants' Response, *supra* note 4, at 7 (citing Letter from David G. Holland to Regional Foresters, *supra* note 74 (internal quotation marks omitted)).
89. USDA Forest Service Briefing Paper, *supra* note 85.

C. The 2011 and 2012 Directives: Fixing the Flaws in the 2004 Directive

In 2011, faced with the flaws in the language of the 2004 Directive and the resulting inconsistent interpretations of the language, the Forest Service set out to rectify these defects. The Forest Service asserted that the purpose of the revisions was to develop language that matched the intent of the 2004 Clause.[90] On November 8, 2011, the Forest Service issued the 2011 Directive as an interim directive that replaced the 2004 Clause.[91] The 2011 Directive created three general groupings of water rights:

> (1) water rights for water diverted from and used on [Forest Service] lands in the permit area; (2) water rights for water diverted from [Forest Service] lands outside the permit area for use on [Forest Service] lands inside the permit area; and (3) water rights for water purchased or leased by the holder and water rights for water diverted from non-[Forest Service] lands.[92]

The first grouping addressed water rights acquired before and after 2004, and the second grouping touched upon water rights acquired before and after 2011. Shortly after the issuance of the 2011 Directive, the NSAA sought judicial review of the 2011 Directive, challenging the legality of the water rights clause.[93] The Forest Service responded by issuing an interim directive, the 2012 Directive, which clarified language pertaining to water available under the permit for ski resort uses, permit holders' ability to divide or transfer their rights in water diverted from Forest Service lands, and permit holders' ability to alter water rights for water diverted from private lands.[94]

1. Ownership of Water Diverted from Within the Permit Area

The 2011 Directive first addressed a permit holder's right to water diverted from within and used on the Forest Service permit site. Here, the language provides that the water must "be used primarily in support of operation of the winter or year-round resort and facilities authorized by th[e] permit."[95] The language comports with the 2011 amendments to

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90. Defendants' Response, *supra* note 4, at 8.

91. Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 12-cv-00048-WJM, 2012 WL 6618263, at *3 (D. Colo. Dec. 19, 2012).

92. Defendants' Response, *supra* note 4, at 9.

93. *Nat'l Ski Areas Ass'n, Inc.*, 2012 WL 6618263 at *3.

94. Defendants' Response, *supra* note 4, at 13-14.

95. *Id.* at 9 (quoting FOREST SERVICE HANDBOOK, *supra* note 5, interim directive no. 2709.11, ch. 50, cl. F.2a (internal quotation marks omitted)).

the Ski Area Permit Act and allows for an expanded use of water rights beyond the former textual commitments to Nordic and Alpine skiing. The 2011 Directive also addressed water rights acquired before and after the 2004 Directive for water diverted from within and used in the permit area. For water rights acquired after June 2004, the permit holder must acquire such rights jointly with the United States with a right of survivorship or, if such a construct is not possible in the relevant state, as tenants in common.[96] To address previous concerns about the ability of a permit holder to sever her water right as a tenant in common, the Forest Service included language limiting the permit holder's ability to sever her ownership interest in the water right from the ski area.[97] Water rights acquired before the 2004 Directive retained their same terms and conditions; the water rights remain with the permit holder if acquired in the name of the permit holder or if the permit terms are silent in regards to ownership, and the water rights remain with the Forest Service if acquired in the name of the United States.[98] Here, the Forest Service appeared to step back from its earlier assertion that the permit holder attained pre-2004 Directive water rights as agents of the United States.

2. Ownership of Water Diverted from Within a National Forest but Outside the Permit Area

Next, the 2011 Directive addressed water diverted from Forest Service land outside of the permit area, clarifying a gray area in the 2004 Directive. Here, the Forest Service provided that the permit holder must first seek the proper special use permits as required under FLPMA, and if the water rights are acquired after November 2011, the water rights must be acquired in the name of the United States.[99] Additionally, the permit holder must use the water primarily to support its resort.[100] If the water right was acquired prior to November 2011, the previous permit terms apply and the permit holder may retain the water right if it is in her name.[101] However, the Forest Service inserted language limiting the permit holder's ability to sever ownership in a water right, or to alter a previously approved use, without the express consent of the Forest Service in either scenario.[102]

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96. *Id.*
97. *Id.* at 10.
98. *Id.*
99. *Id.* at 10-11.
100. U.S. FOREST SERV., *supra* note 95, ch. 50, cl. F.2.(b)(1).
101. Defendants' Response, *supra* note 4, at 11.
102. U.S. FOREST SERV., *supra* note 95, ch. 50, cl. F.2.b.(2).

3. Ownership of Water Diverted from Outside a National Forest

Finally, the 2011 Directive addressed water rights purchased or leased by the permit holder and water rights diverted from outside of Forest Service lands. Here, the permit holder retains sole ownership of previously purchased or leased water rights and of water rights diverted from outside Forest Service lands, presumably from private land or nonfederal land.[103] The Forest Service included this category to assuage concerns raised by the NSAA, and offered as an example in its response brief, that a hypothetical permit holder who purchased surface water rights on a river may change the point of diversion to a well in the permit area and retain sole ownership of the water right.[104] Similar to the two other groupings of water rights permits, the permit holder is also limited in her ability to sever or transfer ownership of the water right for the duration of the permit.[105] The relevant termination and revocation clauses also apply and stipulate that ownership of water diverted from outside Forest Service lands will transfer to the United States, or the permit holder may remove any diversion structures.[106]

4. Changes in the 2012 Directive

As stated earlier, the NSAA challenged the 2011 Directive, and in response, the Forest Service issued the 2012 Directive to amend aspects of the 2011 Directive. The Forest Service maintained the core structure and intent of the 2011 Directive, but slightly altered the language in areas that were of serious concern to the NSAA. Language in the 2011 Directive was modified to clarify that the Forest Service will not take any action to impact the availability of water for winter and year-round resort activities authorized under the permit.[107] Next, language was included to reinforce that a permit holder may divide or transfer an ownership interest in water diverted from Forest Service lands, or repurpose the water for a use other than ski area operations, with the express consent of the Forest Service.[108] Finally, the Forest Service modified the revocation and termination clause to allow permit holders with water rights from non-Forest Service lands to sever the water right if necessary and without the consent of the Forest Service.[109] Despite efforts to clarify the

103. Defendants' Response, *supra* note 4, at 11-12.
104. *Id.*
105. U.S. FOREST SERV., *supra* note 95, ch. 50, cl. F.2. c.(1)-(2).
106. *Id.* ch. 50, cl. F.2.d.
107. Defendants' Response, *supra* note 4, at 13-14.
108. *Id.* at 14.
109. *Id.*

language of the 2011 Directive, controversy will likely remain over a clause granting limited power of attorney to the United States, and a waiver of any claims against the United States for compensation for water rights removed or relinquished as a result of a permit termination.[110] The 2012 Directive is not perfect, but it is a step towards establishing a more thorough water rights policy that encapsulates the stated intent of the Forest Service to ensure water rights attained for permit objectives remain with the public lands. The new policy is also more nuanced, reasonably fair to both sides, and applies to the three primary scenarios in which water rights will be acquired for use on a ski resort. Such a thorough water rights policy is necessary and beneficial for both the Forest Service and NSAA members. The Forest Service will be able to consistently implement a more coherent policy, and the relevant ski resorts will benefit from regulatory consistency.

IV. THE 2012 DIRECTIVE: MARRED BY PROCEDURAL FLAWS BUT SUBSTANTIVELY SOUND

The Forest Service's efforts to amend its water rights policy in the Ski Area Permit Act were hampered by procedural shortcomings, and such a change in policy should rightly be subjected to public notice and comment. However, the 2012 Directive in its current form will likely survive if challenged on substance. One can assume the current clauses pertaining to the power of attorney and waiving of claims against the United States might undergo slight alterations after public comment, but the core of the 2012 Directive should remain valid. Congress began a necessary process of clarifying and modernizing ski area permit policy in enacting the Ski Area Permit Act in 1986 and by further amending the Ski Area Permit Act via the Ski Area Recreational Opportunity Enhancement Act of 2011. The Forest Service followed this trend in forming the 2011 and 2012 Directives. Water rights policy in the Ski Area Permit Act was often unclear and not uniformly enforced, likely because of these ambiguities. If current trends continue and winter precipitation declines and triggers an increase in demand for artificial snow, ski resorts and the Forest Service will need a clear and consistent water rights policy as the acquisition of water becomes even more pivotal

110. *See* Nat'l Ski Areas Ass'n v. U.S. Forest Serv., No. 12-cv-00048-WJM, 2012 WL 6618263, at *3 (D. Colo. Dec. 19, 2012). The permits grant a limited power of attorney to the United States so that the Forest Service can execute any necessary transfer of water rights, and the other waives any claims against the United States for the compensation of any water rights that are "transferred, removed, or relinquished as a result of revocation or termination of [a] permit." U.S. FOREST SERV., *supra* note 95, ch. 50, cl. F.2.e-.f.

to the successful operation of a ski resort. The Forest Service started a necessary revisionary process in enacting the 2011 and 2012 Directives. While select aspects remain objectionable, the terms and conditions associated with the groupings of water rights outlined in the 2012 Directive should remain in subsequent rulemaking addressing water rights under the Ski Area Permit Act.

A. Forest Service Authority

In the NSAA's opening brief in *National Ski Areas Ass'n v. U.S. Forest Service*, the organization challenged the Forest Service's statutory authority to stipulate that permit holders acquire joint ownership in water rights as a condition of a permit.[111] The NSAA recognizes the Forest Service's authority to impose terms and conditions on permits, but the organization believes this does not extend to requiring joint ownership of water rights as a permit term without an express textual commitment in the regulation.[112] However, this argument likely would not survive a substantive challenge. While the NSAA may assert a need for a clear textual commitment, the United States has a strong argument that such power over permit terms and conditions is implied.

The primary source of Forest Service authority over federal lands is the Property Clause of the United States Constitution. The Property Clause stipulates that Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[113] The Organic Act was the first to grant the Forest Service the authority to promulgate rules and regulations necessary to control the "occupancy and use" of national forests.[114] The authority vested in the Forest Service is reiterated in other land management acts, such as MUSYA, which charges the Secretary of Agriculture with developing and administering the national forests under the multiple use mandate and, most importantly, under the Ski Area Permit Act, in which the Forest Service is required to issue permits for ski area development with "reasonable terms and conditions as the Secretary deems appropriate."[115] Here, the permit conditions outlined by the Forest Service can be viewed as an extension of its ability to control

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111. Opening Brief of National Ski Areas Ass'n, Inc. at 3, *Nat'l Ski Areas Ass'n*, 2012 WL 6618263.

112. *Id.* (citing 36 C.F.R. § 251.56(a) (2012)).

113. U.S. CONST. art. IV, § 3, cl. 2.

114. *Nat'l Ski Areas Ass'n*, 2012 WL 6618263, at *4 (quoting 16 U.S.C. § 551 (2006) (internal quotation marks omitted)).

115. *Id.* (quoting 16 U.S.C. §§ 528-531 (2006); 16 U.S.C. § 497b(b)(7) (2006) (internal quotation mark omitted)).

access to the national forests and impose reasonable permit conditions in meeting its multiple use mandate. Given the broad mandate of the Forest Service, as well as the fact that the imposition of reasonable permit conditions is a part of that mandate, one could argue that the right to ask permit holders to acquire water rights in the name of the United States, or as joint owners with the United States, is an implied authority of the Forest Service.

Federal and state judiciaries recognize that the Forest Service is vested with broad discretionary authority over the use and occupation of national forest land. In its response brief in *National Ski Areas Ass'n*, the Forest Service cites a long list of case precedent affirming the Forest Service's authority to regulate the use of national forest land by imposing permit conditions.[116] One of the earliest cases to set out this policy originated from a grazing dispute in Colorado. In *Light v. United States*, the defendant was alleged to have allowed some of his herd to graze on a federal forest reserve (now a national forest) without the proper permits.[117] The defendant challenged the validity of the federal forest reserve, claiming it conflicted with Colorado law.[118] The court rejected the defendant's argument and, citing the Property Clause, asserted that Congress, as a proprietor of federal lands, retains the authority to "prohibit absolutely or fix the terms on which its property may be used."[119] Shortly after the *Light* decision, the Supreme Court reaffirmed the United States' control over federal land and the government's capacity to attach conditions to use of the land. In *Utah Power & Light Co. v. United States*, a defendant utility company built dams, water diversions, and transmission lines on federal land without the permission of the United States.[120] The defendants contested the power of the U.S. government to regulate such lands, and the Court again struck down the challenge, citing the Property Clause, and asserted that the federal government retains the power to control the occupation and use and "prescribe the conditions upon which others may obtain rights in them."[121] Additionally, in *Elko County Board of Supervisors v. Glickman*, the United States District Court for the District of Nevada upheld the Forest Service's power to impose reasonable conditions on

116. Defendants' Response, *supra* note 4, at 27-30.
117. 220 U.S. 523, 525 (1911).
118. *Id.* at 526-27.
119. *Id.* at 536-37.
120. 243 U.S. 389, 402-03 (1917).
121. *Id.* at 403-05.

ranchers' water diversions that originate from and run through Humboldt National Forest to the ranchers' private land.[122]

Similar to the Government's position in *Light* and *Utah Power & Light*, the government in *National Ski Areas Ass'n* contended that the Forest Service is acting within its capacity as a sovereign proprietor when administering Ski Area Permits and granting permit holders access to the national forests. Also, like the permit conditions imposed on the rancher in *Elko County Board of Supervisors*, the permit conditions imposed by the Forest Service on ski resorts operating in national forests fall within the Forest Service's authority to impose reasonable conditions on parties seeking water diversions from within Forest Service lands. Provided with such binding and persuasive precedent, it is foreseeable that a federal court would consider the permit conditions outlined in the 2012 Directives to fall within the Forest Service's discretionary authority to impose reasonable conditions on the occupation of federal lands.

B. The Forest Service as the Sovereign Proprietor

The NSAA won the first battle against the 2012 Directive, but the NSAA and others may not be successful if they push to challenge a form of the 2012 Directive on substance. Under the two-step inquiry outlined in *Chevron v. Natural Resources Defense Council*, when a court reviews an agency's construction of a statute it administers, the court first examines whether the intent of Congress is clear, and if the congressional intent is ambiguous as to the issue at hand, the court then examines whether the agency's analysis is based on a "permissible construction of the statute."[123] At step two in the *Chevron* inquiry, courts must defer to any reasonable interpretation of an administrative agency.[124] The NSAA asserts that absent express language referencing water rights, the phrase "reasonable terms and conditions" in the Ski Area Permit Act does not include the authority to impose conditions related to water rights.[125] Here, the NSAA contends that "reasonable" does not include the ability to develop permit conditions that infringe on a state's traditional authority over water rights.[126] While the NSAA is correct that Congress failed to provide specific language pertaining to water rights, such an omission

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122. 909 F. Supp. 759, 760, 763-64 (D. Nev. 1995) (upholding the Forest Service's authority to impose reasonable conditions even when the rights were acquired prior to the creation of the Humboldt National Forest).

123. 467 U.S. 837, 842-43 (1984).

124. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 333 (2008).

125. Opening Brief of National Ski Areas Ass'n, Inc., *supra* note 111, at 35-37.

126. *Id.* at 36.

could speak to Congress's ambiguous intent and trigger an examination under the second step of *Chevron*. Here, one could contend that the permit conditions of the 2012 Directive are a reasonable extension of the Forest Service's ability to control the use and occupancy of national forests. Further, one could argue that the permit conditions are inherently reasonable because a permit holder retains a right to petition the Forest Service for a change.[127] Provided the amount of deference a court must afford the Forest Service's interpretation of the Ski Area Permit Act, the terms of the 2012 Directive would likely withstand a substantive challenge.

Given that a ski area permit is needed to maintain the vitality of a ski resort and the diversions necessary to acquire the water, such deference to the Forest Service cannot be ignored by the NSAA. Additionally, if the Forest Service so chooses, it could exercise the discretionary authority afforded to it under the Property Clause to make life difficult for NSAA and other permit seekers on national forest lands, possibly denying them the ability to satisfy the "beneficial use" requirement under the prior appropriation doctrine. Courts have upheld the Forest Service's discretionary power to deny a permit under the Ski Area Permit Act and usually conduct a narrow review of such decisions.[128] In such a deferential judicial climate, the NSAA and others would be well-advised to act as a partner in contract with the Forest Service rather than an adversary in court.

1. The Ski Area Permit as a Contract

The Forest Service and ski resorts may easily be viewed as codevelopers in contract under a Ski Area Permit, and the water rights clauses in the 2012 Directive as reasonable conditions attached thereto. Select courts have viewed the terms of a Ski Area Permit as language in a contract.[129] Under such a construct, a court would analyze the terms and conditions of a Ski Area Permit as a contract to determine whether the

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127. *See* U.S. FOREST SERV., *supra* note 95, ch. 50, cl. F.2.a.(3)-.b.(2).

128. *See* Sabin v. Berglund, 585 F.2d 955, 957 (10th Cir. 1978). The court upheld the Forest Service's rejection of a ski area permit and stating in part:

> It should be pointed out also that the Secretary in administering these federal lands is representing the interest of the United States as a proprietor. This, as well as the broad terms of the statute, enhances the power and authority of the Secretary on behalf of the government to manage in the interest of the government and in the interest of all of the people. The nature of the duties that are being performed tends to show that the review of the Secretary's decision, insofar as it is a value judgment, tends to be narrow.

Id.

129. *See, e.g.*, Meadow Green-Wildcat Corp. v. Hathaway, 936 F.2d 601 (1st Cir. 1991).

terms relevant to water rights ownership are "reasonable."[130] In the language of the 2012 Directive, the permitted ski resort is viewed as an "agent" of the United States, and any water rights acquired are for the mutual benefit of the permittee and the United States.[131] Under such an analytical approach, courts could view the water rights clauses in the 2012 Directive as reasonable terms and conditions of a contract between two parties developing a portion of a national forest. Here, the applicant ski resort supplies the relevant facilities and capital, and the Forest Service provides the lands, access to water where appropriate, and long-term exclusive access to the national forest lands for the uses allowed under the permit. In such a scenario, it would be entirely appropriate for the Forest Service to attach limiting conditions on how water rights are acquired and used, provided that the applicant fully agrees to the terms. While the ski resort applicant is not on equal footing with the Forest Service in negotiating access to national forest land, ski resorts should accept this as a necessary cost when conducting business in a national forest. The ski resort also benefits from the reasonably secure long-term access and consistent terms and conditions.

Federal courts have taken this approach and treated Ski Area Permits as contracts when the terms and conditions of the permit are under review. In *Meadow Green-Wildcat Corp. v. Hathaway*, the United States Court of Appeals for the First Circuit viewed a Ski Area Permit as a contract in analyzing the language of the permit because of the lengthy and detailed terms and conditions, the guaranteed security and access provided to facilitate investment, and the specific legal obligations of the parties.[132] The United States Court of Federal Claims took a similar approach in *Son Broadcasting, Inc. v. United States* in examining the language of a special use permit for a telecommunications firm building a broadcast tower in a national forest.[133] There, the court viewed the permit as a contract given the relative exclusivity it granted the permit holder, the long-term security of the agreement, and the terms that bound both parties.[134] One could argue that the Ski Area Permit is not truly a contract because of the revocation and termination clauses contained in the permit conditions.[135] Here, a party could allege that no reasonable person would sign on to a contract where the Forest Service is given

130. 16 U.S.C. § 497b (b)(7) (2006).

131. FOREST SERVICE HANDBOOK, *supra* note 5, interim directive no. 2709.11 ch. 50, cl. F.2 (2012).

132. 936 F.2d at 604.

133. 52 Fed. Cl. 815, 817, 823 (Fed. Cl. 2002).

134. *Id.* at 823-24.

135. *See* U.S. FOREST SERV., *supra* note 95, ch. 50, cl. F.2.d.

unfettered authority to terminate the contract if select terms and conditions are not met to its satisfaction. However, the court in *Meadow Green-Wildcat Corp.* addressed such concerns and stated that "[A] contract that one party may terminate for specified reasons is no less a contract."[136]

State courts take a similar approach and tend to characterize the United States as either a landlord or coapplicant when a party attains water rights on federal lands under state law. Under Idaho state law, a landlord may retain an interest in a water right if a tenant acquired the water right as an agent of the landlord.[137] Here, the United States has a strong argument that under the 2012 Directive, when a joint application is required, the United States is acting within its capacity as a landlord and the permit seeker is merely a tenant on the land. In such a scenario, a permit holder could be viewed as an agent of the United States. In its response brief, the Forest Service also cited a Colorado Water Court ruling allowing the United States to be a coapplicant for a water right because the United States owned the lands where the diversion structure would be located and where the water would be put to beneficial use.[138] In the view of the Colorado Water Court, the Forest Service and an applicant are conceivably joint developers and likely co-owners of the water right.[139] The Forest Service provides the access to the land, the ski resort provides the necessary capital and facilities, and the Ski Area Permit is the contract that binds the parties. Given that a federal court will analyze the Ski Area Permit terms and conditions under the deference afforded the Forest Service under *Chevron*, and possibly as language in a contract, it is likely that the water rights language in the 2012 Directive would withstand a substantive challenge.

2. Possibility To Deny Beneficial Use

Another concern for NSAA members and ski resorts applying for a Ski Area Permit is the Forest Service's ability to deny access to federal lands and possibly inhibit a permit holder's fulfillment of the beneficial-use condition of a water right. As stated previously, a necessary component of perfecting a water right is proving that the water is used for

136. 936 F.2d at 604 (citing E. ALLAN FARNSWORTH, CONTRACTS § 2.14 (1982)).

137. *See* Joyce Livestock Co. v. United States, 156 P.3d 502, 519 (Idaho 2007).

138. Defendants' Response, *supra* note 4, at 39-40 (citing Concerning the Application for Conditional Water Rights and Plan for Augmentation for Copper Mountain, Inc., Case No. 04CW151 (Colo. Water Div. 5 Jan. 26, 2005)).

139. *Id.*

a beneficial use and that the beneficial use is continuous.[140] Within each grouping of water rights, the permit holder is allowed to retain sole ownership in the right if acquired before 2004 in the name of the permit holder, or if acquired before November 2011 in the name of the permit holder and diverted from national forest land outside the permit area, or if the water is diverted from lands outside Forest Service jurisdiction. Under FLPMA, those seeking to place a structure for the diversion or transportation of water must first acquire a permit with the Forest Service.[141] While the possibility of such an occurrence is remote, the Forest Service could conceivably wield its powers as a sovereign proprietor to deny permit holders the permits necessary to bring water to the permit area and compromise the permit holder's ability to meet the continuous beneficial use requirement. Such a scenario could arise through the Forest Service's ability to issue "stop orders" on any unauthorized activity within national forest lands.[142] The United States Court of Appeals for the Tenth Circuit upheld the validity of a Forest Service stop order when a permit holder deviated from the original water diversion plan in a national forest, even when the permit holder acquired a vested water right with the state.[143] Such a delay in a project could inhibit the ability of a Ski Area Permit holder to maintain the beneficial use component of an appropriated water right. While an extreme example, the Forest Service does have regulatory tools at its disposal that could make life difficult for a ski resort operation. In such a context, an NSAA member or ski resort seeking a permit is wise to work together with the Forest Service. While a permit holder under the Ski Area Act must agree to some concessions, the language of the 2012 Directive still affords permit holders the opportunity to seek modifications in the permit terms.

V. CONCLUSION: A PATH TO BETTER POLICY

The 2012 Directive is rightly going back to the Forest Service for the needed public notice and comment procedures.[144] However, the core of the 2012 Directive should remain intact. The Forest Service began a necessary process in 2011 to rectify shortcomings in the water rights

140. TARLOCK, *supra* note 34, § 5:66.
141. 43 U.S.C. § 1761 (2006); 36 C.F.R. § 251.53 (2012).
142. *See* 36 C.F.R. § 261.10(a).
143. City & County of Denver v. Bergland, 695 F.2d 465, 480-82 (10th Cir. 1982).
144. *Jason Blevins, Forest Service Begins Public Vetting of New Ski Area Water Rights Rule*, DENVERPOST.COM (Jan. 29, 2013), http://www.denverpost.com/breakingnews/ci_22475799/forest-service-begins-public-vetting-new-ski-area.

policy in the Ski Area Permit process. These revisions provide a clarified policy that will ideally be enforced with greater consistency than the clauses within the 2004 Directive. While the NSAA was right to object to the procedural shortcomings in the 2011 and 2012 Directives, the organization may not be as successful if it challenges a form of the 2012 Directive on substance. The water rights policy enumerated within the 2012 Directive was fully within the statutory authority of the Forest Service as enumerated by Congress in the Ski Area Act, FLPMA, and other land management statutes. And while some of the NSAA's concerns had merit, the NSAA members did not have much to fear from the 2012 Directive. Most could retain water rights acquired prior to the issuance of the directive, and the use of these water rights was only constrained for the duration of the permit. If a change in the use was needed, the 2012 Directive provided permit holders the opportunity to petition the Forest Service for the change.[145] These conditions were clear, fair, and allowed the Forest Service to meet its statutory objective to protect and preserve the national forests.

As the impacts of climate change become more prevalent, ski seasons shorten, and the demand for water to support snowmaking operations increases, the Forest Service and permit seekers will need a consistent, thorough, and effective water rights policy that ensures water originating from national forest lands remains with the public land. The changes made in the 2011 and 2012 Directives were a needed step that would prove beneficial for the Forest Service and NSAA members. NSAA members received a thorough policy that could be enforced with greater consistency than past policies and that was reasonably fair to permit seekers. The Forest Service had greater guidance in how to go forth with the ever-complex task of acquiring and securing the necessary water rights to ensure the continued vitality of national forest lands. Members of the NSAA and the general public will be best served by retaining the core of the 2012 Directive.

145. U.S. FOREST SERV., *supra* note 131, ch. 50, cl. F.2.a.(3)-2.b.(2).