PACIFIC LEGAL FOUNDATION

August 22, 2014

Ms. Carolyn Holbrook
Recreation, Heritage & Volunteer Resources
Ski Area Water Rights Comments
United States Department of Agriculture
1400 Independence Avenue S.W., Stop 1125
Washington, DC 20250-1125

VIA ELECTRONIC MAIL
skiareawaterrights@fs.fed.us

Re: Proposed Water Rights Clause for Ski Area Permits
79 Fed. Reg. 35,513 (June 23, 2014)

Dear Ms. Holbrook:

Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing thousands of supporters nationwide who believe in limited government, property rights, and free enterprise. For 40 years PLF has been litigating in support of individuals' rights to make reasonable use of their private property, free from unwarranted government interference. *Sackett v. E.P.A.*, 566 U.S. ___, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

These comments are submitted in response to the Unites States Forest Service (Forest Service)'s notice in the Federal Register on Monday, June 23, 2014, 79 Fed. Reg. 35,513. That notice states that the Forest Service is soliciting public input on proposed ski area permit water rights clauses, as a result of the decision in *National Ski Areas Association, Inc. v. United States Forest Service*, 910 F. Supp. 2d 1269 (D. Colo. 2012) (*NSAA*). The *NSAA* decision rules that the Forest Service's prior ski area water rights clause was illegally adopted, and enjoined the implementation of that clause in ski area permits.

PLF offers the following comments, and reserves the right to submit additional comments in the future.

HEADQUARTERS: 930 G Street | Sacramento, CA 95814 | (916) 419-7111 | FAX (916) 419-7747
ALASKA: 121 West Fireweed Lane, Suite 250 | Anchorage, AK 99503 | (907) 278-1731 | FAX (907) 276-3887
ATLANTIC: 8645 N. Military Trail, Suite 511 | Palm Beach Gardens, FL 33410 | (561) 691-5000 | FAX (561) 691-5006
HAWAII: P.O. Box 3619 | Honolulu, HI 96811 | (808) 733-3373 | FAX (808) 733-3374 OREGON: (503) 241-8179
WASHINGTON: 10940 NE 33rd Place, Suite 210 | Bellevue, WA 98004 | (425) 576-0484 | FAX (425) 576-9565
DC: 300 New Jersey Avenue, NW, Suite 900 | Washington, DC 20001 | (202) 888-6881 | FAX (202) 888-6855
E-MAIL: plf@pacificlegal.org
WEB SITE: www.pacificlegal.org

PLF questions the need for the Forest Service to develop any water rights clause for inclusion in ski area permits, or any other permits which it issues, to the extent they have the effect of limiting the incidents of ownership of any privately held water rights under state law. Any rulemaking or adoption of a final policy on this subject must clearly state the interest of the Forest Service in exacting water rights (including the rights to sever or transfer those rights, and the right to exercise them pursuant to state law) from its permit holders, and identify the alternatives which would achieve those interests without transferring title to water rights or otherwise limiting the incidents of ownership of those rights.

Water Rights are Transferable Interests in Real Property under State Law

Water rights are real property interests arising under state law in all of the Western States in which the United States Forest Service permits ski areas. Generally speaking, water rights appropriated under state law in the Western States are appurtenant to the real property on which they are put to beneficial use.[1] State law generally allows the owner of an appropriative water right to sever it from the parcel to which it is appurtenant and to transfer the place of use elsewhere, provided that such transfer does not impair other rights.[2]

Additionally, courts that have examined the question have consistently held that the federal government does not acquire water rights under state law when private parties appropriate water from federal lands. This remains true when the appropriator is acting under a federal permit allowing use of federal land. *See, e.g.*, *Joyce Livestock Co. v. United States*, 156 P.3d 502, 508, 519 (Idaho 2007). Nor do federal agencies acquire the right to regulate the use or disposition of privately

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[1] *State Dep't of Ecology v. Acquavella*, 674 P.2d 160, 163 (Wash. 1983); *Teel Irrigation Dist. v. Water Res. Dep't*, 919 P.2d 1172, 1175 (Or. 1996); *Stanislaus Water Co. v. Bachman*, 93 P. 858, 863 (Cal. 1908); *Beecher v. Cassia Creek Irrigation Co.*, 154 P.2d 507, 509 (Idaho 1944); *Mineral County v. State Dep't of Conservation & Natural Res.*, 20 P.3d 800, 806 (Nev. 2001); *Maclay v. Missoula Irrigation Dist.*, 3 P.2d 286, 290 (Mont. 1931); *Rennard v. Vollmar*, 977 P.2d 1277, 1280 (Wyo. 1999) (citing *Frank v. Hicks*, 35 P. 475, 484 (Wyo. 1894)); *In re Bear River Drainage Area*, 271 P.2d 846, 848 (Utah 1954); *Archuleta v. Gomez*, 200 P.3d 333, 342 (Colo. 2009); *In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County*, 41 P.2d 228, 234 (Ariz. 1935); *Hydro Res. v. Gray*, 173 P.3d 749, 757 (N.M. 2007).

[2] *Beecher v. Cassia Creek Irrigation Co.*, 154 P.2d at 509; *Maclay v. Missoula Irrigation Dist.*, 3 P.2d at 290-91; *but see In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County*, 41 P.2d at 234 (transfer of water rights in Arizona requires showing that existing place of use not economical), *and Hydro Res. v. Gray*, 173 P.3d at 757 (non-irrigation water rights in New Mexico generally not appurtenant to place of use and more freely transferable).

held water rights. The regulation of privately held appropriative rights has been left to the states by Congress.

Congress and the federal courts have repeatedly and clearly directed the Forest Service to comply with state water law in any effort to obtain water rights for ancillary purposes of National Forests. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.") (footnote omitted). Ski areas are one of the secondary purposes of the National Forests. *Id.* at 713-15 (outdoor recreation and other forest purposes under the Multiple Use Sustained Yield Act are secondary purposes). These authorities similarly limit the Forest Service's authority to condition the use or disposition of water rights.

As interests in property, water rights are protected against taking by the federal government without just compensation under the Fifth Amendment to the United States Constitution. *Casitas Municipal Water Dist. v. United States*, 708 F.3d 1340, 1354 (Fed. Cir. 2013) (citing *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 100 (1986)). If the Forest Service were to prohibit the severance or transfer of water rights from ski area permit holders outside of the permitting process, it would undoubtably be taking property for which the Constitution requires compensation. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

The Proposed Water Rights Clause Circumvents State Water Law for the Disposition of Water Rights and Imposes Unconstitutional Conditions on Ski Area Permit Holders

The Forest Service's proposed water rights clause requires ski area operators to surrender or transfer incidents of ownership of privately owned water rights (including any state law rights to sever or transfer those rights) to the Forest Service or other parties (such as successors in interest to ski area permits) as a condition of issuance or continuance of a ski area permit. Proposed Clause D-30, paragraphs F.4.b, F.5.a; 79 Fed. Reg. at 35,518. This requirement limits the range of potential users and purchasers of water rights associated with ski areas to one, driving down the likely compensation that any departing ski area permit holder will receive from that purchaser. The proposed clause also requires ski area permit holders to abandon state issued water rights associated with the ski area in the event that the ski area is not re-authorized, or surrender them to the Forest Service if those rights are currently jointly held. Proposed Clause D-30, paragraph F.5.b; 79 Fed. Reg. at 35,518. Paragraph F.1 of the proposed clause limits the basis in which holders of ski area permits can acquire appropriative water rights under state law. 79 Fed. Reg. at 35,517. Finally, paragraph F.7 of the proposed clause requires ski area permit holders to waive any right to compensation resulting from the transfer, removal, or relinquishment of any water rights. 70 Fed. Reg. at 35,519.

These proposed permit conditions are unconstitutional exactions of property rights, in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. Exactions taken in

the permitting process must have a substantial nexus with the purported legitimate interest which the government seeks to further, and must be roughly proportional to the impact of the project based on a case specific analysis. *Nollan v. California Coastal Commission*, 483 U.S. at 837; *Dolan v. City of Tigard*, 512 U.S. at 386, 391.

The Forest Service has not satisfied *Nollan*'s requirement to establish an essential nexus between the operation of a ski area (the activity for which the Service issues the permits in question) and the private ownership of water rights by the permit holder. There is no harm to the public or to the property caused by the permit holder owning water rights associated with the ski area. Nor has the Forest Service identified any public impact from the transfer of a ski area permit separately from the water rights associated with the ski area. As a practical matter, no new ski area operator will reasonably take over an existing ski area without at the same time acquiring the associated water rights in order to make snow and serve the other water needs of the facility. The water rights are no different from any of the other property that a current ski area permit holder uses in the operation of the ski area. If the operator desires to sell the operation and transfer the permit, it will have to find a willing buyer, who will only purchase the assets if all of them, including the water rights, are available on reasonable terms.

Nor is there any impact to the ski area if the operator relinquishes or allows the permit to lapse, or cannot find a willing buyer for the facility, and then transfers the water rights elsewhere or puts them to another use. By definition, if nobody operates the ski area any further, then the transfer of the associated water rights to another place or manner of use cannot harm the ski area. The private ownership of the water rights causes no impacts to the ski area or any other public harm, either in the case where the ski area is transferred to a new operator, or closed.

The Forest Service would also be unable to meet the requirement set forth in *Dolan* that it demonstrate that an exaction of interests in water rights in the ski area permitting process was roughly proportional to the impact of the permitted activity, based on a case specific analysis. The universally applicable policy and proposed water rights clause, which transfers control over the disposition of private water rights from the ski area permit holder to the Forest Service, is the antithesis of a case specific analysis.

The Proposed Water Rights Permit Clause Violates Existing Forest Service Regulations

These provisions are also inconsistent with the Forest Service's existing regulations dealing with the disposition of privately owned improvements on permitted ski areas upon termination of the permit.[3] Not only may ski area permit holders *remove* privately held improvements under the regulation, they are required to remove them. 36 C.F.R. § 251.60(i). The obligation to sell water rights to

[3] The Forest Service's glib assertion to the contrary at 79 Fed. Reg. at 35,519 notwithstanding.

subsequent permit holders, or abandon or surrender them, is inconsistent with both the text and intent of the regulations relating to other improvements.

The Proposed Paragraph F.1.g Usurps State Regulation of Water Use

The proposed clause includes optional paragraph F.1.g, which is to be inserted "in permits where restrictions on withdrawal and use of water are required by a regulation or policy, an adjudication, or a settlement agreement or are based on a decision document supported by environmental analysis." Proposed Clause D-30, page 2; 79 Fed. Reg. at 35,517. The proposed clause and related explanation in the Federal Register provide no more guidance than this in determining when this "optional" clause is to be imposed. So, Forest Service permitting staff can be expected to impose this provision in their sole discretion.

This open-ended power to modify the terms or restrict the exercise of water rights violates the Congressionally established policy of federal agency deference to state water law, in both substance and procedure. *United States v. New Mexico*, 438 U.S. at 702 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.") (footnote omitted). The Forest Service has no power to take the place of state regulators in administering private water rights arising under state law, or to violate the separation of powers by usurping the authority of state (or federal) courts which have issued water right decrees.

The breadth of this provision allows the Forest Service to unilaterally limit the exercise of water rights. It is left entirely to the discretion of Forest Service staff to determine that "restrictions . . . are required by a regulation or policy" and these sources of restriction are not even limited to those of the Forest Service. A single ski area permit administrator could determine that a regulation or policy of any federal *or state* agency requires restrictions on withdrawals, and impose those limits through the permit. Forest Service staff would be interpreting regulations of other agencies, a task for which the staff is not necessarily or even likely qualified, and would be even farther afield interpreting and applying other agencies' policies.

A restriction could be based on "a settlement agreement" with any party on any subject matter, to which the holder of the water right need not be a party or even have had notice. It would not even be necessary that the *Forest Service* be a party to such a settlement.[4]

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[4] An environmental activist could sue the Fish and Wildlife Service for declaratory relief that more instream flows are necessary to improve habitat for listed aquatic species, and settle the case for an agreement and consent decree to that effect. The Forest Service would then be empowered, under the terms of this permit provision, to impose corresponding flow restrictions on the water rights holder through the ski area permit.

A "restriction . . . required by . . . an adjudication" would fall under the continuing jurisdiction of the court entering the decree in the adjudication, not the Forest Service, except in the highly unlikely case (not known to currently exist) of the court appointing the Forest Service as the watermaster under the decree. Even in such an absurdly unlikely event, any implementation of restrictions under, or enforcement of, the decree would require resort to the decree court. Imposition of restrictions on decreed water use by a federal agency would violate the due process rights of the permit holder, the continuing jurisdiction of the decree court (as well as the terms of the decree itself), and the Congressional policy of deference to state water law processes.

Finally, the proposed clause allows the Forest Service to restrict water use "based on a decision document supported by environmental analysis." As with the prior grounds, this decision document need not be propounded by the Forest Service. Outside of the Ninth Circuit (in which critical habitat designations are exempted from the National Environmental Policy Act by judicial decision[5]), this would encompass past or future critical habitat designations for aquatic species by the Fish and Wildlife Service. It could also be based on actions for which a Finding of No Significant Impact is issued.

The scope of the Forest Service's discretion in restricting water rights based on environmental documents is also much broader than that afforded for other sources of restrictions. Restrictions must be "required" by regulations, policies, adjudications, or settlement agreements. But they need only be "based on" decision documents supported by environmental analysis.

These provisions afford the Forest Service unlimited power to restrict the exercise of privately held state law established water rights. There is no statutory or regulatory authority for such sweeping power; the Forest Service does not even attempt to cite any. Each of these purported bases to impose restrictions exceeds the authority of the Forest Service. Coupled with the required waiver provision discussed above, each of these bases for restricting the use of water rights is also a separate basis for takings liability, as discussed above.

Conclusion

Based on the foregoing observations, PLF encourages the Forest Service to avail itself of existing state processes to address any legitimate interest it has in the disposition of water rights associated with permitted ski areas, and to dispense with the adoption of the proposed water rights clauses.

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[5] *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

Thank you for considering our views on this subject. If you have any questions or require additional information, please feel free to contact Tony François of Pacific Legal Foundation by telephone at (916) 419-7111 or by electronic mail at tfrancois@pacificlegal.org.

Sincerely,

ANTHONY L. FRANÇOIS
Attorney