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January 10, 2012

Senator Mark Udall
Hart Office Building Suite SH-328
Washington, D.C. 20510

Dear Senator Udall:

I am in receipt of Ed Ryberg's January 6, 2012 letter to you regarding the November 8, 2011 water right clause in the ski area permits and believe that his letter contains numerous inaccuracies that need to be corrected and a number of major relevant omissions. As you are aware, I represent and have represented for many decades numerous ski areas in Colorado, Nevada and California and was personally involved in the negotiations with the Forest Service and Department of Agriculture that led to the 2004 water right permit clause.

First of all, the pre-2004 water right clause was not limited to water rights involving the "diversion of water directly from NFS lands" as Mr. Ryberg states. The Forest Service sought all water rights used in connection with the ski area regardless whether they arose on the ski area Forest Service lands, other federal lands or private lands.

That is one of the principal reasons why Harris Sherman, the current Under Secretary of Natural Resources and Environment for the Department of Agriculture who oversees the Forest Service, appealed the White River National Forest Management Plan on behalf of a number of ski areas. In that appeal, Mr. Sherman argued that the Forest Service did not have authority to require the transfer of any ski area water rights. His argument was consistent with the findings and conclusions of the Congressional Report of the Federal Water Rights Task Force created pursuant to Section 389(D)(3) of P.L. 104-127 which stated that "Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits."

Recognizing this lack of authority, the then Under Secretary of Agriculture for Natural Resources and the Environment asked the National Ski Areas Association to discuss with the Forest Service a new water right permit clause to settle this aspect of Mr. Sherman's litigation. That was accomplished and, by the attached letter written by Mr. Ryberg, he stated that the new water right clause was developed "in consultation with our local Office of General Council (OGC)." He also states in that letter that it was written to "clarify the intent of the water rights

Senator Mark Udall
January 10, 2012
Page 2

ownership clause” If he had problems with the clause, why didn’t he express them in his letter?

Another major inaccuracy of his letter is that the new water right permit clause does not only apply to water rights that arise on the ski area Forest Service lands. Like the pre-2004 clause, the new clause impacts water rights on non ski area permit lands regardless of whether they are federal or private lands. The new clause also does not restrict the Forest Service from using the water rights they want to “take” from the ski areas to use in connection with the ski area. There is nothing in the new clause that requires the Forest Service to continue to maintain and use the water rights for ski area purposes and the Forest Service could sell these water rights or dedicate them to wildlife, instream flow, or other forest maintenance purposes. Thus, this clause is an effort to use the permitting process as a way to circumvent State water laws, under which the courts have repeatedly held that neither the Forest Service nor any other federal agency has the ability to reserve water rights for such purposes on Forest Service lands.

Finally, Mr. Ryberg makes the statement that the new clause seeks to correct “the problems with the 2004 clause with respect to Colorado.” I am aware of virtually every ski area water right in Colorado and the cases involving those water rights. There has not been a single instance where the 2004 water clause was in conflict with or caused a problem with respect to Colorado law. That statement by Mr. Ryberg was simply untrue as were many of the other allegations in his letter.

I felt it important to set the record straight on this important matter.

Sincerely,



Glenn E. Porzak

Enclosure

cc w/encl:

Mr. Ed Ryberg
Senator Michael Bennet
Governor John Hickenlooper
Geraldine Link, National Ski Areas Association
Jason Blevins



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Department of
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Forest
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Route To: (2700 Ski Area Management)

Date: August 18, 2003

Subject: Rocky Mountain Region Water Rights Ownership Clause

To: Director, Recreation Heritage and Wilderness, Southwest Region

The purpose of this memo is to clarify the intent of the water rights ownership clause approved for use in ski area authorizations issued in the Rocky Mountain Region (R-2).

The National Forest Ski Area Permit Act of 1986 (the 1986 Act) and its implementing regulations direct the Forest Service, with the consent of ski area permit holders, to convert existing ski area authorizations into authorizations issued pursuant to this act. Agency policy in the Forest Service Special Uses Handbook directs that such new authorizations be issued on Standardized Form FS-2700-5b. This standardized form includes a standardized condition, or clause, which states:

"This authorization confers no rights to water by the holder. Such rights must be acquired under State law".

The Special Uses Handbook also directs that a mandatory clause, X-99, be included in these authorizations (the national clause). This clause states:

"All water rights obtained by the holder for use on the area authorized must be acquired in the name of the United States".

To address concerns with the national clause expressed by ski areas converting to 1986 Act Authorizations, R-2, in consultation with our local Office of General Council (OGC), developed a regional clause (the R-2 clause) to replace the national clause in ski area authorizations issued in this region. This clause states:

"All water rights acquired or claimed by the holder during the term of this permit which involve diversion of water directly from National Forest System lands, to the extent the same are applied to beneficial uses on National Forest System lands authorized under this permit, shall be acquired by the holder and transferred to the United States. Such transactions are subject to the permit holders's right to use".



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This clause is more specific and/or detailed than the national clause in the following areas:

- The R-2 clause only applies to water rights acquired or claimed during the term of the permit. In other words, it only applies to water rights acquired after both the permit holder and the authorized officer have signed the permit. It does not apply to water rights acquired and put to beneficial use on the authorized area prior to the issuance of the permit, and accordingly it does not require permit holders to transfer water rights that were used for permitted purposes under prior authorizations.
- The R-2 clause only applies to water rights involving diversion of water directly from National Forest System (NFS) lands, and put to beneficial use on the NFS lands within the ski area permit boundary. It does not apply to water rights not involving diversions directly from NFS land or to water purchased from third parties such as municipalities or public utilities.
- Finally, the R-2 clause grants the permit holder the right to use the water rights they transfer to the United States, for permitted purposes, through the term of their authorization.

At the request of certain ski areas, and following consultation with the local OGC, the R-2 clause has been substituted for the national clause in several recently issued 1986 Act Ski Area Authorizations in both the Intermountain and Pacific Southwest Regions.

At the present time we are working with the National Ski Areas Association (NSAA) and OGC to draft a new national clause to address contemporary ski industry concerns with both the national and R-2 clauses. Upon approval, we will include the new clause in all new ski area authorizations and amend existing permits, replacing the existing water rights clause with the new clause, upon request from permit holders.

Hopefully this clarification will prove helpful. If you have any questions or concerns, please feel free to contact me at 303-275-5060.

ED RYBERG
National Winter Sports Team Leader

CC: Ken Karkula, WO – RH&WR
Lois Witte, Denver; OGC
Geraldine Link, NSAA