

Ski resorts win water rights case against USFS

By Jason Blevins, Denver Post

A U.S. District judge on Wednesday overturned a controversial new water law requiring ski area permit holders on public land to turn over water rights to the Forest Service.

Judge William Martinez ruled that the Forest Service's revision of 2011 and 2012 permit regulations governing water rights violated federal procedural rules, failed to evaluate economic impact and violated ski area rights.

Martinez sided with the National Ski Areas Association, which was suing the Forest Service over the new water rights permit rules, ordering the agency to not enforce the terms of the new rules. Martinez remanded the issue back to the Forest Service.

If the agency chooses to revive the issue, NSAA public policy director Geraldine Link said would "definitely be a more public process."

"I think a lot of different entities will weigh in this time. This had much broader issues than just the ski industry. I don't expect the Forest Service will issue the same clause next time around," she said. "This really threatened the administration of state water law and I would be surprised if the state didn't weigh in."

The Forest Service argued that the new clause – which required ski area permit holders to transfer water rights secured by areas operating on public land to the federal government – kept the natural resource connected to the land. In mid-November oral arguments before Martinez, the Forest Service argued it merely returned permit water policy to long-held conditions imposed before a 2004 change in the rules.

Still, Martinez's ruling noted that during the last three decades, the Forest Service "did not follow a uniform policy and did not require federal ownership of water rights in all ski area permits."

The agency said it changed the permit requirements to assure that ski areas never sold water rights connected to federal land.

"It's a monetary calculation," Department of Justice attorney Clay Samford argued in the Nov. 15 hearing. "As the value of these rights increases, it may make economic sense for ski areas to sell some rights off."

The NSAA argued that the agency violated the Federal Administrative Procedural Act by not soliciting public input on the new rule. The association's January 2012 lawsuit also argued the new water regulations violated the National Forest Management Act and the Regulatory Flexibility Act. The NSAA said the agency water rules impacted 121 ski areas in 13 Western states.

The Forest Service admitted it did not follow the public review and comment guidelines of the Administrative Procedural Act because the new water rules were simply a regulatory tweak, not a consequential legislative rule change.

Martinez, who in October last year cited improper environmental review in ordering the U.S. Department of Energy to stop permitting uranium mining and milling at 31 leased sites in western Colorado, ruled the Forest Service violated all three regulatory acts when it issued the new water rule.

Martinez's decision only addresses the Forest Service's procedural deficiencies when it crafted the new water directives. He did not rule on the NSAA's substantive claims, specifically that the agency should not condition ski permits on the transfer of water rights obtained through a state process.

The Forest Service midday Wednesday was checking on a response to Martinez's ruling.

Colorado plays a large role in the water issue, said Melanie Mills, whose Colorado Ski Country trade group includes 21 of 25 of the state's ski areas. She said ski areas were ready to work with the agency to forge water rights rules that did not impact water purchased off federal lands but used on federal lands.

"There is plenty of room for agreement. Plenty of common ground," Mills said. "Our belief is that the focus should be on the water on the permit area itself. Talking about water that a permittee might divert from other areas off-permit or might purchase or lease through other arrangements, that gets into area that folks beyond ski areas will be worried about."

Wednesday's ruling is not that surprising. At the Nov. 15 hearing, Martinez grilled Forest Service attorneys on the idea that a ski area would sell essential water rights.

"Why would a ski area sell off water rights and leave itself with insufficient water to operate a ski area?" he said. "Then you are not a ski area anymore."