



**STATEMENT OF GARY DERCK, CEO OF DURANGO MOUNTAIN RESORT
BEFORE THE HOUSE SUBCOMMITTEE ON WATER AND POWER
OVERSIGHT HEARING ON IMPEDIMENTS TO WATER RIGHTS, JOB CREATION AND RECREATION:
A LOCAL'S PERSPECTIVE – APRIL 25, 2013**

Testimony

Thank you for the opportunity to testify today on behalf of Durango Mountain Resort (DMR), a small, but vibrant mountain resort in southwestern Colorado and the Four Corners region, just outside of historic Durango, Colorado. We are one of the largest employers in our region (especially in the winter months), with our primary recreational business providing alpine skiing, Nordic skiing, snowmobiling, snowshoeing, tubing/sledding, and related activities in the winter months. We also provide mountain-biking, alpine slide, zipline, hiking, fishing, a classical mountain music festival, and related activities in the summer months. At full build-out, our resort community will contain approximately 2,000+/- homes and support 400,000+/- winter recreational visits, 200,000+/- summer recreational visits, and employ over 1,200+/- employees. Thus, we are an important economic development contributor to Durango (population = 17,000+/-) and La Plata County (population = 52,000+/-), Colorado.

DMR has been a good environmental citizen both regionally and locally ... and has consistently managed its water resources and those of its neighboring U.S. Forest Service (USFS) lands with proper stewardship and care. Our resort and resort community are made up of 600+/- acres of private lands and a 2,500+/- acre special use permit area on federal (USFS) land (under a 40 year permit valid through 2048). As part of the planning process for the resort and resort community, DMR (and its predecessors) developed a portfolio of water rights decreed in Colorado Water Court on both the front (Purgatory Creek / Highway 550) and back-side (Hermosa Creek) of the resort. DMR also created a sophisticated Water Master Plan that was approved and adopted by La Plata County, San Juan County and the Purgatory Metropolitan District (our local, municipal water provider) that identified multiple/redundant water sources for the resort/community including potable (drinking) water and non-potable (snow-making/irrigation) water through build-out. As part of our resort community approvals process, we cooperated with the Colorado Water Conservation Board in retiring various storage rights with the express purpose of protecting Hermosa Creek. We also participated in the Hermosa Creek workgroup and support the special management area provisions in the Hermosa Creek Watershed Protection Act of 2012 (sponsored by Senator Bennett). We have been an active participant in local watershed protection projects including our current partnership with USFS, Mountain Studies Institute (MSI), and numerous local environmental groups on the Chattanooga and Ophir high-elevation fen restoration projects in the San Juan Mountains. And we have implemented many water conservation projects throughout our resort/ community.

A few years ago, the policies of the USFS took a distinct and concerning change of course. Local USFS officials began telling us that they were no longer in charge of making decisions relative to water rights and water access ... and that direction/decisions on these matters was now coming from “higher up in the Forest Service”. First, the permitting of a back-side test well designed to provide redundant potable and non-potable water for the resort/ community was placed into a bureaucratic “black hole” as the USFS failed to accept our application and would not provide clear direction on how we could address/resolve these concerns (despite significant expense and many years of studies and correspondence). Next, the USFS imposed by-pass flow requirements on the Cascade Creek Pipeline (our primary front-side source of snowmaking water) sufficient to reduce flows in the pipeline to just 5% of our historical snowmaking water demand. While we protested these restrictions, our concerns were never acknowledged. And most recently, the Department of Justice (DOJ), acting presumably under the direction of the USFS, filed a statement opposing a standard diligence renewal application for our back-side water rights claiming DMR should lose its vested water rights because it will never be granted access to these existing private rights on federal lands.

This recent action is the most concerning because: 1) the water rights were adjudicated 30 – 40 years ago by the Colorado Water Court without opposition by USFS; 2) the water rights were originally decreed either on a private ranch owned by our predecessors or within the ski area boundaries; 3) after USFS stipulated to some of the water rights in 1977, it never filed any opposition nor made any claims of access concerns for previous diligence renewal applications that we filed repeatedly with the Water Court on these or similar water rights; 4) the private ranch on which many of these water rights were located was exchanged with USFS by our predecessors in the early 1990s and which land exchange specifically did not include transfer of the water rights in question; 5) these water rights are located in close proximity to existing USFS roads that DMR currently uses to access/maintain our ski operation facilities (so access is convenient and feasible); and 6) the USFS/DOJ did not identify any concerns related to how accessing our private water rights might impact environmental resources ... instead, they simply stated that no access would ever be granted.

As I am sure the Committee is aware, Colorado state law governs the acquisition of property within Colorado by the United States. Water rights are property rights in Colorado. Further, under Colorado law, a presumption exists that whenever property is reserved from a conveyance, the party retains, by implication, what is necessary for the beneficial use of the property it did not convey. This law is fully applicable to water rights and creates an implied easement, where necessary, for access, diversion and delivery of retained water rights. In our instance, an implied easement arose by necessity when our Hermosa Creek Water Rights were severed from the surface estate subject to the land exchange. The importance of allowing landowners easement rights to access their decreed sources of water is well recognized in Colorado. And consistent with the easements recognized by Colorado law, federal law also requires access to privately owned property rights within the National Forest System under the Alaska National Interest Lands Conservation Act, Federal Land Policy and Management Act, and related case law. Our position is that if the United States did not want DMR to access its retained water rights, then it needed to purchase those water rights along with the land as part of the land exchange.

Apart from the obvious “taking” issue of our private water rights, we are concerned that it appears that our local USFS representatives have been directed to “stand down” and stop

working collaboratively with us to help us with what we need to continue to make snow, operate/improve our business, maintain/grow our employment, and provide the recreational activities and services we currently provide for the Four Corners region and the town of Durango.

Attached is a copy of a recent Special Use Permit application we have submitted to the USFS in an effort to get the agency to acknowledge our access rights to our private water rights and to address the extreme hardship their recent top-down water policies present to the ongoing viability of our resort/community. We hope this testimony will help the Committee realize that the USFS's claims that their recent policies, directives and actions are to "protect" the water rights of recreational and agricultural interests could not be further from the truth. Instead, we believe the USFS is using their federal position to try to usurp state water law and take private water rights/supplies. In the case of DMR, the agency's actions have placed our resort/community in extreme jeopardy and are sequentially eliminating the critical water resources necessary to operate our resort.

Thank you for your consideration of this testimony. If further information, clarification or details are needed, please do not hesitate to contact me directly at:

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