



[3410-11]

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596-AD13

Proposed Directive for Additional Seasonal or Year-Round Recreation Activities at Ski Areas

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed directive; request for public comment.

SUMMARY: The Forest Service is proposing to revise its directives for ski areas authorized under the National Forest Ski Area Permit Act of 1986 (Ski Area Permit Act) (16 U.S.C. 497b) to provide additional guidance for implementing the 2011 amendment to this Act, known as the Ski Area Recreational Opportunity Enhancement Act (SAROE) (Pub. L. 112-46, 125 Stat. 538). Current directives limit the criteria for determining whether additional seasonal and year-round recreation activities may be approved at ski areas to those listed in SAROE. The proposed directives would add criteria to help Authorized Officers determine whether proposals for these activities are consistent with SAROE. The proposed directive also would provide guidance on non-exclusive use at ski areas, that is, recreational use at ski areas, such as snowshoeing or cross-country skiing, by the non-paying public. Furthermore, the proposed directive would clarify policy regarding advertising. Timely comments will be considered in the development of the final directive.

DATES: Comments must be received in writing by [insert date 60 days from date of publication in the **FEDERAL REGISTER**].

ADDRESSES: Submit comments electronically by following the instructions at the Federal eRulemaking portal at <http://www.regulations.gov>. Comments also may be submitted by mail to USDA Forest Service Ski Area Comments, Pacific Southwest Regional Office, 1323 Club Drive, Vallejo, CA 94592. If comments are submitted electronically, duplicate comments should not be sent by mail. Hand-delivered comments will not be accepted, and receipt of comments cannot be confirmed. Please confine comments to issues pertinent to the proposed directive, explain the reasons for any recommended changes, and, where possible, reference the specific section and wording being addressed. All comments, including names and addresses when provided, will be placed in the record and will be made available to the public for review and copying. Those wishing to review comments should call Sean Wetterberg at 707-562-8842 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Sean Wetterberg, Acting National Winter Sports Program Manager, 707-562-8842. Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at 800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Daylight Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

1. Background and Need for the Proposed Directive

Most of the 122 ski areas operating on National Forest System (NFS) lands in the United States are authorized under a special use permit issued per the Ski Area Permit Act. As originally enacted, the Ski Area Permit Act authorized Nordic and alpine skiing at ski areas on NFS lands. On November 7, 2011, Congress enacted SAROEA, which

amended the Ski Area Permit Act to authorize additional seasonal and year-round recreation activities and associated facilities that may be approved at ski areas. SAROEAE contains a non-exhaustive list of additional seasonal and year-round recreation activities and associated facilities that may, if certain criteria are met, be approved and a non-exhaustive list of additional seasonal and year-round recreation activities and associated facilities that may not be approved at ski areas. On August 5, 2013, the Forest Service amended FSM 2340 to incorporate the self-executing portions of SAROEAE, that is, the list of additional seasonal and year-round activities and associated facilities that may be authorized at ski areas and the criteria that must be met for those activities to be authorized.

Summer uses at ski areas, both on private and NFS lands, have been increasing in recent years. This increase has been driven in part by new technologies and by the growing number of people seeking recreation activities in more managed settings. Some of these summer uses, such as zip lines, canopy tours (often a combination of zip lines, suspension bridges, and belay points), and mountain bike parks, can be natural-resource based, encourage outdoor recreation and enjoyment of nature, and harmonize with the natural environment, consistent with SAROEAE. Other summer uses have facilities that are common at amusement parks, such as merry-go-rounds, Ferris wheels, miniature train rides, and roller coasters, that do not meet the criteria in SAROEAE. Given recent trends in use at ski areas, the Agency believes that it would be helpful to ski area permit holders and permit administrators to add criteria into policy for determining whether proposals for additional seasonal and year-round recreation activities and associated facilities are consistent with SAROEAE. The Agency also believes that it will be helpful to include the

list of additional seasonal and year-round recreation activities and associated facilities that are prohibited at ski areas based on the exclusions in SAROE. This list of prohibited activities and facilities is not included in the current directive (published August 5, 2013) because its purpose was to allow authorization of only those additional seasonal and year-round recreation activities and associated facilities that are specifically permitted under SAROE. Therefore, there was no need in the current directive to list additional seasonal and year-round recreation activities and associated facilities that are precluded under SAROE.

The Agency recognizes that additional seasonal and year-round recreation activities and associated facilities are important to the long-term viability of ski areas, and that the more managed outdoor recreation settings at ski areas could introduce urban-based population segments, especially youth, to outdoor recreation. This exposure could build a deeper appreciation for nature that could lead to further exploration of NFS lands beyond ski areas. Further guidance on authorization of additional seasonal and year-round recreation activities and associated facilities at ski areas will help permit administrators review proposals for these activities consistent with these objectives and SAROE.

Forest Service regulations and ski area permits provide that authorized uses of NFS lands are not exclusive, and that the Forest Service may require common use of the lands or use by others in any way that is not inconsistent with the permit holder's rights and privileges, after consultation with all affected parties. Several ski areas on NFS lands have experienced a significant increase in the number of recreationists using snowshoes or cross-country skis or simply traveling on foot on slopes within ski areas. The Agency

has identified a need to address how this type of public use may be conducted efficiently and safely. Consequently, the proposed directives would provide guidance on recreational use at ski areas by the non-paying public.

2. Section-by-Section Analysis of Proposed Changes to FSM 2340, Publicly Provided Recreation Opportunities

2340.5 – Definitions

Definitions would be added for “amusement park,” “amusement park ride,” and “natural resource-based recreation” because they are used in the proposed directive to help determine what types of additional seasonal or year-round recreation activities and associated facilities are appropriate at ski areas. The definition for Terrain Park would be revised to add bicycles.

2343.03 – Policy (Concession Uses Involving Privately Developed Facilities)

Proposed Paragraph 11.d

The paragraph would be modified to add “business partners” to the list of entities that may display their name and logo on company vehicles.

Proposed Paragraph 11.f

The title and text would be revised to add “recreation events” to clarify that temporary approval of outdoor advertising is not limited to competitive events.

Proposed Paragraph 11.g

The text would be revised to add “race gates” to the locations where support for snow sport race courses and terrain parks may be recognized.

2343.11 – Policy (Ski Areas)

Proposed Paragraph 3

The list of allowable additional seasonal and year-round recreation activities and associated facilities in SAROEA that was included in this paragraph would be relocated to FSM 2343.14. New paragraph 3 would provide direction to encourage additional seasonal or year-round recreation opportunities at ski areas that connect visitors to the natural environment and that support the Forest Service's mission. This paragraph would establish a broad framework to guide proposals for additional seasonal or year-round recreation activities and associated facilities at ski areas.

Proposed Paragraph 4

The list of factors governing additional seasonal or year-round recreation activities and associated facilities that was included in this paragraph would be relocated to FSM 2343.14. New paragraph 4 would be added to clarify that ski area permit holders may be allowed to charge fees for use of improvements and services in which they have made capital investments, such as ski trails or other facilities they constructed, groom, or otherwise maintain, and to clarify that ski area permit holders may not be allowed to charge for use of non-motorized or motorized trails that are constructed and maintained by the Forest Service.

Proposed Paragraph 5

The text regarding utilization of existing facilities included in this paragraph would be relocated to FSM 2343.14. New paragraph 5 would preclude authorization of an entrance fee at ski areas, and would allow authorization of fees for facilities and services the holders provide, such as lifts, parking lots, and slopes and trails that have been cleared, graded, groomed or covered with manmade snow. Additionally, this paragraph would encourage authorized officers to ensure that some portions of the permit

area remain open to the public without charge, so that the holder's charges do not constitute de facto entrance fees.

Proposed Paragraph 6

The text regarding the basis for modifying acreage under a ski area permit that was included in this paragraph would be relocated to FSM 2343.14. New paragraph 6 would direct Authorized Officers to ensure that ski area operations comply with Forest Service regulations and permit requirements for non-exclusive use and that ski areas remain open to the non-paying public for all lawful uses that are not inconsistent with the holder's rights and privileges. Additionally, this paragraph would require documentation in the operating plan of authorized restrictions on use by the non-paying public and posting of those restrictions in locations where they would be effective in informing the public. This paragraph also would provide that in most cases it would not be appropriate for restrictions to preclude all public use during the ski season other than by those purchasing a lift ticket or paying for other services.

2343.14 – Additional Seasonal or Year-Round Recreation Activities and Associated Facilities at Ski Areas

Proposed Paragraph 1

Paragraph 1 would include criteria in addition to those enumerated at 36 CFR 251.54(e)(1) to be applied during initial screening of proposals involving additional seasonal or year-round recreation activities and associated facilities at ski areas. These additional initial screening criteria include all the requirements in SAROEA that must be met for authorization of additional seasonal and year-round recreation activities and associated facilities at ski areas, except for consistency with applicable law and the

applicable land management plan. These additional criteria include not changing the primary purpose of the ski area to other than snow sports; encouraging outdoor recreation and enjoyment of nature and providing natural resource-based recreation opportunities; to the extent practicable, being located within the developed portions of the ski area or areas that will be developed pursuant to a master development plan; and, to the extent practicable, harmonizing with the natural environment of the site where they would be located. Including consistency with applicable law and the applicable land management plan in paragraph 1 would be redundant, as this criterion is already included in initial screening of special use proposals under 36 CFR 251.54(e)(1)(i) and (e)(1)(ii). The requirement “to the extent practicable, to be located within the developed portions of the ski area” was modified to require, to the extent practicable, location within the portions of the ski area that are developed or that will be developed pursuant to the master development plan. Locations in a ski area that are zoned for development pursuant to a master development plan may become developed portions of the ski area.

In addition, the Agency is proposing to clarify what is meant by harmonizing with the natural environment of the site where the proposed activities would be located by providing that they must:

- (1) Be visually subordinate to the ski area’s existing vegetation and landscape,
and
- (2) Not require significant modifications to topography to facilitate construction or operations.

The Agency is also proposing to add that the proposed additional seasonal or year-round recreation activities and associated facilities must:

- (1) Be consistent with the level of development for snow sports and the zoning established in the ski area's master development plan;
- (2) Not compromise snow sports operations or functions; and
- (3) Increase utilization of snow sports infrastructure and not require extensive new support facilities, such as parking lots, restaurants, and lifts.

These additional criteria are consistent with the criteria in SAROE A. Consistency with the master development plan is akin to consistency with the applicable land management plan. Since SAROE A provides that snow sports must remain paramount at ski areas on NFS lands, additional seasonal and year-round recreation activities and associated facilities must not compromise snow sports operations or functions. Requiring that proposals for these activities increase utilization of snow sports infrastructure and not require extensive new support facilities is consistent with the requirements not to change the primary purpose of the ski area to other than snow sports and to be located in the developed portions of the ski area. Thus, these additional criteria would assist ski area permit holders in developing proposals for these activities that meet the requirements of SAROE A and would assist Authorized Officers in evaluating these proposals consistent with SAROE A.

Proposed Paragraph 2

This paragraph lists the four additional seasonal or year-round recreation activities and associated facilities enumerated in SAROE A (zip lines, mountain bike terrain parks and trails, Frisbee golf courses, and ropes courses) that may be approved if they meet the criteria in proposed paragraph 1. This list is not exhaustive. Other additional seasonal or year-round recreation activities and associated facilities may meet the criteria in proposed

paragraph 1.

Proposed Paragraph 3

This paragraph lists the five additional seasonal or year-round recreation activities and associated facilities enumerated in SAROEA (tennis courts, water slides and water parks, swimming pools, golf courses, and amusement parks) that may not be approved at ski areas on NFS lands. This list is not exhaustive. Other additional seasonal or year-round recreation activities and associated facilities may not meet the criteria in proposed paragraph 1.

Proposed Paragraph 4

This paragraph would enumerate a non-exhaustive list of factors that may affect whether other additional seasonal or year-round recreation activities and associated facilities besides those listed in paragraph 2 may be approved, including but not limited to extensive use of synthetic materials, the degree to which visitors are able to engage with the natural setting, the extent to which the activity could be expected to lead to further exploration and enjoyment of other NFS lands, and the similarity of the activities and associated facilities to those enumerated in paragraph 2 or paragraph 3. These factors would assist in application of the criteria in paragraph 1 and would help establish similarity to activities and associated facilities listed in paragraph 2 or paragraph 3. For example, extensive use of synthetic materials and the extent to which an activity and associated facilities could be expected to lead to further exploration and enjoyment of other NFS lands may affect whether a proposed activity and associated facilities would encourage outdoor recreation and enjoyment of nature, provide natural resource-based recreation opportunities, and harmonize with the natural environment. The speed at

which visitors travel and are able to engage with the natural setting may affect whether a proposed activity and associated facilities are more like a zip line or more like an amusement park ride.

Proposed Paragraph 5

Consistent with the requirement in SAROEA that additional seasonal and year-round recreation activities and associated facilities provide natural resource-based recreation opportunities, paragraph 5 would provide that attributes common in national forest settings must be essential to the recreation experience provided by additional seasonal and year-round recreation activities and associated facilities.

Proposed Paragraph 6

This paragraph would allow temporary activities at ski areas that rely on existing infrastructure, such as concerts and weddings, even if they are not necessarily dependent on but could be enhanced by a National Forest setting. This paragraph also would preclude authorizing new facilities solely for these temporary activities.

Proposed Paragraph 7

Paragraph 7 would encourage holders to utilize existing facilities to provide additional seasonal or year-round recreation activities. This paragraph was previously codified at FSM 2343.11, paragraph 5.

Proposed Paragraph 8

This paragraph would provide for utilization of master development plans to guide the placement and design of additional seasonal or year-round recreation facilities. Additionally, this paragraph would require the following three steps to be followed as part of the master development planning process, in this sequence: (1) establish zones to guide placement and design of additional seasonal or year-round recreation facilities,

basing the zones on the existing natural setting and level of development to support snow sports, (2) depict the location of the facilities, and (3) establish a timeframe for their construction. These requirements would provide a consistent planning framework for the development of additional seasonal or year-round recreation facilities, thereby avoiding piece-meal development, and would ensure that the level of development supporting snow sports is not exceeded by the level of development supporting facilities for additional seasonal or year-round recreation activities.

Proposed Paragraph 9

Paragraph 9 would provide for use of the Forest Service's Scenery Management System (FSM 2380), Built Environment Image Guide (Publication FS-710), and Recreation Opportunity Spectrum (FSM 2310) to ensure that additional seasonal or year-round recreation activities and associated facilities are located and constructed to harmonize with the surrounding natural environment.

Proposed Paragraph 10

Consistent with SAROEA, this paragraph would provide that authorization of additional seasonal or year-round recreation activities and associated facilities is subject to terms and conditions deemed appropriate by the authorized officer. This provision was previously codified at FSM 2343.11, paragraph 4c.

Proposed Paragraph 11

Consistent with SAROEA, paragraph 11 would provide that the acreage necessary for additional seasonal or year-round recreation activities and associated facilities may not be considered in determining the acreage encompassed by a ski area permit and that permit area expansions must be based on needs related to snow sports rather than

additional seasonal or year-round recreation. This provision was previously codified at FSM 2343.11, paragraph 6.

Proposed Paragraph 12

Consistent with SAROEA, this paragraph would provide that additional seasonal or year-round recreation activities and associated facilities that were authorized before enactment of SAROEA and that do not meet the criteria in the preceding paragraphs of FSM 2343.14 may continue to be authorized during the term of the current permit. Also consistent with SAROEA, this paragraph would provide that when the current permit terminates or is revoked, these non-conforming activities and associated facilities may not be reauthorized.

Proposed Paragraph 13

Consistent with SAROEA, this paragraph would provide that proposals for additional seasonal and year-round recreation activities and associated facilities at ski areas that comply with paragraphs 1 through 12 may be approved notwithstanding FSM 2340.3, paragraph 3, and 2343.03, paragraph 1, which preclude authorization of development on NFS lands if it could be provided on non-NFS lands in the vicinity.

3. Section-by-Section Analysis of Proposed Change to FSM 2710, Special Uses

2711.3 – Term Permits

A new subsection 2711.32 would be added, entitled Ski Area Term Permit, that would refer readers to FSM 2721.61e for more information on these types of permits.

4. Section-by-Section Analysis of Proposed Changes to FSH 2709.14, Recreation Special Uses Handbook

Chapter 10 – Organizational Camps and Other Privately Owned Improvements

13.2 – Policy

New paragraph 9 would be added to provide for the proposal, authorization, construction, operation, and maintenance of zip lines and ropes courses at organizational camps. This paragraph would also provide direction to require a site plan showing the placement of facilities and addressing how access will be restricted, require that design and construction conform to standards in FSM 7330, and require an operating plan that conforms to FSM 7330 and restricts access to these facilities to times of supervised operation. Additionally, a cross-reference to FSM 2340 and 7330 would be added for further guidance.

Chapter 60 – Winter Recreation Resorts and Other Concessions Involving Winter Sports

61.1 – Ski Area Term Permit

The heading for section 61.1 would be changed to “Ski Area Term Permit” to clarify that ski area permits are term permits and to be consistent with the wording in FSM 2711.3. Consistent with SAROEA, paragraph 12 would be added to direct that the acreage necessary for additional seasonal or year-round recreation activities and associated facilities may not be considered in determining the acreage encompassed by a ski area term permit. Also, permit expansions would have to be based on needs related to snow sports rather than additional seasonal or year-round recreation.

5. Regulatory Certifications

Environmental Impact

These proposed directives would revise national Forest Service policy governing ski area permits issued under the Ski Area Permit Act. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Agency has concluded that these proposed directives fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

These proposed directives have been reviewed under USDA procedures and Executive Order (E.O.) 12866 on regulatory planning and review. The Office of Management and Budget has determined that these proposed directives are not

significant. These proposed directives would increase opportunities for recreation activities at ski areas consistent with SAROEA. These proposed directives would not have an annual effect of \$100 million or more on the economy, nor would they adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. These proposed directives would not interfere with an action taken or planned by another agency, nor would they raise new legal or policy issues. Finally, these proposed directives would not alter the budgetary impact of entitlement, grant, or loan programs or the rights and obligations of beneficiaries of those programs. Accordingly, these proposed directives are not subject to the Office of Management and Budget review under E.O. 12866.

Moreover, the Agency has considered these proposed directives in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). Pursuant to a threshold Regulatory Flexibility Act analysis, the Agency has determined that these proposed directives would not have a significant economic impact on a substantial number of small entities as defined by the Act because these proposed directives would not impose new record-keeping requirements on them; affect their competitive position in relation to large entities; or significantly affect their cash flow, liquidity, or ability to remain in the market.

To the contrary, these proposed directives would likely have a positive economic effect on ski areas and local communities because these proposed directives would enhance opportunities for recreation activities at ski areas. These benefits are not likely to alter costs to small businesses.

No Takings Implications

The Agency has analyzed these proposed directives in accordance with the principles and criteria contained in E.O.12630 and has determined that these proposed directives would not pose the risk of a taking of private property.

Civil Justice Reform

The Agency has reviewed these proposed directives under E.O. 12988 on civil justice reform. If these proposed directives were adopted, (1) all State and local laws and regulations that conflict with these proposed directives or that would impede their full implementation would be preempted; (2) no retroactive effect would be given to these proposed directives; and (3) they would not require administrative proceedings before parties may file suit in court challenging their provisions.

Federalism and Consultation and Coordination with Indian Tribal Governments

The Agency has considered these proposed directives under the requirements of E.O. 13132 on federalism and has concluded that these proposed directives conform with the federalism principles set out in this E.O.; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary at this time.

Moreover, these proposed directives do not have tribal implications as defined by E.O. 13175, entitled “Consultation and Coordination With Indian Tribal Governments,” and therefore advance consultation with Tribes is not required.

Energy Effects

The Agency has reviewed these proposed directives under E.O. 13211, entitled “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The Agency has determined that these proposed directives do not constitute a significant energy action as defined in the E.O.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Agency has assessed the effects of these proposed directives on State, local, and Tribal governments and the private sector. These proposed directives would not compel the expenditure of \$100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

These proposed directives do not contain any new record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Any information collected from the public that would be required by these proposed directives have been approved by the Office of Management and Budget and assigned control number 0596-0082. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

4. Access to the Proposed Directive

The Forest Service organizes its directive system by alphanumeric codes and subject headings. The intended audience for this direction is Forest Service employees charged with issuing and administering ski area permits. To view these proposed directives, visit the Forest Service's web site at <http://www.fs.fed.us/specialuses>. Only the sections of the FSM that are the subject of this notice have been posted, that is, FSM 2340.5, Definitions; FSM 2343.11, Policy; 2343.14, Additional Seasonal or Year-Round Recreation Activities and Associated Facilities at Ski Areas; FSM 2711.32, Ski Area Term Permit; FSH 2709.14, chapter 10, section 13.2; and FSH 2709.14, chapter 60, section 61.1.

Thomas L. Tidwell,
Chief,
U. S. Forest Service.

Dated: September 26, 2013.

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