

Managing Hotspots in Wildfire Risk at Public Lands Ski Areas

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This article addresses proactive fire prevention efforts that ski areas can take to lessen financial impacts from forced closures and evacuations as well as potential wildfire-related liabilities.

Visits to public lands—many of which include a visit to a ski area—have increased by about 15% over the last decade.¹ During that same period, the frequency and intensity of wildfires in the American West have also increased, fueled by climate change and a reckoning of decades of fire suppression.² Compounding the financial strain of wildfires, the ski area industry lost an estimated \$2 billion when COVID-19 clipped the 2019–20 ski season short, and the challenges continue as resorts attempt to operate while keeping guests safe and complying with pandemic-related restrictions.³

This article surveys the landscape of ski area management with a focus on the challenges facing ski areas in managing wildfire risks. It covers the legal framework governing fire mitigation projects on public lands and proposes measures ski areas can take to meet their legal obligations, build relationships with decision makers, increase preparedness in the event of a wildfire, and, ultimately, reduce their risk.

Public Lands Ski Areas

Federal public lands make up nearly half of the total land area of the American West.⁴ In terms of land management, ski areas account for only a minute portion of a much vaster system—one tenth of one percent of all national forest lands—but in managing the impacts of human use, ski resorts require a great deal of attention.⁵ And they drive revenue. Ski areas pay \$37 million in annual rental payments to the US Forest Service (Forest Service), the managing federal agency, and contribute billions of dollars each year to the economy.⁶ The unique history of this ski area/agency partnership has resulted in challenges that require attention and resources to address the growing threat of wildfire.

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Managing the Ski Areas

Relatively remote western national forest lands offer ideal mountain terrain for ski areas. Indeed, after hiking, downhill skiing/snowboarding is the second most popular use of national forests.⁷ Of the 160 ski areas that operate in the American West,⁸ 122 of them operate on Forest Service land.⁹ As a result, there is a long history of agency management of skiing and other alpine sports on public lands.

For most of the twentieth century, the permitting process for ski areas on public lands was, in the Forest Service’s own words, both “cumbersome and confusing.”¹⁰ In the 1960s and 1970s, Congress increasingly endorsed a multiple-use philosophy for public lands, giving the Forest Service greater discretion in management.¹¹

To simplify the permitting process for ski areas and to balance competing management interests, Congress passed the National Forest Ski Area Permit Act of 1986 (the 1986 Act),¹² which established a single, more streamlined permitting process for ski areas on national forest lands, allowing the Forest Service to issue 40-year special-use permits (SUPs) for ski area operations.¹³

Expanding Summer Operations

Starting in the early 2000s, ski areas began to shift their formerly winter-dependent business model by installing or increasing summer operations.¹⁴ Several considerations drove this shift. Changing climate patterns have led to unpredictable snowpack levels from year to year,¹⁵ causing swings in revenue as ski seasons vary in quality and length.¹⁶ By 2050, the winter season at ski areas could be reduced by as much as a third, an issue that snowmaking cannot sustainably solve.¹⁷ Many ski areas have filled that gap with increased summer activities to round out their annual revenues.¹⁸

Initially, as ski areas developed summertime recreational offerings, the extent of the Forest Service’s authority over these additional activities was uncertain.¹⁹ While permits for these activities were largely approved at the discretion of the Forest Service, the 1986 Act expressly allowed for only Nordic and alpine skiing, not activities like mountain biking, ziplining, or other summer recreation.²⁰ In response,

Congress enacted the Ski Area Recreational Opportunity Enhancement Act of 2011. This legislation allowed ski areas on federal lands to offer summer activities without the burden of obtaining new permits and, as a result, expanded opportunities for ski areas to offer recreational activities year-round.²¹

Ski areas have benefited from investing in more summer infrastructure and staffing, and they now host hundreds of thousands of visitors each summer who infuse millions into ski town economies during what was once the off season.²² For example, at Utah’s Sundance Mountain Resort, the summer of 2015 was more profitable than any previous winter.²³ Even before accounting for summer activities, the ski industry is a powerful economic driver, contributing approximately \$29 billion to the country’s gross domestic product.²⁴ The ski industry in Colorado alone generates nearly \$5 billion annually, a significant economic impact to the state.²⁵ With summer offerings increasing, the economic force of ski areas will likely remain significant, despite the impacts of the COVID-19 pandemic on the industry.

Climate Change and Poor Wildfire Management

The catastrophic 2020 wildfire season (a season is defined as the range between what is typically the year’s first large fire to the year’s last) was a powerful reminder that the changing climate is affecting the American West in many ways.²⁶ Increasing average temperatures, extreme variances in precipitation levels from year to year, more frequent and intense droughts, and more severe weather events will present ongoing challenges for mitigation and adaptation.²⁷ One of these challenges, wildfire, is the perennial bane of the American West.²⁸ Eight of the top 10 most wildfire-prone states—Arizona, California, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming—are Western states with significant ski area operations on public lands.²⁹

In addition to climate change, years of poor forest management have contributed to an increase in the frequency and intensity of wildfires. Decades of fire suppression, once practiced as part of normal forest management and made famous by the mascot “Smokey Bear,”³⁰

have created unmanageable swaths of dense fuel.³¹ Without natural burns to periodically clear downed trees and brush, national forest lands have become tinder boxes. And climbing annual temperatures have increased the length

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of summers and the number of hot days, drying out fuel.³² As a result, wildfires have become larger, hotter, and more destructive than ever.³³

The increase in wildland-urban interface (WUI) (the area where human development

meets the forest) across the West further contributes to the growing destructive power of wildfire.³⁴ From 1990 to 2010, WUI grew dramatically in terms of the number of new houses in the interface (41%) and land area classified as WUI (33%).³⁵ In Colorado, the number of people living in WUI increased by 45% from 2013 to 2018.³⁶ The growth in WUI means that firefighting must increasingly focus on structure protection, causing shifts in technique and planning.³⁷

At the same time, the Forest Service has struggled to meet the demands of fighting fire on the millions of acres of Western public lands.³⁸ Wildland fire management comprises 45% of the Forest Service’s 2021 budget request, compared to only 16% of the agency’s budget in 1995.³⁹ In 2017—the Forest Service’s most costly fire season to date⁴⁰—the agency spent more than \$2.4 billion on fire suppression.⁴¹ This focus on firefighting has diverted funding from the Forest Service’s other programs, including, ironically, fire mitigation initiatives.⁴² To address this issue, in 2018 Congress passed a “fire fix,” granting the Forest Service and Department of the Interior (DOI) authority to tap into additional funds (\$2.35 billion in 2021) when wildfire suppression funding is exhausted.⁴³ But even with the fire fix, wildfire management costs dominate the Forest Service’s discretionary budget,⁴⁴ and non-fire Forest Service personnel have decreased by 39% since 1995.⁴⁵ And, for the foreseeable future, the demand for firefighting is not going away. Since 2010, an average of more than 64,000 wildland fires have burned about 6.5 million acres of land in the US annually, and about 63 million acres of national forest lands are “at risk of uncharacteristically severe wildfires.”⁴⁶

Ski areas are at the center of these concerns, regardless of good snow seasons, as climate impacts are felt regionally. In June 2019, for example, snowpack in high elevations in the American Rocky Mountains was much higher than average, reducing fire danger in these areas.⁴⁷ At the same time, the Canadian Rockies in Alberta burned, and fire activity there was at or above average for that same period.⁴⁸ With increasing summer activities and a shift toward year-round business models, the economic risk to ski areas from wildfires will only grow,

whether or not the inches of snow pile up during the winter.

The Legal Framework for Wildfire Risk Mitigation

Ski areas operating on national forest lands must adhere to extensive federal laws and regulations. The most prominent and demanding are the procedural requirements of the National Environmental Policy Act (NEPA).⁴⁹ NEPA requires the Forest Service and other federal agencies to consider environmental impacts before approving activities such as wildfire mitigation projects by private parties on federal land. The level of analysis and documentation that NEPA requires depends on a project's scope, complexity, and potential impacts.

Typically, an agency must prepare an Environmental Assessment (EA) to determine whether a proposed action is likely to have a significant effect on the environment. If so, the agency must then prepare a lengthier Environmental Impact Statement (EIS) analyzing the effects of the proposed action in comparison to alternatives.⁵⁰ The EA and EIS processes can take months, if not years, to complete. Some activities, however, do not require full NEPA review because they are subject to a categorical exclusion (CE).⁵¹ These activities do not require an EA or EIS because the agency has previously determined that they do not have a significant effect on the environment.⁵²

Using a CE for small-scale wildfire mitigation projects can save time and money.⁵³ For larger wildfire mitigation projects, Congress enacted the Healthy Forests Restoration Act (HFRA) to speed up the regulatory process.⁵⁴ HFRA aims to accelerate wildfire mitigation activities through (1) categorical exclusion of qualifying activities and (2) expedited NEPA review of hazardous fuel reduction projects that do not qualify for a CE.

CEs that may apply to wildfire mitigation projects include:

- harvest of trees in areas not more than 250 acres to control insects or disease,⁵⁵ or to salvage dead or dying trees;⁵⁶
- timber stand improvement activities, including thinning, brush control, and prescribed burning;⁵⁷

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- harvest of live trees not to exceed 70 acres;⁵⁸
- “hazardous fuel reduction projects” in certain national forest areas,⁵⁹ including prescribed fire, mechanical thinning, and installation of fire breaks;⁶⁰ and
- projects to address insect or disease infestation.⁶¹

In addition to an expedited review process, qualifying hazardous fuel reduction projects that do not meet the criteria for a CE receive

preferential treatment because HFRA relaxes NEPA's requirement that the agency analyze project alternatives.⁶²

In June 2019, the Forest Service announced a proposal to streamline NEPA procedures in an effort to increase efficiency.⁶³ Over a year in the making, the NEPA rule was finalized on November 19, 2020.⁶⁴ The Forest Service rule adds new CEs and expands existing ones, including a CE that covers special uses of National Forest lands requiring less than 20 acres of land.⁶⁵ This CE is intended to cover fire mitigation, among other activities.⁶⁶ The new rule could help reduce administrative expenses and streamline approval processes as ski areas look to reduce their wildfire liability and take steps to mitigate wildfire risk.

Analyzing and Mitigating the Risks

A wildfire, like any natural disaster, has wide-ranging impacts. For ski areas, three categories of risk may be particularly detrimental: legal liability for ignition of a wildfire, temporary closure of a ski area due to a nearby blaze, and damage to difficult-to-replace infrastructure and assets. There are several mitigation measures that ski areas can undertake to manage these risks.

Civil and Criminal Liability

Given that ski areas span large swaths of forested lands likely to include dry fuels, resort operators must take care to ensure that their workers operate responsibly with respect to fire risk. A wildfire sparked by the conduct of a ski area employee or contractor can expose the operator to significant liability.

Those whose property is damaged by a wildfire started by a ski area's operations have a wide variety of claims for damages available to them. Depending on the circumstances, a ski area could be held civilly or criminally liable for starting a wildfire.⁶⁷ State statutes typically limit liability to fires started with specific degrees of culpability, that is, intentional, reckless, or negligent behavior. But the inquiry as to a party's culpability is fact-specific and typically entails expensive litigation, so a resort is likely to expend significant resources defending itself, even if it ultimately prevails in a lawsuit. Additionally, both federal and state governments may seek

to hold parties liable for firefighting expenses, which can climb into the millions.⁶⁸

A damages award against a private party that starts a wildfire can be expensive. For example, the Forest Service, State of California, and private parties sued a logging company and its contractor for more than \$1 billion after inspectors concluded that a bulldozer operator negligently caused a wildfire by striking a rock.⁶⁹ That fire burned 65,000 acres, including more than 46,000 acres of National Forest land. Although a judge dismissed the state's lawsuit, the companies eventually settled with the federal government for about \$122.5 million.⁷⁰ The US Attorney's Office for the Eastern District of California alone has secured settlements for wildfire liability with private parties totaling \$200 million since 2012.⁷¹

Ski area operators should exercise diligence and care in developing the area's core operational framework. This includes thoroughly documenting wildfire risk management, implementing regular internal and external assessments, ensuring compliance with internal fire prevention policies, and continually evaluating areas of improvement. These steps should be taken throughout the development of fire mitigation and response planning and be part of standard employee training.

Ski areas should also invest in developing fire management plans. The plans should identify the wildfire risks particular to their resorts and define an approach to manage those risks. The overarching plan should include operational components targeting preparedness, emergency response, and prevention.⁷² Such plans, if made available to all employees and followed during a wildfire event, can help an operator demonstrate that it met the applicable standard of care. A plethora of resources for developing such plans exists that have already been used by several ski areas.⁷³ Additionally, hiring fire safety consultants to conduct regular fire risk assessments can further prove that the ski area is operating with reasonable care and diligence.⁷⁴ Ski areas can also implement fire alert procedures to improve response times to fires by both ski area employees and local fire responders.

To be effective, the above actions must be understood and implemented by employees.

Therefore, employee training should comprehensively address wildfire risk, prevention strategies, and alert processes. Each employee should have a thorough knowledge of the risk of wildfire ignition and his or her role in identifying

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In short, ski area operators can implement and document processes that demonstrate their care in understanding and preventing wildfire risk. These efforts will not only help the ski area respond effectively in the event of a wildfire but also help mitigate liability in later litigation.
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and reporting risks immediately. Regular training refreshers are advisable, particularly during the transitional periods between winter and summer operations.

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risk. These efforts will not only help the ski area respond effectively in the event of a wildfire but also help mitigate liability in later litigation.

Temporary Closures

Evacuations and closures during operating season can have substantial financial impacts as ski resorts miss out on revenue not only from on-mountain activities but also from resort-owned dining, lodging, and retail establishments.⁷⁵ In the arid West, multiple ski areas and their base villages have been evacuated due to wildfire.⁷⁶ During summer 2018, Arizona Snowbowl and Purgatory Resort in Colorado were both forced to shut down operations due to National Forest closures.⁷⁷ Red Lodge Mountain in Montana even experienced a wildfire evacuation *during* the ski season in 2015.⁷⁸

Flames do not need to reach a ski area's boundaries to trigger closures, nor does there need to be an active fire nearby.⁷⁹ The Forest Service has authority to close or restrict the use of National Forest land, roads, and trails due to wildfire risk, and they do not need input from resort ownership to do so.⁸⁰ However, because of their great impact on ski areas,⁸¹ closures are considered a measure of last resort, and Forest Service policy dictates closures for the smallest geographic area possible. They are only to be used when “high to extreme fire danger exists and is predicted to persist,” and most other prevention measures have already been taken.⁸²

When fire danger is high, land managers may impose fire restrictions before resorting to a closure. Stage 1 restrictions do not significantly impact ski area operations, beyond prohibiting campfires and outdoor smoking.⁸³ Stage 2 restrictions typically ban driving off established roads and could therefore impact summer maintenance and construction operations.⁸⁴ The Forest Service may exempt lessees or permittees from those restrictions, but exemptions are rare.⁸⁵

In determining when to institute fire restrictions or closures, agencies consider weather and fuel conditions, the availability of firefighting resources, and public safety.⁸⁶ These risk factors are balanced against socioeconomic considerations, including the impacts on tourism and permittees.⁸⁷ However, public and firefighter safety remain top priorities.

Because closure is a balancing consideration by the Forest Service and/or local authorities, ski area operators should establish a line of communication and a working relationship with these decisionmakers. Given the interplay among ski areas and local communities, it is important to develop the relationship between ski area operators and wildfire officials early and to strengthen it often. Also, some officials may think of ski areas as mostly seasonal economic drivers, so operators should provide officials with the average number of visitors by month and monthly revenue. This seasonal activity data can help officials weight the risks of closure against the risks of fire.

In addition to establishing informal lines of communication, ski areas should develop formal consultation protocols. For example, signing a memorandum of understanding or similar agreement with the local firefighting force as well as one with the Forest Service can solidify good existing practices or establish new ones. A resort's operations plan and/or its fire mitigation and suppression plan can include steps for notification and consultation during periods of potential closure.⁸⁸ Factors that ski areas should consider including in such agreements include points of contact, timing of notices, requirements for communicating with the ski area prior to closure, a timeline for closure decisions, parameters for closure enforcement, and other information beneficial to both firefighting officials and ski area operators.

Damage to Infrastructure

Infrastructure damage presents an increasingly significant risk to ski areas as they develop structures for summer activities—including facilities for ziplining, mountain coasters, and alpine slides—and maintain difficult-to-replace structures, such as ski lifts and slope-side lodges.

Some ski areas have already faced the worst case scenario of direct wildfire damage. Ski Apache in New Mexico lost three lifts and two structures and suffered damage to 65 acres of terrain during the 2012 Little Bear Fire. Fortunately, the resort had a fire plan in place and was able to deploy its snowmaking equipment to fight the fire.⁸⁹ Pajarito Mountain

Ski Area, also in New Mexico, was similarly impacted by wildfire in July 2011. The resort lost two lifts to the fire and was unable to replace them before the next ski season. The impacts of these fires lingered long after the flames were extinguished. Ski Apache was not able to complete restoration of the lands burned in 2012 until late 2018 due to the difficulty of operating heavy equipment on the resort's steep terrain.⁹⁰ Similarly, as recently as 2017, Pajarito was still feeling the effects of the fire. The resort had to close one lift for a month during ski season when a tree in the burn area broke and struck the line.⁹¹


Proactive fire mitigation tactics, including selective thinning of surrounding tree stands, clearing defensible spaces around structures, and maintaining access routes for firefighters all help ski areas reduce the risk of infrastructure damage. Under a variety of CEs discussed above, ski areas may use methods such as prescribed fire, mechanical thinning, and installation of fuel breaks and fire breaks without undergoing the full NEPA EA or EIS processes.

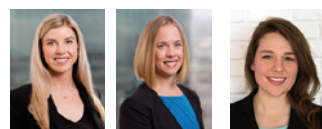
Additionally, consulting with experts on reducing wildfire risk helps with the development of robust plans. Wildland fire experts with the Forest Service, local fire departments, and private consulting firms can provide detailed, useful suggestions for mitigation measures. And conferring regularly with local firefighting experts may help the response effort if a fire erupts within the ski area itself.

For example, in Steamboat Springs, ski area operators worked with local fire departments and the Forest Service fire unit to discuss how snowmaking hydrants could help with firefighting.⁹² The ski area even took the step of building adaptors to fit the snowmaking hydrants to the firefighters' hoses, pumper trucks, and other equipment.⁹³ Measures like these can help firefighters act more quickly and effectively should a fire threaten a ski area.⁹⁴

Finally, when developing a memorandum of understanding or framework agreement with local firefighting officials, ski areas should consider addressing a firefighting plan for the possibility of wildfire within ski area boundaries. Providing maps and information on buildings and infrastructure could help firefighters prioritize in a situation that necessitates difficult decisions.

Conclusion

In the West, wildfire is an inevitability. Even a wet spring such as 2019's can result in more fuel for a dry autumn fire season. And in a year as dry and hot as 2020, the question is not whether to expect large, destructive wildfires, but what the extent of the damage will be. Year-round vigilance and preparedness are the most important tools in safeguarding against wildfire. Ski areas can implement the forward-thinking strategies discussed above to reduce risk to their visitors, facilities, and bottom lines. 



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33. See Am. Ass'n for the Advancement of Sci., Wildfire Trends in the United States, SciLine (Nov. 20, 2018; updated Sept. 10, 2020), <https://www.sciline.org/evidence-blog/wildfires> ("Wildfires are not a new phenomenon, but in many regions of the United States, particularly the western states, they have become larger, longer-lasting, more frequent, and more destructive in terms of lives lost and economic costs."); Ingraham, "Wildfires have gotten bigger in recent years, and the trend is likely to continue," *Wash. Post* (Aug. 14, 2018), <https://www.washingtonpost.com/business/2018/08/14/wildfires-have-gotten-bigger-recent-years-trend-is-likely-continue/> ("Total consumed acreage is increasing not necessarily because there are more fires, but because the typical fire is getting bigger. Throughout the 1980s and 1990s, the average wildfire burned anywhere from 40 to 80 acres of land. The 2010s, on the other hand, have seen several years when the average fire was more than 100 acres in size. So far this year, the average fire has burned through about 130 acres."); Thorley, *supra* note 18.

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40. The total losses for 2020 have yet to be calculated but are expected to surpass 2017 because the year has had the worst fire season on record. See, e.g., Migliozi et

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54. 16 USC §§ 6501 et seq.

55. 36 C.F.R. § 220.6(e)(14)(i)-(ii).

56. 36 C.F.R. § 220.6(e)(13)(i)-(ii).

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58. 36 C.F.R. § 220.6(e)(12).

59. 16 USC § 6591d.

60. 16 USC § 6511(2)(b).

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