

Destination Skiing And The DOJ's Mountain Merger Challenge

By **William Reiss and Ellen Jalkut** (November 8, 2024)

This summer, the U.S. Department of Justice requested additional information on Alterra Mountain Co.'s planned acquisition of Arapahoe Basin, known as A-Basin, signaling the first DOJ challenge to a ski mountain merger in nearly 30 years.

As we move into the ski season, this article explores the evolution of consolidation in the ski industry, the market definition applied in landmark cases and the transformation of the lift ticket market. With this background, we consider what the DOJ's second request portends for Alterra's acquisition of A-Basin.

In its announcement earlier this year that it agreed to acquire A-Basin from Dream Unlimited Corp. of Canada, Alterra hoped to assuage fears of the corporate takeover of independent ski mountain resorts. Alterra quoted Alan Henceroth, the longtime chief operating officer of A-Basin:

A-Basin has a long-time and loyal following among skiers and riders in Colorado and we care deeply about the culture of A-Basin that brings them back. We have worked with [Alterra] since 2019 when we joined the Ikon Pass community, and we have every faith that Alterra is committed to helping us maintain A-Basin's authenticity.[1]

Despite Alterra's assurance, skiers posted messages of dismay on internet forums. Perhaps the Antitrust Division of the U.S. Department of Justice heard their distress.

On June 27, the DOJ issued a second request related to Alterra's acquisition of A-Basin. Ironically, it was the DOJ's most recent challenge to a merger in the ski industry that resulted in A-Basin's independence.

In the 1990s, the DOJ challenged two separate ski industry transactions because of concerns that the resulting decrease in competition would lead to higher prices or reduced discounts for skiers.

But since 1997, the DOJ has not acted, which enabled several companies to amass large portfolios of destination ski resorts. Along with increased consolidation, the intervening years saw major changes in the lift ticket market.

Where skiers might have previously bought season or multiday passes to a single mountain, Vail Resorts Inc. supercharged the idea of a ski pass by introducing a multimountain pass involving partnerships across dozens of competing destination mountains.

Today, over 300 mountains in the U.S. accept a multimountain pass.

Past Challenges

In 1996 and 1997, the DOJ challenged two separate ski industry mergers, which if left



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unchecked would have led to a substantial increase in the concentration of regional ski markets.

When reviewing a merger, the DOJ assesses market concentration and considers whether a change in concentration indicates a "risk of substantially lessening competition." [2]

This analysis requires a market definition, which the DOJ describes as a "reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." [3]

The DOJ's first challenge involved the American Skiing Co.'s proposed acquisition of S-K-I Limited. [3] The two companies were the largest owner-operators of ski resorts in the New England region with four mountains each.

The DOJ defined the relevant product market as the business of downhill skiing, "compris[ing] all services related to providing access to downhill skiing and snowboarding."

In arriving at its definition of the relevant geographic market, the DOJ analyzed skier behavior, and the types of lift tickets sold by ski resorts. According to the complaint, "The distance a skier will travel to a ski resort depends in part on the length of time that skier will stay at the resort and on the qualitative characteristics of the resort."

The resorts targeted different types of ticket packages to customers based on the duration of a ski trip and distance traveled. Weekend skiers enjoyed a discount for purchasing consecutive day passes. Resorts also offered discounts to out-of-state residents or ran coupons in local papers.

Based on its analysis of the available lift tickets, the DOJ defined the geographic markets at issue in ASC's acquisition as the provision of "weekend skiing to Eastern New England residents" and "day skiing to Maine residents."

To measure the concentration of these markets, the DOJ relied on so-called skier days, rather than a more typical revenue measurement. The DOJ defined a "skier day" or "skier visit" as "one day or part of a day of skiing for one person." [4]

Combined, ASC and S-K-I accounted for 43% of all skier days "at resorts reasonably accessible to residents of eastern New England for weekend ski trips." [5] In contrast, the closest competitor only had 7% of the skier days.

Likewise, ASC and S-K-I enjoyed 32% and 19% of the skier days by Maine residents on day trips. The parties reached a settlement whereby ASC and S-K-I each divested a mountain resort. [6]

A year later, the DOJ and the State of Colorado contested Vail's purchase of Ralston Resorts Inc. At the time, Vail owned three mountains in Colorado: Vail, Beaver Creek Resort and Arrowhead Mountain. [7]

Ralston's mountain portfolio consisted of Keystone, Breckenridge and Arapahoe Basin. In the 1990s, the two companies were the largest owner/operators of ski resorts in Colorado.

The complaint described two types of skiers: destination and front range skiers. Destination skiers traveled from outside of Colorado to ski resorts within the state. In contrast, front range skiers traveled from within the major metropolitan areas of Colorado for day or

overnight trips.

Colorado and the DOJ alleged that the ski resorts used different pricing strategies in selling tickets to destination skiers and front range skiers. In particular, front range skiers accessed discounted single day lift tickets through off-mountain retailers and frequent skier cards that provide a free day of skiing after a certain number of paid days.

The complaint limited the geographic market to "the provision of skiing to residents of Colorado's Front Range."

It explained that "[m]ost Front Range skiers drive to their ski resort. Front range skiers are typically more interested in the mountain and skiing facilities than in the resort amenities and are more constrained by distance in choosing among resorts."

Again, the DOJ relied upon skier days to measure concentration in the market. During the 1995-96 ski season, the government alleged that Vail had 280,000 front range skier days at its three resorts, amounting to 12% of the market, while Ralston's resorts saw 600,000 skier days or 26% of the front range market. The parties reached a settlement whereby Ralston divested its interests in A-Basin and Vail ended up with three front range resorts.[8]

History of Consolidation

Notwithstanding the government's challenges, the previously described mergers jump-started consolidation in the ski industry. With its purchase of S-K-I in 1996, ASC owned seven of the largest ski resorts in New England, averaging 3.5 million skier visits a year.[9]

No single company had owned that many ski resorts previously. Around the same time, several other corporations grew their mountain portfolios. By 2010, Intrawest Resorts Holdings Inc. owned five major destination ski resorts and several other smaller mountains throughout North America.[10] Powdr Corp. expanded from one major destination resort in 1994 to nine resorts in 2016.[11]

After its acquisition of Ralston in 1997, Vail went public and slowly increased its holdings. Since 2012, Vail has acquired 31 ski areas across the U.S., Canada and Australia.[12]

In its most recent annual report, Vail reported operating 37 resorts in North America with 17.2 million skier visits, roughly 20% of the North American total.[13]

In 2017, a major consolidation shook the ski industry. Intrawest was acquired by Alterra, a newly-formed entity owned by Aspen Skiing Company LLC and KSL Capital Partners LLC.[14]

In addition to the properties owned by Intrawest, Alterra acquired Squaw Valley Ski Holdings and Mammoth Mountain Ski Area. After completion of its acquisition, Alterra owned 12 four-season mountain resorts in North America with average annual skier visits of 6 million and 20,000 skiable acres. Today, Alterra owns 16 resorts[15] with its owner Aspen operating four.[16]

Changing Lift Ticket Market

While skiers regularly bemoaned daily ticket prices, most mountains historically offered multiday tickets that reduced the average price per day.[17] Many offered discounts for children and seniors.

For different locales, certain passes offered the opportunity to ski multiple mountains.[18] In the 1990s, many resorts began offering preseason passes covering multiple mountains within a defined area.

By 2004, ASC released a limited number of multimountain passes good for unlimited skiing at its six mountains in New England for \$599.[19]

Vail launched a new generation of passes in March 2008. Announcing this initiative, then chief executive officer Rob Katz explained that Vail specifically chose the name Epic because the pass allows for a ski season of unlimited skiing and riding across five world-class mountain resorts with 17,400 acres of terrain, 128 chairlifts and 722 trails.[20]

Vail offered the \$579 Epic pass for a limited time, skiers could only buy the pass until Nov. 15, 2008, prior to the start of the ski season.

Other companies raced to enter the preseason, multimountain pass market. Four independent mountains joined together to sell the Mountain Collective pass for the 2012-2013 ski year at a price of \$349 for two days of skiing at each mountain.[21]

By 2015, the pass included the original four resorts plus eight others throughout the U.S. and Canada for \$399.[22] The next year, a dozen resorts agreed to honor each other's season passes through the Powder Alliance.[23]

Each resort allowed three days of skiing based on use of another member's season pass. In 2014, Intrawest began selling the Intrawest passport for \$589, which allowed guests to ski for six days at each of its six North American resorts.[24] Like the Epic pass, all of these passes were only sold prior to the ski season.

Keeping ahead of the competition, the Epic pass grew in 2017 to include "access to 45 of the world's best mountain resorts" with limited access to 30 resorts in Europe.[25]

To much fanfare, Alterra, with its stable of top destination resorts, jumped into the multimountain market with the Ikon Pass in 2018. As a direct competitor to the Epic Pass, the Ikon Pass provided skiers unlimited access to the 12 mountains owned by Alterra and access to 11 "premier destination partners." [26]

The partners included mountains owned by Boyne Resorts and Powdr, Jackson Hole Mountain Resort, and Alta Ski Area. With an initial price of \$899, the Ikon Pass went head-to-head with the Epic Pass, selling that year at the same price.[27]

This year, Vail announced that the Epic Pass would provide a skier with unlimited access to its 42 resorts and additional access to more than 80 partner resorts for \$982.[28]

For \$1,249, the Ikon Pass grants the holder unlimited skiing at 17 mountains in North America, and seven days at 41 other destination resorts around the world.[29]

Although Vail and Alterra have yet to announce the last day to purchase a pass this year, the Epic and Ikon passes are usually only available for sale until late November or early December.

In an effort to move skiers away from the daily ticket model and push them to commit to a pass before the start of the ski season, Vail and other resorts spiked the price of daily lift

tickets. In Epic's first season, Vail charged \$92 for a single-day lift ticket.[30]

The day-ticket price passed the \$100 mark for the first time over the holiday week a few years later.[31] As early as 2017, ticket prices approached \$200 a day.[32] By 2022, Vail and Steamboat charged \$275 a day, and people started talking about the \$300 daily lift ticket.[33]

Further limiting its ticket-window sales, Vail announced in August 2022 that it would cap the walk-up day tickets at its resorts.[34]

Current Investigation and Conclusion

With the changes in the ski pass market over the past 30 years, the DOJ's definition of the market will be very different than it was in the 1990s. In the past, competition between destination mountain resorts involved the quality and price of the entire package.[35]

According to the U.S. Court of Appeals for the Tenth Circuit in the 2009 decision in *Christy Sports LLC v. Deer Valley Resort Co.*, if skiers "are rational, the price they are concerned about is the sum of all of their prospective vacations costs, including not just lift ticket prices and resort lodging, but air fare, food and drink, apres-ski entertainment, ski rentals, and the like."

Multimountain passes, however, are purchased prior to the ski season, and in many cases, prior to booking a ski vacation. After purchasing a pass, most consumers will only ski at mountains that accept that pass — a skier who purchased an Ikon pass will plan a destination ski trip to a mountain that accepts the Ikon pass.

Within the destination mountains that accept the Ikon pass, Alterra's acquisition of A-Basin may cause the entire package of a ski vacation to increase.

With the Ikon pass, a skier has at least seven days of access to 39 ski resorts in the U.S. Research shows that more than half of passholders ski 10 days or fewer.[36]

Thus, most destination passholders make only one or two trips to a ski resort a year. The Ikon-affiliated resorts compete for Ikon passholders who spend money on meals, lessons and merchandise. Alterra owns a significant portion of the ski resorts that accept the Ikon pass.

It is likely that adding A-Basin to Alterra's portfolio will substantially lessen competition for Ikon passholders, and these passholders will face higher prices for the overall experience of skiing.

In 1997, the DOJ defined the relevant product market as downhill skiing and the relevant geographic market as day and weekend skiers in Colorado's front range. In its current review, the DOJ may well define the relevant product market as destination skiing with the Ikon pass.

Although this very narrow market definition is unusual, the DOJ recognized in the 2023 merger guidelines that a "narrow group of products" can constitute a relevant market. Based on reports regarding its collection of ski data, the DOJ appears poised to limit the geographic area to the Rocky Mountains.[37]

With this narrow market definition, Alterra's acquisition of A-Basin may have the effect of

substantially lessening competition among the resorts that accept the Ikon pass, which could result in higher prices for resort lodging, food and drink, apres-ski entertainment, and ski rentals.

The DOJ's second request for information related to Alterra's acquisition signals that the merger is unlikely to go through without some changes. Moreover, recent statements by the DOJ suggest it recognizes the failures of past consent decrees to preserve competition.

Indeed, the consent decree related to Vail did not preserve competition in the market. At the time of the 1997 merger, the DOJ estimated that Vail would control 32% percent of the front range market.[38]

By 2005, Vail controlled 71% of the market.[39] As the lift ticket market shifted to preseason passes, skiers assumed more risk from the transaction.

The pass is not transferable or refundable. After making such a large purchase, Ikon passholders are locked in to a limited number of destination resorts.

In weighing whether to take action, the DOJ will likely consider how best to ensure that these passholders continue to benefit from competition on the quality and price of the entire ski package.

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