

NO. 42081-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CRYSTAL MOUNTAIN, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Crystal Mountain, Inc. operates and maintains the state's largest ski area, located on federal land. For many years, Washington has imposed the leasehold excise tax, in lieu of property tax, on "the act or privilege of occupying or using publicly owned real or personal property . . . through a leasehold interest." Crystal Mountain has consistently paid the tax. It now seeks a refund of the leasehold excise tax it paid for the 2002 through 2006 tax periods.

Crystal Mountain asserts that the tax does not apply to its use of the federal land because the United States Forest Service (Forest Service) did not give it exclusive possession and control over the land, and therefore it does not have a taxable "leasehold interest." But the plain language of the leasehold excise tax statute, the Legislature's stated purpose in enacting the tax, and the Washington Supreme Court's holding regarding the meaning of "leasehold interest" in *Mac Amusement Co. v. Dep't of Revenue*, 95 Wn.2d 963, 970-73, 633 P.2d 68 (1981), all refute Crystal Mountain's argument. The leasehold excise tax clearly applies to nonexclusive property interests, including Crystal Mountain's permit allowing it to use and occupy federal land to operate its ski area. The trial court correctly concluded that Crystal Mountain uses, occupies, and

possesses federal land sufficiently to trigger the leasehold excise tax.

Crystal Mountain is not entitled to a refund.

II. RESTATEMENT OF THE ISSUE

This appeal presents a single issue of statutory construction. In light of the statutory definition of “leasehold interest” in RCW 82.29A.020(1), as interpreted by the Washington Supreme Court in *Mac Amusement*, did Crystal Mountain owe the leasehold excise tax on the amounts it paid the Forest Service to occupy and use public land to operate a ski area?

III. STATEMENT OF THE CASE

A. **Crystal Mountain Operates A For Profit Ski Area On Land It Uses And Occupies Pursuant To A Permit From The United States Forest Service.**

The facts in this case are almost entirely undisputed. CP at 178-190. Crystal Mountain operates for profit the Crystal Mountain ski area in Pierce County, adjacent to Mount Rainier National Park. CP at 179, Stip. ¶¶ 1, 3. The ski area is the largest in Washington, with over 50 named ski runs. CP at 182, Stip. ¶ 19. The area offers at least nine lifts, two lodges (which include a variety of shops and services like ski rentals), restaurants, and a Summit House. CP at 182-83, Stip. ¶ 21. It also contains ski patrol stations, maintenance shops, several dorms and apartments in an employee

housing complex, a grocery store, and a treatment plant. CP at 183, Stip. ¶ 21, Stip. Ex. 21.¹

The United States owns the land within the Mount Baker-Snoqualmie National Forest where the ski area is located. CP at 179; Stip. ¶ 1, 5. Crystal Mountain operates the ski area under a “ski area term special use permit” issued by the Forest Service (“special use permit” or “permit”). CP at 180, Stip. ¶ 6; *see also* Stip. Ex. 4 (permit) (Appendix A).² The Forest Service issued the permit pursuant to 36 C.F.R. §§ 251.50-251.64. CP at 180, Stip. ¶ 8; Stip. Ex. 4 at 2, ¶ D. These federal regulations define “term permit” as a “special use authorization to occupy and use National Forest System land . . . for a specified period which is both revocable and compensable according to its terms.” 36 C.F.R. § 251.51 (emphasis added).³ The permit authorizes Crystal Mountain to use the federal land to construct, operate, and maintain a “winter sports resort including food service, retail sales, and other ancillary facilities.” Stip. Ex. 4 at 1-2.

The permit covers 4,350 acres, of which approximately 2,600 acres are skiable terrain. CP at 180, Stip. ¶ 9. Crystal Mountain must pay an

¹ Stipulated Exhibit 21 gives a more comprehensive list of Crystal Mountain’s improvements constructed in the permit area.

² A copy of Stipulated Exhibit 4, the permit, is attached as Appendix A.

³ Crystal Mountain did not stipulate that it occupied the land. *See* CP at 180, ¶8. However, the federal regulation upon which the permit was issued clearly provides that a term permit confers authorization to occupy and use. 36 C.F.R. § 251.51.

annual fee to the Forest Service for its right to occupy and use the federal land. CP at 183, Stip. ¶ 24.

The permit does not provide Crystal Mountain with exclusive possession and use of the federal land. Stip. Ex. 4 at 2, ¶ E. The Forest Service has reserved the right “to use or permit others to use any part of the permitted area for any purpose, provided such use does not materially interfere” with Crystal Mountain’s rights under the permit. Stip. Ex. 4 at 2, ¶ E. The lands and waters covered by the permit must remain open to the public, except to the extent that Crystal Mountain and the Forest Service agree upon restrictions to protect the installation and operation of Crystal Mountain’s facilities. Stip. Ex. 4 at 2, ¶ F. For example, skiers can hike up the mountain, without paying for or using the ski lifts, and then ski down. CP at 180-81, Stip. ¶ 13. Crystal Mountain acknowledges, however, that there are portions of the permit area where only its employees may enter. Appellant’s Opening Brief (Appellant’s Br.) at 32 n.14.

With Forest Service approval, Crystal Mountain may sublease land and improvements covered by the special use permit. CP at 183, Stip. ¶ 23. Pursuant to that authority, Crystal Mountain has entered into several sublease agreements with vendors or concessionaires allowing the

sublessee to use a portion of Crystal Mountain's premises within the permitted area. *See, e.g.*, Stip. Exs. 22 & 23.

B. Crystal Mountain Sought A Refund Of The Leasehold Excise Tax, Arguing No Tax Was Due Because It Did Not Have Exclusive Possession Of The Federal Land.

Washington imposes a leasehold excise tax “on the act or privilege of occupying or using publicly owned real or personal property . . . through a leasehold interest.” RCW 82.29A.030(1)(a). The tax is computed at the rate of 12.84 percent of “taxable rent.” RCW 82.29A.030(1)(a), (2). For the years 2002 through 2006, Crystal Mountain paid leasehold excise tax and late-payment penalties to respondent Department of Revenue in the total amount of \$176,755.24. CP at 142, ¶ 46.⁴

In December 2006, Crystal Mountain submitted to the Department an application for refund of all the leasehold excise taxes and penalties that Crystal Mountain had paid for the years 2002 through 2006. CP at 185, Stip. ¶ 31. Crystal Mountain argued that its nonexclusive use of federal land under the special use permit was not a “leasehold interest” as

⁴ Crystal Mountain initially sought a refund of \$197,842.61. CP at 184, Stip. ¶ 29. However, a portion of that amount pertained to leasehold excise tax owed by two unrelated entities, Crystal Chalets Condominium Association and Silver Skis Condominium Association, that operate within the permit area but under separate use permits. CP at 185, Stip. ¶ 30. Because neither Crystal Chalets Condominium Association nor Silver Skis Condominium Association is a party to this refund action, Crystal Mountain submitted a revised refund claim in the total amount of \$176,755.24, which is the amount of leasehold excise tax it paid during 2002 through 2006 on its own behalf. CP at 142, ¶ 46.

defined in the tax statute and corresponding administrative rules. CP at 185, Stip. ¶ 32. The Department concluded that Crystal Mountain correctly paid the leasehold excise tax because the statute does not require exclusive use or possession of publicly owned property for the tax to apply. *See* CP at 186, Stip. ¶ 36. The Department denied the refund request. CP at 185-86, Stip. ¶ 33-35.

C. The Trial Court Concluded The Leasehold Excise Tax Does Not Require Exclusive Possession, And Crystal Mountain Had Sufficient Rights To Use, Occupy, And Possess The Land For The Tax To Apply.

Pursuant to RCW 82.32.180, Crystal Mountain filed a de novo excise tax refund action in Thurston County Superior Court, seeking a refund of the leasehold excise taxes and penalties it paid in 2002 through 2006. CP at 186, Stip. ¶ 38. Following a bench trial, the Honorable Carol Murphy issued a letter opinion denying Crystal Mountain's refund claim. CP at 173-177.⁵

The letter opinion incorporated the parties' stipulated facts and also made additional findings based on testimony and exhibits, either emphasizing or adding to the stipulated facts. CP at 173-75. The court made several unchallenged findings about the tasks that Crystal Mountain performs to operate and maintain its ski area, including managing skiing

⁵ For the court's convenience, the trial court's letter opinion is attached as Appendix B.

and mountain recreational activities, putting up rope lines and signs marking out of bounds and danger areas, maintaining and repairing buildings and equipment, maintaining roads and parking lots within the ski area, performing snow removal and drainage, and providing emergency services and avalanche control. CP at 174-75, Findings of Fact (FOF), 4, 9, 11. In contrast, the Forest Service does not “have any direct operations” or “an office or any buildings” in the permit area. CP at 174, FOF 6.

The trial court explained the permit allows Crystal Mountain “to charge guests certain fees . . . for the use of facilities and equipment.” CP at 174, FOF 5. “A retail store rents equipment and restaurants are located at the foot of the mountain, midmountain, and at the summit.” CP at 174, FOF 5. The revenues from the store and restaurants are included in the calculation of the amount paid to the Forest Service. CP at 174, FOF 5.

The trial court acknowledged that the permit does not give Crystal Mountain exclusive possession of the 4,350 acre permit area. CP at 174, FOF 2. Although the permit area is generally open to the public for lawful uses and purposes, the Forest Service and Crystal Mountain have agreed upon restrictions on public access “to protect the installation and operation of structures and developments” CP at 175, FOF 13.

The trial court analyzed the plain language of the statutory definition of “leasehold interest” without resorting to statutory

construction. CP at 176. It reasoned that while a dictionary definition can be helpful in arriving at the common and ordinary meaning of a statutory term, the definition adopted by a court must be consistent with the language of the statute as a whole. CP at 176. The trial court concluded that the leasehold excise tax statute does not require a lease or permit holder's possession of the land to be exclusive. CP at 176. Nor does it require every inch of the property to be possessed by the leaseholder. CP at 176.

Even though the public has access to the permit area, Crystal Mountain maintains large-scale, permanent facilities, which presumably include locked rooms, doors, and panels, to allow Crystal Mountain to operate its facilities in a safe and orderly manner. CP at 176. Thus, the trial court recognized that Crystal Mountain's interest in the land was unlike a license to fish or hike in a certain area. CP at 176. Accordingly, it determined that Crystal Mountain had possession and use of the permit area, and therefore had a "leasehold interest." CP at 176.

The trial court explained that its conclusion was consistent with the Department's administrative rule interpreting the leasehold excise tax statute. CP at 176. And even if the rule were inconsistent, the statute would be controlling. CP at 176. In sum, Crystal Mountain had not met

its burden at trial to show that it was entitled to a refund of leasehold excise tax paid. CP at 176.

Thereafter, the trial court entered a judgment in favor of the Department. CP at 196-198. Crystal Mountain timely appealed. CP at 194. Crystal Mountain has assigned error to one of the trial court's findings of fact, fourteen conclusions of law, and the judgment as a whole. Appellant's Br. at 1-3.

IV. ARGUMENT

A. Standard Of Review.

The only finding of fact Crystal Mountain has challenged is Finding of Fact 2, which states: "The Permit does not give Crystal Mountain exclusive possession of the 4,350 acre Permit area." Appellant's Br. at 1 (citing and paraphrasing Finding of Fact 2). That challenged finding of fact is reviewed for substantial evidence, "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Clayton v. Wilson*, 168 Wn.2d 57, 62-63, ¶ 8, 227 P.3d 278 (2010). The unchallenged findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, ¶10, 236 P.3d 1287 (2011).⁶

⁶ Because all but one of the trial court's findings of fact are unchallenged, this court need not address Crystal Mountain's argument that the standard of review for facts found on a purely written record should be de novo. Appellant's Br. at 15.

The interpretation of tax statutes or administrative rules, as well as how the statutes or rules apply to the facts, are subject to de novo review. See *Wash. Imaging Servs., LLC v. Dep't of Revenue*, 171 Wn.2d 548, 555, ¶11, 252 P.3d 885 (2011); *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 771, ¶7, 246 P.3d 785 (2011).

B. The Leasehold Excise Tax Statute Does Not Require Exclusive Possession And Control Over The Property For The Tax To Apply; Thus, Crystal Mountain Has A Taxable Leasehold Interest.

1. The leasehold excise tax was enacted to replace the property tax on leasehold interests.

Generally, property located in Washington is subject to annual assessment and taxation based on its value (ad valorem taxation). RCW 84.36.005; see *Wash. Mut. Sav. Bank v. Dep't of Revenue*, 77 Wn. App. 669, 673, 893 P.2d 654 (1995). Wash. Const. art. VII, § 1 does exempt from the ad valorem property tax “[p]roperty of the United States and of the state, counties, . . . and other municipal corporations.” However, this constitutional tax immunity does not extend to the value of a private person’s leasehold interest in publicly owned property. *Duwamish Warehouse Co. v. Hoppe*, 102 Wn.2d 249, 251-52, 684 P.2d 703 (1984); *Moeller v. Gormley*, 44 Wash. 465, 468-69, 87 P. 507 (1906). Thus, while federal property is constitutionally exempt from ad valorem taxation, the value of a private person’s leasehold interest in that property is not.

For many years, Washington courts struggled with the proper way to value and assess a private person's leasehold interest in public property for purposes of taxation. See *Duwamish Warehouse*, 102 Wn.2d at 252-54; *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 94, 558 P.2d 211 (1977); *Pier 67, Inc. v. King Cy.*, 78 Wn.2d 48, 50-58, 469 P.2d 902 (1970); *Clark-Kunzl Co. v. Williams*, 78 Wn.2d 59, 64-65, 469 P.2d 874 (1970).⁷ In 1976, the Washington Legislature responded by enacting the leasehold excise tax in lieu of the property tax on leaseholds. *Duwamish Warehouse*, 102 Wn.2d at 254; *Japan Line, Ltd.*, 88 Wn.2d at 97-98.

The statute creating the leasehold excise tax made two significant changes to the tax treatment of leaseholds. First, the Legislature created an exemption from property tax for all private leasehold interests in public property. Laws of 1975-76, 2d Ex. Sess., ch. 61, § 14 (codified at RCW 84.36.451). The property tax exemption encompassed “[a]ny and all *rights to occupy or use* any real or personal property owned in fee or held

⁷ In *Pier 67, Inc. v. King County*, 78 Wn.2d 48, 469 P.2d 902 (1970), the Washington Supreme Court held that when valuing a privately held lease in publicly owned land for property tax purposes, the county assessor had to determine the fair market value of the lease *without* deducting rents owed or mortgage indebtedness. 78 Wn.2d at 55-56. Elimination of these deductions resulted in an unexpected tax increase. To give relief to parties having negotiated agreements before the *Pier 67* decision, the Legislature enacted a property tax exemption and a corresponding tax on “leasehold estate[s],” but both applied *only* to agreements made before December 31, 1970. Laws of 1973, ch. 187, §§ 2, 4, 11. The property tax remained in place where agreements were entered into or renegotiated after the *Pier 67* decision. See *id.* Then, in 1976, the Legislature repealed the 1973 act, replacing it with the current system. Laws of 1975-76, 2d Ex. Sess., ch. 61.

in trust by the United States, the state of Washington, or any political subdivision or municipal corporation of the state of Washington.” *Id.* (emphasis added). To replace the property tax, the Legislature imposed the leasehold excise tax. *Id.* at §§ 1-13 (codified at RCW 82.29A).

The Legislature emphasized that in many instances, private entities enjoy significant benefits from their ability to occupy and use publicly owned properties. *See id.* at § 1 (codified at RCW 82.29A.010).⁸ The Legislature’s stated purpose in imposing the leasehold excise tax was to ensure fair compensation for governmental services rendered to private persons occupying and using publicly owned property, where property tax is not otherwise paid. *See id.*

The Legislature imposed the leasehold excise tax “on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest. . . .” *Id.* at § 3 (codified at RCW 82.29A.030(1)(a)). The Legislature broadly defined a taxable “leasehold interest” as “an interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, between the public owner of the property and a person who would not be exempt from property taxes if that person owned the

⁸ Crystal Mountain enjoys substantial benefits from its operation of its ski resort on publicly owned land. For example, in 2002 Crystal Mountain earned over \$9.5 million in alpine revenue. Stip. Ex. 24 at 1 (line 9).

property in fee, granting possession and use, to a degree less than fee simple ownership. . . .” *Id.* at § 2(1) (codified at RCW 82.29A.020(1)).

The leasehold excise tax is measured by the “taxable rent” paid to the public owner. RCW 82.29A.030(1). The tax is imposed at the rate of 12 percent plus a surtax for a total rate of 12.84 percent.⁹ RCW 82.29A.030.¹⁰ Where the property at issue is “federally owned or federal trust lands,” the person having a leasehold interest in such property must “report and remit the tax due directly to the department of revenue.” RCW 82.29A.050.

Because the tax is payable in lieu of property tax, the Legislature has created “a credit against the tax as otherwise computed equal to the amount, if any, that [the leasehold excise tax] exceeds the property tax that would apply to such leased property . . . if it were privately owned by the lessee.” RCW 82.29A.120(1). The Legislature also has enacted several exemptions. *E.g.*, RCW 82.29A.130.

⁹ RCW 82.29A.030(1) imposes a tax of 12 percent. RCW 82.29A.030(2) imposes an additional seven percent surtax, which increases the effective rate of the tax to 12.84 percent.

¹⁰ The leasehold excise tax is generally imposed by the State, but RCW 82.29A.040 allows counties and cities to impose their own leasehold excise taxes, with a credit given against the state tax. *See* RCW 82.29A.030(1), .040.

2. **The statutory definition of “leasehold interest” does not require exclusive possession or control of the publicly owned property.**
 - a. **The statute plainly encompasses nonexclusive property interests within the definition of “leasehold interest.”**

This case centers on the meaning of the term “leasehold interest” as defined in RCW 82.29A.020(1), which provides in part:

“Leasehold interest” shall mean an interest in publicly owned real or personal property *which exists by virtue of any lease, permit, license, or any other agreement, written or verbal*, between the public owner of the property and a person who would not be exempt from property taxes if that person owned the property in fee, *granting possession and use, to a degree less than fee simple ownership. . . .*

(Emphasis added.) Crystal Mountain argues that this statutory definition requires *exclusive* possession and control over the publicly owned property. Because Crystal Mountain did not have exclusive possession and control of the federal land upon which it operates its ski area, it asserts that it is not subject to the leasehold excise tax on the amounts it paid to the Forest Service. Appellant’s Br. at 19.

If a statute’s meaning is plain, courts will give effect to that plain meaning as an expression of the Legislature’s intent. *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). The “plain meaning rule” contemplates consideration of not just the ordinary meaning of a statutory provision’s words, but also of “all that the

Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). “[A]n enacted statement of legislative purpose is included in a plain reading of a statute.” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 310, ¶ 10, 237 P.3d 256 (2010). Where a statute’s meaning is plain, there is no reason to apply rules of construction, including the rule interpreting ambiguous tax imposition statutes in favor of the taxpayer. *Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 11 n.7, 248 P.3d 504 (2011).

Crystal Mountain contends that by using the term “leasehold interest,” the Legislature intended to adopt the common law definition of “lease” which, Crystal Mountain asserts, requires the ability to exclude all others, including the property owner. Appellant’s Br. at 22-26. But Crystal Mountain simply ignores that the Legislature expressly defined the term “leasehold interest” for purposes of this statute. There is no reason to resort to the common law meaning of a term when the Legislature has expressly defined it. *See State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997) (permitting resort to common law meaning only “in the absence of a specific statutory definition”). “Legislative definitions included in the statute are controlling.” *State v. Webb*, 162 Wn. App. 195, 206, ¶ 34, 252 P.3d 424 (2011).

As defined in the leasehold excise tax statute, a “leasehold interest” is not limited to common law leases or other exclusive interests in property. Property interests, such as a permits or licenses allowing nonexclusive use of public property, are expressly included within the definition of “leasehold interest.” RCW 82.29A.020(1). In fact, this language has prompted the Washington Supreme Court to characterize the Legislature’s definition as “expansive.” *Mac Amusement*, 95 Wn.2d at 972-73. As discussed in more detail below, the Washington Supreme Court has already recognized that by including nonexclusive interests within the definition, the Legislature gave “‘leasehold’ a meaning not ordinarily contemplated by that term.” *Id.* at 971.

Crystal Mountain asserts that the phrase “possession and use, to a degree less than fee simple ownership” indicates the Legislature intended the leasehold excise tax to apply *only* when the private entity using and occupying the public land has the ability to exclude all others. Appellant’s Br. at 5. In making this argument, Crystal Mountain essentially treats as interchangeable the concept of a “possessory interest” (which, as a property law term of art, includes an element of exclusivity) with the term “possession” as used in the statutory definition of “leasehold interest.” *Id.* *See also* Appellant’s Br. at 19-20. However, the Legislature did not require the property owner to grant *exclusive* possession of the property

for the interest to qualify as a “leasehold interest” for purposes of the tax, even though it could have expressly done so. Nor did the Legislature limit the term “leasehold interest” to “possessory interests” in a technical property law sense. Instead, the Legislature defined a “leasehold interest” to include “any lease, permit, license, or any other agreement, written or verbal...granting possession and use, to a degree less than fee simple ownership.” RCW 82.29A.020(1).¹¹

Property law scholars have recognized that “[p]roperty” is made up of an infinite collection of ‘interests’ that may be held, separated, divided, transferred, restricted—combined and recombined like jackstraws.” 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate* § 1.1 (2011). Determining how to characterize an interest in property as a lease, easement, profit, or license can be difficult, especially in commercial situations. 17 Stoebuck and Weaver, *supra*, at § 6.3; *see also Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 443, 458-59, ¶¶ 30-31, 243 P.3d 521 (2010) (lead opinion) (declining to label the property interest as a lease, easement, or profit because the issue presented could be resolved without doing so). The

¹¹ Crystal Mountain seems to suggest that the phrase “to a degree less than fee simple ownership” somehow indicates that attributes of ownership, including exclusive possession, are required to satisfy the definition of “leasehold interest.” Appellant’s Br. at 26. But the plain language of the statutory definition distinguishes between ownership and a “leasehold interest” granting possession and use “to a degree less than” fee simple ownership. RCW 82.29A.020(1) (emphasis added).

plain language of the leasehold excise tax statute reflects that the Legislature understood this difficulty and used broad language to encompass a variety of arrangements, including non-possessory interests such as a permit or license allowing non-exclusive use of public property. RCW 82.29A.020(1).

The last sentence of the definition of “leasehold interest” also makes clear that the Legislature intended the term to encompass more than possessory interests granting exclusive possession. It excludes from the term “leasehold interest” “road or utility easements, rights of access, occupancy, or use granted solely for the purpose of removing materials or products purchased from a public owner.” RCW 82.29A.020(1). Easements, rights of access, and rights of occupancy or use do not grant exclusive possession. If “leasehold interest” were limited to only possessory interests in property granting exclusive possession, there would be no reason to specify that certain non-possessory uses are exempt from the tax. The clear implication of this exclusion is that easements, rights of access, and rights of occupancy or use created for purposes other than removing materials and products purchased from the public owner are subject to the tax.

A plain language analysis should consider all relevant provisions in a statute. *Campbell & Gwinn*, 146 Wn.2d at 11. The leasehold excise

tax statute's exemptions in RCW 82.29A.130 also establish that the Legislature understood the term "leasehold interest" to encompass interests that grant less than exclusive possession. For example, RCW 82.29A.130(9) creates an exemption for leasehold interests giving "use or possession of the leased property for a continuous period of less than thirty days." However, the Legislature made it clear that a "leasehold interest" does not qualify for this exemption, and is therefore still taxable, if the public lessor merely reserves the right to use the property or to allow others to use the property on a temporary basis. RCW 82.29A.130(9). This provision shows the tax applies regardless of whether the lessor reserves for itself or others some rights of possession and control.

Finally, "an enacted statement of legislative purpose is included in a plain reading of a statute." *G-P Gypsum*, 169 Wn.2d at 310, ¶ 10. Interpreting the leasehold excise tax to apply only where a lease of public property confers exclusive possession and control over the entire property would undermine the purpose behind the leasehold excise tax.

Prior to enactment of the leasehold excise tax, leasehold interests were subject to ad valorem property taxation, even where the public entity had conveyed less than exclusive possession and control over the property. For example, in *New Tacoma Parking Corp. v. Johnston*, 85 Wn.2d 707, 709-11, 538 P.2d 1232 (1975), the Washington Supreme Court held that a

private lessee owed property tax on a leasehold interest for the 1972 and 1973 tax years where the city had conveyed a lease granting the right to manage and operate a city parking garage. The tax was due even though “all parking rates and changes pertaining thereto, as well as all regulations and restrictions affecting the operation of the garages, were fixed, established and maintained by the city” and “the city retained virtually total control.” *Id.* The Court reasoned that restrictions pertaining to possession or use of the publicly owned property might affect the valuation of the leasehold for purposes of determining the amount of property tax due, but those restrictions would not completely excuse the private grantee from the property tax on leaseholds. *Id.* at 712.

The Legislature intended the leasehold excise tax to replace the property tax on leaseholds. *Duwamish Warehouse*, 102 Wn.2d at 254. As a result, the 1976 act imposed the leasehold excise tax, and at the same time exempted from property tax “[a]ny and all rights to occupy or use any real or personal property owned in fee or held in trust by the United States, the state of Washington, or any political subdivision or municipal corporation of the state of Washington.” Laws of 1975-76, 2d Ex. Sess., ch. 61, § 14 (codified at RCW 84.36.451) (emphasis added). Reading the 1976 act to exempt from *property tax* “[a]ny and all rights to occupy or use” public property, but to impose the *excise tax* only on rights conveying

exclusive possession and control over the property, as Crystal Mountain proposes, would create a pocket of non-taxable property rights.

Specifically, all rights to occupy and use public property that fall short of exclusive possession and control would not be taxed—even where those rights had previously been taxed under the property tax scheme. Crystal Mountain has provided nothing to suggest this is what the Legislature intended.

Reading the leasehold excise tax statute to apply only to leaseholds conveying exclusive possession and control would contravene another aspect of the Legislature's stated purpose. The Legislature expressly recognized that private entities using public property enjoy significant state and local benefits, like police and fire protection, state and local road maintenance, and other state and local government services, even though the property is not their own. *See* RCW 82.29A.010(1)(a). Thus, one of the purposes of the tax was to ensure fair compensation for governmental entities for services rendered to those private entities, where property tax (here, property tax on the land) is not otherwise paid. *See* RCW 82.29A.010(1)(c). Allowing taxpayers like Crystal Mountain to enjoy a tax-free right to occupy and use public land would certainly defeat the Legislature's stated purpose, especially where Crystal Mountain occupies

expansive, dedicated areas of federal land, and where it has erected multiple improvements.

In sum, under the plain language of RCW 82.29A.010 (legislative purpose of the leasehold excise tax) and .020(1) (defining “leasehold interest”), exclusive possession or control over the public property is not required for the leasehold excise tax to apply.

b. To require exclusive possession of the property at issue would conflict with the Washington Supreme Court’s holding in *Mac Amusement*.

Consistent with the plain language of the statute, the Washington Supreme Court has already determined that the phrase “use and possession, to a degree less than fee simple ownership” does not require exclusive possession of the property. In *Mac Amusement Co. v. Dep’t of Revenue*, 95 Wn.2d 963, 970-73, 633 P.2d 68 (1981), the Court held that the leasehold excise tax applied even for portions of the public property where the grantee did not have *exclusive* possession and control.

Mac Amusement operated the Fun Forest amusement facility at the Seattle Center. *Id.* at 965. An agreement granted Mac Amusement the right to occupy certain space, including pedestrian walkways. *Id.* at 965, 970.

Similar to Crystal Mountain, Mac Amusement argued in part that it should not be liable for the leasehold excise tax on portions of the

property, including the pedestrian walkways, that remained open to the public. *Id.* at 970. Mac Amusement asserted that these areas should not have been included in the calculation of taxable rent because they remained public in nature. *Id.* at 970-71.

Although Crystal Mountain discusses Parts I and II of the *Mac Amusement* decision at length, it is Part III that is relevant to this case. In Part III, the Court looked to the statutory definition of “leasehold interest” and recognized, based on its plain language, that the term was defined as “not only including leases, but also permits and licenses.” *Id.* at 970-971. The Court reasoned that “[t]he taxable rent additionally includ[ed] those sums paid for *the use as well as the possession of public property.*” *Id.* at 971 (emphasis added). The Court concluded that given the plain language of RCW 82.29A.020(1) (defining “leasehold interest”) and RCW 82.29A.030 (imposing the leasehold excise tax) “it would appear the legislature intended to tax those areas *the use of which was bargained for.*” *Mac Amusement*, 95 Wn.2d at 971 (emphasis added).

The Court went on to explain that, “by including uses and permits [the Legislature gave] ‘leasehold’ a meaning not ordinarily contemplated by that term.” *Id.* Despite Crystal Mountain’s claims to the contrary, the Court did so in the context of discussing whether areas open to the public were subject to the tax in the first instance, not whether they were eligible

for a tax exemption. *See id.* at 970-71; Appellant’s Br. at 38-39. Taxing use as well as nonexclusive possession of the property was consistent with the purpose of the tax. *Mac Amusement*, 95 Wn.2d at 971. As a result, the Court upheld the inclusion of the pedestrian walkways in the “leasehold interest,” even though Mac Amusement had use, but not *exclusive* possession, of those walkways. *Id.* at 972-73. Thus, the Court held that exclusive possession of publicly owned property is not required for a property interest to qualify as a “leasehold interest.” On this point, the Court was unanimous. *Id.* at 973 (Dolliver, J. concurring and dissenting).

Crystal Mountain focuses instead on Parts I and II of the opinion, which are not germane. Appellant’s Br. at 37-42. In those sections of the *Mac Amusement* opinion, the Court discussed Mac Amusement’s payments for favorable location (Part I) and franchise or monopoly rights as a concessionaire (Part II). *Mac Amusement*, 95 Wn.2d at 967-70. Crystal Mountain apparently relies on the fact that the Court concluded that franchise or monopoly rights are not taxable under RCW 82.29A. *Id.* at 970.

In Parts I and II of the *Mac Amusement* opinion, the Court analyzed the statute’s definition of the term “contract rent.” *Id.* at 967. The definition of “contract rent” provides that when payment is made for a leasehold interest “in combination with payment for concession or other

rights granted by the lessor, only that portion of such payment which represents consideration for the leasehold interest shall be part of contract rent.” *Id.* (quoting RCW 82.29A.020(2)(a)). A portion of Mac Amusement’s payment under its contract with the Seattle Center was for the “exclusive right to operate all rides and games at the Center and for the sole right to sell food within the Fun Forest location.” *Id.* at 965. The proportion of rent attributable to those rights was not specified in the agreement, and Mac Amusement asserted that its “contract rent” should not include the amounts it paid for those rights. *Id.* at 966.

The Court concluded that the portion of Mac Amusement’s rent payments that were for “good location” within the Seattle Center were indeed taxable under RCW 82.29A. *Id.* at 969. However, franchise rights, described as exclusivity or monopoly rights, were “concession and other rights” not taxable under RCW 82.29A. *Id.* at 969-70. To the extent that Mac Amusement could show the amount attributable to franchise rights, those amounts were not part of the taxable contract rent. *Id.*

In this case, Crystal Mountain has never asserted that any portion of payments it made to the Forest Service should have been treated as payments for franchise or monopoly rights, rather than contract rent. CP at 3-7 (Notice of Appeal and Complaint). Nor did Crystal Mountain present testimony at trial to establish what, if any, portion of its payments

to the Forest Service could be attributed to payments for a franchise or monopoly right. Instead, Crystal Mountain has consistently asserted that it should receive a full refund because it is not subject to the leasehold excise tax at all. CP at 5-7.

Pursuant to RCW 82.32.180, “the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax.”¹² Crystal Mountain’s failure to show what portion, if any, of its payments are non-taxable payments for a franchise defeats any reliance on Parts I and II of the *Mac Amusement* case. *See also Auto. Club of Wash. v. Dep’t of Revenue*, 27 Wn. App. 781, 786-87, 621 P.2d 760 (1980) (citing RCW 82.32.180 when declining to consider a deduction not properly raised and proved by the taxpayer below); *Tidewater Terminal Co. v. State*, 60 Wn.2d 155, 162-63, 372 P.2d 674 (1962) (declining to allow an argument on appeal that the assessment was only partially correct where the taxpayer had not proved it was eligible for a deduction at trial).

Consequently, the Court’s discussion of franchise rights in Part II of the *Mac Amusement* opinion is not relevant in this case.¹³ By contrast,

¹² RCW 82.32.180 is applicable to cases involving the leasehold excise tax pursuant to RCW 82.32.010 (describing the tax statutes to which chapter 82.32 RCW applies).

¹³ Crystal Mountain argues the *Mac Amusement* Court’s discussion of franchise rights supports its position that it should be excused from the leasehold excise tax

the Court's discussion in Part III of the opinion is controlling and establishes that exclusive possession of publicly owned property is not required under the statutory definition of "leasehold interest."

Nor is Crystal Mountain the first taxpayer to argue, post-*Mac Amusement*, that exclusive possession is required for the leasehold excise tax to apply. In *Rainier Mountaineering, Inc. v. Dep't of Revenue*, BTA Dkt. No. 37206, a commercial mountain guiding service argued to the Board of Tax Appeals that it should not have to pay leasehold excise tax for the portion of its payments to the National Park Service that were for its right to commercially guide on Mount Rainier. *Id.* at 1-2.¹⁴ Rainier Mountaineering had an exclusive license to use National Park property for commercial guiding and climbing above the 8,000 foot level, but the Board acknowledged that "the general public may also use the same territory, albeit for noncommercial, recreational purposes." *Id.* at 11-12. Relying on *Mac Amusement*, the Board held the tax applied, concluding that Rainier Mountaineering's "leasehold interest," for purposes of the leasehold excise tax, included its right to use the climbing routes above 8,000 feet for commercial climbing and guiding purposes. *Id.* at 12-13. Thus, the Board of Tax Appeals has also rejected the argument that a

entirely. Appellant's Br. at 40-42. But Crystal Mountain is granted more than a monopoly right, and even more than mere access to public land. *See infra*, Part B.4., at 36-38. Crystal Mountain occupies a bargained for area. *Id.*

¹⁴ A copy of this Board of Tax Appeals decision is attached as Appendix C.

“leasehold interest” must be limited to the property of which a taxpayer has exclusive possession. *See id.* at 11-13.

c. **Crystal Mountain’s reliance on the dictionary definition of the isolated term “possession” cannot overcome the rest of the statute’s plain language.**

In addition to confusing the word “possession” with “possessory interest,” Crystal Mountain also mistakenly equates “possession” as used in RCW 82.29A.020(1) with exclusive “control.” Crystal Mountain argues that because the word “possession” is not defined in the leasehold excise tax statute, one must first turn to the dictionary to determine its ordinary and common meaning. Appellant’s Br. at 19. Crystal Mountain then picks from many possible dictionary definitions the one that suits its legal argument. According to Crystal Mountain, *the* definition of “possession” is “the act or condition of having in or taking into one’s control.” *Id.* (quoting *Webster’s Third New International Dictionary* 1770 (2002 ed.)). Thus, by selective use of dictionary definitions, Crystal Mountain asserts that the term “possession” as used in RCW 82.29A.020(1) means exclusive “control” over the property.

But simply plucking one possible definition of “possession” from a dictionary, without considering the language and context of the statute, is improper. Crystal Mountain’s use of a dictionary definition in this manner

ignores the actual language of the statute when construed as a whole, the Supreme Court's holding in *Mac Amusement*, and other possible meanings of "possession" that are much more consistent with the plain language of the statute and with legislative intent.

The Washington Supreme Court has cautioned against reliance on a single dictionary definition to define a word appearing in a statute, without consideration for the statute's context. *State v. Lilyblad*, 163 Wn.2d 1, 9, ¶ 17, 177 P.3d 686 (2008). Taken out of context, a common word can sometimes be subject to multiple interpretations and definitions. *Id.* However, multiple possible meanings of a word do not necessarily make the statute ambiguous. *Id.* "All words must be read in the context of the statute in which they appear, *not in isolation or subject to all possible meanings found in a dictionary.*" *Id.* (emphasis added). "When considering an undefined statutory term, the court will consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions." *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709 (2001). A court must also consider the purpose of the statute as part of the surrounding context necessary to determine the

meaning of a statutory term. *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, ¶ 26, 110 P.3d 1132 (2005).¹⁵

One definition of “possession” is “something owned, *occupied*, or controlled.” *Webster’s Third New International Dictionary* 1770 (2002 ed.) (emphasis added). Equating the word “possession”—as used in the first sentence of the statutory definition of “leasehold interest”—with “occupy” is consistent with the second sentence of that statutory definition and with other sections of the leasehold excise tax statutes. The second sentence of RCW 82.29A.020(1) provides that “[t]he term ‘leasehold interest’ shall include the rights of use or *occupancy* by others of property which is owned in fee or held in trust by a public corporation, commission, or authority created under RCW 35.21.730 or RCW 35.21.660 if the property is listed on or is within a district listed on any federal or state register of historical sites.” RCW 82.29A.020(1) (emphasis added). In addition, RCW 82.29A.030(1)(a) provides that the leasehold excise tax is levied and collected “on the act or privilege of *occupying* or using publicly owned real or personal property” (Emphasis added).

¹⁵ See Philip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 Duke L.J. 167, 176 (2010) (“Despite their aura of authority, dictionaries do not define the one, true meaning of a word—they generally provide multiple meanings intended to capture the wide breadth of possible usage.”).

Equating the term “possession,” as used in the definition of “leasehold interest,” with “occupy” is also consistent with the purpose of the leasehold excise tax statute. Doing so reconciles the simultaneously enacted property tax exemption covering “[a]ny and all rights to occupy or use” public property with the scope of its replacement, the leasehold excise tax. RCW 84.36.451 (emphasis added). And it gives effect to the Legislature’s stated purposes to fairly compensate governmental units for services normally supported by property taxes, where property taxes are not otherwise paid. Laws of 1975-76, 2d Ex. Sess., ch. 61, § 1 (codified at RCW 82.29A.010); *see also Affiliated FM Ins. Co. v. LTK Consulting Svcs., Inc.*, 170 Wn.2d 442, 458-59, ¶31 243 P.3d 521 (2010) (lead opinion)(“[T]he privilege to maintain and exclusively operate the [Seattle] Monorail System including the facilities, personal property and equipment, together with the *right to use and occupy*” certain areas “are property interests in using *and possessing* the Seattle Monorail.”). Equating “possession” with “occupy” in this case allows the related provisions of the leasehold excise statute to be read in harmony and consistent with the legislative intent. Crystal Mountain’s proposal to equate “possession” with exclusive “control” does not.

Furthermore, when the meaning of a term has already been resolved by litigation, and the Legislature has not reacted by amending the

statute to the contrary, courts will assume that the Legislature is satisfied with the court's interpretation. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 352, ¶ 24, 217 P.3d 1172 (2009). That the Legislature failed to amend the definition of "leasehold interest" after *Mac Amusement* was decided further undercuts Crystal Mountain's interpretation of "possession."

In the final analysis, the meaning of "leasehold interest" as statutorily defined in RCW 82.29A.020(1) must be based on sensible rules of construction that consider the statute as a whole, the Legislature's stated purpose and intent for enacting the law, and the Washington Supreme Court's holding in *Mac Amusement*. When properly analyzed, it is clear that a "leasehold interest" does not require exclusive possession and control over the property. Rather, the term includes rights to occupy or use property under a license or permit, without regard to whether the holder of the right has exclusive possession or control over the property. This reading of the statute "is consistent with the purpose of the tax." *Mac Amusement*, 95 Wn.2d at 972.

3. The Department’s administrative interpretation of “leasehold interest” is consistent with the statutory definition and does not support Crystal Mountain’s argument.

The Department adopted WAC 458-29A-100 in 1999 pursuant to RCW 82.29A.140. The Department’s rule defines “leasehold interest” to mean “an interest granting the right to possession and use of publicly owned real or personal property as a result of any form of agreement, written or oral, without regard to whether the agreement is labeled a lease, license, or permit.” Former WAC 458-29A-100(2)(f) (2000).¹⁶ The rule states that “[b]oth possession and use are required to create a leasehold interest, and the lessee must have *some identifiable* dominion and control over a defined area to satisfy the possession element.” Former WAC 458-29A-100(2)(f)(ii) (2000) (emphasis added). The rule also states that the element of “some identifiable dominion and control over a defined area” distinguishes a taxable leasehold interest “from a mere franchise, license, or permit.” Former WAC 458-29A-100(2)(f)(ii)(2000).

Crystal Mountain emphasizes this final sentence in WAC 458-29A-100(2)(f)(ii) (2000), even though it appears in a multipart discussion of “leasehold interest.” *See* Appellant’s Br. at 28-29. But the rule should be read as a whole, putting this sentence in context. The requirement that

¹⁶ This version of WAC 458-29A-100 was in place during the tax period at issue. The Department last updated the rule in 2010, but these subsections, while renumbered, remained essentially the same. *See* WAC 458-29A-100(g).

there be “some identifiable dominion and control over a defined area” adds context and is consistent with both *Mac Amusement* and *Rainier Mountaineering*, which emphasized the taxpayers’ use of areas that had been bargained for. *Mac Amusement*, 95 Wn.2d at 971 (“[I]t would appear the [L]egislature intended to tax those areas the use of which was bargained for.”); *Rainier Mountaineering, Inc.*, BTA Dkt. 37206, at 12 (“In any event, the alpine territory comprises an area the use of which has been bargained for by Rainier Mountaineering.”).

Moreover, in a related rule the Department discusses the circumstances under which the taxable rent is determined by considerations other than looking to the contract rent (for example, where the contract rent was not established through competitive bidding). Former WAC 458-29A-200(6)(a) (2000).¹⁷ When calculating taxable rent under those circumstances, the Department will consider any requirements that the private entity share access to the property with the public owner, with another person, or with the general public for purposes of determining the amount to be taxed. Former WAC 458-29A-200(6)(a)(ii) (2000). This shows that the rules assume a “leasehold interest” is

¹⁷ Similarly, this version of WAC 458-29A-200 was in place during the tax period at issue. The Department last updated the rule in 2010, but this subsection remained essentially the same. *See* WAC 458-29A-200(6)(a).

taxable, even where a grantee does not enjoy exclusive possession and control.

Read as a whole, the Department's rules require some identifiable dominion and control over an area, but not exclusive dominion and control, in order for the possession element to be satisfied. WAC 458-29A-100 is therefore consistent with the plain language of the leasehold excise tax statute and with the *Mac Amusement* Court's interpretation of "leasehold interest."

Finally, even if this court were to determine that the rule cannot be reconciled with the plain language of the leasehold excise tax as interpreted in *Mac Amusement*, then the plain language of the statute must prevail. Although a rule is often entitled to great weight, "regulations 'cannot amend or modify [a] statute.'" *North Central Wash. Respiratory Care Servs., Inc. v. Dep't of Revenue*, ___ P.3d ___, ___, 2011 WL 6370031, *6, ¶22 (2011) (quoting *Pierce Cy. v. Dep't of Revenue*, 66 Wn.2d 728, 731, 404 P.2d 1002 (1965)).

In short, exclusive possession and control over the property is not required under the leasehold excise tax statute, the Washington Supreme Court's interpretation of the statute, or the Department's administrative interpretation.

4. The trial court correctly concluded that the special use permit conveys a right to occupy, use, and possess forest service land sufficient to trigger the leasehold excise tax.

To meet the statutory definition of “leasehold interest,” Crystal Mountain’s permit must convey a right to use and possess the property to a degree less than fee simple ownership. RCW 82.29A.020(1). The statute does not require that the interest be a common law possessory interest, much less that Crystal Mountain enjoy exclusive possession and control over the land. As the leasehold excise tax statute does not require exclusive possession or control over the property, the trial court correctly concluded that Crystal Mountain did not meet its burden to prove it was entitled to a refund. Because Crystal Mountain enjoys a right to use and occupy the federal land and it exercises some identifiable dominion and control over a bargained for area, it has a “leasehold interest” for purposes of applying the leasehold excise tax.

Under the terms of the special use permit, Crystal Mountain is allowed to use the land. Stip. Ex. 4 at 1. Thus, the “use” element under the definition of “leasehold interest” is met. Crystal Mountain is also allowed to occupy the land to the extent necessary to construct, safely operate, and maintain the ski area. *Id.* at 1-2; 36 CFR § 251.51 (describing “term permit” as granting authorization to occupy and use the federal

land).¹⁸ Crystal Mountain's improvements and ski area operations on the federal land are extensive. Crystal Mountain owns numerous buildings located on the land, owns and operates at least nine ski lifts, grooms and maintains roughly 50 named ski runs, and maintains the roads and parking lots. Stip. Ex. 21 (listing buildings); CP at 182-83, FOF 19-21 (describing lifts and ski runs); CP at 174 (unchallenged FOF 9). In contrast, the Forest Service does not have any direct operations in the permit area, nor does the Forest Service have an office or any buildings in the permit area. CP at 174, (unchallenged FOF 6). Crystal Mountain is granted more than mere access to public land. It occupies a bargained for area. Stip. Ex. 4 at 1.

Not only does Crystal Mountain maintain some identifiable measure of dominion and control over a bargained for area, it can exclude patrons whom it believes are acting dangerously, are being destructive, or are breaking the law. Stip. Ex. 4 ¶ F; Stip. Ex. 18 at 1-5. Crystal Mountain maintains significant, permanent facilities, along with the ability to operate the ski area without material interference. Stip. Ex 4 at 2, ¶ E.

¹⁸ Crystal Mountain criticizes the Department for having stated in its administrative determination that the permit grants the holder "use of 4350 acres of public land." Appellant's Br. at 29 (*quoting* Stip. Ex 31 at 7). But the Department also explained, "the taxpayer's ski resort operations fully occupy the permit area such that few, if any, other uses of the land are possible." Stip. Ex. 31 at 7. The Department concluded that "the taxpayer has a sufficient degree of dominion and control over the permit area to satisfy the possession element of the test. . . ." Stip. Ex. 31 at 7.

And Crystal Mountain acknowledges that there are areas where it can exclude all others. Appellant's Br. at 32 n.14.

While Crystal Mountain may be required to allow public access to the federal land that it occupies, the special use permit grants Crystal Mountain possession and use of a bargained for area sufficient to trigger the definition of "leasehold interest" in the statute. The trial court was therefore correct to conclude that Crystal Mountain's permit satisfies all of the elements of the definition of "leasehold interest" in RCW 82.29A.020(1). *See* CP at 176. Crystal Mountain cannot meet its burden to show that it was entitled to a refund of leasehold excise tax paid. CP at 176.

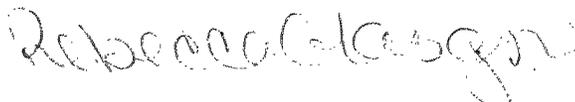
V. CONCLUSION

Crystal Mountain bears the burden to show that it is entitled to a refund of leasehold excise tax that it paid during the tax years at issue. The plain language of the leasehold excise tax statute, the Legislature's statement of its purpose, and the Washington Supreme Court's interpretation of the statute all establish that a private entity need not enjoy exclusive possession or control over the public property for the leasehold excise tax to apply. Moreover, the Department's administrative rule is consistent with the statute's definition of "leasehold interest."

While Crystal Mountain does not enjoy exclusive possession of the entire area of forest service land, it does possess, occupy, and use the property to a degree sufficient to trigger the leasehold excise tax. To hold otherwise would defeat the Legislature's stated purpose. This court should affirm the trial court's judgment denying Crystal Mountain's refund claim.

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in blue ink that reads "Rebecca Glasgow". The signature is written in a cursive style and is positioned above the printed names of the attorneys.

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CERTIFICATE OF SERVICE

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Seattle, WA 98104-7043
mastrodonato@carneylaw.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of February, 2012, at Tumwater, WA.


CARRIE A. PARKER, Legal Assistant

Authorization ID SNO33
Contact ID CRYSTAL MTN SKI
Expiration Date: 04/01/2032

FS-2700-5b (8/99)
OMB No 0596 - 0082

U.S. DEPARTMENT OF AGRICULTURE
Forest Service
SKI AREA TERM SPECIAL USE PERMIT
Act of October 22, 1986
(Ref. FSM 2710)
SKI AREA PERMIT ACT October 22, 1986

Crystal Mountain, INC. of 33914 CRYSTAL MOUNTAIN BLVD., CRYSTAL MOUNTAIN, WA 98022- (hereafter called the holder) is hereby authorized to use National Forest System lands, on the Mt. Baker-Snoqualmie National Forest, for the purposes of constructing, operating, and maintaining winter sports resort including food service, retail sales, and other ancillary facilities, described herein, known as the Crystal Mountain ski area and subject to the provisions of this term permit. This permit covers 4350 acres described here and as shown on the attached map dated 9/19/1991.

National Forest lands within sections 13,14,23,24,25,26,35 and 36 of T.17N., R.10E., Willamette Meridian, Unsurveyed. Sections 19,20,29,30 and 31 of T.17N., R.11E., Willamette Meridian, Unsurveyed. This area shown on a map labeled Exhibit "A" (dated 9/19/91) and hereby made a part of this permit.

Excluded from the permit area are: The Condominiums located within section 24, T.17N., R.10E., and sections 19 and 30, T.17N., R.11E., as shown on map labeled Exhibit "C" (dated 8/5/91) and hereby made part of this permit. The Private Clubs located within Section 19, T.17N., R.11E., as shown on a map labeled Exhibit "D" (dated 9/19/91) and hereby made part of this permit. The Puget Sound Energy power generator site located within Section 13, T.17N., R.11E., as shown on a map labeled Exhibit "E" (dated 9/19/91) hereby made part of this permit. The Communication site on Grubstake Peak, Exhibit "F" (dated 3/24/98) and hereby made part of this permit

The following improvements, whether on or off the site, are authorized:

See Exhibit "B" (dated 5/20/98) which is hereby made part of this permit.

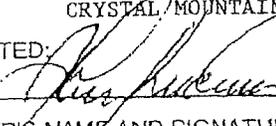
See Exhibit "E" (Site Development and Facilities Map) which is hereby made part of this permit.

Attached Clauses. This term permit is accepted subject to the conditions set forth herein on pages 2 through 15, and to exhibits A to G attached or referenced hereto and made a part of this permit.

THIS PERMIT IS ACCEPTED SUBJECT TO ALL OF ITS TERMS AND CONDITIONS.

CRYSTAL MOUNTAIN, INC.

ACCEPTED:

By: 

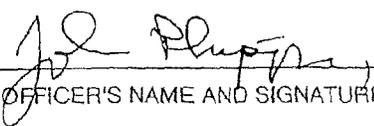
11/12/01

HOLDER'S NAME AND SIGNATURE

DATE

Title: _____

APPROVED:


AUTHORIZED OFFICER'S NAME AND SIGNATURE

Forest Supervisor, 11/27/01
TITLE AND DATE

STIP. EX. 4 - 1

APPENDIX A

TERMS AND CONDITIONS

I. AUTHORITY AND USE AND TERM AUTHORIZED.

- A. Authority. This term permit is issued under the authority of the Act of October 22, 1986, (Title 16, United States Code, Section 497b), and Title 36, Code of Federal Regulations, Sections 251.50-251.64..
- B. Authorized Officer. The authorized officer is the Forest Supervisor. The authorized officer may designate a representative for administration of specific portions of this authorization.
- C. Rules, Laws and Ordinances. The holder, in exercising the privileges granted by this term permit, shall comply with all present and future regulations of the Secretary of Agriculture and federal laws; and all present and future, state, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit to the extent they are not in conflict with federal law, policy or regulation. The Forest Service assumes no responsibility for enforcing laws, regulations, ordinances and the like which are under the jurisdiction of other government bodies.
- D. Term. Unless sooner terminated or revoked by the authorized officer, in accordance with the provisions of the authorization, this permit shall terminate on April 1, 2032, but a new special-use authorization to occupy and use the same National Forest land may be granted provided the holder shall comply with the then-existing laws and regulations governing the occupancy and use of National Forest lands. The holder shall notify the authorized officer in writing not less than six (6) months prior to said date that such new authorization is desired.
- E. Nonexclusive Use. This permit is not exclusive. The Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose, provided such use does not materially interfere with the rights and privileges hereby authorized.
- F. Area Access. Except for any restrictions as the holder and the authorized officer may agree to be necessary to protect the installation and operation of authorized structures and developments, the lands and waters covered by this permit shall remain open to the public for all lawful purposes. To facilitate public use of this area, all existing roads or roads as may be constructed by the holder, shall remain open to the public, except for roads as may be closed by joint agreement of the holder and the authorized officer.
- G. Master Development Plan. In consideration of the privileges authorized by this permit, the holder agrees to prepare and submit changes in the Master Development Plan encompassing the entire winter sports resort presently envisioned for development in connection with the National Forest lands authorized by this permit, and in a form acceptable to the Forest Service. Additional construction beyond maintenance of existing improvements shall not be authorized until this plan has been amended. Planning should encompass all the area authorized for use by this permit. The accepted Master Development Plan shall become a part of this permit. For planning purposes, a capacity for the ski area in people-at-one time shall be established in the Master Development Plan and appropriate National Environmental Policy Act (NEPA) document. The overall development shall not exceed that capacity without further environmental analysis documentation through the appropriate NEPA process.
- H. Periodic Revision.
1. The terms and conditions of this authorization shall be subject to revision to reflect changing times and conditions so that land use allocation decisions made as a result of revision to Forest Land and Resource Management Plan may be incorporated.

2. At the sole discretion of the authorized officer this term permit may be amended to remove authorization to use any National Forest System lands not specifically covered in the Master Development Plan and/or needed for use and occupancy under this authorization.

II. IMPROVEMENTS.

- A. Permission. Nothing in this permit shall be construed to imply permission to build or maintain any improvement not specifically named in the Master Development Plan and approved in the annual operating plan, or further authorized in writing by the authorized officer.
- B. Site Development Schedule. As part of this permit, a schedule for the progressive development of the permitted area and installation of facilities shall be prepared jointly by the holder and the Forest Service. Such a schedule shall be prepared by 3/31/2002, and shall set forth an itemized priority list of planned improvements and the due date for completion. This schedule shall be made a part of this permit. The holder may accelerate the scheduled date for installation of any improvement authorized, provided the other scheduled priorities are met; and provided further, that all priority installations authorized are completed to the satisfaction of the Forest Service and ready for public use prior to the scheduled due date.
 1. All required plans and specifications for site improvements, and structures included in the development schedule shall be properly certified and submitted to the Forest Service at least forty-five (45) days before the construction date stipulated in the development schedule.
 2. In the event there is agreement with the Forest Service to expand the facilities and services provided on the areas covered by this permit, the holder shall jointly prepare with the Forest Service a development schedule for the added facilities prior to any construction and meet requirements of paragraph II.D of this section. Such schedule shall be made a part of this permit.
- C. Plans. All plans for development, layout, construction, reconstruction or alteration of improvements on the site, as well as revisions of such plans, must be prepared by a licensed engineer, architect, and/or landscape architect (in those states in which such licensing is required) or other qualified individual acceptable to the authorized officer. Such plans must be accepted by the authorized officer before the commencement of any work. A holder may be required to furnish as-built plans, maps, or surveys upon the completion of construction.
- D. Amendment. This authorization may be amended to cover new, changed, or additional use(s) or area not previously considered in the approved Master Development plan. In approving or denying changes or modifications, the authorized officer shall consider among other things, the findings or recommendations of other involved agencies and whether their terms and conditions of the existing authorization may be continued or revised, or a new authorization issued.
- E. Ski Lift Plans and Specifications. All plans for uphill equipment and systems shall be properly certified as being in accordance with the American National Standard Safety Requirements for Aerial Passenger Tramways (B77.1). A complete set of drawings, specifications, and records for each lift shall be maintained by the holder and made available to the Forest Service upon request. These documents shall be retained by the holder for a period of three (3) years after the removal of the system from National Forest land.

III. OPERATIONS AND MAINTENANCE.

- A. Conditions of Operations. The holder shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the authorized officer. Standards are subject to periodic change by the authorized officer. This use shall normally be exercised at least 365 days each year or season. Failure of the holder to exercise this minimum use may result in termination pursuant to VIII.B.
- B. Ski Lift, Holder Inspection. The holder shall have all passenger tramways inspected by a qualified engineer or tramway specialist. Inspections shall be made in accordance with the American National

Standard Safety Requirements for Aerial Passenger Tramways (B77.1). A certificate of inspection, signed by an officer of the holder's company, attesting to the adequacy and safety of the installations and equipment for public use shall be received by the Forest Service prior to public operation stating as a minimum:

"Pursuant to our special use permit, we have had an inspection to determine our compliance with the American National Standard B77.1. We have received the results of that inspection and have made corrections of all deficiencies noted. The facilities are ready for public use."

C. Operating Plan. The holder or designated representative shall prepare and annually revise by **October 1 (winter plan) and May 1 (summer plan)** an Operating Plan. The plan shall be prepared in consultation with the authorized officer or designated representative and cover winter and summer operations as appropriate. The provisions of the Operating Plan and the annual revisions shall become a part of this permit and shall be submitted by the holder and approved by the authorized officer or their designated representatives. This plan shall consist of at least the following sections:

1. Ski patrol and first aid.
2. Communications.
3. Signs.
4. General safety and sanitation.
5. Erosion control.
6. Accident reporting.
7. Avalanche control.
8. Search and rescue.
9. Boundary management.
10. Vegetation management.
11. Designation of representatives.
12. Trail routes for nordic skiing.

The authorized officer may require a joint annual business meeting agenda to:

- a. Update Gross Fixed Assets and lift-line proration when the fee is calculated by the Graduated Rate Fee System.
- b. Determine need for performance bond for construction projects, and amount of bond.
- c. Provide annual use reports.

D. Cutting of Trees. Trees or shrubbery on the permitted area may be removed or destroyed only after the authorized officer has approved and marked, or otherwise designated, that which may be removed or destroyed. Timber cut or destroyed shall be paid for by the holder at appraised value, provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the holder at no stumpage cost to the holder.

E. Signs. Signs or advertising devices erected on National Forest lands, shall have prior approval by the Forest Service as to location, design, size, color, and message. Erected signs shall be maintained or renewed as necessary to neat and presentable standards, as determined by the Forest Service.

F. Temporary Suspension. Immediate temporary suspension of the operation, in whole or in part, may be required when the authorized officer, or designated representative, determines it to be necessary to protect the public health or safety, or the environment. The order for suspension may be given verbally or in writing. In any such case, the superior of the authorized officer, or designated representative, shall, within ten (10) days of the request of the holder, arrange for an on-the-ground review of the adverse conditions with the holder. Following this review the superior shall take prompt action to affirm, modify or cancel the temporary suspension.

IV. **NONDISCRIMINATION**. During the performance of this permit, the holder agrees:

- A. In connection with the performance of work under this permit, including construction, maintenance, and operation of the facility, the holder shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, or handicap. (Ref. Title VII of the Civil Rights Act of 1964 as amended).
- B. The holder and employees shall not discriminate by segregation or otherwise against any person on the basis of race, color, religion, sex, national origin, age or handicap, by curtailing or refusing to furnish accommodations, facilities, services, or use privileges offered to the public generally. (Ref. Title VI of the Civil Rights Act of 1964 as amended, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments, and the Age Discrimination Act of 1975).
- C. The holder shall include and require compliance with the above nondiscrimination provisions in any subcontract made with respect to the operations under this permit.
- D. Signs setting forth this policy of nondiscrimination to be furnished by the Forest Service will be conspicuously displayed at the public entrance to the premises, and at other exterior or interior locations as directed by the Forest Service.
- E. The Forest Service shall have the right to enforce the foregoing nondiscrimination provisions by suit for specific performance or by any other available remedy under the laws of the United States of the State in which the breach or violation occurs.

V. LIABILITIES.

- A. Third Party Rights. This permit is subject to all valid existing rights and claims outstanding in third parties. The United States is not liable to the holder for the exercise of any such right or claim.
- B. Indemnification of the United States. The holder shall hold harmless the United States from any liability from damage to life or property arising from the holder's occupancy or use of National Forest lands under this permit.
- C. Damage to United States Property. The holder shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit. The holder shall pay the United States the full cost of any damage resulting from negligence or activities occurring under the terms of this permit or under any law or regulation applicable to the national forests, whether caused by the holder, or by any agents or employees of the holder.
- D. Risks. The holder assumes all risk of loss to the improvements resulting from natural or catastrophic events, including but not limited to, avalanches, rising waters, high winds, falling limbs or trees, and other hazardous events. If the improvements authorized by this permit are destroyed or substantially damaged by natural or catastrophic events, the authorized officer shall conduct an analysis to determine whether the improvements can be safely occupied in the future and whether rebuilding should be allowed. The analysis shall be provided to the holder within six (6) months of the event.
- E. Hazards. The holder has the responsibility of inspecting the area authorized for use under this permit for evidence of hazardous conditions which could affect the improvements or pose a risk of injury to individuals.
- F. Insurance. The holder shall have in force public liability insurance covering: (1) property damage in the amount of **fifty thousand dollars** (\$50,000), and (2) damage to persons in the minimum amount of **five hundred thousand dollars** (\$500,000) in the event of death or injury to one individual, and the minimum amount of **two million dollars** (\$2,000,000) in the event of death or injury to more than one individual. These minimum amounts and terms are subject to change at the sole discretion of the authorized officer at the five-year anniversary date of this authorization. The coverage shall extend to property damage, bodily injury, or death arising out of the holder's activities under the permit including, but not limited to, occupancy or use of the land and the construction, maintenance, and operation of the structures, facilities, or equipment authorized by this permit. Such insurance shall also name the United States as an additionally insured. The holder shall send an authenticated copy

of its insurance policy to the Forest Service immediately upon issuance of the policy. The policy shall also contain a specific provision or rider to the effect that the policy shall not be cancelled or its provisions changed or deleted before thirty (30) days written notice to the Forest Supervisor, **Mt. Baker-Snoqualmie National Forest, 21905 64th Ave. W., Mountlake Terrace, WA 98043-2278**, by the insurance company.

Rider Clause (for insurance companies)

"It is understood and agreed that the coverage provided under this policy shall not be cancelled or its provisions changed or deleted before thirty (30) days of receipt of written notice to the Forest Supervisor, **Mt. Baker-Snoqualmie National Forest, 21905 64th Ave. W., Mountlake Terrace, WA 98043-2278**, by the insurance company."

VI. FEES.

Ski Area Permit Fees. The Forest Service shall adjust and calculate permit fees authorized by this permit to reflect any revisions to permit fee provisions in 16 U.S.C. 497c or to comply with any new permit fee system based on fair market value that may be adopted by statute or otherwise after issuance of this permit.

- A. Fee Calculation. The annual fee due the United States for the activities authorized by this permit shall be calculated using the following formula:

$$\text{SAPF} = (.015 \times \text{AGR in bracket 1}) + (.025 \times \text{AGR in bracket 2}) + (.0275 \times \text{AGR in bracket 3}) + (.04 \times \text{AGR in bracket 4})$$

Where:

$$\text{AGR} = [(\text{LT} + \text{SS}) \times (\text{proration \%})] + \text{GRAF}$$

AGR is adjusted gross revenue;

LT is revenue from sales of alpine and nordic lift tickets and passes;

GRAF is gross year-round revenue from ancillary facilities;

Proration % is the factor to apportion revenue attributable to use of National Forest System lands;

SAPF is the ski area permit fee for use of National Forest System lands; and

SS is revenue from alpine and nordic ski school operations.

1. SAPF shall be calculated by summing the results of multiplying the indicated percentage rates by the amount of the holder's adjusted gross revenue (AGR), which falls into each of the four brackets. Follow direction in paragraph 2 to determine AGR. The permit fee shall be calculated based on the holder's fiscal year, unless mutually agreed otherwise by the holder and the authorized officer.

The four revenue brackets shall be adjusted annually by the consumer price index issued in FSH 2709.11, chapter 30. The revenue brackets shall be indexed for the previous calendar year. The holder's AGR for any fiscal year shall not be split into more than one set of indexed brackets. Only the levels of AGR defined in each bracket are updated annually. The percentage rates do not change.

The revenue brackets and percentages displayed in Exhibit 01 shall be used as shown in the preceding formula to calculate the permit fee.

Adjusted Gross Revenue (AGR) Brackets and Associated Percentage Rates
for Use in Determining Ski Area Permit Fee (SAPF)

Revenue Brackets (updated annually by CPI*)
and Percentage Rates

Holder FY	Bracket 1 (1.5%)	Bracket 2 (2.5%)	Bracket 3 (2.75%)	Bracket 4 (4%)
FY 1996 CPI: N/A	All revenue below \$3,000,000	\$ 3,000,000 to <\$15,000,000	\$15,000,000 to \$50,000,000	All revenue over \$50,000,000
FY 1997 CPI: 1.030	All revenue below \$3,090,000	\$ 3,090,000 to <\$15,450,000	\$15,450,000 to \$51,500,000	All revenue over \$51,500,000
FY 1998 CPI: 1.022	All revenue below \$3,158,000	\$ 3,158,000 to <\$15,790,000	\$15,790,000 to \$52,633,000	All revenue over \$52,633,000
FY 1999 CPI: 1.017	All revenue below \$3,212,000	\$ 3,212,000 to <\$16,058,000	\$16,058,000 to \$53,528,000	All revenue over \$53,528,000
FY 2000 and beyond	BRACKETS WILL BE UPDATED ANNUALLY BY CPI*			

*The authorized officer shall notify the holder of the updated revenue brackets based on the Consumer Price Index (CPI) which is revised and issued annually in FSH 2709.11, chapter 30.

2. AGR shall be calculated by summing the revenue from lift tickets and ski school operations prorated for use of National Forest System lands and from ancillary facility operations conducted on National Forest System lands.

Revenue inclusions shall be income from sales of alpine and nordic tickets and ski area passes; alpine and nordic ski school operations; gross revenue from ancillary facilities; the value of bartered goods and complimentary lift tickets (such as lift tickets provided free of charge to the holder's friends or relatives); and special event revenue. Discriminatory pricing, a rate based solely on race, color, religion, sex, national origin, age, disability, or place of residence, is not allowed, but if it occurs, include the amount that would have been received had the discriminatory pricing transaction been made at the market price, the price generally available to an informed public, excluding special promotions.

Revenue exclusions shall be income from sales of operating equipment; refunds; rent paid to the holder by subholders; sponsor contributions to special events; any amount attributable to employee gratuities or employee lift tickets; discounts; ski area tickets or passes provided for a public safety or public service purpose (such as for National Ski Patrol or for volunteers to assist on the slope in the Special Olympics); and other goods or services (except for bartered goods and complimentary lift tickets) for which the holder does not receive money.

Include the following in AGR:

- a. Revenue from sales of year-round alpine and nordic ski area passes and tickets and revenue from alpine and nordic ski school operations prorated according to the percentage of use between National Forest System lands and private land in the ski area;

- b. Gross year-round revenue from temporary and permanent ancillary facilities located on National Forest System lands;
- c. The value of bartered goods and complimentary lift tickets, which are goods, services, or privileges that are not available to the general public (except for employee gratuities, employee lift tickets, and discounts, and except for ski area tickets and passes provided for a public safety or public service purpose) and that are donated or provided without charge in exchange for something of value to organizations or individuals (for example, ski area product discounts, service discounts, or lift tickets that are provided free of charge in exchange for advertising).

Bartered goods and complimentary lift tickets (except for employee gratuities, employee lift tickets, discounts, and except for ski area tickets and passes provided for a public safety or public service purpose) valued at market price shall be included in the AGR formula as revenue under LT, SS, or GRAF, depending on the type of goods, services, or privileges donated or bartered; and

- d. Special event revenue from events, such as food festivals, foot races, and concerts. Special event revenue shall be included in the AGR formula as revenue under LT, SS, or GRAF, as applicable. Prorate revenue according to the percentage of use between National Forest System lands and private land as described in the following paragraphs 5 and 6.
3. LT is the revenue from sales of alpine and nordic lift tickets and passes purchased for the purpose of using a ski area during any time of the year, including revenue that is generated on private land (such as from tickets sold on private land).
 4. SS is the revenue from lessons provided to teach alpine or nordic skiing or other winter sports activities, such as racing, snowboarding, or snowshoeing, including revenue that is generated on private land (such as from tickets sold on private land).
 5. Proration % is the method used to prorate revenue from the sale of ski area passes and lift tickets and revenue from ski school operations between National Forest System lands and private land in the ski area. Separately prorate alpine and nordic revenue with an appropriate proration factor. Add prorated revenues together; then sum them with GRAF to arrive at AGR. Use one or both of the following methods, as appropriate:
 - a. STFP shall be the method used to prorate alpine revenue. The STFP direction contained in FSM 2715.11c effective in 1992 shall be used. Include in the calculation only uphill devices (lifts, tows, and tramways) that are fundamental to the winter sports operation (usually those located on both Federal and private land). Do not include people movers whose primary purpose is to shuttle people between parking areas or between parking areas and lodges and offices.
 - b. Nordic trail length is the method used to prorate nordic revenue. Use the percentage of trail length on National Forest System lands to total trail length.
 6. GRAF is the revenue from ancillary facilities, including all of the holder's or subholder's lodging, food service, rental shops, parking, and other ancillary operations located on National Forest System lands. Do not include revenue that is generated on private land. For facilities that are partially located on National Forest System lands, calculate the ratio of the facility square footage located on National Forest System lands to the total facility square footage. Special event revenue allocatable to GRAF shall be prorated by the ratio of use on National Forest System lands to the total use.
 7. In cases when the holder has no AGR for a given fiscal year, the holder shall pay a permit fee of \$2 per acre for National Forest System lands under permit or a percentage of the appraised value of National Forest System lands under permit, at the discretion of the authorized officer.
 - B. Fee Payments. Reports and deposits shall be tendered in accordance with the following schedule. They shall be sent or delivered to the collection officer, USDA, Forest Service, at the address furnished by the authorized officer. Checks or money orders shall be made payable to: USDA, Forest Service.

1. The holder shall calculate and submit an advance payment which is due by the beginning of the holder's payment cycle. The advance payment shall equal 20 percent of the holder's average permit fee for 3 operating years, when available. When past permit fee information is not available, the advance payment shall equal 20 percent of the permit fee, based on the prior holder's average fee or projected AGR. For ski areas not expected to generate AGR for a given payment cycle, advance payment of the permit fee as calculated in item A, paragraph 7 (\$2 per acre for National Forest System lands under permit or a percentage of the appraised value of National Forest System lands under permit, at the discretion of the authorized officer) shall be made. The advance payment shall be credited (item B, paragraph 3) toward the total ski area permit fee for the payment cycle.
 2. The holder shall report sales, calculate fees due based on a tentative percentage rate, and make interim payments each calendar **MONTH**, except for periods in which no sales take place and the holder has notified the authorized officer that the operation has entered a seasonal shutdown for a specific period. Reports and payments shall be made by the end of the month following the end of each reportable period. Interim payments shall be credited (item B, paragraph 3) toward the total ski area permit fee for the payment cycle.
 3. Within 90 days after the close of the ski area's payment cycle, the holder shall provide a financial statement, including a completed permit fee information form, Form FS-2700-19a, representing the ski area's financial condition at the close of its business year and an annual operating statement reporting the results of operations, including a final payment which includes year-end adjustments for the holder and each subholder for the same period. Any balance that exists may be credited and applied against the next payment due or refunded, at the discretion of the permit holder.
 4. Within 30 days of receipt of a statement from the Forest Service, the holder shall make any additional payment required to ensure that the correct ski area permit fee is paid for the past year's operation.
 5. Payments shall be credited on the date received by the designated collection officer. If the due date for the fee or fee calculation financial statement falls on a non-workday, the charges shall not accrue until the close of business on the next workday.
 6. All permit fee calculations and records of sales are subject to review or periodic audit as determined by the authorized officer. Errors in calculation or payment shall be corrected as needed for conformance with those reviews or audits. In accordance with the Late Payment Interest, Administrative Costs and Penalties clause contained in this authorization, interest and penalties shall be assessed on additional fees due as a result of reviews or audits.
- C. Correcting Errors. Correction of errors includes any action necessary to calculate the holder's sales or slope transport fee percentage or to make any other determination required to calculate permit fees accurately. For fee calculation purposes, an error may include:
- a. Misreporting or misrepresentation of amounts;
 - b. Arithmetic mistakes;
 - c. Typographic mistakes; or
 - d. Variation from generally accepted accounting principles (GAAP), when such variations are inconsistent with the terms of this permit.

Correction of errors shall be made retroactively to the date the error was made or to the previous audit period, whichever is more recent, and past fees shall be adjusted accordingly.

- D. Late Payment Interest, Administrative Costs and Penalties. Pursuant to 31 U.S.C. 3717, et seq., interest shall be charged on any fee amount not paid within 30 days from the date the fee or fee calculation financial statement specified in this authorization becomes due. The rate of interest assessed shall be the higher of the rate of the current value of funds to the U.S. Treasury (i.e., Treasury tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins annually or quarterly or at the Prompt Payment Act rate. Interest on the principal shall accrue from the date the fee or fee calculation financial statement is due.

In the event the account becomes delinquent, administrative costs to cover processing and handling of the delinquency will be assessed.

A penalty of 6 percent per annum shall be assessed on the total amount delinquent in excess of 90 days and shall accrue from the same date on which interest charges begin to accrue.

Payments will be credited on the date received by the designated collection officer or deposit location. If the due date for the fee or fee calculation statement falls on a non-workday, the charges shall not apply until the close of business on the next workday.

Disputed fees are due and payable by the due date. No appeal of fees will be considered by the Forest Service without full payment of the disputed amount. Adjustments, if necessary, will be made in accordance with settlement terms or the appeal decision.

If the fees become delinquent, the Forest Service will:

Liquidate any security or collateral provided by the authorization.

If no security or collateral is provided, the authorization will terminate and the holder will be responsible for delinquent fees as well as any other costs of restoring the site to its original condition including hazardous waste cleanup.

Upon termination or revocation of the authorization, delinquent fees and other charges associated with the authorization will be subject to all rights and remedies afforded the United States pursuant to 31 U.S.C. 3711 *et seq.* Delinquencies may be subject to any or all of the following conditions:

Administrative offset of payments due the holder from the Forest Service.

Delinquencies in excess of 60 days shall be referred to United States Department of Treasury for appropriate collection action as provided by 31 U.S.C. 3711 (g), (1).

The Secretary of the Treasury may offset an amount due the debtor for any delinquency as provided by 31 U.S.C. 3720, *et seq.*)

- E. Nonpayment. Failure of the holder to make timely payments, pay interest charges or any other charges when due, constitutes breach and shall be grounds for termination of this authorization. This permit terminates for nonpayment of any monies owed the United States when more than 90 days in arrears.
- F. Access to Records. For the purpose of administering this permit (including ascertaining that fees paid were correct and evaluating the propriety of the fee base), the holder agrees to make all of the accounting books and supporting records to the business activities, as well as those of sublessees operating within the authority of this permit, available for analysis by qualified representatives of the Forest Service or other Federal agencies authorized to review the Forest Service activities. Review of accounting books and supporting records shall be made at dates convenient to the holder and reviewers. Financial information so obtained shall be treated as confidential as provided in regulations issued by the Secretary of Agriculture.
- The holder shall retain the above records and keep them available for review for 5 years after the end of the year involved, unless disposition is otherwise approved by the authorized officer in writing.
- G. Accounting Records. The holder shall follow Generally Accepted Accounting Principles or Other Comprehensive Bases of Accounting acceptable to the Forest Service in recording financial transactions and in reporting results to the authorized officer. When requested by the authorized officer, the holder at own expense, shall have the annual accounting reports audited or prepared by a licensed independent accountant acceptable to the Forest Service. The holder shall require sublessees to comply with these same requirements. The minimum acceptable accounting system shall include:

1. Systematic internal controls and recording by kind of business the gross receipts derived from all sources of business conducted under this permit. Receipts should be recorded daily and, if possible, deposited into a bank account without reduction by disbursements. Receipt entries shall be supported by source documents such as cash-register tapes, sale invoices, rental records, and cash accounts from other sources.
2. A permanent record of investments in facilities (depreciation schedule), and current source documents for acquisition costs of capital items.
3. Preparation and maintenance of such special records and accounts as may be specified by the authorized officer.

VII. TRANSFER AND SALE.

- A. Subleasing. The holder may sublease the use of land and improvements covered under this permit and the operation of concessions and facilities authorized upon prior written notice to the authorized officer. The Forest Service reserves the right to disapprove subleasees. In any circumstance, only those facilities and activities authorized by this permit may be subleased. The holder shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet. The holder may not sublease direct management responsibility without prior written approval by the authorized officer.
- B. Notification of Sale. The holder shall immediately notify the authorized officer when a sale and transfer of ownership of the permitted improvements is planned.
- C. Divestiture of Ownership. Upon change in ownership of the facilities authorized by this permit, the rights granted under this authorization may be transferred to the new owner upon application to and approval by the authorized officer. The new owner must qualify and agree to comply with, and be bound by the terms and conditions of the authorization. In granting approval, the authorized officer may modify the terms, conditions, and special stipulations to reflect any new requirements imposed by current Federal and state land use plans, laws, regulations or other management decisions.

VIII. TERMINATION.

- A. Termination for Higher Public Purpose. If, during the term of this permit or any extension thereof, the Secretary of Agriculture or any official of the Forest Service acting by or under his or her authority shall determine by his or her planning for the uses of the National Forest that the public interest requires termination of this permit, this permit shall terminate upon one hundred-eighty (180) day's written notice to the holder of such determination, and the United States shall have the right thereupon, subject to Congressional authorization and appropriation, to purchase the holder's improvements, to remove them, or to require the holder to remove them, at the option of the United States. The United States shall be obligated to pay an equitable consideration for the improvements or for removal of the improvements and damages to the improvements resulting from their removal. The amount of the consideration shall be fixed by mutual agreement between the United States and the holder and shall be accepted by the holder in full satisfaction of all claims against the United States under this clause: Provided, that if mutual agreement is not reached, the Forest Service shall determine the amount, and if the holder is dissatisfied with the amount thus determined to be due him may appeal the determination in accordance with the Appeal Regulations, and the amount as determined on appeal shall be final and conclusive on the parties hereto; Provided further, that upon the payment to the holder of 75% of the amount fixed by the Forest Service, the right of the United States to remove or require the removal of the improvements shall not be stayed pending the final decision on appeal.
- B. Termination, Revocation and Suspension. The authorized officer may suspend, revoke, or terminate this permit for (1) noncompliance with applicable statutes, regulations, or terms and conditions of the authorization; (2) for failure of the holder to exercise the rights and privileges granted; (3) with the consent of the holder; or (4) when, by its terms, a fixed agreed upon condition, event, or time occurs.

Prior to suspension, revocation, or termination, the authorized officer shall give the holder written notice of the grounds for such action and reasonable time to correct cureable noncompliance.

IX. RENEWAL.

- A. Renewal. The authorized use may be renewed. Renewal requires the following conditions: (1) the land use allocation is compatible with the Forest Land and Resource Management Plan; (2) the site is being used for the purposes previously authorized and; (3) the enterprise is being continually operated and maintained in accordance with all the provisions of the permit. In making a renewal, the authorized officer may modify the terms, conditions, and special stipulations.

X. RIGHTS AND RESPONSIBILITIES UPON TERMINATION OR NONRENEWAL.

- A. Removal of Improvements. Except as provided in Clause VIII. A, upon termination or revocation of this special use permit by the Forest Service, the holder shall remove within a reasonable time as established by the authorized officer, the structures and improvements, and shall restore the site to a condition satisfactory to the authorized officer, unless otherwise waived in writing or in the authorization. If the holder fails to remove the structures or improvements within a reasonable period, as determined by the authorized officer, they shall become the property of the United States without compensation to the holder, but that shall not relieve the holder's liability for the removal and site restoration costs.

XI. MISCELLANEOUS PROVISIONS.

- A. Members of Congress. No Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.
- B. Inspection, Forest Service. The Forest Service shall monitor the holder's operations and reserves the right to inspect the permitted facilities and improvements at any time for compliance with the terms of this permit. Inspections by the Forest Service do not relieve the holder of responsibilities under other terms of this permit.
- C. Regulating Services and Rates. The Forest Service shall have the authority to check and regulate the adequacy and type of services provided the public and to require that such services conform to satisfactory standards. The holder may be required to furnish a schedule of prices for sales and services authorized by the permit. Such prices and services may be regulated by the Forest Service: Provided, that the holder shall not be required to charge prices significantly different than those charged by comparable or competing enterprises.
- D. Advertising. The holder, in advertisements, signs, circulars, brochures, letterheads, and like materials, as well as orally, shall not misrepresent in any way either the accommodations provided, the status of the permit, or the area covered by it or the vicinity. The fact that the permitted area is located on the National Forest shall be made readily apparent in all of the holder's brochures and print advertising regarding use and management of the area and facilities under permit.
- E. Bonding. The authorized officer may require the holder to furnish a bond or other security to secure all or any of the obligations imposed by the terms of the authorization or any applicable law, regulation, or order.

Bonds, Performance. Use the following text, when bonding is called for: As a further guarantee of the faithful performance of the provisions of terms and conditions **N/A** of this permit, the holder agrees to deliver and maintain a surety bond or other acceptable security in the amount of \$ **N/A** . Should the sureties or the bonds delivered under this permit become unsatisfactory to the Forest Service, the holder shall, within thirty (30) days of demand, furnish a new bond with surety, solvent and satisfactory to the Forest Service. In lieu of a surety bond, the holder may deposit into a Federal depository, as directed by the Forest Service, and maintain therein, cash in the amounts provided for above, or

negotiable securities of the United States having a market value at the time of deposit of not less than the dollar amounts provided above.

The holder's surety bond shall be released, or deposits in lieu of a bond, shall be returned thirty (30) days after certification by the Forest Service that priority installations under the development plan are complete, and upon furnishing by the holder of proof satisfactory to the Forest Service that all claims for labor and material on said installations have been paid or released and satisfied. The holder agrees that all moneys deposited under this permit may, upon failure on his or her part to fulfill all and singular the requirements herein set forth or made a part hereof, be retained by the United States to be applied to satisfy obligations assumed hereunder, without prejudice whatever to any rights and remedies of the United States.

Prior to undertaking additional construction or alteration work not provided for in the above terms and conditions or when the improvements are to be removed and the area restored, the holder shall deliver and maintain a surety bond in an amount set by the Forest Service, which amount shall not be in excess of the estimated loss which the Government would suffer upon default in performance of this work.

- F. Water Rights. This authorization confers no rights to the use of water by the holder. Such rights must be acquired under State law.
- G. Current Addresses. The holder and the Forest Service shall keep each informed of current mailing addresses including those necessary for billing and payment of fees.
- H. Identification of Holder. Identification of the holder shall remain sufficient so that the Forest Service shall know the true identity of the entity.

Corporation Status Notification:

1. The holder shall notify the authorized officer within fifteen (15) days of the following changes:
 - a. Names of officers appointed or terminated.
 - b. Names of stockholders who acquire stock shares causing their ownership to exceed 50 percent of shares issued or otherwise acquired, resulting in gaining controlling interest in the corporation.
2. The holder shall furnish the authorized officer:
 - a. A copy of the articles of incorporation and bylaws.
 - b. An authenticated copy of a resolution of the board of directors specifically authorizing a certain individual or individuals to represent the holder in dealing with the Forest Service.
 - c. A list of officers and directors of the corporation and their addresses.
 - d. Upon request, a certified list of stockholders and amount of stock owned by each.
 - e. The authorized officer may require the holder to furnish additional information as set forth in 36 CFR 251.54(e)(1)(iv).

Partnership Status Notification:

The holder shall notify the authorized officer within fifteen (15) days of the following changes. Names of the individuals involved shall be included with the notification.

1. Partnership makeup changes due to death, withdrawal, or addition of a partner.
2. Party or parties assigned financed interest in the partnership by existing partner(s).
3. Termination, reformation, or revision of the partnership agreement.
4. The acquisition of partnership interest, either through purchase of an interest from an existing partner or partners, or contribution of assets, that exceeds 50 percent of the partnership permanent investment.

- I. Archaeological-Paleontological Discoveries. The holder shall immediately notify the authorized officer of any and all antiquities or other objects of historic or scientific interest. These include, but are not limited to, historic or prehistoric ruins, fossils, or artifacts discovered as the result of operations under this permit, and shall leave such discoveries intact until authorized to proceed by the authorized officer. Protective and mitigative measures specified by the authorized officer shall be the responsibility of the permit holder.
- J. Protection of Habitat of Endangered, Threatened, and Sensitive Species.
Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act (ESA) of 1973, as amended, or listed as sensitive by the Regional Forester under authority of FSM 2670, derived from ESA Section 7 consultation, may be shown on a separate map, hereby made a part of this permit, or identified on the ground. Protective and mitigative measures specified by the authorized officer shall be the responsibility of the permit holder.
- If protection measures prove inadequate, if other such areas are discovered, or if new species are listed as Federally threatened or endangered or as sensitive by the Regional Forester, the authorized officer may specify additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.
- K. Superior Clauses. In the event of any conflict between any of the preceding printed clauses or any provision thereof, and any of the following clauses or any provision thereof, the preceding clauses shall control.
- L. Superseded Permit. This permit replaces a special use permit issued to: Boyne USA Inc., Authorization ID SNO33 on 06/19/1998.
- M. Disputes. Appeal of any provisions of this authorization or any requirements thereof shall be subject to the appeal regulations at 36 CFR 251, Subpart C, or revisions thereto. The procedures for these appeals are set forth in 36 CFR 251 published in the Federal Register at 54 FR 3362, January 23, 1989.
- N. Drinking Water Systems (B38):
1. The holder, as the water supplier and owner or operator of the drinking water system, is responsible for compliance with all applicable Federal, State, and local drinking water laws and regulations, including meeting the standards of FSM 7420 for the operation and maintenance of a public water system. For the purposes of this authorization, public water systems are as defined in the National Primary Drinking Water Regulations, Title 40, Code of Federal Regulations, Part 141 (40 CFR 141), or by State regulations if more stringent. If required, federally owned nonpublic water systems shall meet the same standards specified in Federal and State regulations for public water systems (FSM 7140).
 2. For federally owned systems, the holder shall notify and consult with the Forest Service within 24 hours or on the next business day after notification by the laboratory of a sample that tests positive for microbiological contamination. The holder shall notify and consult with the Forest Service within 48 hours of notification of a maximum contaminant level violation or an acute violation.
 3. The holder shall retain all records as required by applicable laws and regulations. The holder agrees to make the records available to the Forest Service as well as any other regulatory agency authorized to review Forest Service activities. Copies of microbiological test results for federally owned water systems shall be forwarded monthly to the Forest Service by the 15th of the month following the sampling date. Copies of other required records for federally owned systems shall be forwarded annually to the Forest Service within 15 days of the end of the operating season for seasonal sites or within 15 days of the end of the calendar year for year-round operations. The holder shall surrender all records for a federally owned system to the Forest Service upon permit termination or revocation.

4. For federally owned systems, the holder shall provide the name of the water system operator in writing to the Forest Service and notify the authorized officer within 72 hours of a change in personnel.

O. Water Rights Acquired in the Name of the United States(X-99) All water rights obtained by the holder for use on the area authorized must be acquired in the name of the United States.

P. Disputes. Appeal of any provisions of this authorization or any requirements thereof shall be subject to the appeal regulations at 36 CFR 251, Subpart C, or revisions thereto. The procedures for these appeals are set forth in 36 CFR-251 published in the Federal Register at 54 FR 3362, January 23, 1989.

Q. Condominium Parking. The holder will provide a minimum of 96 parking units for the existing condominiums.

R. Permit Agreements Clause. The holder will assure compliance with the terms and conditions of the permit for all facilities operated within the permit area. Owners of the facilities will manage the day-to-day operations of these facilities in a manner consistent with these terms and conditions. For facilities not owned by the holder, the holder will provide by November 15, 2001, authenticated copies of documents granting to the holder authority necessary to ensure that the facilities are operated according to the terms and conditions of the permit. Such documents shall be subject to the authorized officer's approval.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0596-0082.

This information is needed by the Forest Service to evaluate requests to use National Forest System lands and manage those lands to protect natural resources, administer the use, and ensure public health and safety. This information is required to obtain or retain a benefit. The authority for that requirement is provided by the Organic Act of 1897 and the Federal Land Policy and Management Act of 1976, which authorize the Secretary of Agriculture to promulgate rules and regulations for authorizing and managing National Forest System lands. These statutes, along with the Term Permit Act, National Forest Ski Area Permit Act, Granger-Thye Act, Mineral Leasing Act, Alaska Term Permit Act, Act of September 3, 1954, Wilderness Act, National Forest Roads and Trails Act, Act of November 16, 1973, Archeological Resources Protection Act, and Alaska National Interest Lands Conservation Act, authorize the Secretary of Agriculture to issue authorizations for the use and occupancy of National Forest System lands. The Secretary of Agriculture's regulations at 36 CFR Part 251, Subpart B, establish procedures for issuing those authorizations.

The Privacy Act of 1974 (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552) govern the confidentiality to be provided for information received by the Forest Service.

Public reporting burden for this collection of information is estimated to average 12 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

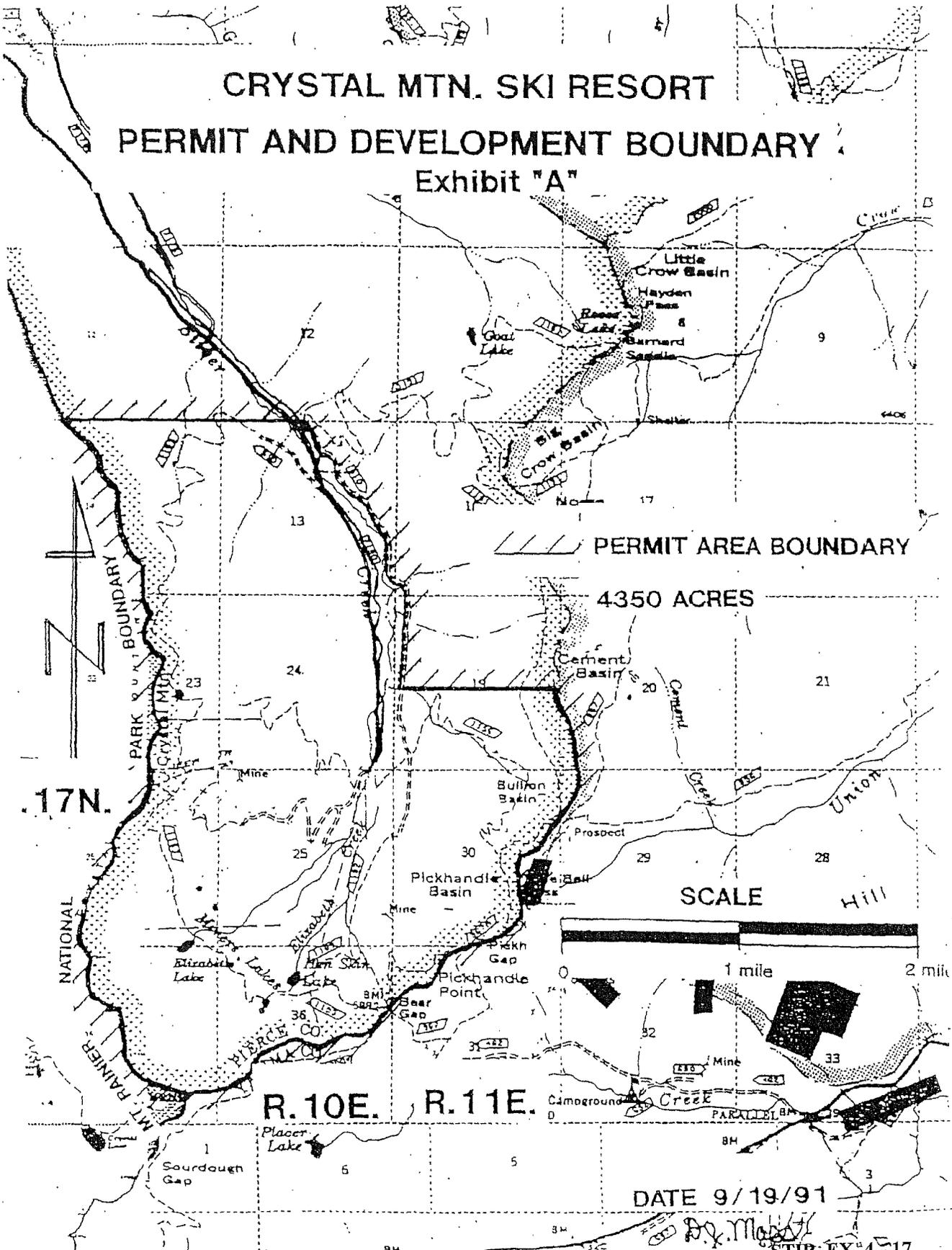
List of EXHIBITS

- EXHIBIT A Permit and Development Boundary Map
- EXHIBIT B List of Crystal Mountain, Inc. Improvements
- EXHIBIT C Silver Skis and Crystal Chalets Condominium Maps
- EXHIBIT D Private Clubs Map
- EXHIBIT E Puget Sound Energy Generator Site
- EXHIBIT F Existing Site Development and Facilities Map (On File at District Office)
- EXHIBIT G Communication Site at Grubstake Peak Map

CRYSTAL MTN. SKI RESORT

PERMIT AND DEVELOPMENT BOUNDARY

Exhibit "A"

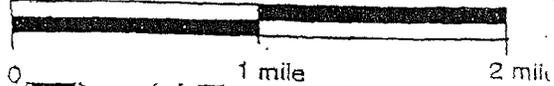


PERMIT AREA BOUNDARY

4350 ACRES

SCALE

Hill



R. 10E.

R. 11E.

DATE 9/19/91

STIP: EX. 4517
DEF BY 105.17

EXHIBIT "B"

Crystal Mountain Inc. Improvements

LIFTS

C-11 Midway Shuttle	C-6 High Cambell
C-10 Rainier Express	C-7 Gold Hills **
C-1 Miners Basin	C-8 Discovery **
C-3 Green Valley	C-9 Forest Queen **
C-4 Quick Silver **	<i>NORTHWAY</i>

** These chairs are lighted for night skiing.

SKI RUNS

4C Boondoggle	6A Powder Bowl	3D Grubstake
4B Quicksilver	10C Gandy's Run	3F Sluiceway
4A Tinkerbell	1A Deer Fly	3B Snorting Elk
9A Queens Run	10G Bull Run	3H Right Angle
9B CMAC	10B Lucky Shot	3I I-5
9C Mr. McGoo	10E Sunnyside	7A Gold Hills
9D Downhill	10D Iceburg Ridge	8A The Meadow
1B Skid Road	10H Iceburg Gulch	3G Kelly's Gap Road
5B Rolling Knolls	3e Green Valley	5C Wally's Way
5A K-2 Face	10I Exterminator	10K Howeird
11A Lower Skid Road	10A Tree Run	10J Break Over
10F Mel's Madness		

BACK COUNTRY AREA'S ***

<u>North Backcountry</u>	<u>South Backcountry</u>
NC Brand-X	SA Three Way Peak
NF Paradise Bowl	SB Silver Basin
ND Spook Hill	SC Silver King
NE Gun Tower	SD Avalanche Basin
NG Niagras	SE The Throne
NA Northway	
NB Lower Northway	

***The North and South Backcountry area's are not Patrolled on a regular basis.

5/20/98

EXHIBIT "B" (continued)

BUILDINGS

- | | |
|-------------------------------|-------------------------------|
| 1 Summit House | 4 Ticket Plaza |
| 3 Sport Shop | 6 Chapel |
| 5 Lodge | 11 Storage Room |
| 10 Grocery Store | * 13 Village Inn |
| * 12 Quicksilver Lodge | 15 Pool Facility |
| * 14 Alpine Inn | 17 Water Treatment Plant |
| 16 Crystal Inn | 19 Carpenter Shop |
| 18 Wastewater Treatment Plant | 21 Electrical Shop |
| 20 Lift Maintenance Shop | 23 Sand shed |
| 22 Vehicle Maintenance Shop | 25 Tennis Courts |
| 24 Refuse Transfer Station | 26 CAMPBELL FABRICATION LODGE |
| * 26 Fire Station | |
- * NOT OWNED BY DMJ

EMPLOYEE HOUSING *****

- | | |
|-------------------------------|-------------------------------|
| 27 Five Bedroom House | 28 Five Bedroom House |
| 29 Eight Bedroom House | 30 Nine Bedroom House |
| 31 Ten Bedroom House | 32 Four Bedroom House |
| 33 Three Bedroom Modular Home | 34 Three Bedroom Modular Home |
| 35 Three Bedroom Modular Home | 36 Three Bedroom Modular Home |

***** Additionally there are ten single wide trailers occupying lots in the employee housing area.

ROADS

37 Area access-These roads are shown on a map titled Exhibit "G" (Existing Site Development and Facilities Map).

UTILITY IMPROVEMENTS *****

Water System
Sewer Treatment Facilities

*****These improvements are shown on a map titled Exhibit "G" (Existing Utilities Map).

PARKING LOTS

Lot PA
Lot PB
Lot PC
Lot PD
Lot PE
Lot PF

***** These parking lots are shown on a map titled Exhibit "G" (Existing Site Development and Facilities Map).

5/20/98

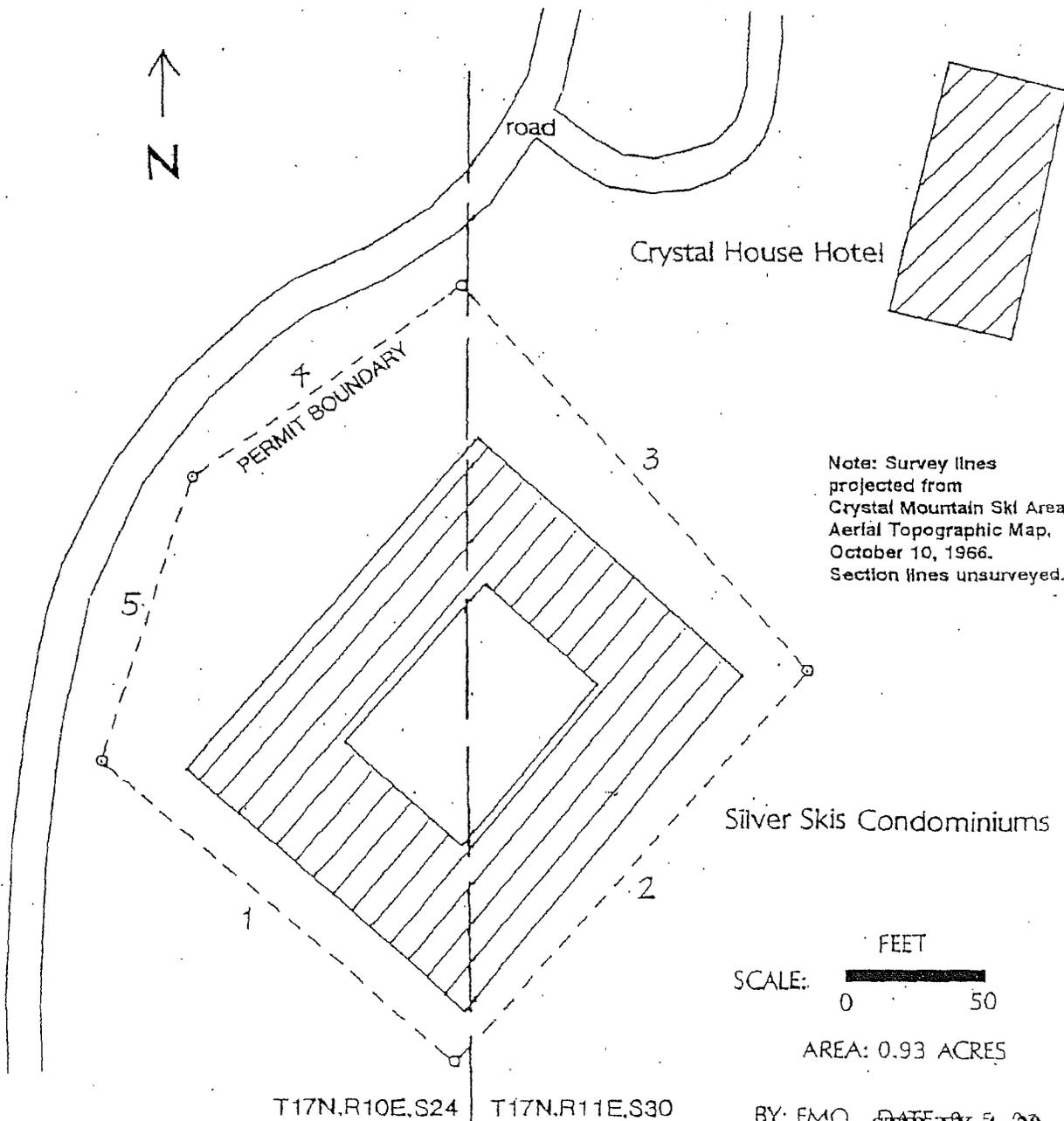
EXHIBIT "C"

Mt. Baker-Snoqualmie National Forest

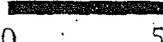
White River Ranger District

SILVER SKIS CONDOMINIUMS TRAVERSE

Crystal Mountain Resort



Note: Survey lines projected from Crystal Mountain Ski Area Aerial Topographic Map, October 10, 1966. Section lines unsurveyed.

SCALE:  FEET

AREA: 0.93 ACRES

T17N.R10E.S24 | T17N.R11E.S30

BY: FMO DATE: 8-5-70
STIP. EX. 4-20

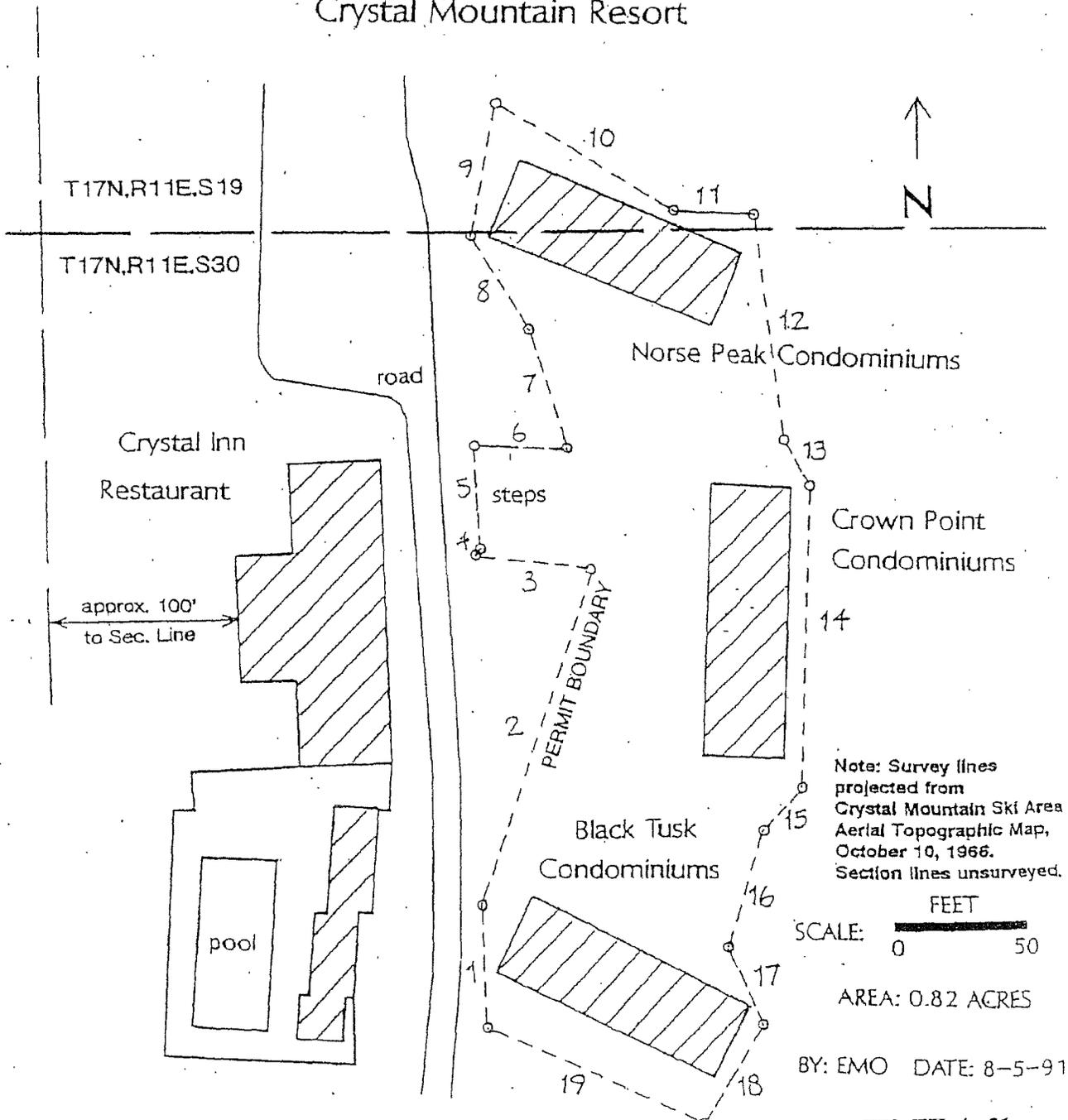
EXHIBIT "C"

Mt. Baker-Snoqualmie National Forest

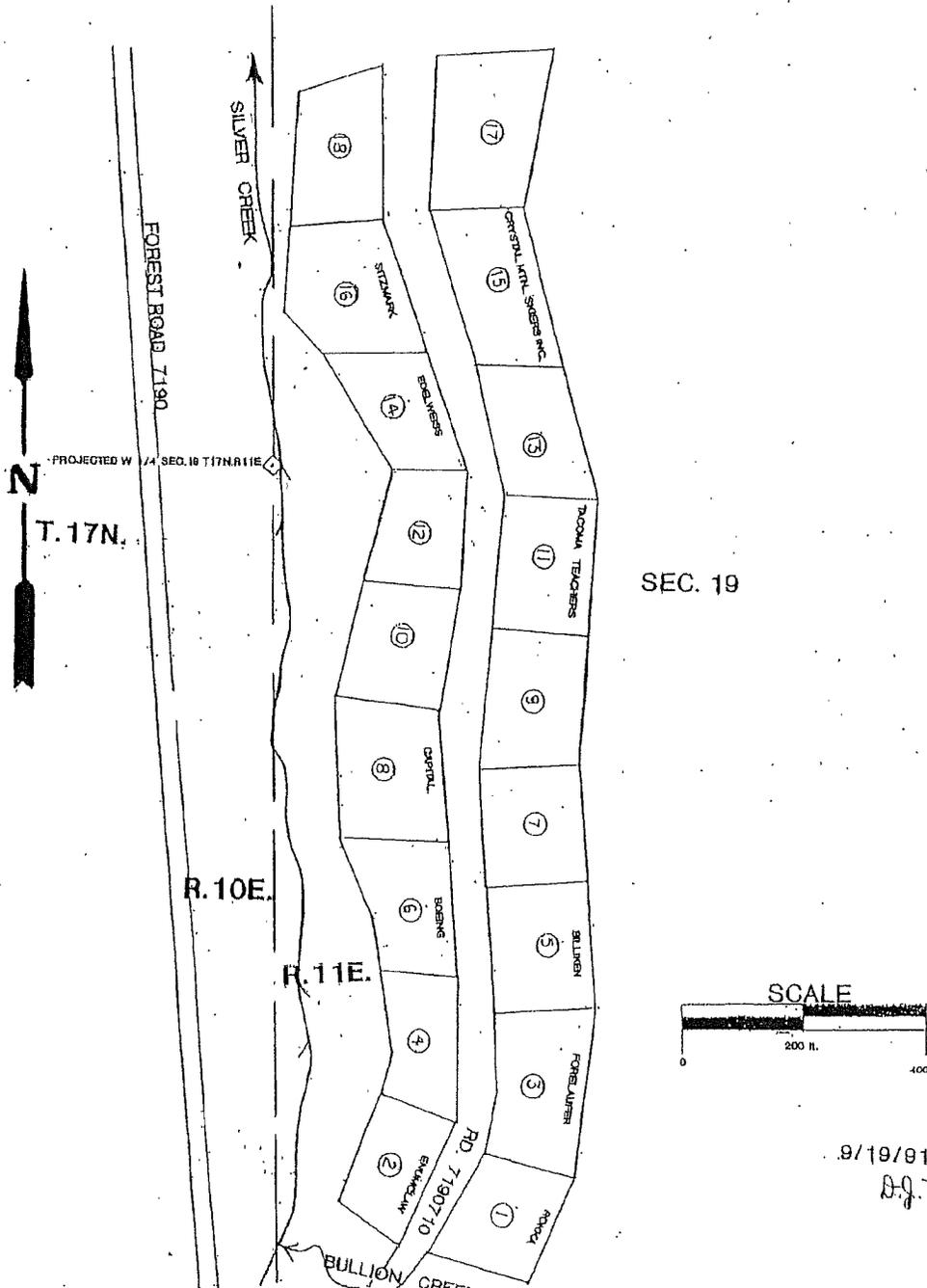
White River Ranger District

CRYSTAL CHALETs CONDOMINIUMS TRAVERSE

Crystal Mountain Resort



MT. BAKER-SNOQUALMIE NATIONAL FOREST
 White River Ranger District
 Ski Clubs Map
 Exhibit "D"



9/19/01
 D.J.

COMMUNICATION
 SITE MAP
 CRYSTAL MOUNTAIN
 SKI RESORT
 MT. BAKER-SNOQUALMIE
 NATIONAL FOREST

Exhibit G

T.17 N. R.10 E. SEC 23

PS TRAIL #183

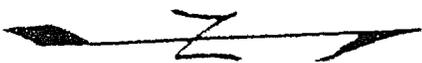
GRUBSTAK

SMOOTHING ELK
 TRAVERSE

SMOOTHING ELK
 TRAVERSE

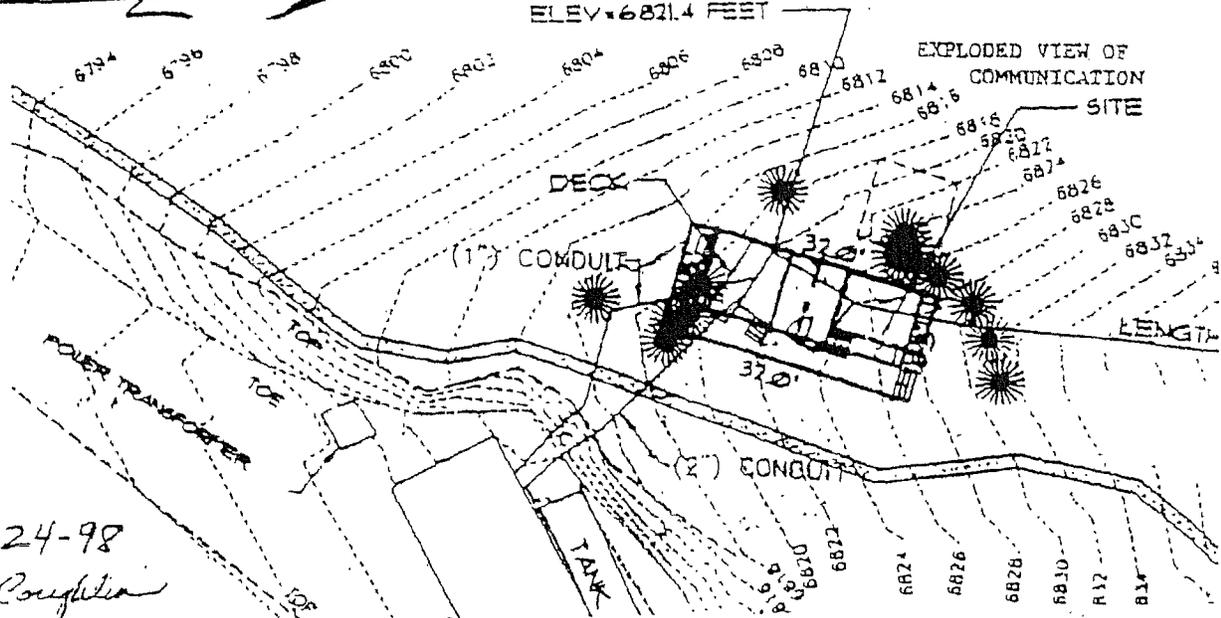
COMMUNICATION BUILDING

PS TRAIL #183



BUILDING
 FINISH FLOOR
 ELEV. 6821.4 FEET

EXPLODED VIEW OF
 COMMUNICATION
 SITE



3-24-98
 D. Roughton

STIP. EX. 4 - 24

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Christine A. Pomeroy, Judge
Department No. 3
Gary R. Tabor, Judge
Department No. 4



2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502
Telephone (360) 786-5560 • Fax (360) 754-4060

Chris Wickham, Judge
Department No. 5
Anne Hirsch, Judge
Department No. 6
Carol Murphy, Judge
Department No. 7
Lisa L. Sutton, Judge
Department No. 8

March 30, 2011

George C. Mastrodonato
Attorney at Law
701 5th Ave. Ste 3600
Seattle, WA 98104-7010

Charles E. Zalesky, AAG
P.O. Box 40123
Olympia, WA 98504-0123

Re: *Crystal Mountain, Inc. v. Washington State Department of Revenue*
Thurston County Cause No. 08-2-02878-7

Counsel:

This matter came before this court for a bench trial held on March 28, 2011. Plaintiff Crystal Mountain, Inc. appeared through its attorney George C. Mastrodonato of Carney Badley Spellman, P.S. Defendant Washington State Department of Revenue appeared through its attorneys Charles Zalesky and Rebecca R. Glasgow of the Office of the Attorney General of Washington. In this matter, the Plaintiff sought a refund of leasehold excise tax paid for the years 2002 through 2006 pursuant to RCW 82.32.180.

The parties entered into and filed a Partial Stipulation of Facts and Exhibits. That document is attached hereto. The court's findings of fact below add to and do not repeat the stipulated facts. The Exhibits were all admitted by the court by stipulation. Plaintiff called one witness trial, John Gerike. Defendant called no witnesses.

Findings of Fact

In addition to the facts stipulated by the parties, the court finds as follows:

1. The Ski Area Term Special Use Permit (Permit) between the United States Forest Service (USFS) and Crystal Mountain, was executed on November 27, 2001, and was amended on June 8, 2005.

APPENDIX B

2. The Permit does not give Crystal Mountain exclusive possession of the 4,350 acre Permit area.
3. Crystal Mountain's website and certain materials indicate that it is a partner in recreation with the USFS. Crystal Mountain operates the ski area on USFS land for profit, not as a public service.
4. Crystal Mountain pays a fee to the USFS for the use of its land to operate its facilities. Crystal Mountain provides, among other services, improvements, operating equipment, and management of skiing and mountain recreational activities.
5. The Permit allows Crystal Mountain to charge guests certain fees and other amounts for the use of facilities and equipment. Crystal Mountain pays the USFS a percentage of these amounts received under a formula set forth in the Permit. A retail store rents equipment and restaurants are located at the foot of the mountain, midmountain, and at the summit. The revenues from the store and restaurants are included in the calculation of the amount paid to the USFS.
6. The Permit describes the parties' relationship in detail. The land is USFS property. USFS closely monitors Crystal Mountain's operations on USFS land, including approval of all development or changes in the master plan by Crystal Mountain. The USFS does not, however, have any direct operations in the Permit area. The USFS does not have an office or any buildings in the Permit area.
7. Crystal Mountain is not exempt from property tax. Crystal Mountain owns and maintains improvements on the Permit area, and pays property tax to Pierce County on those improvements.
8. Crystal Mountain's property is subject to certain USFS standards of repair, sanitation, and safety.
9. Crystal Mountain conducts all maintenance and repair of buildings and equipment. Crystal Mountain maintains roads and parking lots, including snow removal and drainage. Crystal Mountain also provides emergency services and avalanche control in the Permit area. The USFS may require specific maintenance by Crystal Mountain, such as restoration of creek banks, in the Permit area.

10. Crystal Mountain employs 45 employees year-round, and approximately 700 employees at the peak of ski season.
11. Crystal Mountain puts up rope lines and signs during the ski season marking out of bounds areas and danger areas.
12. Crystal Mountain has occasionally cut down trees in the Permit area in order to expand or improve its facilities. This was done in 2010 with the approval of the USFS. Although Crystal Mountain had to pay the USFS for the timber, Crystal did not make any money on the sale of the timber in 2010.
13. The land in the Permit area is generally open to the public for lawful uses and purposes, except mutually agreed upon restrictions to protect the installation and operation of structures and developments authorized by the USFS.
14. Based upon the Muckleshoot Tribe's historical link to the land in the Permit area, Crystal Mountain has entered into an agreement with the Muckleshoot Tribe. The agreement recognizes the Tribe's rights in the Permit area and over Crystal Mountain's use of the land, including development on the land that might otherwise be allowed in the Permit.
15. Crystal Mountain has entered into a consent decree with a group that was opposed to development in the Permit area. As a result of the consent decree, no further major development will occur until the completion of a wastewater treatment facility.
16. While Crystal Mountain has authority over its own facilities, that authority is less than the way a private party may operate its own hospitality or recreation business on land it owned.
17. No evidence in the record shows the market value of the Permit area as a ski and mountain recreation facility.

Analysis and Conclusions of Law

This court has jurisdiction over this matter under RCW 82.32.180. Crystal Mountain has the burden of proving that it is entitled to a refund of the leasehold excise tax. RCW 82.32.180. The tax at issue is "on the act or privilege of occupying or using publicly owned real or personal property" as stated in RCW 82.29A.030(1)(a).

The term "leasehold interest" is defined in RCW 82.29A.020(1) as:

an interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, between the

public owner of the property and a person who would not be exempt from property taxes if that person owned the property in fee, granting possession and use, to a degree less than fee simple ownership.

The parties agree that all elements of this definition apply to the relationship defined in the Permit between the USFS and Crystal Mountain, except one. Crystal Mountain asserts that the Permit does not grant it possession and use of the Permit area. The Department of Revenue claims that it does grant possession and use.

It is agreed by the parties, and clear in the Permit, that Crystal Mountain is granted use of the Permit area. Possession is not defined by the applicable statutes, but it is a word often addressed by courts in the criminal context. A common and ordinary meaning of possession is appropriate. While a dictionary definition may be helpful in determining a common and ordinary meaning, it is important that the definition given by a court is consistent with the statutory language. For instance, because the statutes here clearly do not require ownership, it would not make sense to interpret possession to mean "own" – even though that term may be found in the dictionary to define "possession."

Possession is not required by the statutes to be exclusive. This court concludes that Crystal Mountain is granted possession and use of the Permit area, and therefore has a leasehold interest.

The court's conclusion is consistent with WAC 458-29A-100(2)(f)(ii) and (iii). The Permit at issue here contemplates an extensive relationship between the parties, not a mere license. Neither RCW 82.29A.030(1)(a) nor RCW 82.29A.020(1) require that every inch of the property at issue be possessed by the leaseholder. Even if there were a conflict between the statutory language and an agency's rule, which there is not, the plain language of the statute controls over the language of an agency's rule.

While the court recognizes that the public has access to the Permit areas, and Crystal Mountain must remove its facilities if the Permit is ever terminated, Crystal Mountain maintains large-scale permanent facilities in the Permit area. Presumably, there are locked rooms, doors, and panels within those facilities in order for Crystal Mountain to operate its facilities safely and orderly. This is very different from a license to, for instance, fish or hike in a certain area.

There are a number of rules of statutory construction which could apply to this case. However, this court relies on the plain language of the applicable statutes and regulations. This court believes that the plain language of RCW 82.29A.030(1)(a) and RCW 82.29A.020(1) is not ambiguous and does not require further construction.

Crystal Mountain has not met its burden to establish that it is entitled to a refund for the leasehold excise taxes it has paid.

Alternatively, Plaintiff argues that it is entitled to a credit under RCW 82.29A.120(1) "equal to the . . . amount, if any, that such tax exceeds the property tax that would apply to such leased property. . . if it were privately owned by the lessee." Plaintiff bears the burden of proving its entitlement to such credit and the amount.

Crystal Mountain's argument regarding the credit relies upon the Permit area qualifying as open space land under RCW 84.34.020(1). However, the Permit area is clearly primarily a skiing facility operated by Crystal Mountain. The Permit area is not forest land, so the forest land values in WAC 458-40-540 do not apply.

Crystal Mountain has failed to meet its burden to show that it is entitled to a credit under RCW 82.29A.120(1).

Based upon the above findings and conclusions, this court denies Plaintiff's claim for a refund of leasehold excise taxes paid for 2002 through 2006. This court also denies the Plaintiff's claim of a credit for those taxes paid. The court will sign an appropriate order upon presentment.

Sincerely,

Carol Murphy

Carol Murphy
Superior Court Judge

CM/dkr

cc: Court file ✓

1991 WL 227577 (Wash.Bd.Tax.App.)

Board of Tax Appeals
State of Washington

*1 RAINIER MOUNTAINEERING, INC., APPELLANT,
v.
STATE OF WASHINGTON DEPARTMENT OF REVENUE, RESPONDENT.

Docket No. 37206

April 30, 1991

RE: Excise Tax Appeal

A timely Petition for Reconsideration may be filed to this Final Decision within ten days pursuant to WAC 456-10-755.

FINAL DECISION

This matter came before the Board of Tax Appeals (Board) for an informal hearing on February 28, 1991. W. Gerald Lynch, Attorney, appeared for Appellant, Rainier Mountaineering, Inc. (Rainier Mountaineering). Trish Adler, Administrative Law Judge, appeared for Respondent, Department of Revenue (Department).

This matter was originally heard by the Board's Senior Tax Referee. A Proposed Decision was issued on November 16, 1990, substantially in favor of Rainier Mountaineering. The Department filed exceptions to the Proposed Decision. Upon review of the Proposed Decision, this Board ordered the matter reheard before the entire Board. This Board heard the testimony, reviewed the evidence and considered the arguments made on behalf of both parties. This Board now makes its final decision.

ISSUE

The issue in this appeal involves the application of the leasehold excise tax, RCW 82.29A, to fees paid by Rainier Mountaineering to the National Park Service. Rainier Mountaineering argues that the fees which are paid for its "concession right" to operate a guide service and climbing school on Mount Rainier are exempt from the leasehold excise tax. The Department argues that the leasehold excise tax is measured by all payments to the National Park Service, including fees based upon receipts from Rainier Mountaineering's climbing and guiding activities.

FACTS

Rainier Mountaineering has operated a commercial guiding and climbing service in Mount Rainier National Park (Park) since 1968. The company originally operated under a subcontract with the major park concessionaire. In 1980, Rainier Mountaineering and the National Park Service entered into a formal contract agreement granting the company the exclusive right to operate a guide service and climbing school above the 8,000 foot level on Mount Rainier. Rainier Mountaineering, in return for payment of an escalating percentage of its gross receipts derived from climbing, guiding,

and sales and rentals of equipment to its clients, received the right to: (1) operate snow and ice climbing schools, and guided summit and all other climbs within the Park at elevations greater than 8,000 feet above sea level; (2) conduct guided day hikes to the Paradise Ice Caves; and (3) sell and rent merchandise specifically for use in mountain climbing and hiking.

The rights acquired by Rainier Mountaineering are "exclusive", in the sense that no other commercial guiding service may exercise the rights granted above. The contract provides that Rainier Mountaineering shall have the "right of first refusal" to provide such services as requested by the superintendent of the Park. Only in the event that Rainier Mountaineering declines to provide such services will the National Park Service permit another commercial guide service to operate in the Park. As a practical matter, the National Park Service enforces this contract in such a manner that other commercial guide services are effectively precluded from conducting summit climbs or ice and snow climbing schools. During the years in question, the National Park Service has regularly issued citations to other commercial guide services operating climbs and hikes in the Park. However, Rainier Mountaineering shares the use of the climbing routes with non-commercially guided individual climbers and private climbing parties.

*2 In addition to a percentage of gross receipts, Rainier Mountaineering also pays an amount for the use and occupancy of two structures. It occupies one floor of a four-story building (the "guide shack") located at Paradise on the 5,400 foot level which is used for instruction, equipment rental, and retail sales, as well as its administrative headquarters during the climbing season. It also occupies a small stone hut at Camp Muir at the 10,000 foot level. This hut is used to cook meals for its climbing and guiding clients. Rainier Mountaineering pays an annual fixed fee equivalent to the fair rental value of these properties, as determined by the National Park Service. [FN1]

During the years in question, the rental fees for the two buildings have declined substantially as a percentage of the overall fees paid by Rainier Mountaineering. In 1984, 44.7 percent of the fees paid by Rainier Mountaineering consisted of rental fees. Fees based on guiding and climbing constituted 49 percent; and fees based on retail sales and rentals constituted 6 percent. By 1987, the rental fees had declined to 10.4 percent. Fees based on receipts from climbing and guiding had risen to 75 percent and fees based on retail sales and rentals had risen to 14.3 percent. The majority of Rainier Mountaineering's gross receipts come from climbing and guiding fees. Between 1984 and 1987, 80 to 90 percent of such receipts were from climbing and guiding fees.

The vast majority of Rainier Mountaineering's climbing and guiding revenues is derived from guided summit climbs. The company processes approximately 4,500 clients per year. Of that number, approximately 4,000 are attempting a summit climb (about 2,000 make it). An additional 4,000 to 5,000 individuals attempt a summit climb on their own. The typical summit attempt involves three days of activities. On the first day, the clients check in at Rainier Mountaineering's guide shack at Paradise. The clients may purchase or rent equipment needed for the summit attempt. The first day is spent on snowfields above Paradise instructing clients on the basics of mountaineering skills. The second day begins with a climb to Camp Muir at the 10,000 foot level. The clients and guides are housed in two wooden bunkhouses (owned by Rainier Mountaineering and not part of this appeal). At approximately 2 a.m. the next day, the guided parties leave Camp Muir for the summit. If successful, the parties reach the summit about 9 a.m., returning to Camp Muir by noon and Paradise by 4 p.m. Other than check-in and rental or purchase of equipment, the clients themselves do not use the buildings rented by Rainier Mountaineering.

The Department audited the books and records of Rainier Mountaineering for the period 1984-1987. The Department determined that the company was subject to the leasehold excise tax, and assessed the tax based on both the fees paid for the use and occupancy of the buildings, as well as the fees paid with respect to the climbing and guiding service and retail rental and sales. Rainier Mountaineering protested the assessment of the tax to the extent it was based upon payments in respect to its climbing and guiding service and retail rentals and sales. The Department's Interpretations and Appeals Division upheld the assessment. This appeal followed.

ANALYSIS AND CONCLUSIONS

*3 This case requires us to reconcile an ambiguous statute with the history and purposes of the leasehold excise tax. It is a matter of some importance to both the Department and Rainier Mountaineering.

I.

The Statutory Pattern

The purpose of the leasehold excise tax is to “fairly compensate governmental units for services rendered to ... lessees of publicly owned property.” RCW 82.29A.010. Prior to the enactment of the leasehold excise tax, lessees of publicly owned property paid an ad valorem tax on their leasehold estates. See e.g., Pier 67, Inc. v. King County, 89 Wn.2d 379, 573 P.2d 2 (1977). The present tax was enacted after a six-year controversy over the manner of taxing benefits received by these lessees. Japan Line, Ltd. v. McCaffree, 88 Wn.2d 93, 558 P.2d 211 (1977).

The statute imposing the tax, RCW 82.29A.030(1), provides: “There is hereby levied and shall be collected a leasehold excise tax on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest ...”.

By its terms, the taxable event is limited to the use or possession of public property only through a leasehold interest. A “leasehold interest” means: “an interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, ... granting possession and use, to a degree less than fee simple ownership ...” RCW 82.29A.020(1):

The amount of the leasehold excise tax is measured by “contract rent”, defined as: “the amount of consideration due as payment for a leasehold interest ...” RCW 82.29A.020(2)(a). The term contract rent does not include payments made by the lessee for concession rights (if any) granted in conjunction with the lease. The statute provides:

Where the consideration conveyed for the leasehold interest is made in combination with payment for concession or other rights granted by the lessor, only that portion of such payment which represents consideration for the leasehold interest shall be part of contract rent.

RCW 82.29A.020(2)(a).

The statute, perhaps deliberately, [FN2] does not define the term “concession right”. In MAC Amusement Co. v. Department of Revenue, 95 Wn.2d 963, 633 P.2d 68 (1981), the court held that a “concession right” is equivalent to a “franchise right”, sometimes termed a “monopoly right”. The taxpayer in that case had, among other rights, the exclusive right to operate all rides and games at the Seattle Center. The court distinguished a “concession right” from a leasehold interest on the basis of exclusivity, noting that a concession right could exist even where the exercise and value of the concession right was “inherently dependent” upon the use and possession of publicly owned property. Thus, the term “concession right”, as construed in MAC Amusement, at a minimum denotes an exclusive right to operate a business upon government-owned property. Although a grant of exclusivity is not an essential element of a franchise (See 36 Am. Jur. 2d Franchises § 29 (1968)), such a right is frequently granted and could enhance the value of the franchise under the appropriate circumstances.

*4 A franchise or concession right is distinguishable from a leasehold interest. A “leasehold interest”, as defined in RCW 82.29A.020(1), is an interest in publicly owned real or personal property “granting possession and use, to a degree less than fee simple ownership ...”. A franchise or concession right, on the other hand, although frequently associated with the use or possession of government-owned property, does not necessarily embody a right to possess and use government-owned property. To the extent that a concession right and a leasehold interest are held by the same person, the concession right must therefore be in addition to rights which inhere in the leasehold interest. MAC Amusement, *supra*.

A franchise or concession right is also distinguishable from a license to use real property.

A license in respect of real property may be generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revokable at the will of the latter unless, according to some authorities, expenditures contemplated by the licensor when the license was given have been made in the meantime.

A franchise, however, is neither personal nor temporary, and it is not revokable at the mere will of the grantor, in the absence of a reservation of such right.

(Citations omitted.) 36 Am. Jur. 2d Franchises § 2 (1968).

A franchise is personal property, taxable as such. Commercial Electric Light and Power Co. v. Judson, 21 Wash. 49, 56 P. 829 (1899); United States v. Puget Sound Power and Light, 147 F.2d 953 (9th Circuit, 1944). It is not one of the types of intangible property which is generically exempt from taxation. See RCW 84.36.070. However, to the extent that a non-public utility franchise includes the right to occupy or use publicly owned property, such a right of use or occupancy is exempt from ad valorem taxation. RCW 84.36.451.

II.

Does Rainier Mountaineering possess a concession right?

A.

At the outset, the Department contends that the exclusion of concession rights from the measure of the leasehold tax amounts to an exemption from taxation. Accordingly, the Department argues that we must strictly construe the statutes in favor of the tax, and not extend the exemption beyond the scope clearly intended by the legislature. Pacific Northwest Conference of Free Methodist Church of North America v. Barlow, 77 Wn.2d 487, 463 P.2d 626 (1969). In **MAC Amusement**, the court appeared to adopt the rule of strict construction in construing the leasehold excise tax. [FN3] In dissent, Justice Dolliver pointed out that the issue before the court was not to construe the scope of an exemption, but rather the scope and extent of the tax itself.

We believe the issues before us primarily involve the scope and extent of the tax itself. Exclusion of payments for concession rights from the measure of the tax does not necessarily create a tax exemption for Rainier Mountaineering. Concession rights, to the extent that they can be considered as franchise rights, remain theoretically subject to ad valorem taxation if they have value. The question, then, is under what system of taxation--excise or ad valorem--shall these concession rights be taxed. [FN4]

*5 Accordingly, we hold in the case before us that the statutory provisions of RCW 82.29A, to the extent they are ambiguous, are to be construed according to the usual rules of statutory construction in accordance with legislative intent and in light of the purposes of the tax.

B.

The next issue is whether Rainier Mountaineering has a "concession right" separate and apart from its right to occupy and use Park property. Rainier Mountaineering argues that the federal law authorizing the National Park Service to enter into agreements for commercial use of Park facilities is couched in terms of the grant of "concession rights". See Public Law, 89-249. The Department argues that contract "labeling" is not determinative of the nature of the rights granted. We agree with the Department. "Labeling" of an agreement is not determinative of its content. The definition of "leasehold interest" set forth in RCW 82.29A.020(1) is broad and all encompassing. It includes an interest in publicly owned property stemming from any agreement, written or verbal, without regard to whether the agreement is labeled a lease, license, or permit.

As noted above, the court in **MAC Amusement** equated the term "concession right" to a monopoly franchise right.

The court defined the term “franchise” to mean: “the right granted by the state or a municipality to an existing corporation or to an individual to do certain things which a corporation or individual otherwise cannot do ...”. (Citations omitted.) **MAC Amusement**, *supra* at 969.

In the present case, the agreement between Rainier Mountaineering and the National Park Service grants the company an exclusive right to conduct a commercial climbing and guide service above the 8,000 foot level in the Park. Rainier Mountaineering argues that this grant constitutes a “concession right” indistinguishable from the exclusive right to operate all rides and games at the Seattle Center involved in the **MAC Amusement** case.

The Department argues that agreement does not establish a concession right because the terms of the agreement do not empower Rainier Mountaineering to do anything that any other similarly situated service provider is precluded from doing. The Department argues:

Anyone who operates the same type of business as the taxpayer's could compete for this lease and occupy the premises. The lease permits other concessionaires operating prior to the lease to continue operations; it permits the Park Service to add land and lease to other concessionaires; and it permits the Park Service to authorize other concessionaires to offer services if Rainier Mountaineering chooses not to do so.

Respondent's Memorandum in Support of Petition for Rehearing, at 6.

We disagree with the Department. We find the agreement between Rainier Mountaineering and the National Park Service establishes a “concession right”. Under the terms of the agreement, no other commercial guide service can operate above the 8,000 foot level in the Park. There are no other commercial guide services still in existence which operated prior to Rainier Mountaineering. The agreement does permit the National Park Service to authorize other guide services to operate on land added to the Park, but the probability of actual implementation of this provision is purely speculative and remote at best. Finally, Rainier Mountaineering's “right of first refusal” does not destroy the exclusivity of Rainier Mountaineering's rights. It merely grants Rainier Mountaineering the right to determine if it wishes to remain the exclusive provider of climbing and guiding services in the Park.

*6 In sum, the agreement between Rainier Mountaineering and the National Park Service, regardless of labeling, grants Rainier Mountaineering an exclusive right to operate a commercial climbing and guiding service in the Park. This is a right to perform an act which a corporation or individual otherwise cannot do. It is therefore a monopoly franchise right or “concession right” within the meaning of the term as used in RCW 82.29A.020, **MAC Amusement**, *supra*.

III.

To what extent, if any, are payments for Rainier Mountaineering's concession right excludable from the measure of the leasehold excise tax?

A.

What is the proper methodology to be employed in separating payments made for a concession right from payments made for a leasehold interest?

Our conclusion that Rainier Mountaineering possesses a “concession right” clarifies, but does not resolve, the basic dispute between the parties. This dispute centers on the issue of separating payments made in return for a concession right from payments made in return for a leasehold interest.

The parties approach this issue from opposite directions. Rainier Mountaineering would sort out the payment for its concession right by first determining the fair market rental of the leasehold property, which it considers to include only the guide shack and the cooking hut. Any excess payment would then be attributed to the value of the concession right.

On the other hand, the Department would value the totality of the rights granted to Rainier Mountaineering, and then deduct the value of the concession right. The Department considers the leasehold property to include not only the buildings in question, but also the territory upon which Rainier Mountaineering conducts its climbing and guiding business; i.e., all land in the Park above the 8,000 foot level. The Department would place the burden on the lessee to show the value of the concession right. In the Department's view, in order to qualify for a deduction from "total consideration paid by the lessee", the payment must be clearly based upon a concession, right, or privilege which is of value to the lessee and which does not inhere in or depend upon the quantity or value of goods or products sold on the leasehold property.

Either approach, properly applied, would be an acceptable method of separating payments for the leasehold interest from payments made for the concession right. In MAC Amusement, the trial court determined the rent subject to the leasehold excise tax to be the rent one might pay for similar property surrounding the Seattle Center. MAC Amusement, *supra* at 970. The court's approach is similar to that suggested by Rainier Mountaineering. The methodology at a minimum consists of two steps:

1. Define the property included in the leasehold interest, including all rights inherent therein.
2. Determine the fair market rental for the leasehold interest according to market rents for similarly valued property. This may require one to determine the fair market value of the leasehold interest by means of comparable sales, capitalization of income, or cost of construction of the improvements on the leasehold property. (See RCW 84.40.030.)

*7 If the payment made by the lessee to the governmental lessor is in excess of fair market rental for similarly valued property, the excess can most likely be attributed to payment for a concession right. The burden of proof is on the taxpayer/lessee to establish that the concession right has value in addition to the value of the leasehold interest.

B.

What property rights are included in Rainier Mountaineering's leasehold interest?

Rainier Mountaineering's position assumes that its leasehold interest only extends to property in which it has the right of exclusive possession. [FN5] If we were to accept Rainier Mountaineering's assumption, the amount subject to tax would at most be the fixed payments made for use and occupancy of the buildings and the percentage payments attributable to sales and rentals of climbing equipment at the guide shack.

On the other hand, the Department contends that the property subject to the leasehold interest includes the entire mountain above the 8,000 foot level. According to the Department, Rainier Mountaineering has a license to use this property for commercial guiding and climbing. In the Department's view, a bare license to use governmental property falls within the definition of "leasehold interest" as set forth in RCW 82.29A.020(1).

The first step--defining the property included in the leasehold interest--is thus crucial. Resolving this question requires us to construe the scope and extent of the leasehold excise tax. The statute defining the term "leasehold interest", RCW 82.29A.020(1), is somewhat ambiguous. As defined in the statute, the term means "an interest in publicly owned real or personal property which exists by virtue of any lease, permit, license, or any other agreement, written or verbal, ...granting possession and use, to a degree less than fee simple ownership ...". (Emphasis supplied.)

The statutory phrase, "possession and use", above, could be read to require that the agreement must grant both possession and use in order to create a leasehold interest. Normally, a lease grants both possession and use. However, we are not free to construe the statute as a matter of first impression. The language in question has been construed in MAC Amusement. In that case, the court held that pedestrian thoroughfares intersecting the Seattle Center Fun Forest constituted a part of the leasehold interest, even though the lessee did not have exclusive possession of these tho-

roughfares. The court noted:

By definition, the taxable rent is that rent paid for a "leasehold interest," which is defined as not only including leases, but also permits and licenses. RCW 82.29A.020(1). The taxable rent additionally includes those sums paid for the use as well as the possession of public property. RCW 82.29A.030. From these provisions, it would appear the legislature intended to tax those areas the use of which was bargained for. Those provisions, by including uses and permits, give "leasehold" a meaning not ordinarily contemplated by that term.

*8 **MAC Amusement**, supra at 970-71.

We have previously concluded that the agreement between Rainier Mountaineering and the National Park Service grants an exclusive right to use all territory in the Park above the 8,000 foot level for commercial guiding and climbing services. It is not a totally exclusive right to use the territory in the sense that the general public may also use the same territory, albeit for noncommercial, recreational purposes. Nevertheless, the public's use does not interfere with, nor necessarily detract from, the exclusive rights granted Rainier Mountaineering. In any event, the alpine territory comprises an area the use of which has been bargained for by Rainier Mountaineering.

We must therefore reject Rainier Mountaineering's argument that only the payments made for the occupancy of the buildings are subject to the leasehold excise tax. The property rights comprising the leasehold interest include not only the right to occupy and use the guide shack and cooking hut, but also the right to use the climbing routes for commercial climbing and guiding purposes.

C.

What is the fair market rental for Rainier Mountaineering's leasehold interest?

Having determined the nature and extent of the property rights included in the leasehold interest, the next step is to determine the fair market value of those rights. The Department's position assumes that there is no independent value to a concession right when the lessee's franchise right consists of nothing more than a right to sell goods and services on the leased premises. In most cases, this seems to be a safe assumption. For example, in the case of the general store within the boundaries of a national park, the value of the store premises, and hence its fair market rental, is fixed by the income which can be generated from sales at the store. The exclusive right to make sales at the store is inherent in the right of possession of the store premises. That value is presumably no different, except in unusual circumstances, from the value of similar store premises in the private sector. The same would be true of similar facilities, such as restaurants, resorts, and other recreational facilities of a type commonly operated in the private sector. One exception would be where, in addition to the leasehold interest in the premises, the governmental owner agrees to exclude all others from operating a competing business. **MAC Amusement**, supra. The grant of exclusivity would undoubtedly have value to the lessee when such a competing business would likely be operated on a financially feasible basis given the demand for the product or service in the market area under the government's jurisdiction.

Rainier Mountaineering has the burden of showing the value of its concession right. On the record before us, we believe that Rainier Mountaineering's exclusivity rights have some value. The testimony revealed that competing commercial guiding services from time to time attempt to operate in the Park. This fact alone indicates a demand for additional guiding and climbing services in the Park. Given the relatively low capitalization required to operate a guide service, limited financial resources are apparently not a significant barrier to entry in the commercial guiding and climbing business. But for the grant of exclusivity, it appears that Rainier Mountaineering would face significant competition, the result of which would undoubtedly reduce its market share and gross revenues, and hence the value of its right to use the climbing routes above 8,000 feet. Rainier Mountaineering has thus demonstrated that the concession right has value in addition to its leasehold interest. [FN6]

*9 The question remains: how much value? On the record before us, we are unable to answer this question. Other than Rainier Mountaineering's evidence as to the fair market value of the buildings, there is no evidence in front of us which

would permit us to determine with any degree of precision the fair market value of the entire leasehold interest or its fair market rental. It is not possible to determine the value of the underlying realty, given the lack of market evidence concerning sales of semi-dormant volcanoes. The value of Rainier Mountaineering's license to use the climbing routes is in large part dependent upon its exclusivity rights. Approaching the question from the Department's point of view, there is also no evidence by which we could determine the value of Rainier Mountaineering's exclusivity rights.

For the foregoing reasons, we conclude that Rainier Mountaineering has failed to establish the value of its concession rights. It has therefore failed to demonstrate what portion of its payments to the National Park Service are in return for a concession right. On the other hand, the Department's assessment is based on the erroneous position that Rainier Mountaineering possesses no concession right of value in addition to its leasehold interest. This raises the possibility, if not the probability, that the assessment is based in part on payments for "concession rights". Accordingly, we must remand the matter to the Department for redetermination of the assessment.

DECISION

The assessment made by the Department against Rainier Mountaineering is vacated. The matter is remanded to the Department of Revenue for determination of the fair market rental for the leasehold interest held by Rainier Mountaineering and the amount of payment, if any, for its concession right.

DATED this 30th day of April, 1991.

RICHARD A. VIRANT
Chair

MATTHEW J. COYLE
Vice Chair

LUCILLE CARLSON
Member

FN1 The rental fee is based upon market value of the properties as determined by the replacement cost of the properties less applicable depreciation. The National Park Service hired a professional appraiser to estimate the market value of the two properties occupied by Rainier Mountaineering. The parties do not dispute this market value.

FN2 Given the constraints of time and the English language, the legislature sometimes leaves certain issues to be resolved by administrative agencies. Hama Hama Co. v. Shorelines Hearing Board, 85 Wn.2d 441, 536 P.2d 157 (1975). This appeal concerns one of those issues left for administrative resolution. The Department, apparently waiving attorney/client privilege and executive privilege (RCW 42.17.310(1)(i)), has introduced a memorandum written to then Governor Evans by his legal counsel, Chi-doo "Skip" Li, contemporaneous with the passage of the leasehold excise tax, Laws of 1975, 2d Ex. Sess., ch. 61. In that memorandum, Mr. Li explained the genesis of the language excluding concession rights from the definition of contract rent as follows:

The language on page 3, lines 12-17 was one of the disputed areas between the House and Senate. The Senate had taken this language out but the House refused to back down and prevailed in the conference committee. It applies to leases such as in the Seattle Center Food Circus where concessionaires pay a percentage of gross income for their space, but the amount paid also includes other services and benefits such as utilities, security, and other costs of occupancy. It also applies to the situation of the Ramada Inn across from the airport in Spokane. Ramada pays to the Port of Spokane an extremely high rental for that property, and the reason is that they have an exclusive right to maintain a motel in the immediate vicinity of the airport. Under the language of this bill, the Dept. of Revenue must determine that portion of the rental which actually relates to the leasehold for taxation purposes. This question will undoubtedly be the subject of litigation....

FN3 The court mentioned the rules of strict statutory construction but nevertheless proceeded to construe the term “concession right” solely in light of the purpose for the tax. **MAC Amusement**, *supra* at 966-67.

FN4 The only true tax exemption created in the 1975 leasehold excise tax act was a property tax exemption for: “Any and all rights to occupy or use any [publicly owned] real or personal property ...”. Laws of 1975, 2d Ex. Sess., ch. 61, § 14, Codified as RCW 84.36.451.

FN5 Rainier Mountaineering would view Washington's leasehold excise tax scheme to extend only to the property interests included in a typical possessory interest tax such as California's. The California tax extends only to property in which the lessee has a right of exclusive possession. Thus, the taxable possessory interest of a car rental business at an airport is limited to occupancy of counterspace and cannot be valued with reference to a possessory interest in the entire airport. Hertz Corp. v. County of San Diego, 275 Cal. Rptr. 307 (Cal. Ct. App. 4th Dist. 1990).

FN6 This conclusion requires us to reject the Department's argument to the extent it implies that payment for a concession right is never excludable when the concession right's value inheres in or depends upon the quantity or value of goods or products sold on the leasehold property. We do not believe the legislature intended this result. Most government “concession” or franchise rights involve to some extent the occupancy or use of government property. Indeed, the value of the exclusivity right examined in **MAC Amusement** was inherent in and depended upon the income which could be generated from sales of rides and games at the Seattle Center Fun Forest. According to the Department's own evidence, the legislature intended to exclude this concession right from the reach of the leasehold excise tax.

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