

No. 42081-3

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

CRYSTAL MOUNTAIN, INC.,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
DEPT OF REVENUE
COURT OF APPEALS
DIVISION II

11-23-11

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ASSIGNMENTS OF ERROR

1. The Thurston County Superior Court (the “trial court”) erred in finding that Crystal Mountain, Inc. (“Crystal Mountain” or “Crystal”) is given a possessory interest under the Ski Area Term Special Use Permit (sometimes referred to as “Permit”). Clerk’s Papers (“CP”) 174 (Finding of Fact No. 2).

2. The trial court erred by concluding that all elements of the definition of “leasehold interest” set forth in RCW 82.29A.020(a) are satisfied in the relationship between Crystal Mountain and the United States Forest Service (“Forest Service” or “USFS”) as defined under the Permit. CP 175-176.

3. The trial court erred when it determined that Crystal Mountain has possession and use of the Permit area. CP 176.

4. The trial court erred when it considered the definition of the word “possession” taken from the criminal context. CP 176.

5. The trial court erred when it concluded that the dictionary definition of the word possession is only helpful in determining a common and ordinary meaning of the word. CP 176.

6. The trial court erred when it stated that because the leasehold excise tax statutes “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.’” CP 176.

7. The trial court erred when it concluded that possession is not required by the leasehold excise tax statutes (Chapter 82.29A RCW; *see* RCW 82.29A.020(1)) to be exclusive. CP 176.

8. The trial court erred when it concluded that “Crystal Mountain is granted possession and use of the Permit area, and therefore has a leasehold interest.” CP 176.

9. The trial court erred when it stated that the conclusion stated in the immediately preceding assignment is consistent with WAC 458-29A-100(2)(f)(ii) and (iii).¹ CP 176.

10. The trial court erred when it concluded that the Permit “contemplates an extensive relationship between the parties, not a mere license.” CP 176.

11. The trial court erred when it concluded that “[n]either RCW 82.29A.030(b)(a) nor RCW 82.29A.020(1) require that every inch of the property at issue be possessed by the leaseholder.” CP 176.

12. The trial court erred in concluding that “Crystal Mountain maintains large-scale permanent facilities in the Permit Area.” CP 176.

13. The trial court erred when it concluded that Crystal’s facilities located in the Permit area are “very different from a license to, for instance, fish or hike in a certain area.” CP 176.

¹ This brief references the version of WAC 458-29A-100 effective 11/01/1999 and which covered the relevant years 2002-2006. The rule was revised in 2010 and 2011 and some relevant sections have been reordered.

14. The trial court erred by ruling that “Crystal Mountain has not met its burden to establish that it is entitled to a refund for the leasehold excise taxes it has paid.” CP 176.

15. The trial court erred when it denied Crystal Mountain’s claim for refund of leasehold excise taxes paid in the years 2002 through 2006. CP 177.

16. The trial court erred in entering judgment for the defendant Department of Revenue (DOR), dismissing Crystal Mountain’s refund claims with prejudice, and awarding statutory attorneys’ fees in the amount of \$200.00 to DOR. CP 191-193.

STATEMENT OF ISSUES

The following single issue pertains to all of the assignments of error:

1. Applicability of the Leasehold Excise Tax. Whether the trial court erred in holding that the Leasehold Excise Tax applies to the annual fee Crystal Mountain pays to the United States Forest Service under the Ski Area Term Special Use Permit when: (1) Crystal is granted a limited right of use, only, of the Forest Service land; and (b) the statutory requirements of the tax require that a leasehold interest include both the right of possession and the right of use of publicly owned property.

I. SUMMARY INTRODUCTION

This case involves the requirements for imposing the obligation to pay our state’s “Leasehold Excise Tax” (or “LET”), RCW Chapter 82.29A.

Plaintiff and Appellant Crystal Mountain, Inc., operates the largest downhill ski resort in Washington State. Crystal Mountain has an agreement to operate a ski resort on some 4,350 acres of land owned by the United States Forest Service. The terms and conditions governing Crystal's operations are set forth in a "Ski Area Term Special Use Permit," under which Crystal is granted the right to use the land to operate the ski resort. Although this right is an exclusive one, Crystal otherwise shares its right to use the USFS land with the public at large. If members of the public want to enter the area subject to the Permit, to hike or go cross-country skiing, they have a perfect right to do so and Crystal has no right to prevent them from doing so as long as they do not interfere with Crystal's ski resort operations. The Forest Service, moreover, retains the right to enter the permitted area and assure that Crystal is complying both with various rules and regulations governing the limited nature of its use rights.

Washington's Leasehold Excise Tax is imposed "on the act or privilege of occupying or using publicly owned real or personal property *through a leasehold interest.*" RCW 82.29A.030(1) (emphasis added). The term "leasehold interest" is statutorily defined to 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[.]*

RCW 82.29A.020(1) (emphasis added). Thus, for the LET to apply, four requirements must be satisfied:

1. There must be an interest in publicly owned real or personal property;
2. The interest must exist by virtue of any lease, permit, license or any other agreement, written or verbal;
3. The agreement must be 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; and
4. The person must be granted the possession *and* use of the property, albeit to a degree less than fee simple ownership.

This case turns on the fourth requirement. Crystal Mountain is granted the right to use the permitted area, but it is not granted the right to possess that area. The common and ordinary meaning of “possession” is “control” or “dominion,” and the Forest Service retains control and dominion over the permitted area. Had Crystal been granted both rights, it would not matter in the least that the instrument under which it received those rights was called a “permit” and not a “lease.” As the language and structure of the statute establishes, the Legislature seeks to impose the LET on interests in land that carry with them the substantive rights of a leaseholder, long recognized at common law. Those rights include both the right to use the leased land, *and* the right to possess the leased land -- to exercise control and dominion over that land, up to and including the power to exclude any one else, including the landlord who granted the lease and who retains nothing but the status of the holder of fee simple title to the property.

The Department of Revenue should have acknowledged during the administrative appeal that Crystal was not subject to the LET -- the Department's own regulations make *crystal* clear that the LET does not apply in a circumstance such as this, where the lessee has been granted only use and not possession of the land at issue. Instead, the Department insisted that Crystal must pay the LET, and the Superior Court upheld that determination. This result conflicts with the intended scope of the LET, as established by the tax's plain meaning and confirmed by the Department's interpretive rules and regulations. This Court should reverse, declare the LET does not apply to Crystal, and order a full refund of the LET paid to date.

II. STATEMENT OF THE CASE

A. Nature of the Record Before the Trial Court.

The parties entered into a partial stipulation of facts before the trial court and also agreed to stipulate to a set of exhibits that were necessary or relevant to decide the issues presented in this case.² At trial, one witness was called by Crystal Mountain and his testimony was not challenged.³ The trial court did not base its rulings on any credibility determination.

² The stipulated facts will be referred to as "Stip." and the exhibits as "Stip. Ex."

³ The witness was John Gerike, Controller for Crystal Mountain. Verbatim Report of Proceedings (VRP) at 12. The Department of Revenue (Department) presented no witnesses to refute any of the testimony of Mr. Gerike.

B. Crystal Mountain's Business.

Crystal Mountain, Inc., operates the Crystal Mountain ski area located within the Mt. Baker-Snoqualmie National Forest in Pierce County, Washington. CP 33 (Stip. ¶ 1). The ski area is adjacent to Mount Rainier National Park, approximately 35 miles southeast of Enumclaw, Washington. *Id.*

Crystal Mountain is a Washington corporation originally incorporated as "Corral Pass, Inc." on May 23, 1955. CP 33 (Stip. ¶ 2; Stip. Ex. 1). The company changed its name to Crystal Mountain, Inc. in 1956. CP 33 (Stip. ¶ 2; Stip. Ex. 2). From its inception in 1955 until 1997, Crystal Mountain was owned by a small number of shareholders. CP 33 (Stip. ¶ 4). In 1997 all outstanding stock of Crystal Mountain was acquired by Boyne USA, Inc. ("Boyne USA") pursuant to a merger agreement. CP 33 (Stip. ¶ 4; Stip. Ex. 3). Crystal has operated as a wholly owned subsidiary of Boyne USA since April 1997. CP 33 (Stip. ¶ 4).

C. Crystal Mountain Ski Area Operations.

Crystal Mountain operates its ski area on land owned by the United States. CP 33 (Stip. ¶ 5). Crystal is authorized to operate on federal land pursuant to a Ski Area Term Special Use Permit (sometimes referred to as the "Permit") granted by the Forest Service. CP 34 (Stip. ¶ 6; Stip. Ex. 4). The Permit was issued to Crystal Mountain under the federal Ski Area Permit Act of 1986, 16 U.S.C. § 497(b). CP 34 (Stip. ¶ 7). The Permit was revised and reissued in November 2001, and is currently set to expire

on April 1, 2032. *Id.* The Permit authorizes Crystal to use National Forest System land for the purpose of constructing, operating, and maintaining the Crystal Mountain ski area. CP 34 (Stip. ¶ 8).

The Permit covers 4350 acres, of which approximately 2600 acres are skiable terrain. CP 34 (Stip. ¶ 9). The Permit is not exclusive and the Forest Service reserves the right to use, or to allow others to use, any part of the permitted area for any purpose so long as such use does not materially interfere with Crystal Mountain's rights and privileges under the Permit. CP 34 (Stip. ¶ 10). With limited exceptions the lands (and waters) covered by the Permit remain open to the public for all lawful purposes. CP 34 (Stip. ¶ 11). The public is allowed to go anywhere in the Permit area as long as the public does nothing illegal or unsafe. CP 34 (Stip. ¶ 12). When the public uses any part of the 4350 acres permitted to Crystal Mountain, there is no requirement imposed on the public to use any of Crystal's facilities, such as the ski lifts for which a fee is imposed. CP 34-35 (Stip. ¶ 13). Cross-country skiers can hike up the mountain (*i.e.*, without paying for or using the ski lifts) and then ski down or around the mountain. *Id.* The Forest Service is authorized to revoke or suspend the permit for noncompliance with its terms, noncompliance with federal or state law, or for specific and compelling reasons in the public interest. CP 35 (Stip. ¶ 14; Stip. Ex. 5).

The Crystal Mountain ski area is open for various activities on a year-round basis, although its primary use is as a winter ski resort. CP 35 (Stip. ¶ 15). Crystal Mountain operates the ski area in close coordination

with the Forest Service, and within the terms and guidelines set out in the following agreements (in addition to the Ski Area Term Special Use Permit):

- Crystal Mountain Master Development Plan – Record of Decision. Stip. Ex. 14.
- Crystal Mountain Master Development Plan – Final Environmental Impact Statement. Stip. Ex. 15.
- Agreement between the Muckleshoot Indian Tribe and Crystal Mountain dated September 17, 2004. Stip. Ex. 16.
- Consent Decree entered February 20, 2007, in United States District Court, Western District of Washington, Case No. CV6-1770RSL captioned *Crystal Conservation Coalition v. Crystal Mountain, Inc.* Stip. Ex. 17.

See CP 35 (Stip. ¶ 16).

Under the terms of the Permit, Crystal Mountain is required to prepare and annually revise a summer and winter “Operating Plan” for review and approval by the Forest Service. CP 35 (Stip. ¶ 17 (Stip. Ex. 19 and 20)). The summer and winter Operating Plans identify the operations and services Crystal will be offering during the upcoming summer or winter, season, as well as any planned special events. CP 35-36 (Stip. ¶ 17). The summer and winter Operating Plans also set out Crystal’s responsibilities within the ski area permit boundaries, including “the operation of all user-related and other facilities in accordance with sound operating principles and in accordance with all existing governing bodies’

laws, rules, regulations, applicable codes and [Special Use Permit] commitments.” CP 36 (Stip. ¶ 18).

D. Crystal Mountain Facilities and Capital Improvements.

Crystal Mountain is the largest ski area in Washington, with a total of 2,600 skiable acres and over 50 named runs. CP 36 (Stip. ¶ 19). The Ski Area Term Special Use Permit authorizes Crystal, with the advance approval of the Forest Service, to construct and maintain facilities necessary for the operation of the ski area. CP 36 (Stip. ¶ 20). Over the years Crystal Mountain has made a number of capital improvements within the Permit area. CP 36 (Stip. ¶ 21). Below is a partial list of buildings and improvements built and maintained by Crystal within the Permit area:

- a. Ski lifts serving the terrain:
 - Chinook Express
 - Rainier Express
 - Forest Queen Express
 - Green Valley Express
 - Gold Hill triple chair
 - Discovery triple chair
 - Quicksilver double chair
 - High Campbell double chair
 - Miner’s Basin
- b. Base Area Lodge
- c. Summit House
- d. High Campbell Lodge
- e. Four ski patrol duty stations
- f. Maintenance shop complex

g. Employee housing complex
CP 36-37 (Stip. ¶ 21).⁴

Crystal Mountain pays property tax to Pierce County on the value of the buildings and improvements it owns or has built on the Forest Service land. CP 37 (Stip. ¶ 22 (Stip. Ex. 26)). Crystal Mountain is allowed, with approval of the Forest Service, to sublease the use of land and improvements covered by the Ski Area Term Special Use Permit. CP 37 (Stip. ¶ 23). Pursuant to that authority, Crystal has entered into several sublease agreements with vendors or concessionaires allowing the sub-lessee to use a portion of Crystal Mountain's premises within the Permit area. CP 37 (Stip. ¶ 23; Stip. Exs. 22, 23).

E. Annual Permit Fee and Leasehold Excise Tax Paid by Crystal Mountain During the Periods in Dispute.

Crystal Mountain is required to pay an annual fee to the Forest Service for the right to use the Permit area. CP 37 (Stip. ¶ 24). The amount of the annual fee is computed by multiplying Crystal Mountain's "adjusted gross revenue" by a graduated percentage rate ranging from 1.5 percent to 4 percent. CP 37 (Stip. ¶ 25).

For the years 2002 through 2006, Crystal Mountain reported and paid the annual permit fee to the USFS in the following amounts:

2002	\$315,715.24
2003	\$329,027.20
2004	\$287,511.33

⁴ This list is not exhaustive.

2005	\$229,181.57
2006	\$500,150.42

CP 38 (Stip. ¶ 26 (Stip. Ex. 24)).

The fee paid to the USFS is based on Crystal Mountain’s use of the federal land as a ski area. CP 38 (Stip. ¶ 27). Crystal does not use the land for any other purpose such as growing and harvesting timber, although Crystal has occasionally removed and sold harvestable timber from the land with the Forest Service’s approval. *Id.*; see Stip. Ex. 38.

Washington imposes a 12.84 percent leasehold excise tax “on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest.” CP 38 (Stip. ¶ 28 (citing RCW 82.29A.030(1) and (2))). The term “leasehold interest” is defined in RCW 82.29A.020(1). CP 38 (Stip. ¶ 28). The tax is computed as a percentage of “taxable rent.” RCW 82.29A.020(2). *Id.*

Crystal Mountain reported and paid leasehold excise tax for the 2002 through 2006 excise tax reporting periods as follows:

2002	\$37,179.02
2003	\$43,520.95
2004	\$43,986.68
2005	\$43,008.92
2006	\$30,147.04

CP 38-39 (Stip. ¶ 29 (Stip. Ex. 25)).⁵

⁵ A portion of the leasehold excise tax remitted by Crystal Mountain for the 2002 through 2006 reporting periods related to tax owed by two separate entities, Crystal Chalets
(Footnote is continued on next page.)

F. Refund Claim and Procedural History.

In December 2006 Crystal Mountain submitted an application for refund to the Department seeking a refund of all leasehold excise tax Crystal had paid for the 2002 through 2006 reporting periods. CP 39 (Stip. ¶ 31; Stip. Ex. 29). In its application, Crystal Mountain asserted that its use of federal land under the Ski Area Term Special Use Permit did not qualify as a “leasehold interest” as defined in the tax statute and administrative regulations. CP 39 (Stip. ¶ 32). The refund application was reviewed and denied by the Department’s Miscellaneous Tax Section. CP 39 (Stip. ¶ 33; Stip. Ex. 30). Thereafter, Crystal Mountain filed an administrative appeal with the Department’s Appeals Division. CP 39 (Stip. ¶ 33). The appeal was assigned to an administrative law judge (“ALJ”). CP 39 (Stip. ¶ 34). After an informal hearing, the ALJ issued a written opinion denying Crystal Mountain’s refund claim. CP 39 (Stip. ¶ 34; Stip. Ex. 31).

Crystal Mountain then filed a petition for reconsideration with the Department’s Appeals Division, which was also denied. CP 40 (Stip. ¶ 35; Stip. Ex. 32). In both the initial determination and the determination denying reconsideration, the ALJ found that Crystal Mountain was subject

Condominium Association and Silver Skis Condominium Association, who operate within the Crystal Mountain Permit area but under separate use permits. CP 39 (Stip. ¶ 30). Neither Crystal Chalets Condominium Association nor Silver Skis Condominium Association is a party to this action, and amounts Crystal Mountain remitted on behalf of those two entities are not at issue in this case. *Id.*

to the leasehold excise tax even though Crystal's right to use the federal land was not exclusive. CP 40 (Stip. ¶ 36).

On December 19, 2008, Crystal Mountain filed a timely complaint in Thurston County Superior Court under RCW 82.32.180, seeking a refund of leasehold excise tax paid in the years 2002 to 2006. CP 40 (Stip. ¶ 38). In its complaint, Crystal asserted that it is not liable for leasehold excise tax on the amount it pays to the Forest Service under the Ski Area Term Special Use Permit. CP 40 (Stip. ¶ 39); *see* CP 5-6 (Complaint at ¶¶ 18-21). A one-day trial was held on March 28, 2011, based on the partial stipulated facts (CP 178-186), the stipulated exhibits (CP 167-172, CP 186-190), and the testimony of one witness, John Gerike, Controller for Crystal Mountain (*see* VRP 12-101). On March 30, 2011, the Honorable Carol Murphy issued written findings of fact and conclusions of law. CP 173-177. In her ruling Judge Murphy denied Crystal Mountain's refund claim. *Id.* Judgment for taxable costs and statutory attorneys' fees against Crystal Mountain in the amount of \$200.00 was entered on April 15, 2011. CP 191-93. Crystal timely filed a Notice of Appeal to this Court on May 12, 2011. CP 194-216.

III. STANDARD OF REVIEW

This case was decided by the trial court based upon a partial stipulation of facts, stipulated exhibits, and the testimony of one witness, whose testimony was not disputed. The trial court in its findings of fact and conclusions did not question the witness's credibility. The trial court was not required to resolve any issues of credibility as to competing

witnesses, nor was the court presented with competing documentary evidence.

Washington appellate courts “give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given the trial court.” *Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011). Washington courts apply “a *de novo* standard in the context of a purely written record where the trial court made no determination of witness credibility.” *Dolan*, 172 Wn.2d at 311 (citing *Smith v. Skagit County*, 75 Wn.2d 715, 719, 453 P.2d 832 (1969)). Thus “[w]here the record at trial consists entirely of written documents and the trial court therefore was not required to ‘assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,’ the appellate court reviews *de novo*.” *Dolan* at 310 (citing *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (quoting *Smith*, 75 Wn.2d at 718)).

Here, the facts were largely stipulated to, and supplemented substantially by documentary evidence (exhibits) and the testimony of one witness (Mr. Gerike) whose credibility and reliability were not challenged. Accordingly, the standard of review is *de novo*.

IV. ARGUMENT

A. **The Plain Meaning of the Leasehold Excise Tax Compels the Conclusion That the Tax Does Not Apply to Crystal Mountain's Permit With the United States Forest Service.**

The issue in this case involves statutory interpretation and the application of the “plain meaning” rule. In any matter of statutory interpretation the starting point is the language of the statute. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 20 (2007). If that language lends itself to only one interpretation, the Court’s inquiry ends because plain language does not require construction. *Id.* Absent a statutory definition, courts are to give the words in a statute their common and ordinary meaning. *Garrison v. Wash. State Nursing Board*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). And, to determine that ordinary meaning, courts will look to the dictionary. *Id.*; see *HomeStreet, Inc. v. Department of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

“In addition to dictionary definitions, [courts] also ‘give consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute,’” in other words, the common usage of the words or terms. *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005) (quoting *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 693, 743 P.2d 793 (1987)). “Courts may also resort to the common law for definitions of terms not defined by statute.” *State v. Engel*, 166 Wn.2d 572, 578-79, 210 P.3d 1007 (2009) (citing *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995)).

1. RCW 82.29A.020(1) Contains Four Elements, Each of Which Must Be Present Before the Leasehold Excise Tax May Be Imposed.

The question before the Court is whether Crystal Mountain is liable for leasehold excise tax (or “LET”) on the payments it makes to the USFS for the use of the National Forest Service land under the Ski Area Term Special Use Permit. The LET is imposed “on the act or privilege of occupying or using publicly owned real or personal property *through a leasehold interest.*” RCW 82.29A.030(1) (emphasis added).⁶ The term “leasehold interest” is defined in RCW 82.29A.020(1) to 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[.]

RCW 82.29A.020(1) thus establishes four elements that must be satisfied for there to be a taxable “leasehold interest”:

1. There must be an interest in publicly owned real or personal property;
2. The interest must exist by virtue of any lease, permit, license or any other agreement, written or verbal;
3. The agreement must be 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; and
4. The person must have a grant of possession and use of the property, to a degree less than fee simple ownership.

⁶ RCW 82.29A.030 imposes the leasehold excise tax at the rate of 12 percent plus a surtax. RCW 82.29A.040 authorizes counties and cities to impose leasehold excise taxes on the same basis as the state leasehold tax. Any leasehold excise taxes imposed by cities and counties is allowed as a credit against the state leasehold tax. RCW 82.29A.030(1). The total, combined tax rate is 12.84 percent.

By the plain language of the statute, all four elements of the statute must be present for the taxpayer to have a “leasehold interest” subject to the LET.

2. The USFS Permit Does Not Grant Crystal Mountain Possession and Use of the Land at Issue, Which Is One of the Elements That Must Be Satisfied for the LET to Apply.

There is no question that the first three elements are satisfied here. Crystal Mountain has been granted an interest in 4350 acres of federal land overseen by the Forest Service. CP 33-34 (Stip. ¶¶ 5, 9). Crystal’s interest exists by virtue of the Ski Area Term Special Use Permit, a written agreement. CP 34 (Stip. ¶ 6; Stip. Ex. 4). This agreement is between the public owner of the property -- the USFS -- and a private “person” -- Crystal Mountain, a Washington corporation.⁷ CP 33 (Stip. ¶ 2). As a private person Crystal would not be exempt from property taxes if Crystal owned the property in fee, and in fact Crystal pays property tax on its own property. CP 37 (Stip. ¶ 22; Stip. Ex. 26). That leaves the fourth element, which requires that the taxpaying person be granted “possession and use” of the property. If the Permit from the USFS does not grant Crystal “possession and use” of the property at issue, Crystal is not subject to the LET and should prevail in this action.

Here, the issue is “possession.” Under the Permit from the Forest Service, Crystal is granted the right to use the land at issue for certain designated purposes. The Permit states:

⁷ A “person” is defined by RCW 82.04.030 to include a “corporation.”

Crystal Mountain. . . 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.

(Stip. Ex. 4-1.) Crystal’s right of use, however, is not exclusive:

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.

(Stip. Ex. 4-2.) The Permit also states that “the lands and waters covered by this permit shall remain open to the public for all lawful purposes.” *Id.*

§ F. In short, pursuant to the terms of the Permit, the Forest Service can come onto the grounds; it can allow others to come onto the grounds; and it can permit others to use the grounds.

Because the word “possession” is not defined in the LET, one turns first to the dictionary to determine its ordinary and common meaning. The dictionary definition of “possession” is “**1 a** the act or condition of having in or taking into one’s control[.]” *Webster’s Third New International Dictionary* at 1770 (2002 ed.) (emphasis added). The question therefore is whether the Permit from the USFS grants to Crystal Mountain not only the right to use the land in question, but also the right to control that land.

The Ski Area Term Special Use Permit confers no possessory rights upon Crystal Mountain *to* the USFS land. The Permit gives Crystal permission to *use* the land “for the purpose of constructing, operating, and maintaining winter sports resort including food service, retail sales, and other ancillary facilities.” (Stip. Ex. 4-1). But, “the lands and waters

covered by this Permit [must] remain open to the public for all lawful purposes.” (Stip. Ex. 4-2 (§ F)). Crystal must also remove its facilities if the Permit is ever terminated. Ex. 4-12 (§ X.A). Crystal also cannot exclude *anyone* from the USFS lands (absent violations under the Rules of Use (Stip. Exs. 18-4 to 18-5)) and must share use with others, including the Muckleshoot Indian Tribe and the general public. *See* Stip. Ex. 4-2, Stip. Ex. 16.

In sum, Crystal Mountain plainly does not own “control” the 4350 acres of USFS land that is the subject of the Permit. The Permit therefore does not give rise to a “leasehold interest,” which is the statutory prerequisite for the imposition of the LET. The Legislature intended to tax agreements 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. What the Legislature *specifically* intended to tax were agreements that grant rights less than fee simple ownership *but which still embody both of the elements of possession and use*; hence, it imposed the fourth statutory requirement of “possession and use.”⁸ Because Crystal

⁸ In doing so, the Legislature acted consistent with basic principles of the common law governing ownership and occupancy of land. “The relation of landlord and tenant arises whenever the holder of a possessory estate in land permits another to possess it for a temporal period or at will.” *Washington Real Property Deskbook*, Vol. 2, § 17.2(2) (4th ed. 2009) (citing *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 224, 377 P.2d 642 (1963)). “Because the tenant has an interest in land, [the tenant] is entitled during the term of the leasehold estate to possession and enjoyment of the interest.” *Washington Real Property Deskbook*, *supra*, at § 17.4. And, “as a general proposition, [the tenant] is entitled during the term of that estate to exclusive possession against the whole world, including its landlord.” *Id.* at § 17.4(2).

does not have possessory rights but only use rights, that requirement is not satisfied here and the LET does not apply.

3. The Iteration “Which Exists by Virtue of Any Lease, Permit, License or Any Other Agreement” Was Placed in the Statute to Signify That Substance Prevails Over Form.

At the beginning of the definitional statute (RCW 82.29A.020(1)) the Legislature inserted the clause “which exists by virtue of any lease, permit, license or any other agreement.” The Department will argue that, if a license can create a taxable leasehold interest, this means the statute does not require both possessory and use rights before the LET may be imposed. This argument misreads the statute.

The requirements of a license are well known. “A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass.” *Conaway v. Time Oil Company*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949) (citing *Barnett v. Lincoln*, 162 Wash. 613, 299 Pac. 392 (1931)); *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 18 N.E.2d 362, 119 A.L.R. 1618; 32 Am. Jur. 30, § 5; 51 C.J.S. 806, § 202 (2)). A licensee is “a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.” *Teel v. Stading*, 155 Wn. App. 390, 395, 228 P.3d 1293 (2010) (citing *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 133, 875 P.2d 621 (1994) (quoting *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986)). “If the instrument does not grant possession, but grants only the right to use the premises, then the instrument is a license not a lease.”

In re Harbour House Operating Corp, 26 B.R. 324, 328 (Bankr. D. Mass. 1982); see *Highland Recreation Defense Foundation v. Natural Resources Commission*, 180 Mich. App. 324, 330, 446 N.W.2d 895 (1989) (distinguishing license from lease, and concluding that a permit to use recreation area was a license since it “does no more than grant permission to do certain activities on the property without giving . . . any permanent or possessory interest in the land”); see also *Union Travel Associates, Inc. v. International Associates, Inc.*, 401 A.2d 105, 107 (DC 1979) (“a license confers a personal privilege to act, and not a present possessory estate”). Thus, a license cannot grant possession *and* use. By definition, a license is a grant of a use right only, with possessory rights remaining with the grantor. A lease, on the other hand, “carries a present interest and estate in the property involved for the period specified therein, and . . . gives exclusive possession of the property, which may be asserted against everyone, including the lessor.” *Conaway* at 893 (emphasis added).

The difference between a lease and a license is well-established at common law. Where the Legislature uses a term that has a well-established meaning at common law, the common law meaning is to be applied. *State v. Engel, supra*. The LET uses the term “leasehold interest.” A lease is a right of possession and use granted by the holder of the title in fee simple. A lease gives the lessee the rights of possession *and* use against the world, including the holder of title in fee simple. The lessee even has the right to exclude the owner of the fee simple title. This is basic property law 101 and so there is no need to cite authorities.

Even though the LET law contains a statutory definition of “leasehold interest,” the word leasehold is also a common law term. While a lease is “[a]ny agreement which gives rise to a relationship of landlord and tenant” and includes agreements “for exclusive possession of lands or tenements for [a] determinative period,” a leasehold is similarly defined as “[a]n estate in realty held under a lease.” *Black’s Law Dictionary*, Revised Fourth Edition 1035-36 (1968). Under the common law an “interest” is the “most general term that can be employed to denote a property [right] in lands or chattels.” *Id.* at 950. So a “leasehold interest” at common law means a property right held under a lease.

The iteration “which exists by virtue of any lease, permit, license, or any other agreement” near the beginning of the statutory definition of “leasehold interest” (RCW 82.29A.020(1)) is thus designed to make the point that it does not matter what the agreement is called, and if it creates a leasehold interest it will be subject to LET. In other words, substance controls over form. Even the Department’s LET regulations acknowledge this point: “Regardless of what term is used to label an agreement providing for the use and possession of public property . . . it is necessary to look to the actual substantive agreement between the parties in order to determine whether a leasehold interest has been created.” WAC 458-29A-100(2)(f)(i).

Thus, the importance of the iteration “which exists by virtue of any lease, permit, license or any other agreement” is plain and the Department recognized it in its rule. The Legislature designed a statute whose

application did not turn on form. The iteration was put in the statute because of the danger of an agreement, which is in substance a lease, being labeled a license, permit or franchise to avoid or evade payment of the LET. In other words, if the statute had read “which exists by virtue of any lease agreement, written or verbal,” then there would be claims by taxpayers, “I have a permit; I don’t pay. I have a license; I don’t pay. I have a franchise; I don’t pay.” Instead, the statute was explicitly drafted to say, “which exists by virtue of any lease, permit, license or any other agreement . . . granting possession and use.” It is not, as the Department will contend, to make virtually any agreement become subject to the tax.

So the point, reflecting legislative intent, is made in the body of the statute: under the LET substance controls over form or labels.⁹ The Legislature was telling the government and their tenants in this state not to re-label leases into permits, licenses, or franchises to avoid paying the LET. Crystal agrees with this approach. But if the agreement is a true

⁹ In fact, form over substance has long been a staple of the Washington tax system and this was well-known to the Legislature at the time the LET law was enacted in 1976:

. . . the case of *Estep v. King County*, 66 Wn.2d 76, 401 P.2d 332 (1965), shows that in the area of our own real estate excise tax [REET], form may prevail over substance even in the absence of any substantial independent business purpose because of our supreme court’s reluctance to enter into the same “substance versus form” legal thicket in which the federal courts have become enmeshed.

AGO 1975 No. 6 at 6: Thus, one year before the leasehold excise tax was enacted the Attorney General reaffirmed the general “form over substance” nature of the Washington tax system, in this case the REET. So, when the Legislature came along in 1976 to enact the LET it made sure that what was truly a lease agreement, even though the parties may call it a license, permit, etc. (in other words, never mind the form), it was to be subject to the tax, in effect, making sure that substance prevailed over form at least in the LET context. It was not, as the Department will argue, an attempt to subject anything and everything, including permits, licenses, etc., to LET.

franchise, a true license, or true permit that does not grant possession *and* use as required by RCW 82.29A.020(1), the Department must take the bitter with the sweet, because whatever the agreement is or whatever it's called, it has to grant possession and use. This is a tax on *leasehold* interests; if the agreement does not grant possession and use, then the tax cannot be applied and the Department cannot prevail.

Here, the Forest Service never gave up the right of possession. Moreover, Crystal Mountain has extensive obligations imposed on it under the Permit. Rules have to be complied with and the USFS is monitoring Crystal's use. The Forest Service cannot monitor without the ability to go onto the property and that's precisely what the USFS does. Mr. Gerike even testified that in the recent (2010) construction of the gondola the USFS representative regularly visited the property to check on the work and progress. VRP 40. In short, what matters is Crystal Mountain does not have the relevant power of possession. What is the relevant power of possession? In a lease or leasehold, the power of possession is the power to exclude the landlord. Under the common law, a lessee or tenant has the exclusive use and occupancy of the property without interference, including from the landlord or owner and for all proper and lawful purposes. The Forest Service is the landlord here and it is not excluded from the premises. This is simply basic property law.

The statutory language "owning the property in fee" is meaningful, too, because owning the property in fee grants certain rights: the right of possession *and* the right of use. A person can enter into arrangements –

leases, franchises, licenses – which give somebody else under the terms of those agreements the day-to-day right to exercise perhaps use rights, perhaps possession rights, or perhaps possession and use rights. But if a person owns the property in fee the person has both possession and use rights. And that’s what RCW 82.29A.020(1)’s definition of “leasehold interest” is getting at – agreements which are for all practical purposes, leases.

4. The Language “[G]ranteeing Possession and Use” Is Not Ambiguous. The Word “and” Means “and,” Not “or.”

There is no ambiguity in the language “granting possession and use.” RCW 82.29A.020(1) . The statute clearly and unequivocally requires both possession *and* use to be granted a leasehold interest. The statute contains the conjunctive word “and,” not the disjunctive “or.” “‘And’ conveys a conjunctive meaning, otherwise the legislature would have used ‘or’ if it meant to convey a disjunctive meaning.” *Ahten v. Barnes*, 158 Wn. App. 343, 353 n. 5, 242 P.3d 35 (2010) (citing *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992)). Moreover, there is no indication that in this context the word “and” means “or.” See *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978). RCW 82.29A.020(1) requires the existence of two preconditions to create a leasehold interest: (1) possession of the property, *and* (2) use of the property. Because Crystal Mountain has been granted no possessory rights, it does not have a leasehold interest.

“The main object of judicial interpretation is to ascertain and give effect to the Legislature’s intent.” *Ski Acres*, 118 Wn.2d at 856. RCW

82.29A.020(1) evidences a legislative intent to apply the LET only where a person has been granted “possession and use” of public property. Interpreting the word “and” in this phrase as it was written in the conjunctive gives effect to the Legislature’s intent that leasehold interests subject to tax are those which are most like traditional leases. A true license or a true permit grants use but not possession, so they cannot be taxed as a leasehold interest. *See* WAC 458-29A-100(2)(f)(ii) (the “possession element . . . distinguishes a taxable leasehold interest from a mere franchise, license, or permit”) (this regulation is discussed in more detail later in this brief). In this case, there is no indication of an intent to read “and” as “or” in the phrase “granting possession and use.” RCW 82.29A.020(1). It follows that the statute is to be construed “against the taxing power and in favor of the taxpayer” (*Ski Acres, supra*), requiring both possession and use to create a taxable leasehold interest. This is not a case in which statutory language makes it difficult to determine whether “and” is to be read in the disjunctive. On the contrary, there is absolutely nothing in the language of RCW 82.29A.020(1) that raises any uncertainty about the meaning of the word “and.”

B. The Department’s Regulations Support Crystal Mountain’s Interpretation of the Statute.

The Department has adopted WAC 458-29A-100(2)(f),¹⁰ which addresses the statutory requirements of possession and use:

¹⁰ RCW 82.29A.140 directs the Department to make rules and regulations for administration of the leasehold tax.

“Leasehold interest” means 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.

. . .

(ii) *Both 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*. . . . This requirement distinguishes a taxable leasehold interest from a *mere franchise, license, or permit*.

WAC 458-29A-100(2)(f) (emphasis added). This rule goes on to provide additional definitions:

“License” means permission to enter on land for some purpose, *without conferring any rights to the land* upon the person granted the permission.

. . .

“Permit” means a written document creating a license to enter land *for a specific purpose*.

WAC 458-29A-100(2)(i), (k) (emphasis added).

The Department’s rules thus confirm that *both possession and use* of public property are required in order to create a leasehold interest. A person with possession of public property but not the ability to use that property does not have a taxable leasehold interest. Conversely, a person with use of public property but not possession likewise does not have a taxable leasehold interest.

As previously discussed, the Ski Area Term Special Use Permit confers no possessory rights upon Crystal Mountain *to* the USFS land. The Permit gives Crystal permission to *use* the land “for the purpose of constructing, operating, and maintaining winter sports resort including

food service, retail sales, and other ancillary facilities.” (Stip. Ex. 4-1). But, “the lands and waters covered by this Permit [must] remain open to the public for all lawful purposes.” (Stip. Ex. 4-2 (§ F)).

RCW 82.29A.020(1) and WAC 458-29A-100(2)(i) together recognize the distinction between a lease and a license or permit, and they are both consistent with the common law. The LET is intended to capture leases that may be called licenses, but if the agreement is a true license or permit, both the statute and the regulation recognize that the agreement is not taxable. And the Permit at issue *is* a true permit or license. It allows Crystal Mountain to do certain acts – operate a ski resort – on USFS land without passing possession or any estate to the land. The statute plainly contemplates that any number of arrangements can be taxable.¹¹ But, regardless what the arrangement is *called* it must convey possession *and* use of the property for the tax to apply. Crystal has use but not possession of the USFS land. Accordingly, Crystal Mountain does not have a “leasehold interest” and, without a leasehold interest, it is not liable for the LET under the plain language of the statute.

Determination No. 08-0076 (Stip. Ex. 31), issued to Crystal by the Department, acknowledged that the permit only “grants the taxpayer *use* of 4350 acres of public land for constructing, operating and maintaining a ski resort” (Ex. 31-5 (emphasis added)). This admission, quite frankly, should end the dispute and mandate a reversal in favor of Crystal. The

¹¹ Again, the LET law states a leasehold interest may exist “by virtue of any lease, permit, license, or any other agreement.” RCW 82.29A.020(1).

LET law requires “possession *and* use” of public property, the absence of either element is fatal to a finding that a leasehold interest has been created, and the Department admitted in its Determination issued to Crystal that the Permit grants Crystal only the right to use, not the right to possess, the land at issue.

WAC 458-29A-100(2)(f)(ii) interprets the word “possession” to mean “some identifiable *dominion and control* over a defined area” (emphasis added), but the words “dominion” and “control” are not further defined in the rule. “In the absence of a specific statutory definition, words used in a statute are given their ordinary meaning.” *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1999) (citing *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995); *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991)).¹²

The dictionary defines “dominion” to mean “something that is subject to sovereignty or control[;] . . . a territory . . . subject to . . . or under the control of a particular government.” *Webster’s Third New International Dictionary* at 672 (definitions 2, 3b) (2002). To the extent the word dominion is merely a synonym for “control,” its meaning will be addressed when Crystal discusses the definition of “control,” below. To the extent the word “dominion” is defined to mean “sovereignty,” it should be clear from the record that Crystal does not exercise any

¹² Rules of statutory construction are equally applicable to the interpretation of agency regulations. See *Silverstreak, Inc. v. Department of Labor & Industries*, 159 Wn.2d 868, 881, 154 P.3d 891 (2007).

“sovereignty” over the Permit area; the Forest Service solely and exclusively exercises such authority over the land.

As for “control,” the dictionary defines this word to mean “the act or fact of controlling . . . power or authority to guide or manage : directing or restraining domination.” *Webster’s Third New International Dictionary, supra*, at 496 (definition 1a). This definition perfectly describes the continuing power and authority of the USFS under the Permit to “guide,” “manage” “direct...” and “restrain...” Crystal’s use of the land at issue.¹³ Crystal Mountain is allowed to place and maintain its facilities and equipment on the land, and conduct ski operations on the land, but all of its activities are subject to the terms and conditions allowed by the USFS in the Permit.

Thus, the Department’s own rule, with its rephrasing of the statutory right of “possession” to mean “dominion and control,” also supports Crystal Mountain’s position. Dominion and control correspond to possession. One must have dominion and be in control to have possession over the property. Instead, Crystal merely has the right of day-to-day use. Crystal does not satisfy the dominion and control requirements of WAC 458-29A-100(2)(f). And if Crystal does not have dominion and control, it does not have the requisite possession to create a taxable leasehold interest under RCW 82.29A.020(1).

¹³ The Muckleshoot Indian Tribe exercises additional control over the USFS land through its treaty rights. Stip. Ex. 18.

Black's Law Dictionary (Revised Fourth Edition (1968)) further supports this reading of these key words:

“POSSESSION. The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one’s use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercise it in one’s place and name. Act or state of possessing. That condition of facts which one can exercise his power over a corporeal thing at his pleasure *to the exclusion of all other persons.*” [citations omitted] (p. 1325) (emphasis added).

“DOMINION. *Ownership, or right to property or perfect or complete property or ownership. . . . Title to an article of property which arises from the power of disposition and the right of claiming it.*” . . . [citations omitted] (p. 573) (emphasis added).

“CONTROL, n. *Power or authority to manage, superintend, restrict, regulate, direct, govern, administer, or oversee.*” [citation omitted] (p. 399) (emphasis added).

Thus, under *Black's*, to have “possession” a person must exercise authority over the item or thing at the person’s pleasure and *must also have the power to exclude all other persons*. Crystal Mountain’s power of possession under the Ski Area Term Special Use Permit is the antithesis of the power or authority to exclude others. Crystal cannot exclude *anyone* from the USFS lands (absent violations under the Rules of Use (Stip. Exs. 7-4 to 7-5))¹⁴ and must share use with others, including the Muckleshoot Indian Tribe and the general public. *See* Stip. Exs. 4-2, 16. Indeed, federal law expressly forbids the creation of any such power to exclude.

¹⁴ As a practical matter, there is a limited exclusionary right that goes with use rights. So, for example, Crystal Mountain has the ancillary exclusionary right to prevent a member of the public from opening the door to a generating unit that is powering the ski lifts. But this limited ancillary right plainly is not a general right to exclude the world from the area over which a use right is given. Instead, it is an ancillary right given only to the extent necessary for the person to be able to exercise their use rights.

See 36 CFR § 251.54(e)(1)(iv) (“The proposed use will not create an exclusive or perpetual right of use or occupancy”).¹⁵

Crystal Mountain therefore does not have “dominion” under the *Black’s* definition. Dominion is equivalent to “ownership,” including the “power of disposition” or the “right of claiming” the property. Crystal has none of these attributes under the Permit; again, federal law will not allow it. See 36 CFR § 251.54(e)(1)(iv) (“The proposed use will not create an exclusive or perpetual right of use or occupancy”). “Control” under *Black’s* means the “[p]ower or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee.” Crystal has none of these attributes, either.

Thus, the Department’s interpretation under its rule confirms the meaning of possession in RCW 82.29A.020(1). This is an interpretive rule, not a procedural rule, that was promulgated under the Administrative Procedures Act (APA), RCW chapter 34.05. The Supreme Court has held that RCW 82.01.060(2), which is a part of the enabling legislation that established the Department, provides authority for the Department to make interpretive rules. *Ass’n. of Wash. Bus. v. Dep’t of Revenue*, 155 Wn.2d

¹⁵ 36 CFR § 251.55 further defines the nature of the permittee’s or holder’s interest:

(a) A holder is authorized only to occupy such land and structures and conduct such activities as is specified in the special use authorization. . . .

(b) All rights not expressly granted are retained by the United States, including but not limited to (1) continuing rights of access to all National Forest System land (including the subsurface and air space); (2) a continuing right of physical entry to any part of the authorized facilities for inspection, monitoring, or for any other purposes or reason consistent with any right or obligation of the United States under any law or regulation; and (3) the right to require common use of the land or to authorize the use by others in any way not inconsistent with a holder’s existing rights and privileges after consultation with all parties and agencies involved.

430, 445, 120 P.3d 46 (2005). “Any interpretive rule is based on the statute it is interpreting and the statutory mandate to administer and enforce that statute.” *Id.*¹⁶ The Department’s own interpretative rule of the LET statute thus squarely supports Crystal Mountain’s reading of the statute.¹⁷

¹⁶ In addition, RCW 82.29A.140 directs the Department to “make such rules and regulations . . . to permit [the] effective administration” of the LET.

¹⁷ In recent years, the Department in litigation with taxpayers has shown a tendency to repudiate its own rules when they are inconsistent with the Department’s litigation position. Before the trial court the Department urged the court to ignore the rule if it conflicted with the underlying statute. CP 92. But, what the Department was really saying was, ignore the rule if it supports the taxpayer. In other words, the Department wants to be able to repudiate its rules when convenient. The issue of whether the Department may repudiate a rule as a litigation tactic was before the Washington Supreme Court in *Tesoro Refining and Marketing Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 190 P.3d 28 (2008), but unfortunately was not resolved by that court. Four of the justices said the rule in question in *Tesoro* was consistent with the Department’s position in the case and therefore did not reach the issue of whether the Department may repudiate one of its rules during litigation, while four of the justices said the rule in question was inconsistent with the Department’s position and could not be repudiated except by going through the APA. Chief Justice Alexander concurred with the second group on the issue of whether the rule was consistent with the Department’s position, but disagreed with that group’s conclusion that the Department could not repudiate its rule without going through the APA. The Chief Justice acknowledged there was “a certain unseemliness about the Department of Revenue disavowing its own regulation when it appears to favor the taxpayers” but ultimately concluded that the Department could do so because “a statute trumps a regulation that conflicts with that statute.” *Id.* at 325 (Alexander, C.J., concurring). (This Court in *Tesoro* was also split on the issue of the Department’s repudiation. Compare *Tesoro Refining and Marketing Co. v. Dep’t of Revenue*, 135 Wn. App. 411, 426, 144 P.3d 368 (2006) (op. per Armstrong, J, joined by Penoyar, J.) (permitting repudiation) with 135 Wn. App. at 428-29 (dissenting op. of Quinn-Brintnall, J.) (rejecting repudiation).)

C. Any Doubt or Ambiguity in the Controlling Statute (RCW 82.29A.020(1)) Is to Be Resolved in Favor of Crystal Mountain, the Taxpayer, Not the Department, Because This Is a Tax Incidence Case.

RCW 82.29A.030 creates the *incidence* of the LET. The tax is imposed “on the act or privilege of *occupying or using* publicly owned real or personal property through a leasehold interest.” RCW 82.29A.030(1). RCW 82.29A.020(1) then creates the statutory definition of leasehold interest. The incidence provision – “the act or privilege of occupying or using publicly owned real or personal property” -- is in the disjunctive. On its face, one only has to occupy *or* use public property to create a leasehold interest. But the statute does not stop there and the entire statute must be read to get context and structure. RCW 82.29A.030(1) goes on to state “through a leasehold interest.” Thus, what the introductory phrase in RCW 82.29A.030(1) giveth, the secondary phrase – “through a leasehold interest” and the definition of leasehold interest in RCW 82.29A.020(1) – taketh away. Crystal Mountain concedes that if the incidence statute (RCW 82.29A.030(1)) stopped before “through a leasehold interest” or if RCW 82.29A.020(1) did not have this very precise definition of leasehold interest, Crystal would not have a case because the “occupying or using” language in RCW 82.29A.030(1) would end any dispute. But, the incidence statute does not stop before that point; it continues “through a leasehold interest.” And, of course, there is a statutory definition of the term leasehold interest. RCW 82.29A.020(1).

This case involves a tax statute, and in tax statutes there are additional rules of construction. Those rules are set out in *Mac Amusement Co. v. Dep't of Revenue*, 95 Wn.2d 963, 633 P.2d 68 (1981), coincidentally a case also addressing the LET and one in which the Department relies to support its argument in this case (as will be discussed more fully later, in Section IV.D of this brief). In laying out the rules of construction in tax cases, the Supreme Court stated:

. . . [W]e are faced with two conflicting rules of statutory construction. The first states that if there is any doubt as to the meaning of a tax [imposing] statute, it must be construed against the taxing power. *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 453 P.2d 870 (1969); *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn. 2d 40, 43, 200 P.2d 509 (1948). The other is that tax exemptions are to be strictly construed in favor of the tax and, as a corollary, they are not to be extended beyond the scope clearly indicated by the legislature. *Evergreen-Washelli Memorial Park Co. v. Department of Revenue*, 89 Wn.2d 660, 574 P.2d 735 (1978); *Pacific Northwest Conference of Free Methodist Church of N. America v. Barlow*, 77 Wn.2d 487, 493-94, 463 P.2d 626 (1969).

Mac Amusement, 95 Wn.3d at 966.

This case involves the imposition of a tax – the LET tax on the fee Crystal pays to the USFS. This case does *not* involve an exemption from tax. So, the default rule *in favor* of the taxpayer is applicable here; *i.e.*, if there is any doubt as to the meaning of RCW 82.29A.020(1), that statute must be interpreted *in favor* of Crystal Mountain and *against* the Department. *Mac Amusement*, 95 Wn. 2d at 966.

The Department will contend that Crystal Mountain is seeking an exemption from LET, thereby calling into play the rule that exemptions

from tax are to be strictly and narrowly constructed against the taxpayer and in favor of the state. But there is no exemption from tax sought here by Crystal.¹⁸ This is quite plainly an incidence case -- does the LET apply to the fees paid by Crystal Mountain to the Forest Services under the Ski Area Term Special Use Permit in the first instance? In other words, does the Permit create a “leasehold interest” under RCW 82.29A.020(1)? So, if there is any doubt as to the meaning of this statute, it is to be construed in favor of Crystal and against the taxing power.

D. The Washington Supreme Court’s Decision in *Mac Amusement v. Department of Revenue* Does Not Offer the Department a Safe Harbor. To the Contrary – *Mac Amusement* Establishes That the Permit Constitutes the Grant of a Franchise or Monopoly Right, Which Is Not Taxable Under the Leasehold Excise Tax.

The Department will contend that the Supreme Court held in *Mac Amusement Co. v. Dep’t of Revenue*, 95 Wn.2d 963, 633 P.2d 68 (1981), that “nonpossessory interests” are taxable under the LET. See CP 19 (Department Trial Brief). In *Mac Amusement*, the Supreme Court held that the portion of rent that Mac Amusement paid to the City of Seattle for “favorable location” was subject to leasehold tax, but the portion of the rent that was for “monopoly rights” was not taxable. *Mac Amusement*, 95 Wn.2d at 965. Mac Amusement had a *lease* to operate the Fun Forest amusement facility at the Seattle Center. *Id.* The *lease agreement* provided “for a favorable location among pedestrian traffic, for the

¹⁸ Exemptions from LET are set out in RCW 82.29A.125 to 138. Crystal does not rely on any of those statutes.

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.* For these rights and others, Mac Amusement paid one rental sum and the portion of rent attributable to each right was not stipulated in the lease agreement. *Id.* Mac Amusement sought a partial refund of leasehold taxes attributable to its monopoly rights and favorable location. *Id.* at 965-66. The question was whether such rights granted under the *lease* were “nontaxable ‘concession or other rights’ under RCW 82.29A.020(2)(a).” *Id.* at 966.¹⁹

Mac Amusement cannot save the Department. To begin, Mac Amusement was attempting to exempt a portion of its otherwise taxable rent payments from leasehold tax as a “concession or other rights.” As such, the court was obliged to apply the rule of statutory construction applicable to tax *exemptions*, which “are to be strictly construed in favor of the tax and, as a corollary, they are not to be extended beyond the scope clearly indicated by the legislature.” *Mac Amusement*, 95 Wn.2d at 966 (citing *Evergreen-Washelli Memorial Park Co. v. Department of Revenue*, 89 Wn.2d 660, 574 P.2d 735 (1978); *Pacific Northwest Conference of Free Methodist Church of N. America v. Barlow*, 77 Wn.2d 487, 493-94, 463 P.2d 626 (1969)). This case, on the other hand, deals with the *imposition* of a tax – *i.e.*, whether the LET applies to the Permit as a

¹⁹ RCW 82.29A.020(2)(a) defines the term “contract rent,” which is also taxable rent for purposes of calculating the LET. This statute provides an exception from leasehold tax “[w]here the consideration conveyed for the leasehold interest is made in combination with payment for concession or other rights granted by the lessor” and, in such case, “only that portion of such payment which represents consideration for the leasehold interest shall be part of contract rent.”

matter of law. Here, the Court (as previously discussed) will apply the rule for tax incidence cases: “[I]f there is any doubt as to the meaning of a tax statute, it must be construed against the taxing power.” *Mac Amusement, supra* (citing *Foremost Dairies, Inc. v. State Tax Comm’n*, 75 Wn.2d 758, 453 P.2d 870 (1969); *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn.2d 40, 43, 200 P.2d 509 (1948)).

Second, the Supreme Court’s actual holding in *Mac Amusement* does not support the Department’s reading of the case. The Department asserted before the trial court that *Mac Amusement* established that “possession of the publicly owned property in a strict property law sense is not required” because the Supreme Court supposedly held that “non-possessory property interests” are generally taxable under the LET. CP 21 (Department Trial Brief at 14). But the Supreme Court actually only held that attempting “to segregate from the rent that portion relating to favorable location” was “contrary to the stated legislative purposes for the tax.” 95 Wn.2d at 969. The Supreme Court found favorable location to be akin to a lessee in a shopping center choosing a location on the basis of access to commercial traffic, in which case “access is an inherent element of the location.” *Id.* at 968-69. Thus, the Supreme Court ruled that favorable location was “an inherent element of,” and therefore subsumed within, *Mac Amusement*’s lease; whether the lease itself constituted a “leasehold interest” subject to the LET was not in dispute. Here, however, whether the Permit between Crystal and the Forest Service constitutes a “leasehold interest” subject to the LET *is* in dispute.

Mac Amusement is, however, useful for another purpose – defining the scope of franchise or exclusivity rights which are *not* subject to leasehold tax:

In contrast to a leasehold, a monopoly right when conferred by a municipality is generally considered to be a franchise. *Washington Water Power Co. v. Rooney*, 3 Wn.2d 642, 101 P.2d 580 (1940); *Artesian Water Co. v. State Dep't of Highways & Transp.*, 330 A.2d 432 (Del. Super. Ct.), *aff'd as modified*, 330 A.2d 441 (Del. 1974); *Dunmar Inv. Co. v. Northern Natural Gas Co.*, 185 Neb. 400, 176 N.W.2d 4 (1970). A franchise is

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 . . .

Rooney, at 649, quoting E. McQuillin, *Municipal Corporations* § 1740 (2d ed. 1943). *Accord, Artesian, supra*. It is distinguishable from leaseholds, licenses, and permits the terms used in RCW 82.29A to define “leasehold interests.” *Artesian, supra; Dunmar, supra; Lanham v. Forney*, 196 Wash. 62, 81 P.2d 777 (1938); *Greene Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901 (1940); *Miller v. Owensboro*, 343 S.W.2d 398 (Ky. App. 1961). It remains distinct from a leasehold even when its exercise and value is inherently dependent upon the use and possession of publicly owned property. *Artesian, supra; Hayden v. Houston*, 305 S.W.2d 798 (Tex. Civ. App. 1957); *Glodt v. Missoula*, 121 Mont. 178, 190 P.2d 545 (1948).

Mac Amusement, 95 Wn.2d at 969-970.

Based on these principles, the Supreme Court held that the *exclusivity rights* granted to *Mac Amusement* were a franchise, and therefore were “nontaxable ‘other rights granted by the lessor.’” *Id.* at 970. Here, the USFS has granted a monopoly right or franchise to Crystal Mountain to operate a “winter sports resort.” Stip. Ex. 4-1. The Permit limits the Forest Service and others’ use of the land to use that “does not materially interfere with the rights and privileges” of Crystal. Ex. 4-2 (§ E). The purpose of this provision is to exclude any other entity from

coming onto the land to conduct a “winter sports resort.” This is a monopoly right or franchise. Indeed, the opening paragraph of the Permit grants the monopoly or franchise:

Crystal Mountain . . . 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.

Stip. Ex. 4-1. That the agreement may be called a “permit” is not determinative, because (as shown) substance controls over form. As stated by the Department in its regulation:

Regardless of what term is used to label an agreement providing for the use and possession of public property . . . , *it is necessary to look to the actual substantive agreement between the parties in order to determine whether a leasehold interest has been created.*

WAC 458-29A-100(2)(f)(i) (emphasis added).

The substantive agreement here is a monopoly or franchise and it is distinct from a leasehold. The Permit is the grant of a franchise because it allows Crystal to do certain things – construct, operate and maintain a winter sports resort – which Crystal otherwise cannot do absent the special use permit. *Mac Amusement*, 95 Wn.2d at 969 (citing *Rooney*, 3 Wn.2d at 649 (quoting E. McQuillin, *Municipal Corporations* § 1740 (2d ed. 1943))). The Permit further allows “food service, retail sales, and other ancillary facilities” and others may “not materially interfere with the rights and privileges” granted to Crystal, which is comparable to the City of Seattle granting Mac Amusement “the sole right to sell food within the Fun Forest location” (*Mac Amusement*, 95 Wn.2d at 965), which the

Supreme Court found was a nontaxable monopoly right or franchise. That the Permit should be characterized as a franchise is another reason to reverse the trial court.

E. The Trial Court Misapplied the Law.

The trial court stated that the word “possession” is not defined in the LET statutes. CP 176. The court then observed that the word is “often addressed by the courts in the criminal context.” *Id.* It is not clear what the trial court meant by this comment as it did not further develop how the definition of possession from the criminal law has any bearing on the LET. The trial court then went on to state that the “common and ordinary meaning of possession is appropriate.” *Id.* But the court did not develop or explain what it understood the common and ordinary meaning of possession to be.

Ultimately the trial court concluded that possession under the LET statutes is not required to be exclusive, and because possession under the statute is not require to be exclusive the court could find that “Crystal Mountain is granted possession and use of the Permit area, and therefore has a leasehold interest.” *Id.* But as shown, for one to have the right to possess property one must have the right to exercise control over that property, including the right to exclude others from the property. It is this quality that distinguishes the right to possess from the mere right to use. The trial court’s ruling that possession under the LET does not have to be exclusive drains the word “possession” of all substantive meaning, and

effectively collapses the actual statutory requirement of “possession and use” into the single requirement of “use.”

This result disregards the statute’s language and structure. The statutory language, to use the trial court’s phrase, draws a distinction. It distinguishes between ownership in fee and possession and use that is less than fee simple ownership. Nevertheless, the statute does demand possession *and* use. This tax addresses leaseholds and it is a fundamental principle that lease rights are exclusive. They are the exclusive right to possess and the exclusive right to use. And the rights are distinguishable as between the two. Both the statute and the *rule* reflect this understanding of the property common law.

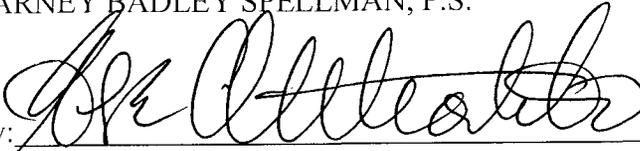
The plain and unambiguous requirements of the statute distinguish possession from use and a person has to have both. Use rights carry with them some rights to exclude, and those are ancillary possessory rights. The fact that the statute says possession *and* use shows that the Legislature intended the tax apply to something that, whatever its title, is the equivalent of a lease. And lease rights – that is, possessory rights – are exclusive. Thus, when the trial court says possession is not required by the statute to be exclusive, the court is wrong. The possession *has to be* exclusive, for it *to be* possessory. The trial court admitted that on this record Crystal Mountain does not have exclusive possession; in other words, the trial court knew Crystal did not have exclusive possessory rights. This is fatal to the trial court’s ruling.

V. CONCLUSION

This Court should rule that the plain language of RCW 82.29A.020(1) requires both possession and use to create a leasehold interest subject to the LET. The Court should hold that Crystal Mountain has use of the Forest Service land, but not possession, and that without possession there can be no taxable leasehold interest. This Court should further affirm the Department's interpretation of the statutory requirements to create a leaseholder interest as reflected in its own rules. Crystal Mountain asks the Court to reverse the trial court and remand for the calculation and determination of the refund owed to Crystal.

RESPECTFULLY SUBMITTED this 23rd day of November, 2011.

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NO. 42081-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

CRYSTAL MOUNTAIN, INC.,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

DECLARATION OF SERVICE

I certify that on the date set forth below I served a copy of the foregoing *Appellant's Opening Brief* and a CD of the Transcripts of Proceedings dated March 28, 2011 by United States Mail, postage prepaid, on the following counsel for the defendant, Department of Revenue:

Rebecca R. Glasgow
Charles Zalesky
Assistant Attorneys General
Attorney General/Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123

and the Original plus one copy of *Appellant's Opening Brief* to the Clerk of the Court of Appeals:

David Ponzoha, Clerk/Administrator
Washington Court of Appeals, Div. II
950 Broadway, #300
Tacoma, WA 98402-4454

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 23rd day of November, 2011.



Patti Saidu, Legal Assistant