

owed if someone were killed or injured. Plaintiffs were unable to safely operate due to the substantial risk and danger created by the snowmobile activity in the ski area parking lot, in addition to finding the agency's decision morally indefensible. The National Ski Areas Association, which includes many ski areas which also operate on National Forest System lands, described the Forest Service's action as showing a "breathtaking" disregard for the safety of the ski area patrons.

The Forest Service subsequently attempted to force Plaintiffs to operate under the dangerous safety and financial risks created by the agency. Plaintiffs refused and instead pleaded with the agency to discontinue allowing the snowmobile activity as Plaintiff had insisted be done if that activity became dangerous, and to instead have that activity occur in other nearby locations where snowmobilers could park and easily access the local trails safely. The snowmobile activity could easily be moved, but the ski area could not. The Forest Service continued to refuse to prohibit the dangerous snowmobile activity in the ski area parking lot. In 2021, the agency revoked Plaintiffs' permit because they refused to operate under the dangerous conditions created by the Forest Service. The Forest Service's actions constitute a breach of contract which has directly caused Plaintiffs to suffer significant damages including but not limited to lost profits under its contract and the value of its improvements at the ski area.

PARTIES

1. Plaintiffs John and Nancy Murray reside in Portland, Oregon and, as the operators of Spout Springs Mountain Resort are named holders of the USDA Forest Service Ski Area Term Special Use Permit issued on behalf of the Defendant. Collectively, Spout Springs Mountain Resort and John and Nancy Murray are hereafter referenced as "Plaintiffs."

2. Defendant is the United States of America acting through the United States Forest Service, an agency under the Department of Agriculture (hereinafter the “Forest Service”). The Forest Service issued the USDA Forest Service Ski Area Term Special Use Permit at issue pursuant to the Act of October 22, 1986, 16 U.S.C. § 497b.

JURISDICTION

3. This Court has jurisdiction over Plaintiffs’ claims under 28 U.S.C. § 1491 (the Tucker Act) as claims “against the United States founded either upon the Constitution, or any Act of Congress or any regulation of any executive department or upon any express or implied contract with the United States.”

STATEMENT OF FACTS

4. The ski area and operation currently known as Spout Springs Mountain Resort (“Spout Springs Mountain Resort” or “ski area”) was originally established in the late 1920s.

5. The ski area is located on the Umatilla National Forest in Oregon.

6. The ski area had been in continuous operation from the late 1920s to 2016 as a family-oriented local ski area.

7. The Blue Mountain Ski Club, which was founded in 1938, sponsored ski competitions at the ski area from the 1950s to the 1970s.

8. The ski area also was the Nordic training center for the United States Olympic team and the Norwegian jump team in the 1950s and 1960s, which allowed Spout Springs Mountain Resort to fly the official Olympic Flag through special permission of the U.S. Olympic Committee.

9. The Forest Service also used the ski area for its ski school in the 1960s.
10. While the ski area is located on federal land within the Umatilla National Forest, all of the improvements at the ski area are privately owned.
11. John and Nancy Murray took over the operations at the ski area in 1999 after purchasing the improvements from the prior operator and entering into a Ski Area Term Permit (“Ski Area Permit”) with the Forest Service.
12. The Ski Area Permit was issued on December 31, 1999 for a forty-year term.
13. The Ski Area Permit constitutes a legally binding contract.
14. The Ski Area Permit authorizes the ski area improvements and operations pursuant to the National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b (“Act”) and its fundamental purpose is to provide skiing to the public.
15. The Ski Area Permit stated that it was issued “for the purpose of constructing, operating and maintaining [a] winter sports resort” known as the “Spout Springs Mountain Resort ski area.”
16. The parking lot area at the ski area was in fact originally built by the ski area permittee for use by ski area patrons.
17. The forty-year term of the Ski Area Permit allows for a permit holder to recoup and justify the significant investments required to operate a ski area.
18. Under the Act, a ski area permit must encompass the area that is sufficient and appropriate to accommodate the permit holder’s needs for ski operations. 16 U.S.C. § 497b(b)(3).
19. Section V.E. of the Ski Area Permit stated:

The holder has the responsibility of inspecting the area authorized for use under this permit for evidence of hazardous conditions which could [] pose a risk of injury to individuals.

20. Section I.E. of the Ski Area Permit prohibited the Forest Service from allowing any other activities at the ski area which materially interfered with the rights and privileges provided to Spout Springs Mountain Resort under the Ski Area Permit.

21. In addition, under Section V.B. of the Ski Area Permit, the Forest Service required Spout Springs Mountain Resort to fully indemnify the agency and hold it harmless if the agency was sued by anyone harmed in the ski area parking lot.

22. At the time Spout Springs Mountain Resort began its operations at the permit area, no snowmobile activity was authorized in or around the permit area or its parking lot.

23. A snowmobile trail which is regularly maintained exists on the opposite side of the road from Spout Springs Mountain Resort.

24. No snowmobile trails can be accessed directly from the ski area parking lot adjacent to the ski area.

25. There are several parking lots nearby Spout Springs Mountain Resort which allow snowmobile recreationists to access snowmobile trails in the area and the parking lots are not used by any ski areas.

26. In 2004 and apparently for the convenience of snowmobile recreationists who owned private cabins across the street from Spout Springs Mountain Resort and did not have sufficient space to park their snowmobile trailers, the Forest Service asked if Spout Springs Mountain Resort would agree to allow certain limited snowmobile related activity occur in the ski area parking lot.

27. In an effort to cooperate with the agency, Spout Springs Mountain Resort agreed but only subject to the caveat that if such activity became unacceptable to Spout Springs Mountain Resort, the activity would again be prohibited.

28. The Forest Service then began to allow snowmobile related activity to occur in the ski area parking lot.

29. Over time, the snowmobile related activity increased and started to become dangerous and also began to interfere with Spout Springs Mountain Resorts' ability to plow the parking lot.

30. Snowmobile recreationists who unloaded their snowmobiles in the parking lot would at times drive their snowmobiles through the parking lot, endangering the safety of ski area patrons, even when directed by Spout Springs Mountain Resorts' staff not to do so.

31. The snowmobile recreationists were also observed consuming alcohol in the parking lot.

32. Plaintiffs and their employees and contractors would see snowmobile recreationists traveling at very high and unsafe speeds up and down the ski area parking lot.

33. Because Spout Springs Mountain Resort was a family-oriented ski area, this activity posed particularly significant risk of harm to the ski area patrons, including the risk of killing or severely injuring a child who was visiting the ski area with their parents and who might walk out unexpectedly between parked cars in the parking lot and be struck by a snowmobile.

34. The unsafe snowmobile activity also resulted in several close calls where serious injury was narrowly averted.

35. Spout Springs Mountain Resort informed the Forest Service of the dangerous snowmobile related activity and attempted to undertake efforts to eliminate the dangerous activity in and around the parking lot.

36. However, Spout Springs Mountain Resort's efforts were met with either indifference, hostility or adversity by the individuals engaging in the snowmobile related activity, local law enforcement and the Forest Service.

37. In 2016, Spout Springs Mountain Resort's insurance agent expressed serious concerns about the clearly unsafe snowmobile related activity occurring in the parking lot, which included snowmobilers driving through the parking lot and consuming alcohol in the parking lot, as well as inadequate plowing of the parking lot due to the presence of snowmobile trailers.

38. The insurance agent stated that the ongoing snowmobile related activity created a substantial risk to both the ski area and its patrons.

39. The National Ski Areas Association, which includes many ski areas which also operate on National Forest System lands, characterized the Forest Service's action as showing a "breathtaking" disregard for the safety of ski area patrons and noted that many ski areas on Forest Service land in the West have restricted snowmobile use in their permit areas and stated that the Umatilla Forest should be willing to do the same.¹

40. In 2016, Spout Springs Mountain Resort requested that the Forest Service, pursuant to Spout Springs' prior caveat when initially agreeing to the snowmobile activity and the parties' obligations under the Ski Area Permit, no longer allow snowmobile related activity in the parking lot.

41. Plaintiffs pointed out that there were several parking areas in the nearby vicinity where snowmobile recreationists could park and access the snowmobile trails on the Umatilla National Forest.

¹ https://www.eastoregonian.com/news/local/tollgate-ski-area-closes-for-season-over-parking-lot-safety/article_35ecfb87-395d-5d7d-95f6-9b636ba822a2.html.

42. The agency insisted, notwithstanding the availability of other nearby parking areas, it had the right to allow snowmobile recreationists to use the ski area parking lot, there was no risk to the ski area patrons and that Plaintiffs were essentially being overly sensitive.

43. The Forest Service refused to prohibit the snowmobile activity in the ski area parking lot and demanded that the Plaintiffs operate and continue to invite patrons, including families with small children, to the ski area.

44. To make matters worse, the Forest Service not only refused to end this activity, it actually interfered with Spout Springs' efforts to mitigate it by stating to the snowmobile recreationists that Spout Springs' staff members who were attempting to protect the ski area patrons had no authority to control activity in the ski area parking lot.

45. When Spout Springs asked the Forest Service District Ranger to protect the physical safety of the ski area patrons including families with small children by prohibiting the snowmobile activity, the District Ranger candidly stated in an email dated September 21, 2016 that the agency would not prohibit the snowmobile activity as previously promised because the agency would "face a great deal of opposition and ill will" from the snowmobile recreationists.

46. Spout Springs Mountain Resort did not operate beginning in the winter 2016-2017 due to the dangerous conditions and risks created by the snowmobile activity.

47. Spout Springs Mountain Resort continued its efforts to have the Forest Service ban snowmobile related activity in its parking lot so that it could safely resume its operations.

48. The Forest Service continued to refuse to prohibit that activity.

49. The Forest Service instead continued to demand that Spout Springs Mountain Resort operate its family-oriented ski area notwithstanding the dangerous snowmobile related activity in the parking lot used by the ski area patrons.

50. By letter dated March 8, 2019, the Forest Service asserted that Plaintiffs were not in compliance with the terms of their permit because they were not operating and inviting patrons to the ski area, but stated that Plaintiffs could cure the alleged non-compliance by beginning proceedings to sell the improvements.

51. Spout Springs Mountain Resort informed the Forest Service that the reason it had not operated was due the Forest Service's refusal to permit safe operations, but nonetheless pursuant to the Forest Service's direction and without waiving any of its rights, engaged in the process of attempting to sell the facilities at the ski area to mitigate its damages.

52. However, the Forest Service's actions in creating the dangerous conditions at the ski area had prevented any such sale.

53. The Forest Service then sent another letter dated September 17, 2020, asserting that Spout Spring Mountain Resort was not in compliance with its permit and again stated that Plaintiffs could cure the alleged non-compliance by beginning proceedings to sell the improvements.

54. By letter dated September 24, 2020, Spout Springs Mountain Resort responded through its counsel to the agency's September 17, 2020 letter, stating:

Unfortunately, the agency's continued insistence that snowmobile related activity be permitted to occur in the same parking areas used by these ski area patrons prevents safe operations at the site. As Spout Springs set out in its prior correspondence, the issue comes down to safety. The Forest Service has inexplicably allowed dangerous snowmobile and snowmobile related activity to occur in the parking areas that have always been used by ski area patrons. As succinctly stated by an insurance agent working with Spout Springs in response to the agency's position, "snowmobiles and recreational skiers do not mix." This action by the Forest Service materially and unduly interferes with and precludes safe ski area operations.

55. By letter dated January 4, 2021, the Forest Service revoked the Ski Area Permit claiming that Spout Springs Mountain Resorts' failure to operate and cure the alleged violation of the permit was a basis for such revocation.

56. Pursuant to its revocation, the Forest Service demanded that Spout Springs Mountain Resort remove the ski area facilities and restore the area to its natural condition.

57. By letter dated February 3, 2021, Spout Springs Mountain Resort appealed the Forest Service's decision pursuant to the agency's administrative review process.

58. By letter dated April 5, 2021, the Appeal Deciding Officer denied the appeal.

59. By letter dated April 30, 2021, the Forest Service decided to conduct a Discretionary Review of the appeal decision.

60. By letter dated May 28, 2021, the Forest Service affirmed the Appeal Deciding Official's decision.

61. Spout Springs Mountain Resort then brought this lawsuit to seek compensation for the Forest Service's breach of its obligations under the Ski Area Permit.

COUNT ONE

(Breach of Contract)

62. Plaintiffs incorporate paragraphs 1-61 above by reference as if fully set forth herein.

63. Defendant's refusal to prohibit snowmobile related activity in and around the ski area at issue and remove hazardous conditions which could and did pose a significant risk of injury to ski area patrons and others resulted in such activity and conditions materially interfering with Plaintiffs' operations, which breached Defendant's legal obligations under the Ski Area Permit.

64. In addition, Defendant's refusal to prohibit snowmobile related activity in and around the ski area at issue notwithstanding that the snowmobile activity could easily occur in nearby areas, as well as the agency's improper revocation of the Ski Area Permit resulted in a breach of Defendant's obligation to act in good faith and cooperate with Plaintiffs to permit Plaintiffs to operate the ski area in a safe manner consistent with ski industry standards and the fundamental purpose of the contract entered into by the parties.

65. As a direct and proximate result of Defendant's conduct, Plaintiffs have been damaged in an amount that will be proven at trial, which includes but is not limited to the value of Plaintiffs' improvements as well as lost profits for the remainder of the term of the Ski Area Permit through 2039.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

That the Court award Plaintiffs monetary relief for the damages they have incurred as a result of the Defendant's breach of Plaintiffs' contract in an amount to be determined at trial.

That the Court award Plaintiffs their attorneys' fees and expenses as allowed pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412 et seq.

That the Court award Plaintiffs their costs and interest as allowed by law.

That the Court grant such other and further relief as the law and the evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

By:

s/Kevin R. Garden

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