

No. 13-35770

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff-Appellant,

v.

CHIP WEBER and UNITED STATES FOREST SERVICE,

Defendant-Appellees,

and

WILLIAM GLIDDEN, RAYMOND LEOPOLD,
NORMAN DEFOREST, EUGENE THOMAS, and the
KNIGHTS OF COLUMBUS (Kalispell Council No. 1328),

Intervenor-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

**BRIEF OF WHITEFISH MOUNTAIN RESORT AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT THE UNITED STATES FOREST SERVICE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae Winter Sports Inc., dba Whitefish Mountain Resort, through its undersigned counsel, states that it is a privately held corporation, that it has no parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF THE IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Whitefish Mountain Resort (“Whitefish”), formerly known as Big Mountain, is a winter resort located deep in the northern Rocky Mountains, only thirty-five miles from Glacier National Park. Whitefish is one of the few ski resorts in the country to have been designed and built by members of the local community, and treasures its remaining links to America’s early ski pioneers, which are threatened by this litigation. Each winter approximately 300,000 people come to Whitefish to enjoy an average 300 inches of snowfall, 3,000 acres of ski-terrain, 102 marked trails, and a warm, friendly atmosphere. Visitors in the summer enjoy the Montana scenery through miles of hiking and mountain biking trails, scenic lift rides, an alpine slide, a zip line, and various other activities.

This case is about an attempt by an activist group to remove a statue that has been a cherished part of Whitefish’s community for more than sixty years. This statue was built as a memorial to the men who died fighting during World War II, some of these in the Tenth Mountain Division, and is one of the few remaining vestiges of an earlier era of American skiing, when the ski industry was smaller and more local, and less homogenized and commercialized than it is today. Generations of families - hundreds of thousands of skiers, hikers, and local residents - have used this statue as a

meeting place, a photo op, a goofy place to hang Mardi Gras beads, a wedding site, and even funeral memorials. It has become an important part of their memories and traditions and the Whitefish community.

Whitefish respectfully submits this Brief of Amicus Curiae to explain to the Court the importance of this statue to the resort, its visitors, and the surrounding community. Whitefish has conferred with counsel for the parties in this case, and all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

On Big Mountain, tucked away in the woods below Chair Two, sits one of the most popular and most unique landmarks of Whitefish Mountain Resort – the “Big Mountain Jesus.” This statue was built in 1954 by returning veterans from World War II, who brought back memories of the little mountain shrines and statues that they saw during their service in Italy. Some of them fought with the Tenth Mountain Division. Since that time generations of local residents and out-of-town guests have skied past the statue, or hiked up to it, pausing to reconnoiter with their group, take photos, and admire the astonishing alpine scenery. *See, e.g.* EOR 396. Like the resort itself, this statue sits on land managed by Flathead National Forest.

The District Court held that allowing this sixty-year old statue to remain on Big Mountain did not violate the Establishment Clause because

“Big Mountain Jesus is one of the last remaining remnants from the original Big Mountain Ski Resort,” and preserving this heritage is a legitimate secular purpose. Slip Op. at 26.

Whitefish would like to take this opportunity to further describe to this Court the history of skiing on Big Mountain and the role of the Tenth Mountain Division, so that the Court can better appreciate the traditions and memories that would be lost, quite aside from any religious practice, if the statue were removed. The value of these traditions to the community is illustrated by the fact that when the Forest Service opened up the decision to renew the statue’s permit, it received approximately 95,000 comments, overwhelmingly supporting renewal.

ARGUMENT

The District Court upheld the decision to renew the permit granted to the Knights of Columbus in part on the ground that this statue “serves as a historical reminder of those bygone days of sack lunches, ungroomed runs, rope tows, t-bars, leather ski boots, and 210 cm. skis.” Slip op. at 3. Whitefish, like many American resorts, has a strong history with veterans of the Tenth Mountain Division and, unlike most resorts, was built entirely by

members of the local community,¹ and, although Whitefish has grown into a world-class resort, this history continues to be an attraction to visitors and a source of pride to locals today. As the court below correctly found, preserving that history is a legitimate purpose to renew the special use permit for the statue.

A. Early History of Skiing on Big Mountain

The ski history of Whitefish, Montana dates back to the 1930s, when Lloyd “Mully” Muldown, the Big Mountain “Father of Skiing,” and other local skiers began to take the long climb up Big Mountain and attempt to ski down, a more than four hour trek. Jean Arthur, *Hellroaring: Fifty Years on the Big Mountain* 2-3 (1995). In 1935, with the permission of a Forest Service ranger, this informal ski club built its first cabin, followed by a second, larger cabin two years later.² This second ski cabin was reportedly built (unlike the challenged statue) at the insistence of the local clergy, who were concerned that bunking men and women together would result in “turpitude.” *Id.* In 1937 these earlier skiers founded Hell Roaring Ski Club, with a dozen original members. *Hellroaring* at 2-3.

¹ Dan Testa, First Tracks, *Whitefish’s Skiing Pioneers*, FLATHEAD BEACON, Jan. 2, 2011, http://www.flatheadbeacon.com/articles/article/escape_magazine_first_tracks/2121.

² Testa, *supra* note 1.

In the summer of 1938 the Hell Roaring Ski club built its first rope tow, having obtained a Special-Use-Permit from the Forest Service. *Id.* at 10. They cannibalized the engine and transmission of an old Dodge car that belonged to the father of one of the members, and the front end of another car, mounted on a frame, formed the base. *Id.* at 10-11. The rope ran along a set of Model T Ford wheels mounted on trees. *Id.* at 10. The remnants of this device, unfortunately, are long gone.

B. The Tenth Mountain Division

When World War II broke out the ski club had a rare opportunity to direct its hobby to a serious purpose, and several skiers from Whitefish, including Ole Dalen, Karl Hinderman, and Otto Ost, joined the Tenth Mountain Division, which was training for service in the mountains of Italy. *Hellroaring* at 11. Karl Hinderman was an instructor for the Tenth Mountain Division. Dalen lost his arm in the war, but made it back to Montana to become the state's first licensed ski instructor.³ Well known ski racer, Toni Matt, who instructed at the resort was also a member of the Tenth Mountain Division.

³ Testa, *supra* note 1.

The Tenth Mountain Division was inspired by the Finnish ski soldiers who defended their country from invasion by the Soviet Union.⁴ There was originally some resistance to the idea, because of the expense involved in acquiring winter equipment, but the success of specially trained German mountain troops in Norway, and the terrible defeat of ill-equipped Italian army in the mountains of Albania persuaded the Army that it needed special troops capable of operating in the mountains in the wintertime.⁵ Ski enthusiasts helped the Army to recruit experienced outdoorsmen and help select appropriate equipment. “They recruited about 8,000 skiers, forest rangers, outdoorsmen — people who were familiar with the mountains and loved being in them.”⁶ The division underwent intensive training in Colorado, with long backcountry trips at high elevations and subzero temperatures.

⁴ Fort Drum, United States Army, “History of the 10th Mountain Division,” available at http://www.drum.army.mil/AboutFortDrum/Pages/hist_10thMountainHistory_lv3.aspx.

⁵ David M. Leach, *The Impact of the Tenth Mountain Division on the Development of a Modern Ski Industry in Colorado and Vermont: 1930-1965*, <http://www.skimuseum.net/images/upload/PageContent/1301348882.pdf>

⁶ Bill Pennington, *The Legacy of the Soldiers on Skis*, N.Y. TIMES, March 10, 2006, http://www.nytimes.com/2006/03/10/travel/escapes/10ski.html?_r=0, quoting John Imbrie, a 10th Mountain Division veteran and historian.

In January 1945, Tenth Mountain Division was sent to the North Apennine Mountains of Italy to assault fortified German positions along the Monte Belvedere-Monte della Torraccia ridge.⁷ They took the ridge after scaling an almost impassable 1,500ft high ridge in the dead of night, and then went on to take and hold a series of heavily fortified peaks and high places. *Id.* In four months of combat almost 1,000 Tenth Mountain Division were killed and another 4,000 wounded. *Id.*

When the war ended, veterans of the Tenth Mountain division built the modern American ski industry. *Id.* In the years following the war these men founded or primarily staffed sixty-two ski resorts, including Aspen, Vail, Loveland, Arapaho Basin, as well as Whitefish Mountain Resort.⁸

C. The Founding of Whitefish

Ed Schenck enlisted with the 87th Infantry Regiment but was transferred to the 82nd Airborne. When he returned to the United States, he

⁷ Fort Drum, United States Army, "History of the 10th Mountain Division," available at http://www.drum.army.mil/AboutFortDrum/Pages/hist_10thMountainHistory_lv3.aspx.

⁸ Robert Bruce Donald, *The 10th Mountain Division and the Boom in Post-War Skiing in America*, Yahoo! Voices, June 7, 2007, <http://voices.yahoo.com/the-10th-mountain-division-boom-post-war-384375.html>; Suppl. EOR 49.

worked as a ski-lift salesmen in Great Falls for Constam Engineering Co.⁹ Along with his colleague Ed Prentice he went scouting for locations to build a ski resort and – finding Tahoe too expensive – came to Whitefish, Montana.¹⁰

The Whitefish Chamber of Commerce was courting ski developers, but the “ski experts” from the Great Northern Railroad were unimpressed by their “God-forsaken bush country.” *Hellroaring* at 13. So the Chamber of Commerce was very enthusiastic when Schenck and Prentice arrived. The two men invested \$20,000 of their own money, and the Whitefish Chamber of Commerce helped raise the remaining \$40,000 by selling stock. *Id.* With that capital, they founded Winter Sports Inc. in 1947 and began building the resort. *Id.* Local legend holds that “The Big Mountain’s promoters stumbled upon the name ‘The Big Mountain’ simply because Mully Muldown pointed up to the peak he dearly loved to ski and called it ‘that big mountain.’” *Hellroaring* at 9.

⁹ Richard Hanners, Big Mountain celebrating 60th year, Hungry Horse News, Dec. 6, 2007, http://www.flatheadnewsgroup.com/hungryhorsenews/news/big-mountain-celebrating-th-year/article_6c15afef-1392-57cd-9935-e1da694a86aa.html.

¹⁰ Hanners, *supra* note 9.

The resort opened in 1947 with a single T-bar, and the first lift tickets cost only \$2.¹¹ The district court's description of this period as "those bygone days of sack lunches," slip op. at 3, may not be entirely accurate, though, since hamburgers were available for 25 cents.¹² In those early years Schenck operated the T-bar, dugged ditches, and cooked the burgers himself. *Hellroaring* at 21.

D. The Statue

Schenck admired the statues of Jesus he saw on the mountain slopes that he skied while in Italy, and he decided to have a similar statue placed near his new resort in memory of the men who had lost their lives during the war, as his longtime friend Bill Martin recounts. Declaration of Bill Martin, Supp. EOR at 49. He contacted the Knights of Columbus, who obtained a Forest Service permit, hired a statuary company, and built the statue. *Id.* The statue was tucked away at the top of Big Mountain, a "little jaunt" from the top of the T-bar and not visible from the run. EOR 386. The Knights of Columbus "did not want it advertised." EOR 386.

As the daughter of one of the Knights of Columbus members involved in the building of the statue told the historical researchers hired by the Forest Service:

¹¹ Hanners, *supra* note 9.

¹² Hanners, *supra* note 9.

Big Mountain was founded in the mid-40s . . . and then, during the second war, many of them who were in the Tenth Mountain Division said that the only reason they are back alive was because of the statutes that they saw as they were going from southern Germany through Switzerland and into Italy . . . They were so moved by it that they were saying . . . “It’s too bad we can’t have something like that here.”

EOR at 428.¹³

The chairman of the Knights of Columbus “Shrine committee” told the local paper that the idea for building originated in the two National Ski Championships held at Big Mountain in 1949 and 1951:

Several of the world’s leading skiers are Catholics and they asked why a shrine had not been placed. They had been to leading ski runs all over the world and a majority of them have a shrine of some sort at the top of the run.

EOR at 71. These two versions of the story of how the idea for the statue was originally conceived are not contradictory – as the local newspaper reported at the time, many of the contestants in the National Ski Championships were veterans of the Tenth Mountain Division. EOR at 388.

From the moment it was built, therefore, the Big Mountain Jesus tied together several strands of tradition. It is a memorial to the soldiers who had died during WWII in the European theater and in the Tenth Mountain Division, and an opportunity to bring home a sight they had seen and

¹³ She also mentioned that, although her father served in the South Pacific, rather than Italy, his ancestors came from northeastern Italy, “so that meant a lot to him right there.” *Id.*

admired in the mountains of Italy. At the same time it is a monument to the early history of ski competitions – a monument planned and discussed by the competitors at the National Ski Championships themselves. As the Forest Service found, “[t]he statue has integrity of location, setting, materials, workmanship, feeling, and association and is a part of the early history of the ski area.” EOR 107.

E. The Growth of the Resort

During the first decade of its existence the resort struggled to stay afloat, recording a loss of \$3,600.¹⁴ In spite of these struggles, the resort slowly expanded its terrain and built hotels, restaurants, and other facilities. *Id.* Few of these facilities and buildings still stand today. EOR 107. The first chairlift, Chair One, was built in 1960 in a different area of the mountain from the T-bar and statue. At the time, it was unusual for a resort as small and isolated as Whitefish to build a real chairlift, and it was one of the longest in the country. *Hellroaring* at 27.

A ski instructor who began teaching in 1967 describes what it was like to come to Big Mountain in those days:

You didn’t come to The Big Mountain unless you took lessons for three days . . . So guests skied hard for five days, and we really got to know them. Some people came back for ten or fifteen years . . . Guests kept coming back because of the

¹⁴ Hanners, *supra* note 9.

homey, no-glitz atmosphere . . . Everybody ate together at noon. That was part of the American Plan package. We shut off Chair One for an hour. At one o'clock, they would fire up the chair, and everybody would go again. That ended in about 1973 because people decided to get modern and run the chair all the time.

Hellroaring at 45.

Chair 3 and Chair 4, and the first condominium building were added in the 1970s. *Id.* More development followed, and today there are three high speed quads, two fixed grip quads, six triple chairs, two T-bars, and a carpet conveyer. This has vastly expanded the terrain available for skiing and enabled Whitefish to accommodate more guests than they would have imagined possible in the days when the resort was a single T-bar, but at the cost of erasing the most visible, physical signs of the early history of the mountain. The Big Mountain Jesus is one of the few surviving edifices of that era.

F. The Role of the Big Mountain Jesus in the Life of Whitefish

When the Big Mountain Jesus was originally built it was obscure and inaccessible, but this did not last. In 1968 the T-bar was replaced by Chair Two, which had an upper terminal above the statue. EOR at 8. Today, although it is between established ski runs and not along any summer hiking trails, the statue can be reached in the winter without a hike. Over the years

it has served as a meeting place for a Tenth Mountain Division veterans group, Boy Scouts, church groups, and other local organizations. EOR 391.

The statue is also a favorite spot with regular guests and has become an important part of their personal histories and family memories. A longtime resident told the Forest Service consultant that she had played viola for weddings at the base of the statue on several occasions. EOR 394. Jean Arthur, who wrote the history of Whitefish, described her interactions with tourists visiting the statue in her years skiing:

[S]ometimes I'd come by and people would say, "Oh would you take a picture for us?" with their camera. And they would of course say, "We have done this every year for the last ten years." So, in that sense, from a tourism standpoint, it was very popular with skiers and families, and, of course, with big weddings over the years. . . . Well, some people would, you know, decorate Jesus. They'd put necklaces or neckties and gloves on the statue and, you know, I think in some people's minds that might be denigrating the statue, and so they took it on as a comical institution on the mountain. And then other people really felt that it was part of their family tradition and a sacred place to be on an annual basis. Because, really, people do come back year after year after year to the mountain.

EOB at 418-19. When asked what the statue meant to her, she said "[I]t's just a part of the mountain as much as the old chalet." EOB 419. Several photos have been published of skiers who dressed the statue in helmets and goggles, and provided him with poles and skis. EOB 396. Skiers high-five the statue so often that the hand has to be reattached almost every winter.

EOR 399. In 2012 the hand briefly disappeared entirely, and then reappeared in Whitefish's lost and found department. *Id.* The resort has recently attempted to reduce the damage to the statue by erecting a fence and putting up an informational plaque. *Id.* at 44.

The Big Mountain Jesus is one of the most popular attractions at Whitefish, something that sets it apart from the other large, modern resorts, ties it to its heritage, and captures the imagination of families and repeat visitors, who come year after year to have their photo taken at the same spot. It is an important part of Whitefish Mountain Resort.

CONCLUSION

In the years since local residents first began climbing up Big Mountain and skiing down, the mountain has grown from two cabins and rope tow built of old car parts into a world-class alpine destination. Now, as the district court found, "Big Mountain Jesus is one of the last remaining remnants from the original Big Mountain Ski Resort." Slip op. at 26. This is a history worth preserving.

More importantly, it is a reminder of the men who served during World War II and in the Tenth Mountain Division and who gave their lives in the mountains of Italy. As the plaque below the statue states: "The statue was installed in 1955 and has been maintained by the Knights of Columbus

from St. Matthew's ever since. We thank those brave troops that brought this special shrine of Christ to the Big Mountain and hope that you enjoy and respect it." EOR 36.

For sixty-years this statue has been a beloved landmark in the community, and a memorial to the men who gave their lives in the service of our country – and to the men who returned from the war to build a sport and a community. There is nothing in the United States Constitution that requires the Forest Service to destroy this monument to our history and tradition. *Van Orden v. Perry*, 351 F.3d 173, 699 (2005) (Breyer, J., concurring).

Whitefish Mountain Resort respectfully supports the Respondents.

Respectfully submitted this 7th day of May 2014,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing brief uses Times New Roman (14-point) proportional type, and contains 3,037 words, exclusive of exempted portions. No counsel for a party has authored the brief in whole or in part. No counsel for a party, or any person other than the amicus, has made a monetary contribution to the preparation or submission of the brief.

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May 7, 2014

CERTIFICATE OF SERVICE

I certify that on May 7, 2014, I electronically filed the foregoing Brief of Whitefish Mountain Resort As *Amicus Curiae* In Support Of Respondent The United States Forest Service with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF system.

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