

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**

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|---|---|--------------------------------|
| UNITED STATES OF AMERICA |) | |
| |) | |
| Plaintiff, |) | |
| |) | Civil Action No. 2:21-cv-00341 |
| v. |) | |
| |) | |
| WILD ROCK WEST VIRGINIA; OPTIMA |) | |
| PROPERTIES WV, LLC; AND WILLIAM |) | |
| FRISCHKORN, ADMINISTRATOR OF THE |) | |
| ESTATE OF CARL F. FRISCHKORN |) | |
| |) | |
| Defendants. |) | |
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AMENDED COMPLAINT¹

The United States of America (“United States”) (“Plaintiff”), by authority of the Attorney General of the United States and on behalf of the U.S. Department of the Interior, National Park Service (“NPS”), files this Amended Complaint and alleges as follows:

INTRODUCTION

1. This civil action is brought pursuant to the System Unit Resource Protection Act (“SURPA”) (the “Act”), 54 U.S.C. §§ 100721, *et seq.*, and common law trespass and conversion against Wild Rock West Virginia; Optima Properties WV, LLC (“Optima Properties”); and William Frischkorn, Administrator of the Estate of Carl F. Frischkorn (collectively “Defendants”). The United States seeks to recover damages and response costs under SURPA, money damages for common law trespass and conversion, and injunctive relief for injuries to the

¹ This Amended Complaint is filed pursuant to Defendants’ written consent received on April 20, 2022, and Federal Rule of Civil Procedure 15(a)(2).

New River Gorge National Park and Preserve (the “Park”) near Fayetteville, West Virginia, that were caused by Defendants.

2. This suit arises from Defendants’ unauthorized cutting of trees and removal of vegetation on land owned by the United States and administered by the NPS, along a common property line shared by the Park and the Wild Rock West Virginia housing development (“Wild Rock”). Defendants’ activities damaged park system resources within the Park, causing the United States to incur damages and response costs, and interfered with the United States’ property rights.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to SURPA, 54 U.S.C. § 100723(a), and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the Southern District of West Virginia pursuant to 28 U.S.C. § 1391(b) because the events giving rise to this action occurred in this District and the properties that are the subject of the action are situated in this District.

5. The Attorney General of the United States has the authority to bring this civil action on behalf of the Department of the Interior pursuant to 54 U.S.C. § 100723(a) and 28 U.S.C. §§ 516 and 519.

DEFENDANTS

6. Defendant Wild Rock West Virginia is an unincorporated association that was formed by Optima Properties and Class VI River Runners (now known as Class VI at Adventures on the Gorge) for the purpose of developing Wild Rock. Wild Rock is located in and around Fayetteville, West Virginia, and shares a common property line with land owned by the United States in the Park.

7. Defendant Optima Properties is a developer of Wild Rock. It is registered in West Virginia and owns several hundred acres of land in and around Fayetteville, West Virginia, as part of the Wild Rock development.

8. Defendant William Frischkorn is the Administrator of the Estate of Carl F. Frischkorn, who died in August 2020 and was a resident of Charlottesville, Virginia. Carl Frischkorn was the Manager of Defendant Optima Properties. In 2015, when the events giving rise to this action occurred, he was the Registered Agent of Liseron, LLC, which owned Lot #A-2 at the Wild Rock housing development. Carl Frischkorn directed certain actions that are the subject of this Amended Complaint.

9. Defendants are “persons” within the meaning of SURPA, 54 U.S.C. §§ 100722(a) and 100723(a).

LEGAL BACKGROUND

SURPA

10. SURPA provides that “any person that destroys, causes the loss of, or injures any System unit resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.” 54 U.S.C. § 100722(a).

11. Title 54, which governs the National Park Service and related programs, defines a “System unit” of the National Park System as “any area of land and water administered by the Secretary of the Interior . . . for park, monument, historic, parkway, recreational, or other purposes.” *Id.* § 100102.

12. “System unit resource” is defined in SURPA as “any living or non-living resource that is located within the boundaries of a System unit,” but “does not include a resource owned by a non-Federal entity.” *Id.* § 100721(3).

13. “Response costs” are defined as “the costs of actions taken by the Secretary [of the Interior] to—

- (A) prevent or minimize destruction or loss of or injury to a System unit resource;
- (B) abate or minimize the imminent risk of the destruction, loss, or injury; or
- (C) monitor ongoing effects of incidents causing the destruction, loss, or injury.”

Id. § 100721(2).

14. “Damages” are defined to include compensation for both restoration and lost services, damages, and damage assessment costs as follows:

“(A) compensation for --

- (i) (I) the cost of replacing, restoring, or acquiring the equivalent of a System unit resource; and
 - (II) the value of any significant loss of use of a System unit resource pending its restoration or replacement or the acquisition of an equivalent resource; or
 - (ii) the value of the System unit resource if the System unit resource cannot be replaced or restored; and
- (B) the cost of a damage assessment under section 100723(b) of this title.”

Id. § 100721(1).

15. Upon request of the Secretary of the Interior and after a finding by the Secretary of destruction, loss or injury to a System unit resource, the Attorney General of the United States may commence a civil action in the United States district court for the appropriate district against any person or instrumentality that may be liable under Section 100722 of the Act for response costs and damages. *Id.* § 100723(a).

Common Law Trespass

16. At common law in West Virginia, “trespass is ‘an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property.’” *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 386 (4th Cir. 2013) (emphasis removed) (quoting *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 352 (W. Va. 1945)).

17. Compensatory damages may be awarded for trespass under West Virginia common law. *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197, 198 (W. Va. 1982).

Common Law Conversion

18. At common law in West Virginia, “[c]onversion involves an act of control or dominion over the property that seriously interferes with the owner’s rights.” *United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986) (citing, *inter alia*, *State v. Holley*, 177 S.E. 302, 305 (W. Va. 1934)).

19. Compensatory damages may be awarded for conversion under West Virginia common law. *Spencer v. Steinbrecher*, 164 S.E.2d 710, 712 (W. Va. 1968).

Punitive Damages in West Virginia

20. West Virginia common law allows factfinders to award punitive damages in addition to compensatory damages in tort actions where “wanton, willful, or reckless conduct . . . appear[s].” *Proctor v. 7-Eleven, Inc.*, 180 F. App’x 453, 459 (4th Cir. 2006) (quoting *Alkire v. First Nat’l Bank of Parsons*, 475 S.E.2d 122, 129 (W. Va. 1996)).

21. In West Virginia, punitive damages are available as remedies for both trespass and conversion. *See Lawson Heirs Inc. v. Skyway Towers, LLC*, No. 2:17CV-2198, 2018 U.S. Dist. LEXIS 115061, at *11 (S.D. W. Va. July 11, 2018) (“Punitive damages may be awarded for actions in trespass where the alleged trespass is willful.”) (citing *Reynolds v. Pardee &*

Curtain Lumber Co., 172 W. Va. 804, 310 S.E.2d 870 (1983)); *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, No. 86-1114, 1987 WL 37511, at *4 (4th Cir. May 26, 1987) (“[U]nder West Virginia law the jury may award punitive damages for conversion in order to punish the defendant and to deter others from engaging in a like course of conduct.”) (citing *Spencer*, 164 S.E.2d at 712).

GENERAL ALLEGATIONS

New River Gorge National Park and Preserve

22. The Park was established in 1978 to preserve a free-flowing 53-mile segment of the New River in southeast West Virginia.

23. The New River Gorge, which is more than 1,000 feet deep, is the Park’s most prominent physiographic feature. It is the longest and deepest river gorge in the Appalachian Mountains.

24. Scenic resources abound in the Park, along with recreational opportunities such as hiking, rafting, paddling, biking, fishing, and rock climbing.

25. The Park is a System unit of the NPS as that term is defined in SURPA, 54 U.S.C. § 100102. *See* National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467.

Wild Rock Housing Development

26. Wild Rock is a 650-acre, 150-home housing development located near Fayetteville, West Virginia.

27. Wild Rock advertises that it is “[l]ocated within the expansive natural beauty of the 70,000-acre New River Gorge National Park,” *Wild Rock West Virginia*, Facebook, <https://www.facebook.com/wildrockwestvirginia> (last visited June 15, 2021) and offers “access to [a] stunning view shed,” *Wild Rock – A Lifestyle to Experience*, <https://wildrockwestvirginia.com> (last visited June 15, 2021).

28. The land that Wild Rock is located on was purchased in 2007, and houses have been constructed on the property and sold since then.

29. Wild Rock shares a common property line with the Park for more than one mile, to the north of the New River Gorge Bridge, near Ames, West Virginia.

30. At the time of Defendant Optima Properties' purchase of the Wild Rock land, Park employees noted that the cliff ecosystem near the border between the Park and Wild Rock was in excellent condition with no evidence of recreational use.

Defendants' Cutting of Trees and Vegetation

31. On June 16, 2015, Park employees discovered that trees had recently been cut on Park-owned land near the border shared with Wild Rock, near a stone overlook on Wild Rock property. Between June 17 and July 28, 2015, Park employees conducted a boundary patrol and investigation and discovered damage at additional sites on Park property, along a Wild Rock hiking trail near the property line. The investigation revealed tree cuts and vegetation removal at a total of seven clifftop sites, along the rim of the gorge approximately two miles north of the New River Gorge Bridge.

32. Park rangers further ascertained that Wild Rock employees or agents had cut the trees and vegetation at the direction of Carl Frischkorn and Mike Henning, former Wild Rock property manager.

33. The removal at the seven damaged sites created a direct view of the New River Gorge and/or the New River Gorge Bridge from Wild Rock's hiking trail and/or properties within the development that did not previously enjoy such views.

34. Park Rangers discovered during their investigation that some tree stumps had been covered with rocks in an attempt to hide them, and in at least one location, a survey

boundary marker appeared to have been moved so that the cut tree would appear to be on Wild Rock property rather than Park land.

35. Certain of the cuts and vegetation removal discovered in June and July 2015 are estimated to have occurred in late May to early June of 2015, in advance of an August 1, 2015 lot sale at Wild Rock. Other sites identified in July 2015 appeared to have been cut earlier and are estimated to have been cut at various times within the six years preceding their discovery.

Damage to the Park

36. The total injury for all seven damaged sites is 0.636 acres, including 149 trees, 124 saplings, and 116 shrubs.

37. Cut trees ranged from 50 to 154 years old.

38. By time the damage was discovered, the cuts had already led to the creation of informal social trails, leading from Wild Rock's hiking trail near the shared border with the Park to certain overlooks, by hikers and Park visitors, creating additional harm to Park property.

39. In November 2015, Park employees noticed evidence of ongoing maintenance of trails and openings on Park property. Some of the injured areas continue to see frequent public use that is hindering most natural recovery.

40. The injured overlooks consist of two distinctly different and sensitive habitat types—exposed rock cliff edge and cliff top/bottom deciduous forest. Injuries include loss of den trees for wildlife and cliff edge habitat, loss of understory vegetation to trails, loss of vegetative buffer for the natural visitor experience, and impacts to threatened and endangered bat species.

41. Due to the challenging nature of the topography and uniqueness of the damaged resources, full recovery of the resource could take 150 to 200 years.

NPS Response, Damage Assessment, and Restoration

42. NPS took response actions to investigate the trespass, which occurred along the border of Wild Rock property, to prevent additional injuries from occurring and to monitor the injuries that already occurred.

43. NPS took damage assessment actions to assess the injuries to park resources and determine restoration needs.

44. Active primary restoration at all seven overlooks is needed to accelerate the Park's return to its baseline condition.

45. The injuries to park resources caused significant loss of use. Offsite compensatory restoration is required to compensate for the loss of use.

FIRST CLAIM FOR RELIEF

System Unit Resources Protection Act

46. Paragraphs 1–45 are re-alleged and incorporated herein by reference.

47. Defendants' cutting of trees and other vegetation in the Park caused the destruction of, loss of, and injury to resources within the Park.

48. The trees, vegetation, and other natural resources injured are "System unit resources" as that term is defined within SURPA, 54 U.S.C. § 100721(3).

49. Defendants' activities caused the United States to incur, and will cause the United States to continue to incur, "response costs" and "damages," as those terms are defined within SURPA, 54 U.S.C. § 100721(1), (2).

50. Pursuant to SURPA, 54 U.S.C. § 100722(a), Defendants are liable for all past and future response costs and damages resulting from the destruction of, loss of, and injury to park system resources within the Park caused by Defendants' activities.

51. The injuries caused by the destruction of, loss of, or injury to the United States' land and resources by Defendant are irreparable and cannot be remedied solely by a monetary remedy.

SECOND CLAIM FOR RELIEF

Common Law Trespass

52. Paragraphs 1–51 are re-alleged and incorporated herein by reference.

53. Defendants committed common law trespass when they, or others acting at their direction, entered onto the United States' land without any right, lawful authority, or an express or implied invitation and cut trees and other vegetation on Park land. Defendants thereby damaged the land and interfered with the United States' possessory interest in and quiet enjoyment of its land.

54. Defendants' trespass on the United States' land was wanton, willful, and reckless.

55. The injuries to the United States' land and resources caused by Defendants' trespass are irreparable and cannot be remedied solely by a monetary remedy.

THIRD CLAIM FOR RELIEF

Common Law Conversion

56. Paragraphs 1–55 are re-alleged and incorporated herein by reference.

57. Defendants committed common law conversion when they, or others acting at their direction, cut trees and other vegetation on Park land without NPS authorization. Defendants thereby exerted control or dominion over natural resources in the Park that seriously interfered with the United States' property rights to those resources.

58. Defendants' conversion of the United States' property was wanton, willful, and reckless.

59. The injuries to the United States' land and resources caused by Defendants' conversion are irreparable and cannot be remedied solely by a monetary remedy.

PRAYER FOR RELIEF

WHEREFORE, the United States of America respectfully requests that this Court:

A. Enter a money judgment in favor of the United States for its response costs and damages in accordance with SURPA, 54 U.S.C. §§ 100721 to 100725;

B. Assess compensatory damages in favor of the United States against Defendants for common law trespass and conversion;

C. Assess punitive damages in favor of the United States against Defendants for their wanton, willful, and reckless conduct for the common law trespass and conversion claims;

D. Permanently enjoin Defendants from causing future destruction of, loss of, or injury to land and resources owned by the United States, including at the Park;

E. Permanently enjoin Defendants from trespassing on and converting property owned by the United States, including at the Park;

F. Order Defendants to provide access to Park land, via Defendants' property, to government employees and contractors for performance of restoration actions under SURPA, or alternatively, order Defendants to pay the costs associated with gaining alternative access; and

G. Order such other relief as the Court shall deem just and proper.

Respectfully submitted,

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