IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 48423-4-II

(Thurston County Superior Court Cause No. 15-2-00527-5)

JOHN ROSKELLEY, FAYETTE KRAUSE, SPOKANE AUDUBON SOCIETY, SPOKANE MOUNTAINEERS, AND THE LANDS COUNCIL,

Appellants,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION, AND MT. SPOKANE 2000,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

The Washington State Parks and Recreation Commission has a dual mission: to protect natural resources in state parks and to provide for recreational opportunities. Much of the time, these missions are compatible; sometimes they conflict. This case involves the latter situation and the agency's failure to follow its own policy for dealing with such a conflict.

Six years ago, the Commission adopted a policy to address natural resource protection in Washington state parks. The policy addressed the possible conflict between recreational pursuits and resource protection. The Commissioners adopted a nuanced policy that did not always favor one mission or the other. In commonplace settings, the policy suggests a balancing of interests. But in settings where unusually important natural resources are present (*e.g.*, resources of "regional or statewide significance"), the policy precludes more intense forms of recreation. In these high value areas, only low-intensity recreational activities are allowed.

This case presented the Commission with a situation directly within the scope of this policy. A part of Mount Spokane State Park is developed

with an existing downhill ski area. The private concessionaire which operates the ski area (respondent Mount Spokane 2000 or "MS 2000") seeks permission to expand the ski area into an old growth forest by clear-cutting ski runs and installing a chair lift. The Parks Commission has identified that forest as perhaps the most exceptional natural resource landscape *in the entire park system.* As the agency's chief wildlife biologist stated:

> The forests of the [proposed expansion area] **meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well).**

CP 214 (emphasis supplied).

The agency also recognized that downhill skiing, with its ski lifts and ski runs, is an intensive form of recreation. If the recently adopted policy had been applied, MS 2000's request to locate a high-intensity recreational use like downhill skiing on these highly valued natural resource lands would have been denied.

This appeal was filed because, not only did the Parks Commission approve the land classification which allowed the ski area expansion, it did so without providing any consideration to the substance of its recently adopted policy. The Commission did not address whether the ski area expansion violated the policy. The Commission did not address whether

some special circumstance existed which justified deviating from the policy. The Commission simply ignored its own policy which had been adopted to address this precise type of conflict.

This case presents a textbook example of arbitrary and capricious conduct. The Commission's decision was arbitrary and capricious because it ignored the Commission's own well-reasoned existing policy which calls for adopting the most protective land classifications for sensitive and unique resources. It was also arbitrary and capricious because the agency deviated from its policy without providing any reasoned justification for doing so.

The agency's decision should be vacated and the matter remanded to the agency to reconsider its decision in light of its own applicable findings and policy.

II. ASSIGNMENT OF ERROR AND ISSUES

A. Assignment of Error

The trial court erred in entering the Order of Dismissal (CP 439) and in entering the Order Dismissing Petitioners' Motion for Reconsideration (CP 469).

B. Issues Pertaining to Assignment of Error

Whether the Commission considered and applied its policy, *Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy, Subpart E*, to its November 20, 2014 land classification decision?

Whether it is arbitrary and capricious for an agency to deviate from an existing policy without providing a reasoned explanation?

Whether an agency must provide a reasoned explanation for its decision on the record?

III. STATEMENT OF THE CASE

A. Procedural History

The Commission's action approving the ski area expansion in Mt. Spokane State Park occurred on November 20, 2014. Petitioners filed a Petition for Judicial Review on March 17, 2015. CP 4. The Parties submitted briefs on the merits. CP 63; CP 403; CP 421; CP 424. The superior court considered oral argument, and then ruled in favor of Respondents. CP 439. Petitioners filed a motion for reconsideration which was briefed by all parties. CP 442; CP 454; CP 461. The superior court considered oral argument, but denied Petitioners' motion for

reconsideration. CP 469. This appeal followed. CP 471.

B. Overview

Mt. Spokane State Park is the crown jewel of the Washington state park system. Its high-quality, uninterrupted habitat is unmatched in Eastern Washington. It is Washington's largest state park at 13,919 acres. Located approximately 22 miles northeast of Spokane in Spokane County, the area was the first state park east of the Cascades. AR 00206. Due to its size and high-quality natural resources, the Commission staff report prepared for the land classification decision noted that the forests of Mt. Spokane "provides significant habitat." CP 194. The forest covering the western and northwestern slopes of Mt. Spokane contains trees that show no signs of human logging and contain stands of old-growth timber that provide ideal habitat for several focal species. CP 151. Little wonder that the Commission's chief wildlife biologist concluded that the lands possessed "the highest level of natural resources quality in the state park system." CP 214.

The area of Mt. Spokane State Park at issue is an approximately 800-acre portion of the park that covers most of the western and northwestern sides of Mt. Spokane. AR 00208. In 1999, the Commission classified all

lands within Mt. Spokane State Park for a variety of uses using its Land Classification System except for the 800-acre portion in question. AR 00207. [1]

An existing privately-operated ski area, the Mount Spokane Ski and Snowboard Park, covers 1,425 acres of the park, or over 10% of the park, on the north, northeastern, and eastern faces of the mountain. AR 00208. MS 2000, the private concessionaire, operates the existing ski area. Mount Spokane Ski and Snowboard Park includes five chairlifts and 32 ski runs, two lodges, and a ski patrol building.

To allow expansion of the ski area into the old growth forests on the western and northwestern sides of Mt. Spokane, the area first had to be classified under the Commission's Land Classification System. The agency's Land Classification System, similar to a zoning ordinance, allows different uses in different classifications. Some classifications are quite protective of natural resources and allow only limited, low impact recreation. Other classifications allow more intense recreational use. The

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[1] The 800 acre area is also referred to as the "Potential Alpine Ski Expansion Area" or "PASEA" due to the fact that the land was unclassified until the November 20, 2014 Commission decision.

only classification that allows high-intensity recreational development, like downhill skiing, is the "Recreation" classification. AR 00207.

In 2010, the Commission adopted a policy to protect natural resources in the park system. Among other things, the policy precluded high-intensity recreational uses on the most important natural resource lands in the park system (including those considered to be of "regional or statewide significance", CP 281).

On November 20, 2014, the Commission voted through a split decision of 5 to 2 to adopt the least protective classification of "Recreation" to allow the ski area expansion. The Commission approved the "Recreation" classification despite the conflict between the decision and the recently adopted policy. The Commission took the action without any analysis of the policy and without providing any justification for deviating from the policy.

C. Mt. Spokane's Significant Natural Resources

State agencies, including the Parks Commission, MS 2000's own consultants, tribes, and members of the public have long recognized the natural resource value of Mt. Spokane, and the northwest and west side of Mt. Spokane in particular. These facts are not in dispute.

In 1993, the Department of Natural Resource's Natural Heritage Program conducted an evaluation of the forests of Mt. Spokane State Park. The Department of Natural Resources recommended that the west and northwest side of Mt. Spokane be classified as a Natural Forest Area. The "Natural Forest Area" classification is one of the most protective classifications in the Commission's Land Classification System. It provides for "preservation, restoration, and interpretation of natural forest processes while providing for low-intensity outdoor recreation activities as subordinate uses." WAC 352-16-020(5).

In 2007, Rex Crawford, Ph.D. and Natural Heritage Ecologist, submitted scoping comments on behalf of the Department of Natural Resources on the first iteration of the proposed ski area expansion. The comments noted that the department's original 1993 report concluded that "much of the park was and still is a natural forest will be emphasized to define it as a valuable conservation asset of **uncommon quality**." CP 154 (emphasis supplied). The Department of Natural Resources emphasized the regional significance of Mt. Spokane State Park: "Mt. Spokane Park appears not only to be the largest, least fragmented forest landscape locally but inspection of aerial photography in Washington and Idaho reveals that

similarly sized and continuous forest areas do not occur within a 20 to 30 mile radius." *Id.* The department also pointed out the unusual habitat provided by Mt. Spokane's west and northwest slopes:

> The forest vegetation communities composing the [western and northwestern sides of Mt. Spokane] are representative of the subalpine and mid-montane forests of the Northern Rocky Mountains. Although these communities may be relatively common, their occurrence in a continuous forest block in a natural, unmanipulated condition is an uncommon quality. The area warrants special recognition and attention so that in [sic] continues to add to the diversity of the park as an important natural destination in Washington.

CP 155. The Department of Natural Resources submitted comments on the Draft Environmental Impact Statement in 2014 reaffirming the natural resource value of this part of Mt. Spokane State Park. AR 00444.

The west and northwest sides of Mt. Spokane have remained in their natural state since the Washington Department of Natural Resources first identified its "uncommon quality" in 1993. Twenty-three years later, the natural and unmanipulated forests have greater value, not less.

In 2010, MS 2000 hired the Pacific Biodiversity Institute to conduct biological surveys in the Biological Survey Area ("BSA") where ski area expansion was proposed. The Commission later adopted the Institute's findings as Appendix B to the Final Environmental Impact Statement. AR

00264. After surveying and mapping 92 discrete sampling areas (known as "habitat polygons") within the BSA, Pacific Biodiversity Institute concluded that the BSA included significant areas of old-growth forest and provided high-quality and abundant habitat for wildlife species:

> There are significant areas of old-growth forest within the BSA. These forests provide habitat for wildlife species dependent on late-successional forest condition. Much of the rest of the forests within the BSA also have some old, large trees and are moving toward old-growth conditions. Nearly all the forest stands in the BSA have abundant large and small snags of various decay classes, providing abundant habitat for wildlife species that depend on snags for nesting, foraging and roosting. In some stands, snags are more common than live trees. Likewise, there is an abundance of coarse woody debris in the forests of the BSA. Many polygons within the BSA have very high levels of large coarse woody debris. There is no lack of habitat for wildlife species that depend on coarse woody debris for any of their life stages or activities within the BSA.

CP 151. Furthermore, Pacific Biodiversity Institute found that the abundant streams, springs, and small wetlands in the BSA "provide habitat and water for many wildlife species." *Id.*

In 2007, the Commission and the Washington Department of Fish and Wildlife identified twenty-one "focal" wildlife species[2] which occur at

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[2] The FEIS explains that the term "focal" was used to identify species from a wide range of taxa and which use a wide range of environments present on Mt. Spokane. AR 00233. The FEIS acknowledges the impacts to the focal species due to clearing and construction of ski facilities. AR 00237. In addition, Mt. Spokane State Park is home to a

Mt. Spokane State Park. AR 00320. The Washington Department of Fish and Wildlife has identified several of these focal species as endangered, threatened, priority, and candidate species. AR 00321. Some focal species, such as the wolverine and northern goshawk, have federal status under the Endangered Species Act. *Id.* Mt. Spokane State Park provides sensitive habitat for all twenty-one of the focal species, habitat that is otherwise not available in the region. AR 00323-330. The park also serves as an invaluable wildlife travel corridor that connects with the rest of the Selkirk Mountains to the north. AR 00353. According to the expert wildlife agency, the west and northwest flanks of Mt. Spokane provide significant habitat for wildlife and ski area development would result in permanent impacts to wildlife habitat and habitat fragmentation that would be difficult, if not impossible, to mitigate. CP 156.

Furthermore, the western and northwest slopes of Mt. Spokane are home to ten Washington Department of Fish and Wildlife "species of concern." AR 00233-00234. "Species of concern" is a term of art that refers to species identified by the Washington Department of Fish and

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wide diversity of other wildlife, including cougar, coyote, deer, moose, elk, black bear, western toads, small mammals, bats, butterflies, and over 110 documented bird species. AR 00319.

Wildlife as a state endangered species, state threatened species, state candidate species, or state monitored species. *Id.*

Based on this and other similar information, the Washington Department of Fish and Wildlife repeatedly urged the Commission to protect the high resource values of the west and northwestern sides of Mt. Spokane. *See, e.g.,* AR 00511. The department even sent an additional comment letter on November 13, 2014, shortly before the Commission's final decision. Noting that the department's concerns had been "well documented" in past correspondence, the department urged the Commission to classify the sensitive forests as restrictively as possible. CP 156. The department's concerns included "wildlife corridor fragmentation, elimination of large ungulate winter and summer thermal cover removal and impacts to Priority Habitats that support a variety of native wildlife and plant species." *Id.*

D. The Land Classification System of the Washington State Parks and Recreation Commission

To protect valuable natural resources and manage lands within state parks, the Commission has established a Land Classification System under WAC 352-16-020. The Land Classification System is similar to a zoning code and provides six land classifications which provide different levels of

resource protection and allow different levels of outdoor recreation. Three classifications are available to protect areas with high resource values:

- "Natural Areas" protect areas with "significant ecological, geological or paleontological value." WAC 352-16-020(3).
- "Natural Forest Areas" preserve old growth, mature forests and other unusual forest communities. WAC 352-16-020(5).
- "Natural Area Preserves" protect areas with "rare or vanishing" wildlife, plants or natural history features. WAC 352-16-020(6).

In each of these areas with high natural resource values, only "low-intensity" recreation is allowed. WAC 352-16-020(3), (5) and (6). A ski area would not be allowed in any of these protective classifications.

Of the three classifications available to protect significant natural resources, the one relevant to this case is the "Natural Forest Area" classification. The rule identifies three different types of significant forest resources that comprise the "Natural Forest Area" classification:

> (a) Old-growth forest communities that have developed for one hundred fifty years or longer and have the following structural characteristics: Large old-growth trees, large snags, large logs on land, and large logs in streams; or
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> (b) Mature forest communities that have developed for ninety years or longer; or

(c) Unusual forest communities and/or interrelated vegetative communities of significant ecological value.

WAC 352-16-120(5).

Two classifications are available for less sensitive areas where more intense recreation is allowed. The "Resource Recreation" classification is a mid-range classification which allows "medium-intensity" and "low-intensity" recreational use. WAC 352-16-020(2). The "Resource Recreation" classification does not allow a ski lift or formal ski run facilities to be constructed. AR 00210. Examples of "low-intensity" recreation include interpretive trails, hiking trails, cross-country ski trails, off-trail hiking, and backcountry skiing. AR 00219. At the far end of the spectrum, the "Recreation" classification allows "high-intensity" recreation. WAC 352-16-020(1). "High-intensity" recreation allows for the clearing of vegetation to construct ski lifts and ski trails, along with the operation of motorized equipment to groom ski runs. AR 00222. Only the "Recreation" classification allows for ski lifts and formal ski trails to be constructed. AR 00210.

The sixth classification (not at issue here) is "Heritage" which provides protection for "unique or unusual archaeological, historical, scientific and/or cultural resources." WAC 352-16-020(4).

E. The Parks Commission's Natural Resource Policy Precludes High Intensity Recreational Uses on Lands with High Natural Resource Value

In 2010, to further its mission of protecting the natural resources in its charge, the Commission adopted an over-arching natural resource policy: Policy 73-04-1, *Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy.* CP 265. The policy serves as the Commission's finding of the "key points needed to promote the long-term protection and conservation of the natural resources in the agency's care." CP 268. "With institutional commitment and budgetary support, this policy will ensure the long-term protection of State Parks' natural resources." *Id.*

Policy E.1, entitled "Land Classification," places the emphasis squarely on conservation, not recreation, when sensitive and significant natural resources are to be classified. The policy identifies the three high resource value classifications (Natural Areas, Natural Forest Areas, and Natural Area Preserves) for primary use in protecting high value natural resources. Each of these allows little or no recreational development. *See supra* at 13. The policy provides that a fourth category (Resource Recreation) may be allowed in some limited circumstances, but as described

above, this category precludes high-intensity recreation, too. There is no reference to classifying these high value resource lands with the "Recreation" designation that allows high-intensity recreation, like downhill skiing. The policy states:

> Areas of a park containing natural resources of regional or statewide significance, unusual and/or sensitive habitats (*e.g.*, bald eagles), or a species of concern should be classified restrictively to allow only low-intensity uses and minor facilities development. Typically, one of three natural area classifications should be applied to such areas (Natural Areas, Natural Forest Areas, or Natural Area Preserves), although the "Resource Recreation" classification also provides a relatively high degree of resource protection and may offer the best option to address conflicting use issues at a specific site.

CP 281.

The Commission's policy is clear: when lands within a park are of significant natural resource value, contain unusual or sensitive habitats, or contain a species of concern, the land should be classified to promote conservation, not recreation. The policy even identifies a fourth, compromise classification — Resource Recreation — to address conflicting uses, but that compromise classification does not allow intense recreation either. WAC 352-16-020(2). In no event does the policy call for the "high-

intensity" Recreation classification where high value natural resource lands are at risk.

F. The Commission's Awareness of Mt. Spokane's Significant Natural Resource Value

The Commission was fully cognizant of the special habitat and significant natural resource values on Mt. Spokane. The Commission's Final Environmental Impact Statement ("FEIS") acknowledges the inevitable destructive impacts a ski area would have on those unique resources. Irreversible impacts identified include forest removal for construction of ski trails and chairlift terminals, clearing with grading, fragmentation of habitat, and the introduction of exotic species. AR 00314. At least 79 acres of forest would be clear-cut to make way for ski trails and chairlifts. AR 00274. But the damage would be more widespread than the 79-acre figure suggests, because the remaining forest would be fragmented. The FEIS explains that the habitat fragmentation would have significant adverse impacts on wildlife and habitat. AR 00333. Dividing it into fragments, separated by ski trails and a ski lift, destroys the value of the entire 279 acres, not just the 79 acres which would be logged. AR 00236.

The FEIS details the impacts that ski area expansion would have on twenty-one focal wildlife species identified by the Department of Fish and

Wildlife. AR 00338-340. Ten of these twenty-one focal wildlife species are identified as species of concern (one of the triggers for the more protective land classifications under the Commission's policy). AR 00233-234. The FEIS finds that long-term impacts to the species of concern (and the other focal species) could occur, including stress/physiological responses, breeding/rearing disturbances, displacement, habitat fragmentation, increased accessibility to predators and competitors, reduction of snags and coarse woody debris used for cover, nesting, and denning, and habituation to human presence. AR 00333-334.

The Commission also was aware of the valuable natural resources and the destructive impact of the ski area due to a report from the agency's chief wildlife scientist, Robert Fimbel, Ph.D. Dr. Fimbel was unequivocal in identifying the area's stellar resource value, referring specifically to one of the three most restrictive land classifications (Natural Forest Area):

> The forests of the [west and northwest side of Mt. Spokane] **meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well).**

CP 214. (emphasis supplied).

Dr. Fimbel went on to summarize, sometimes in scientific and detailed terms, the rare and sensitive nature of the ecosystem in that part of the park:

> [These forests] are a matrix of young to late successional stands of trees (**including old growth**), intermixed with abundant wetlands, small meadows, and talus slopes. They exhibit little/no human modification compared to other sides of the mountain where in excess of 50% of the mountain top has been directly or indirectly modified by recreational developments (primarily roadways and alpine skiing). **These "near-wilderness" conditions are a rarity in the greater Spokane area.** The area is rich in native structure, composition, and functioning processes, providing habitat for a large (and relatively unknown) population of species (charismatic mega-fauna like wolverines to a multitude of often overlooked invertebrates, fungi, and micro-organisms). Based on two, very cursory vascular plant inventories of the area, the [area] is known to support sensitive plant associations and habitats suitable for [Endangered Species Act] listed wildlife species (e.g., lynx and wolves). No invasive species have been observed in this area. Finally, habitat integrity is very high given limited past disturbance by humans and its connectivity to other functional habitats throughout the park, Spokane County, and the greater WA / ID landscape. In time, as climatic conditions change, the [currently unclassified area] (especially the highest areas on the mountain [>5000 ft]) is expected to serve as a critical refuge for migrating and resident species. It is also, unfortunately, expected to experience a significant decline in its winter snow cover.

Id. (emphasis supplied).

While Dr. Fimbel's report inexplicably was not referenced in the staff report provided to the Commission prior to its vote, the Commission was aware of Dr. Fimbel's conclusions about the pristine nature of the unclassified west and northwest parts of Mt. Spokane — counsel for the Lands Council raised Dr. Fimbel's brief during the public hearing the night before the Commission made its final decision. AR 00690.

The message from the Commission's own scientific staff was abundantly clear: the west and northwest side of Mt. Spokane represents the highest level of natural resource value in the state park system and its importance will only grow over time as it serves as a critical refuge for species suffering from climatic change.

Dr. Fimbel was not the only commission staff member to point out the high natural resource value of Mt. Spokane. In a July 2014 Commission meeting, staff member Lisa Lantz provided an overview of the natural resource value of the unclassified portions of Mt. Spokane. During the presentation, Commissioner Brown asked, "So in your staff report, you say regardless of whether the forests of the [proposed ski area] meet a particular definition of old growth or not, they represent the highest level of significance of natural resources in the state park system. That seems to me

to be a rather profound statement. Could you tell me how you drew that conclusion that in the context of our entire system, this is the highest level of significance?" CP 182. Ms. Lantz responded by attributing its significance to several factors, including the relatively large size of the park, the length of time the area has been managed as a park, the presence of significant species, and the depth of scientific study in the park. *Id.* And when asked whether her finding that the area has the highest level of significance refers to Mt. Spokane State Park or the unclassified west and northwest part of the mountain in particular, Ms. Lantz answered: "I would say both, but certainly the [unclassified portion] is a significant resource within Mt. Spokane State Park." CP 183.

Members of the Commission acknowledged the regional and statewide significance of the sensitive habitat in the unclassified areas of Mt. Spokane. During the Commission's deliberations on November 20, 2014, Commissioner Brown stated: "This is a pristine forest. There's not many left. I'm going to give the benefit of the doubt to the Native American leaders who were in the room last night, and I'm going to say there is old growth there. I had a conversation with one of you very briefly—no, excuse me, it was with Daniel, and noting the adjacency of this mountain to a major

urban area in itself is quite unique." AR 00768. Commissioner Brown pointed out the "unique natural attributes associated with this site." *Id.* Commissioner Milner acknowledged the value of the unclassified portions of the Park: "It is an inspiring landscape which preserves many aspects of natural function, while enduring decades of light human disturbance and thousands of years of frequent, intense natural disturbance." AR 00776. Similarly, Commissioner Lantz (not to be confused with staff member Lantz) pointed out the regional and statewide significant of the area, saying "It is a part of a greater system that extends not only [to] the boundary of the park, but it goes far north to where the human footprint, the human interference with the natural ecological process, has been as light as any place you can find, certainly in Eastern Washington, and there are some statements about generally across the state." AR 00785.

G. The Commission's Perceived Dilemma and Failure to Address Its Policy

As just described, the Commissioners, even those who voted against the Natural Forest Area designation, recognized the high natural resource value of the area. AR 00623. But instead of applying the agency's policy which calls for protecting such areas from high-intensity recreation, a majority of the Commission viewed its choice as a dilemma created by the

agency's twin goals to both protect natural resources and provide for recreation. As Commissioner Brown remarked at the November 20, 2014 hearing, the classification decision "does sort of capture the struggle of balancing our job as stewards of natural resources and finding a way to enhance recreational opportunities." AR 00767. Commissioner Milner echoed this sentiment, viewing the mission of the Commission as "meeting the needs of society for readily-available outdoor recreation, while striving to protect the natural function of the land in light of these human disturbances." AR 00779. Commissioner Lantz viewed the Commission as having a "dual mission," saying "we are here to protect the natural resources, and we are to provide recreation. Both of these benefits accrue to all Washingtonians today and forever, so there's a temporal part of this as well." AR 00782.

Curiously, while the Commissioners saw the tension, they seemed oblivious to their own policy which dictated how the balance should be struck when high value resources, like those at issue here, were proposed for a high impact recreational use. Not once in their deliberations was there any discussion of the substance of the policy which addressed this very issue and mandated a protected status for these rare and fragile lands. Instead,

with hundreds of ski enthusiasts testifying in support of a ski area expansion, a majority of the Commission decided to resolve the tension by destroying this priceless, irreplaceable resource and creating a few more ski runs for MS 2000 and its adherents.

The agency's failure to come to grips with its own policy was not limited to the deliberations. While the FEIS acknowledges the rare resource values present on the unclassified lands, it fails to even mention the relevant policy. Curiously, the FEIS references a different portion of the policy document (Policy A.1 entitled "Biological resources – general principles") at three separate points in the FEIS — twice in footnotes and once in response to a comment.[3] Clearly, the Commission's staff was aware of the policy document. But inexplicably, neither in their staff report (CP 191)

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[3] References to *Commission Policy 73-04-1* Subpart (A)(1) can be found in the FEIS at AR00221; AR00280; and AR00532 in response to Mike Petersen's comment. Each instance quotes the same language:

> Commission direction regarding the management of natural resources within areas classified as "Recreation" is discussed in *Commission Policy 73-04-1 Protecting Washington State Parks Natural Resources.* Subsection A(1) states that "State Parks will maintain native plants and animals (biodiversity) that occur, or seek to re-establish them where they historically occurred, within those park lands classified by the Commission as Resource Recreation Areas, Natural Areas, Natural Forest Areas, or Natural Area Preserves. When consistent with recreational use, cultural resources integrity, and other agency objectives, native plants and animals will also be preserved in lands classified as Recreation and Heritage Areas.

nor in the FEIS did the Commission staff mention or even allude to Policy E.1 that spoke directly to protective classifications required for natural resource land of regional or statewide significance or which is home to a species of concern.[4]

Following the lead of its staff, the Commission also failed to address the applicability of its own natural resource protection policy. At the public hearing on November 19, 2014, counsel for the Lands Council provided public testimony to the Commission raising the staff's failure to address the agency's own policy:

> This is a country of laws, . . . and the laws in place here are your policies, your Comprehensive Natural Resource Management Policy adopted in 2010, which, among other things, provides that areas of a park containing natural resources of regional or statewide significance, unusual and/or sensitive habitat or a species of concern should be classified restrictively to allow only low intensity uses and minor facility development. Typically one of three natural area classifications should be applied, natural, natural forest or natural area preserve, although resource recreation may be used in unusual circumstances. But the recreational classification is not allowed at all.

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[4] The FEIS discusses the environmental impacts of the land classification decision and ski area expansion at length, including a section entitled "Land Use" which discusses the Land Classification System established by WAC 352-16-020. AR 00247-00248. However, the FEIS never even mentions the applicable policy — entitled "Land Classification" — even though the FEIS ostensibly is analyzing the Commission's decision on land classification for Mt. Spokane.

AR 00691. The next day at the Commission meeting called to adopt a land classification, Commissioner Brown briefly inquired of staff member Lisa Lantz about the policy and its application to the Commission's decision:

> COMMISSIONER BROWN: My second question—and this may be for Don or Jim—but there was a comment made last night and a specific reference to agency policy, and there was a suggestion made—or I should say an opinion offered—that that policy would apply to this circumstance and would preclude ski area expansion.
>
> So I'd just like to have those two matters discussed, if you would, please.
> (. . .)
>
> MS. LANTZ: So the second issue—so we do have Natural—our Natural Resource policy was quoted last night, and it was quoted accurately, the portion that was read aloud, that does discuss our typical procedure with areas of significant natural resources would be a protected classification of either a Natural Forest Area, Natural Area or Natural Area Preserve, or in some circumstances Resource Recreation.
>
> COMMISSIONER BROWN: Thank you.

AR 00754-755.

One might have expected at that point some discussion of the impact of that policy on the decision to be made at that meeting. But there was none. There was no further discussion between the commissioners and their staff or among the commissioners themselves of the policy. They did not

discuss its meaning. They did not discuss why it would or would not apply in this case. There was no discussion of the policy at all.

Instead, the commissioners anguished over a difficult decision and noted that each side had valid points.[5] For instance, Commissioner Schmitt said, "Making a decision on the PASEA classification is important to both sides, and I can't paint either side as right or wrong. It's a difficult decision." AR 00757. Commissioner Brown said, "I'll just say this, that I've weighed all of this in my mind, and it is a damn tough decision." AR 00767. Commissioner Milner remarked, "First of all, I respect all the opinions that were submitted, and like the other Commissioners, I don't see either side as right or wrong. I see them as equally-balanced situations." AR 00776. Commissioner Bounds said, "And I don't think there's—in this case in particular, I don't think there are any bad guys. I don't think there are any righteous sides to the decision, one way or the other. I think that it's a balancing of the values as Lisa pointed out, and it's making a judgment." AR 00792. Finally, Commissioner Lantz summarized the

[5] The Commissioners had clearly been advised that their remarks would be on the record and serve as part of the basis for the land classification decision. As Commissioner Brown remarked at the hearing, "You know, [counsel for the Commission] said yesterday that we could pretty much say anything we want, but don't be arbitrary or capricious, and so I promise you I won't be arbitrary. I can't make a promise on capricious because I don't know what that means." AR 00767.

balance required in maintaining the competing aims of conservation and recreation: "What tips the scale so that the balance you're trying to achieve with natural resource protection and a minimal amount of recreational use—what tips that scale so it's no longer in balance? We look to the EIS for mitigations, and that is attempts to balance the scale." AR 00786. Unfortunately, no commissioner discussed the applicable policy or whether it would tip the scale in favor of classifying the land restrictively given the policy's clear call for a restrictive classification.

IV. ARGUMENT

A. Standard of Review

The superior court had the inherent power provided in Article IV, section 6 of the Washington State Constitution to review the administrative agency's decision for illegal or arbitrary and capricious actions. Const. art. IV, § 6; *Saldin Securities Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998); *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). The superior court's exercise of this inherent power will not ordinarily occur if either a statutory writ or a direct appeal is available. *Bridle Trails Community Club v. City of Bellevue*, 45 Wn. App. 248, 253, 724 P.2d 1110 (1986). The Supreme Court has

consistently held that a superior court may grant a constitutional writ of certiorari if no other avenue of appeal is available and facts exist that, if verified, indicate the lower tribunal has acted in an illegal or arbitrary and capricious manner. *Saldin Securities,* 134 Wn.2d at 294, 949 P.2d 370.

Because no other avenue of appeal of the Commission's land classification decision exists, a constitutional writ is the appropriate method of reviewing the Commission's decision. There is no statutory right of appeal for land classification decisions of the Commission. *See* Ch. 79A.05 RCW. Because the land classification decision was not a rule-making function of the agency nor an adjudicative proceeding of the agency, review is not proper under the Administrative Procedure Act. RCW 34.05.570. Additionally, the statutory writ of review is not proper in this case because the Commission was not exercising a judicial function. RCW 7.16.040. Accordingly, review was and is proper through the mechanism of the constitutional writ.

When a court reviews agency action via a constitutional writ of review, the standard of review is the arbitrary and capricious test. *Saldin Securities*, 134 Wn.2d 292, 949 P.2d 370. It is well established that "agency action is arbitrary and capricious if it is willful and unreasoning and taken

without regard to the attending facts or circumstances."[6] *Wash. Indep. Tele. Ass'n v. WUTC*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003); *D.W. Close Co., Inc. v. Wash. Dept. of Labor and Ind.*, 143 Wn. App. 118, 130, 177 P.3d 143 (2008). When there is room for two opinions, a reviewing court will not substitute its own judgment for the agency, but the agency action must be taken after due consideration of the facts and circumstances. *Hillis v. State, Dept. of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

B. The Commission's Decision was Arbitrary and Capricious Because It Ignored the Commission's Own Adopted Policy and Factual Findings Regarding How to Balance Natural Resource Protection and Recreation within State Parks.

The Commission has an adopted policy to not allow intense recreation where it would compromise high value natural resource lands. "Areas of a park containing natural resources of regional or statewide significance, unusual and/or sensitive habitats (*e.g.*, bald eagles), or a species of concern should be classified restrictively to allow only low-intensity uses and minor facilities development." CP 281. The Commission stated the policy's provisions serve as the "key points needed to promote

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[6] The "arbitrary and capricious" standard is the same for a constitutional writ as it is for review of agency action under the Administrative Procedure Act, RCW 34.05. *See Saldin Securities*, 134 Wn.2d at 296, 949 P.2d 370.

the long-term protection and conservation of the natural resources in the agency's care." CP 268.

The agency's fact-finding for this case identified the lands at issue as falling squarely within the bounds of that policy. "The forests of the [west and northwest side of Mt. Spokane] meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well)." CP 214. The Commission identified ten "species of concern" present within the area in the FEIS. AR 00233-00234. And as the Washington Department of Natural Resources commented, unusual and sensitive habitat exists on the western and northwestern slopes of Mt. Spokane, calling the forests of "uncommon quality." CP 155.

Despite a policy "to allow only low-intensity uses and minor facilities development" on high value natural resource lands and a finding by their own chief biologist (confirmed in the FEIS and staff report) that the subject lands "represent the highest level of natural resources quality in the state park system," CP 194, the agency approved an intense, recreational development in the middle of these lands. The agency's disregard of its

adopted policy and the facts pertinent to application of that policy is a quintessential example of arbitrary and capricious agency action.

Washington courts have consistently found that when an agency ignores its own findings in making a decision, its action has been taken without regarding to the attending facts and circumstances and is, therefore, arbitrary and capricious. For example in *Rios v. Washington Dept. of Labor and Industries,* 145 Wn.2d 483, 39 P.3d 961 (2002), the Supreme Court reviewed the Department of Labor and Industries' refusal to initiate rulemaking to mandate a blood-testing program for handlers of a certain pesticide. The department refused to engage in rulemaking even after it received a detailed report commissioned by the department which concluded that the test was both "necessary and doable." *Id.* at 506, 39 P.3d 961. The court concluded that the refusal to acknowledge such clear findings undertaken by the department itself was arbitrary and capricious:

> At the time of their request in 1997, the pesticide handlers were not asking the Department to embark on a new enterprise—they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds. In fact, the Department had already made cholinesterase monitoring enough of a priority to draft the non-mandatory guidelines and to convene a team of experts "to identify the essential components of a successful monitoring program." And that report announced in its introductory summary that "[t]he [Department's Technical Advisory Group]

> recommends cholinesterase monitoring for all occupations handling Class I or II organophosphate or carbamate pesticides." Because the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department's 1997 denial of the pesticide handlers' request was "unreasoning and taken without regard to the attending facts or circumstances."

Id. at 507-8, 39 P.3d 961 (internal citations omitted). The "attending facts or circumstances" in *Rios* were the department's own findings of the necessary steps to meet its statutory duty to set a standard that assures that no employee would suffer material impairment of health. *Id.* at 496, 39 P.3d 961. Because the department ignored its own findings when making its decision to not pursue rulemaking, the Supreme Court found its action arbitrary and capricious.

In *Probst v. State Dept. of Retirement Systems*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012), the Court of Appeals found that the State Department of Retirement Systems ("DRS") acted arbitrarily and capriciously because it rendered its decision to calculate interest for the Teachers Retirement System in complete disregard of its own findings. The agency calculated interest for the Teachers Retirement System on a quarterly basis beginning in 1977. *Id.* at 192, 271 P.3d 966. Teachers raised

concerns at several different points that calculating interest on a quarterly basis could have unfair results and the agency even acknowledged the shortcomings of a quarterly interest calculation method. *Id.* at 193, 271 P.3d 966. Despite the repeated concerns and evidence that the quarterly interest calculation method created unfair results, the agency rejected moving to a more frequent interest calculation. *Id.* The Court of Appeals found that this decision was in complete disregard of the facts and circumstances and arbitrary and capricious because the agency ignored its own findings of the shortcomings of a quarterly interest calculation method. *Id.* at 194, 271 P.3d 966.

Here, the Parks Commission had a recently adopted policy which was intended to be applied in situations just like this one and which spoke unequivocally to avoiding high-intensity recreation uses on high value natural resource lands. The agency had identified the policy as serving an important role in protecting the natural resources of Washington State Parks:

> This policy and its future implementing procedures seeks to capture current regulations and management guidelines, and to summarize the key points needed to promote the long-term protection and conservation of the natural resources in the agency's care. With institutional commitment and

> budgetary support, this policy will ensure the long-term protection of State Parks' natural resources.

CP 268. Despite the need for this "institutional commitment," the Commission ignored its policy, except for a brief acknowledgment that it did, in fact, exist. Much like the agencies in *Rios* and *Probst*, the Commission not only ignored the attending facts and circumstances of its policy, but it chose to do the opposite of what the Commission found necessary to ensure the long-term protection of State Parks' natural resources when it adopted the policy a few years earlier.

The policy clearly states that natural resources of statewide or regional significance, unusual and/or sensitive habits, or areas containing species of concern should be classified restrictively to allow only low-intensity uses. CP 281. Usually, only one of three most protective "natural resource" designations will be used. While the policy does contemplate a compromise classification of "Resource Recreation" to "address conflicting use issues at a specific site," the Resource Recreation classification does not allow intense recreation like downhill skiing. *Id.* The only classification which allows downhill skiing is "Recreation" and the policy clearly precludes use of that classification for high value, natural resource lands. *Id.* Yet, that is exactly what the Commission did when it adopted the high-

intensity "Recreation" classification for lands the agency says "meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system." CP 194.

The Commission provided no discussion or analysis to suggest the policy was not relevant to the decision at hand. But rather than apply its unambiguous policy, the Commission chose to do the exact opposite by adopting the most intensive classification, not one of the low-intensity classifications. It even chose to forego the compromise classification of "Resource Recreation" that, in some circumstances, could offer "a relatively high degree of resource protection." CP 281. Thus, because the agency's decision was taken without regard to the attending facts (the undisputed high resource value of the subject lands) and circumstances (the agency's policy committing to protect such lands from high-intensity recreation uses), the Commission's decision was arbitrary and capricious and should be vacated.

C. The Commission's Deviation from Its Own Policy was Arbitrary and Capricious Because the Commission Did Not Provide a Reasoned Explanation for Changing the Policy.

Courts have consistently held that when an agency deviates from its existing policy or precedent, at the very minimum, the agency must provide

a reasoned explanation of its basis for doing so. The Commission did not provide any explanation — reasoned or otherwise — for deviating from its policy and, therefore, its decision was arbitrary and capricious.

In one typical federal case[7] on an agency deviating from its prior policy, the FCC attempted to deviate from its well-established policy to not enforce against fleeting indecent or obscene images. The agency issued an enforcement order against CBS in the wake of the Super Bowl Halftime Show incident, where Janet Jackson's right breast was momentarily exposed on national television. *CBS v. FCC*, 663 F.3d 122, 135 (3rd Cir. 2011). The court found that the FCC deviated from its own policy:

> The FCC contends its restrained policy applied only to fleeting utterances—specifically, fleeting expletives—and did not extend to fleeting images. But a review of the Commission's enforcement history reveals that its policy on fleeting material was never so limited. The FCC's present distinction between words and images for purposes of determining indecency **represents a departure from its prior policy.**

Id. at 138 (emphasis supplied). Because the FCC departed from its own applicable policy, the court found the FCC's actions arbitrary and

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[7] There are no Washington cases that directly address the issue of an agency departing from its own policy, but federal cases similarly apply the arbitrary and capricious standard to review of agency decisions. *See CBS v. FCC*, 663 F.3d 122, 137 (3rd Cir. 2011).

capricious, unless it provided "a reasoned explanation" for the departure: "The agency's actions will then be set aside as arbitrary and capricious if the agency failed to provide a reasoned explanation for its decision to change course." *Id.* at 145 (internal quotations omitted).

It is worth noting that the Third Circuit recognized that the FCC could change its policy: "Like any agency, the FCC may change its policies without judicial second-guessing." *Id.* at 138. However, the key point highlighted by the court was that "it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure." *Id.* Because the FCC did not provide a reasoned explanation for its change in policy, its decision was vacated. *Id.*

In another typical case, then-Circuit Judge Roberts found that the Federal Aviation Administration's ("FAA") suspension of a pilot's license on grounds of his conviction for driving under the influence of alcohol significantly departed from its own precedent in three respects and held that the action was arbitrary and capricious. *Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121 (D.C. Cir. 2003). The FAA had a longstanding requirement of prosecutorial diligence in stale complaint cases, but in *Ramaprakash*, the agency departed from its longstanding rule

and prosecuted a stale claim. *Id.* at 1127. The court noted that "the core concern underlying the prohibition of arbitrary or capricious agency action is that agency 'ad hocery' is impermissible." *Id.* at 1130 (internal quotations omitted). The application of the "stale complaint rule" left little certainty as to how it would be applied in the future. Instead, interested parties were left with "a promise from the Board that at some point in the future, the stale complaint rule may again mean what it once did — depending on 'specific facts of future cases.'" *Id.* Because the agency departed so significantly from its own established policy and precedent without providing any explanation, the District of Columbia Circuit Court found that the agency action was arbitrary and capricious.

Below, the Parks Commission attempted to distinguish these cases by arguing that an agency does not have to provide a reasoned explanation for departing from its own policy when the agency is acting in a proprietary, rather than regulatory, capacity. However, the concerns of the courts in *CBS* and *Ramaprakash* are equally applicable in proprietary and regulatory settings. Just as deviating from an established policy without a reasoned explanation can harm regulated entities, the same holds true for the public affected by an agency's proprietary decisions. Mt. Spokane State Park is

the largest state park and one of the most visited parks in the Washington state parks system. AR 00206. The Commission is responsible for managing state parks for the public's benefit. *See Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 790, 309 P.3d 734 (2013); RCW 79A.05.305. Members of the public who utilize the park should be able to rely upon the agency's policies. Indeed, the Commission considers the public as "partners" in its resource protection efforts. As the natural resource policy document states: "The public, as stakeholders and volunteers, are partners in ensuring the successful stewardship of park resources for future generations." CP 287 (note vii). The public, with whom the agency "partners" to protect natural resources, deserves (much like regulated entities) a rational explanation when the agency deviates from its policy.

Moreover, the Commission's decision not only impacts the public at large, it impacts specific individuals and organizations. Several have joined as petitioners in this lawsuit. Another — MS 2000 — has significant interest in the outcome, too. Simply because the agency is making a proprietary decision does not give it license to act arbitrarily and capriciously to the detriment of individuals, businesses, or the public at large.

Returning to the broader question, the Commission's departure from its own policy here without a reasoned explanation was arbitrary and capricious. First, at no point has the Commission disagreed that its policy (entitled "Land Classification") was applicable to its land classification decision. Commission staff acknowledged that the policy "does discuss our typical procedure with areas of significant natural resources." AR 00754-755. The Commission and Commission staff acknowledged the high natural resource value of the area; its regional and statewide significance; and its occupancy by "species of concern." *See supra* at 17-22. The land classification of these high value natural resource lands in Mt. Spokane State Park clearly is in the domain of the policy.

Second, the Commission's land classification decision departed from its policy. The policy explains that areas of significant natural resource value "should be classified restrictively to allow only low-intensity uses and minor facilities development." CP 281. The only discretion that the policy contemplates is for the Commission to adopt the intermediate "Resource Recreation" classification for areas where conflicting uses exist. *Id.* But the policy unequivocally does not authorize classifying areas of significant natural resource value with the high-intensity "Recreation"

classification. Yet that is exactly what the Commission did by classifying the west and northwest slopes as "Recreation." A more definitive departure from the policy would be difficult to conceive.

Third, the Commission never provided any explanation — reasoned or otherwise — to explain its departure from its policy. In fact, the Commission staff did not so much as mention the policy until shortly before making its ultimate decision. *See supra* at 26. Even then, Commission staff simply acknowledged that the policy exists — there was no discussion or analysis of the substance of the policy, how it applied to the facts of this case, or whether there was a rational justification for not applying it. *See supra* at 26-27.

Below, the Commission noted that the agency and the commissioners spent considerable time and effort analyzing many of the issues, such as the desire of downhill skiers for more ski runs and the desire of others to protect this unique and important natural resource. But deliberating at length does not immunize a decision from a determination that it is arbitrary or capricious. "[T]he arbitrary and capricious standard is not a rubber stamp and cannot be met simply by showing that an adequate number of meetings were held or that deliberations took a certain amount

of time." *Porter v. Seattle School Dist. No. 1*, 160 Wn. App. 872, 880, 248 P.3d 1111 (2011). Here, in all of the meetings and reports on the Commission's land classification decision, the Commission never discussed the substance of its policy nor how it applied in this setting. It never provided any explanation for deviating from its policy. This arbitrary and capricious action is not shielded from review simply because the commission held lengthy meetings and deliberated for an hour or two before making its decision.

D. The Commission was Required to Provide an Explanation for Its Policy Departure on the Record, Not in Litigation Briefs.

Below, the Commission's attorney suggested that the Commissioners may have given great consideration to the policy (even though the Commissioners never said so) and speculated about rationales the Commissioners may have employed for deciding the policy should not apply here. But such *post hoc* rationalizations to fill a gap in the agency's expressed reasoning should be rejected by a reviewing court. Courts have long recognized that an agency must provide a reasoned explanation on the record and cannot supply *post hoc* rationalizations to justify arbitrary and capricious decisions: "The agency's obligation to supply a reasoned analysis for a policy departure requires an affirmative showing on record."

CBS, 663 F.3d at 145. "[A]gency action cannot be sustained on *post hoc* rationalizations supplied during judicial review." *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981). "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

In other words, the Commission cannot now claim that it applied its own policy to its decision or that its counsel has divined a rationale to support deviating from the policy. Moreover, any argument that the Commission did not deviate from its policy and actually applied its policy is nonsensical on its face: the policy clearly calls for areas with significant natural resources to be classified with low-intensity classifications and the Commission did the opposite of what its policy calls for by classifying it with the highest-intensity classification.[8] CP 281. If the Commission had actually applied its policy to its decision, then it would have classified the area in question restrictively.

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[8] The policy's use of the word "should" rather than "shall" does not allow the Commission to completely ignore its policy. Even if the policy used "shall" in its wording, the Commission "may change its policies without judicial second-guessing." *CBS* at 138. However, the requirement to provide a reasoned explanation on the record for the policy change still exists. *Id.* The policy's direction is clear — regardless of whether "shall" or "should" is used — and the Commission departed from the outcome called for by the policy.

Further, the Commission cannot point to the totality of the record and claim that because it considered some general concepts that are also touched on in the policy, then it considered and applied the policy. For instance, the Commission considered Alternative 2, which would have classified the area restrictively as called for in the policy. But the policy does more than just indicate that the Commission should *consider* a low-intensity classification among the several land classification options — it calls for a specific *outcome*: the land should be classified restrictively to allow only low-intensity uses and minor facilities development. CP 281. To argue that the Commission applied the policy to its decision because the Commission had before it — but ultimately rejected — an alternative that would comply with the policy highlights the Commission's lack of valid arguments.

The prohibition on *post hoc* rationalizations is not a nitpicking procedural limitation. It is vital to assure that the real decision makers (the commissioners, appointed by the Governor and confirmed by the Senate, *see* RCW 79A.05.015) engaged in a meaningful consideration of the facts and policies that are to guide their decision. The public (including the appellants) and this Court are left wondering if a real consideration and

application of the policy by the commissioners would have changed the decision. Commissioners Schmitt, Brown, Milner, Bounds, and Lantz all remarked how difficult the ultimate decision was and how the Commission had to balance competing interests. *See supra* 27-28. Yet none of these Commissioners expressed the slightest regard for the direction provided by the adopted policy and how it might assist them in resolving the conflicting recreational and resource protection interests. None of the commissioners considered that the decision on how to resolve the conflict had been made in a deliberate fashion when the policy was adopted. While the agency's counsel can now suggest how counsel would have reached the decision or how the Commissioners may have reached the same decision even if they had considered the policy, it was the duty of the Commissioners in the first instance to consider and apply the policy. And if the Commission felt it was necessary to deviate from the policy, then the Commission must provide a reasoned explanation for the deviation. Their failure to do so cannot be excused by their counsel's litigation briefs. At the very least, the public deserves an explanation why the policy did not guide the Commission's decision. Such agency "ad hocery" is the fundamental concern of the arbitrary and capricious standard. The Commission's land

classification decision is a prime example of arbitrary and capricious agency action.

V. CONCLUSION

This Court should reverse the Superior Court's decision and find that the Washington State Parks and Recreation Commission's decision was arbitrary and capricious. The Court should vacate the decision and remand the matter to the Commission for reconsideration, with explicit instructions to consider all of the agency's relevant policies in making its decision.

Dated this 19th day of February, 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JOHN ROSKELLEY, FAYETTE KRAUSE, SPOKANE AUDUBON SOCIETY, SPOKANE MOUNTAINEERS, AND THE LANDS COUNCIL, Appellants, v. WASHINGTON STATE PARKS AND RECREATION COMMISSION, AND MT. SPOKANE 2000, Respondents.	NO. 48423-4-II (Thurston County Superior Court Cause No. 15-2-00527-5) DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, ANNE BRICKLIN, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for appellants John Roskelley, et al. herein. On the date and in the manner indicated below, I caused Appellants' Opening Brief to be served on:

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DATED this 19 day of February, 2016, at Seattle, Washington.

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