IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 94437-7

Court of Appeals No. 48423-II

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

Petitioners,

v.

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

Respondents.

AMICUS CURIAE MEMORANDUM OF SPOKANE RIVERKEEPER IN SUPPORT OF PETITION FOR REVIEW

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Spokane Riverkeeper

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I. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae-applicant Spokane Riverkeeper adopts and incorporates its statement of interest contained in its motion for leave to file an amicus brief previously filed with this Court.

II. STATEMENT OF THE CASE

Fundamentally, this case is about the obligation of the Washington Parks and Recreation Commission ("Commission") to comply with its own agency-developed policies. The Commission is charged with overseeing the protection of resources in state parks and providing recreational opportunities to the public. Commission's Answer to Review at 2. The Commission has the authority to classify state park land to allow for varying uses. *Id.*

Pursuant to its management authority, the Commission adopted Policy 73-04-1, Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy ("2010 Policy") in August 2010. MS2000 Answer at 4. The 2010 Policy was intended to provide a comprehensive natural resource policy for the agency as it

applies to the management of areas of significant natural or cultural value, and to "summarize the key points needed to promote the long-term protection and conservation of natural resources." 2010 Policy at 2.

On November 20, 2014, the Commission approved expansion of the ski area expansion at Mt. Spokane State Park. Commission's Answer at 8. This decision classifies 279 acres of the park as "recreational," which will allow for the construction of a chairlift for skiing and the clearing of timber for seven new ski runs. *Id.* at 5. However, at no time during the Commission's deliberations was the 2010 Policy expressly mentioned. Petitioner for Review at 8, n. 2. Furthermore, neither the staff report that was prepared for the Commission's decision, nor the final EIS expressly mention the recently adopted 2010 Policy. *Id.* at 8-9.

III. ARGUMENT

Under Washington law, the Commission, like most agencies, is authorized to enact its own policies relating to the "use, care, and administration" of its statutory duties. RCW 79A.05.030(2). Policies are an aspect of all agencies, particularly those implementing environmental protections, such as the Department of Ecology, Department of Fish and Wildlife, and other state agency.

Administrative agencies are generally given deference by a reviewing court in interpreting its own policies so long as that decision was not arbitrary and capricious. *See Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). For an agency action to be arbitrary and capricious the action must be "willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tele. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). Additionally, since the rules of statutory construction are applicable to administrative regulations, *Appeals Decision* at 12, (citing *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)), the Court "must not add words where the [administrative body] has chosen not to include them." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Here, the Commission's decision not to follow its own policy - or expressly provide *any* reason why the 2010 Policy should not apply, affords an opportunity to this Court to provide guidance in interpreting the weight or relevance of an agency's own internally adopted policy. It is apparent that the 2010 Policy was adopted not just as a compilation of what guidelines the Commission followed in the past; but for the purpose to impact land classifications in these sensitive areas in the future. Policy 2010 at 1. The 2010 Policy makes clear that this policy intended to

"ensure the long-term protection of State Parks' natural resources." *Id.* at 2.

Furthermore, the 2010 Policy was adopted in the same month that the Commission was in the lengthy and difficult process of reclassifying the very same state park at issue here. *Appeals Decision* at 3. It is highly unlikely that the Commission adopted the 2010 Policy to simply memorialize how it has handled certain classification decisions in the past.

If review of this case is granted, the Court can create a bright-line rule that would be immensely helpful to state agencies as they establish their own policies or guidelines. Agencies would be put on notice that if it deviates from its own adopted policy that explains what the agency *should* do, or what the agency *typically* does in certain situations, that there must be some reasonable and expressed reason given for not following normal procedure. The public benefits from an administrative process that is transparent as it deters abuse and increases confidence that agencies are actually following the procedures they portray to the public. By holding an agency accountable for the specificity of the language used in its self-governing policies, the public benefits by having reasonable expectations in knowing how or why an agency makes a particular decision.

Furthermore, a decision to review would provide agencies with much needed clarity in how an agency's own policies are to be followed – or

not. Washington adjudicative bodies are already considering giving weight to internally adopted policies in the decision-making process. For example, in a matter involving the Spokane Riverkeeper, the Pollution Hearings Board ("Hearings Board") was presented with a question of whether adopted agency policies and statements made in publications by the Department of Fish and Wildlife created an additional consideration to be made when conducting a Hydraulic Project Approval. *Spokane Riverkeeper, et. al. v. Washington Dep't of Fish and Wildlife*, 2011 WL 2603920 at 6 (Wash. Pol. Control Bd., June 28, 2011). In denying the motion for summary judgment on that issue, the Hearings Board held that it could not rule as a matter of law to exclude a policy requirement, even though it was not required under a statute. *Id.* Unanswered by the Hearings Board was any specific rules or guidance on interpreting and implementing the agency policy. *Id.*

When a large degree of discretion is given to agencies in enacting their policies, it is important that those decisions at least fall within the bounds of that agency's own policies. The Commission of 2010 who passed that policy set standards to be applied in the years to come. By completely ignoring its on-point and internally guiding policy and without providing an explanation of why that policy's provisions were not followed, it essentially renders the policy meaningless.

If the Court denies review of this matter, then it is the same as if there was no policy adopted by the Commission at all as it relates to areas containing natural or cultural resources of significance. Any provision in an agency's policy not containing either "shall" or "must" will be the equivalent of a Tibetan sand mandala: looks great today, forgotten about tomorrow.

IV. CONCLUSION

For the above reasons, *amicus curiae*-applicant Spokane Riverkeeper respectfully requests that this Court grant the petition for review.

Respectfully submitted this 26th day of June, 2017.

UNIVERSITY LEGAL ASSISTANCE

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CERTIFICATE OF SERVICE

I, Julie Claar, certify that on the 26th day of June, 2017, I caused the foregoing Motion for Leave to File Amicus Curiae of Petitioners to be served via USPS postage prepaid on the following:

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