IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 94437-7

Court of Appeals 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,

Petitioners,

v.

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

Respondents.

RESPONDENT MT. SPOKANE 2000'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Mt. Spokane 2000, a Washington non-profit corporation ("MS2000") is the community based non-profit corporation that operates the 1,425 acre ski facility known as Mt. Spokane Ski and Snowboard Park (the "Ski Facility") located within Mt. Spokane State Park ("Mt. Spokane") under a concession agreement with the Washington State Parks and Recreation Commission ("Commission"). MS2000 is the beneficiary of the Commission's November 20, 2014 decision to classify 279 acres of Mt. Spokane for recreational purposes to allow for the expansion of the Ski Facility (the "Classification Decision"). MS2000 was the respondent before Division II of the Court of Appeals in its March 28, 2017 Unpublished Opinion (the "Decision").

II. COUNTER ISSUE PRESENTED FOR REVIEW

Whether the Commission acted arbitrarily and capriciously in approving the November 20, 2014 land classification when it followed the statutory requirements of Chapter 79A.05 RCW, WAC 352-16-020, and the permissive guidance contained within Policy 73-04-1?

III. STATEMENT OF THE CASE

A. INCORPORATION OF COUNTER STATEMENT OF THE CASE FROM THE COMMISSION.

MS2000 hereby incorporates the counter statement of the case submitted by the Commission as though fully set forth herein.

B. MS2000 INTENDED TO DEVELOP THE POTENTIAL ALPINE SKI EXPANSION FOR THE BENEFIT OF THE PUBLIC AT THE TIME IT ENTERED INTO THE CONCESSION AGREEMENT.

1. Mt. Spokane Has Typically Been Home To Alpine Skiing.

Skiing has a long history at Mt. Spokane. In the 1930s, local ski clubs constructed a ski chalet, rope tow and ski jump. AR00065. The first "double chair lift" was built on Mt. Spokane in 1946. *Id.* In the 1950s, there was a ski lodge containing overnight accommodations, a restaurant and alpine skiing which all existed until the lodge burned to the ground in 1952. AR00863. The first private concession was granted by the Commission in the 1950s. AR00065.

In its present form, the Ski Facility consists of 1,425 acres within Mt. Spokane (which contains approximately 13,000 acres) and includes 32 ski runs, 5 chairlifts, 2 lodges, a ski patrol building and a variety of administrative support buildings. *Id.* MS2000 assumed the operation of the Ski Facility in October 1997 through the execution of a concession agreement entered into with the Commission ("Concession Agreement"). *Id.*

2. The 1997 Concession Agreement Carved out the Expansion Area for Use by MS2000.

MS2000's first efforts to expand the Ski Facility were known by the Commission when MS2000 entered into the Concession Agreement. AR00065. At the time, MS2000 and the Commission designated the boundaries of the concession area on a map as well as designated an approximately 800 acre area for expansion of the Ski Facility in the Concession Agreement. AR00007. The expansion area was identified om the Concession Agreement as the "Potential Alpine Ski Expansion Area" ("PASEA"). *Id.* Starting in 1999, the Commission began a process of classifying land uses within Mt. Spokane. AR00065. As an acknowledgement of MS2000's expansion efforts, the Commission left the PASEA completely unclassified. AR00007.

In response to the Concession Agreement, MS2000 proceeded with its efforts to move forward with the expansion of the Ski Facility by undertaking numerous studies of the PASEA to establish the public need for the expansion and how to best minimize its environmental impact. AR00066. These studies included an analysis of the overall expansion concept in 2006, a market and economic analysis for the expansion in 2007, an analysis of a base area lodge (a concept that was later discarded), and environmental review of the PASEA. *Id.* All these concepts were refined

by MS2000 through years of planning and public outreach that ultimately resulted in the current expansion proposal. *Id.*

3. MS2000 Submitted an Expansion Request in 2010 that was Approved by the Commission.

In August 2010, the Commission concluded its master facilities planning and adopted a Master Facilities Plan and a Final Environmental Impact Statement for Mt. Spokane. AR00008. The Master Facilities Plan excluded the PASEA so that it could be further studied to determine whether it would be suitable for MS2000's expansion. *Id.* At the conclusion of the Commission's master facilities process, MS2000 submitted its request to allow for the expansion into only 279 acres of the total area of the PASEA. AR00007.

On May 19, 2011, the Commission approved MS2000's 2010 proposal which included classifying portions of the PASEA as Recreation, Resource Recreation and Natural Forest Area. AR00008. The Commission granted its Director the authority to approve a plan of development and required the preparation of a Supplemental Environmental Impact Statement. *Id.* The Director approved the Supplemental Environmental Impact Statement on October 2012. *Id.* The Commission's 2011 decision to approve a classification that would allow MS2000's 2010 proposal was ultimately reversed by the Court of Appeals in *The Lands Council v.*

Washington State Parks & Recreation Commission, 176 Wn.App. 787, 309 P.3d 734 (2013) as no EIS had been prepared.

C. MS2000 SUBMITTED THE CURRENT PROPOSAL TO THE COMMISSION IN 2013.

1. MS2000 Renewed Its Application To Expand The Ski Facility And The Commission Commenced The Environmental Review Process.

After the Commission's 2011 decision was overturned, MS2000 submitted a new request to the Commission to expand the Ski Facility consistent with the prior proposal. AR00067. The Commission divided MS2000's requested expansion into two actions. The first action considered the classification of the PASEA's 800 acres for protection of its natural resources and the expansion of the Ski Facility, under its regulatory authority[1]. AR00005. The second action considered MS2000's plan of development for the construction of one new chairlift and seven associated ski trails in 279 acres of the PASEA. *Id.* The Commission prepared an Environmental Impact Statement ("EIS") with separate parts addressing the Classification Decision and M2000's plan of development. *Id.*

To ensure that all environmental impacts associated with the expansion were considered, the Commission issued a formal scoping notice

[1] It is important to recognize that the Classification Decision encompassed more than just an expansion of the Ski Facility. It set aside 351 acres as "resource recreation" for limited use and protection and an additional 170 acres as "natural forest area" which could not be disturbed. AR00862.

under the State Environmental Policy Act of 1971 on November 12, 2013. AR00009. The Commission received over 600 formal responses to the scoping notice from state agencies and the public. *Id.* In response to these comments, the Commission revised the potential alternatives to the expansion and defined the scope of the environmental impacts associated with the project. *Id.*

2. The EIS Reviewed and Considered the Purpose and Need for the Expansion and Its Environmental Impacts.

The portion of the EIS discussing the impacts associated with the MS2000 project also discusses the purpose and need for MS2000's expansion. AR 00065. The EIS also proposes potential mitigation measures for the expansion to reduce the amount of project impacts to the greatest extent possible. *Id.* It groups the purpose and need for the expansion into three categories: (i) increasing available terrain, (ii) enhancing the long-term viability of MS2000's Ski Facility, and (iii) improving search and rescue operations for skier safety. *Id.*

The increase in availability of terrain through the approval of the expansion corrects a deficiency in the existing terrain at Mt. Spokane. *Id.* The expansion appeals to the greatest percentage of skiers by providing "low to advanced intermediate level trails." *Id.* It also enhances the existing

skiing experience by providing a more even distribution of skiers across the Ski Facility. *Id.*

The expansion of the Ski Facility also represents the ability to benefit the public by providing early season skiing. AR00068. Before the expansion, the Ski Facility could not operate due to a lack of snow at its terminals and the base areas. *Id.* The expansion into the PASEA provides northwest exposure with more and higher quality snow. *Id.*

The expansion also benefits the public by enhancing search and rescue operations within the PASEA. *Id.* MS2000 is not permitted to patrol, maintain or operate the PASEA in a similar fashion as the Ski Facility. *Id.* Increasingly, the PASEA has become a popular area for skiers seeking a lift served, backcountry experience and MS2000 is routinely used as an emergency response for lost and injured skiers, diverting resources from its ordinary operations. *Id.* The expansion allows for uniform management and a decrease in injuries to skiers. *Id.*

3. The Commission Received Over 700 Comments On The Draft Environmental Impact Statement with the Majority of the Comments Supporting the Expansion.

On August 15, 2014, the Commission released the draft EIS for comments from the public, local, state and federal agencies and tribal entities. AR00010. By the end of the comment period on September 30, 2014, the Commission received 704 total comments. AR00860. These

comments overwhelmingly supported the expansion. *Compare* AR00462-509 *with* AR00443-62; AR00873. The comments were consistent in sentiment with the following select comments:

> Please approve Land Classification alternative #4 Recreational – will allow for significant recreational enhancements, protect natural areas and solidify the long-term future of Mt. Spokane[.] Mt. Spokane fills an important niche as an accessible, affordable 4-season recreational destination for citizens of this region[.] Recreational classification will create greater access for skiers and more terrain which also promotes better skier safety.

AR00497. The comments also commended the environmental stewardship of MS2000's proposal:

> I am writing in support of the Washington State Parks & Recreation Commission to classify the Mt. Spokane PASEA as "Alternative #4 Recreation, Resource Recreation and Natural Forest Area." Both Mt. Spokane State Park and Mt. Spokane Ski Area (MSSA) are great assets to the Inland Northwest and the proposed ski area expansion nicely balances and considers environmental stewardship.

AR00498.

4. The Commission Received Public Testimony Until the Evening of the Decision.

The Commission continued to receive written public testimony on the classification and plan of development through November 19, 2014. AR00905. It also conducted a public hearing on November 19, 2014 and received over three and one-half hours of public testimony. AR00576-725; AR00906.

D. THE COMMISSION WEIGHED THE MERITS OF THE CLASSIFICATION DECISION AGAINST THE DUAL MISSION OF THE COMMISSION.

1. The Commission Developed a Record Consisting of Over 15 Years' of Information.

On November 20, 2014, a day after receiving public testimony at a public hearing, the Commission deliberated on the merits of the classification of the PASEA and the adoption of the plan of development. AR00744. Its record consisted of all the comments on the scoping for the EIS, the draft EIS, and all comments submitted prior to the hearing. AR00746-47. In addition to the November 19, 2014, the Commission relied upon five separate public hearings and each agenda item from all prior public Commission meetings. AR00747. The Commission acknowledged that the record reflected a "substantial opportunity over an extended period of time for the last 15 years for public comment." *Id.*; AR00580.

2. Each Commissioner Deliberated On the Responsibilities of the Commission to Balance Recreation and Conservation and Consideration of MS2000's Extensive Work with the Public on the Expansion and the Legislative Support for MS2000 as Concessionaire.

Each Commissioner carefully considered the dual mission balance of the Commission. For example, Commissioner Schmitt stated: "It's important to protect resource values in the PASEA and throughout the park. It's important to provide for recreation opportunities and the economic

benefits that result. And it's important to live up to our lease partnership opportunities with Mount Spokane 2000." AR00756. Commissioner Schmitt further applauded MS2000's efforts to engage the public in the expansion plans: "I think it speaks to the dedication of Mount Spokane 2000 to be inclusive and engaged with the community and manage their lease with the parks in a responsible way." AR00757.

Commissioner Brown agreed that the Commission needed to adhere to its dual role: "And in my mind I have to remind myself and colleagues that there is the word 'and' a-n-d, between parks and recreation. They are both part of our name, and they're both part of our charge." AR00767. Commissioner Brown also noted that MS2000s "work has been endorsed by the legislature . . . they have been successful in recent years in getting three separate capital budget appropriations." AR00771.

Commissioner Milner noted that the "Plan of Development goes to extraordinary lengths to reroute the ski runs clear of wetlands, older stands and areas of cultural importance and enhanced protection of the areas surrounded by the expansion area." AR00778.

3. The Commission Considered the Overwhelming Public Support for the Expansion and the Consistency of the Proposal with the Mission and Vision of the Commission.

The Commission also considered the extensive public support for the project. As Commissioner Brown stated: "I'm going to come down on

the side of the preponderance of public comments and public testimony and the fact that the two major legislative bodies in this region, both the City of Spokane and the County of Spokane, are supporting expansion." AR00774. Commissioner Brown also acknowledged a 2007 staff recommendation that stated that "a quality viable recreational ski area is consistent with their mission and vision of the agency and the cultural heritage of Mount Spokane State Park." AR00772. Commissioner Lantz acknowledged that the Classification Decision was "guided by Park policy." AR00783.

4. The Commission Voted 5 To 2 To Approve The Classification Of The PASEA To Allow the Expansion.

MS2000's expansions aligned with the Commission's acknowledgement of the dual nature of its mission. The Commission voted 5 to 2 to adopt the classification of the PASEA to allow MS2000's expansion to proceed. AR00908. It concurrently adopted a plan of development to allow for the expansion of the Ski Facility to occur through a unanimous vote. *Id.* This appeal followed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. THIS CASE SATISFIES NONE OF THE STANDARDS OF RAP 13.4.

The Court has limited bases under it which it will accept review of a case. RAP 13.4 limits the Court's acceptance of a petition for review to those cases "in conflict with a decision of the Supreme Court...," "in

conflict with a published decision of the Court of Appeals...," involving a "significant question of law under the Constitution of the State of Washington or of the United States," or involving "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1)-(4). The Petitioners requested review of the unpublished decision of the Court of Appeals satisfies none of these criteria and therefore should not be granted.

B. THE 2010 POLICY DOES NOT MANDATE A PARTICULAR CLASSIFICATION OUTCOME AND THE COMMISSION FOLLOWED ITS POLICY.

1. The Court of Appeals Correctly Used the Rules of Statutory Interpretation to Hold the 2010 Policy was Permissive.

Petitioners entire argument rests upon Policy 73-04-1 entitled *Protecting Washington Parks' Natural Resources: A Comprehensive Natural Resource Management Policy* (the "2010 Policy"). CP 267-284. Petitioners present no argument to counter that the Court's holding that the 2010 Policy was permissive. The Petitioners are unable to point to a case, either from the Court of Appeals or the Supreme Court, holding that the Classification Decision's reliance upon the plain text of the 2010 Policy was in error. Since the Petitioners present no authority and do not argue that the Court of Appeal's use of the ordinary rules of statutory interpretation for

the 2010 Policy was in error, review should not be granted under RAP 13.4(b)(1) and (2).

The Court of Appeals used the well-recognized rules of statutory interpretation to hold that the 2010 Policy does not mandate a particular outcome.[2] *Decision,* p. 13, 16. The Court of Appeals correctly held that Section E.1 of the 2010 Policy used terms such as "should," "typically," and "may" establishes that the 2010 Policy was "discretionary" and did not control a particular outcome for the Commission's Classification Decision. *Decision,* p. 13. The Court of Appeals also correctly held that Section D.2 of the 2010 Policy did not dictate a particular result. *Decision,* p, 16. The Court of Appeals then went further to review WAC 352-16-20, the regulations adopted by the Commission for land classification decisions, to correctly state that land classification decisions are "discretionary" and that no specific land classification is "precluded." *Decision,* p. 17.

The Petitioners present no argument and no authority that the 2010 Policy was anything other than a discretionary land use planning document that guided the outcome of the Classification Decision, but did not control it. *See, e.g. Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (Courts will not consider a challenge unsupported by

[2] Ostensibly, the Commission was well aware of the PASEA and MS2000's long-standing efforts to expand the Ski Facility at the time it adopted the 2010 Policy.

argument or authority). The Decision does not conflict with *published* Washington State Supreme Court or Court of Appeals decisions relying upon the rules of statutory interpretation and therefore review should not be granted under RAP 13.4(b)(1) or (2).

2. The Commission Used the 2010 Policy to Make the Classification Decision.

The Petitioners argue that the Classification Decision was arbitrary and capricious because it represented a complete disregard of the 2010 Policy. First, as discussed above, the 2010 Policy did not mandate a particular outcome. Second, the record before the Commission at the time it made the Classification Decision represents the culmination of 15 years of environmental analysis and public input consistent with the statutory, regulatory and policy objectives of the Commission.

It is well settled law that a court's inherent authority to review an agency action is limited to determining whether they are arbitrary and capricious. Wash. Const. Art. IV, Section 6. The arbitrary and capricious standard requires that the decision is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. WUTC,* 148 Wn.2d 889, 905, 64 P.3d 606 (2003). 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. Dep't of Ecology,* 131 Wn.2d 373, 383 P.2d 139 (1997).

The Commission recognized that the record it developed prior to the Classification Decision was extensive. It received over 600 comments on the scoping for the EIS and over 700 comments on the draft EIS. AR00860; AR00873. It relied upon five separate public hearings and each agenda item from all prior public Commission meetings. AR00747.

During its deliberations it recognized that there was inherent environmental value of the PASEA and that the proposal did its best to "minimize and mitigate the environmental impacts that are inevitable." AR00774-775.[3] The Commission also recognized that there was a "preponderance of public comments and public testimony... supporting expansion." AR00774. It recognized that the Classification Decision represented a "reduced footprint of the expansion area." AR00777. It also acknowledged that the Classification Decision was "damn tough." AR00774.

[3] Petitioners routinely state that the PASEA includes old growth forests leading to the fallacy that the area MS2000 will be expanding the Ski Facility into necessarily includes old growth forests. First, the PASEA is an area 800 acres in size and the expansion area represents a significantly smaller portion of that area. AR00859-860. Second, MS2000 conducted studied the expansion area to determine whether it met any scientific definition of "old growth," by coring 108 trees in the expansion area. AR00111. The result was that the forests in expansion area "did not meet certain definitions of old growth." *Id.* It also found that mature forests occurred outside the area MS2000 would be expanding into. *Id.*

The Classification Decision is not the same type of agency decision as those overturned in *Rios v. Department of Labor Industries,* 145 Wn.2d 483, 39 P.3d 961 (2002) and *Probst v. Department of Retirement Systems*, 167 Wn.App. 180, 271 P.3d 966 (2012).

In *Rios*, the Department of Labor and Industries ignored previous analysis for a chemical contained in a pesticide and specifically found that the tests were "necessary and doable." *Rios,* 145 Wn.2d at 508. The court reversed the Department of Labor and Industries refusal to engage in the rulemaking activities because it ignored these prior findings and the feasible way to protect employees. *Id.*

In *Probst,* the Department of Retirement Systems specifically ignored an unfair result associated with its decision to calculate interest for the teacher's retirement system. *Probst,* 167 Wn.App. at 193-94. The court held that the ignoring the unfair result after having knowledge that the issue was arbitrary and capricious. *Id.*

Neither of these circumstances are present in the Classification Decision. The Commission did not ignore any of the information that was developed over the last 15 years. The Commission was fully aware of the potential environmental impacts that would occur if it approved the expansion. The Commission weighed and balanced the competing interests between environmental stewardship and recreation. The Classification

Decision does not conflict with prior published Supreme Court and Court of Appeals decisions reversing agency actions and review should not be granted under RAP 13.4(b)(1) and (2).

C. THERE IS NO SUBSTANTIAL PUBLIC INTEREST IN THE COURT REVIEWING THE CLASSIFICATION DECISION.

Petitioners argue that land classifications of Washington's parks are of such significance that the Court should review them under RAP 13.4(b)(4). While the land classifications are significant public actions and there is a substantial public interest in the outcome, these actions are vested in the Commission and only subject to being overturned when they are arbitrary and capricious. The substantial public interest in this case has been satisfied through the development of a record before the Commission for nearly 15 years that provided for substantial oral and written public comment.

The Commission is a governing body consisting of seven (7) citizens appointed by the governor with the advice and consent of the senate. RCW 79A.05.015. The governor has a statutory obligation to choose citizens "who understand park and recreation needs and interests." RCW 79A.05.015. Their statutory powers are broad. RCW 79A.05.020, .030, and .035.

The Commission is vested with the authority to engage in land classification decisions pursuant to WAC 352-16-020. These land management decisions are only subject to limited review under the heightened arbitrary and capricious standard of a constitutional writ and not the standards set forth in the Administrative Procedures Act ("APA"). RCW 34.05.010(4)(c); Wash. Const. Art. IV, Sec. 6. These decisions also do not carry with them any type of statutory formulaic decision requirements that may be found within the APA.

The substantial public interest in the land classification of Mt. Spokane has been addressed through 15 years of public input. It has been discussed in 5 public hearings conducted by the Commission. It has been a part of the overwhelming public support for the expansion. AR00774. The public's concerns about the adequacy of environmental review were addressed by Division II in 2013 when it overturned the Commission's prior land classification decision that allowed MS2000 to proceed without preparing an EIS. *See, e.g. The Lands Council v. Washington State Parks & Recreation Commission,* 176 Wn.App. 787, 309 P.3d 734 (2013).

The Classification Decision is exactly the type of decision that should remain in the sole province of the Commission and should only be disturbed when it can be shown that it was a willful and unreasoning action without regard for the facts and circumstances. The substantial public

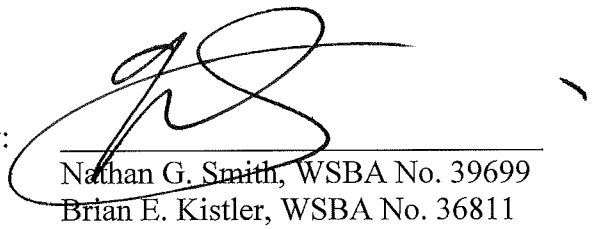
interest in land classification has been thoroughly vetted, addressed and followed in the Classification Decision, and therefore, review should not be granted. RAP 13.4(b)(4).

V. CONCLUSION

The standards set forth in RAP 13.4(b) narrowly limit the type of cases for which the Court grants review. Petitioners cannot establish that the requirements of RAP 13.4(b) have been met. For the reasons set forth herein, the Court should not grant review.

DATED this 26th day of May, 2017.

KUTAK ROCK LLP



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PROOF OF SERVICE

I CERTIFY that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of May, 2017, at Spokane, Washington.

Terry L. Strothman

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