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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 PROPOSED *AMICUS CURIAE* THE SPOKANE TRIBE OF INDIANS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

I. INTEREST OF THE SPOKANE TRIBE OF INDIANS

This case concerns decisions by the Washington State Parks and Recreation Commission ("Commission") to designate a portion of the 13,919acre Mount Spokane State Park for additional high intensity recreational use, and approval to clear cut ski runs on the northwesterly side of Mount Spokane or ***sdAulsum*** as it is known by the Spokane Tribe of Indians ("Tribe").

Prior to being forced onto the Spokane Indian Reservation after many battles with the United States government, the Tribe, comprised of the Upper, Middle, and Lower Bands of the Spokane Tribe lived and thrived from what is now the Idaho state line all the way to the confluence of the Spokane and Columbia Rivers. One geographic feature that played and continues to play an important role in the Tribe's culture and members' lives is Mt. Spokane, or ***sdAulsum*** located in the northeast quadrant of the Tribe's aboriginal territory.

sdAulsum is part of the traditional Upper Spokane band territory, and the Tribe is deeply rooted to the mountain. Several examples evidence this deep connection. For example, several Tribal elders and leaders hail from the area around Mount Spokane. Significant traditional plants grow on the mountain slopes. Tribal members still use this area for

gathering and cultural purposes. Such remaining, intact hunting and gathering patches are of critical importance to the Tribe.

In August of 2014, the Washington State Department of Archeology and Historic Preservation ("DAHP") designated Mount Spokane as a Traditional Cultural Property ("TCP") at the request of the Tribe. Furthermore, the Mountain still contains portions of the traditional summit trail, which has cultural, historic, and archaeological significance to the Spokane Tribe of Indians and portions of it lie within the Potential Alpine Ski Expansion Area ("PASEA"). On January 7, 2016, DAHP designated the site as part of the State of Washington Archaeological Site Inventory and assigned Smithsonian trinomial number 45SP00783 to the site. Accordingly, the Tribe has a significant interest in the outcome of this appeal because of its impact on Mount Spokane, but also the potential ramifications of the Parks Commission use or lack thereof of their own adopted policies when making decisions that impact the Tribe's aboriginal homelands.

The Commission manages another critical area of great importance to the Tribe, and that is the 14,000acre Riverside State Park upstream along the Spokane River from the Tribe's Reservation. The land within this Riverside State Park contains many of the Tribe's current and historic fishing sites, and the waters that run through the park may one day be

important in the effort to reintroduce extirpated salmon, steelhead and lamprey into the areas above Grand Coulee Dam. How the Commission follows its internal policies in the management of these sacred lands is of great importance to the Tribe and this case will impact how the Commission makes decisions not just for Mount Spokane State Park, but all Parks under its authority including Riverside State Park.

II. STATEMENT OF THE CASE

The Tribe hereby adopts the Appellants' statement of the case with the following additions. Mount Spokane is a registered Traditional Cultural Property ("TCP") by the Washington State Department of Archeology and Historic Preservation. AR 00429-00431, AR 00586. Within Mount Spokane State Park a significant portion of the areas above the 4000ft elevation level on Mt. Spokane are dedicated to developed alpine skiing. *See* ARSUPP 0145 & 0075. The approval of additional developed ski runs will increase this to well over 50% of the area of Mt. Spokane above the 4000ft elevation level. *See* ARSUPP 0075.

At the time of the November 20, 2014 decisions Commission members and staff acknowledged and understood the present and historical use of Mt. Spokane by the Spokane Tribe and other members of Tribes in the Region, and the cultural importance of the Mountain to the Spokane Tribe. AR 00787, 00865, 00425-00433 & ARSUPP 00139. The

Tribe submitted written comments and elected Tribal officials, members, and staff provided testimony at the November 19, 2014 public hearing. AR 00582-00588, ARSUPP 00071-00077.

Prior to and during its decision the Commission and staff did not analyze or describe its reasons for non-use of its policy titled "Protecting Washington State Parks' Natural Resources, A Comprehensive Natural Resource Management Policy" (hereinafter "Natural Resource Policy") that was adopted in August 2010. As noted in the Commission's brief in this case, the Commission only referenced the Natural Resource Policy in passing three times in the entire administrative record in this case, and did not once site the Land Classification section of it prior to Lands Council's attorney describing it in his comments at the hearing on November 19, 2014. AR00754-AR00755; *see* Respondent's Brief at 16.

The purpose of the Natural Resource Policy is stated as:

> The purpose of the Comprehensive Policy is to provide an over-arching natural resource policy for the Agency. It reflects a review of all known and relevant state statutes found in the Revised Code of Washington ("RCW"), administrative rules from the Washington Administrative Code ("WAC"), Commission policies, Administrative (Director) policies, and agency procedures, directives, and memoranda that address the protection and management of natural resources on State Park properties. This policy also reflects a review of the natural resource polices used by neighboring states' park agencies and by the National Park Service. Language from the latter was adapted and incorporated into many of the policy statements.

ARSUPP 00179-00180.

Staff briefed the Commission on November 20, 2014 before the decisions and stated, "there are significant natural resources within the PASEA." AR00752. When questioned by Commissioner Brown, the relevant portion the Natural Resource Policy that addresses land classification was referenced by staff as the "typical procedure with areas of significant natural resources." AR 00755. After this exchange no further discussion or analysis of the "typical procedure with areas of significant natural resources" was discussed or analyzed. *Id.*

III. ARGUMENT

A. Legal Standard

The arbitrary and capricious test is the standard utilized when a court is reviewing an agency action pursuant to a constitutional writ of review. *Saldin Securities Inc. v. Snohomish County*, 134 Wn2d 288, 296, 949 P.2d 370 (1998).

> Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.

Hillis v. Dep't of Ecology, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

There are no Washington cases specifically on point that address the situation where an agency adopts a policy that addresses a specific subject matter, and then silently changes the policy or fails to follow it when the agency makes a decision addressed by the that specific policy. However, federal law provides ample guidance on application of the arbitrary and capricious standard in this situation. Accordingly, within the below analysis the Tribe will place the facts within the rubric of federal precedent that addresses agency action under the arbitrary and capricious standard. The United States Supreme Court outlined the following guideposts: "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 555 U.S. 502, 515, 173 L.Ed.2d 738 (2009). Further, the Court outlined that agencies are free to change policy so long as it is permitted by statute, but it must explain the change. *Id.* The Ninth Circuit recently articulated the policy change standard as follows:

> [A] policy change complies with the APA if the agency (1) displays awareness that it is changing position, (2) shows that the new policy is permissible under the statute, (3) believes the new policy is better, and (4) provides good reasons for the new policy, which if the new policy rests upon factual findings that contradict those which underlay its prior policy, must include a reasoned explanation for disregarding the facts and circumstances that underlay or were engendered by the prior policy.

Organized Village of Kake v. U.S. Dept. of Agriculture, 795 F.3d 956, 966 (9th Cir. 2015)(*citing F.C.C. v. Fox Television Stations, Inc.*, 555 U.S. 502, 515, 173 L.Ed.2d 738 (2009).

B. The Commission failed to follow its adopted Natural Resource Policy

As an initial matter the Commission argues that it did follow the Natural Resource Policy and did not change it. The record does not support this argument. The Commission posits that this decision needs to be reviewed through the lens of additional sections of the Natural Resource Policy not Section E in isolation. They argue that consideration of Sections D and E of the Natural Resource Policy together justifies its decision. *See* Respondent's Brief at 18.

Section D. 1. states: "A Commission-approved land classification will be developed for all parks **to preserve the integrity of significant natural resources** through the identification of appropriate recreation uses and developments." ARSUPP 00189 (emphasis added). Section D. "2. Cultural Resources" states the following: "No single resource consistently takes priority over others. Where a resource of national, statewide or regional significance occurs, **its protection will take priority over other resource protection and use efforts**." *Id* (emphasis added). With these guiding principles outlined in Section D. Section E follows with:

> The Commission's 1995 land classification system provides management guidance for appropriate use and development intensities in specific areas of a park and the desired long-term boundary of that park parcel. Areas of a park containing natural resources of regional or statewide significance, unusual and/or sensitive habitats (e.g., bald eagles) 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 relatively high degree of resource protection and may offer the best option to address conflicting use issues as a specific site.

ARSUPP 00190 (emphasis added).

Here, this part of Mt. Spokane contains natural and cultural resources of regional significance, which by following Section D.2. would lead to the guiding principle of "its protection will take priority over other resource protection and use efforts" coupled with the guidance provided in Section E that these areas should be classified as Natural Areas, Natural Forest Areas, or Natural Area Preserves or possibly Resource Recreation. An outside observer reasonably would come to the conclusion that the Commission would choose one of the four low-intensity use classifications listed in Section E of the Natural Resource Policy.

However, that did not occur. According to the Commission, this area of Mt. Spokane is not a significant natural resource that should be subject to the "typical" procedure. The distinction as gleaned from the

Commission's litigation briefs appears to hinge on their concern over certain historical uses. The relevance of historical use within areas, which contain natural resources of regional or statewide significance, is not discussed in the Natural Resources Policy, and the Commission never provided any explanation in the record why Mt. Spokane should not be afforded the typical protections as outlined in the Natural Resources Policy.

Unfortunately, the above analysis is no better than the post hoc explanation for the decision provided in the Commission's litigation briefs because the Commission did not explain its decision to deviate from the "typical" procedure outlined in the Natural Resource Policy. It leaves the Tribe guessing at how the Commission arrived at its decision when the Natural Resource Policy appears to lead to a different result. To the Tribe this indicates an unexplained policy change within the Commission.

The arbitrary and capricious standard is a check to make sure the Commission considers the "facts and circumstances" surrounding their decision. Here the Natural Resource Policy should have been the "typical" procedure but was inexplicably ignored. Accordingly, the Commission's act was arbitrary and capricious. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. at 515.

C. Commission's change of its "typical procedure" resulted in an arbitrary and capricious act

The Tribe provides the following analysis utilizing the four factors described above. *See Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015)

1. The Commission did not indicate awareness of the policy change

First, as the record demonstrates and the Respondents' concede, the Natural Resource Policy was only mentioned three times in passing and was done so with no analysis in the administrative record or citation to the applicable sections of the policy. Further, the record indicates that the Commission or at least certain members may not have been even aware of the Natural Resources Policy's existence prior to the night before the decision to allow additional developed alpine skiing areas on Mt. Spokane. AR00755.

Second, nowhere in the record or the Natural Resources Policy is an alternative procedure described for properties that contain "significant natural resources," but are for one reason or another not subject to the "typical" procedure. The Commission in their brief makes the argument that the historical use of this area is the reason for the Commission's failure to follow the "typical" application of the Natural Resources Policy. This reasoning is flawed because historical use is not mentioned in the

applicable sections of the Natural Resources Policy; only the importance of protecting "significant natural resources." Although, the Commission argues it followed the Natural Resources Policy, albeit without mention, this differentiation based on certain historical uses is clearly a policy change because it is not mentioned or discussed anywhere in the current Natural Resources Policy. Accordingly, the Commission's failure to indicate its awareness to this policy change resulted in an arbitrary and capricious act. *See Organized Village of Kake*, 795 F.3d at 966.

(2) New policy may be permitted under the statute

The Tribe does not dispute that RCW 79A.05.305 gives the Commission some discretion to adopt new polices or to change policies with a clear and reasoned explanation for making the changes. However, this factor is not dispositive since the Commission failed to address and explain the change.

(3) The Commission failed to explain why the policy changes are better than prior policy

This factor is simple to analyze here because no discussion of the Natural Resource Policy or the changes to its application occurred in the record. Accordingly, the Tribe argues that this factor as applied in this case indicates an arbitrary and capricious act by the Commission.

(4) The Commission did not provide "good reasons" for the new policy

In *Organized Village of Kake*, the Ninth Circuit stated that the agency must provide "good reasons for the new policy, which, if the new policy rests upon factual findings that contradict those which underlay its prior policy, must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." 795 F.3d at 966 (internal quotations omitted). The reasons for the Commission's decision as explained by the Commission's counsel in their litigation briefs are difficult to discern, but appear to hinge on historical use. In short, the Natural Resource Policy as applied here must be changed to take into account a factor not mentioned in the current Natural Resources Policy: historical use. Respondent's Brief at 17. Assuming arguendo that this Court finds that the Commission's decision survives the first factor of this analysis given that the Commission failed to acknowledge in any clear way that it was changing existing policy, the Commission's change in policy was made based on erroneous facts and circumstances regarding the historical use. Further, it failed to explain why and how "historical uses" should be considered.

First, almost all of the referenced "historic uses" that the Commission supposedly gave great weight to were primarily not within the PASEA, but "were located just south of the PASEA." AR00859. As

clearly stated in the record the only historic activity of concern to the Commission was the fact that "[a] portion of the two historic rope tows passed through the southeast corner of the PASEA."AR00863. However, some Commission members gave great weight to the fact that skiing and development had historically occurred in the area to be developed even though the record clearly stated the majority of that activity was only near it. *Compare* AR00770 *with* AR00859. This particular historic use was used as justification to change the prior policy.

Second, the new policy failed to explain what "historical uses" were to be given weight in deciding how to classify this area of Mt. Spokane. Nowhere in the Natural Resources Policy or the record does it provide guidance on what historic activities should be given weight to guide the Commission on whether this should be a "typical" procedure or something else. For example, the staff stated the following in their recommendation:

> As a singular peak, Mount Spokane is a significant landscape feature for Native American tribes. Mount Spokane was and is used by tribal elders and others for gathering traditional plants, including bear grass, huckleberries and serviceberries. Tribal elders report that some berries taste sweeter on the higher elevations of the mountain. Western red-cedar, which grows within the PASEA, is sacred to the tribes; its bark and bows are used for ceremonies and in medicine.
>
> The Spokane Tribe has been intimately connected to Mount

> Spokane for as long as oral history recounts. For the Spokane Tribe, the significance of Mount Spokane includes: the location of a creation myth; a vision quest and prayer site; an important hunting and gathering location for first foods and medicinal plants; and a territorial marker.

AR00864.

However, in the staff recommendation and record, the decision on whether this "significant natural resource" was subject to the typical procedure or something different there was no discussion of how the Tribe's historical use should be weighted in the decision process. However, the Commission clearly did not view the Tribe's use since time immemorial as tipping the scales in the face of the historic rope tow passing over the southeast corner of the proposed new ski area sometime in the 1930s.

This highlights the problem with the new policy. Which historic uses will lead to the "typical" or something else procedures under the Commission? At this point it is left up to anyone's guess. The Natural Resources Policy adopted in 2010 makes no such distinctions and only addresses whether the resource is "significant," and unequivocally directs the Commission to adopt low-intensity use classification in order to protect it. As recognized by the staff and documented throughout the record, this area of Mt. Spokane is clearly a significant natural resource.

AR00752. Nowhere in the record does the Commission explain the need to treat significant natural resources differently based on historic use.

Additionally, the Commission in their deliberations considered additional factors mentioned nowhere in the current Natural Resource Policy and further failed to explain how these factors should be applied. For example, one commissioner expressed concern over the State Parks finances as a justification to make their decision. AR00773. Another expressed concern over the original deeds that transferred the land to the State Parks, even though staff clearly acknowledged that these deeds did not specify any specific park use. *Compare* AR 00781 *with* AR00863. In short, how any of the new factors are to be used outside the current Natural Resources Policy, or the relevancy of these additional policy considerations leaves one guessing how this new policy change will be implemented in the future. The Commission's policy change is not supported by the record and fails the "good reasons" portion of the analysis. *See Organized Village of Kake*, 795 F.3d at 967.

V. CONCLUSION

The Parks Commission oversees significant portions of the Tribe's aboriginal homelands. Lands that the Tribe exerted its sovereignty over not long ago. How the Commission makes decisions regarding the Tribe's aboriginal homelands is of great importance to the Tribe. The act of the

Commission to dedicate the majority of the alpine and sub-alpine areas of Mount Spokane above 4000ft on its face does not adhere to the Commission's adopted Natural Resource Policy.

If the Commission is allowed to ignore its own polices with respect to Mount Spokane State Park, it may very well do so for Riverside State Park and so on. The Commission's decisions must follow their adopted policies, or the Tribe and the general public are left to speculate as to how these remaining significant natural resources will be managed.

The Tribe respectfully requests that the Commission's act be vacated and remanded to the Commission for reconsideration in light of its adopted policies.

Respectfully submitted this 30th day of March 2016.

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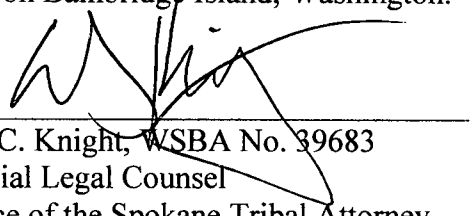
I certify under the penalty of perjury that the forgoing is true and correct.

Dated this 30th day of March 2016 on Bainbridge Island, Washington.



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