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NO. 94437-7

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION and MOUNT SPOKANE 2000,

Respondents.

WASHINGTON STATE PARKS AND RECREATION COMMISSION'S ANSWER TO PETITIONERS' MOTION FOR INJUNCTION

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Respondent, the Washington State Parks and Recreation Commission (Commission), submits this response to Petitioners' Motion for Injunction (Motion). Petitioners have moved the Court for an injunction prohibiting Respondent Mt. Spokane 2000 (MS 2000) from proceeding with work on an approved ski area expansion at Mount Spokane State Park. For the following reasons, this Court should deny Petitioners' Motion.

I. INTRODUCTION

The Commission is charged by law with managing lands under its control to promote both recreation and the protection of natural and cultural resources. The existence of these twin mandates necessarily requires the Commission to balance competing public interests. In this case, involving the expansion of the Mount Spokane Ski and Snowboard Park in an area of Mount Spokane State Park known as the "PASEA," the Commission did just that: it balanced the public interest in increased recreational opportunities, on the one hand, against the public interest in natural resource preservation on the other hand.[1] In classifying the lands of this part of Mount Spokane State Park, the Commission struck a thoughtful balance that allowed for a modest expansion of the ski area in only 279 acres of the 800-acre PASEA, with only 75 acres disturbed for

[1] PASEA stands for "Potential Alpine Skiing Expansion Area."

ski runs.[2] The remaining 630 acres of the PASEA were restricted in order to preserve undisturbed the natural resources in the area. As discussed in the Commission's Answer to Petitioners' Petition for Review, this action was not arbitrary and capricious.

In their Motion, Petitioners ask this Court to grant an injunction blocking work on the expansion of the ski area based *only* on consideration of the interests in preserving the natural resource values of the PASEA. But to do so will necessarily disturb the balance the Commission struck and deprive the public of recreational opportunities the Commission sought to provide, as well as depriving MS 2000 of revenues it expects from expanded skiing at the Mount Spokane Ski and Snowboard Park. For this reason, and because Petitioners are not likely to succeed on the merits of their petition in this case, this Court should deny the Motion. Should the Court grant the Motion and enter an injunction, it should require a bond as requested by MS 2000.

II. BACKGROUND FACTS

As part of its management of lands under its control, the Commission classifies areas of park land based on permitted use, with some lands being classified less restrictively to allow for more intensive

[2] The term "old growth" has been used repeatedly by Petitioners with respect to the trees in this 75 acres. Based on tree corings, the trees did not meet the definition of old growth used in the Spokane County Critical Areas Ordinance. AR 110-11; AR 542-43. Petitioners have submitted no scientific evidence to the contrary.

recreation and recreation-based development and other lands being classified more restrictively for natural and cultural resource preservation. *See* WAC 352-16-020. In November of 2014, the Commission approved a land classification for the PASEA that allowed a modest expansion of the Mount Spokane Ski and Snowboard Park, which is operated by MS 2000, a concessionaire. In particular, the Commission classified 279 acres of the 800-acre PASEA under the "Recreation" land classification, which allows for more intensive recreational uses and development. AR 859-69. The remaining 630 acres of the PASEA were classified more restrictively to preserve the natural resources of the area: 351 acres were classified as "Resource Recreation" and 170 acres were classified as "Natural Forest Area." *Id.* This 630-acre area will not be disturbed by the ski area expansion. *Id.* And, of the 279 acres within the expansion area, only 75 acres will be actually disturbed for ski run and other development. *Id.*

The Commission's land classification decision followed an extensive public process and thorough environmental review. A full Final Environmental Impact Statement (FEIS) pursuant to the State Environmental Policy Act (SEPA) was prepared following an exhaustive SEPA process. AR 202-419. The FEIS identified a number of mitigation measures to lessen the impacts to the environment caused by the expansion. AR 281-87. The public had ample opportunity to scrutinize the

proposed ski area expansion and, as part of the long period of consideration of expansion into the PASEA, the public was invited to provide comments regarding the expansion to the Commission and Parks staff on at least 12 occasions. AR 580. Public comments received through this process reflect strong public interest in the enhanced recreational opportunities that the expansion of the Mount Spokane Ski and Snowboard Park will provide. *See*, *e.g.*, AR 582-723. Public comments also reflect significant interest in conservation of the natural resources of the PASEA. *Id.*

The record contains the Commissioners' extensive deliberations on the question of whether to classify the PASEA in order to allow for the ski area expansion. AR 747-99. Members of the Commission spoke of their reasons for voting as they did. *Id.* These deliberations reflect that the Commission thoroughly considered and weighed the facts demonstrating the demand for enhanced recreational use of the PASEA on the one hand, and considered the facts demonstrating the natural and cultural resource values of that area on the other hand. *Id.* And these deliberations reflect that the Commission, in classifying the PASEA as it did, sought to balance the public demand for additional recreational opportunities with the public interest in natural resource conservation.

MS 2000's work to expand Mount Spokane Ski and Snowboard Park will occur according to a plan of development approved by the Commission. *See* AR 888-901. This plan of development places significant limitations on the expansion into the PASEA in order to minimize the environmental impact. *Id.* As relevant here, the plan of development limits work on the expansion to certain months of the year in order to protect wildlife during sensitive breeding seasons: work may not occur between March 1 and July 31. AR 893. And weather naturally limits such work to some extent during the winter months. Given this work window, even a short delay of the work will likely have the effect of delaying the expansion project for at least an entire year.

III. ARGUMENT

Over two-and-a-half years ago, the Commission approved the land classification for the PASEA that allowed for the expansion of Mount Spokane Ski and Snowboard Park. As discussed above, that decision followed many years of careful study and significant public scrutiny and input. In classifying the lands of the PASEA as it did, the Commission exercised the discretion afforded to it by law to balance competing interests: the desire among a significant portion of the public for greater recreational opportunities at Mount Spokane State Park, on the one hand, and the interest in natural resource conservation on the other hand. This

balance of public interests is built into the Commission's land classification: only 279 acres of the 800-acre PASEA (less than 35 percent) were classified to allow for intensive recreation and development; the remaining 65 percent of the PASEA was classified for less intensive recreation and no development in order to promote conservation.

In considering an injunction, this Court must "exercise[] [ ] caution" *Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d 702 (1955) (per curiam), and must balance the public interests to insure the potential harm justifies the stay. *Id.*; *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). In *Shamley*, this Court entered an injunction blocking a timber harvest based on a finding that an injunction was necessary to preserve the fruits of the appeal, and based on the conclusion that "no appreciable loss is likely to result to respondents if the sale of the timber is temporarily postponed." *Shamley*, 47 Wn.2d at 127.

In this case, it is of course true that some natural resources in the PASEA will be lost as part of the ski area expansion: 75 acres of the 279 acres classified as Recreation will be developed, including the cutting of trees for ski runs. But this loss of natural resources was carefully considered by the Commission in making its land classification decision and was balanced against the strong public interest in the enhanced

recreational opportunities that will result from the ski area expansion. The expansion of the ski area into the PASEA was limited to less than 35 percent of the land area, with the remainder of the area left undisturbed by development. An injunction blocking work on the expansion of the ski area will disturb the thoughtful balance the Commission struck following a years-long process of careful study and public process. Petitioners ask this Court to enter an injunction based *only* on the modest loss of natural resources that will occur as a result of work on the expansion, without any consideration for the loss of recreational opportunities that will result.

An injunction will deprive the recreating public of the opportunity to enjoy skiing and snowboarding on their public lands during the period of any further delay caused by the injunction. As discussed above, because of the limited work window built into the plan of development to protect wildlife during breeding seasons (March through July), AR 893, and given that construction is limited during the winter, work on the expansion must occur within a limited time window. An injunction that delays work during this period may well have the practical effect of delaying work on the expansion for at least an entire year. Furthermore, as explained by Respondent MS 2000, an injunction will deprive MS 2000 of substantial revenues it expects as a result of the ski area expansion. These losses

represent "appreciable loss[es]" that are all but certain to result if an injunction is entered.

Finally, the Court should consider that Petitioners are not likely to succeed on the merits of their claim. For the reasons discussed in the Commission's Answer to the Petition for Review, and as the trial court and the court of appeals concluded, the Commission's action to classify the lands within the PASEA was not arbitrary and capricious. Petitioners incorrectly argue that the Commission's action was arbitrary and capricious, claiming that because the Commission's decision classifying the PASEA was allegedly inconsistent with the Commission's natural resources policy, it was necessarily arbitrary and capricious. But Petitioners' argument is premised entirely on a misreading of the Commission's natural resources policy.

In fact, the part of the Commission's natural resources policy that applies to Commission land classification, Section E, provides guidance to the Commission on what classifications *should typically* apply to lands with high natural resource values. CP 281. Contrary to Petitioners' argument, Section E does not *require* only low-intensity recreational uses in areas with significant natural resources, such as the PASEA. Thus, the Commission's land classification decision did not deviate from its natural resources policy and was not arbitrary and capricious.

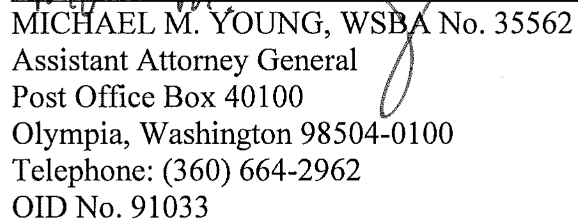
This Court should deny Petitioners' Motion. However, should the Motion be granted and an injunction entered, the Commission asks this Court to require a bond from Petitioners as requested in the Response of Co-Respondent MS 2000.

IV. CONCLUSION

Given the Commission's careful consideration of the land classification at issue in this case, the public's interest in recreation on its public lands, and the appreciable losses that are all but certain to result, Petitioners cannot establish that an injunction is justified in this case. This Court should deny the Motion. Should the Court grant the Motion and enter an injunction, the Court should require Petitioners to furnish a bond, as requested by MS 2000.

RESPECTFULLY SUBMITTED this 19th day of July, 2017.

ROBERT W. FERGUSON
Attorney General



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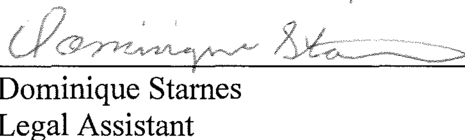
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of July, 2017, at Olympia, Washington.



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Washington State Parks and Recreation Commission's Answer to Petitioners' Motion for Injunction

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