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.

REPLY BRIEF OF APPELLANTS

David A. Bricklin, WSBA No. 7583
Jacob Brooks, WSBA No. 48720
BRICKLIN & NEWMAN, LLP
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154
(206) 264-8600
Attorneys for Appellants

P/M: 4/15/16

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

I. INTRODUCTION

The Washington State Parks and Recreation Commission acknowledges that the natural resource policy we discussed at length in our opening brief is "the applicable policy." Parks Br. at 3. The Commission also concedes the tremendous natural resource value of the lands at issue, referring to the "unique landscape" and its "significant habitat features." *Id.* at 1. The crux of the case, then, comes down to this: The agency asserts that the commissioners gave ample consideration to the applicable policy. Is there *any* evidence in the record to prove that? Notably absent from the agency's brief is a citation to any place in the record where the agency discussed the import of "the applicable policy." The agency does not contest that, but for one fleeting reference by agency staff during the commissioners' deliberations, there was no mention of "the applicable policy" at all. And while the agency dissembles by asserting that the policy was addressed in the FEIS, the agency does not dispute that the FEIS discussed other portions of the policy document, not the applicable policy which was to guide this decision.

The agency does a good job of emphasizing a number of other issues considered by the commissioners, *e.g.*, the disparate public opinion, the historic recreational use, and the desire of the concessionaire to expand

the ski area. But none of that is evidence that the commissioners considered the policy that was to guide their decision.

The purpose of the policy was to provide a framework for the commissioners to use when they assessed the public testimony and other evidence. That framework provides a clear preference for conservation when the lands at issue provide unusually high resource values.[1] In these limited circumstances, the policy framework is to protect the resource and look elsewhere to serve the agency's recreation agenda. There simply is no evidence that, in weighing all the evidence before them, the commissioners ever employed that decision-making framework which is established in their own "applicable policy." Instead, the Commission made its land classification decision in complete disregard of "the applicable policy." Therefore, the decision was arbitrary and capricious.

The agency certainly cannot say it *applied* the policy. The policy expresses a clear direction: "Areas of a park containing natural resources of regional or statewide significance . . . should be classified restrictively to allow only low-intensity uses and minor facilities development." CP 281. The Commission does not dispute that the area in question is among the highest natural resource value contained within the Washington state

---

[1] We sometimes use the shorthand phrase lands with "high resource values" for state park lands described by the policy as "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." CP 281.

park system, so the policy undoubtedly applies. But despite the applicability of the policy, the Commission classified these high resource value lands for high-intensity Recreation — precisely the *opposite* classification called for by "the applicable policy."

After not discussing or applying the applicable policy anywhere in the record and then making a decision that is directly contrary to the policy, the agency attempts to divert the Court's attention to other, immaterial matters and mis-characterizes our arguments and attacks those red herrings. For instance, the agency mis-characterizes our claim when it argues that the agency need not provide a "detailed explanation" of the applicable policy. Parks Br. at 12. We have made no such assertion. There is a wide gulf between ignoring a policy and analyzing it in detail. If the commissioners had provided a moderate level of analysis, we would not be here. The issue is not that the commissioners failed to provide "detailed" analysis; it was that they provided no analysis at all.

The agency also discusses at length the supposed historic use of parts of the disputed lands for a variety of recreational uses.[2] Parks Br. at 10-11. The agency attaches a lengthy appendix to its brief to drive home the point that there was some evidence of alpine recreational use seventy

---

[2] Curiously, the agency does not discuss the Spokane Tribe's historic use of the area, as discussed by the Spokane Tribe's amicus brief filed in this court.

years ago. While the degree of prior intense recreational use is disputed,[3] the factual dispute is immaterial. The applicable policy is based on the land's *current* resource value. Whatever limited alpine ski use may have taken place seventy years ago is irrelevant given the agency's acknowledgement that the land *today* offers a "unique landscape" with "significant habitat features."

The agency again mis-states the issue when it argues it is not responsible to respond in writing to every single policy it has ever passed. However, the policy at issue is not just one among hundreds of policies that the commissioners were to use to guide their decision. This is the *only* policy ever adopted by the agency to guide land classification decisions for lands "containing natural resources of regional or statewide significance." The agency does not contend otherwise.

Ultimately, the only explanations for deviating from the policy that the Commission can offer are impermissible *post hoc* rationalizations offered by its counsel or outlandish arguments that it should not have to provide any explanation — reasoned or otherwise — for its decision to depart from its policy. It is clear from the record that the Commission did not consider the policy, did not apply the policy, and did not explain why it felt that it was necessary to deviate from its policy. Such an approach

---

[3] *See* CP 425-6.

leaves the public wondering when the Commission will apply its own policies again, and in what circumstances the policies might have effect. The Commission's decision was unreasoned in light of its own ignored policies; was made without consideration of the pertinent facts and circumstances (*i.e.,* the applicable policy); and was, therefore, arbitrary and capricious.

II. ARGUMENT

A. The Agency's Policy Does Not Contemplate the High-Intensity Recreation Classification for Lands "Containing Natural Resources of Regional or Statewide Significance."

The Commission provides a truncated, misleading characterization of its policy: "The policy here summarizes competing agency priorities and guides the agency regarding the complicated task of balancing the priorities." Parks Br. at 22. However, the policy goes beyond just summarizing contradictory priorities and then giving the Commission free reign to make whatever decisions it wants. Instead, the policy provides clear direction to the Commission in making land classification decisions for areas containing high natural resource value.

> Areas of a park containing natural resources of regional or statewide significance . . . 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 policy has *already* completed the complicated task of balancing priorities: when areas of high natural resource values are at stake, the land should be classified restrictively to allow only low-intensity recreational use.

The Commission argues that because the policy uses the word "should" instead of "shall," it was free to disregard the clear direction that the policy provided. Parks Br. at 16. Appellants have never argued that the Commission was absolutely locked into the classifications described in the policy. Op. Br. at 44, n. 8. After all, the Commission "may change its policies without judicial second-guessing." *CBS v. FCC*, 663 F.3d 122, 138 (3rd Cir. 2011). The key is that the Commission must provide a reasoned explanation on the record for its policy change. *Id.* Even if the policy used the word "shall" rather than "should," the Commission could still change its policy, *but it must provide a reasoned explanation for doing so*. Here, the agency did not even appear to be aware that it was changing its policy, much less provide a reasoned explanation for doing so. Instead, it chose a classification that was unmistakably contrary to the policy. At the very minimum, it should have discussed the policy and provided some reasoned explanation for deviating from it. Neither

"should" nor "shall" allows the Commission to ignore its own applicable policy.

The Commission also attempts to undermine the clear direction of the applicable land classification policy by arguing that the "Commissioners had to consider several subsections of the policy" and suggesting that there was another portion of the policy that lends support to classifying the land with the most intensive use classification.[4] Tellingly, the Commission cannot cite to another portion of the Natural Resource policy which contradicts the clear direction provided in Subpart E.1. *See* Parks Br. at 18-19. In fact, other sections of the Natural Resource policy actually support the direction provided for land classification in Subsection E.1. For instance, the "Resource Use" section of the policy supports the notion that the balancing act of conservation and recreation was clearly tipped in favor of conservation on high value natural resource lands: "A Commission-approved land classification will be developed for all parks **to preserve the integrity of significant**

[4] There is no evidence that the Commission ever considered any other portion of the policy. Apart from public comment noting the existence of the applicable high resource value policy at the public hearing, staff's faint echo of that the next day, and the brief and fleeting references to the policy's irrelevant Subpart A.1, ("Biological resources—general principles") in the FEIS, there is no reference to any part of the policy at any place in the written or oral record. However, for the sake of this part of the argument, we will assume that the Commission actually read the whole policy or at least the additional sections referenced in the agency's brief on appeal. We can make that assumption carefree because the additional sections cited in this brief are irrelevant to the issue presented by the Commission, as we show in the text above.

natural resources through the identification of appropriate recreation uses and developments." CP 277 (emphasis supplied). The next subsection goes on to state: "Where significant natural and cultural resources exist at a site or within a landscape, agency staff **must protect the integrity of all significant resources**." *Id.* (emphasis supplied).

Considering the policy in its entirety actually provides even more clarity on the land classification decision framework: Balancing recreation and conservation policy objectives can occur on other lands; but on lands of high natural resource value, "all significant resources" "must [be] protect[ed]." The applicable policy provides clear direction to avoid the high impact Recreation classification for these lands. None of the other policies say anything to the contrary.

Ultimately, the direction the policy provides is unambiguous: When lands of high natural resource value exist, they should not be classified to allow high-intensity recreation. The agency balanced the competing goals of conservation and recreation years before it made the land classification decision for Mt. Spokane. When lands of high natural resource value are at stake, the balance is unequivocally in favor of conservation.

B. The Commission Did Not Apply Its Land Classification Policy to Its Land Classification Decision

The Court should reject the Commission's assertion that it applied the applicable land classification policy to this land classification decision. The Commission claims that "[t]he record demonstrates the Commission applied the policy; it did *not deviate from established methods of applying it*." Parks Br. at 20-21 (emphasis in original). But tellingly absent is any citation to the record where the agency gave any meaningful consideration to the applicable policy.

As we noted in our opening brief, the relevant policy was not even mentioned by the Commission until shortly before it made its ultimate decision, and even then, the Commission staff merely acknowledged its existence and nothing more. Op. Br. at 26 (citing AR 00754-755).

The agency continues to completely mischaracterize the record when it asserts that the "policy itself was referenced three times in the EIS." Parks Br. at 16. But as we explained in our opening brief (Op. Br. at 24), the FEIS only made reference to Subsection A.1 of the document, entitled "Biological resources — general principles," not the relevant policy at issue here, Subsection E.1, entitled "Land Classification." *See* AR 00020, AR 00079, and AR 000532. The Commission's reasoning that the commissioners read the FEIS, the FEIS mentions the policy, and,

therefore, the commissioners carefully considered the applicable land classification policy is utterly flawed because the FEIS never mentions the applicable land classification policy.

We explained in detail in our opening brief (Op. Br. at 24-25) that the fleeting references to the policy document in the FEIS included no reference to (let alone discussion of) the applicable land classification policy. The agency ignores this distinction in its response. But ignoring the distinction will not make it go away.

The absence of *any* discussion of the applicable land classification policy in the FEIS is especially pronounced because the Commission was making a land classification decision and the FEIS was entitled "Combined Final Environmental Impact Statement **for the Classification of Land** and Ski Area Expansion." AR 00001 (emphasis supplied). The agency never explains why an FEIS for a land classification decision for lands with a "unique landscape" and "significant habitat features" (Parks Br. at 1) never discusses the land classification policy for lands "containing natural resources of regional or statewide significance."

That the Commission failed to consider and apply the applicable land classification policy is further demonstrated by how much its decision deviated from the guidance provided by the policy. The agency suggests that its decision did not deviate, but rather was consistent with the policy.

In support of this claim, the agency asserts it complied with the policy because it chose a "compromise classification" by only classifying 279 acres of the 800 unclassified acres as high-intensity Recreation. Parks Br. at 16. However, the policy does not contemplate classifying *any* portion of high value natural resources land as high-intensity Recreation. To the contrary, the policy specifically offers a different compromise: utilizing the intermediate intensity "'Resource Recreation' classification [which] 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 (emphasis supplied). The Commission's *post hoc* explanation that it actually complied with the policy by using the single classification *not* offered by the policy (and labeling that unauthorized classification as a "compromise" when the policy identifies a different, less intensive classification as the "compromise") demonstrates the agency's continued indifference to the words and direction of the applicable policy.

C. The Agency's Red Herring Arguments Do Not Address the Agency's Failure to Consider and Apply Its Applicable Policy.

1. The agency's decision does not stem from a mere difference of opinion.

The Commission attempts to obfuscate its complete failure to consider or apply the applicable policy (or explain its deviation from the

policy) by pointing to the disparate positions voiced by the public and characterizing the matter as a mere difference of opinion. The comments to the Commission certainly show that there were many interested parties with divergent ideas. The appellants agree with the Commission that "[b]oth interests have a right to full consideration **under the policy**." Parks Br. at 26 (emphasis supplied). However, the crucial detail here is that after considering all of the public comments and the other evidence before them, the commissioners were supposed to use the applicable land classification policy to guide their decision "under the policy." Thus, for instance, if the public testimony or other evidence had led the commissioners to conclude that the lands' natural resource values were not of regional or statewide significance, then the commissioners could have used that testimony to conclude that a different land classification policy applied. Or, given the agency's acknowledgment of the land's high resource value, the commissioners could have used the public input and other evidence to help them choose between the several low and moderate intensity land classification options available for lands of regional or statewide significance.

But the commissioners did not use the public input or other evidence to resolve those or any other issues "under the policy." Instead, the Commission opted to ignore the applicable policy and engage in *ad*

hoc "balancing" of recreation and resource protection on the back of lands that were to be protected from intense recreational development. The commissioners' willingness to hear from the public is commendable. But their indifference to their own adopted land classification policy is not. It is that indifference which renders their decision arbitrary and capricious.

As the agency acknowledges, the arbitrary and capricious standard is not a rubber stamp. Parks Br. at 31. The arbitrary and capricious standard "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). The fact is that throughout the lengthy deliberations, the Commission never discussed or used the applicable policy to guide their decision and never provided any explanation for deviating from the applicable policy. The agency argues that each commissioner had "to search their souls for an acceptable land use that appropriately balanced the competing interests," (Parks Br. at 32) but the commissioners (or at least five of them) did this in complete disregard of the attending facts and circumstances — namely, their own land classification policy.

The agency presents the agony of the commissioners struggling to navigate their way through the competing interests as justification for ignoring the policy. Parks Br. at 31-32. In our opening brief, we

explained that the applicable policy could (and should) have been used to help the commissioners find safe passage. Op. Br. at 46. The failure of the commissioners to use the compass they had developed themselves four years earlier is the height of indifference and unreasoned consideration, proscribed by the arbitrary and capricious standard.

2. The arbitrary and capricious standard does not create a "trap" for an agency.

The Commission attempts to minimize its unreasoned decision by claiming that the arbitrary and capricious standard "does not mandate an agency to expressly cite and discuss in detail how its discretionary decision relate to every applicable agency policy." Parks Br. at 31. In the Commission's view, being forced to actually explain its decision in light of its guiding policies would create a "trap" for agencies. *Id.* The agency's efforts to avoid accountability suffer from numerous flaws.

First, the agency's paranoia is founded on a mis-characterization of appellants' argument. The appellants are not asking the Commission to provide voluminous written reports on irrelevant agency policies. The appellants did not pick a random policy out of hundreds of agency policies to trap the agency on a technicality. Rather, the appellants are merely asking the Commission to explain its decision to deviate from the only

policy that directly addresses land classification when it made its land classification decision.

Second, relevant federal cases have clearly said that when an agency changes its policy, it should make a reasoned explanation on the record. "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 (emphasis supplied). "The Department was required to provide a reasoned explanation for disregarding the facts and circumstances that underlay its previous decision." *Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956, 969 (9th Cir. 2015).

Third, not only does the Commission's argument have no basis in law, it has not basis in logic either. Allowing an agency to make drastic changes in its policies without any explanation leaves the public guessing as to when the policy will be used by the agency in the future and under what circumstances it might apply. *See Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) ("the core concern underlying the prohibition of arbitrary and capricious action is that agency 'ad hocery' is impermissible").

Fourth, the arbitrary and capricious standard does not deprive agencies of administrative flexibility. The Commission argues that the simple requirement to provide a reasoned explanation for policy changes

"frustrates the difficult task of seeking solutions that serve the needs of all affected public." Parks Br. at 31. But to the contrary, applying the Commission's policy would have made the Commission's task easier. Many of the commissioners saw the decision as difficult, remarking, for instance, that the land classification decision "is a damn tough decision." *See* Op. Br. at 27. But the policy provided the agency with a reasoned, thoroughly vetted framework for making the decision — and provided clear direction to protect these high valued lands (in exchange for greater recreational opportunities elsewhere). The decision was made tougher by ignoring the policy that should have provided the necessary direction.

If the Commission felt that the policy was not suited for this situation, then it would not have been overly burdensome for the Commission to explain to the public, which relies upon the Commission's policy, why the Commission felt it was necessary to change its policy. Simply ignoring the policy and choosing contrary to the policy's direction is the perfect example of arbitrary and capricious agency action — an unreasoned decision made without any consideration of the attending facts and circumstances (here, the applicable agency policy).

Fifth, there was no trap because the Commission had multiple opportunities to address the relevant policy. For instance, the FEIS contains a section which analyzes "Land Use" and specifically mentions

the Commission's Land Classification System established by WAC 352-16-020. But the FEIS fails to even mention the applicable policy. AR 00247-00248. The entire land classification deliberation process was, as the Commission notes, lengthy and included staff reports, staff presentations, and discussion among the Commissioners themselves. The Commission had multiple opportunities to discuss the policy. This was no trap to nab an unsuspecting agency. Rather, it was one missed opportunity after another as the agency assembled data, reports, written and oral testimony, and draft and final environmental impact statements — but never once considered the applicable policy.

3. The cases cited by the Commission are not relevant to the Court's decision.

Neither case cited by the Commission addresses the situation of an agency deviating from its own policy. In fact, *State v. Brannan*, 85 Wn.2d 64, 530 P.2d 322 (1975) actually supports the appellants' position.

In *Brannan*, the agency had a policy and stuck to it. In that case, landowners challenged the route selected by the Department of Transportation for a new highway. The route skirted nearby farmland and crossed the petitioners' land instead. The agency had a policy "to conform its routes and designs to the expressed needs and wishes of the community, wherever possible." *Id.* at 76, 530 P.2d 322. The court found

that "there can be no doubt *from the record* that the protection of agricultural lands was one of the foremost objectives of the people who live in this area." *Id.* (emphasis supplied). "Since agriculture is the dominant concern of the community and its economic life depends upon it, it can hardly be said that the highway commission acted arbitrarily and capriciously when it elected to route this highway so as to avoid the taking of cultivated land wherever possible." *Id.*

Thus, in *Brannan*, "the record" created "no doubt" that the agency had adhered to its policy. If the Parks Commission had adhered to its applicable policy, as the agency did in *Brannan*, this appeal would not have been necessary.

Puget Sound Crab Ass'n v. State, 174 Wn. App. 572, 300 P.3d 448 (2013) deals solely with an agency's discretion in adopting a policy and rule — as opposed to whether the agency considered its existing policy in making a project-specific decision. *Puget Sound Crab* does not address an agency's failure to adhere to existing policy or to explain its departure from its existing policy, and therefore it is not "instructive" as the Commission claims. Parks Br. at 29.

III. 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 15th day of April, 2016.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

David A. Bricklin, WSBA No. 7583
Jacob Brooks, WSBA No. 48720

Attorneys for Appellants

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, PEGGY S. CAHILL, 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 the Reply Brief of Appellants to be served on:

James R. Schwartz
Senior Counsel
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(Attorney for Washington State Parks and Recreation Commission)

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to jims@atg.wa.gov, nancyh5@atg.wa.gov; FWDEF@atg.wa.gov

Michael M. Young
Assistant Attorney General
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
(Attorney for Washington State Parks and Recreation Commission)

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to michaely@atg.wa.gov

Nathan G. Smith
Matthew A. Mensik
Witherspoon, Kelley, Davenport & Toole, P.S.
422 W. Riverside Avenue, Suite 1100
Spokane, WA 99201-0300
(Attorneys for Mt. Spokane 2000)

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to ngs@witherspoonkelley.com, mam@witherspoonkelley.com, karinah@witherspoonkelley.com, shannayd@witherspoonkelley.com

Ted Knight
Spokane Tribe
P.O. Box 100
Wellpinit, WA 99040

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to tedk@SpokaneTribe.com

Court of Appeals
Division II
950 Broadway #300
Tacoma, WA 98402

[X] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[ ] By E-Mail to coa2filings@courts.wa.gov

DATED this 15th day of April, 2016, at Seattle, Washington.

Peggy S. Cahill

PEGGY S. CAHILL