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,

Appellants,

v.

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

Respondents.

APPELLANTS' MOTION FOR INJUNCTION

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I. IDENTITY OF MOVING PARTY

Appellants John Roskelley, Fayette Krause, Spokane Audubon Society, Spokane Mountaineers, and the Lands Council (collectively, "Appellants") seek the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Appellants request an injunction pending appeal, pursuant to RAP 8.3, to prevent the respondents, Washington State Parks and Recreation Commission ("the Commission") and Mount Spokane 2000 ("MS 2000") from logging 79 acres of old-growth forest in Mt. Spokane State Park and from constructing a ski area expansion of Mt. Spokane Ski and Snowboard Park.

Given the likelihood of MS 2000 beginning land-disturbing activities on August 1, 2017, the Appellants also request that this Court grant accelerated review of this motion pursuant to RAP 18.12 and issue its decision on this motion by July 31, 2017.

III. FACTS RELEVANT TO MOTION

This case involves MS 2000's proposal to expand an existing ski area into an old-growth forest on the west side of Mt. Spokane State Park. *See* Appendix A at 2-10. Because the ski area and proposed expansion area is located within a state park, the Commission is ultimately responsible for approving the expansion and adopting the necessary conditions for development.

On April 26, 2017, the Appellants filed a petition for review with this Court. On May 26, 2017, both the Commission and MS 2000 filed responses to the Appellants' petition for review. On June 26, 2017, Spokane Riverkeeper filed a motion for leave to file an amicus curiae brief in support of the Appellants' petition for review and an amicus curiae brief. Answers to the amicus brief are due July 19, 2017.

A. An Old Growth Forest is about to be Clear-cut.

MS 2000 is about to cut 79 acres of rare, old growth forest in Mt. Spokane State Park. Old growth forests are scare anywhere in the State, but particularly in Eastern Washington. The important habitat and resource values provided by the forest is not in dispute. Various state agencies—including the Park Commission's own staff and MS 2000's own consultants—along with tribes and members of the public, have recognized the exceptional quality of these old-growth trees.

The Parks Commission's chief wildlife scientist, Robert Fimbel, Ph.D, was unequivocal in identifying the area's stellar resource value, referring specifically to how the area meets the criteria of one of the three most restrictive land classifications (Natural Forest Area):

> The forests of the [west and northwest side of Mt. Spokane] **meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well).**

CP 214. (emphasis supplied). MS 2000's independent consultant found "significant areas of old-growth forest" and concluded that "[t]here is no

lack of habitat for wildlife species that depend on coarse woody debris for any of their life stages or activities." CP 151. Likewise, the Department of Natural Resources characterized the subject lands as "a valuable conservation asset of uncommon quality." CP 154. The Washington Department of Fish and Wildlife determined that Mt. Spokane State Park provides sensitive habitat not available elsewhere in the region for twenty-one important wildlife species present in the park. AR 00323-330. *See generally,* Appendix A; Appendix B at 5-12.

Under MS 2000's proposal, the old-growth forests on the west side of Mt. Spokane will suffer irreparable harm. At least 79 acres of the forest will be clear-cut to make way for ski trails and chairlifts. AR 00274. But the ecological damage will be even more widespread because the remaining forest will be fragmented, which creates more widespread adverse impacts on wildlife and wildlife habitat. AR 00333. As the Washington Department of Fish and Wildlife has noted, "the permanent removal of old growth/mature forests will result in *permanent* loss or conversion of wildlife habitat and fragmentation of wildlife habitat resulting in decreased connectivity and a decrease in habitat effectiveness . . . Permanent impacts such as these will be difficult to mitigate and can only be avoided by selecting the No-Action Alternative." CP 156 (emphasis in original, internal quotations omitted). The public (and the Appellants and their members) hike through the old-growth forest and enjoy viewing the wildlife that depends on the unique habitat provided by the forest. The public's and

Appellants' use and enjoyment of the unmolested forest will be irreparably harmed if logging occurs. The decimation of the old-growth forest will be permanent and cannot be mitigated.

B. The Commission's Deviation from Its Own Policy is the Basis of this Appeal

The Washington State Parks and Recreation Commission has a dual mission: to protect natural resources in state parks and to provide for recreational opportunities. AR 00782. Often, the Commission can carry out these twin aims without any conflict. But when these twin aims are in conflict, the Commission has an adopted policy that resolves the conflict in favor of conservation, not recreation. However, when the Commission made its final land classification decision that would allow the ski area expansion to proceed, it completely ignored its own policy and actually did the *opposite* of the direction provided by the policy. Even worse, the Commission provided no explanation for why it was so thoroughly disregarding its own agency policy. The Commission's land classification decision made contrary to its own policy and without explanation for deviation from its policy is the underlying issue of this appeal. *See* Appendix A at 5-10; Appendix B at 12-28.

C. MS 2000's Imminent Plans to Log the Old-Growth Forest

MS 2000 can begin logging operations on August 1, 2017 and it has given no indications that it will forego logging operations while this Court considers the Appellants' petition for review.[1]

MS 2000's proposed expansion is guided by a plan of development approved by the Commission on November 20, 2014. *See* Brooks Decl. (July 12, 2017); Ex. A. The plan of development prohibits MS 2000 from logging and other work during a critical wildlife breeding period from March 1 to July 31 of each year. *Id.* at 10. The plan of development also prevents MS 2000 from engaging in work until MS 2000 has obtained all of the permits necessary for the proposed ski area expansion. *Id.* at 1-2.

The Appellants received a temporary injunction that prevented MS 2000 from engaging in any logging or ground-disturbing activity from the Court of Appeals on January 22, 2016, due to MS 2000's imminent plans to begin logging operations. Brooks Decl.; Ex. E.

On February 3, 2016, the Washington State Department of Archaeology and Historic Preservation ("DAHP") wrote to Spokane County and the Commission, informing them that RCW 27.53 requires MS 2000 and the Commission to obtain a permit before any ground disturbing activities can take place due to a recorded archaeological site in the proposed project area. Brooks Decl.; Ex. B. On February 5, 2016, the Commission informed MS 2000 that tree removal and construction could

1 Appellants requested for MS 2000 to indicate when it intends to begin logging operations, but MS 2000 has not, yet, responded to the request. Brooks Decl., ¶ 8.

not take place until a permit was issued by DAHP, per the requirements of the plan of development. Brooks Decl.; Ex. C.

After it became clear that MS 2000 did not have all of the necessary permits to begin logging operations, the Appellants withdrew their motion for injunctive relief on February 10, 2016. Brooks Decl.; Ex. F.

MS 2000 undertook the necessary studies for the permit application, and DAHP made its final permit decision on March 8, 2017. Brooks Decl.; Ex. D. At that point, while this case was still pending in front of the Court of Appeals, MS 2000 had all necessary permits in hand. However, MS 2000 could not begin clearing trees or engaging in construction activities because MS 2000 did not receive the DAHP permit until after the critical wildlife breeding season had begun on March 1. MS 2000 is prevented from engaging in tree clearing or construction until the critical wildlife breeding season ends on July 31, 2017. Brooks Decl., Ex. A at 10.

IV. GROUNDS FOR RELIEF AND ARGUMENT

MS 2000's plans to expand the existing ski area will irrevocably alter the west side of Mt. Spokane and destroy the fruits of a successful appeal. Simply put, the trees cannot be put back after the chainsaws have removed them. Therefore, an injunction is appropriate to keep the forest intact while this Court resolves this matter.

RAP 8.3 provides that "[e]xcept when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of

review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party."

Under RAP 8.3, this Court has the power to issue an injunction pending the outcome of an appeal "to preserve the fruits of the appeal in the event it should prove successful." *Columbian Pub. Co. v. City of Vancouver*, 36 Wn. App. 25, 27 n. 1, 671 P.2d 280 (1983). This Court has held that when ruling on a motion for injunctive relief pending appeal, an appellate court should consider the merits of the underlying appeal only to the extent necessary to determine if it raises "debatable issues." *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956). Moreover, "if the harm is so great that the fruits of a successful appeal will be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (citing *Shamly v. Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955)).

As discussed below, this appeal clearly raises more than debatable issues. An injunction is also necessary to preserve the fruits of the appeal; namely, the preservation of an unfragmented, important old-growth forest located in Washington's biggest state park. Therefore, this Court should issue an injunction to prohibit the Commission and MS 2000 from logging the area pending final resolution of this appeal.

A. The Appellants Have Raised Clearly Debatable Issues.

As explained in the Appellants' petition for review and opening brief in the Court of Appeals, this appeal raises issues that are more than debatable. *See* Appendix A; Appendix B. There is no question that the Commission's natural resource policy applies to the subject area within Mt. Spokane State Park, due to the unique and high quality natural resources present in the area. As the dissent described in the Court of Appeals' opinion below, the natural resource policy expresses a clear preference for classifying unique and valuable state parks lands restrictively within the Commission's land classification system, and the Commission undoubtedly did not comply with the policy's direction. *See* Appendix C at 33.

The Commission provided no explanation for so thoroughly disregarding its own policy. Both Washington state and federal caselaw have clearly held that such action is arbitrary and capricious. *See* Appendix A at 11-14; 16-18. Those cases and the record here demonstrate that the Appellants have presented issues that are well beyond being merely debatable.

B. The Harm Resulting from the Implementation of the Project Necessitates an Injunction.

The irreversible harm that would result from the clear-cutting of old-growth forest and construction of high-intensity recreational facilities warrants injunctive relief because the fruits of the appeal—the old-growth forest on the west side of Mt. Spokane—will be lost without an injunction. The public, the Appellants, and their members will not be able to enjoy the

old-growth forest in its current untrammeled state, and they will suffer direct harm as a result of the clear-cutting and construction of the ski area.

This Court has granted injunctive relief to prevent logging pending appeal before. In *Shamley v. City of Olympia*, 47 Wn.2d 124, 125, 286 P.2d 702 (1955), citizens of Olympia sued to enjoin the City of Olympia from awarding a contract to harvest timber in the "Old Olympia Watershed." After the superior court dismissed their complaint, the citizens moved the Supreme Court for a temporary restraining order to prevent the City from awarding a contract to log the area. *Id.* at 126. Similar to this case, the citizens also sought an injunction pending appeal to "preserve the natural beauty" of the Old Olympia Watershed. *Id.* at 125.

The Supreme Court granted the citizens a temporary restraining order and also an injunction pending appeal. *Id.* at 126-27. The Court explained that absent an injunction prohibiting logging in the Old Olympia Watershed, "the subject matter of the [appeal] will have been destroyed, and a successful prosecution of the appellants' appeal will avail them nothing." *Id.* at 127.

Here, like the citizens in *Shamley*, the Appellants are seeking to preserve an important old-growth forest that is valuable for its natural beauty, recreational opportunities, and ecological values. As in *Shamley*, the forest on the west side of Mt. Spokane will be permanently harmed and the fruits of a successful appeal will be lost. An injunction is necessary to preserve the fruits of the appeal should the Appellants ultimately prevail.

C. The Appellants Request that the Court Rule on this Motion by July 31, 2017.

Given the likelihood of logging beginning on August 1, 2017, the Appellants respectfully request that this Court grant expedited review of this motion pursuant to RAP 18.12 and issue its decision on this motion by July 31, 2017. All parties will be able to file any answers and reply by July 27, per the timelines directed in RAP 17.4(e). Issuing a decision by this date will provide clarity to all parties and will preserve the fruits of this appeal.

V. CONCLUSION

Irreparable harm to the Appellants, their members, and the old-growth forests of Mt. Spokane State Park is certain to occur if logging and construction is not enjoined. The issues presented to the Court are, at the very least, debatable. The Court should enjoin MS 2000 and the Commission from undertaking any logging or other ground-disturbing activities in furtherance of the proposed ski area pending a final order of this Court.

Further, given the likelihood of logging beginning on August 1, 2017, the Appellants request that the Court grant expedited review pursuant to RAP 18.12 and issue its final order on this motion by July 31, 2017.

Dated this 12 day of July, 2017.

Respectfully submitted,

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PETITION FOR REVIEW

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APPENDIX A

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I. IDENTITY OF THE PETITIONERS

John Roskelley, Fayette Krause, Spokane Audubon Society, Spokane Mountaineers, and The Lands Council (collectively, "Roskelley"), appellants below, hereby petition for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Roskelley seeks review of the unpublished opinion by the Court of Appeals for Division I in the case of *Roskelley, et al. v. Washington State Parks and Recreation Commission, et al.*, (March 28, 2017) (App. A hereto).

III. ISSUE PRESENTED FOR REVIEW

Is an agency's decision that departs from the agency's own established policy without a reasoned explanation and contrary to the agency's own findings arbitrary and capricious?

IV. STATEMENT OF THE CASE

Mt. Spokane State Park is the jewel of the Washington State Parks system. The park is the largest in the state and, thus, has been able to provide for the agency's twin missions: lands for recreation and lands for resource protection. A portion of east side of the mountain and park is dedicated to a ski resort run by a private concessionaire, while the western

slope of the mountain is an old-growth forest that provides important habitat for a wide variety of wildlife species.

This case arose out of the ski concessionaire's desire to expand the ski area into old growth forests on the west side of the mountain. The agency's biologist characterized those forests as the "highest . . . quality" in the entire state park system. CP 214. Thus, the proposal posed a conflict between the agency's goals of increasing recreation and protecting natural resources.

Fortunately, the Commission had a policy in place to guide them through resolution of this conflict. The policy distinguishes between the park system's highest quality natural resource lands and other lands. For most lands, the policy provides for a case-by-case determination with suggestions for finding the correct balance between these sometimes-competing goals. But a different direction is provided for the park systems' most valuable resource lands. On those high valued and rare resource lands, the agency policy directs the Commission to preserve the lands, and it does not provide for downhill skiing or other intense recreational development.

If the agency had considered its own policy, the Commission's choice would have been easy. It would have recognized that the balancing of recreational and resource protection interests should not occur on the park system's most valuable resource lands. Instead, agency staff and the

Commission all but ignored the adopted policy. On a divided vote, the Commission approved the proposal to allow this intense development on the park system's highest quality natural resource lands.

This Court has repeatedly held that "agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *See e.g., Wash. Indep. Tele. Ass'n v. WUTC*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003); *Pierce County Sherriff v. Civil Service Com'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). The Commission's decision is precisely the type of agency action which falls under the arbitrary and capricious standard because the agency ignored the attending facts and circumstances of its own policies. Furthermore, the agency made its decision in an unreasoned manner by offering virtually no explanation for its decision that contravened its own policy.

A. Facts Giving Rise to the Dispute

In the Washington state parks system, Mt. Spokane stands alone. The park provides high-quality, uninterrupted habitat that is unmatched in the entire park system. AR 00206. The Commission's chief wildlife biologist concluded that the lands at issue in this case possessed "the highest level of natural resources quality in the state park system." CP 214. The Washington Department of Natural Resources concluded that "much of the

park was and still is a natural forest will be emphasized to define it as a valuable conservation asset of uncommon quality." CP 154. The Washington Department of Fish and Wildlife concluded that the lands in question provide significant habitat for wildlife and that ski area development would result in permanent impacts to wildlife habitat and habitat fragmentation that would be difficult, if not impossible, to mitigate. CP 156. Even the concessionaire's own consultant, Pacific Biodiversity Institute, concluded that "[t]here are significant areas of old-growth forest within the [proposed expansion area]" and that the forest covering the western and northwestern slopes of Mt. Spokane contains trees that show no signs of human logging and contain stands of old-growth timber that provide ideal habitat for several species of particular concern. CP 151.

In addition to the valuable natural resources provided on the western slopes of Mt. Spokane, the area contains valuable cultural resources for the Spokane Tribe. The Spokane Tribe has used the mountain for a wide variety of purposes, such as gathering traditional food and medicine, since time immemorial. *See* Spokane Tribe *Amicus Curiae* Br. at 4.

An existing privately-operated ski area, the Mount Spokane Ski and Snowboard Park, covers 1,425 acres of the park on the north, northeastern, and eastern faces of the mountain. AR 00208. MS 2000, a private concessionaire, operates the existing ski area.

The area of Mt. Spokane State Park at issue is an approximately 800-acre portion of the park that covers most of the western and northwestern sides of Mt. Spokane. AR 00208. In 1999, the Commission classified all lands within Mt. Spokane State Park for a variety of uses under its Land Classification System except for the 800-acre portion in question, which remained unclassified. AR 00207.

To allow expansion of the ski area into the old growth forests on the western and northwestern sides of Mt. Spokane, the area first had to be classified under the Commission's Land Classification System. The agency's Land Classification System, similar to a zoning ordinance, allows different uses in different classifications. Some classifications are quite protective of natural resources and allow only limited, low impact recreation (such as the "Natural Forest Area" classification, WAC 352-16-120(5)). The only classification that allows high-intensity recreational development, like downhill skiing, is the "Recreation" classification. WAC 352-16-020(1); AR 00207.

In 2010, to further its mission of protecting the natural resources in its charge, the Commission adopted an over-arching natural resource policy: Policy 73-04-1, *Protecting Washington State Parks' Natural Resources: A*

Comprehensive Natural Resource Management Policy.[1] CP 265. Policy E.1, entitled "Land Classification," provides guidance for the Commission's land classification system and places the emphasis squarely on conservation, not recreation, when sensitive and significant natural resources are to be classified. The "Recreation" classification is not included as an option for such lands. Policy E.1 states:

> 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 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. Similarly, Policy D.2 unequivocally protects areas where cultural and natural resources exist:

> Where a resource of national, statewide, or regional significance occurs, its protection will take priority over other resource protection and use efforts. Where significant natural and cultural resources exist at a site or within a landscape, agency staff must protect the integrity of all significant resources.

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[1] The policy serves as the Commission's finding of the "key points needed to promote the long-term protection and conservation of the natural resources in the agency's care." CP 268. "With institutional commitment and budgetary support, this policy will ensure the long-term protection of State Parks' natural resources." *Id.*

CP 277.

In most of the park system, the agency leaves itself ample discretion to favor either recreation or preservation. But on lands "of regional or statewide significance, unusual and/or sensitive habitats," Policy E.1 instructs that only one of the "natural area" classifications is appropriate, which allow for only very low impact recreation. The policy identifies a fourth, compromise classification — Resource Recreation — to address conflicting uses. But that compromise classification does not allow intense recreational use either. WAC 352-16-020(2). In no event does the policy entertain the possibility of the "high-intensity" Recreation classification where high value natural resource lands are at risk. Likewise, Policy D.2 provides that where significant cultural resources exist, they "must" be protected.

The Commission was fully cognizant of the facts relating to the impacts to the natural resources on the west side of Mt. Spokane. The Commission's own findings recognized the high natural resource value of the west side of the mountain. AR 00623. The Commission's Final Environmental Impact Statement ("FEIS") acknowledges the inevitable destructive impacts a ski area would have on those unique resources, such as forest removal for construction of ski trails and chairlift terminals, clearing with grading, fragmentation of habitat, and the introduction of

exotic species. AR 00314. Not only would 79 acres of forest be clear-cut to make way for ski trails and chairlifts, but an even larger area would be impacted due to habitat fragmentation from the ski runs. AR 00274.

But instead of applying the agency's policy, a majority of the Commission viewed its choice as a dilemma created by the agency's twin goals to both protect natural resources and provide for recreation. Commissioner Brown's remarks at the November 20, 2014 hearing, reflected the thinking of several Commissioners who thought that the classification decision "does sort of capture the struggle of balancing our job as stewards of natural resources and finding a way to enhance recreational opportunities." AR 00767. Completely missing from the Commission's deliberations was any discussion of its policy which directly addressed a situation like this where the land has "regional or statewide significance, [and] unusual and/or sensitive habitats" – a policy that struck the balance in favor of protection, not recreation, on these valuable lands.[2]

The Commission even failed to address the applicability of its policy to its decision after it was raised in public comments. At the public hearing

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[2] The agency's failure to come to grips with its own policy was not limited to the deliberations. While the FEIS acknowledges the rare resources present on the unclassified lands, it fails to even mention, let alone discuss, the relevant policy. Similarly, the staff report (CP 191) prepared for the Commission's classification decision is also missing any discussion of the applicable policy.

on November 19, 2014, a commenter alerted the Commission about its staff's failure to address the agency's policy. AR 00691. The next day at the Commission meeting called to adopt a land classification, Commissioner Brown briefly inquired of staff member Lisa Lantz about the policy and its application to the Commission's decision, and Ms. Lantz acknowledged that the policy existed:

> MS. LANTZ: So the second issue—so we do have Natural—our Natural Resource policy was quoted last night, and it was quoted accurately, the portion that was read aloud, that does discuss our typical procedure with areas of significant natural resources would be a protected classification of either a Natural Forest Area, Natural Area or Natural Area Preserve, or in some circumstances Resource Recreation.
> COMMISSIONER BROWN: Thank you.

AR 00754-755.

One might have expected at that point for the Commission to evaluate the impact of that policy on the decision to be made at that meeting. But there was none. There was no further discussion between the commissioners and their staff or among the commissioners themselves of the policy. They did not discuss its meaning. They did not discuss why it would or would not apply in this case. There was no discussion of the policy at all.

Instead, the commissioners engaged in an *ad hoc* balancing of the various interests. For instance, Commissioner Schmitt said, "Making a

decision on the . . . classification is important to both sides, and I can't paint either side as right or wrong. It's a difficult decision." AR 00757. Unfortunately, no commissioner discussed the applicable policy or whether the unambiguous direction provided by the policy would tip the scale in favor of classifying the land for resource protection given the policy's clear call for only low impact recreation on these lands.

B. Proceedings Below

The Commission approved the ski area expansion in Mt. Spokane State Park on November 20, 2014. Petitioners filed a Petition for Judicial Review on March 17, 2015 in Thurston County Superior Court. CP 4. The parties submitted briefs on the merits. CP 63; CP 403; CP 421; CP 424. The superior court ruled in favor of agency. CP 439. Petitioners filed a motion for reconsideration which was briefed by all parties. CP 442; CP 454; CP 461. The superior court considered oral argument, but denied the motion. CP 469.

Petitioners appealed the superior court's decision to the Court of Appeals, Division II. The Court of Appeals, in a 2-1 decision, ruled in favor of the Commission. *See* App. A. This petition for review followed.

V. ARGUMENT

A. The Decision Below is in Conflict with a Published Decision of the Court of Appeals and a Decision of this Court.

The Court of Appeals' decision in this case conflicts with previously published opinions of the Court of Appeals and this Court on arbitrary and capricious agency action and, therefore, review by this Court is warranted. RAP 13.4(b)(1); (2).

This Court has found that when an agency acts without regard to its own findings, its action has been taken without regarding to the attending facts and circumstances and is, therefore, arbitrary and capricious. In *Rios v. Washington Dept. of Labor and Industries,* 145 Wn.2d 483, 39 P.3d 961 (2002), this Court reviewed the Department of Labor and Industries' refusal to initiate rulemaking to mandate a blood-testing program for handlers of a certain pesticide. The department refused to engage in rulemaking even after it received a detailed report commissioned by the department which concluded that the test was both "necessary and doable." *Id.* at 506, 39 P.3d 961. The court concluded that the refusal to acknowledge such clear findings undertaken by the department itself was arbitrary and capricious. *Id.* at 507-8, 39 P.3d 961. The "attending facts or circumstances" in *Rios* were the department's own findings of the necessary steps to meet its statutory duty to set a standard that assures that no employee would suffer

material impairment of health. *Id.* at 496, 39 P.3d 961. Because the department ignored its own findings when making its decision to not pursue rulemaking, the Supreme Court found its action arbitrary and capricious.

Likewise, in *Probst v. State Dept. of Retirement Systems*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012), the Court of Appeals found that the State Department of Retirement Systems acted arbitrarily and capriciously because it established a method to calculate interest for the Teachers Retirement System in complete disregard of its own findings. Teachers had raised concerns that calculating interest on a quarterly basis could have unfair results, and the agency acknowledged the shortcomings of a quarterly interest calculation method. *Id.* at 193. Despite the evidence and the agency's acknowledgment that the quarterly interest calculation method was unfair, the agency rejected moving to a more frequent interest calculation. *Id.* The Court of Appeals found that this decision was in complete disregard of the facts and circumstances and, therefore, arbitrary and capricious because the agency ignored its own findings of the shortcomings of a quarterly interest calculation method. *Id.* at 194.

Here, the Commission similarly ignored its own policy findings of the "key points needed to promote the long-term protection and conservation of the natural resources in the agency's care." CP 268. One of those "key points" was designating such lands to allow only low impact

recreation. The Commission's unreasoned decision goes even beyond the agency's arbitrary and capricious decision in *Rios* and *Probst* because the Commission's decision was inconsistent not only with the undisputed facts, but contrary to the direction provided in the formally adopted agency policy.

In the majority opinion, the Court of Appeals held that *Rios* and *Probst* are "not analogous to the Commission's decision here" because the petitioners "have not shown that the Commission ignored a potentially unfair result or that it disregarded the evidence before it." Op. at 18. But the majority overlooked the most important piece of evidence—the unambiguous policy direction which precludes high intensity recreation on these rare and most valuable natural resource lands. The majority misconstrued the policy, finding that it "does not preclude the Commission from adopting a mix of use classifications, including a recreation classification." Op. at 13-14 (emphasis supplied). That statement is flatly inconsistent with the plain language of the policy, which clearly guides the Commission to adopt classifications with low-intensity recreational impact on these lands, not the high-impact Recreation classification.[3]

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[3] Even if the majority viewed adopting a mix of Recreation and Natural Area classifications as a sort of compromise between the competing goals of recreation and conservation, the Commission's action would still be contrary to the policy. The policy clearly addresses compromises between conflicting uses and states that the "Resource Recreation" classification "offer[s] the best option to address conflicting use issues at a specific site." CP 281. The policy does not contemplate a compromise that allows a portion of high value natural resource lands to be classified as "Recreation."

The majority sidestepped this problem by emphasizing the use of the word "should" instead of "shall" in Policy E.2. But as the dissent points out, "If an agency may deviate from this sort of direction without expressing any reason, it has reduced the preference, the 'ought to,' inherent in the term 'should' to the choice among equally balanced options expressed by the term 'may.' To preserve the distinction between 'should' and 'may,' some reason or justification for deviating from the clear preference of section E.1. must be required of the Commission." Op. at 33. Furthermore, the Court does not account for the use of mandatory language in Policy D.2 ("Where significant natural and cultural resources exist . . . agency staff must protect the integrity of all significant resources."). CP 277 (emphasis supplied).

The Commission's decision was directly contrary to the outcomes in *Rios* and *Probst* and, therefore, review by this Court is warranted.

B. This Case Presents Issues of Substantial Public Interest that Should be Addressed by this Court Because It Involves the Management of Public Lands and the Effect of Policies on Agency Actions.

Review of this case also is warranted because it presents two issues of substantial public interest that should be resolved by this Court. First, this case deals with the management of public lands. The public's experience and the integrity of rare natural and cultural resources at Mt. Spokane State Park will be forever altered if the Court of Appeals decision

stands. Second, Washington courts have not offered the same level of detailed guidance on the effect of agency policies on agency decision-making as federal courts. A ruling on that issue will clarify the effect of agency policies for nearly every administrative agency in the state.

1. This case involves the management of a significant public resource.

Mt. Spokane State Park is a public resource of regional and statewide significance. Major alterations to the park, such as those proposed by the Commission and MS 2000 to clearcut ski runs and expand the ski area, will affect a significant portion of the park. The Commission's land classification decision will affect all Washington residents who use Mt. Spokane State Park or enjoy the wildlife that move through and beyond the park. Review of this case also will affect future Park Commission decisions where the agency's natural resource protection policies are implicated. The public is entitled to Commission decisions that are well-reasoned, respect established agency policy, and are not arbitrary and capricious. This matter involves issues of substantial public interest, warranting review by this Court.

2. This case could establish clear guideposts for administrative agency policies that have long been adopted by federal courts, but have not yet been considered by Washington courts.

Administrative agencies regularly adopt formal policies which provide direction and guidance for an agency's actions. Agency policies such as the one at issue here serve multiple purposes. They provide direction to agency staff. They provide the public with a clear expectation of future agency decisions, so they can conduct their affairs with reasonable assurance of future agency action. Perhaps most importantly, they serve as a check on arbitrary agency decision-making which might otherwise be unduly influenced by wayward staff or pressure from outside forces. Review of the role and import of formally adopted agency policy will provide much needed guidance to all state agencies, the public, and lower courts that address this issue in the future. *See In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016) ("A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue.").

For example, Policies D.2 and E.1 reasonably led members of the public to expect that the pristine area of Mt. Spokane State Park would be classified for resource protection and low impact recreation and not be

subject to disruptive, high-intensity recreational uses. *See supra* at 6-7. Instead, the agency did the opposite of its policy direction and classified the land to allow high-intensity recreational use. The public should be able to rely on an agency's policies, or at the very least, be given a rational explanation for an agency's deviation from its own policy. Review of this issue would provide clarity on this common aspect of administrative law.

While Washington courts have repeatedly held that agencies may not disregard the agency's own recommendations, findings, and evidence, federal courts have addressed the issue in greater detail. The United States Supreme Court has outlined the general guideposts for agency decision-making: "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 (2009). The Supreme Court held that agencies are free to change policy so long as it is permitted by statute, but it must explain the change in policy. *Id.* Similarly, the Ninth Circuit has articulated conditions which can warrant an agency's departure from its own established policy:

> [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 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 Studios*, 555 U.S. at 515). The Third Circuit has articulated a similar standard, holding that an "agency's actions will then be set aside as arbitrary and capricious if the agency failed to provide a reasoned explanation for its decision to change course." *CBS v. FCC*, 663 F.3d 122, 145 (3rd Cir. 2011). Furthermore, "[t]he agency's obligation to supply a reasoned analysis for a policy departure requires an affirmative showing on record." *Id.* at 145.

Washington cases do not provide this level of detailed guidance for agency action. While the agency's decision clearly breached the standards set forth in *Rios* and *Probst*, additional guideposts from this Court, along the lines enunciated in the federal decisions, would be extremely useful to all state agencies, the public, and the lower courts. Here, the Commission's decision resulted in an abrupt change in policy, but it did not comply with the minimal requirement articulated by the federal courts to provide a reasoned explanation for its policy change. The public interest would be served by clear guidance from this Court that formally adopted agency policy cannot be ignored in the absence of some reasonable justification provided by the agency at the time of the decision.

VI. CONCLUSION

For the reasons above, petitioner Roskelley, *et al.* respectfully request that this Court grant review of the Court of Appeals decision under RAP 13.4(b)(1), (2), and (4).

Dated this 26th day of April, 2017.

Respectfully submitted,

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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 APPELLANTS

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I. INTRODUCTION

The Washington State Parks and Recreation Commission has a dual mission: to protect natural resources in state parks and to provide for recreational opportunities. Much of the time, these missions are compatible; sometimes they conflict. This case involves the latter situation and the agency's failure to follow its own policy for dealing with such a conflict.

Six years ago, the Commission adopted a policy to address natural resource protection in Washington state parks. The policy addressed the possible conflict between recreational pursuits and resource protection. The Commissioners adopted a nuanced policy that did not always favor one mission or the other. In commonplace settings, the policy suggests a balancing of interests. But in settings where unusually important natural resources are present (*e.g.*, resources of "regional or statewide significance"), the policy precludes more intense forms of recreation. In these high value areas, only low-intensity recreational activities are allowed.

This case presented the Commission with a situation directly within the scope of this policy. A part of Mount Spokane State Park is developed

with an existing downhill ski area. The private concessionaire which operates the ski area (respondent Mount Spokane 2000 or "MS 2000") seeks permission to expand the ski area into an old growth forest by clear-cutting ski runs and installing a chair lift. The Parks Commission has identified that forest as perhaps the most exceptional natural resource landscape *in the entire park system.* As the agency's chief wildlife biologist stated:

> The forests of the [proposed expansion area] **meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well).**

CP 214 (emphasis supplied).

The agency also recognized that downhill skiing, with its ski lifts and ski runs, is an intensive form of recreation. If the recently adopted policy had been applied, MS 2000's request to locate a high-intensity recreational use like downhill skiing on these highly valued natural resource lands would have been denied.

This appeal was filed because, not only did the Parks Commission approve the land classification which allowed the ski area expansion, it did so without providing any consideration to the substance of its recently adopted policy. The Commission did not address whether the ski area expansion violated the policy. The Commission did not address whether

some special circumstance existed which justified deviating from the policy. The Commission simply ignored its own policy which had been adopted to address this precise type of conflict.

This case presents a textbook example of arbitrary and capricious conduct. The Commission's decision was arbitrary and capricious because it ignored the Commission's own well-reasoned existing policy which calls for adopting the most protective land classifications for sensitive and unique resources. It was also arbitrary and capricious because the agency deviated from its policy without providing any reasoned justification for doing so.

The agency's decision should be vacated and the matter remanded to the agency to reconsider its decision in light of its own applicable findings and policy.

II. ASSIGNMENT OF ERROR AND ISSUES

A. Assignment of Error

The trial court erred in entering the Order of Dismissal (CP 439) and in entering the Order Dismissing Petitioners' Motion for Reconsideration (CP 469).

B. Issues Pertaining to Assignment of Error

Whether the Commission considered and applied its policy, *Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy, Subpart E*, to its November 20, 2014 land classification decision?

Whether it is arbitrary and capricious for an agency to deviate from an existing policy without providing a reasoned explanation?

Whether an agency must provide a reasoned explanation for its decision on the record?

III. STATEMENT OF THE CASE

A. Procedural History

The Commission's action approving the ski area expansion in Mt. Spokane State Park occurred on November 20, 2014. Petitioners filed a Petition for Judicial Review on March 17, 2015. CP 4. The Parties submitted briefs on the merits. CP 63; CP 403; CP 421; CP 424. The superior court considered oral argument, and then ruled in favor of Respondents. CP 439. Petitioners filed a motion for reconsideration which was briefed by all parties. CP 442; CP 454; CP 461. The superior court considered oral argument, but denied Petitioners' motion for

reconsideration. CP 469. This appeal followed. CP 471.

B. Overview

Mt. Spokane State Park is the crown jewel of the Washington state park system. Its high-quality, uninterrupted habitat is unmatched in Eastern Washington. It is Washington's largest state park at 13,919 acres. Located approximately 22 miles northeast of Spokane in Spokane County, the area was the first state park east of the Cascades. AR 00206. Due to its size and high-quality natural resources, the Commission staff report prepared for the land classification decision noted that the forests of Mt. Spokane "provides significant habitat." CP 194. The forest covering the western and northwestern slopes of Mt. Spokane contains trees that show no signs of human logging and contain stands of old-growth timber that provide ideal habitat for several focal species. CP 151. Little wonder that the Commission's chief wildlife biologist concluded that the lands possessed "the highest level of natural resources quality in the state park system." CP 214.

The area of Mt. Spokane State Park at issue is an approximately 800-acre portion of the park that covers most of the western and northwestern sides of Mt. Spokane. AR 00208. In 1999, the Commission classified all

lands within Mt. Spokane State Park for a variety of uses using its Land Classification System except for the 800-acre portion in question. AR 00207.[1]

An existing privately-operated ski area, the Mount Spokane Ski and Snowboard Park, covers 1,425 acres of the park, or over 10% of the park, on the north, northeastern, and eastern faces of the mountain. AR 00208. MS 2000, the private concessionaire, operates the existing ski area. Mount Spokane Ski and Snowboard Park includes five chairlifts and 32 ski runs, two lodges, and a ski patrol building.

To allow expansion of the ski area into the old growth forests on the western and northwestern sides of Mt. Spokane, the area first had to be classified under the Commission's Land Classification System. The agency's Land Classification System, similar to a zoning ordinance, allows different uses in different classifications. Some classifications are quite protective of natural resources and allow only limited, low impact recreation. Other classifications allow more intense recreational use. The

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[1] The 800 acre area is also referred to as the "Potential Alpine Ski Expansion Area" or "PASEA" due to the fact that the land was unclassified until the November 20, 2014 Commission decision.

only classification that allows high-intensity recreational development, like downhill skiing, is the "Recreation" classification. AR 00207.

In 2010, the Commission adopted a policy to protect natural resources in the park system. Among other things, the policy precluded high-intensity recreational uses on the most important natural resource lands in the park system (including those considered to be of "regional or statewide significance", CP 281).

On November 20, 2014, the Commission voted through a split decision of 5 to 2 to adopt the least protective classification of "Recreation" to allow the ski area expansion. The Commission approved the "Recreation" classification despite the conflict between the decision and the recently adopted policy. The Commission took the action without any analysis of the policy and without providing any justification for deviating from the policy.

C. Mt. Spokane's Significant Natural Resources

State agencies, including the Parks Commission, MS 2000's own consultants, tribes, and members of the public have long recognized the natural resource value of Mt. Spokane, and the northwest and west side of Mt. Spokane in particular. These facts are not in dispute.

In 1993, the Department of Natural Resource's Natural Heritage Program conducted an evaluation of the forests of Mt. Spokane State Park. The Department of Natural Resources recommended that the west and northwest side of Mt. Spokane be classified as a Natural Forest Area. The "Natural Forest Area" classification is one of the most protective classifications in the Commission's Land Classification System. It provides for "preservation, restoration, and interpretation of natural forest processes while providing for low-intensity outdoor recreation activities as subordinate uses." WAC 352-16-020(5).

In 2007, Rex Crawford, Ph.D. and Natural Heritage Ecologist, submitted scoping comments on behalf of the Department of Natural Resources on the first iteration of the proposed ski area expansion. The comments noted that the department's original 1993 report concluded that "much of the park was and still is a natural forest will be emphasized to define it as a valuable conservation asset of **uncommon quality**." CP 154 (emphasis supplied). The Department of Natural Resources emphasized the regional significance of Mt. Spokane State Park: "Mt. Spokane Park appears not only to be the largest, least fragmented forest landscape locally but inspection of aerial photography in Washington and Idaho reveals that

similarly sized and continuous forest areas do not occur within a 20 to 30 mile radius." *Id.* The department also pointed out the unusual habitat provided by Mt. Spokane's west and northwest slopes:

> The forest vegetation communities composing the [western and northwestern sides of Mt. Spokane] are representative of the subalpine and mid-montane forests of the Northern Rocky Mountains. Although these communities may be relatively common, their occurrence in a continuous forest block in a natural, unmanipulated condition is an uncommon quality. The area warrants special recognition and attention so that in [sic] continues to add to the diversity of the park as an important natural destination in Washington.

CP 155. The Department of Natural Resources submitted comments on the Draft Environmental Impact Statement in 2014 reaffirming the natural resource value of this part of Mt. Spokane State Park. AR 00444.

The west and northwest sides of Mt. Spokane have remained in their natural state since the Washington Department of Natural Resources first identified its "uncommon quality" in 1993. Twenty-three years later, the natural and unmanipulated forests have greater value, not less.

In 2010, MS 2000 hired the Pacific Biodiversity Institute to conduct biological surveys in the Biological Survey Area ("BSA") where ski area expansion was proposed. The Commission later adopted the Institute's findings as Appendix B to the Final Environmental Impact Statement. AR

00264. After surveying and mapping 92 discrete sampling areas (known as "habitat polygons") within the BSA, Pacific Biodiversity Institute concluded that the BSA included significant areas of old-growth forest and provided high-quality and abundant habitat for wildlife species:

> There are significant areas of old-growth forest within the BSA. These forests provide habitat for wildlife species dependent on late-successional forest condition. Much of the rest of the forests within the BSA also have some old, large trees and are moving toward old-growth conditions. Nearly all the forest stands in the BSA have abundant large and small snags of various decay classes, providing abundant habitat for wildlife species that depend on snags for nesting, foraging and roosting. In some stands, snags are more common than live trees. Likewise, there is an abundance of coarse woody debris in the forests of the BSA. Many polygons within the BSA have very high levels of large coarse woody debris. There is no lack of habitat for wildlife species that depend on coarse woody debris for any of their life stages or activities within the BSA.

CP 151. Furthermore, Pacific Biodiversity Institute found that the abundant streams, springs, and small wetlands in the BSA "provide habitat and water for many wildlife species." *Id.*

In 2007, the Commission and the Washington Department of Fish and Wildlife identified twenty-one "focal" wildlife species[2] which occur at

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[2] The FEIS explains that the term "focal" was used to identify species from a wide range of taxa and which use a wide range of environments present on Mt. Spokane. AR 00233. The FEIS acknowledges the impacts to the focal species due to clearing and construction of ski facilities. AR 00237. In addition, Mt. Spokane State Park is home to a

Mt. Spokane State Park. AR 00320. The Washington Department of Fish and Wildlife has identified several of these focal species as endangered, threatened, priority, and candidate species. AR 00321. Some focal species, such as the wolverine and northern goshawk, have federal status under the Endangered Species Act. *Id.* Mt. Spokane State Park provides sensitive habitat for all twenty-one of the focal species, habitat that is otherwise not available in the region. AR 00323-330. The park also serves as an invaluable wildlife travel corridor that connects with the rest of the Selkirk Mountains to the north. AR 00353. According to the expert wildlife agency, the west and northwest flanks of Mt. Spokane provide significant habitat for wildlife and ski area development would result in permanent impacts to wildlife habitat and habitat fragmentation that would be difficult, if not impossible, to mitigate. CP 156.

Furthermore, the western and northwest slopes of Mt. Spokane are home to ten Washington Department of Fish and Wildlife "species of concern." AR 00233-00234. "Species of concern" is a term of art that refers to species identified by the Washington Department of Fish and

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wide diversity of other wildlife, including cougar, coyote, deer, moose, elk, black bear, western toads, small mammals, bats, butterflies, and over 110 documented bird species. AR 00319.

Wildlife as a state endangered species, state threatened species, state candidate species, or state monitored species. *Id.*

Based on this and other similar information, the Washington Department of Fish and Wildlife repeatedly urged the Commission to protect the high resource values of the west and northwestern sides of Mt. Spokane. *See, e.g.,* AR 00511. The department even sent an additional comment letter on November 13, 2014, shortly before the Commission's final decision. Noting that the department's concerns had been "well documented" in past correspondence, the department urged the Commission to classify the sensitive forests as restrictively as possible. CP 156. The department's concerns included "wildlife corridor fragmentation, elimination of large ungulate winter and summer thermal cover removal and impacts to Priority Habitats that support a variety of native wildlife and plant species." *Id.*

D. The Land Classification System of the Washington State Parks and Recreation Commission

To protect valuable natural resources and manage lands within state parks, the Commission has established a Land Classification System under WAC 352-16-020. The Land Classification System is similar to a zoning code and provides six land classifications which provide different levels of

resource protection and allow different levels of outdoor recreation. Three classifications are available to protect areas with high resource values:

- "Natural Areas" protect areas with "significant ecological, geological or paleontological value." WAC 352-16-020(3).
- "Natural Forest Areas" preserve old growth, mature forests and other unusual forest communities. WAC 352-16-020(5).
- "Natural Area Preserves" protect areas with "rare or vanishing" wildlife, plants or natural history features. WAC 352-16-020(6).

In each of these areas with high natural resource values, only "low-intensity" recreation is allowed. WAC 352-16-020(3), (5) and (6). A ski area would not be allowed in any of these protective classifications.

Of the three classifications available to protect significant natural resources, the one relevant to this case is the "Natural Forest Area" classification. The rule identifies three different types of significant forest resources that comprise the "Natural Forest Area" classification:

> (a) Old-growth forest communities that have developed for one hundred fifty years or longer and have the following structural characteristics: Large old-growth trees, large snags, large logs on land, and large logs in streams; or
>
> (b) Mature forest communities that have developed for ninety years or longer; or

(c) Unusual forest communities and/or interrelated vegetative communities of significant ecological value.

WAC 352-16-120(5).

Two classifications are available for less sensitive areas where more intense recreation is allowed. The "Resource Recreation" classification is a mid-range classification which allows "medium-intensity" and "low-intensity" recreational use. WAC 352-16-020(2). The "Resource Recreation" classification does not allow a ski lift or formal ski run facilities to be constructed. AR 00210. Examples of "low-intensity" recreation include interpretive trails, hiking trails, cross-country ski trails, off-trail hiking, and backcountry skiing. AR 00219. At the far end of the spectrum, the "Recreation" classification allows "high-intensity" recreation. WAC 352-16-020(1). "High-intensity" recreation allows for the clearing of vegetation to construct ski lifts and ski trails, along with the operation of motorized equipment to groom ski runs. AR 00222. Only the "Recreation" classification allows for ski lifts and formal ski trails to be constructed. AR 00210.

The sixth classification (not at issue here) is "Heritage" which provides protection for "unique or unusual archaeological, historical, scientific and/or cultural resources." WAC 352-16-020(4).

E. The Parks Commission's Natural Resource Policy Precludes High Intensity Recreational Uses on Lands with High Natural Resource Value

In 2010, to further its mission of protecting the natural resources in its charge, the Commission adopted an over-arching natural resource policy: Policy 73-04-1, *Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy*. CP 265. The policy serves as the Commission's finding of the "key points needed to promote the long-term protection and conservation of the natural resources in the agency's care." CP 268. "With institutional commitment and budgetary support, this policy will ensure the long-term protection of State Parks' natural resources." *Id.*

Policy E.1, entitled "Land Classification," places the emphasis squarely on conservation, not recreation, when sensitive and significant natural resources are to be classified. The policy identifies the three high resource value classifications (Natural Areas, Natural Forest Areas, and Natural Area Preserves) for primary use in protecting high value natural resources. Each of these allows little or no recreational development. *See supra* at 13. The policy provides that a fourth category (Resource Recreation) may be allowed in some limited circumstances, but as described

above, this category precludes high-intensity recreation, too. There is no reference to classifying these high value resource lands with the "Recreation" designation that allows high-intensity recreation, like downhill skiing. The policy states:

> 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 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 Commission's policy is clear: when lands within a park are of significant natural resource value, contain unusual or sensitive habitats, or contain a species of concern, the land should be classified to promote conservation, not recreation. The policy even identifies a fourth, compromise classification — Resource Recreation — to address conflicting uses, but that compromise classification does not allow intense recreation either. WAC 352-16-020(2). In no event does the policy call for the "high-

intensity" Recreation classification where high value natural resource lands are at risk.

F. The Commission's Awareness of Mt. Spokane's Significant Natural Resource Value

The Commission was fully cognizant of the special habitat and significant natural resource values on Mt. Spokane. The Commission's Final Environmental Impact Statement ("FEIS") acknowledges the inevitable destructive impacts a ski area would have on those unique resources. Irreversible impacts identified include forest removal for construction of ski trails and chairlift terminals, clearing with grading, fragmentation of habitat, and the introduction of exotic species. AR 00314. At least 79 acres of forest would be clear-cut to make way for ski trails and chairlifts. AR 00274. But the damage would be more widespread than the 79-acre figure suggests, because the remaining forest would be fragmented. The FEIS explains that the habitat fragmentation would have significant adverse impacts on wildlife and habitat. AR 00333. Dividing it into fragments, separated by ski trails and a ski lift, destroys the value of the entire 279 acres, not just the 79 acres which would be logged. AR 00236.

The FEIS details the impacts that ski area expansion would have on twenty-one focal wildlife species identified by the Department of Fish and

Wildlife. AR 00338-340. Ten of these twenty-one focal wildlife species are identified as species of concern (one of the triggers for the more protective land classifications under the Commission's policy). AR 00233-234. The FEIS finds that long-term impacts to the species of concern (and the other focal species) could occur, including stress/physiological responses, breeding/rearing disturbances, displacement, habitat fragmentation, increased accessibility to predators and competitors, reduction of snags and coarse woody debris used for cover, nesting, and denning, and habituation to human presence. AR 00333-334.

The Commission also was aware of the valuable natural resources and the destructive impact of the ski area due to a report from the agency's chief wildlife scientist, Robert Fimbel, Ph.D. Dr. Fimbel was unequivocal in identifying the area's stellar resource value, referring specifically to one of the three most restrictive land classifications (Natural Forest Area):

> The forests of the [west and northwest side of Mt. Spokane] **meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well).**

CP 214. (emphasis supplied).

Dr. Fimbel went on to summarize, sometimes in scientific and detailed terms, the rare and sensitive nature of the ecosystem in that part of the park:

> [These forests] are a matrix of young to late successional stands of trees (**including old growth**), intermixed with abundant wetlands, small meadows, and talus slopes. They exhibit little/no human modification compared to other sides of the mountain where in excess of 50% of the mountain top has been directly or indirectly modified by recreational developments (primarily roadways and alpine skiing). **These "near-wilderness" conditions are a rarity in the greater Spokane area.** The area is rich in native structure, composition, and functioning processes, providing habitat for a large (and relatively unknown) population of species (charismatic mega-fauna like wolverines to a multitude of often overlooked invertebrates, fungi, and micro-organisms). Based on two, very cursory vascular plant inventories of the area, the [area] is known to support sensitive plant associations and habitats suitable for [Endangered Species Act] listed wildlife species (e.g., lynx and wolves). No invasive species have been observed in this area. Finally, habitat integrity is very high given limited past disturbance by humans and its connectivity to other functional habitats throughout the park, Spokane County, and the greater WA / ID landscape. In time, as climatic conditions change, the [currently unclassified area] (especially the highest areas on the mountain [>5000 ft]) is expected to serve as a critical refuge for migrating and resident species. It is also, unfortunately, expected to experience a significant decline in its winter snow cover.

Id. (emphasis supplied).

While Dr. Fimbel's report inexplicably was not referenced in the staff report provided to the Commission prior to its vote, the Commission was aware of Dr. Fimbel's conclusions about the pristine nature of the unclassified west and northwest parts of Mt. Spokane — counsel for the Lands Council raised Dr. Fimbel's brief during the public hearing the night before the Commission made its final decision. AR 00690.

The message from the Commission's own scientific staff was abundantly clear: the west and northwest side of Mt. Spokane represents the highest level of natural resource value in the state park system and its importance will only grow over time as it serves as a critical refuge for species suffering from climatic change.

Dr. Fimbel was not the only commission staff member to point out the high natural resource value of Mt. Spokane. In a July 2014 Commission meeting, staff member Lisa Lantz provided an overview of the natural resource value of the unclassified portions of Mt. Spokane. During the presentation, Commissioner Brown asked, "So in your staff report, you say regardless of whether the forests of the [proposed ski area] meet a particular definition of old growth or not, they represent the highest level of significance of natural resources in the state park system. That seems to me

to be a rather profound statement. Could you tell me how you drew that conclusion that in the context of our entire system, this is the highest level of significance?" CP 182. Ms. Lantz responded by attributing its significance to several factors, including the relatively large size of the park, the length of time the area has been managed as a park, the presence of significant species, and the depth of scientific study in the park. *Id.* And when asked whether her finding that the area has the highest level of significance refers to Mt. Spokane State Park or the unclassified west and northwest part of the mountain in particular, Ms. Lantz answered: "I would say both, but certainly the [unclassified portion] is a significant resource within Mt. Spokane State Park." CP 183.

Members of the Commission acknowledged the regional and statewide significance of the sensitive habitat in the unclassified areas of Mt. Spokane. During the Commission's deliberations on November 20, 2014, Commissioner Brown stated: "This is a pristine forest. There's not many left. I'm going to give the benefit of the doubt to the Native American leaders who were in the room last night, and I'm going to say there is old growth there. I had a conversation with one of you very briefly—no, excuse me, it was with Daniel, and noting the adjacency of this mountain to a major

urban area in itself is quite unique." AR 00768. Commissioner Brown pointed out the "unique natural attributes associated with this site." *Id.* Commissioner Milner acknowledged the value of the unclassified portions of the Park: "It is an inspiring landscape which preserves many aspects of natural function, while enduring decades of light human disturbance and thousands of years of frequent, intense natural disturbance." AR 00776. Similarly, Commissioner Lantz (not to be confused with staff member Lantz) pointed out the regional and statewide significant of the area, saying "It is a part of a greater system that extends not only [to] the boundary of the park, but it goes far north to where the human footprint, the human interference with the natural ecological process, has been as light as any place you can find, certainly in Eastern Washington, and there are some statements about generally across the state." AR 00785.

G. The Commission's Perceived Dilemma and Failure to Address Its Policy

As just described, the Commissioners, even those who voted against the Natural Forest Area designation, recognized the high natural resource value of the area. AR 00623. But instead of applying the agency's policy which calls for protecting such areas from high-intensity recreation, a majority of the Commission viewed its choice as a dilemma created by the

agency's twin goals to both protect natural resources and provide for recreation. As Commissioner Brown remarked at the November 20, 2014 hearing, the classification decision "does sort of capture the struggle of balancing our job as stewards of natural resources and finding a way to enhance recreational opportunities." AR 00767. Commissioner Milner echoed this sentiment, viewing the mission of the Commission as "meeting the needs of society for readily-available outdoor recreation, while striving to protect the natural function of the land in light of these human disturbances." AR 00779. Commissioner Lantz viewed the Commission as having a "dual mission," saying "we are here to protect the natural resources, and we are to provide recreation. Both of these benefits accrue to all Washingtonians today and forever, so there's a temporal part of this as well." AR 00782.

Curiously, while the Commissioners saw the tension, they seemed oblivious to their own policy which dictated how the balance should be struck when high value resources, like those at issue here, were proposed for a high impact recreational use. Not once in their deliberations was there any discussion of the substance of the policy which addressed this very issue and mandated a protected status for these rare and fragile lands. Instead,

with hundreds of ski enthusiasts testifying in support of a ski area expansion, a majority of the Commission decided to resolve the tension by destroying this priceless, irreplaceable resource and creating a few more ski runs for MS 2000 and its adherents.

The agency's failure to come to grips with its own policy was not limited to the deliberations. While the FEIS acknowledges the rare resource values present on the unclassified lands, it fails to even mention the relevant policy. Curiously, the FEIS references a different portion of the policy document (Policy A.1 entitled "Biological resources – general principles") at three separate points in the FEIS — twice in footnotes and once in response to a comment.[3] Clearly, the Commission's staff was aware of the policy document. But inexplicably, neither in their staff report (CP 191)

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[3] References to *Commission Policy 73-04-1* Subpart (A)(1) can be found in the FEIS at AR00221; AR00280; and AR00532 in response to Mike Petersen's comment. Each instance quotes the same language:

> Commission direction regarding the management of natural resources within areas classified as "Recreation" is discussed in *Commission Policy 73-04-1 Protecting Washington State Parks Natural Resources.* Subsection A(1) states that "State Parks will maintain native plants and animals (biodiversity) that occur, or seek to re-establish them where they historically occurred, within those park lands classified by the Commission as Resource Recreation Areas, Natural Areas, Natural Forest Areas, or Natural Area Preserves. When consistent with recreational use, cultural resources integrity, and other agency objectives, native plants and animals will also be preserved in lands classified as Recreation and Heritage Areas.

nor in the FEIS did the Commission staff mention or even allude to Policy E.1 that spoke directly to protective classifications required for natural resource land of regional or statewide significance or which is home to a species of concern.[4]

Following the lead of its staff, the Commission also failed to address the applicability of its own natural resource protection policy. At the public hearing on November 19, 2014, counsel for the Lands Council provided public testimony to the Commission raising the staff's failure to address the agency's own policy:

> This is a country of laws, . . . and the laws in place here are your policies, your Comprehensive Natural Resource Management Policy adopted in 2010, which, among other things, provides that areas of a park containing natural resources of regional or statewide significance, unusual and/or sensitive habitat or a species of concern should be classified restrictively to allow only low intensity uses and minor facility development. Typically one of three natural area classifications should be applied, natural, natural forest or natural area preserve, although resource recreation may be used in unusual circumstances. But the recreational classification is not allowed at all.

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[4] The FEIS discusses the environmental impacts of the land classification decision and ski area expansion at length, including a section entitled "Land Use" which discusses the Land Classification System established by WAC 352-16-020. AR 00247-00248. However, the FEIS never even mentions the applicable policy — entitled "Land Classification" — even though the FEIS ostensibly is analyzing the Commission's decision on land classification for Mt. Spokane.

AR 00691. The next day at the Commission meeting called to adopt a land classification, Commissioner Brown briefly inquired of staff member Lisa Lantz about the policy and its application to the Commission's decision:

> COMMISSIONER BROWN: My second question—and this may be for Don or Jim—but there was a comment made last night and a specific reference to agency policy, and there was a suggestion made—or I should say an opinion offered—that that policy would apply to this circumstance and would preclude ski area expansion.
>
> So I'd just like to have those two matters discussed, if you would, please.
> (. . .)
>
> MS. LANTZ: So the second issue—so we do have Natural—our Natural Resource policy was quoted last night, and it was quoted accurately, the portion that was read aloud, that does discuss our typical procedure with areas of significant natural resources would be a protected classification of either a Natural Forest Area, Natural Area or Natural Area Preserve, or in some circumstances Resource Recreation.
>
> COMMISSIONER BROWN: Thank you.

AR 00754-755.

One might have expected at that point some discussion of the impact of that policy on the decision to be made at that meeting. But there was none. There was no further discussion between the commissioners and their staff or among the commissioners themselves of the policy. They did not

discuss its meaning. They did not discuss why it would or would not apply in this case. There was no discussion of the policy at all.

Instead, the commissioners anguished over a difficult decision and noted that each side had valid points.[5] For instance, Commissioner Schmitt said, "Making a decision on the PASEA classification is important to both sides, and I can't paint either side as right or wrong. It's a difficult decision." AR 00757. Commissioner Brown said, "I'll just say this, that I've weighed all of this in my mind, and it is a damn tough decision." AR 00767. Commissioner Milner remarked, "First of all, I respect all the opinions that were submitted, and like the other Commissioners, I don't see either side as right or wrong. I see them as equally-balanced situations." AR 00776. Commissioner Bounds said, "And I don't think there's—in this case in particular, I don't think there are any bad guys. I don't think there are any righteous sides to the decision, one way or the other. I think that it's a balancing of the values as Lisa pointed out, and it's making a judgment." AR 00792. Finally, Commissioner Lantz summarized the

[5] The Commissioners had clearly been advised that their remarks would be on the record and serve as part of the basis for the land classification decision. As Commissioner Brown remarked at the hearing, "You know, [counsel for the Commission] said yesterday that we could pretty much say anything we want, but don't be arbitrary or capricious, and so I promise you I won't be arbitrary. I can't make a promise on capricious because I don't know what that means." AR 00767.

balance required in maintaining the competing aims of conservation and recreation: "What tips the scale so that the balance you're trying to achieve with natural resource protection and a minimal amount of recreational use—what tips that scale so it's no longer in balance? We look to the EIS for mitigations, and that is attempts to balance the scale." AR 00786. Unfortunately, no commissioner discussed the applicable policy or whether it would tip the scale in favor of classifying the land restrictively given the policy's clear call for a restrictive classification.

IV. ARGUMENT

A. Standard of Review

The superior court had the inherent power provided in Article IV, section 6 of the Washington State Constitution to review the administrative agency's decision for illegal or arbitrary and capricious actions. Const. art. IV, § 6; *Saldin Securities Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998); *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). The superior court's exercise of this inherent power will not ordinarily occur if either a statutory writ or a direct appeal is available. *Bridle Trails Community Club v. City of Bellevue*, 45 Wn. App. 248, 253, 724 P.2d 1110 (1986). The Supreme Court has

consistently held that a superior court may grant a constitutional writ of certiorari if no other avenue of appeal is available and facts exist that, if verified, indicate the lower tribunal has acted in an illegal or arbitrary and capricious manner. *Saldin Securities,* 134 Wn.2d at 294, 949 P.2d 370.

Because no other avenue of appeal of the Commission's land classification decision exists, a constitutional writ is the appropriate method of reviewing the Commission's decision. There is no statutory right of appeal for land classification decisions of the Commission. *See* Ch. 79A.05 RCW. Because the land classification decision was not a rule-making function of the agency nor an adjudicative proceeding of the agency, review is not proper under the Administrative Procedure Act. RCW 34.05.570. Additionally, the statutory writ of review is not proper in this case because the Commission was not exercising a judicial function. RCW 7.16.040. Accordingly, review was and is proper through the mechanism of the constitutional writ.

When a court reviews agency action via a constitutional writ of review, the standard of review is the arbitrary and capricious test. *Saldin Securities*, 134 Wn.2d 292, 949 P.2d 370. It is well established that "agency action is arbitrary and capricious if it is willful and unreasoning and taken

without regard to the attending facts or circumstances."[6] *Wash. Indep. Tele. Ass'n v. WUTC*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003); *D.W. Close Co., Inc. v. Wash. Dept. of Labor and Ind.*, 143 Wn. App. 118, 130, 177 P.3d 143 (2008). 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. State, Dept. of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

B. The Commission's Decision was Arbitrary and Capricious Because It Ignored the Commission's Own Adopted Policy and Factual Findings Regarding How to Balance Natural Resource Protection and Recreation within State Parks.

The Commission has an adopted policy to not allow intense recreation where it would compromise high value natural resource lands. "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 should be classified restrictively to allow only low-intensity uses and minor facilities development." CP 281. The Commission stated the policy's provisions serve as the "key points needed to promote

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[6] The "arbitrary and capricious" standard is the same for a constitutional writ as it is for review of agency action under the Administrative Procedure Act, RCW 34.05. *See Saldin Securities*, 134 Wn.2d at 296, 949 P.2d 370.

the long-term protection and conservation of the natural resources in the agency's care." CP 268.

The agency's fact-finding for this case identified the lands at issue as falling squarely within the bounds of that policy. "The forests of the [west and northwest side of Mt. Spokane] meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well)." CP 214. The Commission identified ten "species of concern" present within the area in the FEIS. AR 00233-00234. And as the Washington Department of Natural Resources commented, unusual and sensitive habitat exists on the western and northwestern slopes of Mt. Spokane, calling the forests of "uncommon quality." CP 155.

Despite a policy "to allow only low-intensity uses and minor facilities development" on high value natural resource lands and a finding by their own chief biologist (confirmed in the FEIS and staff report) that the subject lands "represent the highest level of natural resources quality in the state park system," CP 194, the agency approved an intense, recreational development in the middle of these lands. The agency's disregard of its

adopted policy and the facts pertinent to application of that policy is a quintessential example of arbitrary and capricious agency action.

Washington courts have consistently found that when an agency ignores its own findings in making a decision, its action has been taken without regarding to the attending facts and circumstances and is, therefore, arbitrary and capricious. For example in *Rios v. Washington Dept. of Labor and Industries,* 145 Wn.2d 483, 39 P.3d 961 (2002), the Supreme Court reviewed the Department of Labor and Industries' refusal to initiate rulemaking to mandate a blood-testing program for handlers of a certain pesticide. The department refused to engage in rulemaking even after it received a detailed report commissioned by the department which concluded that the test was both "necessary and doable." *Id.* at 506, 39 P.3d 961. The court concluded that the refusal to acknowledge such clear findings undertaken by the department itself was arbitrary and capricious:

> At the time of their request in 1997, the pesticide handlers were not asking the Department to embark on a new enterprise—they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds. In fact, the Department had already made cholinesterase monitoring enough of a priority to draft the non-mandatory guidelines and to convene a team of experts "to identify the essential components of a successful monitoring program." And that report announced in its introductory summary that "[t]he [Department's Technical Advisory Group]

> recommends cholinesterase monitoring for all occupations handling Class I or II organophosphate or carbamate pesticides." Because the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department's 1997 denial of the pesticide handlers' request was "unreasoning and taken without regard to the attending facts or circumstances."

Id. at 507-8, 39 P.3d 961 (internal citations omitted). The "attending facts or circumstances" in *Rios* were the department's own findings of the necessary steps to meet its statutory duty to set a standard that assures that no employee would suffer material impairment of health. *Id.* at 496, 39 P.3d 961. Because the department ignored its own findings when making its decision to not pursue rulemaking, the Supreme Court found its action arbitrary and capricious.

In *Probst v. State Dept. of Retirement Systems*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012), the Court of Appeals found that the State Department of Retirement Systems ("DRS") acted arbitrarily and capriciously because it rendered its decision to calculate interest for the Teachers Retirement System in complete disregard of its own findings. The agency calculated interest for the Teachers Retirement System on a quarterly basis beginning in 1977. *Id.* at 192, 271 P.3d 966. Teachers raised

concerns at several different points that calculating interest on a quarterly basis could have unfair results and the agency even acknowledged the shortcomings of a quarterly interest calculation method. *Id.* at 193, 271 P.3d 966. Despite the repeated concerns and evidence that the quarterly interest calculation method created unfair results, the agency rejected moving to a more frequent interest calculation. *Id.* The Court of Appeals found that this decision was in complete disregard of the facts and circumstances and arbitrary and capricious because the agency ignored its own findings of the shortcomings of a quarterly interest calculation method. *Id.* at 194, 271 P.3d 966.

Here, the Parks Commission had a recently adopted policy which was intended to be applied in situations just like this one and which spoke unequivocally to avoiding high-intensity recreation uses on high value natural resource lands. The agency had identified the policy as serving an important role in protecting the natural resources of Washington State Parks:

> This policy and its future implementing procedures seeks to capture current regulations and management guidelines, and to summarize the key points needed to promote the long-term protection and conservation of the natural resources in the agency's care. With institutional commitment and

> budgetary support, this policy will ensure the long-term protection of State Parks' natural resources.

CP 268. Despite the need for this "institutional commitment," the Commission ignored its policy, except for a brief acknowledgment that it did, in fact, exist. Much like the agencies in *Rios* and *Probst*, the Commission not only ignored the attending facts and circumstances of its policy, but it chose to do the opposite of what the Commission found necessary to ensure the long-term protection of State Parks' natural resources when it adopted the policy a few years earlier.

The policy clearly states that natural resources of statewide or regional significance, unusual and/or sensitive habits, or areas containing species of concern should be classified restrictively to allow only low-intensity uses. CP 281. Usually, only one of three most protective "natural resource" designations will be used. While the policy does contemplate a compromise classification of "Resource Recreation" to "address conflicting use issues at a specific site," the Resource Recreation classification does not allow intense recreation like downhill skiing. *Id.* The only classification which allows downhill skiing is "Recreation" and the policy clearly precludes use of that classification for high value, natural resource lands. *Id.* Yet, that is exactly what the Commission did when it adopted the high-

intensity "Recreation" classification for lands the agency says "meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system." CP 194.

The Commission provided no discussion or analysis to suggest the policy was not relevant to the decision at hand. But rather than apply its unambiguous policy, the Commission chose to do the exact opposite by adopting the most intensive classification, not one of the low-intensity classifications. It even chose to forego the compromise classification of "Resource Recreation" that, in some circumstances, could offer "a relatively high degree of resource protection." CP 281. Thus, because the agency's decision was taken without regard to the attending facts (the undisputed high resource value of the subject lands) and circumstances (the agency's policy committing to protect such lands from high-intensity recreation uses), the Commission's decision was arbitrary and capricious and should be vacated.

C. The Commission's Deviation from Its Own Policy was Arbitrary and Capricious Because the Commission Did Not Provide a Reasoned Explanation for Changing the Policy.

Courts have consistently held that when an agency deviates from its existing policy or precedent, at the very minimum, the agency must provide

a reasoned explanation of its basis for doing so. The Commission did not provide any explanation — reasoned or otherwise — for deviating from its policy and, therefore, its decision was arbitrary and capricious.

In one typical federal case[7] on an agency deviating from its prior policy, the FCC attempted to deviate from its well-established policy to not enforce against fleeting indecent or obscene images. The agency issued an enforcement order against CBS in the wake of the Super Bowl Halftime Show incident, where Janet Jackson's right breast was momentarily exposed on national television. *CBS v. FCC*, 663 F.3d 122, 135 (3rd Cir. 2011). The court found that the FCC deviated from its own policy:

> The FCC contends its restrained policy applied only to fleeting utterances—specifically, fleeting expletives—and did not extend to fleeting images. But a review of the Commission's enforcement history reveals that its policy on fleeting material was never so limited. The FCC's present distinction between words and images for purposes of determining indecency **represents a departure from its prior policy.**

Id. at 138 (emphasis supplied). Because the FCC departed from its own applicable policy, the court found the FCC's actions arbitrary and

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[7] There are no Washington cases that directly address the issue of an agency departing from its own policy, but federal cases similarly apply the arbitrary and capricious standard to review of agency decisions. *See CBS v. FCC*, 663 F.3d 122, 137 (3rd Cir. 2011).

capricious, unless it provided "a reasoned explanation" for the departure: "The agency's actions will then be set aside as arbitrary and capricious if the agency failed to provide a reasoned explanation for its decision to change course." *Id.* at 145 (internal quotations omitted).

It is worth noting that the Third Circuit recognized that the FCC could change its policy: "Like any agency, the FCC may change its policies without judicial second-guessing." *Id.* at 138. However, the key point highlighted by the court was that "it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure." *Id.* Because the FCC did not provide a reasoned explanation for its change in policy, its decision was vacated. *Id.*

In another typical case, then-Circuit Judge Roberts found that the Federal Aviation Administration's ("FAA") suspension of a pilot's license on grounds of his conviction for driving under the influence of alcohol significantly departed from its own precedent in three respects and held that the action was arbitrary and capricious. *Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121 (D.C. Cir. 2003). The FAA had a longstanding requirement of prosecutorial diligence in stale complaint cases, but in *Ramaprakash*, the agency departed from its longstanding rule

and prosecuted a stale claim. *Id.* at 1127. The court noted that "the core concern underlying the prohibition of arbitrary or capricious agency action is that agency 'ad hocery' is impermissible." *Id.* at 1130 (internal quotations omitted). The application of the "stale complaint rule" left little certainty as to how it would be applied in the future. Instead, interested parties were left with "a promise from the Board that at some point in the future, the stale complaint rule may again mean what it once did — depending on 'specific facts of future cases.'" *Id.* Because the agency departed so significantly from its own established policy and precedent without providing any explanation, the District of Columbia Circuit Court found that the agency action was arbitrary and capricious.

Below, the Parks Commission attempted to distinguish these cases by arguing that an agency does not have to provide a reasoned explanation for departing from its own policy when the agency is acting in a proprietary, rather than regulatory, capacity. However, the concerns of the courts in *CBS* and *Ramaprakash* are equally applicable in proprietary and regulatory settings. Just as deviating from an established policy without a reasoned explanation can harm regulated entities, the same holds true for the public affected by an agency's proprietary decisions. Mt. Spokane State Park is

the largest state park and one of the most visited parks in the Washington state parks system. AR 00206. The Commission is responsible for managing state parks for the public's benefit. *See Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 790, 309 P.3d 734 (2013); RCW 79A.05.305. Members of the public who utilize the park should be able to rely upon the agency's policies. Indeed, the Commission considers the public as "partners" in its resource protection efforts. As the natural resource policy document states: "The public, as stakeholders and volunteers, are partners in ensuring the successful stewardship of park resources for future generations." CP 287 (note vii). The public, with whom the agency "partners" to protect natural resources, deserves (much like regulated entities) a rational explanation when the agency deviates from its policy.

Moreover, the Commission's decision not only impacts the public at large, it impacts specific individuals and organizations. Several have joined as petitioners in this lawsuit. Another — MS 2000 — has significant interest in the outcome, too. Simply because the agency is making a proprietary decision does not give it license to act arbitrarily and capriciously to the detriment of individuals, businesses, or the public at large.

Returning to the broader question, the Commission's departure from its own policy here without a reasoned explanation was arbitrary and capricious. First, at no point has the Commission disagreed that its policy (entitled "Land Classification") was applicable to its land classification decision. Commission staff acknowledged that the policy "does discuss our typical procedure with areas of significant natural resources." AR 00754-755. The Commission and Commission staff acknowledged the high natural resource value of the area; its regional and statewide significance; and its occupancy by "species of concern." *See supra* at 17-22. The land classification of these high value natural resource lands in Mt. Spokane State Park clearly is in the domain of the policy.

Second, the Commission's land classification decision departed from its policy. The policy explains that areas of significant natural resource value "should be classified restrictively to allow only low-intensity uses and minor facilities development." CP 281. The only discretion that the policy contemplates is for the Commission to adopt the intermediate "Resource Recreation" classification for areas where conflicting uses exist. *Id.* But the policy unequivocally does not authorize classifying areas of significant natural resource value with the high-intensity "Recreation"

classification. Yet that is exactly what the Commission did by classifying the west and northwest slopes as "Recreation." A more definitive departure from the policy would be difficult to conceive.

Third, the Commission never provided any explanation — reasoned or otherwise — to explain its departure from its policy. In fact, the Commission staff did not so much as mention the policy until shortly before making its ultimate decision. *See supra* at 26. Even then, Commission staff simply acknowledged that the policy exists — there was no discussion or analysis of the substance of the policy, how it applied to the facts of this case, or whether there was a rational justification for not applying it. *See supra* at 26-27.

Below, the Commission noted that the agency and the commissioners spent considerable time and effort analyzing many of the issues, such as the desire of downhill skiers for more ski runs and the desire of others to protect this unique and important natural resource. But deliberating at length does not immunize a decision from a determination that it is arbitrary or capricious. "[T]he arbitrary and capricious standard is not a rubber stamp and 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). Here, in all of the meetings and reports on the Commission's land classification decision, the Commission never discussed the substance of its policy nor how it applied in this setting. It never provided any explanation for deviating from its policy. This arbitrary and capricious action is not shielded from review simply because the commission held lengthy meetings and deliberated for an hour or two before making its decision.

D. The Commission was Required to Provide an Explanation for Its Policy Departure on the Record, Not in Litigation Briefs.

Below, the Commission's attorney suggested that the Commissioners may have given great consideration to the policy (even though the Commissioners never said so) and speculated about rationales the Commissioners may have employed for deciding the policy should not apply here. But such *post hoc* rationalizations to fill a gap in the agency's expressed reasoning should be rejected by a reviewing court. Courts have long recognized that an agency must provide a reasoned explanation on the record and cannot supply *post hoc* rationalizations to justify arbitrary and capricious decisions: "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. "[A]gency action cannot be sustained on *post hoc* rationalizations supplied during judicial review." *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981). "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

In other words, the Commission cannot now claim that it applied its own policy to its decision or that its counsel has divined a rationale to support deviating from the policy. Moreover, any argument that the Commission did not deviate from its policy and actually applied its policy is nonsensical on its face: the policy clearly calls for areas with significant natural resources to be classified with low-intensity classifications and the Commission did the opposite of what its policy calls for by classifying it with the highest-intensity classification.[8] CP 281. If the Commission had actually applied its policy to its decision, then it would have classified the area in question restrictively.

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[8] The policy's use of the word "should" rather than "shall" does not allow the Commission to completely ignore its policy. Even if the policy used "shall" in its wording, the Commission "may change its policies without judicial second-guessing." *CBS* at 138. However, the requirement to provide a reasoned explanation on the record for the policy change still exists. *Id.* The policy's direction is clear — regardless of whether "shall" or "should" is used — and the Commission departed from the outcome called for by the policy.

Further, the Commission cannot point to the totality of the record and claim that because it considered some general concepts that are also touched on in the policy, then it considered and applied the policy. For instance, the Commission considered Alternative 2, which would have classified the area restrictively as called for in the policy. But the policy does more than just indicate that the Commission should *consider* a low-intensity classification among the several land classification options — it calls for a specific *outcome*: the land should be classified restrictively to allow only low-intensity uses and minor facilities development. CP 281. To argue that the Commission applied the policy to its decision because the Commission had before it — but ultimately rejected — an alternative that would comply with the policy highlights the Commission's lack of valid arguments.

The prohibition on *post hoc* rationalizations is not a nitpicking procedural limitation. It is vital to assure that the real decision makers (the commissioners, appointed by the Governor and confirmed by the Senate, *see* RCW 79A.05.015) engaged in a meaningful consideration of the facts and policies that are to guide their decision. The public (including the appellants) and this Court are left wondering if a real consideration and

application of the policy by the commissioners would have changed the decision. Commissioners Schmitt, Brown, Milner, Bounds, and Lantz all remarked how difficult the ultimate decision was and how the Commission had to balance competing interests. *See supra* 27-28. Yet none of these Commissioners expressed the slightest regard for the direction provided by the adopted policy and how it might assist them in resolving the conflicting recreational and resource protection interests. None of the commissioners considered that the decision on how to resolve the conflict had been made in a deliberate fashion when the policy was adopted. While the agency's counsel can now suggest how counsel would have reached the decision or how the Commissioners may have reached the same decision even if they had considered the policy, it was the duty of the Commissioners in the first instance to consider and apply the policy. And if the Commission felt it was necessary to deviate from the policy, then the Commission must provide a reasoned explanation for the deviation. Their failure to do so cannot be excused by their counsel's litigation briefs. At the very least, the public deserves an explanation why the policy did not guide the Commission's decision. Such agency "ad hocery" is the fundamental concern of the arbitrary and capricious standard. The Commission's land

classification decision is a prime example of arbitrary and capricious agency action.

V. 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 19th day of February, 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN ROSKELLEY, FAYETTE KRAUSE, SPOKANE AUDUBON SOCIETY, and the LANDS COUNCIL, Petitioners, v. WASHINGTON STATE PARKS AND RECREATION COMMISSION, and MOUNT SPOKANE 2000, Respondents.	No. 48423-4-II UNPUBLISHED OPINION

JOHANSON, J. — John Roskelley, Fayette Krause, the Spokane Audubon Society, and the Lands Council are the Petitioners. They appeal the superior court's ruling that affirmed a Washington State Parks and Recreation Commission's (Commission) land classification decision. The Commission adopted a combination of natural, resource recreation, and recreation land classifications for a small portion of Mount Spokane State Park. Petitioners argue that the Commission's decision to classify as recreation land 279 acres of 800 acres at issue, was arbitrary and capricious. We hold that the Commission's decision was not arbitrary and capricious. The Commission gave due consideration to its policies, the natural resources in the area, and the potential impact of its decision. The Commission's decision is consistent with its policies and regulations, and within its discretion to reach a proper balance between environmental protection

and recreational use. Accordingly, we affirm the superior court and the Commission's land classification decision.

FACTS

I. BACKGROUND

The Commission manages state parks, which includes classifying park land for types of permissible uses. The mission statement of the Commission states, "'The [Commission] acquires, operates, enhances, and protects a diverse system of recreational, cultural, historical and natural sites. The Commission fosters outdoor recreation and education statewide to provide enjoyment and enrichment for all, and a valued legacy to future generations.'" Clerk's Papers (CP) at 287 n.I.

Mount Spokane State Park contains over 13,000 acres. Mount Spokane 2000 (MS 2000), a private concessionaire, operates an existing ski area on Mount Spokane that encompasses 1,425 acres or 10 percent of the park. In 1997, MS 2000 and the Washington State Parks Department agreed to explore whether MS 2000 could expand its ski area. In 1999, using the state park land classification system,[1] the Commission classified most of the park's 13,000 acres as natural or resource recreation lands. The Commission left unclassified an 800-acre area called the "Potential Alpine Ski Expansion Area" (PASEA), but planned to further study the PASEA to determine what the proper land classification should be in light of the proposed ski area expansion. Administrative Record (AR) at 859. The PASEA is near the existing MS 2000 ski area. Even though the PASEA

[1] Ch. 352-16 WAC. There are six classifications of state park areas including three at issue here: "recreation" that permits high-intensity outdoor use, "resource recreation" that permits medium- and low-intensity outdoor use, and "natural areas" that permits "low-intensity" recreation but focuses on preservation of significant ecological values. WAC 352-16-020(1), (2), (3).

remained unclassified, starting in 1999, the Commission directed its staff to manage the PASEA as a natural forest area while allowing backcountry skiing that was already occurring to continue.

At issue here is the Commission's classification of the 800-acre PASEA as natural (170 acres), resource recreation (351 acres), and recreation (279 acres). Of the 279 acres of recreation, 75 acres will be disturbed for ski runs. Petitioners object to only the 279 acres classified as recreation.

II. INITIAL CLASSIFICATION EFFORTS AND RESOURCE POLICY

In August 2010, the Commission reevaluated the Mount Spokane State Park classifications and obtained an environmental impact statement (EIS) to document the potential impacts of new classification options. This evaluation excluded the PASEA. Also in 2010, the Commission adopted a new comprehensive resource policy: "Policy 73-04-1, *Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy*" (2010 Policy). The 2010 Policy's purpose is to "provide an over-arching natural resource" guide for the agency. CP at 267.

The 2010 Policy states,

> This policy and its future implementing procedures seeks to capture current regulations and management guidelines, and to summarize the key points needed to promote the long-term protection and conservation of the natural resources in the agency's care. With institutional commitment and budgetary support, this policy will ensure the long-term protection of State Parks' natural resources.

CP at 268. Sections D.1 and D.2 of the 2010 Policy cover resource use. Section E.1 covers land classification.

In May 2011, the Commission attempted to classify the PASEA as a combination of recreation classification areas and prepared another EIS on the proposed ski expansion area. In September 2013, this court overturned the Commission's classifications.

From 2006 to 2014, MS 2000 contracted a number of studies on the need for more recreation in the PASEA and potential environmental impacts of expanding the skiing area. Meanwhile, a State Environmental Policy Act (SEPA), ch. 43.21C RCW, review of the possible ski expansion determined that a land classification action could have probable significant adverse impact on the environment. Thus, in November 2013, the Commission issued a determination of significance to review the potential impact. This process required another EIS. After seeking additional public comment, the Commission received 600 comments. In August 2014, after considering these comments, the Commission prepared another EIS, resulting in a draft environmental impact statement (DEIS), which set out several potential classification schemes for the PASEA and considered the potential impacts of the ski area expansion. During the 45-day comment period for the DEIS, the Commission received 704 comment letters and e-mails.

III. FINAL EIS

In October 2014, the Commission released a final environmental impact statement (FEIS) in response to the comments made on the DEIS. The FEIS considered several alternative land classification options for the PASEA. These options included not classifying the area and continuing existing practices, classifying the area as different combinations of natural forest areas and resource recreation areas—neither of which would allow for any skiing—and an option called "Alternative 4." Alternative 4 struck a balance by proposing that 279 acres of the 800-acre PASEA be classified as a recreation area where skiing would be allowed, and a new chair lift and ski trails

could be built within a limited 75 acres. Alternative 4 also reserved the remaining 521 acres as natural or resource recreation areas where only low-intensity recreation would be allowed.

The FEIS acknowledged that the ski area expansion would require some removal of vegetation, separation of what was a continuous block of the vegetation already there, and the introduction of exotic species of vegetation. The FEIS further noted that habitat fragmentation could impact wildlife by causing stress responses, breeding and rearing disturbances, displacement or avoidance of the site, increased accessibility to predators, reduction of habitat and woody debris used for cover, and habituation to humans. It also proposed mitigation measures to address those concerns. The FEIS did not explicitly mention sections D.1, D.2, or E.1 of the 2010 Policy.

IV. COMMENTS AND LAND CLASSIFICATION

On November 19, the Commission held a public meeting to obtain final comments before selecting a land classification for the PASEA. One Commission member stated that the Commission reviewed all iterations of the EIS statements and all comments received following each EIS. The commissioner also noted that the Commission took public comment related to the PASEA development 12 times leading up to this decision.

Some commenters advocated that the PASEA be classified to restrict recreation. Some of these comments noted that the PASEA forests "meet or exceed all agency Natural Forest criteria and represent the highest level of natural resources quality in the state park system (and the state of Washington as well)," that the PASEA is part of a continuous area of "old-growth" forest of "uncommon quality" representing a "valuable conservation asset," that some state and federally protected wildlife species potentially occur in the PASEA, that the PASEA contains resources that provide habitat to support wildlife, and that the ski expansion would result in permanent loss,

conversion, or fragmentation of wildlife habitats resulting in decreased mobility by wildlife that will be difficult to mitigate. CP at 214, 151, 154.

Proponents of a recreation classification that would allow for the ski area expansion commented that because the PASEA has high snow quality, it may enjoy more resilient snow packs than other slopes and could expand the ski season. Proponents also commented that the expansion will add needed beginner to intermediate ski terrain, that there was a history of skiing near or in the PASEA, that the PASEA was already a popular destination for backcountry skiers, and that because the PASEA remains unclassified, MS 2000 cannot patrol or maintain the area other than regularly providing emergency response to lost or injured skiers within the PASEA.

The Commission took comments from members of the Spokane Tribe of Indians (Spokane Tribe).[2] The Commission staff noted the Spokane Tribe's past cultural uses on Mount Spokane generally, and in the PASEA in some cases, as well as past recreational uses, including snowshoeing, biking, snowmobiling, and birding.

Counsel for the Lands Council stated that the Commission should be guided by its 2010 Policy. He also expressed his opinion about which classifications were allowed and which were not.

On November 20, the Commission met to vote on the land classification. One commissioner asked a Commission staffer to discuss the opinion offered by counsel for the Lands Council that the section of the 2010 Policy applied to the circumstances at issue and would preclude the ski area expansion. The staffer replied that section E.1 does "discuss that our typical

[2] The Spokane Tribe filed an amicus curiae brief opposing the Commission's land classification.

procedure with areas of significant natural resources would be a protected classification of either a Natural Forest Area, Natural Area or Natural Area Preserve, or in some circumstances Resource Recreation." AR at 755. The Commission staffer also noted that "there are significant natural resources within the PASEA." AR at 752. But the staffer did not comment on the Lands Council's counsel's opinion that section E.1 precluded a recreational classification.

The Commission staff recommended Alternative 4, the mixed use classification for the PASEA ultimately adopted by the Commission:

> Staff believes that Alternative 4 advances the Commission's mission by addressing the desire for active recreational use of Mount Spokane and opportunities for expanded winter recreation activities as expressed by participants in the public planning and environmental review process. This alternative also provides a suitable balance of protection to natural resources by limiting uses and development in the majority of the PASEA.

AR at 865.

The Commission did not specifically discuss section E.1 or the 2010 Policy further. But it did state on the record that it was a tough decision, that the PASEA contained "pristine forest" of a unique quality, that there was a history of skiing in the PASEA, that the information in the FEIS was adequate to help guide efforts to minimize and mitigate the environmental impacts of the development, and that they must balance preservation and promoting recreation. The Commission concluded that Alternative 4 lessened the proposed development of 400 acres to 279 with higher standards of protection in the development plan, and that adding a chair lift to the PASEA would address a safety concern by better enabling ski patrol to evacuate people from that area. The Commission voted five to two to select Alternative 4 to classify 279 acres as a recreation area, allow only 75 acres for ski runs, and to classify 521 acres as natural or resource recreation areas.

V. PROCEDURAL HISTORY

In March 2015, petitioners filed a petition for judicial review via constitutional writ of review[3] of the Commission's land classification. On November 20, the superior court affirmed the Commission's land classification. The Petitioners appeal. MS 2000 joined the Commission as respondents.[4]

ANALYSIS

Petitioners argue that the Commission's land classification decision was arbitrary and capricious because the Commission's policies precluded the recreation classification, the Commission ignored the evidence of the area's natural resource value, and the Commission did not offer an explanation for the deviation from their 2010 Policy. The Spokane Tribe, amicus, adopt the Petitioners' arguments and additionally argue that the Commission's decision also ignored the cultural resources section D.2 of the 2010 Policy. We disagree.

I. STANDARD OF REVIEW

Our review of an administrative decision is de novo. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 677, 875 P.2d 681 (1994). An appellate court stands in the same position as the superior court to review an administrative decision. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). And the appellate court applies the proper standard of review

[3] The purpose of a constitutional writ of review is to enable a reviewing court to determine if an administrative decision was illegal or manifestly arbitrary where a statutory writ or a direct appeal are unavailable. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292-93, 949 P.2d 370 (1998).

[4] MS 2000's joinder incorporates all of the Commission's arguments and authorities without making any additional arguments.

directly to the record from the administrative proceeding and not to the findings and conclusions of the superior court. *D.W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 125-26, 177 P.3d 143 (2008).

The proper standard of review of an agency action via constitutional writ of review is to use the illegal[5] or arbitrary and capricious test. *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). An agency's action is "arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tele. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). "[D]eference to the agency's interpretation is particularly appropriate where its own regulations are concerned." *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 86, 11 P.3d 726 (2000).

II. COMMISSION POLICIES AND RULES

A. COMMISSION POLICIES

The 2010 Policy "provide[s] an over-arching natural resource" guide for the agency. CP at 267. Specifically, the 2010 Policy and its

> [f]uture implementing procedures seeks to capture current regulations and management guidelines, and to summarize the key points needed to promote the long-term protection and conservation of the natural resources in the agency's care. With institutional commitment and budgetary support, this policy will ensure the long-term protection of State Parks' natural resources.

CP at 268. The 2010 Policy further details what the Commission must consider when classifying land. Pertinent sections of the 2010 Policy related to land classification state,

[5] The parties do not argue that the Commission's decision is illegal.

> **D. Resource Use**
>
> 1. Recreational facilities / activities
>
> *State Parks has a mission of protecting resources of the system while providing for recreational use by the public*. Given the need to *balance these goals*, State Parks' staff will carefully analyze on a system-wide and / or park specific basis the long-term impacts to natural processes and resources resulting from facilities development, concessionaire practices, and recreational uses. 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. New developments will seek to minimize the impact of recreational activities to the natural resources of a park.
>
> . . . .
>
> 2. Cultural resources
>
> State Parks has the complex mission of protecting the natural and cultural resources of the system while encouraging their recreational and scientific use by the public. *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. Where significant natural and cultural resources exist at a site or within a landscape, agency staff must protect the integrity of all significant resources.

CP at 277.

> **E. Planning**
>
> 1. Land classification
>
> . . . 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 *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 at 281.

B. COMMISSION RULES

The Commission uses a land classification system set out in WAC 352-16-020 to classify state park land. That provision states in relevant part,

> **State park areas** are of statewide natural, cultural and/or recreational significance and/or outstanding scenic beauty. . . . They *may* be classified *in whole or part* as follows:
>
> (1) **Recreation areas** are suited and/or developed for high-intensity outdoor recreational use. . . .
>
> (2) **Resource recreation areas** are suited and/or developed for natural and/or cultural resource-based medium-intensity and low-intensity outdoor recreational use.
>
> (3) **Natural areas** are designated for preservation, restoration, and interpretation of natural processes and/or features of significant ecological, geological or paleontological value while providing for low-intensity outdoor recreation activities as subordinate uses.
>
> . . . .
>
> (5) **Natural forest areas** are designated for preservation, restoration, and interpretation of natural forest processes while providing for low-intensity outdoor recreation activities as subordinate uses.

WAC 352-16-20 (emphasis added). A "recreation areas" classification allows for the clearing of vegetation to construct ski lifts and trails as well as for the operation of motorized equipment to groom ski runs. Only this classification would allow for a high-intensity outdoor use including ski runs and formal ski trails to be constructed. "Natural Forest areas" allow for low-intensity uses such as interpretive trails, hiking trails, cross-country ski trails, off-trail hiking, and backcountry skiing. When managing the task of land classification, the administrative code further states that "[n]othing in this section shall be construed to allow uses that are otherwise prohibited, *nor prohibit uses that are otherwise expressly allowed*, by the commission, this code or by statute." WAC 352-16-030(2) (emphasis added).

III. RECREATION CLASSIFICATION IN LIGHT OF COMMISSION 2010 POLICY

Petitioners argue that the Commission's land classification decision was arbitrary and capricious because section E.1 of the Commission's 2010 Policy precludes a recreation classification. The Spokane Tribe echoes this argument, but adds that section D.2 covering cultural

resources also precludes this classification. The Petitioners' and the Spokane Tribe's arguments fail.

A. RULES OF LAW

Our initial examination focuses on the plain language of the regulation and "[i]f an administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone." *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). "[R]egulations are interpreted as a whole, giving effect to all the language and harmonizing all provisions." *Cannon*, 147 Wn.2d at 57. We "'must not add words where the legislature has chosen not to include them,' and we must 'construe statutes such that all of the language is given effect.'" *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Rules of statutory construction apply to administrative regulations. *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979).

Courts have interpreted "may" to be permissive language. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982) (holding that "[w]here a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive"). "Should" has also been interpreted as permissive language, expressing a desire or request. *Tennant v. Roys*, 44 Wn. App. 305, 313, 722 P.2d 848 (1986) (holding that "should" and "shall" are distinguishable). Although "should" can express a duty or obligation, another definition of "should" includes a nonemphatic request. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2104 (2002). "Shall" creates

a mandatory or imperative construction. *Scannell*, 97 Wn.2d at 705. "Priority" can be defined as "something requiring or meriting attention prior to competing alternatives." WEBSTER'S at 1804.

B. POLICY SECTION E.1 DOES NOT PRECLUDE A RECREATION CLASSIFICATION

As in statutory interpretation, we review whether the plain language of the Commission's 2010 Policy precludes the Commission's recreation classification. *Burke*, 92 Wn.2d at 478; *Cannon*, 147 Wn.2d at 56. The 2010 Policy, section E.1, provides that 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. Use of the word "should" can indicate a permissive direction or request, not an absolute mandate. *Tennant*, 44 Wn. App. at 313; *and see* WEBSTER'S at 2104.

Petitioners' argument requires that we read words into the 2010 Policy that are not present. Rather than saying these classifications "must always" or "shall" be used, the use of "should" could mean that the Commission has discretion to choose a listed classification or another classification. The Commission could certainly have used the word "shall" if no discretion was intended. We must not add words where a regulatory drafter has chosen not to include them. *Lake*, 169 Wn.2d at 526; *Burke*, 92 Wn.2d at 478.

In addition, section E.1 says that "[t]ypically" one of three natural area classifications "should" be applied to such areas. CP at 281. But it also provides that a fourth option, "resource recreation," "may" offer the best option to address conflicting use issues at a specific site. This language suggests that no single classification is mandated and that there is a range of options, not simply the classifications suggested. *Scannell*, 97 Wn.2d at 704. The discretionary, rather than mandatory, nature of the language used supports the conclusion that section E.1 does not preclude

the Commission from adopting a mix of use classifications, including a recreation classification, for a small portion of the PASEA.

C. POLICY SECTION D DOES NOT PRECLUDE RECREATION CLASSIFICATION

Next, the Spokane Tribe argues that the Commission's classification decision did not follow section D.2 of the 2010 Policy. The Spokane Tribe's limited argument states that because the PASEA contains natural and cultural resources of regional significance, section D.2 required the Commission to use land classifications listed only in section E.1. But section D does not dictate this particular result. Thus, we reject this argument.

The 2010 Policy provides,

> **D. Resource Use**
>
> 1. Recreational facilities / activities
>
> State parks has a mission of protecting resources of the system while providing for recreational use by the public. Given the need to balance these goals, State Parks' staff will carefully analyze on a system-wide and / or park specific basis the long-term impacts to natural processes and resources resulting from facilities development, concessionaire practices, and recreational uses. . . .
>
> . . . .
>
> 2. Cultural resources
>
> State Parks has the complex mission of protecting the natural and cultural resources of the system *while encouraging their recreational* and scientific use by the public. *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. Where significant natural and cultural resources exist at a site or within a landscape, agency staff must protect the integrity of all significant resources.

CP at 277 (emphasis added).

The Commission's mission is to protect resources while providing for recreational use. The Commission must balance these goals. Resources of national, statewide, or regional significance will take priority over other resource protection and use efforts. But no single resource consistently takes priority over others. "Priority" can be defined as "something requiring or

meriting attention prior to competing alternatives." WEBSTER'S at 1804. And while the Commission must protect resources of regional or statewide significance, it must also encourage recreation.

Here, the Commission gave the significant cultural and natural resources of the PASEA considerable attention and consideration. It reviewed studies conducted between 2006 and 2014 about the ski area expansion's potential environmental impacts. It took public comment 12 times and reviewed each round of comments following the issuance of each environmental impact evaluation. And the record shows that the Commission reviewed this information and acknowledged the significant natural resources in the PASEA.

The Commission also heard comments from the Spokane Tribe. The Commission was advised by staff about the past cultural uses of the PASEA by the Spokane Tribe, as well as the past recreational uses of the PASEA including snowshoeing, biking, backcountry skiing, snowmobiling, and birding. Thus, over the course of eight years, the Commission gathered and considered a multitude of information about the resources of the PASEA to inform its decision before adopting the land classifications mentioned in section E.1 for 521 of 800 acres. The Commission's decision gives effect to competing provisions in section D by giving priority to resources of regional or statewide significance and placing a majority of the 800 acres in conservation classifications under section E.1 while encouraging recreation, as required, on only 279 acres.

The dissent relies on the portion of section D.2 that states, "Where significant natural and cultural resources exist at a site or within a landscape, agency staff must protect the integrity of all significant resources." CP at 277. But this language does not prohibit the mixed classification

specifically selected by the Commission to protect the integrity of the significant resources within the PASEA while encouraging recreation. The dissent ignores the surrounding language that says that "[n]o single resource consistently takes priority over others" and that the Commission shall protect resources while encouraging recreational use. CP at 277. Most importantly, the dissent ignores the language that the State Parks must "balance these goals." CP at 277. Instead, the dissent would mandate that the Commission give significant resources exclusive priority rather than allow the Commission discretion to balance competing goals.

We do not read section D.2 in isolation, but instead must give effect to all the words and provisions of the 2010 Policy. *See Cannon*, 147 Wn.2d at 57. We must also read the 2010 Policy in light of the regulations the policy was meant to effectuate. *See Cannon*, 147 Wn.2d at 57. On balance, the language of the regulations, as discussed more fully below, and the Commission's 2010 Policy give the Commission land classification discretion and do not mandate nor preclude any one classification. The Spokane Tribe fails to show how section D precludes the Commission's recreation classification of a small portion of the PASEA.

D. RECREATION CLASSIFICATION NOT PRECLUDED

Finally, the administrative code and the Commission's interpretation of the 2010 Policy support the conclusion that sections E.1 and D do not mandate a particular result. The guiding administrative code states that park areas "*may* be classified *in whole or part*" using one of the listed land classifications, which includes recreation, and that the code should not be read to "*prohibit uses that are otherwise expressly allowed*" by the code. WAC 352-16-20, -030(2) (emphasis added). We do not read these provisions, as the dissent asserts, to say that an allowed category of use *has* to be applied *wherever* terrain or commercial demand is suited to the piece of

land being categorized. Rather, these provisions show that the Commission's land classification decisions are discretionary and no specific classification is *precluded.*

We also must give deference to the Commission's interpretation of its own policy. *Postema*, 142 Wn.2d at 86. And here, the Commission interpreted and applied its 2010 Policy consistent with its mission requiring it to balance preservation and recreation uses. We hold that the Commission did not willfully and unreasoningly disregard its 2010 Policy, and thus the Commission's decision was not arbitrary and capricious.

IV. CONSIDERATION OF THE PASEA'S NATURAL RESOURCES

Petitioners next argue that the Commission's decision was arbitrary and capricious because the decision was made without regard to the undisputed evidence of the high natural resource value of the PASEA lands. Again, we disagree.

An agency's action is arbitrary and capricious if it is taken without regard to the attending facts or circumstances. *Wash. Indep. Tele. Ass'n*, 148 Wn.2d at 905. "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).

Section D.1 of the Commission's 2010 Policy states that the Commission must "balance" the goals of "protecting resources of the [park] system while providing for recreational use by the public." CP at 277. This section demonstrates that the Commission is not charged with prioritizing one goal—preservation or recreation—above the other, but must balance them.

A. CLASSIFICATION IN LIGHT OF *RIOS* AND *PROBST*

Petitioners cite to *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), as analogous examples of agencies acting arbitrarily and capriciously by ignoring the evidence before them. But these cases are distinguishable.

In *Rios*, the Supreme Court reviewed the Department of Labor and Industries' (L&I) refusal to initiate rulemaking to mandate a blood-test program for workers who handled a certain pesticide. 145 Wn.2d at 486. The *Rios* court held that L&I's refusal to engage in rulemaking was arbitrary and capricious where L&I previously invested in researching the chemical found in the pesticide, authorized a study to identify ways to monitor the chemical, and made findings that the tests were "necessary and doable." 145 Wn.2d at 507-08. The *Rios* court held that L&I acted without regard to the attending facts and circumstances because L&I ignored its own findings about a dangerous chemical and a necessary, feasible way to monitor the chemical to protect employees. 145 Wn.2d at 508.

In *Probst*, the court held that the Department of Retirement Services (DRS) acted arbitrarily and capriciously when it rendered a decision about the method used to calculate interest for the teacher's retirement system. 167 Wn. App. at 194. Teachers raised concerns about the DRS continuing to calculate interest on a quarterly basis as it had in the past, and the DRS had evidence that using the quarterly calculation system could be unfair because it could lead to some of the teachers being denied interest entirely. *Probst*, 167 Wn. App. at 193. Rather than addressing the potential of denied interest, the DRS continued to use the quarterly method. *Probst*, 167 Wn. App. at 193. The *Probst* court held that the DRS' decision was arbitrary and capricious because

it did not consider the potentially unfair result of continued use of the quarterly method. 167 Wn. App. at 193-94.

The agencies' disregard of their own evidence in *Rios* and *Probst* is not analogous to the Commission's decision here. The Petitioners have not shown that the Commission ignored a potentially unfair result or that it disregarded the evidence before it. Instead, the record shows that the Commission made its decision based on all the evidence and after carefully considering and balancing competing interests.

As noted above, the Commission reviewed studies, took public comment, and reviewed the comments. Rather than ignoring the evidence presented about the natural resources in the PASEA, the Commission followed section D.1 of its 2010 Policy. The Commission gave priority to preservation and encouraged recreation by classifying 521 acres as natural or resource areas and 279 acres as a recreation area out of 800 previously unclassified acres. In reaching its decision, the Commission acknowledged the potential impacts of the expansion. And the Commission set out accompanying development plans and mitigation measures to minimize that impact on the PASEA's natural resources. This was a complex task that entailed significant public input and review of technical and scientific reports.

The record shows that the Commission considered several alternative land classifications for the PASEA, including not classifying it or selecting different combinations of natural forest area and resource recreation area classifications. Thus, the Commission did not disregard the natural resources in the PASEA, but considered the "typical" classifications set out in section E.1 for high value natural resource areas before selecting another classification combination.

The dissent argues that without acknowledgment or discussion of the preferred land classification categories in section E.1, section E.1 is effectively written out of the Commission's policies because it must balance its goals no matter what.[6] Setting aside that there is no legal requirement that the Commission cite to and analyze specific provisions of their guiding policy on the record, the Commission did not ignore its 2010 Policy.

The Commission acknowledged and gave priority to the section E.1 land classifications for the majority of the 800 acres at issue here. The dissent would eviscerate the Commission's discretion to protect the "diverse system of recreational, cultural, historical and natural sites" as required by the Commission's mission. CP at 287 n.I.

The Commission's action was not arbitrary and capricious where it expressly recognized the natural resource value of the area and gave the evidence before it due consideration before classifying 279 acres of the PASEA's 800 acres as a recreation area. *Hillis*, 131 Wn.2d at 383. We hold that the Commission's decision does not exhibit a willful and unreasoning decision taken without regard to the evidence presented about the PASEA's natural resource value, and thus it was not arbitrary and capricious.

[6] The dissent further argues that this conclusion is supported by SEPA. Neither Petitioners nor the Spokane Tribe rely on SEPA. And although the provisions of SEPA relied on by the dissent illustrate Washington's commitment to the preservation and enhancement of the natural environment, they do not establish that the Commission's land classification violated SEPA or the Commission's policies such that it was arbitrary and capricious.

V. DEPARTURE FROM EXISTING POLICY

Petitioners argue that the Commission's decision was arbitrary and capricious because it represents a departure from section E.1 of the 2010 Policy, a policy departure requires an explanation, and no explanation or discussion of the policy was offered. The Spokane Tribe adopts this argument.[7] Petitioners and the Spokane Tribe's argument fails.

The parties do not cite to any Washington State cases that directly address the issue of an agency departing from its own policy. But Petitioners rely on two federal cases that apply the arbitrary and capricious standard. Because we held above that the Commission did not depart from its policy, we need not reach this issue. But here we reach it and hold that Petitioners' arguments are not persuasive.

1. *CBS CORP. v. F.C.C.*[8]

In *CBS Corp.*, the Federal Communications Commission (FCC) fined the CBS network after an entertainer indecently exposed herself for nine-sixteenths of one second during a televised Super Bowl half-time event. 663 F.3d at 125. The Third Circuit Court of Appeals held that the FCC's actions represented a departure from its past policy because although the FCC prohibits

[7] The Spokane Tribe also argues that the Commission's reliance on historical use represents an arbitrary and capricious adoption of a new policy without explanation because the 2010 Policy does not require historical use analysis. The Commission noted that due to the "historical recreational activities in the PASEA," the PASEA was not a "typical natural area." Br. of Resp'ts at 17-18. And the Commission addressed the historical uses of the PASEA, including the uses by Spokane Tribe members as well as past recreational uses in or near the PASEA. But the Commission's acknowledgment of the PASEA's historical uses does not establish that the Commission adopted a new policy in which historical uses are determinative in a land classification decision.

[8] 663 F.3d 122 (3d Cir. 2011).

indecent behavior on television, at the time of the incident, the FCC also had an exemption in place for almost three decades for fleeting words and images. *CBS Corp.*, 663 F.3d at 125-26 (quoting *CBS Corp. v. F.C.C.*, 535 F.3d 167, 174-75 (3d Cir. 2008), *vacated by F.C.C. v. CBS Corp.*, 556 U.S. 1218, 129 S. Ct. 2176, 173 L. Ed. 2d 1153 (2009)). CBS Corp. argued that the Super Bowl incident fell under the exemption and the Third Circuit Court agreed, holding that "[l]ike any agency, the FCC may change its policies without judicial second guessing," but "cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure." *CBS Corp.*, 663 F.3d at 138. Because the FCC did not provide a reasoned explanation for departing from its fleeting image exception, its decision was arbitrary and capricious. *CBS Corp.*, 663 F.3d at 138.

Here, Petitioners do not demonstrate how the Commission's decision represents a departure from a "well-established course of action" as in *CBS Corp*. 663 F.3d at 138. In *CBS Corp.*, there were three decades of precedent of the FCC applying its policy in a certain way before departing from that precedent. 663 F.3d at 125-26 (quoting *CBS Corp.*, 535 F.3d at 174-75). Here, the Petitioners do not point to any precedent that demonstrate the Commission's land classification decision departs from its established course of interpreting its policies. Rather, Petitioners reiterate their argument that section E.1 "calls for a specific *outcome*" to classify the PASEA more restrictively than the Commission's decision, and therefore the decision was a departure. Br. of Appellants at 45. But as discussed above, the Commission's decision was an authorized action

under the permissive language of its 2010 Policy that directs the Commission to balance its preservation and recreation goals.[9]

2. *RAMAPRAKASH v. FEDERAL AVIATION ADMINISTRATION*[10]

Petitioners also rely on *Ramaprakash*. *Ramaprakash* is distinguishable. In *Ramaprakash*, the Federal Aviation Administration (FAA) had a long-standing "'stale complaint rule'" meant to ensure timely prosecution of violations of rules meant to ensure pilots' ability to fly safely. 346 F.3d at 1123. Despite this rule, the FAA prosecuted and suspended a pilot's license following a federal aviation regulation violation even though the offense occurred well outside of the timeframe of the stale complaint rule. *Ramaprakash*, 346 F.3d at 1123. The District of Columbia Circuit Court held that because the FAA's action significantly departed from its own precedent without providing any explanation, the action was arbitrary and capricious. *Ramaprakash*, 346 F.3d at 1130. The *Ramaprakash* court further stated that this action represented impermissible agency "'ad hocery'" because it left little certainty as to how the stale complaint rule would be applied in the future. 346 F.3d at 1130.

[9] Petitioners do not address the permissive nature of the word "should" in section E.1, but state in a footnote that the "use of the word 'should' rather than 'shall' does not allow the Commission to completely ignore its policy." Br. of Appellants at 44 n.8.

[10] 346 F.3d 1121, 358 U.S. App. D.C. 146 (D.C. Cir. 2003).

Petitioners appear to argue that, as in *Ramaprakash*, the Commission engaged in "ad hocery" or a departure because the Commission chose a land classification not listed in section E.1 and neither the FEIS nor the Commission discussed why the Commission made that selection. For the same reasons articulated above with respect to *CBS Corp.*, we disagree.

3. NO EXPLANATION REQUIRED WHERE THE COMMISSION FOLLOWED ITS EXISTING POLICY

Here, MS 2000 first requested expanding the ski area in 1997. The record demonstrates that since that time, the Commission's process to classify the PASEA and eventual land classification was not ad hoc as in *Ramaprakash*, but was in accord with the Commission's policy directives.

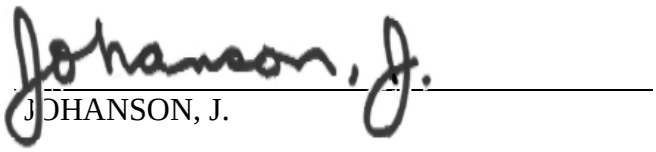
We hold that the Petitioners have not met their burden to show that the Commission acted arbitrarily and capriciously by departing from its 2010 Policy or by creating a new policy without offering an explanation. Instead, the Commission followed its existing policy, and thus an explanation for any "departure" is not required.[11]

[11] The Spokane Tribe cites to *Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1509 (2016). The dissent also relies on *Kake*. But the Petitioners do not show how the Commission's decision represents a departure or an inconsistent action from past actions. *Kake* is not determinative here.

CONCLUSION

In sum, we hold that the Commission's Mount Spokane State Park land classification was not arbitrary and capricious. We affirm the superior court and the Commission's land classification decision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



JOHANSON, J.

I concur:

LEE, J.

BJORGEN, C.J. (dissenting) — The decision of the Washington State Parks and Recreation Commission to classify 279 acres[12] in Mount Spokane State Park as recreation land contradicted one of its policies and was inconsistent with another. Therefore, the Commission's decision was illegal and arbitrary and capricious under the standard of review in *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998) and should be vacated.

The Commission works for ends that would try a Janus. On one hand, it must provide facilities for outdoor recreation, including high intensity recreation. WAC 352-16-020. On the other, it must also provide areas that preserve and restore natural processes, as well as serve the interpretation of and education concerning those processes. *Id*. This difficult and critical balancing merits an ample scope of discretion, but at the same time demands safeguards against misuse of that discretion. Those safeguards are found in part in the Commission's description of its land classifications in WAC 352-16-020 and in its policies implementing those classifications.

I. THE COMMISSION'S LAND CLASSIFICATION CRITERIA

WAC 352-16-020 describes six categories under which state park land may be classified: recreation areas, resource recreation areas, natural areas, heritage areas, natural forest areas, and natural area preserves. WAC 352-16-020 prefaces those descriptions by stating that lands "may be classified in whole or part" under those descriptions. The term "may" in this context simply recognizes the Commission's authority to classify its land. That term does not give the Commission license to ignore or depart from the descriptions of its classifications in WAC 352-

[12] This is part of an 800-acre area referred to in the record as the PASEA, an abbreviation for "potential alpine ski expansion area."

16-020 or from its policies guiding those classifications. To do so would drain these safeguards of any effect.

Similarly, the statement in WAC 352-16-030(2) that "[n]othing in this section shall be construed to . . . prohibit uses that are otherwise expressly allowed, by the commission, this code or by statute" does not mean that an allowed category of use must be allowed wherever terrain or commercial demand is suited to it. To do so, again, would rob the classification descriptions of their effect and the Commission of needed discretion. This statement simply expresses the near tautology that an allowed category of use, such as skiing, cannot be prohibited on all park land.

All six of the classification categories in WAC 352-16-020 look to whether the uses allowed under the classification are suited or related to the land so classified. One category, though, goes further. The provision governing natural forest areas states:

> **Natural forest areas** are designated for preservation, restoration, and interpretation of natural forest processes while providing for low-intensity outdoor recreation activities as subordinate uses, and which contain:
>
> (a) Old-growth forest communities that have developed for one hundred fifty years or longer and have the following structural characteristics: Large old-growth trees, large snags, large logs on land, and large logs in streams; or
>
> (b) Mature forest communities that have developed for ninety years or longer; or
>
> (c) Unusual forest communities and/or interrelated vegetative communities of significant ecological value.

WAC 352-16-020(5). Through subsections (a) through (c), this provision lists precise characteristics that call for preservation and restoration. Although WAC 352-16-020 does not mandate this classification for all areas with these features, it expresses the Commission's determination that land with these characteristics warrants this level of protection.

II. THE 2010 POLICY

The most direct bridle on the Commission's discretion in balancing the interests of development and conservation is found in its own policies. Of those, Policy 73-04-1, *Protecting Washington State Parks' Natural Resources: A Comprehensive Natural Resource Management Policy* (2010), speaks most directly to this appeal.[13]

A. The Effect of the 2010 Policy

At the outset, the terms of the 2010 policy make clear it is something more than a public relations device or an internal guideline that may be ignored at will. First, the policy characterizes its purpose as providing "an over-arching natural resource policy for the agency." Clerk's Papers (CP) at 267. More to the point, the policy states that

> [it] and its future implementing procedures seeks to capture current regulations and management guidelines, and to summarize the key points needed to promote the long-term protection and conservation of the natural resources in the agency's care.

CP at 268. In similar vein, the policy states that

> [w]ith institutional commitment and budgetary support, this policy will ensure the long-term protection of State Parks' natural resources.

Id.

A policy that captures regulations and guidelines, that summarizes key points "needed" to serve a purpose, and states that with commitment and support it will "ensure" the fulfillment of that purpose, is more than a suggestion that may be spurned or embraced at will. Instead, it is a policy intended to be followed. Any other conclusion abandons both ordinary meaning and the safeguards needed to govern the Commission's balancing of development and conservation.

[13] This policy is referred to in this opinion as the 2010 policy.

B. Section D.2. of the 2010 Policy

Two subparts of the 2010 policy are the most relevant to this appeal. First, section D.2., Cultural Resources, states:

> State Parks has the complex mission of protecting the natural and cultural resources of the system while encouraging their recreational and scientific use by the public. 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. *Where significant natural and cultural resources exist at a site or within a landscape, agency staff must protect the integrity of all significant resources.*

CP at 277 (emphasis added). The most salient feature of this policy is the mandatory nature of the highlighted text. The phrase "must protect" significant natural and cultural resources leaves no room for quibble or dodge; it imposes a duty on the Commission.

The 2010 policy defines "cultural resource" as

> [a]n aspect of a cultural system that is valued by or significantly representative of a culture or that contains significant information about a culture. A cultural resource may be tangible or intangible. Biotic cultural resources include both plant and animal communities. Non-biotic examples of cultural resources include landscapes, districts, sites, structures, buildings and objects.

CP at 285.

Mount Spokane has been registered as a Traditional Cultural Property by the state Department of Archaeology and Historic Preservation. To its credit, the commission staff recognized the depth and the intimacy of Native Americans' relation to Mount Spokane, reaching back well before the American conquests. In its report on the classification decision at issue, the commission staff stated:

> 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.

Administrative Record (AR) at 864. This evidence leaves little doubt that Mount Spokane is a significant cultural resource to Native Americans.

The evidence also shows the presence of significant natural resources on Mount Spokane. In 2007 the Washington Department of Natural Resources (DNR), through Natural Heritage Ecologist, Rex Crawford, Ph.D., responded to the proposal to expand the ski area on Mount Spokane. The Crawford report concluded that the area was "a valuable conservation asset of uncommon quality." CP at 154. The report also stated that

> [t]he northwest slope of Mt. Spokane (the ski expansion area) is part of the largest, least fragmented forest habitat in the Park and connects the park forests on the south to forests on and off the park to the north.
>
> Mt. Spokane Park appears not only to be the largest, least fragmented forest landscape locally but inspection of aerial photography in Washington and Idaho reveals that similarly sized and continuous forest areas do not occur within a 20 to 30 mile radius.

CP at 154-55.

These values are echoed in the Final Environmental Impact Statement (FEIS) for the proposed expansion, which notes that the PASEA includes a wildlife corridor linking Mount Spokane State Park with the rest of the Selkirk Mountains. According to the FEIS, the proposed ski area expansion could affect habitat connectivity through that corridor, which would limit the use of those areas by wildlife. The FEIS also notes that some of the species the Washington Department of Fish and Wildlife (WDFW) identified as endangered, threatened, priority or

candidate species have been seen in the PASEA, but also states they are seen throughout the park and does not state that any of the species make the PASEA their exclusive habitat.

In 2010, the project proponent, MS 2000, hired the Pacific Biodiversity Institute (Institute) to conduct biological surveys in the PASEA, which the Commission adopted as an appendix to the FEIS. The Institute surveyed and mapped 92 discrete areas within the PASEA and noted that the area contained "significant areas of old-growth forest." CP at 151. The Institute also found that the PASEA contained areas of tree debris and decay, as well as streams, springs, and small wetlands, all of which provide habitat for wildlife species.

Recognizing these values, a representative from DNR's Natural Heritage Program submitted a comment to the 2014 Draft Environmental Impact Statement advocating that the PASEA be left in its natural state. The WDFW also submitted a comment stating that elimination of forests for the ski area will result in permanent loss, conversion or fragmentation of wildlife habitats, resulting in decreased connectivity and travel by wildlife that will be difficult to mitigate. For these reasons, WDFW opposed the proposed ski area expansion.

As noted, section D.2. of the 2010 policy states that "[w]here significant natural and cultural resources exist at a site or within a landscape, agency staff *must protect the integrity* of *all* significant resources." CP at 277 (emphasis added). The Commission and the majority take the position that this requirement is met by protecting some of the resources in the PASEA and sacrificing others. This position, though, founders on section D.2.'s plain command to protect the integrity of *all* significant resources in these circumstances. It also raises a reductio ad absurdum by allowing successive decisions to develop part of the remaining protected area. For example, if the loss of significant cultural and natural resources in the 279 acres at issue here is

justified by protecting the remaining 521 acres of the PASEA, then a future decision to develop part of the 521 acres would also be justified by the protection of the shrinking remnant. Ultimately, this rationale would countenance the loss of any protection of the PASEA. Holding the Commission to the plain terms of its policy avoids this contradiction, but does not give exclusive priority to conservation, as the majority suggests. Instead, it simply follows the policy's recognition that some land is of such cultural or natural value that it demands protection in the balancing of development and conservation. The Commission is free to devote other lands to development if consistent with its policies, as it already has.

The evidence just summarized shows the presence of both significant cultural and natural resources in the expansion area. The natural resources, in fact, were significant enough to lead two state agencies with expertise to oppose the expansion. In no manner does expanding a downhill ski development into this area "protect the integrity" of these significant resources in that area. Therefore, the Commission's classification decision violates the mandatory terms of its own policy. As such, the Commission's action is both illegal and arbitrary and capricious under the standards discussed in the majority opinion.

C. Section E.1. of the 2010 Policy

Section E.1. of the 2010 policy, Land Classification, states:

> 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 for that park parcel. *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 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 at 281 (emphasis added).

The evidence discussed above relating to wildlife corridors and the fragmentation of forests shows that the expansion area includes natural resources of regional or statewide significance. The evidence discussed above also suggests it contains species of concern. Section E.1., however, is not phrased in mandatory terms; it states instead that areas containing these resources "should be classified restrictively" in categories that do not allow the proposed ski area expansion. The question, then, is whether the Commission acted illegally or arbitrarily and capriciously by acting counter to its own directive that this area should not be classified to allow a development such as a downhill ski facility.

The majority cites *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1983), for the proposition that "should" is permissive, expressing a desire or request. *Scannell*, though, examined the meaning of "may," not "should." Unlike "may," the term "should" carries more the sense of what is expected or probable or what ought to occur. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2104 (2002).

Thus, even though section E.1. does not impose a duty, it expresses the notion that downhill ski facilities ought not to occur or are not expected to occur in areas such as the PASEA. If an agency may deviate from this sort of direction without expressing any reason, it has reduced the preference, the "ought to," inherent in the term "should" to the choice among equally balanced options expressed by the term "may." To preserve the distinction between "should" and "may," some reason or justification for deviating from the clear preference of section E.1. must be required of the Commission.

The Commission argues that the record displays that justification in two ways. First, the Commission points to the consideration by it and its staff of the biodiversity polices of section A.1. of the 2010 policy. That section, however, requires the Commission to maintain native plants and animals to different degrees in different land classifications. It does not deal with the issue posed by this appeal, whether the adoption of a different classification may be sustained. That is governed by section E.1.

The Commission's second argument is stronger. The Commission, as well as the appellants, point out that the commission members wrestled with this decision, especially with the difficult balancing of the often opposing goals of recreational development and conservation. What the record appears to lack, though, is any consideration of the conservation preferences of section E.1. Without that consideration, the Commission's position necessarily is that a more generalized discussion of the difficulty in balancing conservation and development, without any discussion of the preferences of E.1. or how they apply to the PASEA, is enough to justify abandoning those preferences in reclassifying part of the PASEA.

This argument has some support, since the determination whether the preferences of section E.1. should be abandoned would include, among other matters, the balancing of development and conservation. Greater force, however, lies in the counter argument. If consideration of this balancing alone is enough to justify abandoning the preferences of E.1., without any discussion of those preferences or of the features of the PASEA that demand their application, then section E.1. is effectively written out of the Commission's policies, since the Commission must balance development and conservation in any event. To avoid that, the

Commission must consider and express some principled reason why the expectations or preferences of section E.1. will not be followed. The record does not show that it did so.

This conclusion is also supported by the State Environmental Policy Act, (SEPA), chapter 43.21C RCW. SEPA directs that, "to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter." RCW 43.21C.030. Among those SEPA policies is the recognition of "the responsibilities of each generation as trustee of the environment for succeeding generations," RCW 43.21C.020(2)(a), and the recognition that "each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 43.21C.020(3). Reading the 2010 policy to allow the Commission to set aside the preferences of section E.1., with no reasoned explanation for abandoning those preferences, is not "in accordance with" these SEPA policies. *See also Puget Soundkeeper All. v. State, Pollution Control Hr'gs Bd.*, 189 Wn. App. 127, 148, 356 P.3d 753 (2015).

Finally, although not directly on point, the Ninth Circuit's decision in *Organized Village of Kake v. United States Department of Agriculture*, counsels the same conclusion. 795 F.3d 956 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1509 (2016). In 2001, the Department of Agriculture adopted a rule prohibiting road construction and timber harvesting in certain areas of the national forests (Roadless Rule). *Kake*, 795 F.3d at 960. With certain exceptions, the Roadless Rule applied to the Tongass National Forest. *Id.* In applying the Roadless Rule to the Tongass in 2001, the Department found that that "'the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast

Alaska] communities'" from the Roadless Rule. *Id.* at 967 (alteration in original) (quoting 66 FR 3244-01, 2001 W.L. 27402.).

In 2003 the Department reversed its course, returning the Tongass to management through a local forest plan. *Id.* at 962. In doing so, the Department found, on the same record as was before it in 2001, that "'the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits'" of the Roadless Rule. *Id.* at 967 (quoting 68 FR 75136-01, 2003 WL 23021330).

In reviewing the 2003 action under the federal Administrative Procedure Act (APA), 5 U.S.C. 500 et seq., the court noted that the act requires it to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 966 (citing § 706(2)(A)). This standard closely parallels the illegal or arbitrary and capricious test we apply to the constitutional writ of review now before us. *Cf. Saldin Secs., Inc.*, 134 Wn.2d at 292. In applying this standard *Kake* held that "'[u]nexplained inconsistency' between agency actions is 'a reason for holding an interpretation to be an arbitrary and capricious change.'" *Kake,* 795 F.3d at 966 (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)).

More specifically, relying on *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009), the Ninth Circuit held that the absence of a "'reasoned explanation'" for the inconsistency between the 2001 and 2003 findings violated the APA and was reason to vacate the 2003 rule. *Kake*, 795 F.3d at 969. The court noted that "'[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past,

any more than it can ignore inconvenient facts when it writes on a blank slate.'" *Id.* at 969 (quoting *Fox*, 556 U.S. at 537 (Kennedy, J., concurring)).

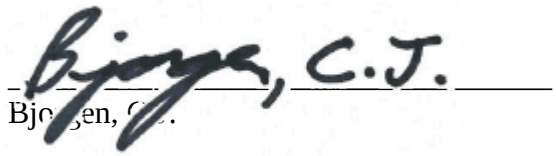
Unlike *Kake* and *Fox*, this appeal involves an agency acting inconsistently with its policies, not a change in a rule or long-standing practice. Nonetheless, the rationale of *Kake* illuminates the present analysis as much as it did the Ninth Circuit's decision. By adopting section E.1., the Commission adopted a policy establishing a preference or expectation that high-intensity recreation facilities would not be allowed in areas with the characteristics of the PASEA. By reclassifying the 279 acres to allow downhill skiing facilities, it forsook that policy, giving no reasoned explanation for its deviation. Although the Commission may decide not to observe the preferences of its own policies, to abandon those polices with no reasoned explanation raises the same sort of unreasoning action found fatal in *Kake*. As such, the Commission's action was arbitrary and capricious for the same reasons as was the government's action in *Kake.*

The Commission's failure to give a reasoned explanation as to why it was repudiating the clear direction and preferences expressed in section E.1. was inconsistent with the terms of its policies and the rationale followed in *Kake*, as well as the interpretive standards of SEPA. Without such an explanation, even though the Commission honestly discussed the balancing between development and conservation, its reclassification of the 279 acres to allow high-intensity recreation should be deemed illegal and arbitrary and capricious.

CONCLUSION

The Commission's reclassification violated the mandatory terms of section D.2. of its 2010 policy and was inconsistent with section E.1. of the same policy. Under the standards for

constitutional certiorari in *Saldin Securities, Inc.*, 134 Wn.2d at 292, the reclassification should be vacated.



Bjorgen, C.J.

BRICKLIN & NEWMAN, LLP

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