

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

NO. 94437-7

(Thurston County Superior
Court Cause No. 15-2-00527-5)

DECLARATION OF JACOB
BROOKS IN SUPPORT OF
REPLY IN SUPPORT OF
MOTION FOR INJUNCTIVE
RELIEF PURSUANT TO RAP
8.3

I, JACOB BROOKS, declare as follows:

1. I am one of the attorneys representing petitioners in this matter. I make this declaration based upon my personal knowledge.

2. Attached hereto as **Exhibit A** is a true and correct copy of Mount Spokane 2000's "Mountain Safety" webpage, accessed on July 20, 2017, which describes Mount Spokane 2000's out of bounds policy.

3. Attached hereto as **Exhibit B** is a true and correct copy of Mount Spokane 2000's "Response to the Lands Council Motion for Preliminary Injunctive Relief Pursuant to RAP 8.3," filed on January 22, 2013, wherein Mount Spokane 2000 requests a bond of \$2,500,000.

4. Attached hereto as **Exhibit C** is a true and correct copy of a ruling issued by Commissioner Schmidt, Washington State Court of Appeals, Division Two, enjoining Mount Spokane 2000 from logging and requiring a \$10,000 bond.

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

Dated this 21 day of July, 2017, at Spokane, Washington.



Jacob Brooks

EXHIBIT A

BASE: 0°

SUMMIT: 0°

24 HOUR SNOW
TOTAL:[BUY TICKETS »](#)[SEE FULL WEATHER REPORT »](#)[VIEW WEBCAMS »](#)[HOME](#) [THE MOUNTAIN](#) [TICKETS/PASSES](#) [LESSONS & RENTALS](#) [MEDIA GALLERY](#) [EVENTS](#) [NEWS](#)[ABOUT](#) [CONTACT](#)

MOUNTAIN SAFETY

SKI PATROL

Mt. Spokane Ski Patrol is committed to skier safety and education, and to providing the finest first aid care to the guests of Mount Spokane Ski & Snowboard Park. Look for one of the red and black jackets wherever you slide. The MSSP is one of the largest all-volunteer ski patrols in the country and also one of the first, being formed in 1938. Today the patrol consists of 130 volunteer patrollers that are present on the mountain each day and night during the season. Our patrollers are trained to the highest standards set by the National Ski Patrol. Each patroller must undergo over 120 hours of classroom, hands-on, and on-the-hill training for initial certification, plus annual update training sessions, and hands-on training all season long. MSSP has alpine and telemark skiers, snowboarders, student patrollers and non-toboggan pullers (auxiliary), plus a Nordic Patrol for the Mt. Spokane State Park Nordic Area. The MSSP is an all-volunteer group, and a 501 (c)3 non-profit organization. The annual Mt. Spokane Ski Patrol Ski Swap is the primary source of funding for the MSSP for operations, purchase of medical and first aid supplies, rescue equipment and training materials.

How can I become a member of the MSSP?

An annual recruiting event is held in late February or early March. Candidate patrollers undergo a 12 week, 90 hour class in Outdoor Emergency Care and an additional six-weekend “on-the-mountain” training program in the fall and early winter. Email info@mssp.org for more information.

Tips from the Ski Patrol

- Always wear eye protection such as snow goggles or sunglasses. This includes your children!
- Dress in layers for warmth to allow movement and blood circulation. Only one layer of socks is recommended.
- If you're a first-time, take a lesson to get started in the right direction!
- If you encounter an injured guest, contact the nearest lift attendant to notify Ski Patrol.
- Snow skates are allowed with proper leashes and metal edges.
- Equipment must have safety braking devices. Skis or snowboards without metal edges are prohibited.
- Sledding is prohibited within Mt. Spokane State Park. The only exception to this is use of Mt. Spokane's Tubing Hill with the provided tubes.
- Snow bikes are currently prohibited.

- Dogs are not allowed within ski area boundary

USING THE LIFTS

- If unfamiliar with using the chairlift, ask the operator for assistance.
- Obey all posted signs and placards.
- Have your lift ticket or season pass out and ready to be scanned every single time.
- Remove poles strapped to wrists before loading.
- Remove backpacks before loading. Children in backpacks are prohibited, other than Chair 5 with express permission from the bottom lift attendant BEFORE loading.
- When loading, turn inward and grab the center pole of the chair.
- If riding alone, always load on the seat nearest the operator.
- Skiers keep your tips up while approaching the unloading ramp.
- Only load and unload at designated ramps.
- Move quickly away from the unloading area after you have unloaded the chair.
- Swinging or bouncing the chair can be dangerous to yourself or others and is prohibited.
- *Jumping from the chairlift is expressly forbidden and extremely dangerous! A sudden jump could cause deropement of the chairlift resulting in potential injury or death. Jumping from the chair carries a minimum \$500 fine and mandatory court appearance.*
- Chair closing times are 3:30pm for Chairs 1 & 4, 3:45pm for Chairs 2 & 3, and 4:00pm for Chair 5, or 9:15 for Chairs 2 & 3, and 9:30pm for Chair 5 during night operation. Clocks are posted on all lift shacks.

RESPONSIBILITY CODE

As a skier or a snowboarder it is your responsibility to observe the code listed below and share with other skiers the responsibility for a great skiing experience. **Be safety conscious and KNOW THE CODE. IT'S YOUR RESPONSIBILITY.**

1. Always stay in control.
2. People ahead of you have the right of way.
3. Stop in a safe place for you and others.
4. Whenever starting downhill or merging, look uphill and yield.
5. Use devices to help prevent runaway equipment.
6. Observe signs and warnings, and keep off closed trails.
7. Know how to use the lifts safely.

TERRAIN PARK SAFETY / SMART STYLE

*insert Park Smart image here from TP Folder *

Smart Style is about all safety and having the knowledge to enjoy your freedom and the freestyle terrain. Park Smart reinforces five important points for the use of freestyle terrain:

- 1. START SMALL:** If you are just getting into the park for the first time, or first time that day, start with small features and work your way up. If you aren't sure about how to use a feature, build your skills first. When starting out, look for small progression parks and features and then work your way up to medium or large parks and features. Freestyle Terrain comes in different sizes so make sure and start small and work your way up before going into larger parks.
- 2. MAKE A PLAN:** Every time you use freestyle terrain have a plan for each feature you are going to use. Remember, your speed, approach and take-off will directly affect your maneuver and landing. When first inspecting the jumps consider the following elements of each jump (ATML):
 - (A) The approach zone is for setting your speed and stance
 - (T) The Take-off zone is for making moves that start your trick
 - (M) The Maneuver zone is for controlling your style
 - (L) The Landing Zone is for getting straight and riding away clean.
- 3. ALWAYS LOOK:** Before you drop. Before getting into freestyle terrain observe all signage and warnings. Use your first run as a warm run and to familiarize yourself with the park layout and features. Remember that the features change constantly due to weather, usage and time of day so it is important to continue to inspect features through out the day.
- 4. RESPECT GETS RESPECT:** Respect the features and other users. One person on a feature at a time. Wait your turn and call your drop-in. Always clear the landing area quickly. Respect all signs and stay off closed features. Remember that respect is important both in the park, and on the rest of the resort. So be smart when you are heading down the mountain or to the lift and save your best tricks for the park.
- 5. TAKE IT EASY:** Know your limits. Land on your feet. Ride within your ability and consider taking a lesson if you want to build your knowledge, skills, and bag of tricks. Stay in control both on the ground and in the air. Remember you can control how big or small you take the feature by varying speed and take off. Inverted aerials increase the chance of serious injury and are not recommended.

OUT-OF-BOUNDS POLICY

Mt. Spokane does not recommend skiing or snowboarding out-of-bounds. As with all ski areas, safety is a major concern.

Respect boundary markings (marked with rope, ribbon lines, orange markers, flagging, and signs). Ducking or jumping over boundary markings is not permitted and is punished by revoking ticket or season pass privileges.

Two well-marked exit gates are located near the summit of the mountain - one near the unloading zone of Chair 1, and the other directly above the Ski Patrol Bump Shack at the unload area of Chair 2. If you wish to leave the ski area boundary, you must exit via these gates.

Be smart, know before you go, and don't go alone. Out of bounds is NOT patrolled and any search, rescue, or pull-out is subject to fine.

Uphill travel is NOT permitted while the ski area is operational. Uphill travel is permitted during closed hours only on certain routes and during certain times. See our complete [Uphill Travel Policy](http://www.mtspokane.com/uphill-travel-policy) (<http://www.mtspokane.com/uphill-travel-policy>).

You should realize that your actions affect not just yourself, but also every other member of your party and potentially any other winter enthusiast or ski patroller who may be required to help in the case of an accident. If you feel something is above your ability level, it is your responsibility to make the wise judgment and inform your group.

UPHILL TRAVEL POLICY

Uphill use by means of skinning has gained popularity at Mt. Spokane in recent years. This type of recreational use raises safety concerns for the ski area as well as its uphill and downhill users. Uphill users can help preserve this opportunity by following these simple guidelines:

- Within the Mt Spokane Ski Area Boundary, uphill travel is permitted only on designated routes under conditions that do not adversely impact grooming, parking, snow removal, maintenance or other ski area operations.
- All uphill travelers in the patrolled ski area boundary are considered skiers and are required to familiarize themselves with this policy as well as the Skier's Responsibility Code.
- Specific routes may be closed at any given time due to safety or hazardous conditions. These conditions include but are not limited to; hazard trees, construction, and grooming or maintenance operations. Check the **Mt. Spokane Snow Report** for notices of closures or route changes.
- Hourglass, No Alibi and Two Face often necessitate the use of a winch grooming system to maintain managed slopes. Extreme safety hazards present themselves to users during winch operations.

See full policy and route maps here: <http://www.mtspokane.com/uphill-travel-policy> (<http://www.mtspokane.com/uphill-travel-policy>)

DRONE POLICY

Out of safety concerns for guests, employees, and resort property, as well as concerns for individual privacy, Mt. Spokane Ski & Snowboard Park prohibits the operation or use of unmanned aerial systems, or drones, by the general public – including recreational users and hobbyists – without the prior written authorization from the Resort. This prohibition includes drones used for filming or videotaping, as well as any drone use by media or journalists operating above or within Resort boundaries. This prohibition on drone operations or use extends to any drones launched or operated from Resort property, as well as drones launched from private property outside of the Resort boundaries. Please contact a resort representative in the Snow Sports Center if you have any questions or if you seek prior authorization to operate any aerial drones. Any authorized operation of aerial drones may be governed by Federal Aviation Administration (FAA) rules and regulations, local law enforcement, and State Park rules, as well as those policies separately established by this Resort, which may include certification, training, insurance coverage, indemnification requirements, and waivers or releases of liability. Any violation of this policy may involve suspension of your skiing or

snowboarding privileges, or the revocation of your season pass, as well as confiscation of any drone equipment, and may subject violators to any damages, including, but not limited to, damages for violations of privacy and/or physical or personal injuries or property damage, as well as regulatory fines and legal fees.


BASE: 0° | SUMMIT: 0°

24 HOUR SNOW TOTAL: 

 [SEE FULL WEATHER REPORT »](#) 

29500 N Mt Spokane Park

Dr.
PO BOX 1659
Mead, WA 99021

 · (509) 238-2220
· (509) 238-7974 (Ski Report)

Directions:

Mt. Spokane is located less than a gallon of gas away from Spokane.

[Get directions now!](#)

Sign Up for our eNewsletter

<input type="text" value="Email"/>	<input type="button" value="SUBSCRIBE"/>
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All Season Passes and Tickets are subject to Washington State Business and Occupational Tax, State Sales and Use Tax, and Local and Regional taxes. Total taxes are 8.1% of purchase.

EXHIBIT B

RECEIVED

JAN 24 2013

BRICKLIN & NEWMAN, LLP

No. 43158-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

The Lands Council,

Appellant,

v.

Washington State Parks and Recreation
Commission,

Respondent,

and

Mount Spokane 2000,

Intervenor.

INTERVENOR MS2000'S
RESPONSE TO THE
LANDS COUNCIL
MOTION FOR
PRELIMINARY
INJUNCTIVE RELIEF
PURSUANT TO RAP 8.3

I. IDENTITY OF RESPONDING PARTY

Mount Spokane 2000, a Washington non-profit corporation ("MS2000"), is the Intervenor in this action and the operator of the Mount Spokane Ski and Snowboard Park.

II. RELIEF REQUESTED

A. THE TEMPORARY RESTRAINING ORDER SHOULD BE IMMEDIATELY DISSOLVED AND INJUNCTION DENIED.

The Lands Council requested relief from the Court bars MS2000 from proceeding with a timber harvest that was approved by Washington State Parks and Recreation Commission (the "Commission") and Spokane

County. Despite The Lands Council being fully advised that MS2000 was moving forward with the expansion project since March, 2012, waiting nearly ten months after filing its appeal, waiting nearly three months after MS2000 was authorized to expand the ski facility, and waiting until shortly after Spokane County issued the timber harvest permit, it requests an injunction to stop MS2000 to from conducting its lawful timber harvest.

As a result of the inequitable delay in requesting this relief, MS2000 requests the temporary restraining order be immediately dissolved, no further injunction granted and MS2000 awarded its fees as costs in response.

B. IN THE EVENT THAT THE LANDS COUNCIL'S INJUNCTION IS MAINTAINED, MS2000 REQUESTS A BOND OR OTHER SECURITY IN THE AMOUNT OF \$2,500,000.

MS2000 is ready, able and willing to move forward with the permits to expand the ski facility. It has all the permits necessary in order to do so. Any delay, irrespective how expeditious the hearing, will result in substantial cost and expense to MS2000, which it should not be required to bear in the event it is successful. As a result, MS2000 requests a bond or other security in the amount of \$2,500,000.

C. MS2000 CONCURS WITH THE LANDS COUNCIL AND THE COMMISSION IN THEIR REQUEST FOR EXPEDITED REVIEW.

In order to partially mitigate the harms caused by The Lands Council's injunction request, MS2000 concurs with the requests of the Commission and The Lands Council requesting an expedited hearing and decision pursuant to RAP 18.12.

III. RELEVANT FACTS

A. MS2000 INCORPORATES THE FACTUAL HISTORY SET FORTH IN STATE PARKS RESPONSE BRIEF.

Rather than set forth the full factual history associated with the expansion of the Mount Spokane Ski and Snowboard Park, MS2000 incorporates the "Counter Statement of the Case" facts as set forth in State Parks Response Brief of Respondent Washington State Parks and Recreation Commission filed July 27, 2012.

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do
so.

As a procedural matter, the Commission and MS2000 filed concurrent motions to dismiss the claims of The Lands Council. (CP 192-94). Contemporaneously therewith, The Lands Council requested a constitutional writ of certiorari requesting the preparation of the Commission's record. (*Id.*).

The Thurston County Superior Court agreed with the Commission and MS2000, summarily dismissing The Lands Council's claims and affirming the Commission's classification decision and contemporaneous environmental review on February 3, 2012. (*Id.*). The Thurston County

Superior Court denied The Lands Council request for a constitutional writ, concluding that the Commission did not act illegally or arbitrarily. (*Id.*). Subsequently, The Lands Council filed this appeal on March 5, 2012.

No injunctive relief was sought by The Lands Council.

B. SUBSEQUENT TO THE APPEAL FILED BY THE LANDS COUNCIL, MS2000 AND THE COMMISSION WORKED TOWARDS THE EXPANSION.

After the commencement of the appeal, MS2000 and the Commission engaged in the initial step that may allow for the expansion of the alpine skiing facilities by preparing a Supplemental Environmental Impact Statement ("SEIS"). The SEIS completes the Environmental Impact Statement prepared for the Mount Spokane State Park Master Facilities Plan completed in 2010 and was required before the commencement of expansion. (McQuarrie Dec., ¶ 6).

C. THE COMMISSION AND MS2000 PURSUED THE PREPARATION OF THE SEIS.

The facts are as follows:

1. Spring, 2012 – MS2000 and the Commission prepare a draft SEIS. (McQuarrie Dec., ¶¶ 12, 13).¹

¹ The Lands Council's statements that "The EIS does not, however, analyze alternative (non-downhill skiing) uses for the area aside from downhill skiing" is false. *Lands Council Motion*, p. 5. The EIS plainly provides for a "no action" alternative an "enhanced recreation alternative," and a "mitigated proposed action" alternative. (McQuarrie Dec., ¶ 11).

not detailed

2. April 26, 2012 – The Commission issues a “Notice of Availability” informing the public and interested parties of the availability of the draft SEIS, and the potential that development will proceed, for review and comment no later than May 29, 2012. (McQuarrie Dec., ¶¶ 12, 13).

3. May 3, 2012 - Seven days after the Notice of Availability was published, The Lands Council requested an extension of the comment period in order to "educate" the public. (McQuarrie Dec., ¶ 14, Ex. "A"). This means that The Lands Council was completely aware of the resulting expansion.

4. May 7, 2012 - MS2000 responded to the Commission objecting to an extension. (McQuarrie Dec., ¶ 14, Ex. "B")

5. May 10, 2012 - The Commission denied The Lands Council's extension request, agreeing with MS2000. (McQuarrie Dec., ¶ 16, Ex. "C").

6. May 29, 2012 - The comment period for the draft SEIS closes, with The Lands Council submitting comments prior to the deadline. (McQuarrie Dec., ¶ 17, Ex. "D"). The close of the comment period means that the agency will begin the deliberative process over the alternatives.

7. October 5, 2012 – the Final SEIS was approved by the Commission. (McQuarrie Dec., ¶ 20). No appeal of the SEIS was filed. (*Id.*). The final SEIS specifically states that the “tentative date of implementation” is “2013.” (McQuarrie Dec., ¶ 21, Ex. "G").

8. November, 2012 – The Commission approves MS2000’s Plan of Development authorizing MS2000 to conduct a timber harvest. (McQuarrie Dec., ¶ 21, Ex. "F").

9. January 15, 2012 – Spokane County approves MS2000’s timber harvest permit, authorizing MS2000 to cut timber. (McQuarrie Dec., ¶ 24, Ex. "H").

10. January 17, 2013 - The Lands Council appealed the issuance of the timber harvest permit to the Spokane County Hearing Examiner. (Smith Dec., ¶ 3). In response, MS2000 requested that the Spokane County Hearing Examiner expedite review of The Lands Council's appeal. (*Id.*).

10. January 22, 2012 – ^{Today} The Commission approves MS2000’s timber harvest prescription. (McQuarrie Dec., ¶ 23, Ex. "G"). As a result, MS2000 is fully and completely capable of moving forward with the timber harvest.

D. ALL OF MS2000'S APPROVAL DOCUMENTS PREFER TIMBER REMOVAL OVER THE SNOW.

The EIS prescribes the methodology for the clearing and grading for the construction of the runs:

Ski trail clearing and construction of other facilities (i.e. chairlift terminals and towers) **will take place over the snow to the greatest extent possible.**

(McQuarrie Dec., ¶ 20, Ex. "E") (emphasis added). The Plan of Development imposes the **same condition.** (McQuarrie Dec., ¶ 21, Ex. "F").

Moreover, the SEIS prescribes four pages of "Construction Related Mitigation Measures" that MS2000 is required to employ as part of the construction process. (McQuarrie Dec., ¶ 20, Ex. "E"). The SEIS imposes additional limitations on MS2000's timber harvest activities occurring after March 1:

Spot surveys by a qualified wildlife specialist would occur prior to and during implementation of project activities between March 1 to July 15 to ensure effects to the twenty-one focal species would be limited or non-existent. In the event one or more of these species is detected...construction in the immediate area would cease immediately, and all project activities would relocate to a location approved by a qualified wildlife biologist.

(*Id.*). The Plan of Development approved by State Parks imposes the same limitations on MS2000. (McQuarrie Dec., ¶ 20, Ex. "E").

IV. DISCUSSION

A. THE TEMPORARY RESTRAINING ORDER SHOULD BE DISSOLVED AND MS2000 AWARDED ITS FEES.

For the reasons set forth herein, The Lands Council's temporary restraining order should be immediately dissolved as there is no basis for continuing to delay MS2000's lawful efforts to expand the ski facility. As a result of its immediate dissolution, MS2000 requests its attorney's fees and costs. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998); *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 635 P.2d 108 (1981).

7
- road

B. IT IS INEQUITABLE THAT THE LANDS COUNCIL WAITED TEN TO REQUEST AN INJUNCTION.

1. The Lands Council's request for an injunction should be denied as it sat idly by in the face of MS2000 incurring substantial efforts and expense on the expansion.

The Lands Council requests an injunction to prevent MS2000 from conducting the approved timber harvest and site clearing activities in accordance with the SEIS, Plan of Development and timber harvest prescription. It is inequitable that The Lands Council sat on the sidelines of for nearly ten months before requesting an injunction in the face of MS2000's good faith efforts and expenditures to continue with the expansion.

There is no automatic stay imposed by the filing of a Notice of Appeal. *Fite v. Lee*, 11 Wn.App. 21, 31, 521 P.2d 964 (1974). In order

for a party to suspend the operation of a final decision, RAP 8.3 allows the Court to enter appropriate orders to ensure "effective and equitable review". RAP 8.3. *Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d 702 (1955). Injunctive relief under RAP 8.3 is to be exercised "with caution" and only in those instances where it is necessary to preserve the fruits of the appeal in the event the appeal should prove successful. *Shamley*, 47 Wn.2d at 126. One of the fundamental tenants of whether to grant an injunction is the equitable factor of the "delay, if any, in bringing the suit." *Holmes v. Harbor Water Co., Inc. v. Page*, 8 Wn.App. 600, 603, 508 P.2d 628 (1973) (denying injunctive relief when the injunction was not brought until after the construction of a house).

The Lands Council participated in the SEIS preparation and development process. Despite being fully apprised that the expansion was a likely outcome, that Commission approved the expansion and that MS2000 was ready to move forward, it waited, and requested injunctive relief at the 11th hour.

2. MS2000 and the Commission proceeded with permitting activities subsequent to the Thurston County's Order dismissing The Lands Council's claims.

It is inequitable that The Lands Council waited ten months after the filing of its Notice of Appeal, three months after the approval of the Plan of Development and the eleventh hour before MS2000 actually

started the work, in order to file this request for an injunction. The Lands Council was aware of and participated in the preparation of the SEIS by the Commission and MS2000 and was fully aware that MS2000 would be permitted to move forward. (McQuarrie Dec., ¶ 14, Ex. "A," ¶ 17, Ex. "D").

If it truly wanted to stop MS2000's plan for expanding the ski facility, it should have done so at the time it filed its Notice of Appeal. The Lands Council was acutely aware that MS2000 planned, intended to, and was authorized to engage development activities that it is presently complaining of. The alleged harms were the same, the players were the same, the only difference is that MS200 had not yet spent significant time, money and resources in good faith reliance on prior decisions and orders. This is merely another tactic to delay MS2000's ski facility expansion.

Recognizing that there is no automatic stay as a result of the appeal filed by The Lands Council and in reliance upon the legitimate decision of the Thurston County Superior Court, MS2000 and Commission commenced the permitting activities required by the decision to reclassify the PASEA for recreation and resource recreation uses.

Immediately after the order of the Superior Court, MS2000 and the Commission began the expensive and lengthy process of preparing the

SEIS. (McQuarrie Dec., ¶11). The preparation of SEIS required public notice, with an extensive comment period.² (McQuarrie Dec., ¶ 12).

Noticeably absent from The Lands Council's brief is any discussion of its participation in the preparation of the SEIS. (McQuarrie Dec., ¶¶ 14, 17). The Lands Council was very active in the process, requesting an extension to the comment period for the purpose of "educat[ing] the public," which was denied by the Commission. (McQuarrie Dec., ¶¶ 14, 16). It also submitted comments to the SEIS. (McQuarrie Dec., ¶ 17, Ex. "D").

By October, 2012 after the Commission approved the SEIS (with its implementation date of 2013), The Lands Council was fully aware that the Commission and MS2000 were committed towards moving forward with expansion.

The SEIS, Plan of Development, and timber harvest prescription all prefer that MS2000 complete the timber harvest while snow is on the ground, that is, before May 15, 2013. (McQuarrie Dec., ¶ 19). Moreover, the mitigation requirements under the SEIS and Plan of Development impose additional, expensive requirements for harvesting that occurs after

² The Lands Council entire argument on appeal is that an EIS should have been required as part of the classification decision by the Commission. The relief requested by The Lands Council has been by the preparation of the SEIS, to which no appeal has been taken.

March 15, 2013 due to wildlife impacts that would not exist if harvesting is done during the winter months. (McQuarrie Dec., ¶¶ 32-33).

The Lands Council's delay in requesting an injunction resulted in substantial expense to MS2000. It should come as no surprise to The Lands Council that such activities naturally flow from the Commission's classification decision currently under appeal. MS2000 undertook significant expansion costs by preparing the Plan of Development, the timber harvest prescription, hiring additional staff and renting equipment, with such costs exceeding \$93,000 for planning purposes and \$53,000 in equipment purchases and staff hires in reliance upon the timber harvest permit. (McQuarrie Dec., ¶¶ 25, 26).

It is inexcusable that The Lands Council participated in the SEIS preparation process, was fully aware that MS2000 and the Commission were fully ready to move forward and yet waited to halt MS2000. As such, its request for a preliminary injunction should be denied.

C. IF GRANTED, THE LANDS COUNCIL'S INJUNCTIVE RELIEF SHOULD BE CONDITIONED ON THE REQUIREMENT TO PROVIDE SECURITY.

MS2000 will suffer significant harm if the project is delayed. MS2000 stands ready, able and willing to remove timber as permitted by the timber harvest permit issued by Spokane County. It is precisely that harvest that The Lands Council asks the Court to prevent. Setting aside,

for the time being, whether such injunction is proper, no such injunction can issue without The Lands Council posting a sizeable bond. There is nothing extraordinary about the injunction sought by The Lands Council requiring any deviation from the practice requiring a bond pursuant to RAP 8.3.

The Court of Appeals will "ordinarily condition the order [for injunction] on furnishing a bond or other security." RAP 8.3. This requirement equates to the mandatory requirements of RCW 7.40.080 requiring the imposition of a bond or other surety before the court grants a preliminary injunction, absent limited circumstances allowing for the waiver of security. RCW 7.40.080; *See also Irwin v. Estes*, 77 Wn.2d 285, 461 P.2d 875 (1969) (stating that the giving of a bond is a "condition precedent" to an injunction and that the court "is not at liberty to disregard such statute."); *Evar, Inc. v. Kurbitz*, 77 Wn.2d 948, 468 P.2d 677 (1970).

The requirement for a bond or other security is an affirmative requirement when the delay occasioned by the imposition of the preliminary injunction can be met by the posting of a bond. *Boeing Co. v. Sierracin Corp.*, 43 Wn.App. 288, 292, 716 P.2d 956 (1986) ("If the harm occasioned by the appellate delay can be met by a bond, supersedeas should **always** be granted."); *See also Confederated Tribes of Chehalis Reservation*, 135 Wn.2d at 758 ("[I]f the harm occasioned by appellate

delay can be measured in terms of a monetary amount, then a bond is appropriate.").

"The purpose of [an] injunction bond is to ensure that the adverse party affected thereby will be able to recover all damages and costs which might accrue 'by reason of the injunction or the restraining order, and that the fund shall be readily available.'" *Cheney v. City of Mountlake Terrace*, 20 Wn. App. 854, 857, 583 P.2d 1242 (1978) (emphasis added). In an action for wrongful injunction, recovery is limited to the amount of the bond plus interest from the date that the action is brought. *Jensen v. Torr*, 44 Wn. App. 207, 211, 721 P.2d 992 (1986). **This is the only remedy available to a defendant where it is subsequently found to have been wrongfully restrained.** *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343,347,541 P.2d 1014 (1975). Such injunction should "account for all the various damages [the party] might suffer pending appeal." *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 64, n. 4, 738 P2d 665 (1987).

MS2000 will be damaged as a result of the issuance of an injunction. Its foreseeable damages are substantial, in the form of increased cost for timber removal and the potential loss of revenue for the upcoming 2013-2014 ski season in the event that the timber harvest cannot be completed this year.

1. MS2000's costs exponentially increase in the event the timber harvest cannot be completed prior to March 1, 2013.

The anticipated environmental impacts associated with the timber harvest are minimal if the harvest can be completed by March 1, 2013. Thereafter, costs quickly mount. As a baseline, MS2000 itemizes its costs per day to perform the approved work as follows:

Costs per day for timber harvest between January, 2013 and March 1, 2013:	
Foreman/Sawyer	\$300
Sawyer	\$260
Cat Operator	\$234
Laborer/Choker setter	\$198
Snow Cat time/fuel	\$320
Equipment Rental	\$48
Total	\$1,360

(McQuarrie Dec., ¶ 30). MS2000 estimates that all timber harvesting work could be completed by March 1, 2013. (McQuarrie Dec., ¶ 28).

The Construction Mitigation Measures identified in the SEIS and Plan of Development require MS2000 to employ additional on-site biologists in the event that the work is not completed prior to March 1, 2013. MS2000's itemized costs per day in the instance of being forced wait until March 1, 2013 to commence the harvest:

Costs per day for timber harvest between March 1, 2013 and May 15, 2013:	
Foreman/Sawyer	\$300
Sawyer	\$260

Cat Operator	\$234
Laborer/Choker setter	\$198
Snowmobile Transporter/Labor	\$122
Snow Cat time/fuel	\$320
Equipment Rental	\$74
Wildlife Biologist	\$1,000
Avian Biologist	\$1,000
Efficiency factor	\$421
Total	\$3,929

(McQuarrie Dec., ¶¶ 32, 33). MS2000 relies upon an efficiency factor of twelve percent (12%) on the basis that the SEIS requires that work be slowed, or ceased if any one of the twenty-one focal species is located. (*Id.*).

Finally, in the event that MS2000 is delayed in its harvest until May 15, 2013, the time period in which it is no longer permitted to utilize over-the-snow timber harvest techniques, its costs per day will economically quantifiable:

Costs per day for timber harvest between May 15, 2013 and September 30, 2013:	
Foreman/Sawyer	\$330
Sawyer	\$286
Laborer/Choker setter	\$286
Laborer/Choker setter	\$242
Choker runner	\$220
Choker runner	\$220
Driver/Firewatch	\$260
Helicopter removal	\$6,861
Equipment Rental	\$122
Efficiency Factor	\$1,326

Total	\$10,153
-------	----------

(McQuarrie Dec., ¶ 35). MS2000 estimates a decreased efficiency factor of thirty-two percent (32%) based upon the SEIS's limitations that prohibit the ability to use vehicle transport, snow cats and the increased risk of fire danger restrictions. (*Id.*) Given that the costs for harvesting timber during this time period exceed \$10,000, MS2000 would be financially unable to complete the harvest until the winter of 2014 when trees would again be able to be harvested over the snow pack. (McQuarrie Dec., ¶ 36).

For each day MS2000 is delayed into the window between March 1, 2013 and May 15, 2013, it would cost MS2000 \$2,569 (\$3,929 per day less \$1,360 per day) more than if it were permitted to proceed in accordance with its permits. And for each day that MS2000 is delayed into May 15, 2013, it would cost MS2000 \$8,793 (\$10,153 per day less \$1,360 per day) more than if it were permitted to proceed today.

Even on the most expedited schedules, this matter will not be resolved in time for MS200 to complete the timber harvest by March 1, 2012. The Lands Council's tactic has, therefore, resulted in increased costs and a delay of one full year. The Lands Council could have brought this action earlier, but it did not. The Lands Council was fully aware of the SEIS timeframes and the increases costs that would accompany a project time-table that stretched beyond March 1, 2013. The Lands

Council should not be permitted to intentionally delay, subjecting MS200 to increase costs and likely forcing MS2000's timber harvest to 2014, without posting adequate security to compensate MS2000 for the harm that a year-long delay causes.

2. The Lands Council's injunction effectively bars MS2000 from performing the timber harvest until 2014.

As discussed above, MS2000 may be barred from proceeding with the timber harvest since the expense is too substantial or fire restrictions prohibit the activity. (McQuarrie Dec., ¶ 36).

In 2007, MS2000 paid for the Commission to contract with SE Group to perform a Mt. Spokane Alpine Concession Financial Analysis to identify the estimated financial benefit accruing as a result of the construction of an additional lift and seven trails. (McQuarrie Dec., ¶ 37, Ex. "I"). SE Group estimated that there would be a 73% increase in the total number of skiers, a 62% increase in the total amount of revenue and a 65% increase in the concession rent payable to the Commission per year based upon the construction of the additional runs. (McQuarrie Dec., ¶ 38).

As a result of MS200 inability to perform the timber harvest this winter, it will suffer in excess of \$2,100,000 revenue losses for just the

2013-2014 skiing season. MS2000's anticipated losses are more specifically stated as follows:

Delay Losses for MS2000 for 2013-2014 Skiing Season for failure to be able to perform the expansion:	
Annual Visitation Loss	34,160
Operating Revenue Loss	\$2,093,863
State Revenue Loss	\$112,816

(McQuarrie Dec., ¶ 39)

MS2000 should not be required to bear the risk of loss in the face of The Lands Council's wrongfully sought injunction. A bond or other security in an amount not less than \$2,500,000 would be appropriate to ensure that MS2000 is adequately protected and to offset its losses, increased costs and attorney's fees in the event that The Lands Council's injunction is granted.

D. MS2000 JOINS IN THE REQUEST OF THE COMMISSION AND THE LANDS COUNCIL FOR EXPEDITED REVIEW.

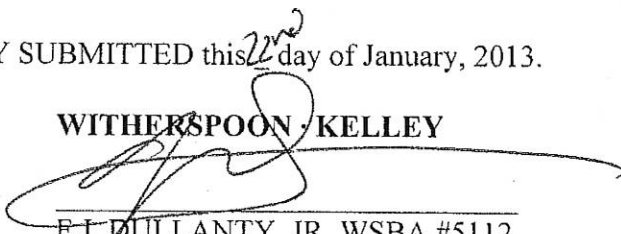
So that MS2000 can expeditiously implement the SEIS, Plan of Development, and the timber harvest prescription, MS2000 concurs with The Lands Council and State Parks in their request for expedited review pursuant to RAP 18.12. Such expedited review will minimize, but not absolve, the financial impacts to MS2000 resulting from the potential issuance of an injunction in favor of The Lands Council.

V. CONCLUSION

It should come as no surprise to The Lands Council that timber harvesting and ground disturbance activities would occur after its claims were dismissed by the Thurston County Superior Court. The Lands Council sat idly by in the face of MS2000's expansion activities despite being fully aware such actions were being undertaken. In reliance upon the dismissal of The Lands Council's claims, the Commission and MS2000 undertook substantial and costly permitting activities resulting in the preparation of plans that would authorize MS2000 to commence its timber harvest immediately. The Lands Council's delay in seeking the equitable relief should not be rewarded with an injunction. The injunction, if imposed, results in substantial expense to MS2000, therefore The Lands Council should be required to post security in order for such relief to be effective.

RESPECTFULLY SUBMITTED this ^{22nd} day of January, 2013.

WITHERSPOON · KELLEY



F.J. DULLANTY, JR, WSBA #5112
NATHAN G. SMITH, WSBA #39699
ATTORNEYS FOR INTERVENOR
MOUNT SPOKANE 2000

EXHIBIT C



Washington State Court of Appeals Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

January 28, 2013

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CASE #: 43158-1-II/The Lands Council v. State Parks and Recreation Commission

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

Respondents continue to be enjoined from engaging in any logging or other ground-disturbing activities pending the opinion from this court on Appellant's appeal. The Appellant has shown that the harm to it in the absence of an injunction is greater than the harm that will befall the Respondents by the entry of an injunction. RAP 8.1(b)(3). Appellant shall post \$10,000 in security. RAP 8.1(b)(3). The parties' joint request to accelerate review is granted. Oral argument will be set for the April, 2013 term or as soon thereafter is feasible.

Very truly yours,

David C. Ponzoha
Court Clerk

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

NO. 94437-7

DECLARATION OF
AMY NABORS-BIVIANO

I, Amy Nabors-Biviano, declare as follows:

1. I am Amy C. Nabors-Biviano. I am over the age of 18 years and am competent to testify herein. I make this declaration based on my personal knowledge. I am a Certified Public Accountant, as certified by the Washington State Board of Accountancy. I have worked in financial

reviews, analysis and nonprofit consulting for the past decade. I obtained my Masters of Business Administration with a focus on taxation from Gonzaga University Business School in 2007 and my undergraduate degree from Yale University in 1997.

2. I have reviewed the declaration submitted in this case by Edward Beeler and his attached Exhibit B (“Existing and Future Operating Evaluation for Mt. Spokane Ski and Snowboard Park”) and have found several errors and inconsistencies in interpretation and analysis.

3. First, the cash flow projections created by SE Group are based on an increase in skier days alone, with the assumption that increasing available days with the expansion will correlate directly to an increase in use of the park. This is an example of the “build it and they will come” thinking that gets many businesses in trouble as they expand without regard to whether demand will keep up with an ever-expanding supply. No well-informed economist, accountant or entrepreneur would simply assume that if they build more capacity that it will be utilized to the same extent as existing capacity. Yet that is exactly the method Mr. Beeler uses in developing his estimate that the new ski lift will attract 24,000 more skiers per year. *See* Beeler Decl., Ex. B at 3 (applying utilization rate for existing lifts to the maximum (“comfortable carrying

capacity”) of the new lift to forecast the number of new skiers who will use the new lift).

4. Mr. Beeler purports to confirm the reasonableness of his 24,000 new skier day forecast by analyzing the number of new skier days resulting when two other resorts added new lifts. *Id.* The problem with this method is that it ignores the vast variation in skier days from year to year based on extraneous factors, most notably weather. As the attendance figures for Mt. Spokane reveal (Exhibit 1), without any change in uphill capacity, attendance varies year-to-year from 10% to 200%, as a result of other factors, most likely weather. Yet, Mr. Beeler assumes that a 20% increase in attendance at two other ski areas is attributable exclusively to a new lift at each resort. This clearly is another unfounded assumption.

5. These two methods – assuming new capacity will be used at the same rate as existing capacity without any study of demand to back up the assumption, and assuming that a one-year increase at another resort was due to new lift capacity and not more favorable weather or any other external factor – are the only methods Mr. Beeler employed for supporting his claim that adding the new lift at Mt. Spokane would generate 24,000 more skier days and up to \$1.1 million in new net revenues. Stripped of these two unfounded assumptions, Mr. Beeler offers nothing to support his

lost income projections. In sum, his projections are based on unsubstantiated assumptions and should be viewed as entirely speculative.

6. Using his unfounded assumptions, Mr. Beeler ultimately opines a contribution margin range of \$1,033,000 to \$317,000 in years with full service after expansion. Beeler Decl., ¶ 13. But following Generally Accepted Accounting Principles, reporting the proper valuation and estimate of loss should be taken at the low end of any reasonable estimate. By utilizing a value of \$854,000 in his estimates of loss, Mr. Beeler has violated GAAP and should instead lower his loss amount to \$317,000 per year (even if his unfounded assumptions were reasonable).

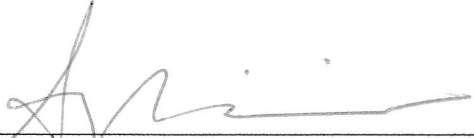
7. Further, Mr. Beeler should not characterize his \$854,000 value as the “midpoint” between the low and high end of his range. The actual midpoint is \$675,000.

8. Mr. Beeler compounds his erroneous estimate of the first and second year’s “losses” by assuming those losses are gone forever. Actually, if a stay is granted and then later MS 2000 is allowed to build, the net revenues (assuming there are any) will still be realized, but just a year later. With proper economic protocol, the potential loss would be estimated by comparing the net present value of the stream of income if it starts this winter with the net present value of that stream of income if it is

delayed one year (assuming the injunction is in place no longer than one year).

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

Dated this 21st day of July, 2017, at Spokane,
Washington.



AMY NABORS-BIVIANO

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

NO. 94437-7

DECLARATION OF
MICHAEL P. PETERSEN

I, MICHAEL P. PETERSEN, declare as follows:

1. I am above the age of eighteen and I make this declaration based on my own personal knowledge.
2. I have been Executive Director of The Lands Council since 2002.

3. The Lands Council offices are at 25 W. Main Ave., Suite 222, Spokane WA 99201.

4. The Lands Council has approximately 1,600 members and supporters that live across the Northwest, including many members in Spokane County.

5. The Lands Council is a non-profit 501(c)(3) conservation organization which has been in existence since 1983. Its mission is to preserve and revitalize our Inland Northwest forests, water, and wildlife through advocacy, education effective action, and community engagement. Our EIN# is 94-3090355.

6. The Lands Council does not have the capacity to post a bond, as MS2000 has requested. Our annual budgets for the past five years are a fraction of the amount MS 2000 seeks to have bonded:

2017 -	\$550,000
2016 -	\$526,500
2015 -	\$458,000
2014 -	\$434,000
2013 -	\$452,400

Our total available cash, as of July 1, 2017 was \$62,671, or which only \$8,535 is unrestricted. The rest is committed by contract to our restoration

and outreach work. There is no way that The Lands Council could post a bond in the amount sought by MS 2000 or anything close to it.

7. In fact, The Lands Council could afford to post no more than a nominal bond. All of our funds are fully committed. Over 80 percent of budget revenue goes directly towards TLC's program expenses, such as planting trees, taking students on field trips, restoring riparian areas, informing low income and ethnic communities about toxics in the river, and working with four forest collaborations and the U.S. Forest Service. The remainder goes towards administration and development. Most of the budget is devoted to salaries, rent and other fixed expenditures. Our funding is mostly restricted to expenditures in our grant agreements. In several of the past five years we have had a negative cash flow. There simply are no funds available for posting a bond greater than \$5000, and even that would take an extraordinary effort.

8. It would be an extreme hardship for the Lands Council to acquire even \$5000 for a bond by MS 2000's requested date of July 31. Because the Lands Council relies upon volunteer donations for its non-discretionary budget, it would be extremely difficult, if not virtually impossible, to engage in fundraising in such a short period of time.

9. I have personally spoken to the other Appellants in this case, including John Roskelley, Fayette Kraus, the Spokane Mountaineers,

and the Spokane Audubon Society, regarding their ability to post a bond in this case. The Spokane Mountaineers and Spokane Audubon Society are run by volunteers who do not draw a salary, and both organizations' annual budgets are much smaller than the Lands Council's annual budget. Both John Roskelley and Fayette Kraus are retired and live on fixed incomes and, therefore, cannot afford to post more than a nominal bond either.

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

Dated this 21st day of July, 2017 in Spokane, Washington.


MICHAEL P. PETERSEN

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

NO. 94437-7

Court of Appeals No. 48423-4-II

(Thurston County Superior
Court Cause No. 15-2-00527-5)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

ss.

I, ANNE BRICKLIN, under penalty of perjury under the laws of the
State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for appellants John Roskelley, et al. herein. On the date and in the manner indicated below, I caused Appellants' Reply in Support Injunction; Declaration of Jacob Brooks in Support of Reply in Support of Motion for Injunctive Relief Pursuant to RAP 8.3; Declaration of Michael P. Peterson; and Declaration of Amy Nabors-Biviano to be served on:

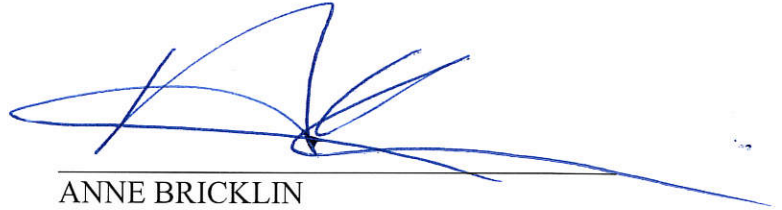
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(Attorneys for Mt. Spokane 2000)

By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail
 By E-Mail to Nathan.Smith@KutakRock.com

DATED this 21st day of July, 2017, at Seattle,
Washington.



ANNE BRICKLIN

BRICKLIN & NEWMAN, LLP

July 21, 2017 - 1:53 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94437-7
Appellate Court Case Title: John Roskelley, et al. v. State Parks and Recreation Commission, et al.
Superior Court Case Number: 15-2-00527-5

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