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DIVISION II

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STATE OF WASHINGTON

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**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.

**RESPONSE BRIEF OF RESPONDENT WASHINGTON STATE
PARKS AND RECREATION COMMISSION**

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I. INTRODUCTION

This case evaluates whether the State Parks and Recreation Commission (Commission) complied with the State Environmental Policy Act (SEPA) when it utilized a mitigated determination of non-significance in connection with its decision to consider expansion of an existing ski area in an undeveloped portion of Mount Spokane State Park already under lease to the ski area – Mount Spokane 2000 (lessee).

The ski area's lease includes 850 acres of undeveloped land. The lessee proposed to develop 279 acres of that land to expand the ski area. After reviewing many environmental reports and much public input and debate, the Commission ultimately rejected the idea of a 279-acre development. Instead, it adopted a land classification for the 850-acre area that maintained the existing recreational activities in most of the undeveloped area, but reserved for further study and approval the possibility of a smaller expansion proposal.

The Commission issued a mitigated determination of non-significance for the land classification and for its decision to consider a smaller development proposal when a detailed proposal could be submitted. The conditions imposed by the mitigated determination limited the manner in which general development activities might take place and specifically required the lessee to prepare an environmental impact statement in connection with any specific development proposal. SEPA expressly authorizes an agency to issue a mitigated determination of non-significance as one of three threshold determinations. SEPA further authorizes an agency

to time full environmental review to fit when review is most useful. The Commission did not avoid environmental review; it ensured meaningful review at the appropriate time when a specific development proposal would provide the needed detail to make the project level environmental impact statement useful.

II. CROSS APPEAL – ASSIGNMENT OF ERROR

The trial court erred in its conclusion that Lands Council has standing to sue.

III. ISSUES RELATING TO THE ASSIGNMENT OF ERROR

Under the SEPA rules, the agency must make a threshold determination of whether a land-use proposal will have significant impacts. WAC 197-11-310. When the threshold determination is made, the agency must determine whether the proposal is “specific enough” to allow an immediate environment analysis, or “identify the times at which the environmental review shall be conducted.” WAC 197-11-055.

1. Did the Commission comply with WAC 197-11-310 and WAC 197-11-055 when it issued a threshold determination of mitigated non-significance for the general land use classification of an area, prohibited any development until a sufficiently detailed proposal for use is made, and conditioned any future use on submission of an environmental impact statement?

2. Did the trial court err by holding that Lands Council had suffered an injury in fact that was not speculative when the classification plan only specified what recreational activities would be allowed in the

850-acre area, the classification did not restrict Lands Council members from engaging in their historic recreational activities, and the Commission prohibited any ski expansion into the area until a final plan with full environmental review was complete and that final plan, if permitted, was subject to appeal under the Land Use Petition Act?

3. Did the trial court properly deny Land Council's request for a Constitutional Writ of Review as not arbitrary or illegal when the community was split on what level of recreational use was appropriate for the potential expansion area, and the Commission followed specific procedures authorized by SEPA?

IV. COUNTER STATEMENT OF THE CASE

The Commission is responsible for managing the land within state parks to meet the recreational needs of the state.¹ As part of these management responsibilities, the Commission adopts land use classes within each park to guide the multiple uses that fit the park's natural character.² This case involves the Commission's decision to classify an 850-acre undeveloped area of Mount Spokane State Park.³ Mount Spokane State Park is Washington's largest state park, encompassing 14,000 acres.⁴

The non-profit ski resort, Mount Spokane 2000, has leased a portion of Mount Spokane State Park for several decades.⁵ The lease

¹ CP 76-77.

² CP 77-78.

³ CP 80; the Order is attached as Exhibit A. CP 367-369.

⁴ CP 77.

⁵ *Id.*

includes a developed area with downhill ski runs and lodges and an undeveloped potential expansion area on the back side of the mountain.⁶ The lessee has considered a variety of development proposals for the potential expansion area for over a decade.⁷ The public historically engaged in a variety of activities in that area such as hiking and biking during the summer, and snowshoeing and backcountry skiing through the trees during the winter.^{8,9}

In 2008, the lessee submitted a conceptual plan to develop most of the 850 acres located within the potential expansion area.¹⁰ That plan was abandoned and, in late 2010, the lessee submitted a conceptual plan to undertake far less development in the form of seven runs on approximately 279 of the 850 acres.¹¹ The lessee's revised conceptual plan consisted of a map illustration; it was not a specific detailed development proposal and did not identify how the potential lift and ski runs would be constructed.¹² The remainder of the potential expansion area would be used for lower impact activities such as snowshoeing and hiking, or left in a natural condition.¹³

⁶ *Id.*; there is an illustration of the expansion area attached in Exhibit B. CP 157-158.

⁷ *Id.*

⁸ *Id.*, CP 340.

⁹ Lands Council members also engage in these activities in this area. CP 131, 135.

¹⁰ CP 77.

¹¹ *Id.* The Commission studied the environmental elements of Mount Spokane State Park in 2010 when it prepared an environmental impact statement in conjunction with the adoption of a master facility plan for the entire park. CP 78. The potential expansion area was not included within those documents because the lessee was no longer pursuing its 2008 plan for developing the area. *Id.*

¹² CP 77-78.

¹³ CP 77.

The Commission considered two requests at its May 2011 public meeting: (1) a general land classification plan for the entire 850 acres, and (2) the lessee's revised conceptual proposal to develop a lift and seven ski runs.¹⁴ In preparation for the meeting, Commission staff prepared four land-classification options ranging from Natural Forest (precluding development) to Recreation (anticipating future development).¹⁵ Commission staff held a public meeting in March 2011 and prepared an environmental checklist under SEPA for the classification decision and for the conceptual plan.¹⁶ The checklist for the classification plan incorporated by reference 25 documents and reports, most of which provided analysis of environmental information for Mount Spokane State Park.¹⁷ The checklist identified potential environmental impacts from a classification that would allow the highest intensity uses and offered many mitigating conditions to address such impacts.¹⁸

After reviewing the checklist, Commission staff made the threshold decision that a mitigated determination of non-significance was appropriate for both decisions at issue.¹⁹ The mitigated determination for the classification decision imposed 45 conditions on any future recreational trail and facility development within the potential expansion area.²⁰ The mitigated determination for the conceptual plan included the

¹⁴ CP 78.

¹⁵ *Id.*

¹⁶ CP 78.

¹⁷ CP 22-24.

¹⁸ CP 37, 41.

¹⁹ CP 79.

²⁰ CP 18-19.

condition that, prior to any ski area expansion, the lessee would be required to prepare an environmental impact statement (EIS).²¹

At the May 19, 2011, meeting, the Commission received several hours of public comment and debated the benefits and impacts of each classification alternative.²² There was significant community support for both developing and leaving the potential expansion area undeveloped.²³ Ultimately, the Commission adopted a hybrid of the four classification proposals: the Commission adopted a classification that significantly limited the future development opportunities in the potential expansion area.²⁴ The Commission precluded any development for the vast majority of the 850-acre area and classified only an area of approximately 60 acres as Recreation.^{25, 26} As a result, 90 percent of the potential expansion area could not be altered from its natural state consistent with existing uses.²⁷ The Commission remained open to the idea of a specific ski area expansion project within the 60-acres classified for Recreation, but retained control over any future development in that area. It required the lessee to submit a specific development proposal before any authorization

²¹ CP 22.

²² CP 79.

²³ CP 79-80.

²⁴ CP 80.

²⁵ CP 80, 367.

²⁶ See recreation classification illustrated in red attached as Exhibit C. CP 371.

²⁷ The 60 acres is the area remaining after the “treed islands” that the Commission classified as Resource Recreation are subtracted from the 279-acre potential expansion area.

could be granted and the preparation of an EIS in connection with any specific development proposal the lessee sought to have authorized.²⁸

V. ARGUMENT

A. Standard of Review

When reviewing an appeal of a summary judgment order, the appellate court engages in the same inquiry as the trial court. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is appropriate if, when taking the facts most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

A threshold determination that an EIS is not required is subject to judicial review under the “clearly erroneous” standard. *Norway Hill Pres. & Prot. Ass’n v. King Cnty. Council*, 87 Wn.2d 267, 273-76, 552 P.2d 674 (1976). Under this standard, a reviewing court will only overturn an agency’s determination when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Norway Hill*, 87 Wn.2d at 274.

B. The Trial Court Correctly Interpreted SEPA

Under SEPA, an agency must make a threshold determination for actions that are not categorically exempt under SEPA.

²⁸ CP 368.

RCW 43.21C.310.²⁹ The purpose of the threshold determination is to determine if a proposal has probable significant adverse environmental impacts. WAC 197-11-310(5). That determination is based on the information provided in a checklist that describes various environmental elements that could be affected by a proposal. WAC 197-11-315. If the checklist identifies significant adverse impacts that cannot be mitigated, the agency must issue a determination of significance and prepare an EIS to analyze the impacts. WAC 197-11-400.

Not every governmental action, however, requires the preparation of an EIS. Instead, SEPA only requires preparation of an EIS on “proposals for legislation and other major actions having a probable significant, adverse environmental impact.” RCW 43.21C.031. Furthermore, if the agency imposes conditions on the proposal that prevent or lessen any identifiable adverse impacts associated with the proposed action below the significance level, the agency can issue a mitigated determination. WAC 197-11-350.

Lands Council challenged the Commission’s ability to issue a mitigated determination for the land classification plan it adopted – a decision that preserved pre-existing non-intensive uses of the land and allowed future consideration of one development concept on 60 acres, but only after the project was fully specified and evaluated in an EIS. This

²⁹ Appellant argues that the SEPA issue was properly before the trial court both as an independent action under SEPA and/or the petition for constitutional writ. Because the trial court addressed the SEPA issue on the merits, for the purpose of this appeal, it is unnecessary to resolve whether a SEPA appeal can be brought independent of any other basis of appeal. As a result, the state will focus on the substantive requirements of SEPA.

challenge fails because the threshold determination was appropriate to the governmental action being undertaken (a nonproject approval of a land classification), and addressed potential impacts that might arise from the limited nature of that kind of decision.

1. The SEPA Rules Provide for Flexible Timing to Fit the Proposal

Lands Council challenges the timing of review chosen by the Commission. The SEPA rules, however, specifically provide for flexibility in approaching environmental review. The rule reads as follows:

(2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.

(i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

(b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis. Agencies may also organize environmental review in phases, as specified in WAC 197-11-060(5).

(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).

WAC 197-11-055.

There is no blanket requirement to undertake an EIS at a stage in the land-use planning process where specific projects remain unclear. Indeed, SEPA contemplates that land-use planning may proceed without an EIS where the action is preliminary and is not specific enough to identify actions that will produce impacts. WAC 197-11-055(2)(a)(i). Those are the facts in this case. The decision challenged here did not approve the expansion. Instead, it considered whether to classify the potential expansion area in a manner that would preclude all development proposals or would allow consideration of possible development proposals. The Commission studied the impact of both options and ultimately chose the classification that would allow limited expansion, but only if a proposal were detailed and its impacts fully analyzed. While this kind of nonproject decision can certainly be characterized as opening the door to potential development, the impact of any future development proposal remains nothing more than a possibility. Accordingly, it was appropriate to respond to the potential “impact” with a mitigation condition specifying that any specific development was prohibited and

would only be considered after an EIS responsive to the particulars of such development was prepared and fully evaluated.

The Commission's approach is consistent with SEPA, which requires early consideration when that is appropriate, but also eschews formalistic decisions to prepare an EIS where there is no meaningfully concrete action and attendant impacts to analyze. "Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis." WAC 197-11-055(2)(a)(ii). This is essentially the position the Commission was in. It had a concept for development. It had a prior EIS and environmental studies discussing the region in general and a checklist for the concept. It had sufficient information to decide whether to consider the concept, but needed full details to allow meaningful environmental analysis. That is why the concept was conditioned to preclude any development until the details were analyzed in an EIS.

2. The Commission's Approach Does Not Avoid Environmental Review, It Requires Full Review

Lands Council attempts to characterize this as a case of segmented review where meaningful SEPA review is avoided by decisions that place the agency on a concrete course of action likely to produce specific impacts. Although the Commission accepted a mitigated determination for the classification, it imposed 45 conditions to mitigate potential environmental impacts³⁰ and, more importantly, prohibited any expansion

³⁰ CP 18-19.

until there was a detailed plan with full environmental review. This approach allows the agency to better assess potential impacts on wetlands, trees, and wildlife when the final run and lift configurations, run width, and grading details are known. In addition, the public will still have the opportunity to comment on and challenge any detailed expansion plan and supporting environmental analyses at the permit phase should the expansion be approved.

Lands Council cites *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024 (1993), for the proposition that even approval of a general land use plan can start a snowball effect such that development is inevitable. While this case stands for the proposition that some nonproject land-use planning decisions require the preparation of an EIS, it is not true that all such decisions trigger the need for an EIS. The issue here is whether the Commission's classification decision and mitigated determination adequately addressed generalized impacts that might flow from opening up the potential expansion area to possible development. Because the Commission both addressed and conditioned generalized impacts from opening the land to development and ensured detailed review of specific project impacts, the Commission's determinations were consistent with SEPA.

Closer inspection of *King County* reveals the limitation of its holding and why the present case is distinguishable. The King County Boundary Review Board considered whether to approve the City of Black Diamond's proposed annexation of certain lands within the county. The

court characterized that decision as “substantially more than a mere possibility that the land in question would be developed following annexation; indeed, it was a virtual certainty.” *Id.* at 665. The record in that case also demonstrated that the “virtually certain” development associated with adding the annexed area to an urban growth area would “have a significant adverse impact on the environment.” *Id.*

The *King County* decision ultimately stands for the proposition that, where a land-use planning decision will clearly lead to probable adverse impacts, a determination of non-significance is not appropriate. Instead, meaningful SEPA review of the likely impacts from future development must occur – typically through an EIS – even though specific projects have yet to be fully identified. The rationale for this conclusion is that foregoing EIS evaluation in these circumstances is likely to undercut the purpose of SEPA – fully informed decision-making in the face of articulable and likely impacts. *King Cnty.*, 122 Wn.2d at 664 (“Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action.”).

It may be logical to assume that a land-use decision that changes the designation of private property from rural to urban density may open the door to more development, as private entities will be entitled to develop their property to its highest use if they can meet the local zoning and building requirements. Once the zoning is in place, the only control retained by local government is to ensure compliance with the various

codes. In that circumstance, private development may proceed in a fractured manner as each landowner decides independently as to when it may develop the property. The local government would be limited to reviewing the subsequent impacts of such fractured development on a piecemeal basis.

However, the holding in that case does not mandate the preparation of an EIS where the possible future development consists of one specific project on a parcel of state-owned land that remains under control of the state landowner and where the state retains control over any proposals to develop the property. Furthermore, the *King County* case does not address whether a mitigated determination of non-significance is a meaningful response in the case of a nonproject planning decision that contemplates future development and specifically addresses the manner in which that development will continue to be evaluated – in this case with a full EIS – as the decision making moves from a nonproject to project level stage.

In contrast to the determination of non-significance in *King County*, the Commission reviewed a SEPA checklist and had before it an EIS from the 2008 planning process, along with numerous studies about the habitat and wildlife in the planning area. After considering this information, the Commission classified the potential expansion area in a manner that allows Parks to consider future development on a 60-acre portion of the 850-acre leased parcel rather than foreclosing development entirely. But this is by no means a decision that is fairly characterized as one that ensures development with attendant adverse impacts as was the

case in *King County*. Rather than issuing a determination of non-significance, the Commission's SEPA analysis lead to a mitigated determination that categorically requires EIS preparation and ensures careful environmental review of any future use of the 60-acre area classified as Recreational.

In contrast to the lack of SEPA review associated with the determination of non-significance issued in the *King County* case, the mitigated determination here is a thoughtful and measured approach to this nonproject decision. The approach does not produce the kind of harm the *King County* court identified – a decision that sets in motion incremental development and the evasion of meaningful SEPA review of identifiable adverse impacts associated with that development.

Accordingly, while the Commission did not foreclose development, neither did it ensure development. To the extent that the classification decision reflects an openness to development, it mitigated any chance that the classification decision will lead to an avoidance of SEPA review by imposing specific conditions that limit the development of the potential expansion area and that mandate a project level EIS for any specific development proposals to ensure that any decision on such a proposal is fully informed. Considering the fact that development is by no means assured simply by classifying land as developable rather than undevelopable, and considering the other limitations placed upon future development of the potential expansion area, this approach is fully

consistent with the SEPA considerations that informed the decision in *King County*.

3. SEPA Authorizes an Agency to Phase the Level of Review

The Commission's decision to require more detailed environmental review through an EIS at the later stage is supported by applicable SEPA regulations. SEPA provides for a phased approach to SEPA review (WAC 197-11-060(5)). WAC 197-11-060(5)(c) reads as follows:

(c) Phased review is appropriate when:

(i) The sequence is from a nonproject document to a document of narrower scope such as a site specific analysis (see, for example, WAC 197-11-443); or

(ii) The sequence is from an environmental document on a specific proposal at an early stage (such as need and site selection) to a subsequent environmental document at a later stage (such as sensitive design impacts).

The above scenario is exactly what confronted the Commission. The Commission was looking at a nonproject classification proposal with the possibility for subsequent development if later approved. As to the expansion proposal, the Commission only had a concept; it did not have the details that would guide accurate environmental analysis.

The Washington Supreme Court has acknowledged an approach similar to that taken by the Commission is appropriate in some contexts such as nonproject proposals: "Nonproject rezoning has been held not to require an EIS as long as the council retains the authority to require such

an evaluation at the project permit stage.” *Hayden v. Port Townsend*, 93 Wn.2d 870, 879, 613 P.2d 1164 (1980) (upholding city’s consideration of environmental factors in reaching rezone decision), *overruled on other grounds, Save a Neighborhood Env’t (SANE) v. City of Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984).

The SEPA rules reflect this flexible approach: “In making a threshold determination, the responsible official should determine whether: . . . (b) Environmental analysis would be more useful or appropriate in the future in which case, the agency shall commit to timely, subsequent environmental review, consistent with WAC 197-11-055 through 197-11-070. . . .” WAC 197-11-330(2). Such broad guidelines leave substantial leeway for agency resolution. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Ch. 13, § 13.01[3], 13-32 (Matthew Bender). The Commission specifically required an EIS to be prepared in conjunction with any final detailed expansion plan that would be submitted to the Director for his review and decision.

Nor is it necessary to require an EIS for a nonproject proposal if the agency has studied the potential effect of its decision and adequately addressed the potential impacts that can be predicted with conditions in a mitigated determination. *West 514 v. Cnty. of Spokane*, 53 Wn. App. 838, 849, 770 P.2d 1065 (1989) (upholding county’s issuance of a mitigated determination of non-significance where the planning department adopted the pertinent parts of an earlier EIS, reviewed the environmental checklist,

and conditioned approval subject to modification as suggested by studies mentioned in the mitigated determination of non-significance).

In this case, Parks presented a master facilities plan to the Commission for approval in 2008. Parks prepared an EIS of the entire park in conjunction with the facilities plan. At the time the classification of the potential expansion area went forth in 2011, Parks already had performed environment studies. The specific environment of the potential expansion area still needed to be addressed in detail; however, the Commission expressly conditioned approval of any further development by requiring a supplemental EIS for the area as a condition of the mitigated determination. The Commission did not cut corners to the detriment of the environment or the park users. The Commission did not violate SEPA.

C. Lands Council Lacks Standing

Lands Council lacks standing because it cannot demonstrate a concrete injury in fact resulting from the classification decision.³¹ To establish standing, Lands Council had to demonstrate (1) that its interests are within the zone of interest protected by SEPA, and (2) that the decision results in injury in fact. *Harris v. Pierce Cnty.*, 84 Wn. App. 222, 230, 928 P.2d 1111 (1996). Injury in fact requires more than a threatened injury: the injury must be immediate, concrete, and specific. *Id.* at 231.

³¹ The foregoing SEPA analysis need not be decided unless this Court upholds the trial court determination that Lands Council has standing to sue.

Lands Council alleged that its organization promotes sound land management decisions.³² It further alleged that its members regularly visit and recreate in Mount Spokane State Park. Lands Council argues that the classification paves the way to subsequent expansion of the ski resort into the potential expansion area.³³ Lands Council, however, failed to demonstrate any set of concrete injuries that will occur as a result of the classification decision itself. There is no injury in fact.

The classification only authorizes the possibility of general land uses for the potential expansion area. It does not require such uses to be developed or even authorize a specific development plan to be implemented. Indeed, the Commission's decision approving a conceptual plan for future expansion of the ski resort specifically prohibited any development until the lessee provided the Parks Director a detailed plan of development along with an EIS of any significant environmental impacts.³⁴ Accordingly, development activity, and any change in the environment that Lands Council may experience, will only occur if the Director approves a detailed plan of development. Furthermore, any approval decision will be made with the benefit of an EIS that evaluates the specific changes in environment being proposed.

³² CP 4.

³³ CP 8.

³⁴ CP 367.

Lands Council did not challenge the decision to approve a conceptual expansion plan.³⁵ This makes sense because the “concept approval” was nothing more than a way to provide the lessee with initial feedback on what may be acceptable. The actual development proposal is what will provide the opportunity to evaluate a specific project proposal and the potential for environmental impacts. It is premature to challenge something that is simply conceptual, just as it is premature in this case to conduct an EIS for the classification when the specific details of a future expansion plan were not yet known.

Any injury that may follow from expansion of the ski resort, should the proposal proceed, is purely conjectural or hypothetical at this point and does not confer standing on Lands Council to challenge the land classification decision. *Harris*, 84 Wn. App. at 231-32.

Harris is instructive on the injury-in-fact element of standing. In *Harris*, the county adopted a proposal for a multi-use trail system extending from the Nisqually Delta area to Mount Rainier. Citizens Against the Trail challenged the adoption of the trail proposal, alleging it would adversely affect their property that abuts the proposed trail. The trial court dismissed the action because the citizens group failed to establish standing under SEPA. The Court of Appeals affirmed, concluding that the allegation the county might try to acquire land in the

³⁵ That expansion proposal has not received final approval and is not ripe for review. Furthermore, any final decision on a specific expansion proposal will be subject to appeal under the Land Use Petition Act.

future to accommodate the trail was only a threatened injury, not an injury in fact. *See also Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992) (plaintiff lacked standing in SEPA challenge because he failed to prove injury in fact arising from city issuance of a determination of non-significance as part of zoning change and plaintiff simply assumed the change would adversely affect his property).

The classification plan, which is the subject of this challenge, only approved general uses for the area. Actual development of the area, and specifically the proposed development of a ski area expansion, will go through subsequent review by Parks and, if approved by Parks, a permitting process reviewable under the Land Use Petition Act. Those subsequent decisions by Parks and the local permitting agency will provide appropriate review of this expansion proposal because a final plan will be in place and an EIS will have been performed. At this stage, the classification decision does not create an injury in fact. Any injury from the classification plan is speculative.

D. The Trial Court Correctly Denied the Request for a Constitutional Writ

Lands Council argues that it requested the constitutional writ only as an alternative basis of review should the trial court refuse to address the SEPA challenge. Here, the trial court addressed the SEPA challenge on the merits. Furthermore, under the writ analysis, Lands Council failed to meet the threshold requirements to issue such a writ. Accordingly, this Court should affirm the trial court's decision to deny the writ.

The decision to grant or deny a constitutional writ lies entirely within the trial court's discretion, and an appellate court will not disturb a trial court's refusal to grant a writ if based on tenable grounds. *Gehr v. South Puget Sound Cmty. Coll.*, 155 Wn. App. 527, 533, 228 P.3d 823 (2010). In deciding whether to grant a writ, the trial court determines whether the petitioner's allegations, if true, would clearly demonstrate that the agency's action was arbitrary, capricious, or illegal. "Arbitrary and capricious means 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Id.* at 534, *citing Foster v. King Cnty.*, 83 Wn. App. 339, 347, 921 P.2d 552 (1996). Illegal action, in the context of a writ request, does not equate with an error of law standard but instead refers to the agency's authority to perform the act. *Id.* at 534.

1. The Commission Decision Was Not Arbitrary

Where there is room for two opinions, a decision is not arbitrary. *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 983 P.2d 602 (1999). The Commission approved the classification plan identifying the range of activities that would be allowed within the potential expansion area only after considering numerous hours of public comment, environmental studies, and four alternatives. The four distinct classification proposals included a wide range of activities, from keeping the entire area undeveloped to allowing various degrees of development. After hearing approximately six hours of testimony and reviewing studies on the environmental impacts, the Commission debated the benefits and impacts of

each alternative at the May 19 meeting.³⁶ The Commission ultimately approved a hybrid of the four classification proposals. Public testimony supported both the no development and ski expansion options.³⁷ The extensive review process does not support an inference of arbitrary behavior. The decision may not have satisfied Lands Council, but it was not arbitrary.

2. The Commission Decision Was Not Illegal

As noted above, illegal action, in the context of a writ request, does not equate with an error of law standard but instead refers to the agency's authority to perform the act. *Gehr*, 155 Wn. App. at 534. Some courts have used the constitutional writ to address SEPA issues using a legal standard adopted for SEPA: SEPA determinations are reviewed under the clearly erroneous standard. *Norway Hill*, 87 Wn.2d at 273-76. However, more recent cases confine the legal standard for issuance of a writ to acting without legal authority. *See Federal Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011) (error of law is not the standard for constitutional writ; illegality in the context of a request for a writ refers to an agency's jurisdiction and authority to perform an act). This has led to confusion as to the standard of illegality applied for issuance of a constitutional writ. The trial court accepted the standard set forth in *Federal Way School District No. 210* as the proper standard for writ purposes. This court should follow suit.

³⁶ CP 80.

³⁷ CP 79-80.

In the current case, the Commission not only had authority to adopt management classifications for the state park, it was obligated to adopt such classifications under WAC 352-16-010 and -020. The ability to adopt a mitigated determination was also expressly authorized by WAC 197-11-350. As a result, this action could not be deemed illegal under the legal standard set forth in *Federal Way School District No. 210*.

The trial court correctly denied Lands Council's request for a writ. This Court should affirm the trial court decision to deny the writ.

VI. CONCLUSION

This Court should affirm the trial court's dismissal because Lands Council cannot articulate any injury in fact arising from a decision that merely classifies the potential expansion area as potentially developable. Assuming that Lands Council has standing to challenge the mitigated determination of non-significance issued for the land use classification decision, this Court should affirm the trial court's decision: the Commission followed the SEPA rules for phasing review and the mitigated determination ensures that any future development project will undergo thorough SEPA

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review utilizing an EIS prior to any agency decision to authorize such development.

RESPECTFULLY SUBMITTED this 27th day of July, 2012.

ROBERT M. MCKENNA
Attorney General

/s/ James Schwartz
JAMES SCHWARTZ, WSBA No. 20168
Senior Counsel

/s/ Jessica Fogel
JESSICA FOGEL, WSBA No. 36846
Assistant Attorney General

Attorneys for Respondent Washington State
Parks and Recreation Commission

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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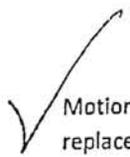
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of July, 2012, at Olympia, Washington.

/s/ Nancy J. Hawkins
NANCY J. HAWKINS
Legal Assistant

EXHIBIT A



E-3
final
COPY

Motion: I hereby move that the amended action approved this morning be struck in its entirety and replaced with the following amended action:

Second: *Joe*
Discussion: *Rodger* } *passed*

Amended Option 3

Land Classification: The PASEA shall be classified:

1. Recreation/Resource Recreation: The 279-acre proposed developed ski area is classified Recreation with the exception that the treed islands between the developed ski runs are classified Resource Recreation as illustrated in the amended Option 3 map;
2. Resource Recreation: The area north of the proposed 279-acre proposed ski area and east (above) the Chair 4 Road and including the Chair 4 Road, as illustrated in Blue in the Option 3 map;
3. Natural Forest Area: All areas below the Chair 4 Road as illustrated in Green in the Option 3 map are classified Natural Forest Area.

This option would allow for the development of the MS 2000 proposal to develop one lift and seven ski runs on the 279-acre developed ski area with a higher standard of natural resource protection called out in the treed islands between the ski runs. The ski area development is predicated upon:

1. An action by the Commission that includes a statement of future development recommended in the PASEA as outlined in the recommended action;
2. Successful project level environmental review and permitting;
3. MS 2000 agreement to finance any approved and mutually agreed upon improvements including the financial impacts of those improvements to the Commission for both operating and capital expenses; and
4. Director approval of the final development plan for expansion of developed alpine skiing into the PASEA.
5. Recognition that the MS 2000 proposal is conceptual in nature and that final development plans will designate the location of the treed ski islands and developed ski runs. The Commission intends a higher degree of natural resource protection in the treed ski islands included in the final development plans that will be approved by the Commission.

In designating the 279-acre area above the Chair 4 Road as Recreation/Resource Recreation, development within the area north of the 279-acre ski development proposal area and east of (above) the Chair 4 Road, the Commission is setting an expectation that the PASEA requires and would receive greater natural resource protection in the treed ski islands than in the existing ski area on the front side of the mountain by limiting the amount and type of clearing that may occur in the treed islands.

This option would provide a balanced approach to meet the agency mission of Public Recreation and Natural Resource Protection. The intent of Option 3 is to set a higher level of natural resource protection in the PASEA than that currently afforded to the existing developed ski area.

Option 3 would provide a limited number of informal skiing routes through the treed islands between the ski runs. Some clearing of trees, snags, understory vegetation, and downed woody debris would be allowed however, clearing would be limited to that necessary to provide a safe and enjoyable route of travel through these areas while appropriately managing the risk to skiers. A higher concentration of natural features would be left undisturbed to allow natural processes to proceed in the treed ski islands between formal ski runs.

Conditional uses: Conditional Uses within the Resource Recreation area shall be as follows:

- Alpine Skiing is an allowed conditional use in areas designated Resource Recreation. Future development in support of Alpine Skiing will be limited to include sanitary facilities and other ancillary developments and support facilities (e.g.) warming hut, chemical or vault toilet) but not large developed ski lodge facilities.

Future development within the area north of the 279-acre ski development proposal area and east of (above) the Chair 4 Road, as illustrated in Blue, shall only be in support of the conditional use of search and rescue operations, with no other conditional uses authorized now or in the future trail and/or facility planning, with the exception of ^{undeveloped} alpine ski use. Said development of the area north of the 279-acre ski development proposal area and east of (above) the Chair 4 road will only consist of dropping downed and leaning timber to ground level to allow for appropriate corridors for snowmobile access for emergency search and rescue.

INSERT

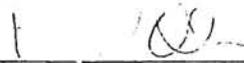
Except as amended, the remainder of Option 3 remains the same and is incorporated herein.



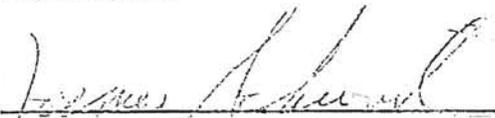
Recommended Action of Commission: The Recommended Action remains the same except as restated in #4 below:

New Number 4:

4. Adopt the land classification and conditional uses as amended in Option 3 above.



Fred Olson, Chair

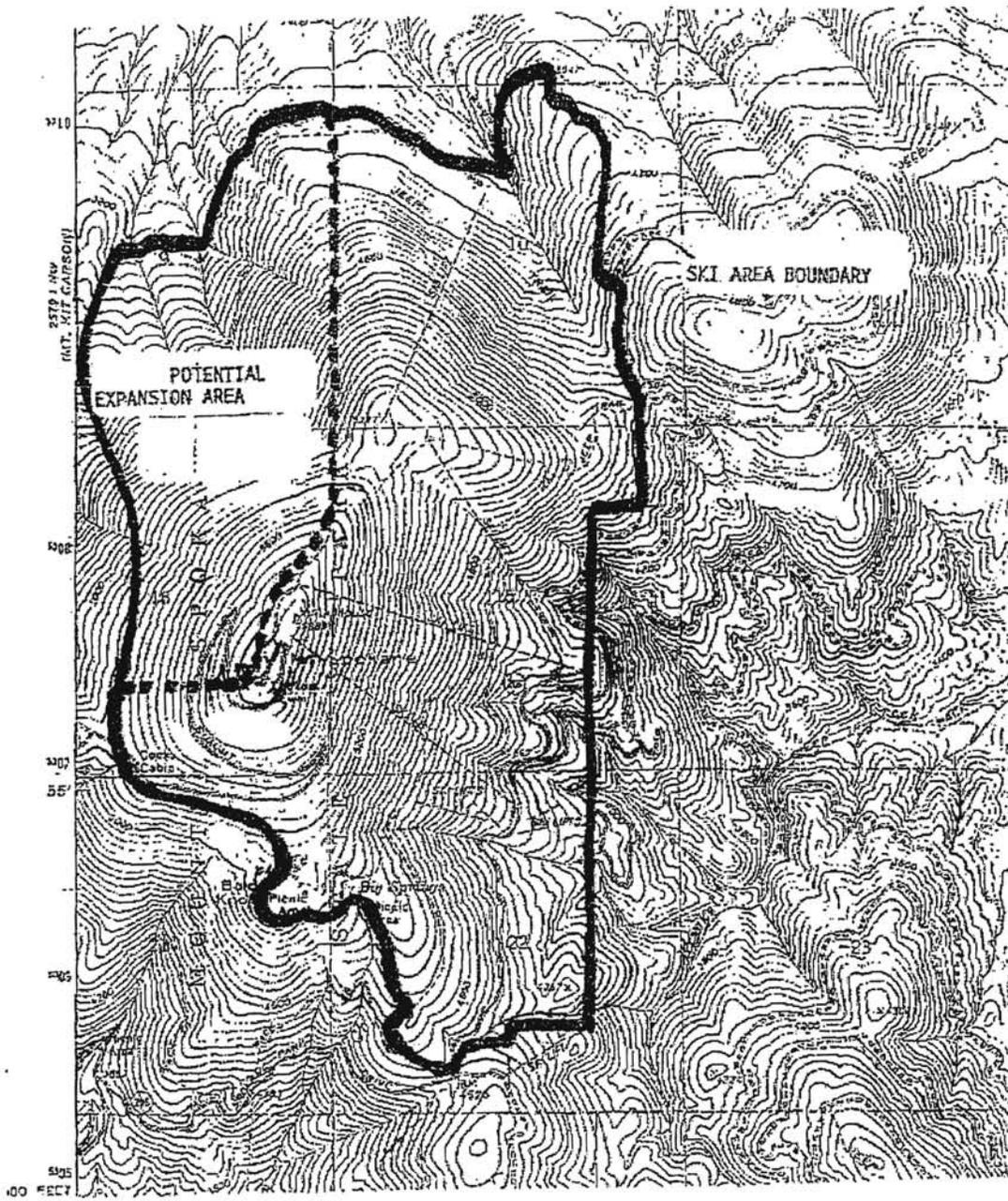


Jim Schwartz, AAG: May 19, 2011

EXHIBIT B

ATTACHMENT A

Description of Concession Area



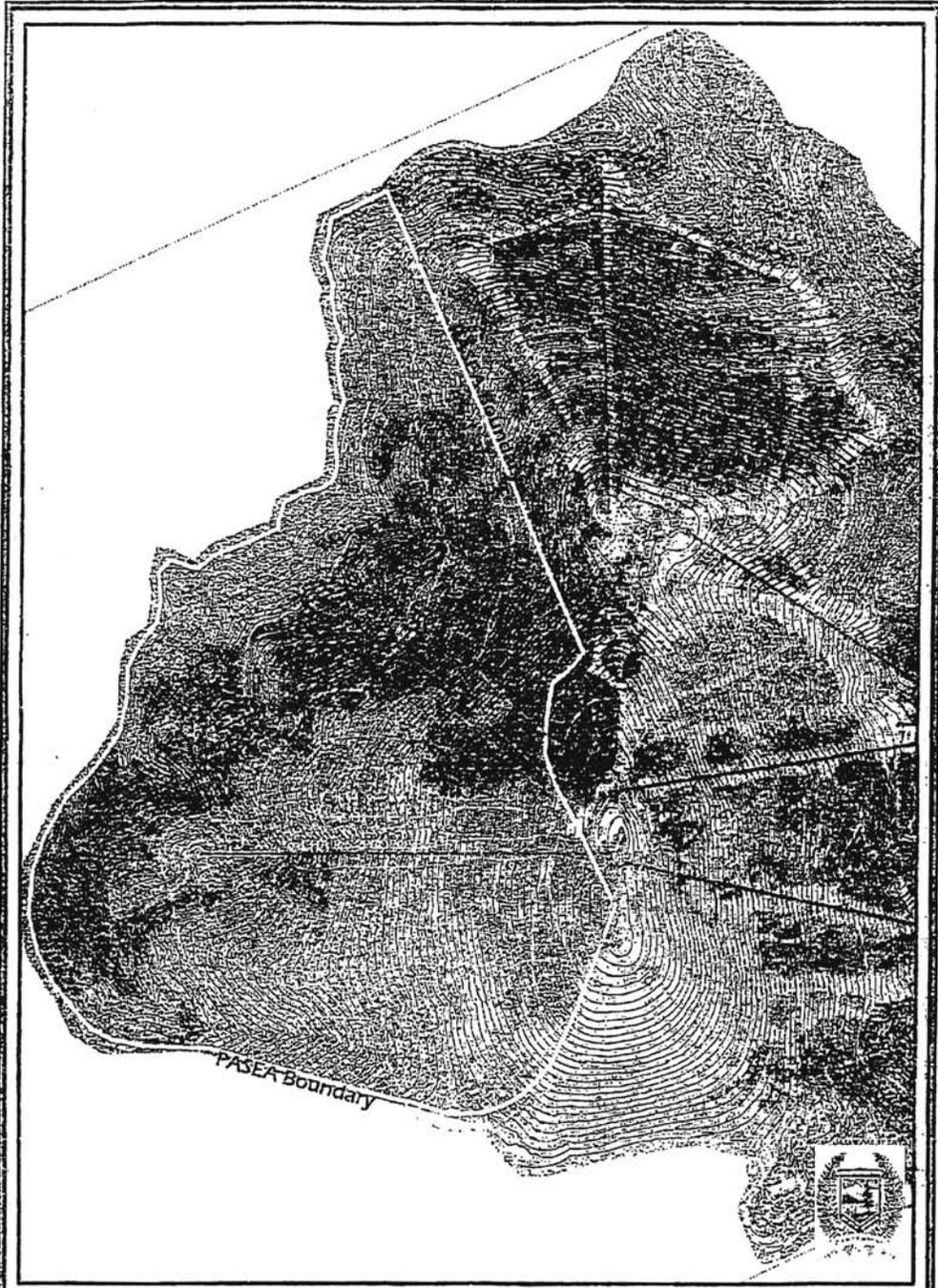


FIGURE 3
BIOLOGICAL SURVEY AREA
MT. SPOKANE STATE PARK

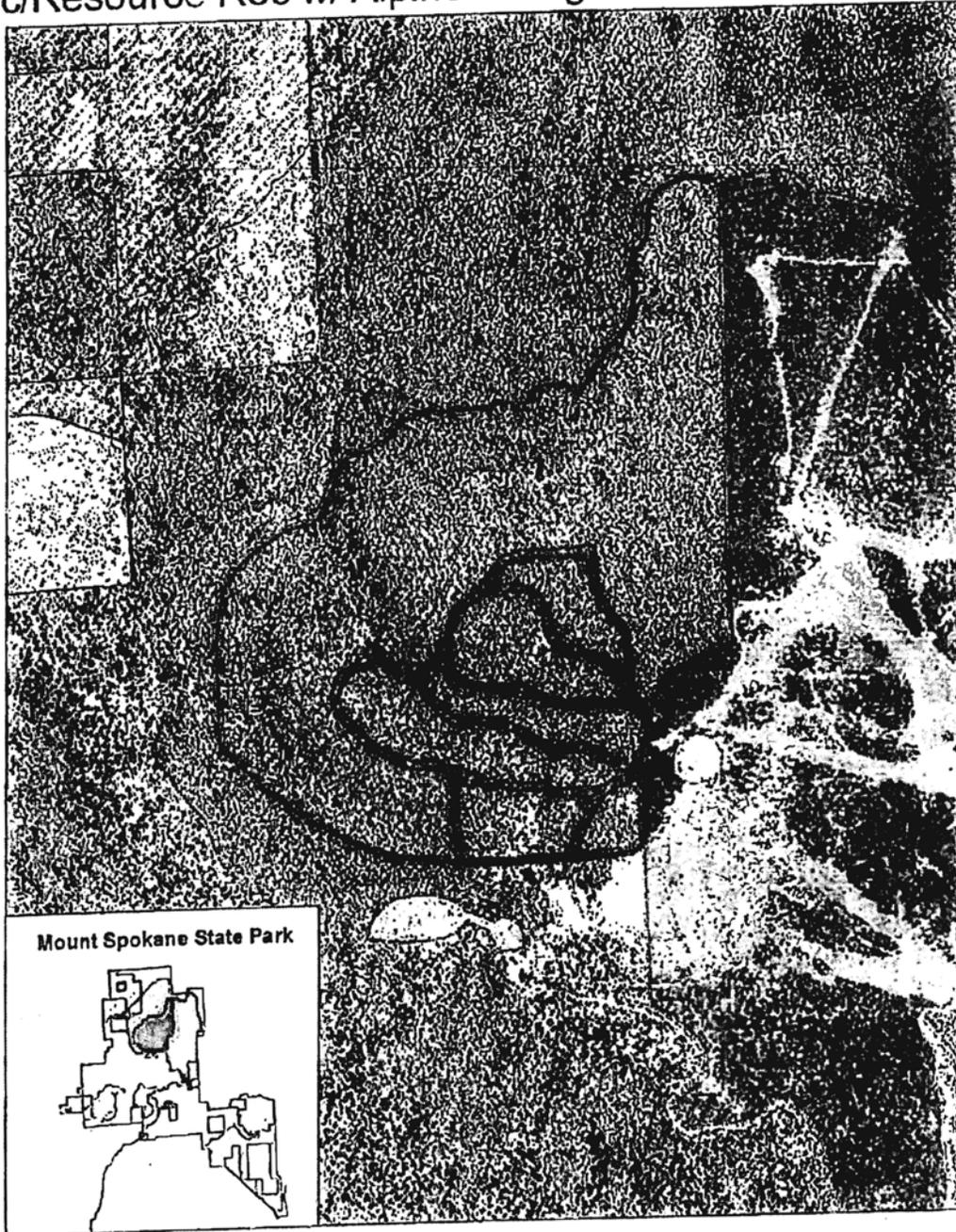
Source: SE Group and Pacific University Institute
 October 2016
 25 ft. contour interval
 Scale = 1"=1000'
 0 500 1000 2000'

Legend

- Existing Ski Lift
- Proposed Ski Lift
- Proposed Ski Run
- Existing Road
- Management Survey Area

Mt. Spokane State Park
 1974
 Mt. Spokane Ski and Snowboard Resort
 Spokane, Washington, USA
 www.mtskispokane.com

Mount Spokane State Park PASEA Land Classifications Rec/Resource Rec w/ Alpine Skiing Cond. Use & Nat. Forest



- PASEA
- Heritage
- Recreation
- Recreation Included In Long-Term Boundary
- Resource Recreation
- Resource Recreation Included In Long-Term Boundary

- Resource Recreation Appropriate for Surplus / Exchange
- Resource Recreation for Acquisition by Exchange only
- Natural Forest
- Natural Forest Included in Long-Term Boundary
- Natural Area Preserve

0 1,000 2,000

4,000 Feet



0-000000371