No. 48423-4

COURT OF APPEALS, DIVISION II
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.

WASHINGTON STATE PARKS AND RECREATION COMMISSION'S RESPONSE TO SPOKANE TRIBE OF INDIANS' *AMICUS CURIAE* BRIEF

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The Spokane Tribe of Indians (Tribe) alleges its cultural connection to property owned and managed by Washington State Parks is affected by the classification decision. As the Tribe points out, the Parks and Recreation Commission (Commission) was fully informed as to the Tribe's interest in this area. The Tribe has used this area historically for many activities related to their culture concurrently with the existing recreational users. The classification decision does not preclude any of the Tribe's activities.

The Tribe also argues the classification fails to give the proper priority to preserve natural resources under the Commission's Natural Resource Policy. The classification decision preserves 725 acres of the 800 acres affected. This decision strikes a reasonable balance between recreation and preservation, while prioritizing preservation. Because the Commission decision fully considered the cultural and natural resources of this area prior to making the classification, the decision was not arbitrary and capricious and should be affirmed.

I. ARGUMENT

The Tribe's brief repeats several of the arguments raised by Appellants. As a result, the Commission will not address those arguments in detail to avoid duplication of briefing. The Commission, instead, will focus its response on the Tribe's argument that the Commission ignored or

created a new policy by this action. The Commission will also demonstrate why the case relied upon by the Tribe, *Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956 (9th Cir. 2015), is factually distinguishable and does not support a finding the Commission decision was arbitrary, as suggested by the Tribe.

Briefly, the Tribe suggests the Commission ignored the Policy because the record *only* mentions the policy three times. To the contrary, mention of the policy three times demonstrates the staff and the Commission were well aware of the policy. The Tribe also suggests that the Commissioners failed in their comments to address the particular requirements of the Policy. As briefed earlier, the record is replete with comments by the Commissioners at the final meeting addressing the conflicting goals and provisions of the Policy. Those comments speak for themselves. Several of the Commissioners spoke to the particular requirements covered by Sections D and E of the policy. Commissioner Lantz actually paraphrased one section of the policy addressed in the Tribe's brief. This documented discussion and consideration in the record is all that is required to uphold the Commission decision under the arbitrary and capricious standard.

> Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. More specifically, "[w]here there is

> room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." . . . "[T]he standard is that '[t]he court must scrutinize the record to determine if the result was reached through a process of reason, *not whether the result was itself reasonable in the judgment of the court.*'" Further, in scrutinizing the record, we ask whether the decision "was rational at the *time* it was made."

Nw. Sportfishing Indus. Ass'n v. Ecology, 172 Wn. App. 72, 99-100 ¶ 44, 288 P.3d 677 (2012) (internal citations omitted; emphasis in original). The arbitrary and capricious standard and the plentitude of case law applying it to agency decisions do not require the Commission to cite a policy section-by-section.

The Tribe suggests that their interest may be affected by future decisions the Commission may or may not make in other parks. This is speculative. This Court may not review issues that are not ripe and that were not raised below and, therefore. the Commission does not respond to the Tribe's concerns about reintroduction of extirpated salmon in an off-site area. *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 733, 987 P.2d 634 (1999) ("Generally, appellate courts will limit review to claims argued before the trial court.") (citing RAP 2.5(a), RAP 9.12).

A. The Commission Did Not Ignore Its Existing Policies Nor Adopt a New Policy

The Tribe acknowledges that Section D of the Policy – Recreational Facilities – applies to this decision. The Tribe then argues

the Commission either ignored the provisions of Section D or formulated a new policy at the meeting to fit the circumstances of this case. Section D of the Policy reads as follows:

> **D. Resource Use**
>
> 1. Recreational facilities / activities
>
> State Parks has a mission of protecting resources of the system **while providing for recreational use** by the public. Given the need to **balance** these goals, State Parks' staff will carefully analyze on a system-wide and / or park specific basis the long-term impacts to natural processes and resources resulting from facilities development, . . . and recreational uses. A Commission-approved land classification will be developed for all parks to preserve the integrity of significant natural resources through the identification of appropriate recreation uses and developments. New developments will seek to minimize the impact of recreational activities . . . .
>
> 2. Cultural resources
>
> State Parks has the complex mission of protecting the natural and cultural resources of the system while encouraging their recreational and scientific use by the public. No single resource consistently takes priority over others. Where a resource of national, statewide or regional significance occurs, its protection **will take priority** over other resource protection and use efforts. Where significant natural and cultural resources exist at a site or within a landscape, agency staff **must protect the integrity** of all significant resources. The management and protection of cultural resources will be consistent with the Commission's Cultural Resources Management Policy . . . .

ARSUPP00189 (emphasis added). Commissioner Lantz, who voted against the proposal, paraphrased the language from this section – "No

single resource consistently takes priority over others." – when she said as follows:

> We're here in a really interesting situation because it, of course, is a dual mission. We are to protect the natural resources, and we are to provide recreation. Both of these benefits accrue to all Washingtonians . . . .
>
> What we're doing today is making a value judgment. There is competing goods, recreation and preservation of natural resources. There's not one good that trumps the other.

AR00782. The Commission knew the policy well enough to address the particular provisions and, in one instance, to paraphrase its contents.

The Tribe suggests this section precludes the expansion of existing recreation to the 75 acres that will be used for ski runs. AR00757. The word priority, however, does not mean to preclude all other uses. Priority is defined in several ways, one of which is appropriate here: "something requiring or meriting attention prior to competing alternatives." Webster's Third New International Dictionary 2:c (2002). The Commission and staff prioritized this regional resource area by limiting development within the classified area. The Commission classified 521 acres for limited use or preservation as natural area. The Commission also classified 279 acres for high intensity recreation with additional restrictions limiting cutting of trees to just 75 acres. AR00757.

More importantly, the classification does not limit the Tribe's historic uses of the area for cultural purposes. The Tribe has historically enjoyed the use of this area concurrently with the historic recreational users near and within the PASEA. Recreational activities have occurred in and near the PASEA for decades: some examples are snowshoeing (AR00789), biking (AR00797), backcountry skiing (AR00797), snowmobiling (AR00119), and birding (AR00596). AR00667, AR00688. This concurrent use was acknowledged by a tribal member who spoke at the public meeting the night before the decision.

> Please do not get me wrong. The Tribe does support healthy activities for all of our community members and youth, such as alpine skiing and snowboarding. However, we cannot support the expansion of Mount Spokane as planned and being considered here. The Tribe holds the mountain sacred and does not want to see any further clearcutting and damage to what is now a vibrant and unique ecosystem that supports a variety of current recreation uses, such as backcountry skiing, hiking, equestrian use and other activities.

Comments by Ms. Evans, AR00583.

In response to such concerns, Commissioner Schmitt articulated the actual impact of the decision as follows:

> Making a decision on the PASEA classification is important to both sides, and I can't paint either side as right or wrong. It's a difficult decision. Arguments that stipulate we are destroying 279 acres of old-growth we heard last night -- they don't really touch on the real facts. Only 75 acres will be disturbed by ski runs. And

> importantly, the ski runs themselves will not be bulldozed as we heard. Only the lift tower pads and the lift loading zones will be disturbed to the soil. The other 60 acres will be cut to 18 inches above the surface, and the remaining 200 acres of the 279 acres, what we call the treed islands, will have stringent management prescriptions.

AR00757.

Partly in response to the concerns expressed, Commissioner Schmitt offered an amendment, accepted by the Commission, to further restrict activities in the 351-acre area classified for Resource Recreation (AR00862).

> Emergency search and rescue use, including snowmobile use, and lift-served backcountry skiing use in the Resource Recreation classification area north of the Recreation classification area and east of (above) Chair 4 Road are allowed conditional uses. No other uses will be authorized.

AR00759.

Commissioner Brown also acknowledged the Tribe's concerns in his comments.

> This is a pristine forest. There's not many left. I'm going to give the benefit of the doubt to the Native American leaders who were in the room last night, and I'm going to say there is old growth there. I had a conversation with one of you very briefly -- no, excuse me, it was Daniel, and noting the adjacency of this mountain to a major urban area in itself is quite unique.

AR00768.

Resource protection was also front and center in the last classification process that occurred in 1999. Commissioner Whaley pointed this out in her comments for the 2014 decision at issue:

> The volume of what we have studied has been substantial. The exact location of the expansion area, its current and historical uses by the public, are also important as Commissioner Brown mentioned and as Commissioner Bounds mentioned.
>
> Its relationship to the rest of the park is also key, and this is not done in isolation. In 1999 a great deal of thought was given to exactly where was the best place on the mountain for a variety of uses summer and winter and how to avoid conflicts with all those uses in the future.
>
> And in 1999 the Commission took steps then to assure adequate protection for many resources in the park and struck a balance for what was needed then for preserving the important natural resources of the park and the needs to allow the right uses.

AR00795.

In the instant decision, staff and the Commission gave the appropriate priority to cultural and resource protection by striking a balance between the historic uses and protection – dramatically favoring protection.

B. There Is No Evidence of a Conflicting Application of the Policy

The Tribe offers *Organized Village of Kake*, 795 F.3d at 967, for the proposition that an agency must explain its reasoning when it adopts a position that conflicts with a prior holding or application of policy.

Organized Village of Kake is a procedurally complicated case dealing with multiple appeals in different district courts, with reversal in several of the courts, addressing challenges to the "roadless" rule implemented by the Department of Agriculture. The essence of the case, however, is the Court ruled that the Department cannot take diametrically different positions using the exact same facts without explaining its reasoning. The holding is not helpful here because that is not the situation before this Court.

The roadless rule limited commercial activity, such as logging, in national forest administered by the Department. In 2001, the Department issued a record of decision (ROD) indicating the "long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities." *Id.* at 967. In 2003, after a change in presidential administration, the Department rescinded the rule. The Court found the agency's 2003 record of decision, supporting the rescission, did not simply rebalance old facts to arrive at the new approach. The 2003 ROD made factual findings directly contrary to the findings in the 2001 ROD, using the same information. The 2003 ROD did not explain why an action that it previously found posed a "prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one." *Id.* at 969. The Court went on to say "An agency cannot simply disregard contrary or inconvenient

factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate. " *Id.*, quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537, 129 S. Ct. 1800 (2009).

In the instant case, there is no evidence the Commission applied this policy to this area before, nor anywhere else, in a manner inconsistent with its application of the policy for this decision. The natural elements of the area and its historic uses were thoroughly studied and documented, addressed in the Environmental Impact Statement and public meetings, and discussed at the final Commission meeting at which the decision was made. There was no inconsistent prior application of the policy nor findings requiring a detailed explanation of an inconsistency. The Commission looked at all the attending facts and circumstance for an area that was unique as to its natural elements, its historical uses, and its adjacency to an urban area, and made a judgment call that prioritized the natural resource over the historic recreational uses, while allowing some expansion to meet the community's request for more recreation.

C. The Decision Properly Considered Preservation of Cultural Resources

The record indicates, and the Tribe seems to acknowledge, the Commission was well aware of the Tribe's concerns presented prior to the decision. The Commission acknowledged those concerns and addressed

them in detail in the comments to the Environmental Impact Statement and at the public meeting the day of the decision. Subsequent to the decision, the Tribe raised an additional concern relating to a historic Native American trail located in the park which may be affected by the development. The evidence is conflicting as to whether the historic trail ever entered the proposed expansion area. The matter is now under consideration by the agency with expertise in such matters – the Department of Archeology and Preservation – as is appropriate.

Based on the Commission's extensive consideration of the Tribe's interests, the Commission exceeded the minimum requirement to reach a determination through a reasoned process as required to uphold a decision under the arbitrary and capricious standard of review. *Nw. Sportfishing Indus. Ass'n*, 172 Wn. App. at 100-01 ¶ 46 (court upholds Ecology's decision when the record showed the decision was made through a reasoned process after considering hundreds of studies and input from other parties) (citing *Rios v. Wash. Dep't of Labor and Indus.*, 145 Wn.2d 483, 501, 507, 39 P.3d 961 (2002)).

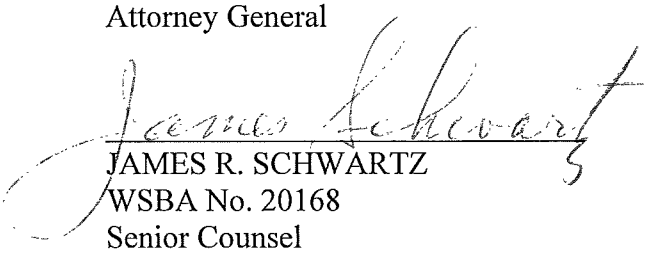
II. CONCLUSION

This Court should affirm the trial court. The Commission decision balancing the competing community interests in recreation and

conservation and preserving 725 of 800 acres was thoughtful, thorough, and soul searching. It was not arbitrary and capricious.

RESPECTFULLY SUBMITTED this 26th day of April, 2016.

ROBERT W. FERGUSON
Attorney General



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

DATED this 26th day of April, 2016, at Olympia, Washington.

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April 26, 2016 - 10:00 AM

Transmittal Letter

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Comments:

Respondent Washington State Parks and Recreation Commission's Response to Spokane Tribe of Indians' Amicus Curiae Brief

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