

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

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WHIDBEY ENVIRONMENTAL            )  
ACTION NETWORK,                    )  
  )  
                  Petitioner,            )  
  )  
                          vs.             ) SUPERIOR COURT NO. 21-2-00329-34  
  )  
WASHINGTON STATE PARKS        )  
AND RECREATION COMMISSION,    )  
  )  
                          Respondent.    )

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THE HONORABLE JAMES J. DIXON PRESIDING

ALR ruling  
Report of proceedings  
April 1, 2022  
2000 Lakeridge Drive SW  
Olympia, Washington

Court Reporter  
Ralph H. Beswick, CCR  
Certificate No. 2023  
1606 12th Avenue SW  
Olympia, Washington

A P P E A R A N C E S

For the Petitioner:           Zachary Griefen  
                                      Bryan Telegin  
                                      Bricklin & Newman, LLP  
                                      1265 Xenia Street  
                                      Bellingham, WA 98229

For the Respondent:           John Heidinger  
                                      Assistant Attorney General  
                                      PO Box 40100  
                                      Olympia, WA 98504-0100

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1  
2 THE COURT: Thank you. The court's ready to rule.

3 At issue is the January 28, 2021, decision of the  
4 Washington State Parks and Recreation Commission wherein  
5 that commission delegated authority to staff to issue  
6 permits to the United States Navy for use of state parks  
7 for training and its decision to allow staff to allow the  
8 lifting of certain limitations previously imposed, although  
9 it appears to this court that that decision was never  
10 reduced to writing. As I recall that was a verbal decision  
11 made by the commission. I didn't see it anywhere in  
12 writing. Lastly, the court is asked to review the decision  
13 of the commission with respect to the state environmental  
14 policy act mitigated determination of nonsignificance.

15 Article IV, Section 6 of the state constitution grants  
16 this court the authority to review administrative  
17 decisions. This court must decide whether a writ of cert  
18 should issue in the event the commission had lacked  
19 jurisdiction and authority to make the determination or  
20 determinations it did. Here more specifically the court is  
21 asked to consider whether the commission acted within its  
22 statutory authority in authorizing its director to permit  
23 the use of state parks by United States military for  
24 training purposes, and secondly, did state parks properly  
25 and completely or adequately conduct a SEPA review.

1           The starting point in the court's analysis is the  
2 statutes at issue, and starting with RCW 79A.05.305 which  
3 provides the legislative policy relating to public  
4 recreational lands. That statute provides in relevant part  
5 ". . . it is the continuing policy of the State of  
6 Washington to . . . manage . . . lands within the state for  
7 public park purposes." To comply with these purposes the  
8 lands shall be managed "to maintain and enhance ecological,  
9 aesthetic and recreational purposes," preserve natural  
10 resources, "protect historical resources . . . provide . . .  
11 recreational opportunities . . . preserve and maintain  
12 habitat . . . and encourage public participation in the  
13 formulation and implementation of policies and park  
14 programs."

15           So that's the starting point here in this court's  
16 analysis. You look at the policy of the State of  
17 Washington as it relates to public lands and public parks.  
18 And that's from the legislature. It's not from the court.

19           Similarly, RCW 79A.05.600 provides the legislative  
20 policy relating to seashore conservation areas, and that  
21 statute provides in part "The beaches bounding the Pacific  
22 Ocean . . . provide the public with almost unlimited  
23 opportunities for recreational activities." "The number of  
24 people wishing to participate in . . . recreational  
25 activities grows annually. This increasing public pressure

1 makes it necessary that the state dedicate the use of . . .  
2 beaches to public recreation and to provide certain  
3 recreational and sanitary facilities. Nonrecreational use  
4 of the beach must be strictly limited. . . . recreational  
5 uses must be regulated in order that Washington's unrivaled  
6 seashore may be saved for our children in much the same  
7 form as we know it today."

8 Pretty strong words from the legislature. That sets the  
9 framework for what the Parks and Recreation Commission  
10 shall bear in mind in its decisionmaking policies. Do they  
11 have the authority to manage and regulate public parks and  
12 beaches? Yes. But in this court's opinion that authority  
13 must be viewed and analyzed in the framework within the  
14 framework of the policies set by the legislature that the  
15 court just reviewed.

16 RCW 79A.05.010, which is cited by and referred to by  
17 both parties in their arguments and in their briefings at  
18 subsection four provides "'Recreation' means those  
19 activities of a voluntary and leisure time . . . that aid  
20 in promoting entertainment, pleasure, play, relaxation or  
21 instruction." That's what recreation is defined as by the  
22 legislature.

23 RCW 79A.05.020 and .030 respectively set forth the  
24 mandatory duties and powers of the state Parks and  
25 Recreation Commission. Those mandatory duties include

1 "care, charge, control and supervision of . . . parks and  
2 parkways . . . set aside" -- I'm going to slow down because  
3 this is important in this court's analysis -- "set aside by  
4 the state for park . . . purposes. Adopt policies . . .  
5 and enforce rules pertaining to the use, care and  
6 administration of state parks. . . ." And there are a  
7 handful of other mandatory duties and responsibilities of  
8 the commission, none of which are relevant in the instant  
9 case.

10 There are additional powers and duties of the commission  
11 that include, but are not necessarily limited to, managing  
12 timber, applying conservation practices, designating  
13 certain forest areas as preserves, the authority to remove  
14 certain trees if they are hazardous, maintain roads,  
15 easements, et cetera. Those additional powers and duties  
16 are found in RCW 79A.05.035.

17 There are several other discretionary powers and duties  
18 afforded the commission including, but not limited to,  
19 those duties found in 79A.05.055 which include the study of  
20 recreational needs of the state, provide publication and  
21 sale of interpretive materials, and interestingly enough,  
22 and I'm looking at this for the first time, 79A.05.055(3)  
23 "Coordinate the parks and recreational functions of the  
24 various state departments" -- and I'll emphasize the last  
25 clause of this sentence -- "and cooperate with state and

1 federal agencies in the promotion of parks and recreational  
2 opportunities." Contracting with the United States  
3 military to conduct training exercises is not coordinating  
4 with government agencies to promote parks and recreational  
5 opportunities. In fact, the opposite is true. RCW  
6 79A.05.070(4) provides as an additional or in this case  
7 more specifically further power of the director of parks  
8 and recreation its authority to "Act jointly, when  
9 advisable, with the United States . . . in order to carry  
10 out the objectives and responsibilities of this chapter."

11 Now, a close parsing of that statute leads to only one  
12 conclusion, and that conclusion is that this court, nor the  
13 commission for that matter, should review that authority  
14 piecemeal. Rather, this court and the commission should  
15 review that statute as a whole. And the second clause of  
16 that statute includes the requirement that the director act  
17 ". . . in order to carry out the objectives and  
18 responsibilities of this chapter."

19 And the court started its analysis by referring to the  
20 objectives and policies of the statute which are found,  
21 again, in RCW 79A.05.305. In short, the statutory duties  
22 and powers, both mandatory and discretionary, are set forth  
23 by the legislature in some detail. In this court's  
24 analysis and review all of those duties and powers are  
25 centered around the protection and enhancement of public

1 parks and the lands. Nowhere in the statutes may it be  
2 implied that the commission has the authority to authorize  
3 military training. Certainly it simply does not exist.  
4 Again circling back to RCW 79A.05.305, the policy of the  
5 legislature is to manage lands "for public park purposes."

6 The statutes at issue, and that have been discussed by  
7 this court, must be read and interpreted as a whole,  
8 bearing in mind the overriding and clearly defined policy  
9 from the legislature.

10 It also occurs to the court that had the legislature  
11 intended to grant authority to the Department of Parks and  
12 Recreation to enter into contracts with the United States  
13 military, or any other entity or agency for that matter, it  
14 could have done so. It simply did not. And it would be  
15 error for this court to interpret the statutes to conclude  
16 that there was some implied authority conferred upon Parks  
17 and Recreation that would allow them the discretionary  
18 authority to enter into contracts with a government agency  
19 for the purpose of conducting military training. It's not  
20 even a stretch. It just does not exist either in real  
21 words or by implication.

22 So the court finds -- and I'll get to this more  
23 specifically in a moment -- that the Parks and Recreation  
24 Commission acted outside its statutory authority. Its  
25 decision was *ultra vires*. More on that in a moment.

1           With respect to the argument related to the state  
2 environmental policy act, this court finds it is not  
3 necessary for the court to make a ruling on whether the  
4 commission's decision, or it might be argued lack of  
5 decision or faulty decision, violated SEPA. I'm going to  
6 make that decision regardless. This court does not believe  
7 it's necessary for the court to rule on that, but this  
8 court is fully aware that another court might be reviewing  
9 this court's decision and might disagree with this court in  
10 its decision and analysis with respect to whether the Parks  
11 and Recreation Commission exceeded its statutory authority.

12           So that being said, this court will also rule that even  
13 if a reviewing court disagrees with this court on the first  
14 issue, whether the commission acted outside its statutory  
15 authority, the court will also find that the decision made  
16 by the state parks commission violated the provisions set  
17 forth in the state environmental policy act. The state  
18 environmental policy act requires state agencies to assess  
19 potential impacts of decisions regarding the environment.  
20 If such impacts might be significant, an environmental  
21 impact study must be conducted. If there is no probable  
22 significant adverse impact in the eyes of the agency, then  
23 the agency issues a determination of nonsignificance. The  
24 agency may also ultimately issue a mitigated determination  
25 of nonsignificance setting forth requirements or imposing

1 conditions that would result in reducing environmental  
2 impacts to nonsignificance. That's what the agency did in  
3 the instant case. Ultimately they issued a mitigated  
4 determination of nonsignificance.

5 This threshold decision requires the agency to either  
6 conduct an environmental impact study or make a  
7 determination of nonsignificance or a mitigated  
8 determination of nonsignificance. Regardless, it is  
9 critical that the agency has the obligation to consider  
10 relevant environmental factors in a manner to sufficiently  
11 comply with SEPA requirements. The agency must conduct its  
12 analysis thoroughly, methodically and it must be well-  
13 documented. If potential impacts are unknown or if the  
14 cost associated with identifying and quantifying those  
15 impacts are difficult, impossible, cost exorbitant, the  
16 agency must then provide a worst-case analysis per  
17 Washington Administrative Code 197-11-080(3).

18 The standard of review of SEPA decisions is "clearly  
19 erroneous." This court finds that the agency's SEPA  
20 analysis was clearly erroneous. The agency did not analyze  
21 what is referred to by the petitioners here as the "creep  
22 factor."

23 Over the past few days this court has spent some time  
24 trying to articulate another definition or phrase that  
25 might adequately describe the emotional impact of people

1 who utilize our state parks, something other than "creep  
2 factor" because it's a long way from a legal term. But I  
3 can't find one. It is creepy. And the argument that,  
4 "Look judge, look court, no harm, no foul," in this court's  
5 analysis falls on deaf ears. The fact is that the public  
6 has been advised that the military will be using state park  
7 lands to conduct military training. That fact and that  
8 fact alone creates a significant environmental impact.  
9 Will people use the parks knowing that the military's going  
10 to be there -- I was just thinking about this the other day  
11 as I was driving to work -- especially in light of a couple  
12 of things that have happened in our world. January 6th,  
13 2021, for instance. I'll be very careful about what I say  
14 and what I don't say here. But these are difficult  
15 political times, challenging political times. And it begs  
16 the rhetorical question of what might happen or what  
17 impression a park user might have if she or he stumbles  
18 upon military training in state parks, and now, of course  
19 with the benefit, or nonbenefit, of additional time that  
20 has elapsed since the commission made the decision it made  
21 last January, still significant. With what's going on in  
22 Eastern Europe right now where a government is conducting,  
23 in a light most favorable to that government, military  
24 exercises, in a light not most favorable to that government  
25 conducting war, what might be the impression of a park-goer

1 when a park-goer sees somebody in military garb on state  
2 park lands? It boggles the mind, at least my mind.

3 An argument is made that it's not significant, these  
4 potential impacts, and that is not environmental. This  
5 court disagrees. These are very significant. They do  
6 impact the recreational use or perhaps nonuse of park-  
7 goers. It is clear to this court that people -- I'm not  
8 going to say citizens of our state because that's not fair.  
9 Just people might not use the parks if the military is  
10 conducting training.

11 And also, not that it's important in this court's  
12 analysis, but also it is not lost on this court that I  
13 don't know how many hundreds of miles of coast land and  
14 nonpark land is available to the military to conduct their  
15 training exercises. I think that issue was raised at the  
16 hearing below, and the response was well, that's true, but  
17 it's important to the military's training to conduct its  
18 training in a way that individuals are actually at the  
19 park. Now, that was an example of a significant  
20 environmental impact which was not taken into  
21 consideration.

22 Circling back to the analysis the court must conduct,  
23 that type of analysis or that factor alone was not  
24 considered, certainly not adequately, certainly not  
25 thoroughly, certainly not methodically by the commission

1 when it issued its mitigated determination of  
2 nonsignificance. In other words, when the commission  
3 ultimately ruled that these concerns, potential  
4 environmental concerns, can be mitigated by imposing  
5 certain conditions and restrictions on the military in its  
6 use, in this court's opinion and conclusion that type of  
7 decision was short-sighted. It was incomplete. It did not  
8 take into consideration the full impact and gravity of the  
9 environmental impact at issue, and to take it one step  
10 further, even if it was difficult if not impossible for the  
11 commission to quantify or analyze that environmental  
12 factor, under the SEPA provisions in the Washington  
13 Administrative Code as I've cited earlier, it is incumbent  
14 upon the agency to prepare what is referred to as a  
15 worst-case scenario. They didn't do that. So this court  
16 also finds that the Parks and Recreation Commission  
17 violated the provisions set forth in the state  
18 environmental policy act, that the decision was clearly  
19 erroneous.

20 So the court finds and rules that the commission  
21 decision to allow training operations in state parks  
22 violates the purposes and the duties of the parks and  
23 recreation set forth in RCW 79A.05. It is a violation of  
24 their limited authority to allow the use of state parks for  
25 nonpark purposes. The decisions made by the commission

1 were arbitrary and capricious. They exceeded the statutory  
2 authority conferred by the legislature. Accordingly, the  
3 court grants declaratory judgment in favor of the  
4 petitioner.

5 The court further rules that the commission's mitigated  
6 determination of nonsignificance does not comply with the  
7 substantive and procedural requirements of the state  
8 environmental policy act. The proposed training operations  
9 are likely to have significant adverse impacts that were  
10 not considered or not appropriately and fully and carefully  
11 considered by the commission. There was no worst-case  
12 analysis conducted in the event the commission were to find  
13 that the impacts were difficult to determine.

14 Pursuant to RCW 34.05 this court finds and concludes  
15 that the actions and decision at issue were outside the  
16 statutory authority and jurisdiction of the commission, the  
17 commission's actions were accordingly illegal, they were  
18 not supported by substantial evidence and were arbitrary  
19 and capricious. This court rules that the commission's  
20 order is reversed. It is vacated. The mitigated  
21 determination of nonsignificance is vacated. The  
22 petitioner is entitled to costs and attorney's fees.

23 The court will ask the prevailing party, in this case  
24 the petitioner, to draft a pleading that is consistent with  
25 this court's ruling and to circulate that to Mr. Heidinger

1 for his review. Of course, the State of Washington need  
2 not agree and presumably does not agree with this court's  
3 ruling. That being said, if the parties agree with respect  
4 to the language to be included in the order, that the  
5 language comports with and is consistent with this court's  
6 ruling, an order can be presented to this court for the  
7 court's consideration on an *ex parte* basis. In the  
8 alternative, if the parties disagree with respect to the  
9 language to be included in an order, please draft  
10 respective proposed orders, file them with the court and  
11 note this matter for presentation.

12 Mr. Griefen, any questions from your client?

13 MR. GRIEFEN: Your Honor, in drafting the proposed  
14 order would there be time to obtain a transcript of the  
15 hearing and review it so that we accurately capture what  
16 Your Honor has stated here today?

17 THE COURT: Yes.

18 MR. GRIEFEN: Thank you.

19 THE COURT: Mr. Heidinger, any questions from your  
20 client?

21 MR. HEIDINGER: No, Your Honor.

22 THE COURT: The court wishes to extend its  
23 appreciation to both parties for their extensive briefing  
24 and their professionalism in their oral arguments to the  
25 court this afternoon. Thank you to the two of you. The

1 court is off the record and in recess.

2 (A recess was taken.)

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## CERTIFICATE OF REPORTER

STATE OF WASHINGTON    )  
                                   ) ss.  
 COUNTY OF THURSTON    )

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I reported the proceedings stenographically;
2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;
3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and
4. I have no financial interest in the litigation.

Dated this 6th day of April, 2022

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RALPH H. BESWICK, CCR  
 Official Court Reporter  
 Certificate No. 2023  
 1606 12th Avenue SW  
 Olympia, WA 98502  
 Fax: (360) 754-4060  
 beswicr@co.thurston.wa.us