

RIVER RUNNERS FOR WILDERNESS

A PROJECT OF LIVING Rivers

September 1, 2016

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Secretary of the Interior
The Honorable Sally Jewell
Department of the Interior
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Dear Mr. Henry,

Please accept the following comments for Navajo Nation legislation number 0293-16, titled:

An Action Relating to Law And Order, Resources And Development, Budget And Finance, And Naabik'iyati Committees And Navajo Nation Council; Approving The Master Agreement For The Development Of The Grand Canyon Escalade Project; Approving The Funding Application Of Sixty Five Million Dollars (\$65,000,000) For The Development Of The Off site Infrastructure To The Grand Canyon Escalade Project; Authorizing The Navajo Nation Hospitality Enterprise To Enter Into A Development And Operating Agreement; Accepting The Approval Of The Withdrawal Of Land In The Bodaway/Gap Chapter; Approving A Covenant Not To Compete; Waiving Certain Provisions Of 7 N.N.C. §§ 1101-1118

As you are aware, this proposal is being put forward by Arizona-based developer Lamar Whitmer. He has offered to construct a tramway to the bottom of the Grand Canyon at the far southern end of Marble Canyon at the Confluence of the Colorado and Little Colorado rivers. Mr. Whitmer's proposed construction would occur in Grand Canyon on land of the Navajo Nation immediately adjacent to lands in Grand Canyon administered by Grand Canyon National Park.

Since 2002, River Runners for Wilderness (RRFW) has represented a broad spectrum of river runners, wilderness lovers, and American citizens who care about the wilderness river resources in the Colorado River watershed. Our members, now numbering over two thousand with outreach to over 20,000 whitewater enthusiasts, continue to have a deep concern for the future of the wilderness values of the Colorado River watershed and the management of these landscapes.

- 1) Our members view this construction proposal as akin to building a gondola ride to the top of the Sistine Chapel. We are not alone in considering this area sacred and worthy of preservation, free of development such as Mr. Whitmer proposes. The Hopi and Zuni

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Tribe, All Pueblo Council of Governors and many Navajo view Mr. Whitmer's proposal as being horribly offensive and a desecration of an incredibly sacred location. Native Americans are not alone in being stewards of the land. All faiths see open undeveloped landscapes as areas of inspiration, to be safeguarded from future development. Nowhere is this more important than to the entire Grand Canyon, especially including the area Mr. Whitmer intends to develop. His development scheme would violate the very spirit of what is held sacred by all faiths.

- 2) The potential for litigation against the Navajo Nation if this legislation is passed is very real.

Both the Hopi and Zuni Nations, along with the All Pueblo Council of Governors are on record opposed to Whitmer's plans, based on cultural ties to the immediate area. Nowhere in the legislation is the protest by these groups mentioned, even though the Hopi Tribe has given the Navajo Nation notice of their intent to litigate if the project is approved. Testimony presented by Hopi Tribal Chairman Honani was not included in the legislative packet.

Page 18 of the proposed legislation notes Whitmer "cannot warrant that litigation will not occur, and that such litigation may cause delays in the development schedule." When such litigation occurs, legal costs will impose additional financial strain on the Navajo Nation, a financial strain Whitmer will be shielded from. Whitmer can also impose additional financial stress on the Navajo Nation should there be delays in the infrastructure construction (Article 9.2.2, Legislation pg 80-81).

In a Memorandum dated December 18, 2014, to the 2 N.N.C. 164 Reviewers, Counsel for the Navajo Nation Mr. Henry Howe noted The Project Area Includes Lands for which Jurisdiction is in Dispute (his emphasis). In a January 14, 2015, rebuttal to Mr. Howe's boundary dispute concerns, Albert Damon, then Executive Director, Division of Economic Development, cosigned with Mr. Deswood Tome, then Special Advisor to the President, replied as follows: "*While resolving the boundary issue may delay the Project, we agreed with CP to resolve it through direct engagement of the DOI and our congressional delegation. If it requires legal action, as Mr. Howe knows CP and DOJ agreed upon a conceptual form of a litigation agreement with CP funding the costs and that the agreement would be drafted and executed after Council action. It is the Nation's perspective that the Western Boundary of the Navajo Nation is the middle of the Colorado River.*"

Please note that the Navajo Boundary Act of 1934 placed the boundary on the left bank's water's edge at the Confluence, while the 1975 Grand Canyon Enlargement Act placed the boundary one-quarter mile east of the rim escarpment. River Runners For Wilderness and a number of environmental organizations will be very interested in this litigation and may intervene on the side of the National Park Service to protect the Grand Canyon resource from Mr. Whitmer's ill-conceived development. We will also be visiting with our delegation in support of the 1975 boundary one-quarter mile east of the rim escarpment. Mr. Whitmer will have then successfully pitted the environmental community against the Navajo Nation.

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- 3) We would like to bring to your attention an existing mechanism that allows the Navajo Nation to work cooperatively with the Department of Interior in the preservation and interpretation of the area Mr. Whitmer would like to develop. Most importantly, this would be done through the development of resource-protecting jobs.

It is possible your office is unaware of the fact that such a cooperative approach to the eastern half of the Grand Canyon is a mandate of the Secretary of Interior as directed by Congress forty years ago. The basis for this statement is found in the 1975 Grand Canyon National Park Enlargement Act, PL 93-620, sections 2, 3a, 5, and 6.

As you may be aware, one purpose of the 1975 Enlargement Act was to add to the Park the east side of Marble Canyon, up to and including the eastern rim, from the Little Colorado River north to Lee's Ferry, if the Navajo Nation agreed to a transfer of jurisdiction.

However, the Navajo Nation made it clear, before and during the Act's consideration, that it was not interested in giving up title to the eastern half of Marble Canyon, and wanted the "existing situation" to continue. There has been no Navajo Nation action since the law was enacted in 1975. The result has been little or no interaction along the eastern side of Marble Canyon between Grand Canyon National Park and the Navajo Nation.

Recognizing that the Navajo Nation may not concur to a title and jurisdictional adjustment, the United States Congress clearly stated that the United States has a national interest in the east side of Marble Canyon for both interpretation of a complete Grand Canyon and the protection of same.

Below are the relevant texts from the 1975 Act, for your consideration and here edited with added emphasis to show relevance to the eastern Marble Canyon lands;

Declaration of Policy

*Sec. 2. It is the object of this Act to provide for the recognition by Congress that **the entire Grand Canyon**, from the mouth of the Paria to the Grand Wash Cliffs, **including tributary side canyons and surrounding plateaus**, is a natural feature of national and international significance. Congress therefore recognizes the need for, and in this Act provides for the further protection and interpretation in accordance with its true significance. U.S.C. 228A*

*Sec 3a. Grand Canyon National Park shall comprise, **subject to any valid existing rights under the Navajo Boundary Act of 1934**, all those lands, waters, and **interests therein**, ... within the boundaries depicted on map 113-20,021 B. U.S.C. 228B*

RRFW would like to point out that the named map shows the eastern half of Marble Canyon with a boundary along the rim of Marble Canyon, with this accompanying text:

MARBLE CANYON EAST Proposed Boundary on Canyon Rim

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Note: Subject to Concurrence of the Navajo Nation

Sec. 5. No land or interest in land, which is held in trust for any Indian tribe or nation, may be transferred to the United States under this Act or for purposes of this Act except after approval by the governing body of the respective Indian tribe or nation. U.S.C. 228D2

*Sec. 6. In the administration of the Grand Canyon National Park, as enlarged by this Act, the Secretary is **authorized and encouraged** to enter into cooperative agreements with other Federal, State and local public departments and agencies and with **interested Indian tribes** providing for the **protection and interpretation of the Grand Canyon in its entirety**. Such agreements shall include, but not be limited to, authority for **the Secretary** to develop and operate interpretative facilities and programs on lands and waters outside of the boundaries of such park, **with the concurrence of the owner or administrator thereof**, to the end that there will be a unified interpretation of the entire Grand Canyon. U.S.C. 228E*

The United States Congress has “authorized and encouraged” the Secretary of Interior to take an interest in the **entire** Grand Canyon both inside and **outside** the boundary of Grand Canyon National Park. That national interest is clearly spelled out as **interpretation and protection**. The 1975 Act recognized the Navajo Nation’s interest in the welfare and well-being of its people, and their advancement based on section 6 activity. These joint recognitions form the foundation of cooperative action for the planning and implementation of sec 6 facilities and programs.

Interest need not mean only possession in title, nor mean exclusive jurisdiction or administrative responsibility. To see parts of Grand Canyon outside Grand Canyon National Park exploited in a non-natural way, marred by structures inappropriate to the Grand Canyon's natural scene, is to have the integrity of the Grand Canyon violated for the visitor and the nation's heritage. The goals of the 1975 Grand Canyon Enlargement Act are to **present, interpret, and protect the Grand Canyon in its entirety**. A Grand Canyon with man-made structures imposed on and in it is in violation of the intent of Congress. Congress intended that it is in the interest of the United States to protect the entire Grand Canyon as "a natural feature of national and international significance."

In fact, the addition of these lands, even with the concurrence requirement, was based on fears of inappropriate development below, on and beyond the rim from Lee’s Ferry to the Little Colorado River Confluence.

The Navajo Nation has consistently spoken to the need for development of Western Navajo with job development. On Navajo Nation land east of the Colorado River from Lee's Ferry to the Confluence with the Little Colorado River up to the eastern rim escarpment, the Navajo Nation, prior to 1975, had already identified this area as a Navajo Nation Tribal Park. As such, the Navajo Nation must be involved to the highest degree in an active role of cooperation, concurrence, interest, and approval as the governing body.

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The 1975 Act envisioned both the United States and the Navajo Nation as being active and interactive with each other for the protection and interpretation of this region of the Grand Canyon including **to develop and operate interpretative facilities and programs** on this land using United States financial resources. The Act recognized the interest of the United States and the Navajo Nation in this region of Grand Canyon. **Congress encouraged concurrence, cooperation and joint involvement** in protection and interpretation of the eastern side of the Grand Canyon. This included the Colorado River in the entire Marble Canyon and adjacent plateaus with the approaches to the Grand Canyon with its unique setting of both geographic and human context. Specifically, such **a joint recognition would specify a joint set of criteria** for what will be allowed and appropriate in order to develop and operate facilities and programs to protect and interpret this area of the Grand Canyon.

It is clearly in the best interest of both the United States and the Navajo Nation to develop modest infrastructure in this east side area. The interest of the Navajo Nation is not only in the protection and interpretation of this region, but in the welfare of its people and the existing residents of this area. In this case, the Navajo Nation would become a joint interest partner of the United States. The United States would provide appropriate funding and the Navajo Nation would provide locally approved and administered actions. These actions would include employment along with infrastructure development and improvement that provides for the protection and interpretation of this region of the Grand Canyon.

The Secretary is the mandated participant on the part of the United States, to take action to bring about cooperation with the Navajo Nation. Therefore it is the Secretaries duty, as directed by Congress, to immediately express this interest to the Navajo Nation and to begin negotiations with the Navajo Nation to provide for the implementation of the 1975 Act.

- 4) The 1934 Navajo Nation Boundary Act dealing with the Navajo Nation boundary states, in part:

“There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat.L 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the authority of the United States”

We emphasize these words: *“until (the designated lands) shall be required for ... uses under the authority of the United States”*.

That is, under the 1934 Act, if the United States **requires** lands once designated for water-power and power-site purposes for the use of protecting the Grand Canyon from inappropriate development, then the United States may use the Antiquities Act to declare

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the designated lands as a National Monument with no development allowed. This action is authorized by the 1934 Boundaries Act and the 1975 Enlargement Act, because the designated lands are urgently **required** to protect the Canyon's integrity, Grand Canyon National Park's protection and interpretive purposes, and the sacred and traditional uses exercised since time immemorial by the Navajo and other First Nations.

- 5) As you know, this legislation requires the Navajo Nation to invest \$65,000,000 to build a road and telecommunications, water, and power lines. The benefit to the Navajo Nation has not been proven for this \$65 million infrastructure. The funding is solely for the benefit of the Phoenix, Arizona, based developer. The \$65 million expenditure allows the developers to avoid having to raise and/or borrow those funds themselves. That is not for the welfare of the Navajo Nation, and any benefit to the residents of Western Navajo would be vague, ambiguous, secondary, even tertiary. Use of the \$65 million for the development would actually hurt, not benefit, the welfare of the Navajo Nation. A study under the auspices of the Navajo Nation must be conducted to determine how \$65 million of Navajo Nation funding can be best used for the benefit of Western Navajo residents. Judgment can only be made by comparing benefits and costs of this development scheme against other uses for \$65 million. The study could be done jointly with the Secretary of Interior, who could bear the costs under section 6 of the 1975 Act. The same could be done for the Environmental Impact Study that certainly would be required.
- 6) The exchange between Mr. Howe and Mr. Damon raises the issue of identifying grazing permit holders that use the area Mr. Whitmer wants for his own Grand Canyon and Navajo Nation-destroying playground. In forty years of hiking in the area Mr. Whitmer wants to destroy, in twenty or so visits I have consistently seen livestock including sheep and horses, along with actively working homes and camps. Oftentimes I would be approached by one of the Martins, just checking that everything was OK. This is in refutation to the statement that "*it was determined that there are not any grazing permit holders using the 420 acre site.*" There are indeed families out there using that land. The Wilsons and Martins have run livestock and held ceremonies for generations on the very ground Mr. Whitmer wants. The traditional families have formed a group to oppose Mr. Whitmer and they need your help to stop his shortsighted plans.
- 7) The legislation, as proposed, gives Mr. Whitmer some stunning control of this project. Whitmer and his team, not the Navajo Nation, design and plan the project entrance at the junction with Highway 89, and the build-out at the rim (Section 2 SCOPE OF SERVICES 2.2.8.2). The Navajo Nation would have no recourse if Whitmer's team made the entrance or rim construction demeaning to the Navajo Nation. Whitmer also controls Change Orders (2.2.12.5). If the Navajo Nation saw the need for a change in design, Whitmer would not have to change it.

Article 3, ENGAGEMENT OF CP, is another part of this legislation where Whitmer can do whatever he wants, and the Navajo Nation can do nothing about it. The language 3.4. states "*The Nation and the Enterprise acknowledge and agree that during the term of this Agreement, neither the Nation nor the Enterprise shall give orders or instructions to employees of CP, including without limitation, the general manager or any other manager or*

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involve themselves in any way with the day-to-day operations of CP, and warrant to CP uninterrupted, exclusive control of the development and operations of the Project, subject to the rights of the Nation and the Enterprise as provided by this Agreement.”

It should be clear to all members of the Navajo Nation Tribal Council that this extreme language is not in the interest of the Navajo Nation.

ARTICLE 7 DEVELOPMENT RESPONSIBILITIES OF THE PARTIES 7.5.3

Mechanic's Liens, protects Mr. Whitmer from any lien on the land involved in any non-payment dispute. The ability to impose a lien on the land is what contractors use to assure payment. This language is not in the interest of any contractors who may get involved in this project.

ARTICLE 8 OPERATION OF THE PROJECT 8.4.3 Personnel are CP's Employees

states “All personnel employed, whether on a permanent or temporary basis, to render services in connection with the Project (including the general manager and supervisors) shall be employees of CP, and shall not be employees of the Enterprise or of the Nation. Neither the Enterprise nor the Nation shall supervise or direct (or attempt to supervise or direct) the general manager or any of the Project's employees. However, the Nation and the Enterprise shall have the right to communicate with CP regarding the operation of the Project.” This language strips the Navajo Nation of ensuring Navajo tribal members get the benefit of employment in this project. This language makes it difficult to argue this legislation brings jobs and economic development to Western Navajo.

- 8) In visiting the area where this project is proposed, one quickly realizes this is an exposed and very windy area. Mr. Whitmer has provided no year-round data on the winds that impact this area. Tramways and high winds don't mix, and during times of high winds tramway operations must be suspended. There are no projections in Mr. Whitmer's plans for how many days of the year the tramway will be closed due to high winds.
- 9) Another glaring oversight in Mr. Whitmer's plan is tramway rescue. Most tramways are constructed such that should the tramway become non-operational, passengers can be lowered to the ground and walk down to the lower terminal. In this case, this is not an option. Helicopter rescue will be impossible if the tramway breakdown occurs on a windy day. Temperatures inside stalled tramway cars can quickly reach deadly levels in the summertime. The fact that this legislative packet is missing any discussion of tramway rescue, safety and wind shutdown begs the question as to how well Mr. Whitmer, an individual with no track record undertaking a project of this magnitude, has thought this tramway concept through.
- 10) While Mr. Whitmer has agreed to be responsible for crowd control and policing on the tramway site, the Navajo Nation will be responsible to provide actual Law Enforcement. In the GRAND CANYON ESCALADE OPERATING AGREEMENT Section 3 OPERATION OF THE PROJECT (i)(1) we note that “CP employed security personnel have only the authority of private citizens in their interaction with customers and employees.”

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The gateway community of Tusayan at the South Rim of Grand Canyon National Park has been able to rely on Federal Law Enforcement Officers working for Grand Canyon National Park to cover the bar fights, thefts, fires, plane crashes and serious automobile accidents that occur just outside the Park. These services would not be available to the proposed project, where actual law enforcement personnel may be hours away. Nothing in this legislation defines just how much the Navajo Nation will have to pay for real law enforcement in this area.

- 11) This entire proposal is based on the need to provide the Navajo Nation, in particular Western Navajo, with economic security. Mr. Whitmer has written this legislation so that the only secure guarantee is that the majority of funds generated will go to him. For seventy-five years, Whitmer and his company will receive between 88% and 92% of all the gross revenue generated. While he goes to the bank, local craftspeople will be excluded from selling arts and crafts on the Navajo Nation provided and paid-for road to his project. This is not a good deal for the residents or the economy of Western Navajo.
- 12) Finally and most importantly, the heated exchange between the offices of Mr. Howe and Mr. Damon at the highest levels of Navajo Nation government should send a chill through all the Council delegates. Given the contention this destructive proposal has caused, not only within the Tribal Government but to families all across the Navajo Nation out to the Bodaway/Gap Chapter, it is evident the clear path out of this trap set by Phoenix developers is to vote no on this legislation.

The Tribal Council has before them the opportunity to heal the wounds of this ill-conceived legislation by recognizing the earlier good work of prior Navajo Nation Tribal Councils. Navajo Nation elders have already worked to preserve the Marble Escarpment by proclaiming a Marble Canyon Tribal Park. Their work to preserve this part of the Grand Canyon stands as a testament today to the high regard the Navajo Nation has for the Grand Canyon. There clearly are other options for economic development in Western Navajo, as well as protecting the sacred landscape of the Grand Canyon. River Runners For Wilderness encourages you to embrace these exciting economic opportunities for Western Navajo. These opportunities include the use of the 1975 Grand Canyon Enlargement Act to care for the entire Grand Canyon and protect it from Mr. Whitmer's grotesque development while at the same time allowing for real and sustainable economic development for this important region of the great Navajo Nation.

Sincerely Yours,



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