

No. 08-15112

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RIVER RUNNERS FOR WILDERNESS, et al,

Plaintiffs-Appellants,

v.

JOSEPH F. ALSTON, et al,

Defendants-Appellees,

GRAND CANYON RIVER OUTFITTERS ASSOCIATION, et al,

Defendants-Intervenors-Appellees.

**BRIEF OF AMICI CURIAE SIERRA CLUB et al.
IN SUPPORT OF PLAINTIFF-APPELLANTS RIVER RUNNERS FOR
WILDERNESS, et al. SUPPORTING REVERSAL**

Appeal from The United States District Court
For Arizona, Phoenix

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Corporate Disclosure Statement.

No amicus is a corporation that has any parent corporation or issues stock.

Rule 29 Compliance.

River Runners for Wilderness, the Park Service, Grand Canyon Private Boaters Association, and Grand Canyon River Outfitters Association consent to the filing of this amicus brief.

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I.

IDENTITY AND INTERESTS OF AMICI CURIAE

The Sierra Club was founded on May 28, 1892, in San Francisco, California, by John Muir, who became its first president. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club has been working to protect the wilderness character of the Colorado River in Grand Canyon National Park for over thirty years.

The Grand Canyon Hikers and Backpackers Association formed in 2000 and is a private, non-profit organization with members throughout the United States. Its mission is to promote, encourage and advocate the interests of the hiking and backpacking community in the regions of Grand Canyon. The Grand Canyon Hikers and Backpackers Association interest in this amicus is to support wilderness protection for Grand Canyon National Park including the Colorado River, and to support equitable wilderness access for all wilderness compatible recreational activities in Grand Canyon, including river running.

Californians for Western Wilderness is an unincorporated citizens group founded to protect remaining wilderness in the West. Californians for Western

Wilderness is interested in this amicus to both preserve wilderness character in Grand Canyon National Park, and support impartial wilderness compatible recreational access for the river and backcountry areas of the park.

The Center for Biological Diversity is a not for profit membership organization supported by over 80,000 members and e-activists. The Center combines conservation biology with litigation, policy advocacy, and an innovative strategic vision to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension for the spiritual welfare of generations to come. The Center for Biological Diversity supports wilderness protection for the Colorado River in Grand Canyon and equitable public access to that wilderness.

Friends of the Earth is an international network of environmental organizations in 70 countries that works on issues around the world related to disarmament, human rights, environmental justice and protection. Friends of the Earth supports protecting wild rivers and wilderness areas, and environmentally just access to these precious resources.

Friends of Yosemite Valley was formed in 1997 to promote respect for and appreciation of Yosemite's natural and wild values, including specifically the Merced River. Friends of Yosemite Valley support preserving wild characteristics of the Colorado River in Grand Canyon.

Great Old Broads for Wilderness was founded in 1989 to celebrate the 25th anniversary of the Wilderness Act. It is a grassroots organization dedicated to wilderness growth and protection. Great Old Broads supports wilderness protection for the Colorado River in Grand Canyon National Park.

Mariposans for the Environment and Responsible Government is a nonprofit group formed in 1989 to inform the public and agencies about environmental issues so that the best choices can be made for a sustainable high quality of life for present and future Mariposans. Mariposans for the Environment and Responsible Government supports preserving the wild characteristics of the Colorado River in Grand Canyon.

Roderick Nash is a professor of history and environmental studies at the University of California at Santa Barbara. Nash supports River Runners' efforts to protect and restore the wilderness character of the Colorado River in Grand Canyon, including equitable wilderness access to the river in the canyon.

The North West Rafters Association was founded in 1983 and is a private, non-profit organization of up to 640 self-outfitted river runners, primarily living and running rivers in Oregon and southwest Washington. Its river runners frequent portions of many wilderness rivers, and encourage preservation and conservation management for all wilderness rivers, including the Colorado River in Grand Canyon.

Olympic Park Associates was founded in 1948 to preserve Olympic National Park's wilderness beauty and splendor "for the benefit and enjoyment of the people" of present and future generations. Olympic Park Associates supports River Runners' efforts to protect and restore the wilderness character of the Colorado River in Grand Canyon.

The Western Lands Project was founded in 1997 to monitor exchanges of land between the federal government and private parties—an issue affecting the entire West. Western Lands Exchange supports River Runners attempt to safeguard wilderness from mechanized commercialization and supports equitable public access to the Colorado River in Grand Canyon.

The Southern Utah Wilderness Alliance is a private non-profit organization founded in 1983. Its mission is to preserve the outstanding wilderness at the heart of the Colorado Plateau, and the management of these lands in their natural state for the benefit of all Americans.

II.

SUMMARY OF ARGUMENT

The National Park Service ("NPS") has specifically and repeatedly found that motorized uses along the Colorado River in the Grand Canyon harm the river's natural resources and wilderness character, and diminish the nature of this extraordinary place for the relatively few people fortunate to experience it. The

issue is whether given those findings, NPS adopted a river management plan (“CRMP”) that faithfully implements federal laws related to permissible commercial motorized uses of the river and the canyon. NPS did not, because it failed to find that motorized uses of the river and the canyon are either necessary or appropriate under the National Parks Concessions Management Improvement Act of 1998 (“Concessions Act”); it authorized amounts of motorized uses that are neither necessary nor appropriate under the Concessions Act; it failed to implement binding policies that require that the river be managed as potential wilderness; it violated the Organic Act of 1916 by authorizing motorized uses along the river and in the canyon that ruin one of their primary attributes, the natural soundscape; and it unfairly allocated use of this limited resource.

III.

ARGUMENT

A. NPS’s Allowance of Motorized Services Violates the Concessions Act.

1. NPS Failed to Make Findings Required by the Concessions Act.

In the Concessions Act, Congress cautioned NPS that it could allow “accommodations, facilities, and services” in national parks “only under carefully controlled safeguards against unregulated and indiscriminate use.” 16 U.S.C. § 5951(a). One such safeguard is that NPS must find that any commercial use is

both “necessary and appropriate” for public use and enjoyment of the park. 16 U.S.C. § 5951(b). The structure of the Concessions Act requires NPS to make an explicit finding as to necessity and propriety as a prerequisite to authorizing any such use. See High Sierra Hikers Assn. v. Blackwell, 390 F.3d 630, 647-648 (9th Cir. 2004) (interpreting analogous provision of the Wilderness Act); ER 45 (NPS admission that the Concessions Act provision is analogous to the Wilderness Act commercial services provision at issue in Blackwell). This is true regardless of whether NPS must also protect the wilderness character of the river.

NPS never explicitly found that motorized commercial services are either necessary or appropriate for public use and enjoyment of the river or canyon. Rather, the EIS that accompanies the CRMP generally states that people unable to successfully navigate the river need “experienced and professional river guides” to assist them. ER 303. While that is true, it does not establish that motorized services specifically are necessary or appropriate for anyone. Indeed, in the district court, NPS conceded that any demand for a motorized service “does not mean that it is ‘necessary and appropriate.’” ER 458, doc. #81, at 14:11-12.

Instead, NPS sought to justify authorizing motorized services by arguing for the first time in this litigation that they are necessary because they enable people to move down the river more quickly than non-motorized boats. Id. at 15:9-11. But even in this respect NPS contradicts itself, because elsewhere it admitted that

quicker trips are in fact unnecessary, because they are merely a “convenience which enables the trip to be made in less time” for certain people. ER 218. It also makes no difference, as the Outfitters Association argued in the district court, that quicker motorized trips may be a good thing because they move more people through the canyon with fewer impacts. ER 458, doc. #79, at 11:14-17. That does not prove any necessity of motorized services and, more important, authorizing motorized services to move more people down the river sacrifices the unique qualities of the river and canyon.

Amici curiae anticipate that this Court may be concerned about safety related to different modes of running the river. But NPS never found that motorized services are necessary or proper for public safety, or a similar purpose. Indeed, the record demonstrates that non-motorized trips have a lower risk of fatality than motorized trips, and are as safe or safer than them. ER 292; ER 49.

2. NPS Failed to Justify the Amount of Motorized Uses.

Even if NPS made the requisite findings that motorized commercial services are both necessary and appropriate in the canyon, it failed to justify the amount authorized in the CRMP. The Concessions Act is explicit that commercial services “shall be limited to those . . . that are [] necessary and appropriate.” 16 U.S.C. § 5951(b). NPS acknowledged that the Concessions Act requires that it determine the necessity and propriety of its “current concession allocation level.” ER 240.

In the CRMP, NPS authorizes 115,500 user days for commercial clients. ER 316. Among commercial uses, motorized commercial trips make up roughly 72 percent of commercial launches, 75 percent of commercial passengers, and 67 percent of commercial user days. ER 56. But NPS has never made any explicit finding that its current allocation of motorized services among these commercial services is necessary or appropriate. Instead, NPS simply authorized amounts of motorized services sought by concessionaires.

B. NPS’s Authorization of Motorized Uses Violates the Organic Act.

The national park system traces its beginnings to 1872, when Congress designated Yellowstone as the first national park. By the time Congress enacted the Organic Act in 1916, fourteen national parks had already been formed. Currently, there are approximately 60 national parks. The Organic Act states that the purpose of national parks is to “promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of future generations.” 16 U.S.C. § 1.

The language of the Organic Act and its legislative history indicate that preservation is the primary goal, and public use and enjoyment are secondary to that goal. The Act leads with the conservation of scenery, nature, and wildlife, and

further requires preservation for future enjoyment. A primary sponsor of the legislation, Congressman Kent, asserted that national parks should be preserved in “a state of nature.” See Robin W. Winks, The National Park Service Act of 1916: “A Contradictory Mandate”?, *Denv. U. L. Rev.* 575 (1997). The author of the preamble, Robert Olmsted, identified rigorous standards for any allowance of development in national parks. See id. at 599-601. This reading of the Act is supported by the historical events that, in part, prompted enactment of the Organic Act: the overdevelopment of Niagara Falls, and the proposed threat relating to the Hetch Hetchy valley. See Stupak-Thrall v. United States, 89 F.3d 1269, 1283 (6th Cir. 1996) (noting history).

Historically, NPS acknowledged the primacy of preservation over use as the accurate interpretation of Congress’s mandate. In its National Park Service Management Policies 2001 (2001 Policies), NPS stated:

[The National Parks] warrant the highest standard of protection.

[The Organic Act] begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment, and so applies all the time, with respect to all park resources and values, even when there is risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest degree practicable, adverse impacts on park resources and values.

[W]hen there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.

2001 Policies at 10 & 12. These policies are reflected in NPS's repeated efforts to phase out motorized uses. As detailed by the Appellants in their opening brief, the Park Service has found several times that continued motorized use of the River is inconsistent with the mandates of the Organic Act. Given that finding, elimination of motorized use is the only reasonable and non-arbitrary decision, in light of the mandate of the Organic Act and the Park Service's own binding management policies that "the Service will allow only uses that ... can be sustained without causing unacceptable impacts to park resources or values. Recreational activities and other uses that would impair a park's resources, values, or purposes cannot be allowed." 2001 Policies at 80. They further state that "negative or adverse environmental impacts are never welcome in national parks, even when they fall far short of causing impairment." Id.

Further, the district court is incorrect that NPS's policies do not supply the necessary law or guidance to determine whether its actions are lawful. NPS itself, outside of the context of this litigation, states publicly:

Commercial Visitor Services in parks are subject to National Park Service Management Policies. Policies are an indispensable tool to help NPS employees manage parks responsibly and make rational, well-informed decisions. Concerned citizens may also refer to these policies to better understand how the Service will meet its park management responsibilities under the 1916 NPS Organic Act. Chapter 10 of the Management Policies provides management guidance specific to Commercial Visitor Services. The preamble to the Commercial Visitor Services Management Policy stated

below is directly aligned with the National Park Service Mission and the intent of Public Law 105-391. . . .

<http://www.concessions.nps.gov/policy3.cfm> (last visited May 20, 2008). NPS

also links its policies to the Organic Act:

Fortunately, the Organic Act also authorizes the NPS to ‘regulate the use’ of national parks, which means we may develop more detailed policies to implement the overarching policies set by Congress. We have articulated those detailed policies in NPS *Management Policies*, which govern the way NPS managers are to make decisions on a wide range of issues that come before them.

<http://www.nps.gov/policy/DOrders/thingstoknow.html> (*italics original*) (last visited May 20, 2008). Given NPS’s public representation of the meaning of its policies, this Court should determine whether NPS’s actions are lawful in the light of the policies.

Here, River Runners has amply established that motorized uses in the canyon, particularly in the significant amounts authorized by the CRMP, violate the policies.

In contrast, NPS has never established grounds for the significant change in its approach to motorized commercial uses on the river and in the canyon. As a result, its decision is unlawful under the APA. Fund for Animals, 294 F.Supp.2d at 104 (requiring a reasoned analysis beyond that required in the first instance where agency reverses an earlier decision); Bush-Quayle ’92 Primary Committee v. Federal Election Comm’n, 104 F.3d 448, 453 (D.C. Cir. 1997) (otherwise

permissible agency interpretation is prohibited where the agency has failed to explain its departure from prior precedent).

C. NPS's Allocation of Use is Arbitrary and Capricious.

In addition to its primary call to preserve scenery, nature and wildlife, the Organic Act embraced a secondary purpose of providing “for the enjoyment of future generations.” 16 U.S.C. § 1. NPS states that it “will provide, through the use of concession contracts, commercial visitor services within parks that are necessary and appropriate for visitor use and enjoyment.” 2001 Policies at 117.

However, in this case, the amount of overall commercial use NPS authorized is not necessary or appropriate for visitor use and enjoyment, and in fact, due to competing demands by those who want to experience the river without paying a commercial vendor, some public users have waited as long as 20 years without an opportunity to experience the river. As River Runners establish in their opening brief, concessionaires fail to use all of their commercial allocation, while noncommercial users now have to submit to a yearly lottery for a chance to float the river, where their odds of drawing a permit are less than 1 in 200 for the most popular summer launch dates.¹ See www.nps.gov/grca/planyourvisit/upload/2009_Main_Lottery_2-27-08.pdf (last visited May 23, 2008). As a result, the use

¹ Notably, there has been a yearly spike in permit applications for the launch dates immediately following the motorized season cutoff date, worsening odds to as low as 1 in 471 for fall 2009. Id. This spike reflects the public desire and demand to float the river during warmer weather and without the disruption of motors.

allocation NPS selected is arbitrary and capricious, because it completely fails to allocate access in a manner that “is necessary and appropriate for the public use and enjoyment of the park” and “will enhance visitor use and enjoyment of the Park.” 16 U.S.C. § 5951(b); 2001 Policies at 118. Given the competing demands on the river and the Concessions Act mandate that concession uses be “consistent to the highest practicable degree with the preservation and conservation of the resources and values of [the Park],” NPS’s failure to analyze and identify the amount of commercial services allowed to meet the requirements of the Organic Act, the Concessions Act, and its own binding policies was arbitrary and capricious. 16 U.S.C. § 5951(b)(2).

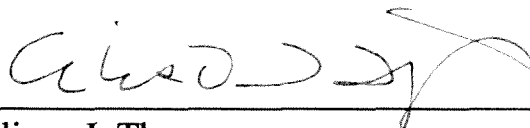
IV.

CONCLUSION

Amici Curiae respectfully request this Court rule that NPS violated the Concessions Act and the Organic Act, and remand this matter to the district court to consider appropriate injunctive relief.

Dated: May 23, 2008.

Respectfully submitted,



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Certificate of Compliance Pursuant to Circuit Rule 32-1.

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,881 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2000 in 14-point font size and Times New Roman type style.



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Certificate of Service

I hereby certify that on May 23, 2008, I caused two copies of this brief to be served upon the parties to this appeal by first-class mail, postage prepaid, addressed to:

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