

No. 08-15112

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

**RIVER RUNNERS FOR WILDERNESS, et al.,
Plaintiffs-Appellants,**

v.

**STEPHEN MARTIN, et al.,
Defendants-Appellees,**

and

**GRAND CANYON RIVER OUTFITTERS ASSOCIATION and
GRAND CANYON PRIVATE BOATERS ASSOCIATION,
Intervenors-Defendants-Appellees,**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. CV-06-894-PCT-DGC**

**BRIEF OF AMICI CURIAE GRAND CANYON RIVER RUNNERS
ASSOCIATION, GRAND CANYON RIVER GUIDES, CHICAGO
WHITEWATER ASSOCIATION, AND ELIZABETH BRUBAKER IN
SUPPORT OF DEFENDANTS-APPELLEES STEPHEN MARTIN, et al.
SUPPORTING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that Grand Canyon River Runners Association, Grand Canyon River Guides, and Chicago Whitewater Association are non-profit corporations exempt from taxation pursuant to the Internal Revenue Code. Elizabeth Brubaker is an individual person. None of the *amici curiae* have any parent corporations, and there is no publicly held corporation that owns 10 percent or more of the stock in any of the *amici curiae*.

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RULE 29 COMPLIANCE

Plaintiffs-Appellants River Runners For Wilderness, *et al.*, Defendants Appellees Stephen Martin, *et al.*, and Intervenors-Defendants-Appellees Grand Canyon River Outfitters Association and Grand Canyon Private Boaters Association consent to the filing of this *amicus* brief. Accordingly, under Rule 29 of the Federal Rules of Appellate Procedure, no leave of the court is required to file this brief.

IDENTITY AND INTERESTS OF AMICI CURIAE

Three organizations and one individual respectfully submit this brief to the Court to assist the Court in its review of the decision below, and to urge this Court to affirm that decision.

The **Grand Canyon River Runners Association** (“GCRRA”) is a non-profit organization with members throughout the United States, whose principal focus is on preserving access to the Colorado River in Grand Canyon National Park for members of the public who rely on the National Park Service’s professional river concessioners to facilitate their enjoyment of the Grand Canyon. GCRRA was founded in 2004 to represent the largest group of users of the Grand Canyon’s Colorado River corridor, *i.e.*, the members of the public who utilize the Park’s NPS-authorized outfitter and guide concessioners for Grand Canyon river trips (currently over 18,000 people annually). GCRRA represents people of all ages and physical capabilities, American and foreign, who, whether because they lack the skills or for any other reason, choose to access the Park’s river corridor via the variety of guided services, including motorized trips, currently available through the NPS’s licensed concessioners. GCRRA was established to reflect concerns in the river running community that reducing professional river services historically available in the Grand Canyon could limit the public’s ability to experience the Canyon in a safe and responsible manner. Among other things,

GCRRA works to: keep the public informed about river access issues; preserve and protect the public's opportunities to access the river and to choose an environmentally responsible motorized or non-motorized river trip; preserve the current diversity of trip options, including trip length and group size; provide a community forum for river runners; and promote the highest ideals of resource stewardship and conservation for the Colorado River corridor within the Grand Canyon.

Grand Canyon River Guides (“GCRG”) is a grassroots 501(c)(3) non-profit organization founded in 1988 to provide over 1,600 river guides and river runners with a collective voice regarding the protection of natural resources in Grand Canyon National Park. As river stewards, it is our mission to protect the Grand Canyon, provide the best possible river experience, set the highest standards for the guiding profession, and celebrate the unique spirit of the river community. GCRG supports a diversity of visitor experiences in Grand Canyon, including the historic use of motorized craft, because we understand the necessity of maximizing the number of river visitors who can enjoy the river experience while minimizing their impact on the resource. Managing for a wilderness-type experience is a critical tenet of river guide ethics and one we believe can be applied successfully through stewardship, monitoring, mitigation measures, and the adaptive management framework of the CRMP.

The **Chicago Whitewater Association** (“CWA”) is a non-profit organization founded in 1972 as a resource for whitewater boaters in the Chicago area. CWA’s purposes include providing educational, informational, and training services to increase the safety, enjoyment and skills of those paddling on whitewater rivers, and advocating for existing and new whitewater paddling opportunities. Our members have paddled rivers throughout the United States as well as internationally, and those who have paddled the Grand Canyon speak only in superlatives. CWA supports the outcome of the public process that resulted in the current CRMP.

Elizabeth Brubaker, of Elburn, Illinois, is a 68-year old individual who traveled as a commercial passenger on a motorized 8-day raft trip through the Grand Canyon in May 2008. Due to her age and health limitations relating to arthritis, she is unable to hike 9.8 miles on the Bright Angel Trail into, or out of, Phantom Ranch, as would be required to participate in a shortened segment of a longer rowing trip. Likewise, she is unable to withstand the rigors of a lengthy rowing trip in smaller, more physically constraining rafts, which do not offer a variety of seating and movement options throughout the day. Further, her inability to withstand prolonged desert camping and living conditions characteristic of Grand Canyon river trips makes it impossible for her to participate in non-motorized river trips that are necessarily much longer than a motorized raft trip.

Consequently, if a motorized option had not been available for her, she would not have been able to see the river corridor of the Grand Canyon as she did.

ARGUMENT

Amici curiae urge this Court to affirm the decision of the District Court, which rejected Appellants' challenge to NPS's planning decision on the management of the Colorado River corridor in Grand Canyon National Park. The NPS's decision is predicated upon an extensive administrative record, reflecting a planning effort that the NPS initiated more than ten years ago. As the extensive record in this case demonstrates, the NPS's Record of Decision ("ROD") and Final Environmental Impact Statement ("FEIS") for the 2006 Colorado River Management Plan ("CRMP") are reasonable and consistent with the Concessions Management Improvement Act ("CMIA"), 16 U.S.C. §§ 5901, *et seq.*, the NPS Organic Act ("Organic Act"), 16 U.S.C. §§ 1, *et seq.*, and the NPS's 2001 Management Policies.

The Administrative Procedure Act ("APA") governs this Court's scope of review, *see, e.g., City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004), and the Court may reverse NPS's actions (and thus the District Court's decision) only if the Court concludes that the NPS's planning decision was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 471 (9th Cir. 2000). Although the Court's inquiry must be "searching and careful," *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989), it

“must uphold agency decisions so long as the agencies have ‘considered the relevant factors and articulated a rational connection between the factors found and the choice made.’” *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9th Cir. 2003) (quoting *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990)); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Organic Act and the CMIA vests the NPS with latitude in how it chooses to manage the National Parks. This discretion includes determining, for each National Park, what public uses should be permitted, what concessions services should be authorized to facilitate the public’s use and enjoyment of the National Parks, what if any limitations on public use are appropriate, how public use should be allocated when and where limitations are imposed, and what in the Park Service’s professional judgment constitute an impairment of Park resources.

Historically, how the Park Service has exercised its discretion in the management of the Colorado River through the Grand Canyon has been the subject of considerable debate and disagreement. In the words of three eminent public land scholars, “Grand Canyon river trips are in some ways a microcosm of the challenge of managing recreation throughout the national park system.” GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY, *FEDERAL PUBLIC LAND & RESOURCES LAW* 958 (5th Ed. 2002).

Well before Congress passed the CMIA, the original 1916 NPS Organic Act charged the Park Service with carrying out a dual mandate to “conserve the scenery and the natural and historic objects and the wild life” in the parks and “provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. In the seminal 1980 work on the management of the national parks, Professor Joseph Sax addressed how the Park Service’s management decisions ultimately must balance different interests, often ideological and ethical more than physical or scientific;¹ and he explained how promoting the use of the national parks and preserving the resources so as to leave them unimpaired for future generations offered the NPS unique and evolving challenges, and how the NPS could ignore neither the ideals of the preservationist nor the needs of the tourists. “[P]arks,” he

¹ JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980) (reprinted at http://www.nps.gov/history/history/online_books/sax/index.htm). Back in 1980, Professor Sax observed that “[o]ne such recent controversy has arisen over the use of motors on concessioner-run boat trips down the Colorado River in Grand Canyon. In fact, motorized boats don’t measurably affect the Canyon ecosystem, nor do they significantly intrude upon those who want to go down the river in oar-powered boats. Reduced to essentials, the preservationist claim is simply that motors don’t belong in this remote and wild place” *Id.* at 12-13; *see also id.* at 51 (explaining that “the presence of motorboats in the Grand Canyon is not really an ecological issue”).

wrote, are “not self-justifying” and “[t]olerance is required on all sides, along with a certain modesty.”²

Through an extensive EIS process spanning two different administrations, the new management plan carefully addresses these significant challenges while protecting the Park’s resources and affording both the present and future public an opportunity to use and enjoy those resources. The extensive planning process and administrative record underlying the ROD and FEIS amply demonstrates that the NPS considered the relevant factors in developing and issuing the 2006 CRMP. Indeed, the administrative record shows that the CRMP is the result of an open, transparent planning effort that provided substantial opportunities for interested individuals and groups, including Appellants, to provide comments and recommendations concerning the management of the Colorado River corridor. As the administrative record confirms, the NPS meaningfully considered these comments and recommendations. There simply is no basis for any finding that NPS failed to consider any relevant factor in developing and issuing the 2006 CRMP.

The administrative record (and, in particular, the FEIS, ROD, and CRMP) also demonstrates that NPS reached a final decision that is fully justified and supported, and reasonable in light of the information that it received and developed

² JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS, at 108-109.

during the long planning process. That Appellants disagree with elements of that decision is clear. But this disagreement is not sufficient to warrant a decision by this Court to overturn the considered decision of NPS.

The major issues that the NPS confronted and addressed in this quite historic planning effort—most notably, the continued authorization of motorized watercraft and the allocation of limited use among public user groups—are issues that have paralyzed the agency’s efforts to manage Grand Canyon National Park effectively for decades. Although few will assert that the result of this plan is perfect, *amici curiae* maintain that the new CRMP reasonably and lawfully accommodates the varied, often-conflicting interests that NPS must consider in developing complex management plans like the CRMP.

Many of the historically adversarial stakeholders who have been concerned with the management of the river corridor in Grand Canyon National Park, including *amici curiae*, have accepted the NPS’s path-breaking decision and have proceeded to work cooperatively in the implementation of the plan. Most stakeholders, including *amici curiae*, recognize that, through adaptive management, part of NPS’s monitoring and implementation plan for the CRMP, NPS maintains the ability to review and revise its management of the river corridor as needed to protect Park resources during the operation of the 2006 CRMP. ER 421.

Most stakeholders, including *amici curiae*, also recognize that NPS may review the plan periodically and, if necessary, amend specific sections of the plan during the life of the plan, and that all stakeholders will have a full opportunity to again urge NPS to take their interests into consideration when it revises the plan again. *Id.* And, in fact, most stakeholders accept that, while perhaps not ideal for any particular stakeholder group, the CRMP is working well, and they recognize that their interests are better served by working constructively with NPS than by fighting it at every turn.

NPS has been implementing the CRMP and managing the river corridor on the basis of that plan—since the issuance of the ROD in February 2006—for more than two years. Any substantial change at this time to the CRMP along the lines that Appellants appear to seek through their lawsuit would be incredibly disruptive to Park management and those—including members of the public, concessioners, river guides, and others—who rely on an established river management plan. Like NPS, stakeholders have suffered from years of uncertainty regarding the critical river management issues in Grand Canyon National Park. There will be opportunities for the various interests, including Appellants, to advocate for further changes to the management of the Park’s river corridor through adaptive management and in the context of the next management planning process. An

endless planning process benefits no one. The CRMP should be given a chance to work.

CONCLUSION

Amici curiae respectfully request that this Court reject Appellants' claims that the NPS violated the APA, Organic Act, CMIA, and 2001 Management Policies, and affirm the decision of the District Court in this matter.

Dated:

Respectfully submitted,

Robert A. McConnell

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2008, I served copies of *Amici Curiae's*

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