

CASE NO. 07-15124  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DIRK KEMPTHORNE, *et al.*,

Defendants/Appellants,

v.

FRIENDS OF YOSEMITE VALLEY, *et al.*,

Plaintiffs/Appellees.

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**BRIEF OF AMICI CURIAE IN SUPPORT OF THE BRIEF ON  
APPEAL OF DIRK KEMPTHORNE, *ET AL.*, FOR REVERSAL OF  
THE DISTRICT COURT'S JUDGMENT AND INJUNCTION  
(Filed with the consent of all parties.)**

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On Appeal From the United States District Court for the  
Eastern District of California (DC NO. CV-00-06191-AWI)

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## **FRAP 26.1 CORPORATE DISCLOSURE STATEMENTS**

Intervenor The Yosemite Fund is the business name of the Yosemite Foundation, a non-profit corporation organized under the laws of the State of California. The Yosemite Foundation has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

Intervenor The Access Fund is a non-profit corporation organized under the laws of the State of Colorado. The Access Fund has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

Intervenor The American Alpine Club is a non-profit corporation organized under the laws of the State of Pennsylvania. The American Alpine Club has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

Intervenor California Trout is a non-profit corporation organized under the laws of the State of California. California Trout has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

Intervenor Friends of the River is a non-profit corporation organized under the laws of the State of California. Friends of the River has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

Intervenor National Parks Conservation Association is a non-profit corporation organized under the laws of the District of Columbia. The National Parks Conservation Association has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

Intervenor The Wilderness Society is a non-profit corporation organized under the laws of the District of Columbia. The Wilderness Society has no parent corporation, operates under Internal Revenue Code § 501(c)(3) and, as such, has no stock, and no publicly held company can or does own 10% or more of its stock.

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## INTEREST OF THE AMICI CURIAE

The amici curiae on this brief (“Amici”) represent a diverse group of Yosemite National Park supporters, recreational enthusiasts, and environmentalists, all of whom are based or have deep roots in California, all of whom participated actively in the National Park Service’s development of the Merced Wild and Scenic River Comprehensive Management Plan (“CMP”), and all of whom agree with one conclusion: the CMP was the best result for varied interests that seek to protect, preserve, restore, and enjoy Yosemite and the Merced River corridor. The Amici believe that the District Court, though well intentioned, got it wrong, that this Court should correct this wrong, and that the failure to correct the wrong will have implications far beyond Yosemite.

As shown below, the Amici are intimately familiar with the issues in the underlying litigation and in this appeal, and who take issue with claims made by the plaintiffs below and the appellees herein, Friends of Yosemite Valley and Mariposans for the Environment and Responsible Government (“Plaintiffs”). The Amici’s members are respectful users of Yosemite, such as rock and mountain climbers, backpackers, day hikers, campers, anglers, and river conservationists. They will be impacted negatively and personally by the setting of “numerical limits” – which, by their nature, can be nothing more than arbitrary limits, on access to the Merced River corridor. Neither the Plaintiffs nor NPS can represent to this Court the position of the Amici and their members.

The Amici file this brief pursuant to Rule 29(a), Federal Rules of Appellate Procedure, with the consent of all parties to the appeal. The Amici and their interests are as follows:

### **The Yosemite Fund**

Founded in 1985 and incorporated in 1988, the Yosemite Fund (“the Fund”) is an independent private non-profit foundation authorized by the National Park Service (“NPS”) to solicit contributions for projects and programs to protect, preserve and enhance Yosemite National Park. As the Park’s primary fundraising organization, the Fund provides grants to improve Yosemite’s natural, cultural, and historic resources and the visitor experience. Seventy-five thousand individuals and numerous corporations and foundations have enabled the Fund to grant over \$40 million to Park projects. The Fund provides funding in project areas that include trail repair and access, habitat restoration, visitor services and education, cultural and historic preservation, scientific research, and wildlife management. The Fund’s project milestones include the \$13.5 million restoration of the Lower Yosemite Falls area, the restoration of Glacier Point, provision of 2,000 lockable food boxes that curbed bear incidents by 85%, restoration of Stoneman, Cook’s, and Royal Arches meadows in Yosemite Valley, the complete restoration of the Visitor Center bookstore, lobby, exhibit hall, and theatre, including the production of the award-winning film, “Spirit of Yosemite,” and the launching of the Fund’s current \$13.5 million Campaign for Yosemite Trails.

## **The Access Fund**

Founded in 1989, the Access Fund is the only national advocacy organization whose mission is to keep climbing areas open and conserve the climbing environment. A 501(c)(3) non-profit organization supporting and representing over 1.6 million climbers nationwide in all forms of climbing, including rock climbing, ice climbing, mountaineering, and bouldering, the Access Fund is the largest US climbing organization with over 15,000 members and affiliates. Its largest membership is in California. Yosemite is a climbing resource of international importance, and the Access Fund has been an active participant in Yosemite's planning and management for the last two decades.

## **The American Alpine Club**

The American Alpine Club (“AAC”) is the leading national non-profit organization in the U.S. focused on issues facing rock climbers and mountaineers. As the only U.S. representative of UIAA – the International Mountaineering and Climbing Federation – the AAC also represents the interests of several million climbers globally. Founded in 1902, the AAC is dedicated to the knowledge, conservation, and community of mountains around the world, including the polar regions. Several of the world’s icons of conservation and creation of national parks have been AAC members, including John Muir, Theodore Roosevelt, and David Brower. For over a century the AAC has had strong interest in Yosemite, as it is one of the most important climbing locations in the world and continues to

play a key role in the history and evolution of the sport of rock climbing. In the late 1990s, the AAC transformed its litigation against NPS over the protection of Camp 4 in Yosemite Valley into a productive pathway for catalyzing a mutually-beneficial relationship between both organizations. Today Camp 4 is a National Historic Place and the AAC and NPS work together as collaborative partners not just in Yosemite, but throughout America.

### **California Trout**

The mission of California Trout is to protect and restore wild trout and steelhead waters throughout California. For over 35 years, California Trout has been the only organization solely dedicated to protecting California's wild trout and steelhead streams. California's wild trout and steelhead habitats are the most diverse of any state in the nation and contribute vital elements to the overall health of the state's environment and economy. Based in San Francisco, the organization supports a full-time staff of 14 including six conservation managers who work with communities across California to protect and restore the state's most important wild trout and steelhead regions. California Trout has a membership of more than 6,000 and participates in coalitions that represent more than 250,000 Californians.

### **Friends of the River**

As the oldest environmental organization specializing in California river resources protection, Friends of the River has a long history of involvement in the designation and management of wild and scenic rivers throughout California,

including the Merced River. Friends of the River was a leader in the efforts to include the Merced River in the National Wild and Scenic Rivers System in 1987 and 1992, and actively commented on the United States Forest Service's and Bureau of Land Management's 1989 classification and boundary determinations for the Merced River, as well as BLM's 1990 and 1991 comprehensive management plans for those sections of the Merced River below Yosemite National Park.

### **National Parks Conservation Association**

Since 1919, the non-profit National Parks Conservation Association ("NPCA") has been a leading voice of the American people in the fight to safeguard the scenic beauty, wildlife, and historical and cultural treasures of the largest and most diverse park system in the world. Originally created as a watchdog for the NPS, today NPCA continues to work on the ground and in Congress to protect park resources, educate the public, and foster better management in parks nationwide. NPCA has more than 330,000 members nationally, with over 45,000 in California.

### **The Wilderness Society**

Founded in 1935, The Wilderness Society ("TWS") is a national, non-profit environmental organization with 35,000 members in California, working to protect American's wilderness and to develop a nationwide network of wild lands through public education, scientific analysis and advocacy. TWS's goal is to ensure that

future generations will enjoy the clean air and water, wildlife, beauty and opportunities for recreation and renewal that pristine forests, rivers, deserts and mountains provide.

### **Jay Watson**

Jay Watson is a private citizen with an extensive history of involvement in planning and management issues at Yosemite National Park. Mr. Watson participated in the planning processes that produced the Yosemite Valley Plan, Merced River Comprehensive Management Plan, and Fire Management Plan. He was a highly visible participant in these planning processes and continues to involve himself in efforts to see these plans implemented. He has actively lobbied the United States Congress on Yosemite issues and has been extensively quoted in the media on Yosemite. Mr. Watson is a resident of the State of California and lives in the town of Sonoma.

### **ARGUMENT OF THE AMICI CURIAE**

A February newspaper editorial may best describe the plight that faces Yosemite in this litigation:

TOO POPULAR for its own good, Yosemite has long struggled with the notion of improving its facilities without inviting overboard commercialization or summertime hordes. For years, ponderous talk and skimpy budgets led nowhere, while meadows were worn down and tourist cabins sagged.

Finally in 1997, Mother Nature forced park rangers, environmentalists and locals to stop dithering and take action. A monster New Year's storm flooded the slender seven-mile valley, ripping out campgrounds, damaging buildings and chewing up roads. Emergency repairs patched the worst of it, but it was clear there was no avoiding major work.

A minor miracle took place beneath the silver waterfalls and thousand-foot granite faces. All sides got together and reached agreement on a sweeping update of the park's creaking facilities.

A budget of \$220.5 million was sent west from Washington, and the work began. While hundreds of employees were moved out of the park, new housing was built for the smaller number needing to stay. Dirt trails were replaced with paved walkways and boardwalks to preserve undergrowth. The first updates in decades were made in utilities and sewer pipes that had snaked everywhere.

But this steady, needed progress has largely stalled. Two local environmentalist groups, far smaller than the big organizations that blessed the rebuild plan, have tied up matters in court.

On one level the dispute is over protections for the Merced River, the glassy, placid watercourse that caused all the trouble when it jumped its banks in 1997. Last year, a federal judge in Fresno ordered clearly stated protections for the Merced, enshrined with special status as a wild and scenic river. It was a galling defeat for the park plan.

But buried in the lawyering is a second question. Should Yosemite come up with limits on the number of visitors in order to protect the river? The narrowness of the valley means that any extra protections for the Merced essentially govern what gets built between the steep rock walls.

The park doesn't have a cap on visitation, and the National Park Service says it doesn't need a quota to manage carefully. On the half-dozen summer days when valley parking lots fill up, rangers steer new arrivals elsewhere in Yosemite.

No other national park sets a limit on entries, and imposing one in Yosemite – one of the nation's first and most popular parks – would be a politically loaded matter. Local businesses could suffer, if visitors regard the park as subject to such closures. The image of national parks as friendly and accessible would dim.

Not only is a cap unpopular, it's not especially useful. "We don't think a cap tells you very much about the resource or the experience," said Lynn Scarlett, the deputy secretary of the Interior Department, which oversees the National Park Service. Limiting visitors at the park gates isn't an efficient way to safeguard the Merced's water quality, delicate river banks or tributaries. She favors "adaptive management," an approach that meters human impact based on closer study of cause and effect.

The park service is appealing the judge's ruling, which, if unchallenged, could mean up to 33 months of new studies.

Along with this delay comes a stop on all major improvements called for by the original post-flood planning. That will mean, for example, there won't be any upgrades to the park's notoriously bumpy, narrow roads, inefficient traffic patterns and to Yosemite Lodge, which is due to be reduced in size. Large RVs, which often run noisy generators at night, won't be sent to a new campground, but will still be mixed in with other car campers looking for a quieter experience. The up-and-down court fight has left the valley half-finished.

The opposition is adamant about what it sees wrong in a remodeled Yosemite. The changes mean more asphalt, buses and tourist facilities – a prelude to a new commercialized Yosemite built on a rush of overnight visitors and day-trippers.

It's an unfair charge that misses the basics. The number of visitors has declined from a high of 4 million in 1996 – the year before the park-wrecking flood – to 3.36 million last year. The average traveler comes for the day, not an overnight stay or several days. The park service plan reflects this changing world by offering better roads, inducements to use free buses, and less emphasis on hotels. If this argument sounds hard to accept, remember that it was worked out by a large group of Yosemite observers.

Throwing away a reasonable rebuilding plan makes no sense. Neither does a limit on park visitors. Yosemite's future lies in a broad-based master plan, not a stubborn court fight.

Editorial, *Don't Leave Yosemite in the Past*, S.F. Chron., February 11, 2007, at C4. The Amici agree. The CMP is reasonable, and the current, protracted court fight is causing more environmental harm, preventing ecological restoration, and is in nobody's best interest.

After the flood of 1997, NPS dramatically changed its planning process in Yosemite to allow for much greater inclusion of the public in shaping management decisions for the park. NPS' new process represented a new, vastly improved and forward-thinking form of constructive engagement that in fact drew out better management ideas and produced a better management blueprint for the Merced River. In short, the CMP that resulted is a sound plan that reflects the diverse interests of all those who seek to protect, preserve, restore, and enjoy Yosemite.

The Amici file this brief to address two core issues of the District Court's Memorandum Opinion And Order, the resulting judgment, and the injunction in favor of Plaintiffs: the District Court's apparent conclusion that only a plan based on a "user capacity program that states an actual level of visitor use" – a euphemism for a cap (*Friends of Yosemite Valley v. Scarlett* ("FOYV v. Scarlett"), 439 F. Supp. 2d 1074, 1100 (E.D. Cal. 2006)), and only a plan contained within a "single, self-contained" document (*id.* at 1094) can pass muster.<sup>1</sup>

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<sup>1</sup> Though the Amici do not address other aspects of the Memorandum Opinion And Order Re Cross-Motions For Summary Judgment, the Amici agree that the District Court's judgment, and the Memorandum Opinion And Order Re Plaintiffs' Motion For Injunctive Relief that flows from summary judgment for Plaintiffs, should be reversed.

The “cap” referred to in the editorial is a cap on Yosemite or Merced River corridor visitors, which cannot be what this Court meant when it sent NPS back to revise the 2000 CMP in October 2003. The law requires effective ways to limit visitor use to a level that protects and enhances outstandingly remarkable values (“ORVs”). Years of professional experience and practice have enabled park resource managers to develop a cutting edge, adaptive management approach that allows parks to set measureable, enforceable visitor-use limits in a number of ways, based on *real* resource-condition data that triggers park mechanisms to ensure that conditions meet predetermined standards and indicators. These mechanisms can be, but are not necessarily limited to, numerical visitor “caps.” To impose one particular approach is unjustified, and rolls back the science of resource management to a point it surpassed decades ago.

Unfortunately, the District Court seemingly found that the CMP was deficient for failing to impose temporary or permanent numerical caps on visitors to the Merced River corridor. A cap cannot ensure the protection necessary for the Merced River’s ORVs, and mandating a cap does not allow the necessary deference to NPS’ authority and expertise to protect the Merced River corridor.

Even more so, the District Court’s finding that the 2005 Revised CMP was invalid for not being “a single, self-contained” document strikes the Amici as a classic and ill-advised elevation of form over substance. The Amici question the wisdom of holding that NPS could not incorporate by reference those portions of

the 2000 CMP that the District Court upheld and this Court affirmed, or that Plaintiffs did not appeal. To hold that the CMP is invalid, and to hold protection, preservation, and restoration hostage to a 33-month schedule to issue yet another CMP because the 2005 Revised CMP is not “self-contained” is not in Yosemite’s best interest, nor does it reflect the requirements of the National Environmental Policy Act.

**A. The Visitor Experience And Resource Protection Framework Is A Sound Method To Address User Capacities And Prevent Degradation, While Visitor Caps Would Necessarily Be Arbitrary, Capricious, And Ineffectual.**

**1. The Visitor Experience And Resource Protection Framework Is A Valid, Scientifically Supported Means For Protecting The Merced River.**

The Wild and Scenic Rivers Act (“WSRA”) requires a federal agency responsible for overseeing a wild and scenic river to prepare a comprehensive management plan that, among other things, “address[es] . . . user capacities” (16 U.S.C. § 1274(d)(1)) for the protection of the river’s “outstandingly remarkable . . . values” (16 U.S.C. § 1271). As the District Court concluded when staying its injunction against certain projects in Yosemite, WSRA is marked by “a scarcity of case law,” such that the NPS raised “serious questions regarding [the District Court’s] rulings on the 2005 Revised Plan.” *Friends of Yosemite Valley v. Kempthorne*, CV F 00-6191 AWI DLB, 2007 U.S. Dist. LEXIS 20378, at \*5 (E.D. Cal. March 21, 2007).

Analyzing this Court's opinions, the District Court concluded that this Court required NPS to "adopt specific limits on user capacity" (*FOYV v. Scarlett*, 439 F. Supp. 2d at 1079), and then interpreted this to mean numerical limits or a cap on visitors. The Amici believe that such an approach is misguided at best. NPS' ecologists, biologists, and resource-management professionals have grappled with carrying capacity issues for decades, and have evolved an array of techniques that are responsive to actual resource conditions. Only by adopting the appropriate techniques, based upon observable data, can managers be assured of meaningful results. Imposing only one technique, numerical limits, would necessarily be arbitrary and capricious.

There are many reasons why "caps" might not be appropriate under certain circumstances. Numerical limits do not account for the type of visitors – a motorcycle gang or a group of senior citizens – the behavior of visitors, whether they congregate in one place for an impromptu gathering or fan out across the river corridor, what weather conditions persist at the time of the visit and, indeed, whether their activities are damaging ORVs. The only numerical limit that would assure no harm is a limit of zero – and that would presumably violate WSRA's requirement to preserve "recreational" values, among other ORVs, and to provide for the "enjoyment" of wild and scenic rivers. *See* 16 U.S.C. § 1271.

The Amici believe that NPS made its case that the Visitor Experience and Resource Protection (“VERP”) framework is a far better means of managing threats to ORVs. As an NPS expert declared:

The concept of carrying capacity (CC) has evolved substantially since first developed and applied in range management as the number of livestock that a track of pastureland can sustain. Early CC application of “overuse” by visitors in park settings revealed the innate difficulties of transferring such a simplistic numerically based concept. My research and consulting experience had repeatedly revealed that reliance on limiting visitor numbers to prevent unacceptable levels of resource degradation is misguided and ineffectual. Here’s why. My research and that of others published in the peer-reviewed literature clearly demonstrates that factors other than the amount of visitor use are more important in determining the amount of resource impact associated with visitor activities.

(Declaration Of Jeffrey L. Marion In Support Of Defendants’ Opposition To Plaintiff’s Motion For Relief, September 15, 2006, ¶ 9 (6-ER-1163-64).)<sup>2</sup> As Dr. Marion concluded, “Current carrying capacity frameworks such as VERP call upon land managers to evaluate the causal factors behind unacceptable conditions.” (*Id.*, ¶ 10.) “Managers analyze problems for their root causes and address those specifically, choosing from a tool box with a diverse array of management strategies and actions.” (*Id.*, ¶ 15 (6-ER-1166).)

Importantly, the use of VERP allows users like Amici’s members to monitor NPS’ actions. If members see adverse effects without an adequate NPS response, they can seek immediate action. With numerical limits, NPS retains little or no

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<sup>2</sup> The Amici cite to NPS’ Excerpts of Record (“ER”). The citation, “6-ER-1163-64,” refers to pages 1163 and 1164 in volume six of the ER.

duty to monitor. To the extent that degradation occurs with numerical visitor limits, the only corrective action may be petitioning NPS to reevaluate numerical limits through another time-consuming planning process that ultimately results in yet more numerical limits that do not address the cause of degradation.<sup>3</sup>

While the District Court found fault with VERP for being “a reactionary tool to try to stop degradation that has already occurred” (*FOYV v. Scarlett*, 439 F. Supp. 2d at 1100), the Amici finds this misleading. Certainly it is “reactionary,” since this adaptive management approach relies on taking action in response to certain conditions. However, the pre-determined “standards and indicators” are set so that the conditions that trigger management actions are well below a level that raises concerns about unacceptable impacts or resource impairment. The District Court’s assessment of the VERP process inaccurately suggests that NPS is locked into a black-or-white set of alternatives: either do absolutely nothing until the serious degradation of park resources occurs and *then* belatedly scramble to undo the damage, or impose visitor entrance caps. This unfairly ignores the broad range of management responses that are available to able and conscientious park

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<sup>3</sup> Importantly, in this case, “numerical limits” do not always protect against degradation. Wildlife, weather, and other factors can degrade ORVs. The CMP recognizes that reality by setting interim limits – not all numerical visitor caps, but limits nonetheless – combined with VERP. The advantage of using VERP is that it provides adaptive management approaches ensuring that, whatever limits are adopted (numerical caps, closures, parking limits, etc.), they will be based upon real resource conditions and can be adjusted when data shows that ORVs might be threatened.

managers who will be monitoring the impacts of visitor use on park resources. VERP's advantage is the ability to identify trends, prevent harm, and correct unacceptable impacts before they become an impairment.

Amici are aware of no statutory history, no statutory language, no judicial authority, and no desirable public policy that the phrase, "address . . . user capacity," means that NPS must cap the number of visitors rather than use an adaptive management technique such as VERP to address potentially harmful visitation patterns. In 2003, this Court indicated that the first Merced River Plan insufficiently addressed user capacities because the plan "fail[ed] to yield an actual measure of user capacities, whether by setting limits on the actual number of visitors, by monitoring and maintaining . . . criteria under the VERP framework, or through some other method." *Friends of Yosemite Valley v. Norton* ("FOYV v. Norton"), 348 F.3d 789, 796 (9th Cir. 2003). The opinion continued with several other acknowledgements that specific numerical "caps" were not the only way to achieve these "actual measures." In fact, on the user capacity issue, this Court simply concluded that even if the Park Service will "take years to implement VERP, it may be able to comply with the user capacity mandate in the interim by implementing preliminary or temporary limits of some kind" *Id.* at 797.

The problem in the current case is that the District Court failed to see that the new plan, issued in 2005 to specifically follow this Court's directions, contained exactly what was requested. The District Court instead dismissed the adaptive

management component of VERP and its flexibility to evolve and hone its methods and application, as “leaving itself the option of deciding in five years to abandon its currently proposed method and proceed to an entirely different, as yet unidentified, manner.” *FOYV v. Scarlett*, 439 F. Supp. 2d at 1099. Moreover, the District Court seemingly ignored the copious and clearly explained interim limits, all set at ascertainable, often numerical limits. With all due respect, it appears that the District Court simply adopted Plaintiffs’ arguments without following this Court’s clear instructions.

In sum, on this issue, the Court hit the nail on the head when it made it very clear that “§ 1274(d)(1)’s instruction that a CMP must ‘address . . . user capacities’ to require only that the CMP contain specific measurable limits on use.” *FOYV v. Norton*, 348 F.3d at 797. Even setting aside the VERP adaptive management approach, the plan contains a plethora of measurable limits.

In the 2005 CMP, NPS has set temporary numeric limits for overnight lodging, camping spaces, day visitor parking spaces, bus parking spaces, tour busses allowed entry into Yosemite Valley, and employee housing in the river corridor – at numbers that are less than those that existed before the 1997 flood. (2005 Revised CMP, III-17 – III-22, Tables III-4, III-5, III-6 (2-ER-278-85).) The Wilderness Trailhead Quota system caps on a long-term basis visitation to 51 of the 81 miles of the Merced River in Yosemite. (2005 Revised CMP, II-8 (2-ER-217, 220-222).) As NPS notes, most of the temporary and long-term limits are

well below the level existing in 1980, before Congress designated the Merced River as wild and scenic. (2005 Revised CMP, Tables III-5, III-6 (2-ER-285-86).)

Furthermore, in the alternatives that NPS considered for the 2005 Revised CMP, NPS weighed the wisdom of capping visitation. Among other things, Alternative 3 considered a daily limit on the number of visitors within each segment of the river corridor, a maximum annual limit on visitors to the entire corridor, and a limit on the number of employees commuting into the corridor. (2005 Revised CMP at III-29 – III-37 (2-ER-290-98).) Alternative 4 considered limits on the number of people at one time within each management zone, and a maximum annual limit on visitors to the entire corridor. (2005 Revised CMP at III-41 to III-49 (2-ER-302-10).) After considering public comment, NPS opted for Alternative 2 to comprise the 2005 Revised CMP.

Given the “substantial discretion in its management of the protected river areas” (*Sierra Club v. United States*, 23 F. Supp. 2d 1132, 1136 (N.D. Cal. 1998)), NPS’ consideration and rejection of numerical limits in favor of VERP and the many other mechanisms contained in the CMP’s User Capacity Program should be within NPS’ discretion. NPS explained its reasons for rejecting caps after considering extensive public comment from Plaintiffs, the Amici, and many others. (2005 Revised CMP, at III-53 – III 55, III-57 – III-79 (2-ER-314-16, 318-40); Record Of Decision, ROD-20 – ROD-21 (4-ER-809-10).) The Amici submit that NPS “articulated a rational connection between the facts found and the choice

made” such that NPS’ decision was not arbitrary or capricious. *See FOYV v. Norton*, 348 F.3d at 793 (quoting *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir. 2003)). The Amici urge this Court to resist Plaintiffs’ demand that this Court substitute its judgment for NPS’ judgment on a question that is within NPS’ expertise.

The Amici suggest one more reason for rejecting efforts to replace the sound science of VERP with the questionable science underlying Plaintiffs’ demands for numerical limits or caps: Such a precedent threatens NPS’ ability to continue relying on VERP as the best present-day method for protecting our national parks. (See Declaration Of Fran P. Mainella In Support Of Defendants’ Opposition To Plaintiffs’ Motion For Relief, September 20, 2006, ¶ 7 (6-ER-1158) (“NPS has integrated the VERP process into the 2001 and 2006 *National Park Service Management Policies*. (The Management Policies serve to document the core policies governing the management of each of the more than 390 units of the National Park System.)”).) As the Director of the National Park Service explained in her Declaration to the District Court:

If the attempt to discredit the VERP process and three decades of work by national experts and professional land managers is validated by the court, the NPS and our sister agencies will be forced to turn back years of advancement on the subject of user capacity. This would have far reaching implications to the long-term success of visitor use management planning in the NPS and other public land management agencies.

(*Id.*, ¶ 9.) VERP is too important a resource-management tool to relegate it to a backup method to control degradation on public lands.

**2. The Visitor Experience And Resource Protection Framework Is Consistent With The Secretaries' Interpretation Of The Directive In The Wild And Scenic Rivers Act To Address User Capacities.**

This Court's interpretation of the Secretarial Guidelines promulgated by the Departments of Agriculture and Interior is consistent with the interpretation that WSRA does not require strict numerical visitor limits. *See FOYV v. Norton*, 348 F.3d at 797 (finding that, although NPS must "adopt specific limits on user capacity," the Secretarial Guidelines "do not specify that this obligation can be satisfied only by capping the number of visitors"). In fact, the Secretarial Guidelines explicitly describe management of a wild and scenic river that is more consistent with VERP than with the adoption of limits on the number of visitors:

*Carrying Capacity.* Studies will be made during preparation of the management plan ***and periodically thereafter*** to determine the quantity and mixture of recreation and other public use which can be permitted without adverse impact on the resource values of the river area. ***Management of the river area can then be planned accordingly.***

*Public Use and Access.* Public use will be regulated and distributed ***where necessary*** to protect and enhance (by allowing natural recovery where resources have been damaged) the resource values of the river area. Public use ***may be controlled*** by limiting access to the river, by issuing permits, or by other means available to the managing agency through its general statutory authorities.

National Wild and Scenic Rivers System: Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,459 (Sept. 7, 1982) (emphases added).

The descriptions of “General Management Principles” above suggest to the Amici that the Secretarial Guidelines describe the VERP-type of adaptive management, not the imposition of mandatory “numerical limits,” as the means for “address[ing] . . . user capacities.” The Amici respectfully disagree that references to “the kinds and amounts of public use” or the “quantity and mixture of recreation and other public use” require the adoption of “numerical limits.” But the Amici agree that courts should “defer to the Secretarial Guidelines as an exercise of the administering agencies’ authority to resolve ambiguities in the statute they administer.” *FOYV v. Norton*, 348 F.3d at 797 (citing *United States v. Mead*, 533 U.S. 218, 227 (2001)). And the Amici believe that the responsible agencies resolved the ambiguity in favor of adaptive management.

The District Court misinterpreted this Court’s requirement to adopt “specific limits on user capacity . . . [and ] that such limits describe an actual level of visitor use” to mean that the numerical limitations combined with the adaptive management approach contained in the 2005 CMP were somehow insufficient. *See FOYV v. Scarlett*, 438 F. Supp. 2d at 1100. That interpretation would fly in the face of decades of resource-management science and experience, and the Amici do not feel it is justified by this Court’s orders. As this Court acknowledged, use

levels and numbers can be limited and specified by a range of techniques, many of which were employed by the 2005 CMP.

If there is a time and a case for overruling NPS' actions, the Amici respectfully submit that this is not the time or the case. NPS engaged in a thoughtful planning process to draft the 2005 Revised CMP, weighing significant public input to draft a CMP that does not please everyone, but reasonably balances the competing interests. Yosemite and the Merced River corridor should not be sacrificed to speculation and second-guessing about the meaning of "address . . . user capacities." Congress chose to leave the definition to agencies like NPS, and the Amici suggest that the courts should not disturb NPS' definition in this case.

**B. Requiring The 2005 Revised Comprehensive Management Plan To Be A "Single, Self-Contained" Document Finds No Support In Statute, Caselaw, Or This Court's Prior Decisions In This Matter And, In Any Event, Would Be A Senseless Exercise.**

The Amici's second concern is with the District Court's conclusion that the 2005 Revised CMP could not reference and incorporate portions of the 2000 CMP that Plaintiffs did not challenge, or that the District Court upheld and Plaintiffs did not appeal. To require NPS to block and copy sections of the 2000 CMP to satisfy Plaintiffs' demand that the 2005 Revised CMP be "a single, self-contained" document is the apogee of pointlessness and waste.

Plaintiffs' argument rests atop two tenuous propositions: (1) the language from this Court's April 20, 2004 order noting that it had previously "held that the entire Merced Wild and Scenic River Comprehensive Management Plan ('CMP')

is invalid” and requiring the NPS to prepare “a new or revised CMP”; (2) any reference to, or reliance on, the 2000 CMP as a separate, free-standing document apart from the 2005 Revised CMP is improper, because this Court held the 2000 CMP to be invalid. *See FOYV v. Scarlett*, 439 F. Supp. 2d at 1091. But Plaintiffs cannot seriously contend that all data or discussions in the 2000 CMP are inaccurate, improper, or legally invalid.

Just as an unsigned contract may not be legally valid and binding, the text it contains is not invalid because the parties failed to fulfill the procedural requirements to make the contract valid and binding. Just as parties are not foreclosed from making a valid and binding contract in a signed agreement that incorporates the earlier draft, the Amici do not see the sense in foreclosing NPS from referencing and incorporating otherwise valid elements of the 2000 CMP and avoiding the wasteful requirement of duplicating those elements in their entirety in the 2005 Revised CMP.

The District Court cites no legal support for its conclusion that the 2005 Revised CMP must be “a single, self-contained” document. Instead, the District Court ignores the title of the “Revised Comprehensive Management Plan,” and accepts Plaintiffs’ invitation to find that, because NPS’ Record Of Decision says that the 2005 Revised CMP “will amend” the 2000 CMP, the 2005 Revised CMP attempts to “amend” an invalid CMP. But in form-over-substance fashion, Plaintiffs conceded at hearing that “there is nothing wrong with Defendants using

parts (even very large parts) from the 2000 MRP to create a whole new or revised plan.” *Id.* at 1093. To hold the present and future of a preeminent national park hostage to this sort of semantic quibbling seems especially troubling.<sup>4</sup>

### CONCLUSION

The Amici do not take their involvement in this appeal lightly. Some of the Amici have been at odds with NPS in the past and have resolved disputes through litigation as well as through the constructive, good faith engagement. The Yosemite Fund, not seeing itself as an advocacy organization, has generally avoided involvement as an amicus or intervenor, but sees the need to protect the thousands whose contributions to improve Yosemite have been placed on hold as a result of this lawsuit.

None of the Amici would claim that NPS is perfect. Indeed, they do not claim perfection themselves. The Amici recognize that no one stakeholder group or segment of stakeholder groups could have perfect knowledge of how to preserve, protect, and allow for public enjoyment of such a large and complex natural and cultural landscape as Yosemite. They understand clearly that the only

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<sup>4</sup> The District Court’s conclusion is all the more troubling in that NPS did produce a “single, self-contained” document that contains required elements of the CMP, mapping support for the elements in the 2000 CMP and the 2005 CMP. (*See* 5-ER-826-996; *see also id.* at 845 (“While [this document] does not repeat the analyses of the Merced River Plan/FEIS or the Revised Merced River Plan/SEIS, this document presents all of the elements that comprise the management plan for those segments of the river administered by the National Park Service. This document replaces the 2000 version of the *Merced Wild and Scenic River Comprehensive Management Plan.*”).

way to achieve this is to try engaging all stakeholder groups in a constructive process that, in effect, enables NPS to manage and protect this magnificent iconic national park and World Heritage Site with the assistance of stakeholders, and not by ignoring their interests. Significantly, the Amici believe that, in the case of Yosemite, NPS now understands this bedrock principle, and followed it in crafting the CMP. Upholding the CMP is critical to allowing NPS to provide Yosemite with the fixes it so badly needs, and giving evidence to the overwhelming majority of participants in the process that their participation yielded a benefit.

The Court should be mindful that the National Wild and Scenic River System is one of great diversity, with a wide range of circumstances, appropriate management objectives, and resource tools available to agency managers. While establishing clear statutory direction in some areas of wild and scenic river management (such as prohibiting FERC-licensed dams, or roads or intensive developments in “wild” river corridors), congressional direction to managing agencies is more general in areas such as “addressing user capacities” or the specific tools and authorities that can be chosen to achieve WSRA management objectives. Appropriate deference to the range of choices available to a managing agency to achieve these objectives is one of the reasons for the success of the system, and the continued interest of agencies to support its expansion.

The Amici respectfully urge this Court to reverse the District Court's judgment, vacate the District Court's injunction, and remand with instructions that the District Court enter judgment for NPS.

Dated: May 10, 2007.

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and JAY WATSON

I certify that (**check appropriate option(s)**)

\_\_\_\_ 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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I am a citizen of the United States, more than eighteen years old and not a party to this action. My place of employment and business address is 400 Capitol Mall, Suite 3000, Sacramento, California 95814.

On May 10, 2007, I served two copies of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF THE BRIEF ON APPEAL OF DIRK KEMPTHORNE, ET AL., FOR REVERSAL OF THE DISTRICT COURT'S JUDGMENT AND INJUNCTION** by placing the documents in envelopes addressed to:

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and then sealing the envelope, affixing adequate first-class postage and depositing it in the United States mail at Sacramento, California.

Executed on May 10, 2007, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.



Jeanette L. Ponce