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FROM » »

ZETTERBERG & ZETTERBERG
Attorneys at Law
319 Harvard Avenue — Claremont, California 91711

TO » »

Dr. Frank C. Craighead

P.O. Box 156

Moose, Wyoming 83012





NAME, ADDRESS AND TELEPHONE NUMBER OF ATTORNEY(S)
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319 Harvard Avenue
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ATTORNEY(S) FOR Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DENNIS G. MARTIN, as Administrator of the Estate of HARRY EUGENE WALKER, Deceased,

PLAINTIFF(S)

VS

UNITED STATES OF AMERICA,

DEFENDANT(S)

CASE NUMBER

Civil No. 72-3044-AAH

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On January 2, 1975, I served a true copy of Summary of Deposition of Glen F. Cole

☐ by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); ☒ by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following: (List names and addresses for person(s) served. Attach additional sheets if necessary.)

William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief, Civil Division, William B. Spivak, Jr., Assistant U. S. Attorney, 1100 U. S. Court House, 312 North Spring Street, Los Angeles, California 90012

Place of Mailing: Claremont, California

Executed on January 2, 1975 at Claremont, California.

YOU ARE REQUIRED TO CHECK ALL APPLICABLE BOXES
BEFORE PRESENTING TO THE COURT FOR FILING

☐ I hereby certify that I am a member of the Bar of the United States District Court, Central District of California. *

☒ I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. *

Clarice K. Kelly

Signature of person making service

Clarice K. Kelly

Subscribed and sworn to before me

(Date)

*Document must be notorized only if neither of these certifications is applicable.

Notary Public in and for the County of _____, State of California.

(Seal)

ACKNOWLEDGMENT OF SERVICE

I, _____ received a true copy of the within document on _____, 19____.

(Signature)

for: _____

(Party served)

(1)

Draft
12-26-74

EXPERT TESTIMONY: DR. FRANK C. CRAIGHEAD

(Note: The order of this Court dated August 7, 1974, provided that the testimony of experts should be summarized and should be served on opposing counsel five days before the trial date. At the instance of Mr. Spivak, this five-day period was later extended to ten days.

(On December 9, 1974, while plaintiff's counsel was trailing at the end of the calendar into the afternoon session of the Court, Mr. Spivak brought into Court an application for a clarification of the August 7, 1974, order of the Court, requesting inter alia that the Court state whether it wanted a summary or a narrative of expert testimony. The Court made its order striking the word "summarizing" from the order of August 7, 1974, and stated that a narrative of the expert testimony would be acceptable. Plaintiff's counsel immediately wrote Dr. Frank Craighead asking for such a narrative, but received no answer for a number of days, learning that Dr. Craighead was away from his home in Moose, Wyoming, in other parts of the United States. Plaintiff's counsel left a request for a telephone call, and Dr. Frank Craighead did telephone plaintiff's counsel on December , 1974, stating that he had just arrived in his home in Moose, Wyoming, and had received letters from me, and would do his best to respond to the letters with material, but he related that he had some pre-existing obligations connected with his work and that he would do the best that he could.

(On December , 1974, plaintiff's counsel received in the mail a number of papers and documents from Dr. Frank Craighead, and he has reviewed these on December 24 and 25, 1974, and plaintiff's counsel has attempted to the best of his ability to put forth in narrative form the testimony of Dr. Frank Craighead, as expert. Plaintiff's counsel understands that

the principle purpose of such narrative is to advise opposing counsel of the nature of the expert's testimony. Plaintiff's counsel believes the defendant counsel is fully advised by his own experts as to the nature of the testimony of Dr. Frank Craighead, but he hopes the following will serve. However, plaintiff's counsel respectfully requests the consideration of the Court and opposing counsel in case plaintiff's counsel, in drawing up the narrative, has made error or omission or of interpretation. Dr. Craighead will be available in court to testify both as an expert and as a witness and rebuttal witness. Plaintiff requestfully requests that the defendant disclose the appearance and testimony of his Government experts so that the testimony may be arranged so that the experts may be present in court at the same time, in order to facilitate the clarification of the issues involved.)

SUMMARY OF QUALIFICATIONS OF EXPERT FRANK C. CRAIGHEAD, JR., OF MOOSE, WYOMING:

A true copy of the summary of the personal data and qualification of Frank C. Craighead, Jr. is attached hereto as Exhibit A, which consists of eleven (11) pages, as follows:

Professional experience, from 1934 to the present, pages 1-3;
Education, page 3;
Honors, page 3;
Foreign travel, page 3;
Professional, scientific, and other societies and organizations, page 3;
Civic and political activities, page 3;
Illustrated lectures, page 4;
Popular articles, National Geographic Magazine

(with J. J. Craighead), pages 4-5;
Books, technical, page 5;
Books, semi-popular, page 5;
Publications, pages 5-10.

NARRATIVE:

Grizzly bears are the strongest land mammal in North America, and can grow to nearly 1,200 pounds of muscle. When standing on its haunches, a full-grown grizzly may be 8 to 10 feet tall and capable of sprinting over 30 miles per hour. Its strength can be fully appreciated only if felt or observed. Left undisturbed by the Indians, and early white settlers who shared its land, the giant bear was free to roam where it pleased. Most of the grizzly bears residing in the Western United States are found in a narrow corridor, including Glacier National Park south to Yellowstone and the Grand Tetons, and the largest concentration of grizzly bears is in the Yellowstone plateau, or eco-system, centering in Yellowstone National Park. There are also black bears in Yellowstone National Park, but they are smaller, a less fearsome wild animal, often seen along the roads at Yellowstone National Park. Although dangerous if molested or fed, they are one of the park's major attractions.

It is my opinion that the closing of the garbage dumps caused an increase in the influx of grizzly bears to campgrounds and developed areas in Yellowstone National Park. Grizzly bears normally avoid humans when the bears are away from developed areas. If grizzly bears have contact with humans, they would tend to lose respect for humans and develop behavior patterns with respect to humans, which patterns are unmarked by fear of humans.

In Yellowstone Park, grizzly bears which are considered troublesome or dangerous are the subject of "control actions." Control actions include transplanting, transferring to a zoo or similar facility, or killing the bear.

Our studies show that grizzlies have a strong homing instinct. When a grizzly is transplanted no more than 50 miles from the place of the control action, the grizzly will soon return to the point of capture.

It is the policy of park rangers in Yellowstone Park to carry out control actions, and information about the control actions do not always come to the attention of the Superintendent.

Transplant data I have accumulated shows a low success expectancy for transplants. Of 145 grizzlies captured and transplanted during the 1959-1969 period, 98 returned to a campground or developed area where they were captured. This is only 32.7% transplant success. Of 19 grizzlies transplanted by the Montana State Fish and Game, 84.2% of these grizzlies were either killed near the transplant areas or returned to a developed area during the first year.

The bear that killed Harry Walker was age 20, weighed 232 pounds. She had no fangs. The Montana State University autopsy report showed: "All canine teeth were broken and worn smooth to the level of the warn incisor teeth. The cheek teeth had considerable use and were smoothly cupped . . . . Generally, this female was a very old individual of average size. . . ."

This same bear had been trapped in a control action on about October 14, 1970, in the area of the Camper Cabins Cafe at Old Faithful. It had been seen in the developed area four or five times before it was trapped. It was trapped in a typical "culvert" trap, consisting of a culvert pipe with metal grill work at the end. It is my belief there was no metal plate inside to keep the bear from trying to bite through the grill work. The

better kind of culvert trap has a metal plate inside so that the trapped grizzly cannot ruin his teeth trying to bite the grill.

This same bear, on about October 14, 1970, was transplanted in the control action to Gibbon Meadow, about 18 miles north. This distance is not adequate to prevent the bear from returning to the Old Faithful area, and the Yellowstone Park biologist knew or should have known that such a distance was inadequate. The employee or employees of the Government at the time of the control action who made the decision to move this bear only 18 miles north of the place where it was trapped, did not in my opinion make a prudent decision, but made a decision, and a transplant, which created a risk of danger to humans, at some future time, at the Old Faithful area.

On September 16, 1970, a vacant camp was found within a half mile of Old Faithful on the Fire Hole River. No person or owner was ever found, to my knowledge. The rangers who inspected the camp made a determination that a bear had invaded the camp. The reported marks on the cans indicated that the canned goods had been chewed, but many or all of them were unbroken. It is likely that an old bear with worn teeth invaded this camp. Grizzly bears, if surprised by humans, will often attack, and if they attack, and are hungry, they will eat. They also have a practice of burying or covering over the prey they have killed. It is within the realm of possibility that a person was killed by a grizzly bear on September 16, 1970; it is also a reasonable possibility that the bear that destroyed the camp which was found vacant was the same bear that was seen in the Old Faithful area during the week prior to October 14, 1970, and which was trapped and transplanted to Gibbon Meadow, this being the bear that killed Harry Walker.

It is my opinion that the rangers and park personnel that carried out the transplant of October 14, 1970, were

negligent, and did not act with reasonable prudence, in at least two respects, namely, that the transplanted bear was likely the same bear that entered the camp a month earlier, and that the bear should have been transplanted or otherwise disposed of to a distance great enough so that it would not have returned. They were reasonabley charged with the knowledge that the bear would return and that it would be dangerous. It did in fact return and killed Harry Walker.

As hereinafter described, my brother, Dr. John Craighead, and I, initiated a long-range ecological study of the grizzly bear in Yellowstone National Park in 1959, and in 1967 we prepared, at the request of the Park Service, a 113-page report, "Management of Bears in Yellowstone National Park." During the eight years of that study, and in my training and experience prior thereto, and since 1967, I have become familiar with the grizzly bear and its habits. This familiarity is based not only on my studies, research, and reading, but on direct field observation, including field observation, tracking, marking and radio tracking grizzly bears in the Western United States, and particularly in Yellowstone National Park.

In the course of our research work, we determined through numerous censusses that there was a minimum population of about 174 grizzlies in Yellowstone and the surrounding area. Refinement of this data through computer analysis indicated an average of 229 grizzlies for the entire ecosystem, with the population reaching a maximum of 245 in 1967, then declining to 136 animals in 1974. We also determined through marking and through radio-tracking that in spring grizzlies move from distant parts of the park and even from beyond its borders into the central portion

of the park in Hayden Valley. Here they tended to congregate in summer when visitor numbers were the greatest. They also concentrated in lesser densities in the area of Old Faithful (the Rabbit Creek Dump, about four miles north of Old Faithful, was closed at the end of the 1969 season), Pelican Valley and at some of the other dump sites. These earth-filled dumps provided supplemental food for the bears and tended to keep them zoned away from people. In the fall of the year with the drop in tourists and accompanying drop in food refuse, the bears dispersed outward to fall foraging areas and winter den sites. Thus to rapidly remove earth-filled dumps, we warned, would not only dislocate the foraging habits of the bears, but would also disrupt traditional patterns of movement and migration.

Our research on the grizzly during this eight-year period revealed that the population had more or less stabilized, increasing by only an average of about six animals per year. Although grizzlies were being hunted and taken in forest areas surrounding the park in Wyoming and Montana, the annual increment was still slightly greater than the annual mortality. In other words, the population was doing well and holding its own.

In 1968 there was a change of Park administration, and Jack Anderson became Superintendent. In 1968 the volume of garbage at the Trout Creek Dump was drastically reduced. The number of grizzlies captured during this year was about four times the average for the previous nine years. This in itself should have been a warning that the method being used in Yellowstone Park of eliminating the dumps, and the food source for the grizzlies, was a dangerous method. We had recommended that the carcasses of the animals such as elk (which were often in over-supply in the ecosystem) could be placed by helicopter out in areas away from tourist use, and could attract and hold the grizzlies during the period of the greatest tourist visitation.

We had experimented with the use of baits over a period of years and found it very effective in drawing bears from distant and diverse areas, and congregating them in a small, localized area. Our recommendation was not followed.

In 1969 and 1970, grizzlies moved in unprecidented numbers into campgrounds where they were either killed or trapped and moved to distant parts of the park or beyond. Most of these animals eventually became mortalities, either killed by drugs, killed by hunters, campers, or ranchers in the area where they were released, or eliminated when they returned to their point of capture. It was inevitable that most of them that were not killed upon release would eventually return, as grizzlies have a strong homing instinct. Closure of the Rabbit Creek dump in 1970 followed by the complete closure of Trout Creek in 1971 moved grizzlies from these areas into the vicinity of West Yellowstone where many were trapped and transported to areas surrounding the park.

The Yellowstone ecosystem also includes black bears, which are a different ~~breed~~ species. Black bears, while dangerous if molested, are probably Yellowstone Park's largest single attraction. Black bears are often seen along the highways in Yellowstone. They ~~are~~ have a different ~~breed~~ temperment than the grizzly. Grizzly bears are fearless, ~~and rate high on the intelligence scale of animals.~~ though not belligerant animals of high intelligence. Black bears are ~~farther down the food-chain~~ less aggressive and tend to avoid grizzlies. They are smaller than grizzly bears. They sometimes become what are known as "bear bums." Grizzly bears ~~never~~ seldom if ever become car or roadside bears. The grizzly's natural instinct is to avoid humans. In the eighty years before the garbage dumps were closed in Yellowstone, the grizzly bears annually went to the garbage dumps, which were located away from human areas. The grizzly bears responded to this available food source just as the Alaskan brown bear responds to salmon runs. There are not two kinds of grizzly bears: garbage bears and wild

bears, although the Yellowstone Park administration incorrectly has thought so. Our studies, including systematically tracking many grizzly bears, show that the grizzly bears moved in and out of garbage dumps in search of their food, and were just as wild as though they had had no contact with garbage. Their movements and behavioral patterns in response to this food became traditional. The dumps became a part of the bears' way of life. They were a part of the total ecology and the situation could not suddenly be altered without great risk to humans.

Neither grizzly bears nor black bears normally track and try to attack kill humans. If surprised or threatened grizzly bears will kill humans. Then if the bear is hungry, it might eat. But grizzly bears who have not entered places of human use and habitation will, if not surprised, avoid humans. One cannot say that a grizzly bear is ever afraid of man; but a grizzly bear which enters the area of human use and habitation loses the respect for humans that ordinarily keeps grizzly bears at a distance and will often return to areas where human contact is possible; such bears, then without fear or respect for humans, are a threat to the visitor population of the park.

On September 19, 1972, my brother John Craighead presented the results of a computer analysis of grizzly bear population. At that time we knew of 91 grizzly bear mortalities in two years' time, and by the end of 1972 we had tallied 120 mortalities. In Yellowstone Park, the Park Service's approach to this problem was to state they were eliminating troublesome bears, garbage bears, and would eventually have only a wild, free-roaming population. We pointed out to Park Service personnel in Yellowstone that all of our data on the movements of these bears indicated that there was but a single population exhibiting one set of behavioral traits when around garbage dumps and another when in the wilderness country. Our data showed that sooner or later practically all of

the grizzly bears in the huge Yellowstone ecosystem had moved into the dump areas to feed, either for short or extended period of time. A policy that attempted to eliminate these bears would eventually decimate the entire Yellowstone grizzly bear population. We did not advocate bear garbage dumps as has sometimes been stated. It was our opinion that the feeding and migrating habits of these animals could not be abruptly disturbed without dire consequences, both to visitors of the park and the bears themselves. In November, 1970, at an international conference on bear research and management at Calgary, Alberta, Canada, in the conference discussion and in the presence of the animal biologist who was advising the Superintendent of Yellowstone Park, my brother reported our view that if, instead of phasing out the dumps, the dumps were closed down abruptly, that there would be tremendous changes in the movements and habits of grizzly bears, and predicted that if the dumps were so closed, there would very likely be a fatality in Yellowstone.

During the time Lemuel Garrison was Superintendent of Yellowstone National Park, we were given cooperation and assistance in our studies in Yellowstone of the grizzly bear, the elk, and the black bear. We were allowed to do extensive and intensive field work in the back country of Yellowstone, and given space and facilities to assist us in our work. After Lemuel Garrison left, and during the time Yellowstone Park personnel began the abrupt closing of the garbage dumps, we were denied access to the park for research unless we signed an agreement of understanding which would require our publications, both technical and popular, to be cleared by the Park Service before being released. Our research was done independently, largely financed independently, but carried out on public lands under an agreement of understanding. We could not do research under such restrictions, because it violated our scientific and academic freedom.

In 1970, my brother and I supplied data for use by the National Parks System clearly indicating that carcasses of carrion, such as elk, had been effectively used to draw grizzlies away from areas occupied by people and thus should be considered as a management technique. My brother and I both recommended that this technique be used. Its use was available and feasible. The National Park Service, and particularly the Yellowstone Park administration, neglected and failed to use such technique, which, if used, would have drawn grizzlies away from areas occupied by people. Also, prior to 1970, we had given the National Park Service, the Yellowstone Park administration, and their advisors, data showing that grizzly bears would gravitate into the campgrounds if the dumps were closed abruptly without the use of carrion feeding. In the administration of Yellowstone Park, the Park administration chose instead to make an assumption that some of the bears would gravitate into campgrounds. The Park administration continued to assume that there were two types of grizzly bears, namely, garbage bears and wild bears. These assumptions were contrary the facts, which facts we had made available in depth to and for the use of the Yellowstone Park administration.

By radiotracking done under the auspices of Atmospheric Sciences Research Center, State University of New York at Albany, Montana Cooperative Wildlife Research Unit, University of Montana, my brother and I determined that grizzly bears once numbering hundreds of thousands within the continental United States are now reduced to about 800. Research efforts of a thirteen-year ecological study were concentrated within the five million acre Yellowstone ecosystem. Censuses revealed an average minimum population of 175 grizzlies and a maximum of 250. The average age composition was: Cubs 19 percent, Yearlings 13 percent, Two-year-olds 10 percent, Three and Four-year-olds 15 percent, and Adults 43 percent. Twenty grizzly bear seasonable ranges, eight home

and one lifetime range were delineated by radio. They varied in size from 7 to 168 square miles. The major factor influencing ranges was food abundance and availability. Ranges overlapped, were not defended, and were of two types: A discrete area used throughout the year, and separate summer and fall foraging areas connected by a migratory corridor. Eight types of bear movement were identified. Grizzlies travelled as far as 60 airline miles. Migratory movements concentrated bears from near and far within Yellowstone National Park during summer. In fall they dispersed throughout the park and far beyond. Informaiton on ranges and movement is essential to computing and interpreting grizzly bear population figures and densities within the Yellowstone ecosystem and must be considered in management programs. Management policies were suggested based on research findings.

The rangers and management in Yellowstone National Park negligently failed to institute management procedures to re-distribute grizzly bears during the summer months of high-visitor use, and failed effectively to reduce the probability of bear-man encounters on an operational basis when means for such reduction of encounters were at hand.

FURTHER QUESTIONS TO BE PUT TO DR. CRAIGHEAD:

The deposition of Dr. Craighead has not been taken, although Mr. Spivak and Mr. Zetterberg have interviewed Dr. Craighead in Jackson Hole, Wyoming. Dr. Craighead can give direct testimony on matters relating to grizzly bears and Yellowstone Park and the park administration. In addition to rebuttal testimony, the nature and content of which will depend upon the Government's evidence and testimony and the testimony of their witnesses, it is expected that questions on the following subjects will be put to Dr. Craighead at the time of trial:

1. How was grizzly bear data obtained by you and your brother and your associates prior to 1968?

2. During the period 1959 to 1968, what did the management of Yellowstone National Park do to assist you in your studies?

3. How did you conduct your studies and field work during the time of your presence in Yellowstone National Park?

4. Has there been a change in the method of research and study of grizzly bears in Yellowstone National Park since your departure?

5. Describe that change.

6. What necessitated your departure from Yellowstone National Park?

7. How reliable are the figures and data in connection with grizzly bears and grizzly bear management in Yellowstone National Park since 1967, including June, 1972?

8. Were you familiar with park management procedures actually in effect for camping in Yellowstone National Park during June, 1972?

9. Describe those procedures.

10. Have you and your brother done camping in Yellowstone National Park?

11. Over what period?

12. Given the evidence in testimony regarding the camp of the Walker boy at the time of his death, would you describe how the apparent camping procedures used by the decedent and his companion compared with procedures used by other campers in the park?

13. By backcountry campers in the park?

14. In 1972, was it permissible for park visitors to hike in the backcountry area without the requirement of a permit?

15. When, if ever, was a permit required for backcountry hiking?

16. Backcountry camping?

17. Are you personally familiar with the reasons for requiring permits, if permits have been required for backcountry camping in Yellowstone National Park?

18. Do you know whether permits were required for backcountry camping, in accordance with management policy at Yellowstone National Park, prior to July 1st, 1972?

19. How are grizzly bear sightings now made in Yellowstone Park?

20. How have they been made since the beginning of 1968?

21. How does this differ from the sightings done by you, your brother and your associates?

22. Compare and contrast the reliability of your record keeping with the record keeping that has taken place at Yellowstone National Park since 1968.

23. Describe what conversations you have had regarding grizzly bears, since 1966, with national park personnel, including Jack Anderson, Jack Anderson's predecessor, Glenn Cole, Nathaniel Reed, Mr. Loveless, Mr. Lynn, and any rangers, regarding grizzly bear management practices, control actions, and any other grizzly bear actions or procedures with reference to Yellowstone National

Park.

24. Do you consider that you warned the National Park Service Administration at Yellowstone of the risks and dangers to humans of the grizzly bear management practices being carried out at the time of Harry Walker's death?

25. If so, what was that warning, when and how given?

26. Describe the relationship between the elk population and the Yellowstone ecosystem and the grizzly bears.

27. Is the elk population in undersupply or oversupply?

28. Describe the differences,if any, you have observed between grizzly bear management practices and warnings at Glacier National Park with those at Yellowstone National Park, in effect at the time of the Walker death.

29. Is the pamphlet "Danger" prepared primarily for black bears or for grizzly bears?

30. Do you agree or disagree with accuracy of government figures on injuries from grizzly bears in Yellowstone National Park for periods since 1967?

31. If they are not reliable, state why you think they are not reliable.

The foregoing are some of the general topics that will be posed to Dr. Craighead, but are not exclusive.

fendant's books and records as a "special factor militat[ing] in favor of transfer."

Moreover, as the *Sears* court observed,

> Were these actions transferred . . ., pretrial discovery could be better coordinated with the requirements of that court and the needs of the trustee, and the possibility of a conflict with respect to the need for documents between the efficient operation of that proceeding and an efficient trial in this forum could be avoided. *Id.* at 267.

The SEC relies heavily on Stull v. Baker, 311 F.Supp. 1205 (S.D.N.Y. 1970), where the forum court, the Southern District of New York, denied a motion to transfer the case to the Central District of California. In *Stull*, 11 of 17 individual defendants resided in the proposed transferee district. Here, four of six defendants reside in the Eastern District and a fifth spends most of his time there. In *Stull*, many of the principal witnesses were nearer the forum state than California. Here, the principal witnesses reside in the Eastern District. Moreover, Judge Bonsal, who decided *Stull*, observed in a subsequent opinion that plaintiff's choice of forum controlled in *Stull* for the reason that the transferor and transferee districts were "equally inconvenient." Seiden v. Price Waterhouse Co., 327 F.Supp. 1325, 1327 (S.D.N.Y.1971) (motion to transfer under 28 U.S.C. § 1404(a) allowed). Stull v. Baker, therefore, has minimal application to the case at bar.

[5, 6] Plaintiff's choice of forum remains a factor for this Court's consideration. Of course, it must be accorded considerable weight, but its significance under the common law doctrine of *forum non conveniens* has diminished since the enactment of § 1404(a). *See* Norwood v. Kirkpatrick, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955). Moreover, the choice of forum, by a plaintiff agency of the United States, carries no more weight than that of the ordinary plaintiff. United States v. General Motors Corp., 183 F.Supp. 858 (S.D.N.Y.1960).

On November 27, 1974, the bankruptcy court at Danville issued a restraining order prohibiting, so the parties have assumed, the SEC and creditors of the three corporate defendants from continuing or commencing any suits against the corporations. The order refers only to one of the three corporations, FNF. Nevertheless, in view of the interlocking relationship of FNF, Leichner, and Burhold, the order can, as a practical matter, be interpreted to apply equally to them. The Referee in Bankruptcy at Danville has, moreover, assured this Court that his intent in issuing the order was to prohibit action against all three of the defendant corporations. Although thus restrained from proceeding against the corporate defendants, the SEC, through its counsel, has indicated its intention to proceed independently against the individual defendants. If separate trials do therefore occur, it will be more convenient for more people to hold the trials in the Eastern District, where the defendants, principal witnesses and books and records are concentrated.

[7] This concentration in the Eastern District of Illinois of defendants, principal witnesses, books and records, and a bankruptcy court with jurisdiction over the books and records establishes a "clear balance of inconvenience" compelling this Court to transfer this case. Accordingly,

"Defendants' Motion Pursuant To 28 U.S.C. § 1404(a) For Entry Of Order Transferring This Cause To The United States District Court For The Eastern District of Illinois At Danville will be, and the same hereby is, *allowed*."

Dennis G. MARTIN, as Administrator of the Estate of Harry Eugene Walker, Deceased, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 72-3044-AAH.

United States District Court, C. D. California.

April 4, 1975.

Action was brought under the Federal Tort Claims Act for death of camper who was killed by grizzly bear in Yellowstone National Park. The District Court, Hauk, J., held that government was negligent in failing to provide camper adequate warnings about dangers posed by grizzly bears and in abruptly closing garbage dumps at which grizzly bears formerly fed, and that camper was not contributorily negligent.

Judgment for plaintiff.

1. Animals ⇐69

Whether camper who was killed by grizzly bear in Yellowstone National Park was a business invitee, a business licensee, a business visitor, or a gratuitous licensee, government had duty to camper of warning him and all other persons in park of hidden dangers and of dangers of camping or sleeping or walking near to and including the area where body was found. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

2. Animals ⇐69

Government was negligent as to camper who was killed by grizzly bear in Yellowstone National Park in willfully and intentionally discontinuing radio and visual monitoring of grizzly bear activity at time when government undertook the extra hazard of closing down garbage dumps. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

3. Animals ⇐71

Camper who was killed by grizzly not contributorily negligent. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

4. Death ⇐18(3)

No award for death of camper who was killed by grizzly bear in Yellowstone National Park would be made to camper's sisters who had left home and established their own families prior to camper's death.

5. Death ⇐84, 85, 88

Father, mother and sister who was living at home at time of death of camper who was killed by grizzly bear in Yellowstone National Park were entitled to recover from government burial expenses, loss of support, and loss of care, comfort, advice, society, nurture, in the proportion suffered by each. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

Zetterburg & Zetterburg, Stephen I. Zetterburg, Claremont, Cal., for plaintiff.

William D. Keller, U. S. Atty., Frederick M. Brosio, Jr., Asst. U. S. Atty., Chief, Civil Div., and William B. Spivak, Jr., Asst. U. S. Atty., for defendant.

MODIFIED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

HAUK, District Judge.

On December 20, 1972, a complaint under the Federal Tort Claims Act, being 28 U.S.C.A. Section 2671 et seq. and 28 U.S.C.A. Section 1346(b), having been filed in this Court against the United States of America as defendant, by Dennis G. Martin, Administrator of the Estate of Harry Eugene Walker, Deceased, pursuant to Letters of Administration duly issued to said Dennis G. Martin by the Superior Court of the State of California, County of Los Angeles, case number EAP-9456, Zetterberg & Zetterberg, and Stephen I. Zetterberg, attorneys for plaintiff, claiming damages for the wrongful death of Harry Eugene Walker, on behalf of the surviving mother and father and three sisters of said decedent, Harry Eugene Walker;

LAW LIBRARY

LOS ANGELES COUNTY

On or about September 14, 1972, the defendant United States of America having appeared by William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, and William B. Spivak, Jr., Assistant United States Attorney, and said defendant United States of America having answered, and the Court having heard and disposed of all motions and pre-trial proceedings, and the case having been brought to issue; and, the case having duly come on for trial before this Court, the Honorable A. Andrew Hauk, Judge presiding, on January 9, 1975, before the Court without a jury pursuant to the Federal Tort Claims Act, testimony having been taken January 9 through January 17, 1975, and the case having been recessed, and further testimony having been taken February 18 through February 24, 1975, evidence, oral, written, and documentary, having been introduced, and defendant United States of America having submitted evidence offered in behalf of its defense, and the parties having rested, and due deliberation having been had thereon by the Court:

I do decide as follows:

FINDINGS OF FACT

1. Decedent Harry Eugene Walker, age twenty-five on the date of his death, was killed by a grizzly bear on the night on June 24–25, 1972, while camping in the Old Faithful Subdistrict of Yellowstone National Park, State of Wyoming, United States of America.

2. Defendant owned, operated and maintained said National Park as a place to which members of the public, including decedent, were invited for recreational purposes, to the benefit of defendant.

3. Defendant's Rangers on duty when the decedent entered the Park at the north entrance of Yellowstone National Park permitted the decedent to enter without paying the usual admission charge.

4. In particular, defendant invited decedent, to camp within the confines of the Park, both within improved campgrounds and in backcountry, and defendant knew that many people did, at and before the date of decedent's death, in fact, camp and sleep out in the backcountry areas of the Park, and in the country in and adjacent to the developed area at Old Faithful, in the Old Faithful Subdistrict of the Park.

5. Defendant, through its various grizzly bear control programs, exerted control over the behavior of grizzly bears, including the particular bear that killed decedent, in that it could and did exert control over the number of bears, the ranges of the bears, including the bear that killed decedent, their diet, and the relative danger they posed to Park visitors.

6. Prior to decedent's death, defendant had abruptly closed backcountry garbage dumps, including Rabbit Creek garbage dump, about four miles from the Old Faithful developed area. This and other such garbage dumps had been used by grizzly bears for years as a part source of food. Defendant knew, from partial dump closures in 1968 and 1969, and from dump closures thereafter, that abrupt closure of the garbage dumps was an extremely hazardous activity. Defendant had been previously warned that if it carried out such abrupt closure, there could be a resulting visitor death from grizzly bear attack.

[1] 7. It was the duty of the defendant and its employees at Yellowstone National Park to warn all visitors, including decedent, of park dangers known to the defendant. Whether the decedent be said to be a business invitee, a business licensee, a business visitor, or a gratuitous licensee, the defendant at all times had a duty of warning him and all other persons in Yellowstone Park of hidden dangers and of dangers of camping or sleeping or walking near to and including the area where the body was found, which the Court finds was within a developed area. The defendant of decedent's death, that backpackers and hitchhikers were in the Old Faithful area, including the developed area, sleeping out at night. Warnings could have been made of the grizzly bear dangers to such campers resulting from the program of abrupt closing of garbage dumps undertaken by defendant. Such closing imposed an extra hazard of grizzly bear danger to campers and backpackers sleeping out in such area. Warnings could have been made by signs, and signs could have been made pointing to campgrounds and campsites within a reasonable distance. The Park willfully and intentionally failed to provide such warnings and place such signs despite the minimal cost thereof.

[2] 8. Furthermore, prior to 1968, the brothers Dr. Frank C. Craighead and Dr. John J. Craighead, through studies sponsored by many institutions, including the National Geographic Society, the National Science Foundation, and others, through the Montana Cooperative Wildlife Research Unit at the University of Montana, and by the Environmental Research Institute, by independent reserach conducted in Yellowstone National Park commencing in 1959, had developed a system of radio monitoring grizzly bears instrumented with radio collars, and of visually tagging grizzly bears, so that the habits, ranges, and movements of grizzly bears could be observed. The defendant, under the administration of Superintendent Anderson commencing in Yellowstone in 1968, willfully and intentionally stopped all of such radio monitoring and tracking as recommended by the Craigheads, and contrary to the defendant's own so-called "Leopold" report, discontinued monitoring and visual tracking, and willfully and intentionally removed devices recommended by the Craigheads for such monitoring, despite evidence which showed that radio monitoring devices could have been furnished and installed for between $3,000 and $6,000. The evidence shows that the defendant's administration at Yellowstone National Park, instead of discontinuing the monitoring plan, should have radio monitored bears which were trapped for transplanting, including the bear trapped in 1970, identified as number 1792, which killed Harry Walker in 1972. The evidence showed increased grizzly bear activity in and around the developed areas of Yellowstone National Park, which had been near the garbage dumps which were closed. It was negligent on the part of the defendant, at the time it undertook the extra hazard of closing down the garbage dumps, willfully and intentionally to discontinue radio and visual monitoring as recommended both by the Craighead brothers and by the defendant's "Leopold" committee. Defendant's own reports including the report prepared for the defendant by the National Academy of Sciences, showed that before the stopping of radio monitoring and of identifiable visual color markings which had been used by the Craigheads in grizzly studies before the Park administration changed in 1968, information and statistics on grizzly bear activities were more reliable and better than those available after the system was curtailed, starting in 1968. The defendant should have allowed independent research on the grizzly bear such as had been conducted by the Craighead brothers prior to 1968. The need for continued research was confirmed by the study made for the defendant by the National Academy of Sciences, which in July, 1974, reported that the research program carried out by the National Park Service administration since 1970 has been inadequate to provide the data essential for devising sound management policies for grizzly bears in the Yellowstone ecosystem.

9. The defendant adopted the "abrupt" program for closing of the dumps, rather than following the "phasing out" closure procedures as recommended by Dr. Frank Craighead. Both Dr. Craighead, and the "Leopold" committee appointed by the defendant, had recommended supplementary "carrion feeding" of the bears in the backcountry as a procedure which should have been

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adopted during the phasing out of the garbage dumps.

10. The bear that killed decedent, number 1792, was an old female, with worn and broken teeth, that had been captured and trapped in, and transplanted approximately 18 miles from, the developed area of the Old Faithful Subdistrict of Yellowstone National Park, by agents and rangers of the defendant, on about October 14, 1970. When the defendant trapped grizzly bear number 1792, it failed to transfer the bear a sufficient distance, considering grizzly bear homing instincts of which defendant had knowledge, to return to the Old Faithful area. The bear did again visit the area, where it killed the decedent. The Park Service at Yellowstone could and should have removed the bear a sufficient distance so that she would not have come back.

11. Defendant failed to exercise due care toward decedent in the following respects:

a. Defendant failed to provide decedent and other Park visitors adequate warnings about the dangers posed by grizzly bears, which defendant knew to be dangerous animals within the Park.

b. In carrying out its program of grizzly bear management and control, defendant abruptly closed garbage dumps in Yellowstone National Park at which grizzly bears formerly fed, thus negligently creating an unreasonable danger to Park visitors, including decedent, from grizzly bears, including this grizzly bear.

c. Defendant failed to take adequate precautions to mitigate the extreme danger created by abrupt closure of the garbage dumps, and failed to warn visitors, including decedent, of the special danger, although it could and should have done so at minimal cost and expense to it.

d. Defendant was aware of the dangers of grizzly bears to Park visitors. Defendant, knowing such dangers, did faultily planned, and negligently executed.

e. In 1970 defendant captured the particular bear that later killed decedent. Defendant then had knowledge that the bear was dangerous to visitors and was likely to return to the Old Faithful Subdistrict, but negligently failed to transplant the bear an adequate distance or to eliminate it from the grizzly bear population in Yellowstone National Park, in particular the Old Faithful Subdistrict thereof, including the developed area in and around Old Faithful Village.

Defendant was negligent in that it failed to act with reasonable prudence, considering the information available to it, concerning the particular bear that killed Harry Eugene Walker. Prior to the capture and transfer of this particular grizzly bear in October of 1970, it had been seen four to six times in the developed area of Old Faithful Village near a garbage holding area behind a restaurant, in an area frequented by humans thus displaying dangerous lack of respect for humans. Moreover, when the bear was captured in October, 1970, it was an old female grizzly; Dr. Frank Craighead testified that it would have been prudent to examine the bear's teeth, which in 1972 were found to be worn; the bear was less able to be competitive for food with younger and stronger bears, and therefore more likely to invade camp areas in search of food, making the bear unreasonably dangerous to humans. Further, at the time of its capture, defendant had knowledge that in late August or early September, 1970, along the Fire Hole River near the Old Faithful Developed area, a campsite had been destroyed by a bear, the owner of the campsite was missing, and never found, and the defendant rangers had determined the campsite had likely been destroyed by a bear, possibly a grizzly bear, but negligently failed to act with reasonable prudence in that defendant failed to consider the possibility that the

have been the bear which was trapped and transplanted in 1970, and which later killed Harry Eugene Walker.

12. As a sole, direct, and proximate result of each of the negligent acts and omissions of defendant, taken individually and together, including and as a direct and proximate result of the activity of abrupt closing of garbage dumps, and as a direct and proximate result of defendant's failure to avert an attack on the decedent by prudent control action on the grizzly bear which killed decedent, and as a direct and proximate result of the failure of the defendant and its employees to warn decedent of danger known to them but unknown to him, to wit, the danger of grizzly bears in Yellowstone National Park, and particularly in the Old Faithful Subdistrict and Old Faithful Village area of Yellowstone National Park, Harry Eugene Walker's death was caused.

[3] 13. The decedent was not contributorily negligent, and did not directly or indirectly contribute to the cause of his own death.

14. Decedent was trained and experienced in dairying, and particularly in operating the family dairy in Alabama, and plaintiffs had a reasonable expectation that he would operate the family dairy farm with his father, and manage and operate the farm on his father's illness and retirement, and his death caused the family, and each member thereof, loss of support, care, comfort, advice, society, and nurture in the amount hereinafter found as damages.

15. The practice in this part of Alabama was for dairies to be run in family partnership, including parent and son, or sons, and the decedent and his father had an understanding and agreement to so operate the dairy farm owned by decedent's mother and father.

[4] 16. Decedent's heirs entitled to recover damages for the wrongful death of Harry Eugene Walker are his father, Wallace R. Walker, his mother, Jessie

his death, and at the time of trial, was living at home. I make no award to decedent's older sisters, Betty Simmons and Caroline Crowe, since they had left home and established their own families prior to his death.

[5] 17. The family is entitled to recover burial expenses, loss of support, and loss of care, comfort, advice, society, nurture, in the proportion suffered by each. I find that the total damages suffered by the family to be: $1,217.67 paid by the father for burial expenses; $61,200.00 for loss of support, and $25,000.00 for non-pecuniary losses, totalling $87,417.67, plus costs, allocable as follows:

a. To the father, Wallace R. Walker, the sum of two-fifths (⅖th) of $61,200.00, that is, the sum of $24,480.00, plus $1,217.67 burial, plus $10,000.00 non-pecuniary loss, for a total of $35,697.67;

b. To the mother, Jessie Louise Walker, the sum of two-fifths (⅖th) of $61,200.00, that is, the sum of $24,480.00, plus $10,000.00 non-pecuniary loss, for a total of $34,480.00;

c. To the sister, Jenny Lynn Walker, the sum of one-fifth (⅕th) of $61,200.00, that is, the sum of $12,240.00, plus $5,000.00 non-pecuniary loss, for a total of $17,240.00

18. The plaintiff, Dennis G. Martin, is a resident of the State of California, and of the Central District of California, and is the duly-appointed Administrator of the Estate of Harry Eugene Walker, Deceased, appointed by order of the Superior Court of the State of California for the County of Los Angeles, and the judgment should be paid to him, to receive and disburse the funds in order to carry out the terms of the findings and the judgment.

19. Any Conclusions of Law deemed to be Findings of Fact are hereby incorporated in the foregoing Findings of Fact.

CONCLUSIONS OF LAW

1. Defendant United States of Amer-

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Park Service in Yellowstone National Park, was negligent, and failed to exercise due care towards the decedent, Harry Eugene Walker, in each of the several respects hereinabove specifically set forth in the findings of fact.

2. The negligence of the defendant, United States of America, was the sole, direct, and proximate cause of the death of Harry Eugene Walker on the night of June 24–25, 1972.

3. The decedent Harry Eugene Walker was not contributorily negligent and did not directly or indirectly contribute to the cause of his death.

4. The defendant has failed to establish any affirmative defense to plaintiff's action for wrongful death.

5. Plaintiff should have judgment in the amount of damages fixed by the Court, in the foregoing Findings of Fact, and for costs.

6. Any Findings of Fact deemed to be Conclusions of Law are hereby incorporated in the foregoing Conclusions of Law.

Let judgment be entered for plaintiff in accordance with these findings of fact and conclusions of law.

MODIFIED JUDGMENT

Upon the Court's own motion, and the Defendant United States of America having on March 31, 1975, filed its Objections to Plaintiff's Findings of Fact, Conclusions of Law and Judgment, one day within the two week time period after Plaintiff lodged his Findings of Fact and Conclusions of Law and Order for Judgment on March 18, 1975, all as ordered by the Court on February 24, 1975; and

The Court having inadvertently signed and entered its Judgment herein on March 26, 1975, prior to the receipt of Defendant's said objections; and

Good cause appearing therefor, the Court now makes, signs and orders entered its Modified Judgment, as follows·

The above-entitled action came on for trial before the Court, the Honorable A. Andrew Hauk, United States District Judge, sitting without a jury, prusuant to the Federal Tort Claims Act, 28 U.S.C. 1346 et seq., on January 9, 10, 13, 14, 15, 16 and 17, 1975, and February 18, 19, 20, 21 and 24, 1975, at Los Angeles, California, the plaintiff, Dennis G. Martin, duly appointed Administrator of the Estate of Harry Eugene Walker, Deceased, appearing in person and by his attorney, Stephen I. Zetterberg and Zetterberg & Zetterberg, of Claremont, California, and the defendant United States of America appearing by the United States Attorney for the Central District of California, William D. Keller, and Assistant United States Attorneys Frederick M. Brosio, Jr., Chief, Civil Division, and William B. Spivak, Jr., in person appearing for said defendant, and the Court having rendered its decision and having filed Modified Findings of Fact, Conclusions of Law, and Order for Judgment herein, now, pursuant to said Order for Judgment, it is hereby:

Ordered and adjudged, that the plaintiff, Dennis G. Martin, as Administrator of the Estate of Harry Eugene Walker, Deceased, have judgment against the defendant in the sum of $87,417.67, to be allocated to the survivors of Harry Eugene Walker, Decedent, as follows:

To Wallace W. Walker, father of the decedent, $35,697.67;

To Jessie Louise Walker, mother of the decedent, $34,480.00;

To Jenny Lynn Walker, sister of the decedent, who is over the age of 18 years, the sum of $17,240.00;

and for the costs and disbursements of plaintiff in this action, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court, in the sum of $_____.

Let this judgment be entered.

Louis Paul MATRANGA, Petitioner,

v.

UNITED STATES of America, Respondent.

Civ. A. No. 74-1801.

United States District Court, D. South Carolina, Columbia Division.

April 18, 1975.

Federal prisoner moved to have his sentence vacated on ground that he had been denied a speedy trial. The District Court, Hemphill, J., held that delay of approximately 15 months between petitioner's indictment and trial with ten others on charges involving conspiracy and burglary of federally insured banks did not deny petitioner his right to speedy trial where there was no intentional delay by government, no witness desired by petitioner was precluded from appearing because of delay, petitioner had approximately ten and one-half years remaining on a state sentence at time of delay, and petitioner did not assert right until 54 months after conclusion of trial.

Motion dismissed without hearing.

1. Criminal Law ⇐573

The right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇐573

Some of the factors which a court must assess in determining whether a defendant has been denied his right to speedy trial include length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇐573

Delay of approximately 15 months between petitioner's indictment and trial with ten others on charges involving conspiracy and burglary of federally insured banks did not deny petitioner his right to speedy trial where there was no intentional delay by government, no witness desired by petitioner was precluded from appearing because of delay, petitioner had approximately ten and one-half years remaining on a state sentence at time of delay, and petitioner did not assert right to speedy trial until 54 months after conclusion of trial. 28 U.S.C.A. § 2255; 18 U.S.C.A. § 4208(a)(2); U.S.C.A.Const. Amends. 5, 6, 14.

4. Criminal Law ⇐575

Petitioner's contention that 15⅓-month delay in his trial prejudiced him by foreclosing his right to have federal sentence run concurrently with Louisiana sentence on which he had ten and one-half years remaining at time of trial was speculative where petitioner was sentenced under statute providing him with an opportunity of earning release on parole if he applied himself to that end and where petitioner had an extensive history of prior criminal activity. 18 U.S.C.A. § 4208(a)(2); 28 U.S.C.A. § 2255; U.S.C.A.Const. Amends. 5, 6, 14; Fed.Rules Civ.Proc. rule 50(b), 28 U.S.C.A.

Louis Paul Matranga, pro se.

Jack L. Marshall, Asst. U. S. Atty., Columbia, S. C., for respondent.

ORDER

HEMPHILL, District Judge.

This matter comes before the court on a motion filed by Louis Paul Matranga under 28 U.S.C. § 2255.

Petitioner was one of eleven persons indicted in this District on January 31, 1969, in a thirteen-count indictment charging conspiracy and burglary of federally-insured banks located in several southern states. His conviction was subject to subsequent appeal [1] and, after

1. United States v. Walden, 448 F.2d 925 (4th Cir. 1971), 458 F.2d 36 (4th Cir. 1972), 464 nom. 409 U.S. 867, 93 S.Ct. 165, 34 L.Ed.2d 116 and 410 U.S. 969, 93 S.Ct. 1436, 35 L.

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FROM » »

ZETTERBERG & ZETTERBERG
Attorneys at Law
319 Harvard Avenue — Claremont, California 91711

TO » »

Dr. Frank Craighead, Jr.
P.O. Box 156
Moose, Wyoming 83012

ZETTERBERG & ZETTERBERG
ATTORNEYS AT LAW
319 HARVARD AVENUE
CLAREMONT, CALIFORNIA 91711

STEPHEN I. ZETTERBERG
CHARLES L. ZETTERBERG
DENNIS G. MARTIN

TELEPHONE
(714) 621-2971

December 6, 1976

Dr. Frank Craighead, Jr.
P.O. Box 156
Moose, Wyoming 83012

Dear Frank:

I enclose herewith a copy of the decision in the Walker case.

We have fourteen days from December 3 within which to petition for re-hearing, and then ninety days thereafter within which to petition the Supreme Court for hearing.

Of course, the Supreme Court will not be interested in delving into the facts, but might be interested in reviewing the standards of care followed by the government, and in the standards by which an appellate court reviews what a trial court has done. There are one or two other points. But in stating these matters we will be able to show the facts which were really not reviewed, namely, that the danger to visitors came from the Government's lack of proper management in closing the dumps, forcing the bears into the visitor area, the lack of due care in transplanting bear 1792, the lack of one single sign warning of grizzly bears, and the like.

I enclose an extra copy. If you have any marginal notes, let me have them.

I am sending a copy of this letter to John Craighead, and a copy to the Walkers.

Sincerely,

Stephen I. Zetterberg

SIZ:cj

Encs.

cc: John Craighead
Mr. and Mrs. Wallace Walker

FILED

DEC 3 1976

EMIL B. MELEI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS G. MARTIN, Administrator of the Estate of Harry Eugene Walker, Plaintiff-Appellee, vs. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 75-2918 OPINION

Appeal from the United States District Court
for the Central District of California

Before: BARNES and ELY, Circuit Judges, and VAN PELT, Senior District Judge*

VAN PELT, Senior District Judge

This is a Federal Tort Claims Act case. It arises by reason of the death of Harry Eugene Walker, age 25, who was unmarried, on June 25, 1972 in Yellowstone National Park following an attack by a grizzly bear. The trial judge, Judge A. Andrew Hauk, awarded damages of $87,417.67 allocated to decedent's father, mother and sister, plus costs. Defendant, United States of America, has appealed.

While the appellant and appellee do not agree as to the statement of the issues, it is believed that a fair statement of the questions presented by the appeal is:

1) Whether the Tort Claims Act exemption contained in 28 U.S.C. § 2680(a) bars a recovery in this case.

2) Whether the United States is liable under the facts of this case for the death of a hitchhiker attacked by a grizzly bear in Yellowstone National Park.

3) Whether the United States was guilty of willfully failing to warn the decedent of a dangerous condition under the facts of

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* Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

this case (The trial court,in effect, so found in finding No. 7.).

4) The standard of care owed by the United States of America to decedent, a hitchhiker, who paid no admission when he entered the park and was camping without permission in an unauthorized area.

5) Whether decedent was contributorily negligent, and if so, whether such negligence bars a recovery.

6) Whether omissions or negligence of the Park Service was the proximate cause of Walker's death.

7) Whether it is sufficient to prove that it was within the realm of possibility that bear Number 1792, which was sought after Walker's death, and killed, was the same bear that had disturbed a camp on Fire Hole River, where a man disappeared in September, 1970, or is the standard one of reasonable probability.

We conclude that our decision on the first issue makes unnecessary deciding the others although comment on some other questions is necessary in a full discussion of the facts.

Originally an issue was made of whether the California state court could appoint an administrator for the estate of an Alabama resident whose only asset was the wrongful death claim. It is not pressed in this court. Interestingly, all of the Yellowstone National Park bear cases have been brought in states other than Wyoming.

The record discloses that decedent Walker and a friend, Phillip Bradberry, who escaped the grizzly bear's attack and summoned aid for Walker, were hitchhiking into Yellowstone National Park on Thursday, June 22, 1972. Vikki Searer, a maid at Old Faithful Inn, was driving to her work in the park and gave them a ride. They arrived at the North park entrance about 5:00 p.m. Searer's car had a sticker on it which identified her as a park employee. She and the two hitchhikers were waved through the gate by the attendant. Thus the two hitchhikers paid no entrance fee and did not receive the brochures distributed to all park visitors,

which included a map of the park, a red folder entitled "Danger", and a pamphlet about bears. At the entrance to the park there is a large sign approximately 7 feet by 5 feet with a map on it, showing the designated campground areas and stating: "Overnight stopping permitted only in designated campgrounds." Searer testified that Walker and Bradberry asked her whether they needed a permit to camp and were told that they did and to obtain it at the Ranger Station. They said they did not want to go to the Ranger Station. When they asked her to recommend a good place to camp she again told them to go to the Ranger Station and get a camping permit. This they did not do. Had they gone to the Ranger Station or to the Visitors' Center they would have received pamphlets entitled "In Grizzly Country", a list of designated campgrounds, and a pamphlet entitled "Campground Management." The Rangers would also have evaluated their camping abilities and if entitled could have issued a back country permit and assigned them to a particular site regularly patrolled by the park Rangers.

The men left the Searer car near the girls' dorm for Old Faithful Inn and went to the upper geyser basin and the Old Faithful Geyser area. Here they walked on boardwalks which were posted with signs which advised staying on the boardwalks due to the thermal features. Nevertheless, the two left the boardwalks, walked into the forest, climbed a hill and pitched camp á considerable distance from the boardwalk. Decedent that evening called on Searer at the dorm and then returned to the campsite. The next evening both young men went to the dorm and Searer returned with them to their campsite. She told them they were too close to the geysers and would "catch hell" if caught at an unauthorized campsite. They told her of seeing paw prints, although they may have been joking. She told them she was scared and decedent and Searer returned to the dorm. She saw both hitchhikers the next day, after which the two men re-returned to the campsite and cooked dinner. They left a pot of food tied in a tree and returned to the dorm area in the evening. As they

returned to their campsite around midnight, Walker was attacked by a bear and killed. A sow grizzly, No. 1792, was trapped the next day at the Walker-Bradberry campsite, and killed.

The bear handling policies of Yellowstone Park, both in general and with respect to sow grizzly 1792, were the subject of testimony at the trial. The evidence showed that there had been a meeting at Yellowstone on September 6 and 7, 1970, to consider the management of grizzly bears. Present at this meeting were three members of the National Sciences Advisory Committee, the director of the National Park Service and some of his staff, Jack K. Anderson, Superintendent of Yellowstone, and some of his staff, as well as three consultants on grizzlies, Dr. John Craighead, Dr. Frank C. Craighead, and Dr. Charles E. Olmsted. Jack K. Anderson testified that everyone at the meeting was in agreement that the garbage dumps at the Park had to be closed to prevent the bears from feeding there. However, there was no consensus as to how this should be done. Essentially, there were two choices--the dumps could be phased out gradually or closed abruptly. Drs. Frank and John Craighead had studied the bears in Yellowstone for several years and maintained a laboratory there which was closed in 1970. They had prepared a 113 page report in 1967 for the National Park Service entitled "Management of Bears in Yellowstone National Park" recommending that any closure of garbage dumps be done slowly or the garbage be replaced with another food source, such as placing carrion out for the bears to eat. It was Dr. Frank Craighead's opinion, both in the report and at trial, that closing the dumps abruptly would cause a change in the movement and habits of the grizzly bears, and that they would tend to go into the campgrounds in search of food. At the September, 1970 meeting a report was presented (referred to as "the Leopold Report") by Dr. A. Starker Leopold, who was Chairman of the National Sciences Advisory Committee from its inception until April, 1972. This report stated that whether the closure of the dumps should be abrupt or gradual

depended upon judgment, as there was no data on the subject. The Leopold report did not adopt one theory over the other. Mr. Glen Cole, Chief Research Biologist at Yellowstone, had compiled park records on grizzly injuries to humans and past management of bears in the park and presented this information at the September meeting. The Park Service drew up an eleven point bear management program based upon the Leopold and Cole reports. The main thrust of this program was to cease feeding garbage to grizzly bears while maintaining the public safety. All members of the National Sciences Advisory Committee supported the abrupt closure decision, and the garbage dumps were closed down in 1970 and 1971. Superintendent Anderson testified that the decision to close the dumps abruptly was made because it was felt that the longer the bears had the garbage to feed upon the more they would rely on it, and new generations of cubs would become accustomed to human food. He also testified that a decision was made not to use supplemental carrion feeding because:

> I felt that we would be instituting another dangerous procedure by placing elk out, where people might wander into a grizzly on an elk unknowingly. Our putting the elk out there, because the implication was that they thought they should be close to campgrounds. And youngsters have a way of walking out of the campground into the wood;....

T. Vol. X, p. 1079, l. 18-23. Superintendent Anderson testified that precautions taken when the dumps were closed included sanitizing the campgrounds, expanding the information programs, extra night patrol Rangers, a six man Ranger team to move bears which appeared close to campgrounds and human areas, and the closure of some campgrounds.

The Government's evidence showed that in 1971, the year when the last park dump was closed, there were no injuries from bears for the first time in 15 years and no injuries again in 1973 and 1974. There were injuries in 1972, including Walker's death. The only two prior fatalities from grizzlies had been in 1907 and 1916. The Government's testimony was to the effect that the

bears encountered in camping areas has dropped each year since 1971.

Dr. Frank Craighead, who was called as a witness for plaintiff, testified that the Government was negligent in creating an unreasonable danger by abruptly closing the garbage dumps and failing to warn decedent and others of the dangers, and that the precautions undertaken were carelessly and faultily planned and negligently effected. With respect to bear No. 1792, Dr. Craighead testified that the Park Service was negligent and did not act with reasonable prudence when on October 14, 1970 it transported a grizzly bear, No. 1792, to Gibbon Meadows, which is 18 miles north of the Old Faithful area. It was Dr. Craighead's opinion that when a bear is transplanted no more than 50 miles away from where it is captured, the bear will soon return to the point of capture. He also testified it was likely that No. 1792 had invaded a camp on September 16, 1970; that it was within the realm of possibility that the bear that destroyed and invaded that camp, which in the record is frequently called the Fire Hole Camp or the Fire Hole River incident, was the same bear seen in the Old Faithful area the week prior to that incident and the same bear which was trapped and then transplanted to Gibbon Meadows. However, Dr. Leopold testified that he considered this a successful move, since bear No. 1792 did not show up for two years after the transplant and there was no evidence that No. 1792 was the bear responsible for the Fire Hole incident. Dr. Leopold testified that he also thought 18 miles was sufficient since the bear was moved well into the fall and at this time of year the campgrounds are not occupied and the bears are seeking a place to hibernate. Mr. Cole testified that there was no indication that Gibbon Meadows was not a good release site. He stated that some bears released 50 miles away return to the site of their capture and others that are released only 18 miles away do not return to the site of their capture. Dr. Arthur Pearson, a

research scientist with Canadian Wildlife Service, testified that often trapping a grizzly bear has a negative impact on the bear, and it will not return to the site at which it was trapped. Dr. Pearson also testified that "each translocation must be judged on its own merits as to whether it is successful" (T. Vol. XIV, p. 1508, l. 19-20) and that based on the knowledge that was available he thought it was reasonable to transplant the bear to Gibbon Meadows, and that the transplant was successful. It was his opinion that the bear was in her normal grizzly habitat at the time of the accident.

The foregoing is only a brief resume of the transcript which comprises 1745 pages, and relates particularly to the exercise by the Government employees of their discretionary functions and duties with respect to bear management.

The parties agree that this court is bound by Judge Hauk's findings of fact unless we find them to be clearly erroneous. In determining whether findings of fact are or are not clearly erroneous, we look to the teaching of United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), where it is stated:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This panel is firmly convinced that a mistake has been committed by the trial judge in certain of his findings and in entering judgment for the plaintiff. We are likewise firmly convinced that the case should be reversed and dismissed.

The Federal Tort Claims Act, 28 U.S.C. § 2680(a) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

We are convinced that the acts of the Park Service or Interior Department employees which Dr. Craighead said constituted negligence are within the protection of 28 U.S.C. § 2680(a) and the discretionary function rule enunciated in Dalehite v. United States, 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953). That case held that various decisions with respect to instituting a fertilizer export program, conducting further experiments regarding the combustibility of the fertilizer, and decisions regarding bagging temperature, bag labelling, fertilizer coating and bagging material were all made at a planning rather than operational level. The case specifically states that "all employees exercising discretion" are covered by the Act. Id. at 33. The summary of the record shows that the decision to abruptly close the garbage dumps was likewise made at the planning level. Superintendent Anderson, who issued the regulations and who made the decisions of which plaintiff and Dr. Craighead complain, was making a policy judgment. Even Dr. Craighead agreed at the trial that the handling of bears is a matter of judgment and someone must apply it. Similarly, we believe that the measures taken to prevent human-bear contact at this time were discretionary, as was the decision to transplant bear No. 1792 to Gibbon Meadows, 18 miles north of the Old Faithful area.

We do not believe it was the intention of Congress in enacting 28 U.S.C. § 2680(a) to fasten liability upon the defendant for its handling of bears generally or sow 1792 in particular when such discretion is exercised reasonably, after investigation, consultation, and reports by qualified experts in the field. It was not the intention of the Congress as we read the Federal Tort Claims Act and the enactments relating to Yellowstone Park, to make the defendant, United States of America, an insurer of the safety of all Yellowstone National Park visitors. Approval of the trial judge's findings and order would, in effect, do that. We should also note that our conclusions here find support

in Rubenstein v. United States, 338 F. Supp. 654 (N.D. Cal. 1972), a decision by Judge Spencer Williams which was affirmed by a panel of this court in 488 F.2d 1071.

We would further comment that it is clear that these two young men disregarded the advice and the warnings of Miss Searer and intentionally failed to go to the Ranger Station or the Visitors' Center. Thus they avoided receiving warnings about bears, both grizzly and black. It is clear that they camped in an area which they knew was unauthorized. All of the warnings which the Park Service could devise will do no good as to persons such as decedent and Bradberry who, in effect, refuse to put themselves in contact with persons from whom they would receive advice, including warnings, and by whom they would be told not to camp at a place they seemed determined to camp.

We again note that the two young men disregarded the warnings they did receive. To require the Park Service to post signs and warnings on every boardwalk, path or trail every few hundred feet throughout a park as extensive as Yellowstone would not only be prohibitive in cost but would destroy the park's beauty as well. To require the Park Service to search out from among the 25,000 daily visitors on the days decedent and Bradberry were in the park those two and any others who had entered the park without paying and without receiving the warning bulletins and to hold that failure to warn such individuals is actionable negligence is for the Congress and not for the courts. To date, as we read the Federal Tort Claims Act and the acts relating to Yellowstone in particular, and other national parks generally, the Congress has not intended such broad coverage. Fortunately there are but few who, like decedent and Bradberry, come in without paying the required fee and attempt to avoid receiving the services and advice, including warnings, which the Park Service provides. We find there is no credible evidence to support the trial judge's findings that the Park Service willfully failed to warn decedent of a dangerous condition. Instead, the trial court could well have

found that the decedent willfully disregarded the warnings he was given.

We would also note that in 1973 the Wyoming legislature passed a comparative negligence law which has been determined not to be retroactive. Therefore, the previous contributory negligence rule of Wyoming, which would bar recovery by decedent if there was any negligence on his part, is applicable in this case. The above recited facts show such contributory negligence and do not need to be repeated here.

This case is reversed and remanded with directions to the trial court to enter an order dismissing the complaint at the costs of the plaintiff.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

December 3, 1976

DEC 6 1976

TO ALL PARTIES

Re: C.A. No. 75-2918 MARTIN v. U.S.A.

Dear Counsel:

An opinion was filed and a judgment entered in the above case today, REVERSING and REMANDING the judgment of the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

Emil E. Melfi, Jr.
Clerk of Court

See Rules: 36, 40 and 41 of the Federal Rules of Appellate Procedure

CO 76.2

FILED

DEC 3 1976

EMIL B. MELEI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS G. MARTIN, Administrator of the Estate of Harry Eugene Walker, Plaintiff-Appellee, vs. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 75-2918 OPINION

Appeal from the United States District Court
for the Central District of California

Before: BARNES and ELY, Circuit Judges, and VAN PELT, Senior District Judge*

VAN PELT, Senior District Judge

This is a Federal Tort Claims Act case. It arises by reason of the death of Harry Eugene Walker, age 25, who was unmarried, on June 25, 1972 in Yellowstone National Park following an attack by a grizzly bear. The trial judge, Judge A. Andrew Hauk, awarded damages of $87,417.67 allocated to decedent's father, mother and sister, plus costs. Defendant, United States of America, has appealed.

While the appellant and appellee do not agree as to the statement of the issues, it is believed that a fair statement of the questions presented by the appeal is:

1) Whether the Tort Claims Act exemption contained in 28 U.S.C. § 2680(a) bars a recovery in this case.

2) Whether the United States is liable under the facts of this case for the death of a hitchhiker attacked by a grizzly bear in Yellowstone National Park.

3) Whether the United States was guilty of willfully failing to warn the decedent of a dangerous condition under the facts of

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* Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

this case (The trial court,in effect, so found in finding No. 7.).

4) The standard of care owed by the United States of America to decedent, a hitchhiker, who paid no admission when he entered the park and was camping without permission in an unauthorized area.

5) Whether decedent was contributorily negligent, and if so, whether such negligence bars a recovery.

6) Whether omissions or negligence of the Park Service was the proximate cause of Walker's death.

7) Whether it is sufficient to prove that it was within the realm of possibility that bear Number 1792, which was sought after Walker's death, and killed, was the same bear that had disturbed a camp on Fire Hole River, where a man disappeared in September, 1970, or is the standard one of reasonable probability.

We conclude that our decision on the first issue makes unnecessary deciding the others although comment on some other questions is necessary in a full discussion of the facts.

Originally an issue was made of whether the California state court could appoint an administrator for the estate of an Alabama resident whose only asset was the wrongful death claim. It is not pressed in this court. Interestingly, all of the Yellowstone National Park bear cases have been brought in states other than Wyoming.

The record discloses that decedent Walker and a friend, Phillip Bradberry, who escaped the grizzly bear's attack and summoned aid for Walker, were hitchhiking into Yellowstone National Park on Thursday, June 22, 1972. Vikki Searer, a maid at Old Faithful Inn, was driving to her work in the park and gave them a ride. They arrived at the North park entrance about 5:00 p.m. Searer's car had a sticker on it which identified her as a park employee. She and the two hitchhikers were waved through the gate by the attendant. Thus the two hitchhikers paid no entrance fee and did not receive the brochures distributed to all park visitors,

which included a map of the park, a red folder entitled "Danger", and a pamphlet about bears. At the entrance to the park there is a large sign approximately 7 feet by 5 feet with a map on it, showing the designated campground areas and stating: "Overnight stopping permitted only in designated campgrounds." Searer testified that Walker and Bradberry asked her whether they needed a permit to camp and were told that they did and to obtain it at the Ranger Station. They said they did not want to go to the Ranger Station. When they asked her to recommend a good place to camp she again told them to go to the Ranger Station and get a camping permit. This they did not do. Had they gone to the Ranger Station or to the Visitors' Center they would have received pamphlets entitled "In Grizzly Country", a list of designated campgrounds, and a pamphlet entitled "Campground Management." The Rangers would also have evaluated their camping abilities and if entitled could have issued a back country permit and assigned them to a particular site regularly patrolled by the park Rangers.

The men left the Searer car near the girls' dorm for Old Faithful Inn and went to the upper geyser basin and the Old Faithful Geyser area. Here they walked on boardwalks which were posted with signs which advised staying on the boardwalks due to the thermal features. Nevertheless, the two left the boardwalks, walked into the forest, climbed a hill and pitched camp a considerable distance from the boardwalk. Decedent that evening called on Searer at the dorm and then returned to the campsite. The next evening both young men went to the dorm and Searer returned with them to their campsite. She told them they were too close to the geysers and would "catch hell" if caught at an unauthorized campsite. They told her of seeing paw prints, although they may have been joking. She told them she was scared and decedent and Searer returned to the dorm. She saw both hitchhikers the next day, after which the two men re-returned to the campsite and cooked dinner. They left a pot of food tied in a tree and returned to the dorm area in the evening. As they

returned to their campsite around midnight, Walker was attacked by a bear and killed. A sow grizzly, No. 1792, was trapped the next day at the Walker-Bradberry campsite, and killed.

The bear handling policies of Yellowstone Park, both in general and with respect to sow grizzly 1792, were the subject of testimony at the trial. The evidence showed that there had been a meeting at Yellowstone on September 6 and 7, 1970, to consider the management of grizzly bears. Present at this meeting were three members of the National Sciences Advisory Committee, the director of the National Park Service and some of his staff, Jack K. Anderson, Superintendent of Yellowstone, and some of his staff, as well as three consultants on grizzlies, Dr. John Craighead, Dr. Frank C. Craighead, and Dr. Charles E. Olmsted. Jack K. Anderson testified that everyone at the meeting was in agreement that the garbage dumps at the Park had to be closed to prevent the bears from feeding there. However, there was no consensus as to how this should be done. Essentially, there were two choices--the dumps could be phased out gradually or closed abruptly. Drs. Frank and John Craighead had studied the bears in Yellowstone for several years and maintained a laboratory there which was closed in 1970. They had prepared a 113 page report in 1967 for the National Park Service entitled "Management of Bears in Yellowstone National Park" recommending that any closure of garbage dumps be done slowly or the garbage be replaced with another food source, such as placing carrion out for the bears to eat. It was Dr. Frank Craighead's opinion, both in the report and at trial, that closing the dumps abruptly would cause a change in the movement and habits of the grizzly bears, and that they would tend to go into the campgrounds in search of food. At the September, 1970 meeting a report was presented (referred to as "the Leopold Report") by Dr. A. Starker Leopold, who was Chairman of the National Sciences Advisory Committee from its inception until April, 1972. This report stated that whether the closure of the dumps should be abrupt or gradual

depended upon judgment, as there was no data on the subject. The Leopold report did not adopt one theory over the other. Mr. Glen Cole, Chief Research Biologist at Yellowstone, had compiled park records on grizzly injuries to humans and past management of bears in the park and presented this information at the September meeting. The Park Service drew up an eleven point bear management program based upon the Leopold and Cole reports. The main thrust of this program was to cease feeding garbage to grizzly bears while maintaining the public safety. All members of the National Sciences Advisory Committee supported the abrupt closure decision, and the garbage dumps were closed down in 1970 and 1971. Superintendent Anderson testified that the decision to close the dumps abruptly was made because it was felt that the longer the bears had the garbage to feed upon the more they would rely on it, and new generations of cubs would become accustomed to human food. He also testified that a decision was made not to use supplemental carrion feeding because:

> I felt that we would be instituting another dangerous procedure by placing elk out, where people might wander into a grizzly on an elk unknowingly. Our putting the elk out there, because the implication was that they thought they should be close to campgrounds. And youngsters have a way of walking out of the campground into the wood;....

T. Vol. X, p. 1079, l. 18-23. Superintendent Anderson testified that precautions taken when the dumps were closed included sanitizing the campgrounds, expanding the information programs, extra night patrol Rangers, a six man Ranger team to move bears which appeared close to campgrounds and human areas, and the closure of some campgrounds.

The Government's evidence showed that in 1971, the year when the last park dump was closed, there were no injuries from bears for the first time in 15 years and no injuries again in 1973 and 1974. There were injuries in 1972, including Walker's death. The only two prior fatalities from grizzlies had been in 1907 and 1916. The Government's testimony was to the effect that the

bears encountered in camping areas has dropped each year since 1971.

Dr. Frank Craighead, who was called as a witness for plaintiff, testified that the Government was negligent in creating an unreasonable danger by abruptly closing the garbage dumps and failing to warn decedent and others of the dangers, and that the precautions undertaken were carelessly and faultily planned and negligently effected. With respect to bear No. 1792, Dr. Craighead testified that the Park Service was negligent and did not act with reasonable prudence when on October 14, 1970 it transported a grizzly bear, No. 1792, to Gibbon Meadows, which is 18 miles north of the Old Faithful area. It was Dr. Craighead's opinion that when a bear is transplanted no more than 50 miles away from where it is captured, the bear will soon return to the point of capture. He also testified it was likely that No. 1792 had invaded a camp on September 16, 1970; that it was within the realm of possibility that the bear that destroyed and invaded that camp, which in the record is frequently called the Fire Hole Camp or the Fire Hole River incident, was the same bear seen in the Old Faithful area the week prior to that incident and the same bear which was trapped and then transplanted to Gibbon Meadows. However, Dr. Leopold testified that he considered this a successful move, since bear No. 1792 did not show up for two years after the transplant and there was no evidence that No. 1792 was the bear responsible for the Fire Hole incident. Dr. Leopold testified that he also thought 18 miles was sufficient since the bear was moved well into the fall and at this time of year the campgrounds are not occupied and the bears are seeking a place to hibernate. Mr. Cole testified that there was no indication that Gibbon Meadows was not a good release site. He stated that some bears released 50 miles away return to the site of their capture and others that are released only 18 miles away do not return to the site of their capture. Dr. Arthur Pearson, a

research scientist with Canadian Wildlife Service, testified that often trapping a grizzly bear has a negative impact on the bear, and it will not return to the site at which it was trapped. Dr. Pearson also testified that "each translocation must be judged on its own merits as to whether it is successful" (T. Vol. XIV, p. 1508, l. 19-20) and that based on the knowledge that was available he thought it was reasonable to transplant the bear to Gibbon Meadows, and that the transplant was successful. It was his opinion that the bear was in her normal grizzly habitat at the time of the accident.

The foregoing is only a brief resume of the transcript which comprises 1745 pages, and relates particularly to the exercise by the Government employees of their discretionary functions and duties with respect to bear management.

The parties agree that this court is bound by Judge Hauk's findings of fact unless we find them to be clearly erroneous. In determining whether findings of fact are or are not clearly erroneous, we look to the teaching of United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), where it is stated:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This panel is firmly convinced that a mistake has been committed by the trial judge in certain of his findings and in entering judgment for the plaintiff. We are likewise firmly convinced that the case should be reversed and dismissed.

The Federal Tort Claims Act, 28 U.S.C. § 2680(a) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to--
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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We do not believe it was the intention of Congress in enacting 28 U.S.C. § 2680(a) to fasten liability upon the defendant for its handling of bears generally or sow 1792 in particular when such discretion is exercised reasonably, after investigation, consultation, and reports by qualified experts in the field. It was not the intention of the Congress as we read the Federal Tort Claims Act and the enactments relating to Yellowstone Park, to make the defendant, United States of America, an insurer of the safety of all Yellowstone National Park visitors. Approval of the trial judge's findings and order would, in effect, do that. We should also note that our conclusions here find support

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found that the decedent willfully disregarded the warnings he was given.

We would also note that in 1973 the Wyoming legislature passed a comparative negligence law which has been determined not to be retroactive. Therefore, the previous contributory negligence rule of Wyoming, which would bar recovery by decedent if there was any negligence on his part, is applicable in this case. The above recited facts show such contributory negligence and do not need to be repeated here.

This case is reversed and remanded with directions to the trial court to enter an order dismissing the complaint at the costs of the plaintiff.