

April 1, 2008

TO: Neutrals
Mike Murray
Jason Waanders

FROM: Michael Stevens

SUBJECT: Negotiated rulemaking—question about rights of motorcyclists—**revised**

At the March 18-19, 2008 meeting of the negotiated rulemaking advisory committee for Cape Hatteras National Seashore, during the presentation of the “vehicle characteristics” work group, a debate arose about whether motorcycles should be allowed on Seashore beaches. During that debate, an assertion was made about a federal court decision holding that motorcycles may not be treated differently than any other vehicles. I was asked to research this question. My findings are as follows:

(1) I was unable to find a case that contains this specific holding. I searched cases regarding motorcycles in general, and a search of the most recent 600 federal cases that even contained the word “motorcycle” revealed nothing. I then searched all cases that addressed the twin concepts of “motorcycles” and “discrimination.” The vast majority of the cases I found had nothing to do with regulation of motorcycles per se, but with issues like alleged discrimination based on membership in a motorcycle club, prohibitions on wearing biker colors, discrimination cases involving motorcycle police officers, enforcement of helmet laws, allegations of discrimination based on disability that was caused by a motorcycle accident; or, interestingly, immigration cases where people sought asylum based on fear of terrorists in their home country, who often carry out attacks on innocent civilians from motorcycles.

I found only three motorcycle cases that were even remotely relevant, none of which supported the assertion. One case flat-out contradicted it: in Shanks v. Forsyth County Park Authority, Inc., 869 F. Supp. 1231 (M.D.N.C. 1994), a district court dismissed a lawsuit by a motorcyclist who alleged that a ban on motorcycles in a county park (note that this is in North Carolina) violated his constitutional rights. The court granted the park authority’s motion to dismiss, holding that the ban did not violate plaintiff’s rights to equal protection or substantive due process. In Northwest Motorcycle Ass’n v. USDA, 18 F.3d 1468 (9th Cir. 1994), the court affirmed a lower court’s upholding of a Forest Service decision to close certain trails to use by all ORVs, including motorcycles. Similarly, in Williams v. Bankert, 2007 U.S. Dist. LEXIS 77503 (D. Utah Oct. 18, 2007), the court affirmed a decision of the Interior Board of Land Appeals affirming BLM’s San Rafael Route Designation Plan that closed some routes to ORVs, including motorcycles.

(2) Thanks to Sandy Hamilton, I located another case that, although not involving motorcycles or vehicles in parks, was entirely on point with this question. In Personal Watercraft Industry Ass’n v. Dep’t of Commerce, 48 F.3d 540 (D.C. Cir. 1995), the court

upheld a regulation limiting the use of personal watercraft (PWCs) in a marine sanctuary. An industry group had challenged the regulation, alleging that it was arbitrary and capricious in treating PWCs differently from other vessels. 48 F.3d at 544. The district court agreed but the court of appeals reversed, holding that the differential treatment was necessary, reasonable and supported by the record. Id. at 546.

(3) Although this was beyond the scope of what I was asked, I searched the special regulations for NPS units that allow ORVs to determine their policies on motorcycles. My findings:

- (a) Gulf Island National Seashore allows operation of ORVs with a permit. 36 C.F.R. § 7.12(b)(2)(ii). However, it will not issue a permit for motorcycles, or any vehicle that does not have 4-wheel drive capability. Id., § 7.12(b)(2)(vi).
- (b) Fire Island National Seashore issues driving permits only to vehicles with 4-wheel drive capability. 36 C.F.R. § 7.20(a)(7)(ii).
- (c) Gateway National Recreation Area prohibits operation of motorcycles on an oversand vehicle route or beach. 36 C.F.R. § 7.29(b)(5).
- (d) Assateague Island National Seashore permits travel by motorcycles only on public highways and parking areas. 36 C.F.R. § 7.65(b)(3)(ii).
- (e) Cape Cod National Seashore prohibits motorcycle operation on oversand routes. 36 C.F.R. § 7.67(a)(5)(vi).

The only national seashore that allows motorcycles is Padre Island, which manages ORVs and motorcycles through the same regulations. 36 C.F.R. §7.75(a). However, as Jason Waanders has pointed out, at Padre Island the beach is considered a road under state law, and so the seashore may have little choice but to allow them.

The regulations of one other unit that allows ORVs, Big Cypress National Preserve, do not specifically mention motorcycles. See generally 36 C.F.R. § 7.86(a). However, the Preserve's 2000 ORV management plan implicitly prohibits motorcycles by not including them among the types of vehicles that are permitted. See ORV plan at 34, 112-115.

Tentative conclusion: I found no case law supporting the proposition that motorcycles may not be regulated differently from motor vehicles. To the contrary, the available case law clearly supports the conclusion that motorcycles may be regulated differently, or even prohibited, as long as the regulation has a rational basis and is supported by the record. The survey of NPS special regulations bears this out. However, Jason Waanders' point is worth reiterating: NPS is not required, as a matter of law, to regulate motorcycles differently, and may allow them, again as long as the decision is well-reasoned and supported by the record.

I admit that my research was not exhaustive. However, I feel comfortable stating that, based on the search parameters I used, it is highly unlikely that I overlooked a significant federal (I did not research state law) case that contradicts this conclusion. If the interested party has any more information that would allow me to refine my search, I would be happy to revisit the issue before providing a definite answer.