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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SUSAN LOYE, et al.,

CASE NO. CV F 10-1581 LJO GSA

Plaintiffs,

**ORDER ON GOVERNMENT’S F.R.Civ.P.  
12(b)(1) MOTION TO DISMISS  
(Doc. 19.)**

vs.

UNITED STATES OF AMERICA,

Defendant.

\_\_\_\_\_ /

**INTRODUCTION**

Defendant United States of America (“Government”) seeks to dismiss plaintiff Susan Loye’s (“Ms. Loye’s”) personal injuries claims arising from her fall from steps (“steps”) at Yosemite National Park (“YNP”) as barred by the discretionary function exception of the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680. The Government further seeks to dismiss the loss of consortium claim of plaintiff Kenneth Loye (“Mr. Loye”), Ms. Loye’s husband, in the absence of Ms. Loye’s viable claims. Mr. and Ms. Loye (collectively the “Loyes”) contend that construction of the steps failed to implement a policy to comply with building codes to bar the discretionary function exception. This Court considered the Government’s F.R.Civ.P. 12(b)(1) motion to dismiss on the record without a hearing, pursuant to Local Rule 230(g). For the reasons discussed below, this Court DISMISSES the Loyes’ claims.

1 **BACKGROUND**

2 **Summary**

3 During the late afternoon of May 23, 2009, Ms. Loye walked up the steps from a viewing area  
4 to a parking lot at YNP’s Olmsted Point, lost her balance, fell onto rocks adjacent to the steps, and  
5 suffered significant injuries. In their Complaint for Damages (“complaint”), the Loyes allege that the  
6 steps were negligently constructed and maintained because they lacked handrails or guardrails, have a  
7 confusing rise and run, were bordered by jagged boulders, and did not comply with mandatory building  
8 requirements. The Loyes further fault the National Park Service’s (“NPS”) failure to warn of the steps’  
9 risk to visitors. The Government contends that NPS was not subject to building requirements as to the  
10 steps and that NPS’ design and construction of the steps is subject to FTCA’s discretionary function  
11 exemption to bar the Loyes’ claims.

12 **Rehabilitation Of Olmsted Point Steps**

13 Olmsted Point is the largest overlook on YNP’s Tioga Road, is a popular viewing area, and  
14 provides views of YNP’s granite landscape, including Half Dome, Cloud’s Rest and Tenaya Lake.  
15 Olmsted Point includes small parking and viewing areas, which are surrounded by slopes dotted with  
16 large boulders. On one side of the viewing area, eight granite steps lead to a short exposed aggregate  
17 path to a junction to three trails leading to points of interest. The steps provide access from the parking  
18 lot to the viewing area.

19 In 2005 and 2006, NPS engaged in the Olmsted Point Rehabilitation Project (“rehabilitation  
20 project”) to rehabilitate and improve the parking and viewing areas because of eroded rock footings in  
21 the parking and viewing areas and the non-maintained trail extending to the viewing area. NPS decided  
22 to alter the short rock-lined path leading down the slope from the viewing area to the trail junction. The  
23 Government explains that the alterations did not change the path’s alignment but were designed to  
24 accommodate terrain grade changes and to maintain the existing path entrance by constructing eight trail  
25 connection steps and replacing interior trail steps with a continuous exposed aggregate surface. The  
26 Government notes that NPS chose the rise and run of the steps and omitted a handrail or guardrail to  
27 preserve the area’s natural terrain and Olmsted Point views. The Loyes characterize the steps as “an  
28 integral part” of the rehabilitation project.

1 After its September 2006 completion, YNP Superintendent Mike Tollefson (“Superintendent  
2 Tollefson”) described the rehabilitation project as “an incredible balance between protecting our natural  
3 areas and improving access to one of the most distinctive panoramas in the world.”

#### 4 **Building Codes Requirements**

5 The Loyes note that Superintendent Tollefson made “a policy decision” that the rehabilitation  
6 project “comply with applicable building codes.” The Loyes point to the rehabilitation project’s Project  
7 Manual and Specifications (“bid set”), which were published on July 15, 2005 and sent to all contractors  
8 who wished to bid on the rehabilitation project. The bid set’s section 1.14 addresses “Regulatory  
9 Requirements” and states:

10 The codes and regulations together with local amendments when applicable  
11 adopted by the State and other government authorities having jurisdiction shall establish  
minimum requirements for this project. This project shall comply with the following:

- 12 1. Uniform Building Code (UBC) [1997 edition]
- 13 2. Uniform Building Code Standards (UBCS) [1997 edition]
- 14 3. Uniform Fire Code (UFC) [1997 edition]
- 15 4. California Building Code [1998 edition]
- 16 5. California Code of Regulations.

17 In his deposition, landscape architect Doug Nelson (“Mr. Nelson”) testified that the bid set’s regulatory  
18 requirements covered the rehabilitation project, including the steps, and that the bid set accurately  
19 reflected rehabilitation project requirements. The Loyes explain that the bid set gave potential bidders  
20 information for an accurate bid to meet rehabilitation project requirements and to provide a full  
21 understanding of the scope of work. Rehabilitation project coordinator Michael Pieper (“Mr. Pieper”)  
22 testified:

23 Q. So at least in terms of the point at which the bid was put, the representation to  
24 bidders was that these regulatory requirements would apply to the contract they  
were bidding on, right?

25 . . .

26 A. This is what they were told, what’s written in here, yes.

#### 27 **Failure To Comply With Building Codes**

28 Mr. Pieper testified that he lacked authority to deviate the steps from building code compliance.

1 The Loyes identify only Superintendent Tollefson and accessibility coordinator Larry Harris (“Mr.  
2 Harris”) as the “two people with that authority.” Superintendent Tollefson testified that he did not recall  
3 giving anybody permission to build the steps out of building code compliance. Mr. Harris responded  
4 “No” to the question: “Did you ever give permission for those stairs to be built out of compliance with  
5 any building codes?” Mr. Harris testified that he made no determination whether building codes applied  
6 to the steps.

7 Mr. Pieper testified that he was primarily responsible to determine building code compliance for  
8 the rehabilitation project. Mr. Pieper further testified: “My job was to insure that the work was  
9 completed in compliance with the National Park Service requirements” and to do so, he needed to know  
10 NPS requirements for building code compliance.

11 Mr. Nelson testified that “[t]here was an assumption that the codes did not apply” to the steps  
12 because the steps were part of the trail and that he relied on NPS personnel to make such determination.

13 Mr. Pieper testified that “[w]e did make an assessment” as to the steps UBC compliance and  
14 “they weren’t in compliance.” Mr. Pieper noted that during construction, Mr. Pieper and Mr. Nelson  
15 discussed that the steps did not comply with building codes. Nonetheless, Mr. Nelson testified that he  
16 designed the rehabilitation project as to the building codes “[i]n a general way, as these applied, as we  
17 believed these applied.”

#### 18 **Absence Of Handrails**

19 Mr. Pieper testified that there was discussion to eliminate permissibly handrails for the steps to  
20 avoid view obstruction. Mr. Nelson testified that handrails were omitted “[b]ecause these were  
21 considered trail steps and not – not designed with accessibility considerations.” Mr. Nelson further  
22 testified that during discussions with NPS personnel, “one of the design considerations was . . . minimize  
23 vertical elements” to warrant handrail elimination. Mr. Nelson understood that the steps did not need  
24 to comply with accessibility regulations.

#### 25 **Steps’ Rise And Run**

26 Mr. Pieper testified that the steps’ rise and run were higher and longer than permitted by code.  
27 Mr. Pieper further testified that the steps’ rise and run decision was made by “a combination” of Mr.  
28 Pieper “along with other people in the park and the designers.” Mr. Pieper further testified as to the

1 decision:

2 Q. . . . But there was no obstruction or impairment to view caused by the rise and  
3 run of the steps, was there?

4 A. No. But what it would have meant is, these stairs would have had to be carried  
5 out further. . . . [I]f we changed the rise and run – say we reduced the rise, we  
6 would have to carry the steps out and the ground kept falling. So we’d have to  
7 get out here a lot further which means it was more impairment of the view again  
8 the further we carried it.

9 Mr. Pieper further testified that he discussed with Mr. Nelson “[t]hat we were going to have to make the  
10 rise enough to make the connection with the existing trail without protruding out so far that it became  
11 an obstruction again to the natural terrain and the rip rap.”

12 Mr. Nelson testified that the steps’ rise and run was determined by his office without NPS  
13 involvement and that NPS did not prohibit an extension of the steps’ landing. Mr. Nelson testified that  
14 he was unfamiliar with UBC or CBC rise and run requirements for stairs.

### 15 ADA Accessibility

16 The Loyes note that YNP accessibility coordinator Mr. Harris confirmed that NPS policy  
17 required compliance with the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12111-12117.

18 Mr. Harris testified:

19 Q. And we’ve established that the NPS is required to comply with the ADA?

20 A. Correct.

21 Q. And we’ve established that it’s not a choice, that they’re required to do it, right?

22 . . .

23 A. My answer to you is that the policies are the national park policies applying to  
24 accessibility rule and standards has been accommodated in the project because  
25 they’re included in the requirements to the designer to implement them.

26 Mr. Harris further testified that new design and construction projects are required to comply with  
27 accessibility standards and guidelines, which were to apply uniformly to NPS parks. Mr. Harris noted  
28 that he lacked discretion to withhold application of ADA laws and standards. Mr. Harris testified: “Once  
you make that determination that it is and needs to be accessible, then all the codes and regulations,  
UFAS, ADA and all building codes appropriate to ADA accessibility then applied, regardless. You can’t  
get around them.”

1 The Loyes note that stairs meet the definition of “facility” under the ADA Accessibility  
2 Guidelines (“ADAAG”) and Uniform Federal Accessibility Standards (“UFAS”). The ADAAG define  
3 facility as “[a]ll or any portion of buildings, structures, site improvements, complexes, equipment, roads,  
4 walks, passageways, parking lots, or other real or personal property located on a site.” The UFAS define  
5 facility as “[a]ll or any portion of a building, structure or area, including the site on which such building,  
6 structure or area is located, wherein specific services are provided or activities performed.”

7 The Loyes point out that the ADAAG and UFAS impose minimal requirements for newly  
8 constructed facilities, including an “accessible route” to connect accessible spaces and elements of a  
9 facility and “handrails on both sides of all stairs.” The Loyes conclude that absence of handrails for the  
10 rehabilitation project violated the ADAAG and UFAS.

11 The Government points out that accessibility coordinator Mr. Harris determined that accessibility  
12 guidelines were inapplicable to proposed path alterations because the steps lead to an area that was not  
13 designed or created to be accessible by walkway or sidewalk. Mr. Harris testified that “you don’t have  
14 to have an accessibility path of travel from the landing because you’re not going anywhere that’s  
15 accessible. That includes the steps. The steps are not an accessibility path of travel.” Mr. Harris further  
16 testified:

17 . . . we did not need an accessible path of travel from the upper landing area, down  
18 through the work that they were proposing to do on the trail, which included the steps.  
19 It didn’t require me to do any further investigation because that was my determination.

20 It didn’t require me to look up any codes or regulations specifically, because I  
21 believed I was following the requirements of the Director’s Order to provide . . . as much  
22 accessibility as we possibly can and wherever we can.

23 The Government notes that Mr. Harris evaluated the steps’ safety and accessibility and concluded  
24 that bringing disabled persons to the graveled and sanded terrain was a safety hazard and that the vista  
25 was already accessible from the viewing area for all persons. The Government concludes that NPS did  
26 not design the path alterations to comply with the accessibility guidelines which were inapplicable  
27 because the trail was not accessible by walkway or sidewalk.

### 28 **Plaintiffs’ Claims**

The complaint alleges that at 4:15 p.m. on May 23, 2009, Ms. Loye walked up the granite steps  
from the viewing area to the parking lot to depart and fell off the edge of a step onto ornamental boulder-

1 sized jagged rocks. The complaint alleges Ms. Loye suffered “catastrophic injuries,” including blunt  
2 force head trauma, anoxic brain injury, cervical spine fractures, seizures, and residual cognitive and  
3 neurological disability.

4 The complaint alleges a (first) negligence; premises liability claim that the area where Ms. Loye  
5 was injured constituted a dangerous condition because:

- 6 1. The steps “lacked exterior guardrails, handrails, grab bars or other safety features”;
- 7 2. The Government “incorporated and maintained an unguarded drop-off” onto the  
8 boulders;
- 9 3. The “steps incorporated an inappropriate, unsafe and confusing rise and run”;
- 10 4. The “steps were constructed and maintained in violation of applicable building, safety,  
11 construction, and engineering codes and industry standards”;
- 12 5. The Government “failed to remove or protect against injury by the large jagged  
13 boulders”; and
- 14 6. “[T]here was a failure to comply with the mandatory requirements of NPS Management  
15 Policies, 2006, and Director’s Order No. 50, as well as other directives and statutes.”

16 The claim alleges that the rehabilitation project violated mandatory NPS and Department of Interior  
17 regulations which Government employees lack discretion to violate and including the California  
18 Building Code, Uniform Building Code, National Park Services Management Policies, 2006 § 8.2.5.1,  
19 National Park Service Director’s Order 50, 50B and 50C, and “A Sense of Place: Design Guidelines For  
20 Yosemite Valley” (2004). The claim further alleges that the Government “did not act to remedy, warn  
21 or eliminate the risk presented to park visitors.”

22 The complaint alleges a (second) loss of consortium claim that Mr. Loye has suffered the loss  
23 of Ms. Loye’s love and companionship.

24 The complaint seeks recovery for the Loyes’ medical expenses and emotional distress.

### 25 **DISCUSSION**

#### 26 **F.R.Civ.P. 12(b)(1) Motion To Dismiss Standards**

27 The Government contends that the discretionary function exception bars invocation of this  
28 Court’s subject matter jurisdiction.

1 F.R.Civ.P. 12(b)(1) authorizes a motion to dismiss for lack of subject matter jurisdiction.  
2 Fundamentally, federal courts are of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S.  
3 375, 377, 114 S.Ct. 341 (1994). A “court of the United States may not grant relief absent a  
4 constitutional or valid statutory grant of jurisdiction.” *U.S. v. Bravo-Diaz*, 312 F.3d 995, 997 (9<sup>th</sup> Cir.  
5 2002). “A federal court is presumed to lack jurisdiction in a particular case unless the contrary  
6 affirmatively appears.” *Stock West, Inc. v. Confederated Tribes*, 873 F. 2d 1221, 1225 (9<sup>th</sup> Cir. 1989).  
7 Limits on federal jurisdiction must neither be disregarded nor evaded. *Owen Equipment & Erection Co.*  
8 *v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396 (1978). “When subject matter jurisdiction is challenged  
9 under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order  
10 to survive the motion.” *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9<sup>th</sup> Cir.  
11 2001).

12 When addressing an attack on the existence of subject matter jurisdiction, a court “is not  
13 restricted to the face of the pleadings.” *McCarthy v. U.S.*, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988). In such a  
14 case, a court may rely on evidence extrinsic to the pleadings and resolve factual disputes relating to  
15 jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9<sup>th</sup> Cir.), *cert. denied*, 493 U.S. 993, 110 S.Ct.  
16 541 (1989); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9<sup>th</sup> Cir. 1987); *Augustine v. United States*, 704  
17 F.2d 1074, 1077 (9<sup>th</sup> Cir. 1983); *Smith v. Rossotte*, 250 F.Supp.2d 1266, 1268 (D. Or. 2003) (a court  
18 “may consider evidence outside the pleadings to resolve factual disputes apart from the pleadings”).

19 No presumptive truthfulness attaches to a plaintiff's allegations, and the existence of disputed  
20 material facts does not preclude evaluation of the merits of jurisdictional claims. *Thornhill Pub. Co.,*  
21 *Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9<sup>th</sup> Cir. 1979). On a factual attack of a  
22 complaint with affidavits or other evidence, “the party opposing the motion must furnish affidavits or  
23 other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage v.*  
24 *Glendale Union High School*, 343 F.3d 1036, 1040, n. 2 (9<sup>th</sup> Cir. 2003).

25 When a court considers “items outside the pleading” on a F.R.Civ.P. 12(b)(1) motion, the court  
26 resolves “all disputes of fact in favor of the non-movant.” *Dreier v. United States*, 106 F.3d 844, 847  
27 (9<sup>th</sup> Cir. 1996). The Ninth Circuit Court of Appeals explains that “where the district court has properly  
28 considered items outside the complaint in considering a motion to dismiss, the standard we apply upon



1 de novo review of the record is similar to the summary judgment standard that the district court  
2 purported to apply.”

3 With these standards in mind, this Court turns to the Government’s challenges to subject matter  
4 jurisdiction.

### 5 FTCA’s Discretionary Function Exception

6 The Loyes seek to invoke this Court’s subject matter jurisdiction under the FTCA to pursue their  
7 claims.

8 The FTCA is a “limited waiver of sovereign immunity, making the Federal Government liable  
9 to the same extent as a private party for certain torts of federal employees acting within the scope of their  
10 employment.” *United States v. Orleans*, 425 U.S. 807, 813, 96 S.Ct. 1971 (1976). The FTCA waives  
11 the federal government’s sovereign immunity when its employees are negligent within the scope of their  
12 employment. *Faber v. United States*, 56 F.3d 1122, 1124 (9<sup>th</sup> Cir. 1995).

13 FTCA’s immunity waiver is limited by the discretionary function exception, which bars claims  
14 “based upon the exercise or performance or the failure to exercise or perform a discretionary function  
15 or duty on the part of a federal agency or an employee of the Government, whether or not the discretion  
16 involved be abused.” 28 U.S.C. § 2680(a). The discretionary function exception “restores the  
17 government’s immunity in situations where its employees are carrying out governmental or ‘regulatory’  
18 duties.” *Faber*, 56 F.3d at 1124. “The purpose of the discretionary function exception is to protect the  
19 ability of the government to proceed with decisionmaking in carrying out its unique and vital functions  
20 without ‘second-guessing’ by the courts as to the appropriateness of its policy choices.” H.R. Rep. No.  
21 1015, 101<sup>st</sup> Cong. 2<sup>nd</sup>. Sess. 134 (1991).

22 The Government “bears the burden of proving the applicability of one of the exceptions to the  
23 FTCA’s general waiver of immunity” because such an exception “is analogous to an affirmative defense”  
24 to correctly place the burden on “the party which benefits from the defense.” *Prescott v. United States*,  
25 973 F.2d 696, 702 (9<sup>th</sup> Cir. 1992). “Although the plaintiff bears the initial burden of proving subject  
26 matter jurisdiction under the FTCA, ‘the United States bears the ultimate burden of proving the  
27 applicability of the discretionary function exception.’” *Faber*, 56 F.3d at 1124 (quoting *Prescott*, 973  
28 F.2d at 701-702).

## Two-Step Analysis

1  
2           The United States Supreme Court has articulated and refined a two-part test to determine whether  
3 a claim is subject to the discretionary function exception. *See United States v. Gaubert*, 499 U.S. 315,  
4 322, 325, 111 S.Ct. 1267, 1273, 1275 (1991); *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536,  
5 108 S.Ct. 1954, 1958 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig*  
6 *Airlines)*, 467 U.S. 797, 813, 820, 104 S.Ct. 2755, 2764, 2768 (1984); *Dalehite v. United States*, 346  
7 U.S. 15, 36, 73 S.Ct. 956, 968 (1953). The first step requires determination whether any “federal statute,  
8 regulation, or policy specifically prescribes a course of action for an employee to follow.” *Gaubert*, 499  
9 U.S. at 322, 111 S.Ct. at 1273 (citing *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958). If so, the  
10 discretionary function exception does not apply because there is no element of judgment or choice in  
11 the complained of conduct. *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273. In the absence of an element  
12 of judgment or choice, “the inquiry is at an end.” *Blackburn*, 100 F.3d at 1429. Discretion is removed  
13 “under the FTCA when it is embodied in a specific and mandatory regulation or statute which creates  
14 clear duties incumbent upon the governmental actors.” *Kennewick Irr. Dist. v. U.S.*, 880 F.2d 1018,  
15 1026 (9<sup>th</sup> Cir. 1989). Nonetheless, a general regulation or policy “does not remove discretion unless it  
16 specifically prescribes a course of conduct.” *Kelly v. United States*, 241 F.3d 755, 761 (9<sup>th</sup> Cir. 2001).

17           To determine whether the complained of conduct was grounded in judgment or choice, the  
18 crucial first step is to determine exactly what conduct is at issue. *Autery v. United States*, 992 F.2d 1523,  
19 1527-1528 (11<sup>th</sup> Cir. 1993), *cert. denied*, 511 U.S. 1081, 114 S.Ct. 1829 (1994). “The nature of the  
20 conduct involved governs whether the so-called discretionary function exception applies.” *Cunningham*  
21 *v. United States*, 786 F.2d 1445, 1446 (9<sup>th</sup> Cir. 1986). Negligence “is irrelevant to our inquiry at this  
22 point. Governing administrative policy, not the [defendant’s] knowledge of danger, determines whether  
23 certain conduct is mandatory for purposes of the discretionary function exception.” *Autery*, 992 F.2d  
24 at 1527-1528.

25           If an element of choice or judgment is involved, the second step of the analysis is invoked to  
26 determine whether the challenged discretionary acts “are of the nature and quality that Congress intended  
27 to shield from tort liability.” *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764. Decisions that require  
28 choice are exempt from suit under the FTCA if they are “susceptible to policy judgment” and involve

1 an exercise of “political, social, [or] economic judgment.” *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275;  
2 *Varig Airlines*, 467 U.S. at 820, 104 S.Ct. at 2768. “When established governmental policy, as  
3 expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise  
4 discretion, it must be presumed that the agent's acts are grounded in policy when exercising that  
5 discretion.” *Gaubert*, 499 U.S. at 624, 111 S.Ct. 1267. Where there is room for policy judgment and  
6 decision, there is discretion of the sort protected by 28 U.S.C. § 2680(a). *Dalehite*, 346 U.S. at 36, 73  
7 S.Ct. at 968. “[I]f judicial review would encroach upon this type of balancing done by an agency, then  
8 the exception would apply.” *Chamberlin v. Isen*, 779 F.2d 522, 523 (9<sup>th</sup> Cir. 1985) (quoting *Begay v.*  
9 *United States*, 768 F.2d 1059, 1064 (9<sup>th</sup> Cir. 1985)).

10 Moreover, “[t]he challenged decision need not be actually grounded in policy considerations.”  
11 *Miller v. United States*, 163 F.3d 591, 593 (9<sup>th</sup> Cir. 1998). The discretionary function exception applies  
12 “[e]ven if the decision is an abuse of the discretion granted.” *Terbush v. United States*, 516 F.3d 1125,  
13 1129 (9<sup>th</sup> Cir. 2008).

## 14 **Steps Design And Construction**

### 15 ***Mandatory Course Of Action***

16 The Government argues that “there are no federal statutes, regulations, or policies that created  
17 a clear duty to which the NPS had to adhere in designing, constructing, and maintaining the steps at  
18 Olmsted Point.” The Loyes accuse Mr. Pieper of failing to implement an NPS policy to require “the  
19 stairs to comply with applicable building codes.”

20 The Government faults the Loyes’ reliance on the NPS’ 2006 Management Policies  
21 (“Management Policies”) and points to the Management Policies’ section 8.2.5.1 which provides in part:

22 These management policies do not impose park-specific visitor safety prescriptions. The  
23 means by which public safety concerns are to be addressed is left to the discretion of  
24 superintendents and other decision-makers at the park level who must work within the  
25 limits of funding and staffing. Examples include decisions about whether to install  
26 warning signs . . . or install guardrails . . . . Some forms of visitor safeguards typically  
27 found in other public venues – such as fences, railings, and paved walking surfaces –  
28 may not be appropriate or practicable in a national park setting.

26 The Government contends that the Management Policies fail to establish a “specifically  
27 prescribed federal policy” to address the design or construction of the Olmsted Point steps.

28 The Government challenges the Loyes’ reliance on Director’s Orders 50, 50B, 50C, 58 and 83

1 in that Director’s Orders “are guidelines setting forth the goal of visitor safety at national parks, not  
2 specific mandates to that end.” *See Terbush*, 516 F.3d at 1137 (“Reading through the document [NPS-  
3 50], one is hard pressed to find any mandatory requirements applicable here. That discovery should be  
4 no surprise in light of the document's intended role as a policy guideline.”); *Blackburn*, 100 F.3d at 1431  
5 (“Although the policy manuals [NPS 50 and others] outline general policy goals regarding visitor safety,  
6 they do not set out the specific means by which the NPS employees are to meet these general goals.”)  
7 The Government concludes that the Director’s Orders fail to preclude application of the discretionary  
8 function exception.

9         The Government further faults the Loyes’ reliance on Director’s Order 42, the Uniform Building  
10 Code, and the California Building Code in that they provide no mandates to install handrails for the  
11 Olmsted Point steps or to utilize a particular rise and run for the steps. The Government notes that the  
12 Uniform Building Code applies to buildings, not projects such as the Olmsted Point steps. The  
13 Government continues that application of the California Building Code would violate the U.S.  
14 Constitution’s Supremacy Clause “by constituting a direct and intrusive regulation by the State of the  
15 Federal Government’s operation of its property at Yosemite” and “would do violence to the main  
16 purposes and objectives underlying the National Park System: visitor enjoyment and resource  
17 protection.” *Blackburn*, 100 F.3d at 1435.

18         The Government challenges the Loyes’ reference to “A Sense of Place Design Guidelines for  
19 Yosemite Valley” given that the document notes: “The guidelines should be aides to decision-making  
20 rather than prescriptions or formulas.” The Government concludes that absence of a mandatory course  
21 of action prong of the discretionary function exception is met in that NPS’ “design decisions require  
22 balancing resource preservation with public access.”

23         The Loyes fail to challenge directly the Government’s points regarding Management Policies,  
24 Director’s Orders, and “A Sense of Place Design Guidelines for Yosemite Valley.” Rather, the Loyes  
25 rely on the bid set’s reference to codes and regulations as an NPS policy that the rehabilitation project  
26 “would comply with specified building codes” which Superintendent Tollefson instituted. The Loyes  
27 characterizes “Mr. Pieper’s job [as] merely to implement the decision made by” Superintendent  
28 Tollefson. The Loyes point to Mr. Pieper’s acknowledgment that he “permitted the stairs to be built out

1 of code” although he had “no rightful option but to adhere” to Superintendent Tollefson’ directive. The  
2 Loyes conclude that Mr. Pieper’s conduct “in permitting the stairs to deviate from applicable building  
3 codes could not ‘appropriately be the product of judgment or choice’” to preclude the discretionary  
4 exception.

5 The Government responds that the bid set “required the YNP to exercise its discretion to  
6 determine the extent to which the codes listed in Part 1.14, if any, should be applicable to the trail  
7 connection steps” and “do not specify which of the codes listed in Part 1.14 are applicable to which  
8 aspects of the Rehabilitation Project.” The Government characterizes the bid set as “subject to  
9 interpretation.” An “engineering standard” must be “‘embodied in a specific and mandatory regulation  
10 or statute which creates clear duties incumbent upon the government actors’ before we can conclude that  
11 failure to satisfy such a standard is a non-discretionary act.” *GATX/Airlog Co. v. United States*, 286 F.3d  
12 1168, 1177 (9<sup>th</sup> Cir. 2002) (quoting *Kennewick Irrigation*, 880 F.2d at 1026). The Government further  
13 points to Mr. Nelson’s testimony that codes did not apply to the steps because they are part of the trail.  
14

15 The Loyes fail to demonstrate that the bid set and its reference to codes and regulations constitute  
16 a prescribed course of action which precludes the discretionary function exception. The bid set does not  
17 constitute a federal statute, regulation or policy. The Loyes emphasize NPS alleged wrongdoing rather  
18 than isolate a directive which eliminates discretion. The Loyes’ failure to pinpoint a requisite directive  
19 dooms their challenge to the discretionary function exception.

20 In addition, the Government notes that NPS considered accessibility during the Olmsted Point  
21 steps’ design process and concluded that handrails were unnecessary since the steps are the start of the  
22 trail which is beyond an accessible area. The Government explains that the Olmsted Point parking lot  
23 and viewing area were designed with accessibility guidelines but the trail connection steps separated  
24 these accessible areas and were part of the inaccessible trail segment and wilderness area. The  
25 Government points out that since there is no regulation that a trail connection is a “program” under the  
26 Rehabilitation Act, 29 U.S.C. §§ 701, et seq., accessibility coordinator Mr. Harris “considered aesthetics,  
27 safety, the terrain and other factors in assessing whether accessibility guidelines applied.”

28 The Loyes respond that rehabilitation project “documents” incorporate the “policy decision that

1 new construction, including the subject stairs, were required to comply with accessibility standards . .  
2 . embodied in the ADAAG and UFAS.” The Loyes contend that the ADAAG and UFAS require  
3 handrails even if the stairs lead to an inaccessible path.

4 The Loyes fail to demonstrate that the ADAAG and UFAS apply to the rehabilitation project,  
5 which address national park areas clearly rendered inaccessible under ADA standards. The steps lead  
6 to hiking trails beyond the purview of the ADA and accessibility considerations. The Loyes fail to  
7 substantiate that the rehabilitation project constitutes a site to which the ADAAG and UFAS apply. The  
8 Loyes fail to overcome the discretionary function exception in the absence of an applicable directive  
9 requiring handrails.

#### 10 *Policy Judgment*

11 The Government argues that the policy judgment prong of the discretionary function exception  
12 is met in that in rehabilitating the Olmsted Point, NPS followed goals of the 1916 Organic Act, 16  
13 U.S.C. §§ 1, et seq., to preserve the “scenery and natural and historic objections” to “leave them  
14 unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. The Government argues that no  
15 accessibility guidelines were invoked for the Olmsted Point steps due to safety concerns and absence  
16 of the trail’s end point or destination to limit access for disabled persons.

17 The Government contends that the design decision of the Olmsted Point steps “balanced the  
18 goals of maintaining the view in its natural setting, including trail connection steps consistent with the  
19 granite surroundings, and visitor access and safety.” The Government argues that the decision to omit  
20 handrails balanced “visitor safety with preservation of the aesthetic beauty of a national park.” The  
21 Government further argues that the steps’ “rise and run” were designed to conform and blend with and  
22 not obstruct the existing natural terrain. The Government further points to the steps’ design difficulties  
23 arising from the terrain’s “naturally dropping off on a slope.” The Government notes that NPS balanced  
24 considerations and concluded that the trail connection steps “were safely designed.”

25 The Loyes offer nothing meaningful to challenge the policy judgment prong of the discretionary  
26 function exception. The Government demonstrates room for policy judgment and decision to design and  
27 construct the rehabilitation project to enhance YNP aesthetics, in particular, sight lines to avoid view  
28 obstruction. The record reveals that the rehabilitation project sought to preserve scenery and in turn

1 promote NPS policy.

2 **Failure To Warn**

3 The Government contends that the discretionary function exception bars the Loyes' failure to  
4 warn claims.

5 "The entire process, including identifying hazards, determining which hazards require a warning,  
6 and determining how and when and where the warning should proceed, involves discretion." *Terbush*,  
7 516 F.3d at 1137. The Management Policies' "broad mandate to warn the public of and protect it from  
8 special hazards involves the exercise of discretion in identifying such hazards, in determining which  
9 hazards require an explicit warning and in determining the precise manner in which to warn it of those  
10 hazards." *Blackburn*, 100 F.3d at 1431.

11 The Government faults the Loyes' inability to identify "a specific mandate for warnings" for the  
12 Olmsted Point steps and to "overcome the legal precedent that public policy considerations are involved  
13 in balancing access to, and preservation of natural resources, with warning of potential hazards." The  
14 Government argues that discretionary decisions arise with hazard identification and warning, including  
15 the nature of warning, to subject a failure to warn claim to the discretionary function exception.  
16 Warning decisions "are policy-based" to require NPS "to balance access with safety, and take into  
17 account conservation and resources in designing area plans and making individual trail determinations."  
18 *Childers v. United States*, 40 F.3d 973, 976 (9<sup>th</sup> Cir. 1994), *cert. denied*, 514 U.S. 1095, 115 S.Ct. 1821  
19 (1995).

20 The Loyes offer nothing to challenge the Government's failure to warn arguments. This Court  
21 agrees with the Government that the "entire process" surrounding warnings involves discretion to invoke  
22 the discretionary function exception.

23 **Loss Of Consortium**

24 The Government argues that Mr. Loye's loss of consortium claim is "derivative" of and fails with  
25 Ms. Loye's claims.

26 A "common law rule has arisen, granting either spouse the right to recover for loss of consortium  
27 caused by negligent injury to the other spouse." *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382,  
28 393, 525 P.2d 669 (1974). "[I]n California each spouse has a cause of action for loss of consortium .

1 . . caused by a negligent or intentional injury to the other spouse by a third party.” *Rodriguez*, 12 Cal.3d  
2 at 409, 525 P.2d 669. Loss of consortium requires the allegedly injured spouse to have a viable claim.  
3 “Since he [plaintiff] has no cause of action in tort his spouse has no cause of action for loss of  
4 consortium.” *Blain v. Doctor's Co.*, 222 Cal.App.3d 1048, 1067, 272 Cal.Rptr. 250 (1990).

5 Mr. Loye’s loss of consortium claim fails with application of the discretionary function  
6 exception, which bars Ms. Loye’s claims.

7 **CONCLUSION AND ORDER**

8 For the reasons discussed above, this Court:

- 9 1. DISMISSES with prejudice the Loyes’ claims;  
10 2. DIRECTS the clerk to enter judgment in favor of defendant United States of America  
11 and against plaintiffs Susan Loye and Kenneth Loye; and  
12 3. VACATES the February 14, 2012 pretrial conference and March 26, 2012 trial.

13 IT IS SO ORDERED.

14 **Dated: October 12, 2011**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**

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