TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

STATEMENT OF THE CASE/INTRODUCTION

The Grand Canyon Private Boaters Association (˘˝GCPBA˘˝) is a non-profit public interest group formed in 1996. AR 050535. Its purpose is to represent and advocate for the interests of recreational river runners in regard to management issues at the Grand Canyon. Id. More than one thousand river runners belong to GCPBA, an all-volunteer organization. Id.

GCPBA filed litigation in 2000 to cause the National Park Service (˘˝NPS˘˝) to resume river management planning after that effort was cancelled in 2000. Facts, ˘˝ 22.1 NPS settled the case by agreeing to restart the planning process and complete a new Colorado River Management Plan (˘˝CRMP˘˝) by 2004. Id.

In response to the Draft Environmental Impact Statement (˘˝DEIS˘˝), GCPBA filed joint comments supporting the Park Service˘˝s proposed action, along with Grand Canyon River Outfitters Association, American Whitewater, and the Grand Canyon River Runners Association. AR 050534-41; Facts ˘˝ 28. The joint comments ˘˝are a product of ˘˝a major and historic achievement, the coming together of Grand Canyon user groups that traditionally have been embroiled in deep conflict regarding core Colorado River management issues.˘˝ AR 050534. This challenge to the NPS˘˝s final action approving the new CRMP followed in 2006.

STANDARD OF REVIEW

Under the Administrative Procedure Act (˘˝APA˘˝), the Court reviews agency action to determine that it is not ˘˝arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.˘˝ 5 U.S.C. ˘˝ 706(2)(A). The ˘˝arbitrary and capricious test is a narrow scope of review of agency factfinding.˘˝ Ariz. Cattle Growers˘˝ Ass˘˝n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001) (citing Abbott Labs

References to ˘˝Facts ˘˝ x˘˝ are to the Federal Defendants˘˝ and Defendant-Intervenors˘˝ Joint Statement of Material Facts in Support of Summary Judgment.

v. Gardner, 387 U.S. 136 (1967)). Under this narrow scope of review, the reviewing court determines whether the agency ˘˝articulated a rational connection between the facts found and the choice made.˘˝ Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003) (quoting Pub. Citizen v. DOT, 316 F.3d 1002, 1020 (9th Cir. 2003)). Overall, ˘˝[a]s long as the agency decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency˘˝s action as arbitrary and capricious.˘˝ Ariz. Cattle Growers˘˝ Ass˘˝n, 273 F.3d at 1236 (citations omitted). Furthermore, while the court may not ˘˝rubber-stamp˘˝ agency decisions ˘˝that are inconsistent with a statutory mandate or that frustrate congressional policy underlying a statute,˘˝ id. (citing NRLB v. Brown, 380 U.S. 278, 291-92), once the Court is ˘˝satisfied that an agency˘˝s exercise of discretion is truly informed, ˘˝[it] must defer to that informed discretion.˘˝˘˝ Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (citations omitted).

ARGUMENT

I. THE NATIONAL PARK SERVICE IS PROPERLY MANAGING THE COLORADO RIVER CORRIDOR FOR WILDERNESS CHARACTER CONSISTENT WITH APPLICABLE AUTHORITIES

Plaintiffs argue that the NPS is violating a duty under the Wilderness Act (˘˝Act˘˝), the 1976 Master Plan, the 1996 General Management Plan, and the NPS Management Policies to manage the Colorado River corridor for its wilderness character. Plaintiffs contend that the National Park Service (˘˝NPS˘˝) has violated this duty by authorizing continued motorized uses in the Colorado River corridor in the CRMP. Specifically, plaintiffs claim

that the NPS has failed in managing the Colorado River corridor because authorization of motorized activities impairs the wilderness character of the corridor.

A. THE WILDERNESS ACT AND WILDERNESS DESIGNATION PROCESS

The Wilderness Act contains a detailed process for giving federal public land statutory recognition as ˇ˝wilderness,ˇ˝ but does not prescribe the management standards while that land is still wending its way through the process. 16 U.S.C. ˇ˝˝˝ 1131, et seq. Other authorities may do so, but the Act is silent. Id.

The Wilderness Act requires the Secretary of Interior to evaluate the lands within his or her jurisdiction for inclusion by Congress in the National Wilderness Preservation System. 16 U.S.C. ˇ˝ 1132(c). The first step in this process requires the National Park Service to evaluate the suitability of its lands for designation as wilderness based on the criteria in the Wilderness Act. SAR 016135. Next, the NPS conducts ˇ˝wilderness studiesˇ˝ that identify the areas suitable for immediate wilderness designation or potential wilderness designation. SAR 016136. ˇ˝Potential wildernessˇ˝ is lands ˇ˝that do not ˇ˝ qualify for immediate [wilderness] designation due to temporary, non-conforming, or incompatible conditions,ˇ˝ as opposed to lands that meet the requirements of the Wilderness Act and qualify for immediate designation. Id.

The NPS then forwards its study findings to the Secretary of Interior as ˇ˝proposed wilderness.ˇ˝ Id. The Secretary recommends to the President the lands for inclusion in the National Wilderness Preservation System and the President, in turn, transmits the recommendation to the Congress. Id. Upon enactment of legislation establishing the wilderness areas, the land becomes a designated wilderness area. Id.

Pursuant to the Grand Canyon Enlargement Act of 1975, 16 U.S.C. ˇ˝ 228i-1, SAR 003037-41, and the Wilderness Act, 16 U.S.C. ˇ˝ 1132(c), in 1976 the Secretary of Interior conducted a study of the roadless areas of Grand Canyon National Park to determine the suitability of those lands for inclusion in the National Wilderness Preservation System. See Facts ˇ˝˝˝ 5, 7. The study resulted in the ˇ˝1976 Preliminary Wilderness Proposal,ˇ˝ which identified the Colorado River corridor as a ˇ˝potential wilderness addition, pending finalization of the river management plan.ˇ˝ SAR 003079; Facts ˇ˝ 7. The River corridor qualified only as a ˇ˝potentialˇ˝ wilderness due to motorized boat use. Id. Motors enabled the use of larger boats and group sizes but precluded the Colorado River corridor from meeting the criteria of ˇ˝providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation.ˇ˝ Id.

In 1980, the NPS proposed that the river corridor be designated ˇ˝potential wilderness.ˇ˝ AR 093675, AR 093891, and SAR 005770-005893; Facts ˇ˝ 7. At the time of the 1980 Wilderness Recommendation, the Colorado River Management Plan required the phase-out of motorized boats. SAR 005785; Facts ˇ˝ 18. As such, the river corridor was recommended ˇ˝as potential wilderness pending the phase-out of non-wilderness use by motorized craft.ˇ˝ SAR 005787. The so-called ˇ˝Hatch Amendmentˇ˝ curtailed the planned phase-out of motors. SAR 005900; Facts ˇ˝ 18. The amendment prohibited federal funds from ˇ˝being used in the implementation of any management plan for the Colorado River within the Grand Canyon National Park which reduces the number of user days or passenger launches for commercial motorized watercraft excursions for the preferred use periodˇ˝below that which was authorized for the same period in calendar year 1978.ˇ˝ SAR 005896; Facts ˇ˝ 18.

The 1993 Update to the Final Wilderness Recommendation similarly recommended that the Colorado River be ˇ˝designated potential wilderness addition pending resolution of the motorized riverboat question.ˇ˝ SAR 008307; Facts ˇ˝ 8. NPS opined that the river corridor could not be recommended for immediate designation as wilderness because the levels of motorized use in 1993 ˇ˝probably contradict[ed] the intent of the wilderness designation.ˇ˝ Id. In addition, the 1993 Update recommended that a provision be included in any wilderness legislation giving the Secretary the power to reclassify potential wilderness as wilderness when non-conforming uses ceased. Id. Congress has not yet acted on the Wilderness Recommendation, however. AR 093675, AR 095089; Facts ˇ˝ 9. As such, the Colorado River corridor remains a potential wilderness area.

Currently, in the interim between wilderness recommendation and Congressional action, NPS follows the NPS Management Policies and the planning documents for the Grand Canyon National Park in managing proposed and potential wilderness areas. The FEIS states, ˇ˝Until Congress acts on Grand Canyon National Park Wilderness Recommendation, this section of the Colorado River will be managed as potential wilderness in accordance with NPS Management Policies and the Grand Canyon National Park Wilderness Recommendation as updated in 1993.ˇ˝ AR 093892; Facts ˇ˝

10. The NPS has complied with these policies. Furthermore, the NPS has complied with the Grand Canyon National Park planning documents for managing potential wilderness areas.

B. THE NPS IS MANAGING THE COLORADO RIVER CORRIDOR IN ACCORDANCE WITH APPLICABLE AUTHORITIES

i. The Wilderness Act does not apply to management of potential wilderness.

The Wilderness Act, 16 U.S.C. ˇ˝ˇ˝ 1131, et seq., requires that ˇ˝each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the areaˇ˝.ˇ˝ 16 U.S.C. ˇ˝ 1133(b) (emphasis added). No lands within the Park have been designated as wilderness.2 The Colorado River corridor has the status of a ˇ˝potential wilderness additionˇ˝ because of the transient, non-conforming motorized uses. AR 093891 (ˇ˝Action on this [1993 Wilderness] recommendation is still

The NPS has assessed the impact of the CRMP on wilderness character. AR 094645-67; Facts ˇ˝ 53. To evaluate the CRMPˇ˝s impact on wilderness character, the NPS, in the FEIS, adopted the ˇ˝definitions and concepts developed through an interagency process to establish a framework for monitoring conditions related to wilderness characterˇ˝ˇ˝ AR 093894. The framework utilizes the four Wilderness Act qualities of: untrammeled (essentially unhindered and free from human control), natural (ecological systems free from effects of humans), undeveloped (without permanent improvements), and outstanding opportunities for solitude or a primitive and unconfined type of recreation. Id.; See 16 U.S.C. ˇ˝ 1131(c); Facts ˇ˝ 53. The CRMP excludes ˇ˝untrammeledˇ˝ from consideration because of the impact and permanent presence of the Glen Canyon Dam. Id.

pendingˇ˝). By definition, a potential wilderness is an area with uses that are inconsistent

with the Wilderness Act. See NPS Management Policies, SAR 016136.

Because Congress thus far has declined to act on the wilderness designation, the NPS uses its internal guidance documents for management of the river corridor as a potential wilderness area. The FEIS states, ˇ˝Until Congress acts on Grand Canyon National Park Wilderness Recommendation, this section of the Colorado River will be managed as potential wilderness in accordance with NPS Management Policies and the Grand Canyon National Park Wilderness Recommendation as updated in 1993.ˇ˝ AR 093892; Facts ˇ˝ 10.

ii. The CRMP complies with the NPS Management Policiesˇ˝ requirement that the NPS ˇ˝seek to removeˇ˝ non-conforming uses from proposed potential wilderness areas.

The NPS Management Policies guide management of all NPS lands. SAR 016073-206. Chapter Six of the Management Policies, ˇ˝Wilderness Preservation and Management,ˇ˝ directs management of wilderness areas and areas with wilderness characteristics in national parks. SAR 016134-143. In adopting the Management Policies, the National Park Service extended its duty to all lands under its administration that exhibit some wilderness character. SAR 016135. The Management Polices, unlike the Wilderness Act, define wilderness to ˇ˝include the categories of suitable, study, proposed, recommended, and designated wilderness. Potential wilderness may be a subset of any of these five categories.ˇ˝ SAR 016136.

While potential wilderness areas are included in the agency˘´s definition of wilderness, the Management Policies explicitly recognize the unique challenges to administration of them. Potential wilderness includes lands ˘´that do not ˘´ qualify for immediate [wilderness] designation due to temporary, non-conforming, or incompatible conditions.˘´ Id. The general policy for management of wilderness resources requires NPS to:

take no action that would diminish the wilderness suitability of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed. Until that time, management decisions pertaining to lands qualifying as wilderness will be made in expectation of eventual wilderness

designation. Id.

In managing proposed potential wilderness, however, the Policies mandate that NPS manage it ˘´as wilderness to the extent that existing non-conforming conditions allow.˘´ SAR 016137 (emphasis added). In addition, the NPS ˘´should seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation.˘´ Id. (emphasis added).

The plain language of the Management Policies sets only an aspirational standard for the removal of non-conforming uses from potential wilderness areas. The Management Policies do not state that the NPS ˘´shall˘´ remove all non-conforming uses immediately. Rather, NPS must try, i.e. ˘´seek to remove,˘´ those uses. SAR 016137.

There is a long history of potential wilderness areas with temporary, non˘´conforming, or incompatible uses -- much like the motors in the Grand Canyon -- eventually becoming actual designated wilderness. For example, Congress designated potential wilderness in Chiricahua National Monument, Haleakala National Park, Isle Royale National Park, Joshua Tree National Monument, and Shenandoah National Park. SAR 012096; Pub. L. No. 84-567. Thereafter, the Secretary of the Interior exercised the authority to designate the potential wilderness as actual wilderness when the uses ˘´prohibited by the Wilderness Act have ceased.˘´ Pub. L. No. 84-567; Pub. L. No. 95˘´

625. See also 48 Fed. Reg. 12,842 (March 28, 1983) (designating 138 of 231 acres of potential wilderness in Isle Royale National Park as wilderness); 62 Fed. Reg. 28,729 (May 27, 1997) (designating 3,502.2 acres of potential wilderness as wilderness in Joshua Tree National Park); 67 Fed. Reg. 6,944 (Feb. 14, 2002) (designating 5,449 acres of potential wilderness as wilderness in Haleakala National Park). In sum, areas with temporary, non-conforming uses can ˘´graduate˘´ to full wilderness status. The prior conflicting uses do not disqualify them.

The CRMP complies with the Management Policies for administration of potential wilderness areas, and Plaintiffs do not show the contrary. See Pl. Br. 6-10. The FEIS and ROD demonstrate that the NPS has decreased the presence of motorized boats in the river corridor by creating a 6 ˘´ month motor-free period each year. AR 093701. NPS has also reduced the maximum group size and maximum trip length. AR 093701.3 Therefore, the NPS has greatly limited the temporary, non-conforming use of motorized boats from the potential wilderness of the Colorado River corridor, fulfilling its duty under the Management Policies.

iii. The CRMP fulfills the requirements of the Grand Canyon planning documents, including the General Management Plan, regarding wilderness character.

Plaintiffs also claim that the NPS violated its duty to protect the wilderness character, as required by the Grand Canyon General Management Plan (˘´GMP˘´), by allowing motorized uses in the CRMP. Pl. Br. 3-5. Plaintiffs ignore the fact that the GMP sets the broad management objectives but leaves it to the CRMP to set the specific objectives for the Colorado River corridor. The GMP ˘´provides a foundation from which to protect park resources while providing for meaningful visitor experiences.˘´ AR 093352. NPS issued the Grand Canyon

General Management Plan in 1995. SAR 010126-99; Facts ˇ˝ 19. In accord with the NPS Management Policies, the GMP requires that the NPS ˇ˝treats all proposed wilderness areas as wilderness˝ˇ˝ SAR 010188. Additionally, a Management Objective states: ˇ˝Manage areas meeting the criteria for wilderness designations as wilderness.ˇ˝ SAR 010138. Finally, the GMP states that the

Specifically, whereas the previous plan prohibited motors only from September 15 to December 15, the 2005 CRMP extends the ˇ˝no motorsˇ˝ months from September 16 to March 31. Id.; Facts ˇ˝ 48. The maximum group size, including guides, for commercial motor trips was decreased from forty-three year around to thirty-two in the summer season (May to August) and twenty-four in the remainder of the year. Id.; Facts ˇ˝ 42. In addition, maximum trip length of commercial motor trips was shortened by eight days in the summer and by six days in the shoulder seasons.

management of proposed wilderness areas ˇ˝should preserve the wilderness values and character.ˇ˝ SAR 010137.

The GMP defers the duty for management of the Colorado River corridor to the CRMP, however. SAR 010188; Facts ˇ˝ 20. Regarding the relationship between the two plans, the FEIS states that ˇ˝the management objectives in the General Management Plan were developed with the presumption that discrete objectives would be developed specifically for the Colorado River Management Plan.ˇ˝ AR 093670. Furthermore, the GMP expressly recognizes that only the CRMP will address the use of motorized boats on the Colorado River. SAR 010188 (ˇ˝The use of motorboats will be addressed in the revised [Colorado River Management] plan, along with other river management issues identified in the scoping process.ˇ˝); SAR 010142 (ˇ˝Provide a wilderness river experience on the Colorado River (this objective will not affect decisions regarding the use of motorboats on the river).ˇ˝).

C. AUTHORIZATION OF TEMPORARY, NON-CONFORMING USES DOES NOT PERMANENTLY INJURE WILDERNESS CHARACTER OR PROHIBIT EVENTUAL WILDERNESS DESIGNATION.

i. Areas with non-conforming uses remain eligible for wilderness designation.

Plaintiffs argue that the NPS violated the Wilderness Act by authorization of ˇ˝temporary or transientˇ˝ motor use on the Colorado Rivers. As discussed above, however, the Wilderness Act applies, by its terms, to designated wilderness areas only. Furthermore, plaintiffs contradict themselves by arguing that ˇ˝there is nothing temporary nor [sic] transient about the disturbances caused by motorized boats,ˇ˝ while conceding that the ˇ˝Colorado River qualifies as potential wilderness because transient motorboat use can be phased out.ˇ˝ Pl. Br. 12. As shown above, the NPS can allow non-conforming uses in potential wilderness areas if eventual elimination of these uses will leave areas ˇ˝unimpaired for future use and enjoyment as wilderness.ˇ˝ SAR 016135.

The underlying assumption of Plaintiffsˇ˝ argument appears to be that wilderness

designation is reserved only for pristine, untouched wilderness. This is not so. The

definition of wilderness requires only that ˇ˝the imprint of manˇ˝s work is substantially

unnoticeable.ˇ˝ 16 U.S.C. ˇ˝ 1131(c)(3). The NPS Management Polices state that when

lands are being reviewed for wilderness suitability,

[l]ands that have been logged, farmed, grazed, mined, or otherwise utilized in ways not involving extensive development or alteration of the landscape may also be considered suitable for wilderness designation, if, at the

time of assessment, the effects of these activities are substantially unnoticeable or their wilderness character could be maintained or restored through appropriate management actions. SAR 016135.

Furthermore, the Management Policies instruct that lands should not be excluded from

review for wilderness suitability ˇ˝solely because of existing rights or privileges...ˇ˝ Id.

Instead, if the lands ˇ˝possess wilderness character, they may be includedˇ˝so that they

can be considered for designation as wilderness or potential wilderness.ˇ˝ Id.

ii. Ample precedent exists for designation of wilderness with prior nonconforming uses.

One wilderness area that was designated after intensive use of the land is the Shenandoah Wilderness in Shenandoah National Park. Pub. L. No. 94-567(1)(m). In 1976, 17,019 acres in Shenandoah National Park were designated as wilderness and 560 acres as potential wilderness. Id. The wilderness areas included land that had returned to ˇ˝a primarily forested condition after having been extensively logged, burned, farmed, grazed, mined, and inhabited and built upon by several generations of people.ˇ˝ Shenandoah National Park Backcountry/Wilderness Plan, August 1998, Chap. 5, p. 2. See also shenandoah.national-park.com/info.htm#wild. In designating the Shenandoah Wilderness, among other wilderness designations, Congress recognized that ˇ˝wilderness values could be restored to the landscape.ˇ˝ National Park Service Wilderness Task Force Report, 15; SAR 008726.

When it designates wilderness areas, Congress has the option of completely prohibiting any prior conflicting use as long as the impaired wilderness characteristic is restored. This was the case in the designation of the Boundary Waters Canoe Area Wilderness, the River of No Return Wilderness, and the Sylvania Wilderness. As shown by these examples, prior use of motorboats does not necessarily impair or prohibit wilderness designation.

The Boundary Waters Canoe Area Wilderness is located along the Minnesota-Canada border and contains a network of over 1,000 lakes. Minnesota v. Block, 660 F.2d 1240, 1245 (8th Cir. 1981). There, prior motorized use did not inhibit restoration of wilderness characteristics when motors were removed from certain areas. Friends of the Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 819 (8th Cir. 2006). In response to ˇ˝˝˝threatened deterioration of wilderness from excessive use,ˇ˝ Congress enacted the Boundary Waters Canoe Area Wilderness Act,ˇ˝ which prohibited motorboat use on approximately three-quarters of the waters within the wilderness area.4 Id.

In the Frank Church River of No Return Wilderness, Congress restricted the use of motorboats to only one section of the Salmon River. Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, ˇ˝ (9). Motorboats on this section of the Salmon River are permitted ˇ˝at a level not less than the level of use which occurred during calendar year 1978.ˇ˝ Id. Motorboats are not allowed on any other waterways within the Frank Church River of No Return Wilderness, including the Middle Fork of the Salmon River. Id.

Finally, the restriction of motorboats in the Sylvania Wilderness in Michigan demonstrates that Congress often designates wilderness with the full awareness that motorized, non-conforming uses existed prior to the time of designation. Congress designated the Sylvania Wilderness in ˇ˝ (3)(b) of the Michigan Wilderness Act of 1987.

GCPBA does not, by its citation to the limited use of motors in the Boundary Waters wilderness, endorse this result in Grand Canyon National Park. It uses this and the other examples provided above only to show that the current use of motors on the Colorado River does not disqualify the area from eventual designation as wilderness.

Pub. L. No. 100-184. Testimony before Congress revealed that motorboats had been used on several lakes within the area. 133 Cong. Rec. H1813-06 (statements of Mr. Marlenee) (˘˝the area designated as the Sylvania Wilderness contains several lakes on which motorboats are currently used.˘˝). Currently, motorboats are prohibited on the lakes within the Sylvania Wilderness Area, with the exception of electric motors on one lake that is only partially within the wilderness boundary. Stupak-Thrall v. Glickman, 988 F. Supp. 1055, 1065 (W.D. Mich. 1997).

As shown, previous use -- or even continuing use -- of motors does not hinder Congress˘˝ ability to designate an area as wilderness under the Wilderness Act. The Colorado River corridor remains suitable for unqualified wilderness designation with complete removal of the non-conforming motorized use.5 As such, the rationale in the CRMP for authorization of continued motorboat use is not arbitrary and capricious.

iii. The temporary use of motorboats does not impair the River from eventual wilderness designation.

Plaintiffs argue that the current use of the Colorado River by motorized boats 1) is not allowed under the Wilderness Act, and 2) is not temporary or transient. Motorboats in the Colorado River corridor have been recognized as a temporary, non-conforming use since 1976. SAR 003079. It is precisely because of the motorboats that the corridor has the status of a ˘˝potential˘˝ wilderness addition. As discussed above, the characterization as potential wilderness presumes that the non-conforming or incompatible use is temporary and can be removed. Plaintiffs concede that, ˘˝by definition, the non˘˝conforming uses that the Park Service must ˘˝seek to remove˘˝ from potential wilderness areas include any bona fide ˘˝temporary or transient˘˝ uses.˘˝ Pl. Br. 11 (citations omitted).

GCPBA notes that Congress could also provide that the Colorado River remain potential wilderness, ˘˝with the authority in the Secretary to elevate it to full wilderness after eliminating motors. Congress could also designate the River as wilderness with an exemption for established motor use under ˘˝ 4 (d)(1) of the Wilderness Act. GCPBA does not endorse either option at this time.

The CRMP specifically limits motorized use to 5 ˘˝ months of the year, thus fulfilling its duty to ˘˝seek to remove˘˝ the non-conforming, temporary use.

The FEIS demonstrates that motors have minimal impact on wilderness characteristics such as water quality and air quality. In analysis of impacts on water quality, the FEIS found that the CRMP ˘˝would not result in the impairment of water quality in Grand Canyon National Park.˘˝ AR 093051. Additionally, the FEIS recognizes that conversion to four-stroke motors from two-stroke motors, completed in 2001, ˘˝is thought to have substantially reduced water pollution from exhaust.˘˝ AR 093039; see also Facts ˘˝ 46. Air quality impacts are also minor. AR 093082-84. The FEIS concluded, ˘˝[e]missions from recreational use of the Colorado River under [the CRMP] would result in a generally small (less than 5%) contribution to air pollution produced in the Grand Canyon.˘˝ AR 093084.

The FEIS also finds that the soundscape of the Colorado River corridor ˘˝would benefit overall under [the CRMP] compared to Alternative A6 during the peak season, but impacts would be slightly greater in the shoulder and winter seasons, due primarily to increased use levels.˘˝ AR 093132. (The increased use levels will occur because of the additional noncommercial permits awarded during these periods). Thus, the CRMP does not cause an adverse impact on the soundscape at Grand Canyon National Park.

In conclusion, the Colorado River corridor remains suitable for wilderness designation, and current motorized uses do not constrain Congress from designating the area as wilderness.

D. MANY IMPORTANT COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT RECOGNIZED THAT IMMEDIATE REMOVAL OF MOTORIZED USE IS NOT REQUIRED.

Plaintiff˘˝s own comments to the DEIS recognized that immediate removal of motorized boats from the Colorado River corridor is simply not required by any law or

Alternative A is the ˘˝No-Action Alternative.˘˝

regulation. Instead, the comments endorse a plan to ˘˝phas[e] out motorized use over a

reasonable time period not to exceed 10 years.˘˝ AR 050222.

Several other comments on the DEIS acknowledged that motors do not need to be

immediately removed from the park to fulfill the NPS˘˝ management duties. For instance,

the Grand Canyon Trust stated:

The Park Service˘˝s preferred alternative H cuts the period of time in which motorized uses are permitted from nine to six months. This is a step in the right direction. We appreciate the highly charged politics of the wilderness/motors issue and the complexity of decision making involved. Nonetheless, we encourage the park to gradually phase-out motorized use, a policy that is consistent with wilderness management and use. AR 050381.

The Wilderness Society also promoted the phase-out of motorized use over time. While opining that the preferred alternative is insufficiently strict on phase-out, the Wilderness Society recognized ˘˝the controversy with motorized use in the Colorado River corridor and the historic difficulty in implementing the mandate of the Wilderness Act.˘˝ AR 050265. As such, the Wilderness Society endorsed ˘˝phasing out motorized use over a reasonable time period.˘˝ AR 050267.

Thus, both Plaintiffs and other leading advocates of wilderness protection concede that immediate removal of motors is not required by the law.

II. THE NATIONAL PARK SERVICE HAS NOT VIOLATED ITS DUTIES UNDER THE ORGANIC ACT

Plaintiffs argue that the National Park Service has violated the Organic Act for two reasons. First, despite the fact that the CRMP establishes a 50-50 allocation of permits between commercial and private boaters, plaintiffs claim that the allocation of river permits interferes with free access to the Colorado River. Second, plaintiffs claim that the NPS˘˝ determination of non-impairment of the natural soundscape is arbitrary and capricious.

The Organic Act, which established the National Park Service, mandates that the

Park Service:

promote and regulate the use of the Federal areas known as national parks˘˝by such means and measures as conform to the fundamental purposes of the said parks˘˝which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 16 U.S.C. ˘˝ 1.

The National Park Service has complied with the mandate of the Organic Act by providing for the enjoyment of the park through the river rafting experience while conserving the scenery of the Colorado River corridor for future generations.

A. THE NATIONAL PARK SERVICE˘´S RIVER PERMIT ALLOCATION SYSTEM IS BASED ON APPROPRIATE AND IDENTIFIABLE STANDARDS AND THEREFORE IS NOT ARBITRARY AND CAPRICIOUS.

Plaintiffs argue that the allocation system established by the CRMP is arbitrary and capricious because it ˘´inequitably favors access, temporally and in quantity, by private commercial users who can afford to pay for guided trips˘´´´ Pl. Br. 28. Specifically, they claim that the NPS did not allocate ˘´use pursuant to any identifiable or appropriate standards˘´ and that the allocation is inequitable. Pl. Br. 24.

The Organic Act mandates that ˘´no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public.˘´ 16 U.S.C. ˘´ 3. The Organic Act does not direct how the NPS should carry out its mandate of providing for enjoyment of the parks and the conservation of resources, however. Courts have recognized that:

[T]he Organic Act is silent as to how the protection of park resources and their administration are to be effected. Under such circumstances, the Park Service has broad discretion in determining which avenues best achieve the Organic Act˘´s mandate. National Wildlife Federation v. National Park Service, 669 F. Supp. 384, 391 (D. Wyo. 1987) (citations omitted).

In addition, the ˘´Secretary of Interior, acting through the National Park Service, has the authority to determine what use of park resources are appropriate public uses, and what proportion of a park˘´s limited resources are available for such use.˘´ Eiseman v. Andrus, 433 F. Supp. 1103, 1106 (D. Ariz. 1977) (citing 16 U.S.C. ˘´ 3). Thus, Congress has granted the NPS considerable discretion in carrying out the allocation.

The Organic Act also requires the Secretary of the Interior to promulgate rules regarding the ˘´use and management of the parks˘´´´ 16 U.S.C. ˘´ 3; Facts ˘´ 3. Pursuant to this mandate, the Secretary promulgated 36 C.F.R. ˘´ 7.4(b), which regulates whitewater boat trips on the Colorado River. Facts ˘´ 4. The regulation states,

The National Park Service reserves the rights to limit the number of [river] permits issued, or the number of persons traveling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area. 36 C.F.R. ˘´ 7.4(b)(3).

In 1973, in response to ˘´the greatly increased and intensified use of the Colorado River for rafting and boating, and the resulting ecological threat to the River, the National Park Service began to limit the number of user days allowed˘´´´ Eiseman, 443 F. Supp. at 1104. The NPS capped the total user days at 96,600 and allocated 89,000 of those days to commercial boaters and 7,600 to private boaters as part of an interim management plan, a 92-8 split. Id.; Facts ˘´ 14. Private boaters challenged the apportionment between private and commercial boaters. Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1252 (9th Cir. 1979). In this case, the private boaters claimed:

[T]here is no justification for allocating between commercial and noncommercial

use, and that to do so amounts to arbitrary action; that it denies them ˘´free access˘´

to the river contrary to 16 U.S.C. ˘´ 3

Id. at 1253. The Wilderness Public Rights Fund further claimed that ˘´noncommercial applicants receive unfair and unequal treatment at the hands of the Service˘´ because they ˘´must apply ˘´ for permits and thus must plan their trips well in advance˘´ whereas those ˘´who make the trip under a guide may deal directly with the concessioners and make trip arrangements at the last minute.˘´ Id. at 1254. The court rejected this claim, stating

that the requirement for advance permits by noncommercial boaters ˇ˝comports with the NPSˇ˝ right to regulate river trips in the interest of safety.ˇ˝ Id. (citing 36 C.F.R. ˇ˝ 7.4(h)(3)). The court also recognized the allocation system as a valid mechanism for fulfilling the NPSˇ˝s obligation to ˇ˝protect the interestsˇ˝ of both private and commercial boaters. Id. It stated:

If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the ˇ˝free accessˇ˝ of any user must be limited to the extent necessary to accommodate the access rights of others.

Id. at 1253. The court in Wilderness Public Rights Fund did not reach the issue of the arbitrariness of the 92-8 split allocation in the interim management plan because the NPS issued a new management plan with a 70-30 split allocation while the case was pending. Id. at 1254; Facts ˇ˝ 15. It did, however, outline the standard of review to decide such an issue. Id. ˇ˝Where several administrative solutions exist for a problem, courts will uphold any one with a rational basis, but the Secretaryˇ˝s balancing of competing uses must not be an arbitrary one.ˇ˝ Id. (citing Udall v. Washington, Virginia, & Maryland Coach Co., 398 F.2d 765 (D.C. Cir. 1968)). ˇ˝The question ˇ˝ is whether allocation has been fairly made pursuant to appropriate standards.ˇ˝ Id.

Here, the Park Service considered three alternative allocation systems before deciding to implement a hybrid version of the split allocation system. AR 093686-88. The alternatives included ˇ˝Split Allocation,ˇ˝ ˇ˝Common Pool Allocation,ˇ˝ and ˇ˝Adjustable Split Allocation.ˇ˝ Id. In addition, NPS identified four reasonable objectives to use in making a fair allocation. AR 093686. These included:

Address use perception of allocation inequity; Maintain or improve the quality of

commercial services offered to river users; Minimize costs to river users while

adequately funding river operations; and Minimize complexity for people seeking

river trip opportunities.

Id. In choosing the split allocation, NPS analyzed how well each alternative met the stated objectives. AR 093688. None of the alternatives fulfilled each objective, though the split allocation and adjustable split allocation alternatives satisfied three of the four objectives. Id. The adjustable split allocation failed to ˇ˝minimize complexity for people seeking river trip opportunities.ˇ˝ Id. The chosen split allocation system met all objectives except eliminating ˇ˝user perception of allocation inequity.ˇ˝ Id.

The NPS also set objectives and analyzed alternatives for a noncommercial permit system and a procedure for transition from the old to the new system. AR 093767-74. The ˇ˝hybrid weighted lottery for trip leadersˇ˝ uses a lottery system that awards additional chances to applicants based on ˇ˝the most recent time any potential leader had been on a commercial or noncommercial river trip.ˇ˝ AR 093770. In order to accommodate applicants currently on the waiting list, NPS chose a ˇ˝three stage expedited transition.ˇ˝ AR 093773-74. The transition seeks to provide to those who have waited longest on the old waitlist the greatest opportunity to obtain a river permit. Id. Ultimately, the transition system will ˇ˝immediately benefit approximately 33% of waitlist members with launch dates, and result in most others obtaining launches in 10 years.ˇ˝ AR 093774.

Overall, the CRMP greatly increases private boating opportunities and apportions the river permits between private and commercial boaters in a 50-50 split of user-days.7

Plaintiffs claim that the split allocation system provides ˇ˝the majority of the allocated use to motorized commercial use.ˇ˝ Pl. Br. 22 (italics added). This statement is very misleading. The total number of user-days on the river equals 228,986 user-days (113,486 + 115,500). AR 093718. Of these, only 76,913 user-days are allocated for commercial motor use. Id. The total number of trips launching equals 1,101 trips (598 +503). Id.

Of these, 429 are allocated for commercial motor use. Id. Finally, the total number of recreational passengers equals 24,657 (17,606 + 7,051). Id. This is the only category in which more than half of the allocation is given to commercial motor use, with 13,177 total passengers participating in a motorized commercial trip. Id. While the other categories favor non-motorized trips, the total number of motorized commercial passengers is greater because of the larger group size allowed on commercial trips. Id. Therefore, the CRMP concentrates the commercial motorized passenger in larger boats

AR 093719; Facts ˇ˝ 17. The total commercial use is capped at 115,000 user-days, but the private allocated use is nearly doubled from 58,058 to 113,486 (with no cap). AR 093700, AR 093718; Facts ˇ˝ 17. In addition, the CRMP increases the total number of private boaters per year by 97% (from 3,570 to 7,051). Id.; Facts ˇ˝ 36. The total number of annual launches by private boaters almost doubled (from 253 to 503) and the total number of shoulder season launches more than doubled (from 97 to 199). Id.; Facts ˇ˝ 36. Therefore, the 2005 CRMP greatly increases private boater access over the prior plans.

As shown, the NPS has based the CRMP on identifiable and appropriate standards. The FEIS offers a reasoned and rational explanation for each aspect of the allocation. In addition, the allocation of river permits equitably apportions use between private and commercial boaters. As such, the chosen allocation does not interfere with ˇ˝free accessˇ˝ to the Colorado River. Furthermore, the allocation falls within the broad discretion of the National Park Service to balance its twin mandates of resource conservation and providing for the public use and enjoyment of the park.

B. THE NATIONAL PARK SERVICE CORRECTLY FOUND THAT THE RIVER CORRIDOR IS NOT IMPAIRED BY THE RECREATIONAL ACTIVITY AUTHORIZED IN THE CRMP.

Plaintiffs argue that the NPS has made an improper nonimpairment finding because it failed to address the effects of aircraft overflights in the impairment analysis. Pl. Br. 32. In effect, Plaintiffs contend that the CRMP must disallow river recreation sounds simply because overflights already make the area noisy. If Plaintiffs were to prevail on this contention, the River corridor would remain significantly affected by continuing overflight noise, but the nonimpairing sounds associated with river use would be disallowed. The relief would not redress Plaintiffsˇ˝ complaints about an impaired soundscape, which shows that this argument misses its mark.

with shorter trip-lengths. Motorized trips are not, as plaintiffs would have the court believe, the majority of all allocated use.

Plaintiffs have chosen to challenge the CRMP despite knowing that the CRMP has no bearing on the flight paths or noise of overflying aircraft. AR 093133. Congress has specifically taken action to address aircraft impacts in the National Park Overflights Act of 1987. AR 093096. If plaintiffs seek to challenge the adverse impacts to the natural soundscape from aircraft ˇ˝ the only impacts NPS found to be significant ˇ˝ then Plaintiffs must avail themselves of any rights they may have under the Overflights Act. They cannot, however, bring such a claim by challenging the CRMP.

The Organic Act requires the NPS to provide for the use and enjoyment of park resources ˇ˝in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.ˇ˝ 16 U.S.C. ˇ˝ 1. This mandate of non-impairment ˇ˝is inherently ambiguous.ˇ˝ S. Utah Wilderness Alliance v. Natˇ˝l Park Serv., 387 F. Supp. 2d 1178, 1187 (D. Utah 2005). Pursuant to the authority granted to it by Congress, the NPS has interpreted the non-impairment mandate in the 2001 Management Policies.

The 2001 Management Policies define and apply the broad non-impairment mandate of the Organic Act. The Management Policies recognize that the NPS has the ˇ˝discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a parkˇ˝˝˝ SAR 016086. The NPS may not, however,

allow impacts that ˇ˝constitute impairment of the affected resources and values.ˇ˝ Id. The Management Policies define impairment as:

An impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. Id.

As part of the impairment determination, all environmental impact statements generated by the NPS must ˇ˝include an analysis of whether the impacts of a proposed activity constitute impairment of park natural resources or values.ˇ˝ SAR 016102. The park resources or values to be protected include ˇ˝natural soundscape.ˇ˝ SAR 016087.

With respect to the impact on natural soundscape of Modified Alternative H, the selected alternative for the upper section of the river (from Lees Ferry to Diamond Creek), NPS concluded that overall noise intrusions would be of "minor to moderate intensity (at high-use areas and gathering points). It is likely that impacts can be reduced to minor levels or less with adequate funding and staffing for a monitoring and mitigation program." AR 093133. NPS also noted that even if all noise from all river recreation were eliminated from the Park (including river-related helicopter flights at Whitmore), "[t]here would still be 'significant adverse effects' on the natural soundscape due to frequent, periodic and noticeable noise from [non-river-related] overflights." Id.; Facts ˇ˝

52.

The NPS Management Policies provide:

Overflights do not make an area unsuitable for wilderness designation. The nature and extent of any overflight impacts, and the extent to which the impacts can be mitigated, would need to be addressed in subsequent wilderness studies. SAR 016136.

Thus, it is the presence of aircraft overflights in Grand Canyon National Park ˇ˝ not river-related recreation -- that has a significant impact on the natural soundscape of the park. AR 093801. Aircraft noise sources include ˇ˝high-altitude commercial jet traffic, military training activity, general aviation use, NPS administrative operationsˇ˝, and commercial air tours.ˇ˝ Id.

The National Parks Overflights Act of 1987 specifically recognized that ˇ˝noise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the parkˇ˝˝˝ Pub. L. No. 100-91, ˇ˝ 3(a), 101 Stat. 674. Under the Overflights Act, the NPS has been working with the Federal Aviation Administration ˇ˝to address the aircraft noise issue and to work together to ˇ˝substantially restore natural quietˇ˝ to Grand Canyon National Park.ˇ˝ AR 093110; Facts ˇ˝ 50.

The National Park Service has made an appropriate non-impairment finding regarding the natural soundscape of the Colorado River corridor. AR 093133. As directed by the Management Policies, the NPS has determined, within its ˇ˝professional judgment,ˇ˝ that no impairment to the natural soundscape would result from the CRMP. In addition, the non-impairment determination ˇ˝falls well within the NPSˇ˝s broad grant of discretionˇ˝˝˝ S. Utah Wilderness Alliance, 287 F. Supp. at 1193 (deferring to NPSˇ˝s impairment determination). In the FEIS, the NPS has provided a detailed analysis and rational basis for this finding.

III. THE NEPA AND CONCESSIONS ACT CLAIMS HAVE NO MERIT

These claims are addressed by the defendants in their briefs.

CONCLUSION

For the reasons stated above, GCPBA respectfully requests the Court to deny plaintiff˝s motion for summary judgment and grant GCPBA˝s cross motion for summary judgment.

Respectfully submitted this 6th day of August, 2007