No. 08-15112

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RIVER RUNNERS FOR WILDERNESS, et al.,
Plaintiffs-Appellants,
v.

JOSEPH F. ALSTON, et al.,
Defendants-Appellees,
v.

GRAND CANYON RIVER OUTFITTERS ASSOCIATION, et al.,
Defendant-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
D.C. No. CV-06-00894-DGC

PLAINTIFFS–APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs-Appellants, River Runners for Wilderness et al., (collectively "RRFW") hereby submit this reply to Federal-Defendants-Appellees' ("NPS") and Defendant-Intervenors-Appellees' ("GCROA" and "GCPBA") (collectively "Defendants'") Answer briefs.

ARGUMENT

I. NPS VIOLATED THE CONCESSIONS ACT.

A. The Organic Act's Standards For Protecting Park Resources And Values Apply To NPS's Action Under the Concessions Act.

NPS's argument that the "necessary and appropriate" standard in the Concessions Act is less binding than the nearly identical provision in the Wilderness Act is premised on two misinterpretations: (1) that NPS need only protect the Grand Canyon's resources and values for future generations and not *present* visitor enjoyment; and (2) that it must allow and accommodate a broad range of visitor desires even where those desires impact and impair the Park's resources and values and conflict with the public's enjoyment of such resources and values. See NPS at 15. Defendants are wrong.

The Concessions Act's "necessary and appropriate" standard is inextricably linked to NPS's duty to protect the resources and values of our National Parks. 16

U.S.C. §§ 5951, 5952(4)(A)(iii). Just as "[t]he limitation on the Forest Service's discretion [to allow commercial services] . . . flows directly out of the agency's obligation under the Wilderness Act to protect and preserve wilderness areas," High Sierra Hikers Association v. Blackwell, 390 F.3d 630, 647 (9th Cir. 2004), the limitation on NPS's discretion here flows directly from the Agency's obligations under the Organic Act. These obligations include the duty to conserve and preserve park resources and values at all times, avoid impairment of park resources and values, and provide for the present and future enjoyment of such resources and values by the public to the extent that conservation predominates and park resources and values are left unimpaired. See 16 U.S.C. § 1; MP 1.4.3; MP 1.4.4.; Bicycle Trails of Marin v. Babbitt, 82 F.3d 1445, 1453 (9th Cir. 1996) (The "overarching concern" of the Organic Act is "resource protection.").

The fundamental difference between the Wilderness Act and the Organic Act is that all areas of designated wilderness must be protected in a primitive state free from human development, while National Parks may include both primitive and undeveloped areas, and developed areas. However, those areas within National Parks that are primitive and undeveloped must be preserved as such and

left unimpaired, not unlike designated wilderness.[1] See MP 6.3.1 et seq. In fact, for areas which must be preserved as wilderness, such as the Colorado River corridor, NPS treats its duty to only authorize "necessary and appropriate" commercial services under the Concessions Act and the Wilderness Act the same:

> Wilderness-oriented commercial services that contribute to public education and visitor enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the "necessary and appropriate" tests of the [Concessions Act and the Wilderness Act] . . .

MP 6.4.4.[2] Thus, Blackwell establishes the correct statutory interpretation.

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[1] Wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness," 16 U.S.C. § 1131(a), just as NPS must "provide for the enjoyment of [park resources] in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. That certain wilderness resources in National Parks are not designated under the Wilderness Act is really a label without distinction since NPS in its MPs confirms that under its Organic Act mandate, it must preserve and protect those wilderness resources as if they were designated wilderness and leave them unimpaired. MP 6.3.1.

[2] Only GCROA suggests that the Court must look to legislative history to interpret the plain meaning of the Concessions Act. GCROA at 8-11. Here, where the plain meaning of the statute is clear, legislative history is irrelevant and the plain meaning of the statute should be enforced. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984). Even if the provision were ambiguous, the Court defers to the agency's interpretation, which is found in MP 6.3.1, if it has the force of law. U.S. v. Mead Corp., 533 U.S. 218, 121 S.Ct. 2164 (2001). The FEIS provides no other interpretation of the Concessions Act. GCROA also suggests that the Court should look beyond the plain meaning of the statute because it causes "absurd or impracticable

GCROA suggests that NPS has a duty to authorize concessions in National Parks independent of NPS's obligations under the Organic Act. The Concessions Act, however, is not a free-standing statute and would not exist but for the Organic Act. In fact, the Concessions Act specifically serves to limit commercial services in parks and ensure that the primary mandate of NPS to conserve park resources and values is upheld. 16 U.S.C. § 5951. Congress could have adopted a more permissive standard, but it did not. Further, GCROA's examples of the types of concessions that are permitted under NPS regulations, i.e., food service, lodging, and rentals, are not relevant to this case because, here, commercial services are being provided in a potential wilderness area where hard-sided lodging and any other development would be inappropriate. What may be necessary and appropriate in front-country developed areas, which are more heavily used, is different from what is necessary and appropriate in the backcountry.

Even the authority cited by Defendants pertained to its discretion to *limit* recreational activities and facilities by commercial enterprises. See George

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consequences." GCROA at 9, citing Avendano-Ramirez v. Ashcroft, 365 F.3d 813, 816 (9th Cir. 2004). The plain meaning of the necessary and appropriate mandate of the Concessions Act is entirely consistent with the Organic Act, which places resource conservation first and limits commercial activities in parks to protect free public access. 16 U.S.C. §§ 1, 3; MP 1.4.3. It would be absurd if NPS could provide unnecessary or inappropriate commercial services in the Colorado River Corridor.

Cameron Coggins & Robert L. Glicksman, Concessions Law and Policy in the National Park System, 74 Denv. U.L.Rev. 729, 741 (1997); see also Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 299 (1984) (holding that time, place and manner restrictions on free speech in parks were within the discretion of NPS in order to protect park resources). In short, nothing Defendants cite supports their view that the Concessions Act's "necessary and appropriate" standard is less strict than the Wilderness Act or that it may be broadly interpreted to allow unnecessary uses or uses that impair park resources and values. Moreover, the slightly differing language in the Concessions Act stating that commercial services "shall be limited to those . . . services that are necessary and appropriate," instead of allowing commercial services "to the extent necessary," is arguably a tougher, not a weaker standard. Both statutes require strict limits on commercial services to those that are necessary and appropriate.

B. NPS Never Found that Motorized Commercial Services are Necessary or Appropriate.

NPS asserts that it considered whether motorized commercial services are "necessary and appropriate" under the Concessions Act because the "CRMP was *designed* to address motorized access." NPS at 23. NPS is incorrect. The CRMP did not consider or evaluate the necessity of authorizing motorized commercial

services or explain why NPS's previous findings that motorized uses are unnecessary were wrong. Instead, the CRMP presumes that motorized commercial services are necessary. The FEIS also fails to explain why no-motor alternatives were feasible or why the river can be motor-free for six months, if motors are in fact necessary. As such, NPS's decision on motors is inconsistent and without a rational basis.

NPS claims that the allocation "was necessary to satisfy visitor experience objectives." NPS at 23. "Satisfying visitor experience objectives," however, is not what the law requires. Further, the reason the FEIS found that visitor experience objectives were not met for the no-motor alternatives was "due to the elimination of motorized river trip and Whitmore [helicopter] exchange opportunities." SER 316.[3] Thus, the FEIS used the status quo visitor experience with motors as the standard and, as such, any non-motorized alternatives automatically failed to meet the visitor experience objective. See SER 320 (alternatives that offered "a balanced variety of trip types and characteristics" including motorized trips were preferred in the FEIS); NPS at 25 (explaining that NPS analyzed whether motorized rafting access was sufficient to meet the needs of

[3] SER is NPS's supplemental excerpts of record. All other SER cites are denoted by RRFW, GCROA or GCPBA.

visitors seeking motorized trips.). In this way, NPS put the proverbial cart before the horse. NPS should have assessed the need for different commercial services in providing a wilderness river experience first and then defined its visitor experience objectives by how well "necessary and appropriate services" were provided in each alternative. Instead, NPS assumed without analysis or any kind of necessity determination that motorized commercial services were appropriate (simply because some people desire them) and rejected any alternative that failed to provide those services.

NPS also argues that it attempted to provide the "greatest access to the greatest number of users" and "to provide diverse trip types and opportunities." NPS at 25 (SER 368). Again, these goals sidestep the statutory mandates. NPS has no legal duty to provide the greatest amount of access or diverse trip types. It must protect the wilderness resource and the public's wilderness experience, even if that means limiting the types and reducing the amount of use. For instance, some people may wish to jet ski, stay in hard-sided lodging, or even take a gondola ride from the rim to the River, but NPS does not permit these types of activities in the River corridor. In short, NPS does not have a duty to accommodate the desires of *all visitors* who may seek a type of activity that is inappropriate for some areas of the park. See SER-RRFW 6. This is especially

true when doing so will cause NPS to violate both the Concessions Act and the Organic Act.

C. Motorized Commercial Services Are Unnecessary.

NPS asks the Court to disregard its earlier conclusion that "motorized boat use is not necessary for the use and enjoyment of this area." NPS at 26; see ER 218, 108, 50-51(¶42).[4] NPS, however, has never stated in the FEIS or ROD, or anywhere in the record, that it had changed its mind. Nor has it provided an explanation for its about-face. While an agency "is not disqualified from changing its mind . . . the consistency of an agency's position is a factor in assessing the weight that position is due. As the Supreme Court has stated: 'An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.'" NRDC v. EPA, 526 F.3d 591, 605 (9th Cir. 2008) (citations omitted).

The two places in the FEIS, for instance, where the necessity determination

[4] GCROA incorrectly attributes a public comment to NPS, just as the district court did in its decision, which RRFW pointed out in its opening brief. GCROA at 16; RRFW at 15-16 (citing ER 347-348). GCROA clings to this public comment because NPS never distinguished its own previous findings that motors are unnecessary or provided a rational basis for its inconsistent decision. Even in its response to the public comment, NPS does not adopt the commenters analysis. ER 348 (C8 Response).

is discussed were not even in the DEIS when the alternatives were developed. See ER 297, 302-304 (bolded-italicized writing denote additions from DEIS to FEIS). NPS stuck in the language in response to comments, but never analyzed or altered its alternatives based upon any finding of necessity for commercial services. NPS cites to the bibliography as the place where the FEIS allegedly considered NPS's prior findings that motorized services are unnecessary. NPS at 27(citing SER 445). The "more recent data and analyses" relied on by NPS, however, does not mention or analyze the necessity of motorized services, but focuses instead on visitor perceptions and desires, changes in use patterns, conditions along the river and visitor encounters. See NPS at 27 (citing SER 121, 133-35, 148, 211, 237-42, 447).

Even if visitor preferences could rationally be translated into a "need" for a service, the only motor-oar study conducted to accurately compare visitor preferences after experiencing both motorized and non-motorized trips on the River found that "[p]eople with both kinds of experience clearly preferred oar travel." SER-RRFW 4-5. (79 to 91 percent of people who were surveyed after experiencing both kinds of trips preferred the non-motorized trip while 4 to 6 percent preferred the motor trip). Even in the visitor preferences study cited by NPS, where visitors filled out questionnaires after taking only one type of trip,

only 62 percent of people who had taken a commercial motorized trip preferred it. SER 128, 145. Thus, if it were necessary to accommodate all visitor preferences (which RRFW disputes), between 38 and 91 percent of commercial motorized uses would still be considered unnecessary. However, the single largest allocation of use on the Colorado River during the preferred summer and shoulder seasons in terms of passengers, launches and user-days is to commercial motorboats. ER 314-316. Even over an entire year, NPS gives more permits to passengers who are willing to travel on commercial motorboats than not. ER 316.

RRFW is not seeking to supplant its views for the agency's. Rather, in the absence of any subsequent, rational explanation to the contrary, RRFW seeks to hold NPS to its own reasonable position that motorized commercial services are unnecessary. NPS's *post hoc* analysis that motorized trips are necessary for time, cost or special needs was not provided in the FEIS and cannot constitute a rational basis for finding that the services are necessary. NPS at 27-28. Further, there is no record evidence that NPS needs to provide six to seven day motorized trips of the river from Lees Ferry to Whitmore or Lake Mead. NPS does not respond to the fact that short non-motorized trips are available. On cost, the evidence shows that non-motorized oar trips are offered at a lower per day cost (SER 221), but that all commercial trips discriminate against the less wealthy, including would-be

noncommercial boaters. SER 228. Finally, while there is evidence that special-needs groups use motorized commercial services, NPS, GCROA and GCPBA each admit that eliminating motor trips would not exclude any group and that special needs groups can safely access the river on oar-powered trips.[5] ER 53(205-206), 54(208); see also ER 97, 191, 292.

Ultimately, NPS's brief offers an explanation "that runs counter to the evidence before the agency." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th Cir. 2006).

D. NPS Did Not Base Its Commercial Allocation Decisions On Any Necessity Determination.

In all of Defendants' record citations, this Court will not find a single analysis of how much commercial services are needed on the Colorado River. There is evidence of what GCROA and its coalition wanted and evidence that NPS considered different allocation scenarios and assessed their impacts on resources and visitor experience. But there is *no discussion* of whether the amount of

[5] RRFW relies on findings made by NPS, while NPS relies on public comments in the record from people who had taken motorized trips and perceived that motorized trips were somehow easier or safer. NPS cannot rely on visitor perceptions from the record as the rational basis for its decisions. The analysis and rational basis must be found in the FEIS. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998). If NPS has changed its position on the safety or feasibility of non-motorized rafting, it must clearly state so in the FEIS.

commercial services allocated in the varying alternatives was "necessary" for public use and enjoyment.

NPS states that it "based its allocation of necessary commercial rafting concessions on thorough analyses of known and estimated use levels." NPS at 20. NPS's reliance on demand for commercial services, which is unknown, and actual commercial use fails to account for the amount of commercial services that are actually necessary. NPS cites to one discussion in the FEIS on general demand where it states that "[c]oncessioners report that they turn away prospective users because their trips are full," but there is no real evidence of this as there is for the noncommercial side. SER 344-45; SER-RRFW 10. In contrast, there is real evidence that at least a portion of commercial use comes from the noncommercial sector because people cannot gain access through the noncommercial permit system. It is undisputed that people who do not need to, and would rather not, take commercial trips. RRFW at 18-19. In fact, in defending "free access," NPS even suggests that individuals who do not obtain a noncommercial permit through the lottery "may reserve a space on a commercial trip." NPS at 52. This is a plain admission that NPS allocates unnecessary levels of commercial services at the expense of noncommercial users. It also nullifies NPS's defense that actual use models are relevant in determining need, when NPS failed to determine how much

of past actual commercial use was truly necessary.[6]

NPS has also found that "the easy availability of commercial trips encourages people to take river trips who might be satisfied with some other activity (e.g., a week at a resort), displacing non-commercial users who are willing to spend considerable time, effort, or money to take a Grand Canyon trip–if access were available." SER 228.

NPS has a duty to account for unnecessary amounts of actual use levels in order to limit commercial services to amounts that are necessary.

E. Authorizing Motorized Services is Inconsistent with Protecting the Values of the River to the Highest Practicable Degree.

NPS argues that because the FEIS concluded in a chart that the preferred alternative met the management objectives, it has not violated the duty to protect the values of the river to the highest practicable degree. NPS at 31. NPS does not cite a single page in the FEIS or ROD where it explains how the "adverse impacts of moderate intensity" on visitors opportunities for solitude or primitive and unconfined types of experiences on the river from motorized services is consistent with protecting the values of the river to the highest practicable degree. See ER 410. Nor does NPS explain why its wilderness coordinator was wrong when he

[6] The previous allocations (use levels) were not based on actual demand information either. SER 228.

found, in 2003, that motorized services on the Colorado River did not meet the minimum requirements test for areas managed as wilderness under the MPs. ER 269a-270. As a result, NPS has no rational basis for claiming that its authorization of motorized concessions protects the values of the river to the highest practicable degree. GCROA's arguments that this evidence from the FEIS itself and from the NPS wilderness coordinator, during the CRMP planning process, is somehow outdated, superseded or biased is unavailing. GCROA at 19.

As it did in Greater Yellowstone Coalition ("GYC") v. Kempthorne, – F.Supp.2d–, 2008 WL 4191133, *6-7 (D.D.C. 2008), NPS impermissibly permits adverse impacts to the Grand Canyon's resources and values to provide a form of recreation – motorized boating – that is unnecessary for the public's enjoyment of the Colorado River. NPS claims that, "[m]otorized rafting is a temporary and transient use," and thus, its adverse impacts do not affect future generations, just current generations. NPS at 16. However, in the case of a conflict between recreation and conservation, "conservation is to be predominant." MP 1.4.3. And current visitors also have the right to experience the resource and values in their preserved state. Id.

NPS relies on City of Sausalito v. O'Neill, 386 F.3d 1186, 1227 (9th Cir. 2004) in arguing that it has acted consistently with its preservation and

conservation mandates. The facts of that case, however, are completely dissimilar to those presented here. The resource at issue in City of Sausalito was Fort Baker, an urbanized area of San Francisco with heavy use. See id. The new structure in dispute was to be developed only on pre-disturbed sites and accompanied by the removal of other structures along with intensive natural and historic restoration efforts. Id. In contrast, in this case NPS is authorizing motorboats and helicopters in an area that is to be managed for its wilderness values.

II. NPS FAILED TO PRESERVE THE RIVER'S WILDERNESS CHARACTER.

Defendants make two arguments in defense of their failure to preserve the Colorado River's wilderness character: (1) that the 2001 MPs are a non-binding, internal agency guidance document that cannot be enforced in federal court; and (2) that the ROD authorizing motorized uses was in full compliance with the 2001 MPs. Defendants are wrong on both accounts.

A. The 2001 MPs Are Binding On NPS.

Defendants agree that the 2001 MPs are binding on the courts, i.e., that the MPs are entitled to Chevron deference and can be used as a shield to uphold NPS decisions in federal court. See NPS at 38-39; ER 12-13. Defendants maintain, however, that the same 2001 MPs are non-binding on NPS, i.e., the MPs cannot be

used as a sword or "club" to set aside NPS decisions that are inconsistent with the 2001 MPs. See id. Defendants' attempt to have it both ways should be rejected by this Court. As outlined below, NPS's 2001 MPs are entitled to Chevron deference and are binding on the Agency because: (1) NPS's regulations require compliance with the MPs; (2) the MPs have the force and effect of law; and (3) NPS committed to comply with the MPs in the FEIS.

1. 36 C.F.R. § 1.6 requires compliance with the MPs.

Defendants fail to explain why 36 C.F.R. § 1.6's mandate that all permits for use of the Grand Canyon "*shall be consistent with* applicable legislation, Federal regulations and *administrative policies* . . ." does not bind NPS to follow the 2001 MPs. (Emphasis added). Instead, Defendants claim that this regulation "has no bearing on the enforceability of the 2001 Policies themselves." NPS at 34 n. 7. Defendants are mistaken.

36 C.F.R. § 1.6 has direct bearing on the enforceability of the 2001 MPs because pursuant to the ROD, NPS will issue both commercial and non-commercial permits to use the River. See ER 297, 418, 421, 435; see also 36 C.F.R. § 7.4 (permit requirement). NPS's regulations explicitly mandate that such permits be consistent with all "administrative policies" which include the 2001 MPs. 36 C.F.R. § 1.6. Based on 36 C.F.R. § 1.6, therefore, the MPs are binding

on NPS.

2. The 2001 MPs have the force and effect of law.

Relying on the D.C. Circuit's decision in The Wilderness Society (TWS) v. Norton, 434 F. 3d 584 (D.C. Cir. 2006), and rejecting the District of Utah's decision in SUWA v. NPS, 387 F. Supp. 2d 1178 (D. Utah 2005), Defendants maintain that the 2001 MPs are not enforceable against NPS "because they neither purport to create substantive rules, nor were they promulgated in conformance with rulemaking requirements." NPS at 33-39. Defendants are incorrect.[7]

Agency pronouncements have the force and effect of law if they: (1) prescribe substantive rules – not interpretative rules, general statements of policy or rules of agency organization, procedure or practice; and (2) conform to certain procedural requirements. Western Radio Services Company v. ESPY, 79 F.3d 896, 901 (9th Cir. 1996). To "satisfy the first requirement the rule must be substantive in nature, affecting individual rights and obligations; to satisfy the

[7] This case is a challenge to an affirmative agency decision – a ROD – pursuant to § 706 (2)(A) of the APA. In contrast, the TWS decision relied on by Defendants involved a challenge to "compel agency action unlawfully withheld or unreasonably delayed" under § 706 (1) of the APA. To establish a right of judicial review under § 706 (1), a plaintiff "must identify a statutory provision mandating agency action." Center for Biological Diversity v. Veneman, 335 F. 3d 849, 854 (9th Cir. 2003). Because of this differing standard, courts generally refuse to extend holdings in § 706 (1) cases to § 706 (2)(A) cases. See EPIC v. Blackwell, 389 F. Supp. 2d 1174, 1211 (N.D. Cal. 2004).

second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." Id. These two requirements are satisfied.

First, portions of the 2001 MPs read like a substantive rule. The "primary distinction between a substantive rule . . .and a general statement of policy . . . turns on whether the agency intends to bind itself to a particular legal position." Syncor Intern'l Corp. v. Shalala, 127 F. 3d 90, 94 (D.C. Cir. 1997). An agency's intention to bind itself can most easily be found in the plain language of the document. See Norton v. SUWA, 542 U.S. 55, 71 (2004) (plain language can "create a commitment binding on the agency"); Community Nutrition Inst. v. Young, 818 F. 2d 943, 946 (D.C. Cir. 1987) ("mandatory, definitive language is a powerful, even potentially dispositive factor").

Here, the plain language of the 2001 MPs evinces NPS's intent to bind itself: "Adherence to [the MPs] *is mandatory unless specifically waived or modified by the Secretary*. . . Park Superintendents will be held accountable for their, and their staff's adherence to [the MPs]." MP (Introduction) (emphasis added).[8] As one court noted, in "implementing the [2001 MPs] . . . NPS made

[8] Defendants concede that no waiver was sought or obtained from the Secretary in this case. See NPS at 37 n.8.

compliance with the Management Policies mandatory . . .By doing so, the NPS bound itself to the Management Policies." SUWA, 387 F. Supp. 2d at 1189. The 2001 MPs "are not a general statement of policy, but *prescribe substantive rules*." Id. (emphasis added); see also Terbush v. U.S., 516 F. 3d 1125, 1132 (9th Cir. 2008) (recognizing that "mandatory and specific directives" may be contained in portions of NPS's 1988 MPs); Voyageurs Region National Park Assoc. v. Lujan, 966 F. 2d 424, 428 (8th Cir. 1992) (treating MPs as a rule).

Indeed, one of the central purposes of the 2001 MPs is to implement the "Organic Act and other pertinent statutes" including the Concessions Act, Wilderness Act, and the Grand Canyon Protection Act. See MP (Introduction). The 2001 MPs "interpret the ambiguities of the law and . . .fill in the details left unaddressed by Congress in statutes." Id.[9]

These details include, for instance, interpreting the Organic Act's no-impairment mandate (see MP 1.4) and interpreting the Wilderness Act's and Grand Canyon Protection Act's mandate to study and manage lands for inclusion within the national wilderness preservation system. See MP 6.2 (wilderness study process); MP 6.3 (management of areas). The 2001 MPs' impairment section, for

[9] Notably, in GYC, NPS recently conceded "that § 1.4 [of the MPs] serves as NPS's official interpretation of the Organic Act and is therefore enforceable against NPS." 2008 WL 4191133 at *4 at n.1.

instance, includes binding, mandatory language and "decision-making *requirements* to avoid impairment." MP 1.4.7 (emphasis added); see also MP 1.4.4 (*prohibition* on impairment); MP 4.9 (NPS "*will* preserve . . .the natural soundscapes"); MP 6.3.1 (NPS "*must* ensure that the wilderness character is . . .preserved"); MP 6.4.3 ("Recreational uses . . .*will* be of a nature that enable the areas to retain their primeval character . . .[and] provide outstanding opportunities for solitude"); MP 6.4.3.3 ("use of motorized equipment or any form of mechanical transport *will be prohibited* in wilderness"); MP 6.4.4 (only "wilderness oriented commercial services . . .may be authorized if they meet the 'necessary and appropriate' tests").

In this respect, the 2001 MPs differ from the Forest Service Manual (FSM) and handbook (FSH) at issue in Western Radio, the U.S. Customs Manual at issue in U.S. v. Fifty Three (53) Eclectus Parrots, 685 F. 2d 1131 (9th Cir. 1982), and NPS's "rate-setting guidelines" at issue in Lake Mojave Boat Owners Ass'n v. National Park Service, 78 F. 3d 1360 (9th Cir. 1995). Unlike the internal agency pronouncements in those cases, the 2001 MPs include binding, mandatory language indicative of a substantive rule. See SUWA, 387 F. Supp. 2d at 1189.

Second, the 2001 MPs were promulgated pursuant to a specific statutory grant of authority and after an almost-complete formal notice-and-comment

rulemaking procedure. Congress "unquestionably granted the [NPS] express authority to manage national parks, including the authority to issue regulations which it 'deems necessary or proper for the use and management of the [national] parks . . ." SUWA, 387 F. Supp. 2d at 1188 (quoting 16 U.S.C. §§ 1, 3); Alaska Wildlife Alliance v. Jensen, 108 F. 3d 1065 (9th Cir. 1997). It is apparent from this delegation of authority "that Congress expects the [NPS] to be 'able to speak with the force of law' when issuing rules of a substantive nature pursuant to formal notice-and-comment procedures." Id. NPS published the "notice of availability" of the draft 2001 MPs in the Federal Register (FR). See 65 Fed. Reg. 2984-01. In the FR notice, NPS invited the public to submit comments on the draft MPs for a 60-day period, explained that some of the "policies . . .have been updated . . .by means of 'Director's Orders,' which have been issued following a public notice and comment period," and asked that all comments "be specific as to how a policy might be changed or strengthened." Id. NPS also committed to review all comments and incorporate all "appropriate suggestions" into a final version of the 2001 MPs which will appear in the FR. See id. NPS later published a "Notice of New Policy Interpreting the National Park Service Organic Act" giving notice to the public that it was adopting the portion of the 2001 MPs interpreting the Organic Act's "no-impairment" standard. See 65 Fed. Reg. 56003. The FR notice

also explains the legal framework underlying the 2001 MPs and the purpose of the revisions. See id. In addition, the FR notice included a summary of public comments received and NPS's response to such comments. See id.

Thus, while the procedures used by NPS in implementing the 2001 MPs do not technically conform to all the rulemaking requirements set forth in section 533 of the APA (a complete copy of the MPs was not published in the FR), the procedures followed by NPS "satisfy the purpose behind formal rulemaking procedures, which is to 'assure fairness and mature consideration of rules.'" SUWA, 387 F. Supp. 2d at 1188 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969)). The procedures used "foster the fairness and deliberation that should underlie a pronouncement of . . .force." Northwest Ecosystem Alliance v. U.S. FWS, 475 F. 3d 1136, 1141 (9th Cir. 2007) (quoting Mead, 533 U.S. at 230).

The salient issue with respect to the NPS's 2001 MPs, therefore, is not whether strict compliance with formal rulemaking procedures of the APA was adhered to – as Defendants argue – but rather, whether the 2001 MPs "are the type of agency decision that Congress intended to 'carry the force of law.'" SUWA, 387 F. Supp. 2d at 1188 (citing Mead, 533 U.S. at 221)); Northwest Ecosystem Alliance, 475 F. 3d at 1141-42. Here, RRFW agrees with the Court's reasoning in SUWA that Congress intended the 2001 MPs to carry the force of law because

Congress granted NPS express authority to issue rules and regulations to manage our National Parks (see 16 U.S.C. § 3) and the "procedural and substantive nature of the 2001 MPs are so closely analogous to that of a formal regulation," that Congress would expect the 2001 MPs to carry the force of law. See id. at 1188. In this respect, NPS's 2001 MPs are more akin to the U.S. Fish & Wildlife Service's distinct population segment policy at issue in Northwest Ecosystem Alliance and NAHB v. FWS, 340 F. 3d 835, 852 (9th Cir. 2003) than the FSM and FSH at issue in Western Radio and Customs Manual at issue in Eclectus Parrots.[10]

3. NPS committed to comply with the 2001 MPs in the FEIS.

Even if one assumes, *arguendo*, that the 2001 MPs do not have the force and effect of law, NPS's failure to comply with the MPs is still "arbitrary and capricious" because in both the DEIS and FEIS, NPS discusses the 2001 MPs as if they are binding, claims that the CRMP is in full compliance with the 2001 MPs,

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[10] Defendants ask this Court to ignore the Supreme Court's decision in Mead, this Court's holding in Northwest Ecosystem Alliance interpreting Mead, and the District of Utah's decision in SUWA because they are "fundamentally different" judicial deference cases. NPS at 38. According to Defendants (and the district court), the 2001 MPs can only be used as a *shield* to uphold NPS's decisions and not as a *sword* or "club" to set aside NPS decisions that are inconsistent with the 2001 MPs. See NPS at 38-39; ER 12-13. In other words, the 2001 MPs are binding on the courts but not binding on NPS. This Court should reject NPS's attempt to create a distinction without a difference. The 2001 MPs are either entitled to deference and binding on the Courts and NPS *or* entitled to no deference and non-binding on the Courts and NPS.

and *commits itself* to manage the Colorado River corridor in accordance with the 2001 MPs. See Ecology Center v. Austin, 430 F. 3d 1057, 1069-1070 (9th Cir. 2005), overruled on other grounds Lands Council v. McNair, 537 F. 3d 981, 994 (9th Cir. 2008), (requiring compliance with soil standard in the FSM because agency committed to do so in FEIS); Lands Council v. Powell, 395 F. 3d 1019, 1034 - 1035 (9th Cir. 2005) (USFS's failure to ensure compliance with soil standard in FSM violated NFMA).

In NPS's own words: "Until Congress acts on the Grand Canyon National Park Wilderness Recommendation, this section of the Colorado River *will be managed* as potential wilderness *in accordance* with NPS Management Policies . . ." ER 339 (FEIS); see also SER 276 (same). NPS's General Management Plan for the Grand Canyon echoes this commitment. See ER 246 (the CRMP "will be consistent with NPS wilderness policy requirements"). ER 246.[11]

Thus, even if Defendants were correct that the 2001 MPs do not have the force of law, because NPS committed to comply with such MPs in the FEIS, it

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[11] In the FEIS, NPS also committed to manage the Colorado River corridor "as potential wilderness in accordance with . . .the Grand Canyon National Park Wilderness Recommendation as updated in 1993." ER 339. The 1993 Wilderness Recommendation, in turn, states that "the current levels of motorized boat use probably contradict the intent of wilderness designation. This use is inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation." ER 235.

would now be "arbitrary and capricious" for NPS to ignore them. See Ecology Center, 430 F. 3d at 1069. NPS, haven chosen to promulgate the 2001 MPs, "must follow that policy." NAHB, 340 F.3d at 852; see also Resources Ltd. v. Robertson, 35 F. 3d 1300, 1304 n. 3 (9th Cir. 1994) (agency cannot treat guidelines as optional where decision made was contingent on adherence to guidelines); GYC, 2008 WL 4191133 at *4 n.1 ("NPS Policies [are] relevant to the same extent that NPS relied upon those statements in making the decision under review"). Morever, as mentioned above, acting in accordance with the 2001 MPs is pivotal to complying with the Organic Act, Concessions Act, Wilderness Act, and Grand Canyon Protection Act. To date, however, NPS has yet to explain how it can comply with these statutory directives if its decision is not in compliance with the MPs. See Ecology Center, 430 F. 3d at 1070.

B. NPS Failed To Comply With The 2001 MPs.

Defendants' second argument is that its decision to authorize motorized uses is in compliance with the 2001 MPs because such uses are only temporary and will not "preclude [eventual] wilderness designation" or diminish the River's "wilderness suitability for future designation." NPS at 39-44. Defendants are incorrect for four reasons.

First, Defendants' argument is limited to "motorized rafting." NPS at 39-44. Defendants do not explain or address how its authorization of helicopter passenger exchanges at Whitmore – a use authorized by the ROD that will have *major* adverse impacts on the natural soundscape (see SER 385-386) – is in compliance with the 2001 MPs' requirement to preserve the River's wilderness character and "provide outstanding opportunities for solitude." MP 6.4.3; see also MP 6.4.3.3 (use of motors); MP 6.4.4 (commercial services).

Second, the 2001 MPs' specific requirements for preserving the River's wilderness character *exist now* – for current users – and not for some future time if and when Congress passes a wilderness bill for the Grand Canyon. MP 1.4.3. In planning for the River corridor, NPS must "ensure that the wilderness character is . . .preserved." MP 6.3.1. NPS must prohibit "use of motorized equipment or any form of mechanical transport . . .in wilderness except as provided for in specific legislation." See MP 6.4.3.3. NPS may only allow "recreational uses . . .that enable the areas to retain their primeval character . . .[and] provide outstanding opportunities for solitude." MP 6.4.3. Moreover, only "[w]ilderness oriented commercial services that . . . provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the 'necessary and appropriate' tests." MP 6.4.4. Without question, NPS's decision to authorize motorized uses

of the River is inconsistent with these existing wilderness requirements. NPS, in fact, reached this same conclusion in 1993. See ER 235 (motorized use "is inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation").[12]

Third, the 2001 MPs' specific requirements for preserving the River's wilderness character (mentioned above) do not provide for a "temporary" or transient use exception. See MP 6.3.1; MP 6.4.3; MP 6.4.3.3; MP 6.4.4. There is nothing in the 2001 MPs that says NPS need only preserve the River's wilderness character some of the time, i.e., when motors and helicopters are not running. Indeed, Defendants' interpretation would render the 2001 MPs' wilderness mandate largely superfluous and undermine the integrity of all potential,

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[12] Defendants ignore these specific directives in the 2001 MPs and rely instead on the "general policy" language. The"[f]undamental maxims of statutory construction require that a specific section be found to qualify a general section. A specific statutory provision will govern even though general provisions, if standing alone, would include the same subject." Smith v. Califano, 597 F. 2d 152, 157 (9th Cir. 1979). Moreover, the general policy section's statement that potential wilderness areas be "managed as wilderness to the extent that existing non-conforming conditions allow" and that NPS "will seek to remove . . .temporary, non-conforming conditions" does not give NPS carte blanche to authorize and re-authorize *new*, non-conforming uses in the River corridor. Motorized uses only "exist" in the river corridor today because NPS issued new contracts for their operations in 2006. See ER 297 ("New contracts [authorizing motorized uses] will be issued for commercial operations upon the completion of the [CRMP]."). NPS fails to explain how authorizing motorized uses in 2006 qualifies as an attempt to remove non-conforming uses.

recommended, or designated wilderness areas. Under NPS's interpretation, an unlimited amount of motorboat, car, jeep, motorcycle, ATV, generator, helicopter, and even ground disturbing uses would be allowed in potential wilderness so long as the disturbance can be removed and does "not permanently denigrate wilderness values." In effect, Defendants would read in a "temporary impairment to current values and visitors" exception that does not exist in the 2001 MPs.

Fourth, NPS's obligation to comply with the 2001 MPs *now* should not be influenced by what Congress may or may not eventually include in a wilderness bill. Defendants' discussion of other wilderness bills (i.e., Boundary Waters, Frank Church, or Sylvania wilderness areas) or suggestion that Congress has the authority to include motorized uses within a wilderness bill because such uses are "established" is therefore misplaced.[13] Congress has the authority, when enacting legislation, to do as it sees fit. This, however, is not the issue. The issue, rather, is NPS's present compliance with the 2001 MPs and what level of wilderness management NPS must afford the Colorado River corridor now *before and until* Congress makes a final decision on a wilderness bill for the Grand Canyon.

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[13] Notably, NPS's 2001 MPs *do not* permit "established uses" in wilderness areas to continue. See MP 6.4.3.3.

III. NPS FAILED TO COMPLY WITH THE ORGANIC ACT.

A. NPS's Permit System Interferes With Free Access By The Public.

Defendants continue to characterize the free access issue as between noncommercial and commercial users. However, RRFW seeks to protect the interests of all members of the public who want to experience the Colorado River in the Grand Canyon, including people who require professional guides and those who can do it themselves. Both types of users should have equitable access to the River and not be compelled to pay a commercial outfitter in order to gain access.

1. Allocations of use must be fair under any system NPS uses.

This Court held in Kleppe that NPS: (1) has discretion to choose a system of allocating use of the river; but (2) must, under whatever system it uses, allocate use fairly so that both commercial and noncommercial users have equitable access to the River. Wilderness Preservation Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979). In Kleppe, however, the Court did not examine whether NPS's 1972 split "allocation ha[d] been fairly made pursuant to appropriate standards" because the question was moot. Id. at 1254. This Court, therefore, must now determine whether NPS's new 2006 split allocation system provides equitable access to the River.

NPS suggests that RRFW merely prefers other systems of allocation. See NPS at 48. This is incorrect. RRFW refers to NPS's analysis of other allocation systems as evidence of the unfairness and lack of standards in NPS's allocation under the split system and the availability of other ways of fairly allocating use. See SER 236 ("the agency has also developed an alternative split allocation system that can be similarly responsive to demand [as a common pool system]."). However, the systems themselves are not standards for fair allocations. The method for fairly allocating use under the system chosen also must not be arbitrary.[14] Kleppe, 608 F.2d at 1254.

Moreover, NPS does not have discretion to deny the public free access to the River. Rather, NPS's method of providing free access is only entitled to deference if it has a rational basis, considers all of the relevant factors and meets the standard articulated by this Court in Kleppe.[15] See Bicycle Trails Council of

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[14] Contrary to what NPS suggests (p.52), RRFW does not argue that commercial visitors must use the same permitting system as noncommercial visitors in order for there to be free access. RRFW argued that one standard for fair allocations, recommended by NPS experts, would be that there is equal disappointment in obtaining river access for those needing commercial services as for those boaters who can raft the river unassisted. RRFW at 35 (citing ER 276, 274-275).

[15] GCROA makes disparate arguments that are irrelevant to the Court's inquiry here. RRFW does not agree with the entirety of GCROA's analysis (see p.28-35), but limits its response to the relevant issues before the Court. This

Marin, 82 F.3d at 1454; Bear Lake Watch,Inc. V. FERC, 324 F.3d 1071, 1077 (9th Cir. 2003) (upholding agency's methodology where it relied on reasonable views of its own experts).[16]

2. NPS did not factor appropriate standards for fairness into its allocation decisions.

In defending this claim, Defendants do not state any appropriate standard by which it fairly allocated use in the FEIS. Nor does NPS dispute that the key criteria used to develop alternatives had no standards for fairness or equity in use.[17] RRFW at 35(citing ER 308-313). Consequently, the Court cannot assess whether standards were appropriate or whether the allocations were made pursuant

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Court's holding is clear that if commercial services are necessary and appropriate, fair allocations are required. Kleppe, 608 F.2d at 1253. GCROA is wrong that the Court should not address the legality of the decision (the result) reached. GCROA at 42. The Court would have done so in Kleppe if the decision had not been mooted by a new one. Kleppe, 608 F.2d at 1254.

[16] That the Court upheld the Forest Service's methodology of allocating recreational motorized and non-motorized uses in Hells Canyon National Recreation Area, where motorized uses are statutorily protected as a valid use, is not pertinent here, where NPS is governed by a different statutory scheme. Hells Canyon Alliance v. U.S. Forest Service, 227 F.3d 1170, 1176, 1184 (9th Cir. 2000).

[17] GCPBA refers to four stated objectives for allocating use as if they might qualify as standards. GCPBA at 19 (citing SER-GCPBA 4). Notably, NPS does not suggest these are standards for fairness. Only one of the four goals, "[a]ddress user perception of allocation inequity," pertains to fairness, but the adopted alternative did not even achieve that goal. SER-GCPBA 4; ER 408. Thus if it were a legitimate standard for fairness, NPS concedes it did not meet it.

to appropriate standards.

In the absence of an appropriate standard, Defendants contend that the FEIS "estimates that annual commercial and noncommercial user-days will be roughly equal."[18] NPS at 47. "Roughly equal" annual user-days, however, is not a standard for fairness and none of the record pages cited by NPS even suggests so. If it were, then each of the FEIS' seven alternatives would have had equal annual user-days between commercial and noncommercial users in order to comply with the law, but they do not. SER 288. The FEIS' impact analysis on visitor use even fails to mention fairness as a standard being evaluated. RRFW at 38 (citing ER 356-404). The truth is that NPS never established standards for fairness, but arbitrarily plucked the "roughly equal" split of user-days in an attempt to create perceptions of equity in the preferred alternative, which did not work. ER 408 (preferred alternative did not meet objective of addressing user perceptions of

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[18] NPS adds that it "has *enhanced* non-commercial visitors' 'free access' compared to commercial visitors.'" NPS at 47. The question remains whether the "enhanced levels" constitute equitable access according to appropriate standards. NPS claims its starting point for allocations was "actual past use," as in Kleppe. NPS at 47. However, Kleppe did not address whether the user-day allocations based on past use were valid because those decisions had been superseded. 608 F.2d at 1254. Further, NPS set use limits for the first time in 1972 (freezing use at existing levels for both user groups), which is quite different from starting at actual use in 2006, where significant limits on noncommercial boater access had been in place, resulting in waiting periods of up to twenty years to gain access. Id. at 1251; ER 330, 434, 240, 52.

equity).[19]

Further, NPS's brief ignores the unfairness of using a "roughly equal" annual user-day allocation method, including: its arbitrariness; its disregard for demand, need and relative wait times to access the river; its lack of even distributions between groups throughout the year and its limited focus in a multi-faceted permitting system . RRFW at 39-43. An expert study relied upon by NPS confirms that although a 50/50 division in a split system "is 'equal' (because there are two groups), it may be arbitrary or 'unfair' if the two sectors are not similar in size." SER 225. Further, in noting that the Grand Canyon is the "only river where allocations are split by user days," it advises that "[a] complete allocation picture requires splits to be described in terms of launches, people, and user days." SER 225.

With respect to seasons of use, GCPBA and GCROA suggest that because noncommercial boaters will take a winter trip (if that is what is available) and

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[19] GCROA argues that "parity," defined as 50-50 allocation of user-days between commercial and noncommercial users was the standard for fairness. GCROA at 39. However the FEIS analysis cited by GCROA shows that parity was not discussed as a standard of fairness. SER-GCROA 89 Notably, only the preferred alternative claimed parity for user-days between the two sectors. And for total passenger numbers, the FEIS claimed "less disparity" for the preferred Modified Alternative H. The logical conclusion of GCROA's argument (not even waged by NPS) is that none of the other alternatives had fair allocations that would comply with the Organic Act.

could use 90-100% of the winter allocation, the allocations were not arbitrary. This ignores that NPS had no standard for fairness in allocating use and gave noncommercial boaters over one-third of their allocation in the winter while excluding motors in winter because the commercial outfitters do not want to run their businesses then. NPS has acknowledged that most boaters, commercial and noncommercial, do not want to take a winter river trip. See ER 312, 413-414, 294-295. Clearly, "parity" does not apply to seasons of use. It is indisputable that GCROA would not support NPS in this litigation if the outfitters had been allocated one-third of their user-days to winter months.

Defendants also focus on the alleged reasonableness of NPS's decision not to conduct a demand study. Evidence exists that a demand study would be one way to fairly allocate use in a split system and evidence exists that assessing relative demand may not produce wholly accurate results and could cost a lot of money. However, if NPS does not study relative demand, contrary to the advice of experts, it must come up with some other standard and method for ensuring fairness in its split allocations.[20] It has not done so and consequently, its decisions

[20] Grand Canyon's Superintendent sought information on demand for commercial services from GCROA, SER-RRFW 7, but never received it. See SER-RRFW 10 (GCROA memo on the CRMP planning process discussing the need to have the support of GCPBA in order to avoid being "at loggerheads with the privates over user-days with demand being the leading candidate to serve as

are arbitrary and capricious. Kleppe, 608 F.2d at 1253.

Last, GCPBA argues that allocation is equitable because private boaters received "a significant gain." GCPBA at 24. Even if GCPBA were right, "a significant gain" does not equate to fair allocation of a limited resource. RRFW brought this lawsuit to compel compliance with the law and seeks to protect the wilderness resource as much as the public's right to equitable access. GCPBA's policy decision to team up with GCROA and walk away from its wilderness resource protection principles in order to accept in its view "a significant gain" for private boaters, is irrelevant to the legal requirements with which NPS must comply. See SER-RRFW 12 (stating GCPBA's prior position that the river should be managed as wilderness). Organizational politics cannot supply the rational basis that NPS needs to support its decisions in the CRMP anymore than RRFW's preferred allocation system can be imposed on the agency.

3. The allocations are unfair.

NPS has the duty to demonstrate the rational basis for its decisions and has

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the base allocation apportionment criterion on which all will depend, as imperfect as the demand thing is. We will have no scientific or otherwise credible evidence to support our contention that commercial demand constitutes 68% of the total and that private demand is only 32%. We will only have our intuition to offer, the intuition of a group with a clear profit motive at stake. *This will continue to convince no* one.") (emphasis original).

failed to do so. In addition, RRFW shows that NPS ignored evidence that the allocations are unfair.

RRFW's opening brief illustrated three ways in which the allocations are unfair. RRFW at 43-46. NPS does not respond to the evidence that: (1) it takes considerable time to obtain a noncommercial permit compared to no waiting period for commercial users; (2) anyone can pay concessioners for timely river access as an end-run around the noncommercial permit system and (3) there is real disparity in seasonal allocations between the two groups.[21]

In addition, one study relied upon by NPS found that the "easy availability of commercial trips encourages people to take river trips who might be satisfied with some other activity . . . displacing noncommercial users who are willing to spend considerable time, effort, or money to take a Grand Canyon trip–if access were available." SER 228. In addition, "[c]ommercial trips generally cost more and studies show that commercial users have substantially higher incomes than non-commercial users."[22] Id.

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[21] GCPBA and GCROA's response to the third is inadequate and addressed above.

[22] In spite of some pricing limitations imposed by NPS, the agency cites evidence compiled by Appellee-GCPBA that "commercial trips could be offered at lower prices and still produce a profit." SER 228. This supports RRFW's contention that inequitable allocations allow concessioners to sell "access," not

Without addressing these inequities in access, NPS concedes that individuals who do not obtain a noncommercial permit through the lottery "may reserve a space on a commercial trip," as an apparent salve to the unfair allocations. NPS at 52. The very fact that people who do not want nor need commercial services must purchase expensive commercial services to gain river access under this CRMP, makes it illegal under the Organic Act and the Concessions Act.

B. NPS Failed To Follow Its Own Procedures In Finding No Impairment To The Grand Canyon's Natural Soundscape.

1. NPS applied the wrong baseline.

Defendants are wrong that NPS properly measured the impacts of its ROD against the natural sound levels of the Grand Canyon in the absence of human-caused noise and that RRFW is misreading the FEIS, including Table 3-4.

The FEIS's definition of "natural ambient sound levels," Table 3-4 in the FEIS, and the 1993 study upon which the natural ambient sound levels used in the FEIS were established (see ER 236) does not exclude human-caused noise

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just guide services. One study also stated that when concessioners sell their businesses, they have included in the sale price the market value of their allocations, costs which then get passed onto consumers. SER 224; see also SER-RRFW 13 (noting only 5 percent of the population could afford a commercial trip in 2000).

including aircraft overflights from the background or baseline condition. The plain language of the FEIS is clear: "For the purposes of the [1993] study, natural ambient sound levels in Table 3-4 were determined *in the presence of audible human-caused noise including aircraft overflights*." ER 335 (emphasis added).

Indeed, the 1993 study summarized in Table 3-4 was prepared in response to an NPS request "to develop an acoustic profile at a specific sites in Grand Canyon National Park." ER 237. These acoustic profiles "provide thorough, consistent baseline documentation of the intensity and duration of aircraft sources in relationship to non-aircraft sources (both human related and park indigenous) at specific locations within the parks." Id. The purpose of the study was to document the existing sound environment (both natural and human-induced) at specific locations. ER 239. The study documented both "aircraft and background sound levels." ER 239. At site # 3 – the 96 Mile Camp site – for instance, "5 to 7 overflights were heard during a 20 minute period . . .[and] aircraft were generally heard as much as 60 to 80 percent of the time." ER 239. As such, site #3 "had fairly constant background levels between 38 and 42 dBA, and aircraft maximums were many and ranged between 40 and 65 dBA." Id.; see also ER 335. Notably, Table 3-4 incorporates *all of the sounds* recorded at each of the locations into a "typical" measurement or level that was exceeded 90% of the time. For example,

"Separation Canyon . . . had a natural ambient background level of 11-21 dBA, with aircraft audible 20% of the time. . .Burnt Springs Canyon [had] . . .a natural ambient of 13-17 dBA, and aircraft audible for 49% of the time." ER 355. Thus, the audibility of aircraft is clearly part of the "natural" ambient sound level or background condition. Without question, by adopting this approach, NPS is artificially diluting and masking the impacts to the Grand Canyon's natural soundscape. See MP 8.2.3 (defining the baseline); ER 334 (defining the natural soundscape); Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988) ("[w]ithout establishing the baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment . . .").

2. NPS failed to consider cumulative impacts when making its no impairment determination.

Defendants concede that they must consider cumulative impacts when making an impairment determination but maintain that NPS complied with this requirement by properly concluding that motorboats, helicopters, and generators would only "contribute an adverse, *negligible* increment to cumulative effects." NPS at 58 (citing SER 410) (emphasis in original). According to Defendants, "[i]n finding no impairment, NPS analyzed the 2006 CRMP's *incremental effects* and reasonably explained that they are negligible." NPS at 58 (emphasis added).

Defendants' response reveals a fundamental misunderstanding of cumulative impacts.

By considering only the "incremental" or "negligible" contributions to cumulative impacts when making an impairment determination, NPS failed to adequately assess the cumulative impacts. Cumulative impacts are the "incremental impact[s] of the action *when added* to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (emphasis added); Great Basin Mine Watch v. Hankins, 456 F. 3d 955, 971 (9th Cir. 2006). In other words, NPS "cannot treat the identified environmental concern in a vacuum, as an incremental approach attempts." Grand Canyon Trust v. FAA, 290 F. 3d 339, 346 (D.C. Cir. 2002). "Sometimes the *total impact* from a set of actions may be greater than the sum of the parts." Klamath-Siskiyou Wildlands Center v. BLM, 387 F. 3d 989, 994 (9th Cir. 2004) (emphasis added). As this Court explained, "the addition of a small amount of sediment to a creek may have only limited impact . . .But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where *even a marginal increase* will mean no salmon survive." Id. 994 (emphasis added). "Even a slight increase in adverse

conditions that form the existing environmental milieu may sometimes threaten harm that is significant. One more factory . . .may represent the straw the breaks the back of the environmental camel." Grand Canyon Trust, 290 F. 3d at 343 (citations omitted).

Here, as Defendants concede, when making its impairment determination, NPS looked only at the "negligible increment" to cumulative impacts on the Grand Canyon's natural soundscape. See NPS at 58; SER 410 - 411. NPS never considered the total, overall, or combined impacts of its decision when making an impairment determination. Consequently, NPS has yet to properly account for the cumulative impacts when making its impairment determination. See Grand Canyon Trust, 290 F. 3d at 343 (ordering FAA to consider cumulative impacts and rejecting FAA's argument that increased noise levels, compared to existing sound, was negligible); Pacific Coast Federation of Fisherman's Assoc. v. NMFS, 265 F. 3d 1028, 1036-1037 (9th Cir. 2001) (Agency's "disregard of projects with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects . . .is [a] major flaw").

3. NPS ignored an extensive body of research, studies, previous NEPA documents and management plans on the adverse impacts of motorized use when finding no impairment.

Defendants contend that there is no obligation to consider previous NEPA

documents, management plans, or other research, studies, and data documenting the impacts of motorized use because this information "never previously addressed the issue of whether motor noise impairs the natural soundscape." NPS at 59-60. Defendants are wrong.

"The impairment that is prohibited by the Organic Act . . .is an *impact* that . . .would harm the integrity of park resources or values, including the opportunity that otherwise would be present for the enjoyment of those resources or values." MP 1.4.5 (emphasis added); see also ER 279 (action which "will result in sound pollution that intrudes upon the tranquility and peace of visitors" results in impairment). When preparing an earlier CRMP for the River, NPS carefully considered, studied, and assessed how motorized use "impacts" the integrity of the natural soundscape and the ability of visitors to use and enjoy the natural sounds of the Park.

NPS's 1972 river plan, for instance, called for the phase out of motorized craft in the Grand Canyon based "on some preliminary sociological study results." ER 67. NPS followed up the 1972 river plan with a draft environment statement to evaluate how best to protect the Park's resources and values – including natural soundscape – from "[e]nvironmental pressures caused by a spiral of ever-increasing use." SER-RRFW 1. The environment statement concluded that:

> The use of motors pollutes the river with gasoline and oil, the air with smoke, and *assaults the senses with sound* and should be eliminated as soon as possible from the river environment.

SER-RRFW 2 (emphasis added). Ultimately, NPS determined that phasing motors out of the River corridor will provide a "higher quality experience," and lower the "[c]urrent levels of noise, congestion, pollution of air and water, litter, and other environmental insults." SER-RRFW 3. A study conducted in 1973 also found that "[m]otor noise . . .masks natural sounds in the Canyon and, in contrast, its almost unnatural quiet . . .[and] recommended that the use of outboard motors in the Canyon be either discounted or substantially curtailed." ER 72.

The Colorado River Research Program (CRRP) included four studies on impacts to the Grand Canyon's "natural noise level" and visitor experience from motorized uses. See ER 73, 146-149 (synthesis of studies on noise impacts). This research concluded that unnatural noise intrusions from motors in the Park should be reduced or eliminated to preserve the Grand Canyon's natural soundscape. See ER 148. After completing the CRRP, NPS released a final environmental impact statement and new river plan in 1979 calling for the phase out of motors in the River corridor over a 5-year period. See ER 161; ER 192. NPS's decision to phase out motorized watercraft was "based on the extensive [CRRP] for the Grand Canyon and considers public input from the two series of public meetings on river

management." ER 167 ; see also ER 188 (summarizing research); ER 220 (study contrasting motors and oars).

The findings of the CRRP, as well as NPS's previous management plans and environmental studies directly contradict NPS's current position. NPS, however, has failed to consider this dissenting information when making its no impairment finding. See MP 1.4.7.[23]

C. NPS's Decision To Authorize Motorboats And Helicopter Exchanges, In Conjunction With Existing Aircraft Overflights, Impairs The Grand Canyon's Natural Soundscape.

Defendants agree that the Grand Canyon's natural soundscape is a park resource and value that cannot be impaired. NPS at 54; see also MP 1.4.6; ER 355. Defendants also acknowledge that the cumulative impacts to the Grand Canyon's natural soundscape are long-term, major, and significant. In fact, the FEIS concluded that the cumulative effects of NPS's decision to authorize motorized uses of the River corridor in the Grand Canyon "would be *regional,*

[23] Defendants refer to the bibliography in the FEIS – which includes some of the CRRP studies, previous management plans, and environmental statements – as evidence that they considered this dissenting information when issuing its no-impairment finding. Merely burying a document in the bibliography of an FEIS, however, is insufficient to demonstrate that NPS carefully considered the dissenting opinions when making an impairment determination. See e.g., Center for Biological Diversity v. USFS, 349 F. 3d 1157, 1169 (9th Cir. 2003); Pacific Coast Fed. of Fisherman Assoc. v. NMFS, 482 F. Supp. 2d 1248, 1253 (W.D. Wash. 2007).

adverse, long-term, and major primarily due to the extensive aircraft overflights of the park." ER 355 (emphasis added). The "Grand Canyon's natural soundscape is considered a disappearing resource that requires restoration, protection, and preservation." ER 334-335.

To date, however, NPS has yet to explain why such long-term and major cumulative impacts to the Grand Canyon's natural soundscape – a "disappearing resource" that is an integral component of the Park – does not constitute impairment to the Park's natural soundscape. After all, there "is no higher level than 'major' on the impact scale." GYC, 2008 WL 4191133 at *16. Instead, Defendants maintain that the question of whether impairment occurs is a question that must be left up to NPS which has broad, unfettered discretion when determining whether an impact rises to the level of impairment. Defendants also argue that RRFW's impairment claim "has absurd implications" because it would prevent NPS from authorizing "*any use* of the Park that will add noise." NPS at 61. Defendants are mistaken.[24]

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[24] Defendants suggest that NPS's decision is an improvement over the existing situation (Alternative A in the FEIS). This is not entirely correct. The FEIS determined that the "natural soundscape would benefit overall . . .compared to Alternative A during the peak season, but impacts would be slightly greater in the shoulder and winter seasons, due primarily to increased use levels." SER 410. Moreover, even if NPS's decision is an improvement over the existing conditions, such an improvement is of no legal consequence. NPS's mandate is not to

NPS is entitled to a certain level of discretion. However, it "is bounded by the terms of the Organic Act itself." GYC, 2008 WL 4191133 at *7; Daingerfield Island Protective Soc'y v. Babbitt, 40 F. 3d 442, 446 (D.C. Cir. 1995) (same). In the 2001 MPs, for instance, NPS explicitly recognizes that "[w]hile Congress has given the Service the management discretion to allow certain impacts within parks, *that discretion is limited* by the statutory requirement (enforceable by the federal courts) that the Park Service must leave park resources and values unimpaired." MP 1.4.4 (emphasis added). This prohibition on impairment, the "cornerstone of the Organic Act, establishes the primary responsibility of the National Park Service . . .[and] ensures that park resources and values will continue to exist." Id. As such, the NPS has *no discretion* to authorize activities that impair a park's resources or values. See MP 1.4.3; MP 1.4.4 (same); MP 1.4.5 (same).

Second, Defendants' suggestion that RRFW's argument "has absurd implications" because it would prevent NPS from authorizing "*any use* of the Park that will add noise" is a gross over simplification of the issues and incorrect. NPS's authorization of motorboats (including high-powered pontoon boats),

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"improve" the Park's natural soundscape but to ensure that current and future conditions do not result in impairment. See MP 1.4.4; GYC, 2008 WL 4191133 at * 22

helicopters, and generators in the Grand Canyon is not "*any use* of the Park that will add noise" or use that can be compared to non-motorized uses of the Grand Canyon. On the contrary, unlike non-motorized human uses of the Park, high-powered motorboats, helicopters, and generators are not "necessary and appropriate" for members of the public to use and enjoy the River corridor in the Grand Canyon. Supra at 5-11. Nor are such uses consistent with NPS's wilderness obligations. Supra at 25-29.

Moreover, motorized uses will have more than a negligible or incremental impact on the Grand Canyon's natural soundscape. Indeed, this is partially why NPS prepared a environmental impact statement (EIS) instead of an environmental assessment (EA) for the new CRMP under NEPA. See 42 U.S.C. § 4332 (c) (EIS required for "major federal actions significantly affecting quality of the human environment"). NPS's decision, for instance, authorizes the use of motorboats (including high-powered pontoon boats) in the Colorado River corridor. See ER 418, 420. In the Upper Gorge, for instance, up to six motorized commercial boats would be allowed to launch each day for up to 10 day trips (most commercial "trips" involve the use of two, thirty-six foot long motorized rafts). ER 417. This figure – which does not include noncommercial trips – translates into approximately *60 motorboats* in the Grand Canyon's Upper Gorge at any given

day during the popular summer season. SER 408. Noise from one motorboat alone would be audible for approximately 54 minutes per day at one point in the River corridor (assuming nine minutes audibility per boat) and passengers on boats would experience noise from the boat's motor for approximately 3.5 hours per day (not including noise from other boats). See SER 408. In the Lower Gorge, "[n]oise from boats . . .would be audible about 276 minutes/day . . .and 330 minutes . . .on busy days." SER-RRFW 14**.** According to NPS, such noise impacts "would be an *adverse, major impact*." Id. (emphasis added).

In addition to motorboats, NPS's decision also authorizes passenger helicopter exchanges at Whitmore and the Quartermaster Area. See ER 418, 420. The FEIS determined that passenger helicopter exchanges at Whitmore will have "moderate to major adverse impacts" to the Grand Canyon's natural soundscape on days of heavy helicopter use. SER 409-410. According to NPS:

> as many as three groups of 32 passengers each could need helicopter shuttles before 10:00 am during many summer days. This would correspond to up to *40 flights per day* (20 in and 20 out for the 96 passengers . . .When helicopter exchanges occur, noise free-intervals would be *less than 10 minutes*. Helicopters exchanging river trip passengers at Whitmore have been measured at *up to 83 dBA* at a distance of 200 feet from the source.

SER 409 (emphasis added).[25] The impacts are even more severe in the Lower

[25] A "sound measuring seventy decibels is perceived to be 'noisy' and is the equivalent of being in a room with a running vacuum cleaner." GYC, 2008 WL

Gorge, where NPS found "[n]oise from boats and helicopters . . .would be audible from 2,412 to 3,042 minutes/day. Because this is more than 100% of the 12-hour day, there would be considerable overlap noise events . . .During peak-use days, there would be very little time for noise-free intervals . . .This would be an adverse, *major impact* in that zone." SER-RRFW 14 (emphasis added).

In terms of adverse impacts to the Grand Canyon's natural soundscape, therefore, motorized uses of the River corridor are not like "any uses" or "any additional human-caused noise" and cannot be equated with the "sounds of conversation or oars banging" as suggested by Defendants. Motorized uses of the River corridor have major adverse impacts on the natural sounds of the Park and, in conjunction with the existing aircraft overflights, impairs the Grand Canyon's natural soundscape. See ER 279 (action that results in "sound pollution that intrudes upon the tranquility and peace of visitors" is impairment); MP 1.4.5 (explaining when impacts constitute impairment). Defendants suggestion, therefore, that RRFW's approach to cumulative impacts "has absurd results" is entirely off base.

Indeed, the only absurd result is that the Grand Canyon's natural soundscape is a "disappearing resource" in need of "restoration, protection, and

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4191133 at *11.

preservation." ER 334. The absurdity is NPS's failure to acknowledge when impairment is occurring and to take the necessary steps to improve the situation. Instead of trying to lesson the unnecessary impacts to the Grand Canyon's natural soundscape, NPS adds insult to injury by authorizing more motorized uses into an already degraded (if not impaired) environment. In NPS's view, since the Grand Canyon's natural quiet is already adversely impacted by aircraft overflights there is no harm in authorizing *additional* motorized uses. This defeatist approach to managing the Grand Canyon – a national treasure – is illogical and illegal.

NPS is instructed "to preserve to the greatest extent possible the natural soundscapes of the park, which exist in the absence of human-caused sound." ER 334 (citing MP 4.9). NPS must "strive to preserve and restore the natural quiet and natural sounds" of the Park. Id. When faced with an on-going activity that is causing impairment to the Grand Canyon's natural soundscape, the "Director must take appropriate action, *to the extent possible* with the Service's authorities and available resources, *to eliminate the impairment*." MP 1.4.7 (emphasis added). In this case, however, NPS took the opposite approach by authorizing more motorized uses of the Grand Canyon.

CONCLUSION

RRFW respectfully requests that this Court declare that NPS violated the Concessions Act, the Organic Act, and its MPs and remand this matter to the district court with instructions to consider appropriate injunctive relief.

Respectfully submitted this 17th day of October, 2008.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. Rule 32 (A)(7)(C), undersigned counsel of record for River Runners hereby certifies that this opening brief is proportionally spaced, has a typeface of 14 points or more and contains 12,050 words. River Runners' counsel relied on Corel Word Perfect 12 to obtain the word count.

Julia A. Olson

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2008, I served two true and correct copies of Plaintiffs-Appellants' Reply Brief, one copy of Plaintiffs-Appellants' Supplemental Excerpts of Record and one copy of Plaintiffs-Appellants' Motion to Exceed the Type-volume Limitation For a Reply Brief on the following counsel of record, via First Class U.S. mail, postage prepaid:

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