

Lori Potter (CO Bar No. 12118)
KAPLAN KIRSCH & ROCKWELL LLP
1675 Broadway, Suite 2300
Denver, CO 80202
Tel: 303-825-7000

Counsel for Defendant-Intervenor
Grand Canyon Private Boaters Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

River Runners for Wilderness, et al.)	No. 06-CV-00894 PCT-DGC
)	
Plaintiffs,)	REPLY MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
v.)	OPPOSITION TO PLAINTIFFS'
)	MOTION FOR SUMMARY
Stephen P. Martin, et al.)	JUDGMENT AND IN SUPPORT
)	OF GCPBA'S CROSS-MOTION
Federal Defendants; and)	FOR SUMMARY JUDGMENT
)	
Grand Canyon River Outfitters)	
Association; Grand Canyon Private)	
Boaters Association,)	
)	
Defendant-Intervenors)	
)	

TABLE OF CONTENTS

I. THE NATIONAL PARK SERVICE IS MANAGING THE COLORADO RIVER AND MOTORIZED USE OF THE RIVER IN CONFORMITY WITH ALL APPLICABLE AUTHORITIES 1

A. Use of Motorized Boats Does Not Cause Lasting Impacts to Wilderness Resources. Allowing Temporary But Incompatible Uses Is Consistent With NPS Management Criteria. 1

B. Because Motors Were Being Used At the Time of NPS’s Wilderness Recommendation, NPS May Manage Motorized Rafting as an “Existing” Non-conforming Condition. 4

II. THE NATIONAL PARK SERVICE HAS NOT VIOLATED ITS DUTIES UNDER THE ORGANIC ACT IN ALLOCATING ANNUAL USER-DAYS EVENLY BETWEEN COMMERCIAL AND NON-COMMERCIAL BOATERS 5

A. Creation of a No-Motors Winter Season and Allocating all of the Winter Use to Private Boaters Has a Rational Basis. 7

B. Private Boaters Have Achieved an Equitable Allocation of Motor-Free Conditions and Rafting Opportunities on the River. 9

TABLE OF AUTHORITIES

Cases

Wilderness Public Rights Fund v. Kleppe
608 F.2d 1250 (9th Cir. 1979) 6

Other Authorities

Martin, *Day Hikes From the River*, Vishnu Temple Press, Flagstaff, AZ (2002) 8

Defendant-Intervenor Grand Canyon Private Boaters Association (“GCPBA”) submits this Reply Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of GCPBA’s Cross-Motion for Summary Judgment.

ARGUMENT

I. THE NATIONAL PARK SERVICE IS MANAGING THE COLORADO RIVER AND MOTORIZED USE OF THE RIVER IN CONFORMITY WITH ALL APPLICABLE AUTHORITIES

GCPBA showed in its opening brief that the National Park Service properly manages the Colorado River corridor as proposed “potential wilderness” that will qualify for full wilderness designation and status when the existing nonconforming use – motor boats – is eliminated. “Potential wilderness” status applies to areas that have wilderness qualities but also contain temporary uses that are incompatible with full wilderness designation. SAR 016136.

Plaintiffs made two principal contentions in reply: first, that NPS may not allow even “temporary or transient disturbances” in potential wilderness, and second, that motors are not an “established” use that NPS may permit until Congress takes final action. Both arguments fail.

A. Use of Motorized Boats Does Not Cause Lasting Impacts to Wilderness Resources. Allowing Temporary But Incompatible Uses Is Consistent With NPS Management Criteria.

Plaintiffs’ claim requires the Court to find that a temporary disturbance of wilderness character, such as last summer’s motorboats, is impermissible even if

there are no lasting impacts to wilderness. The administrative record is vast, but Plaintiffs nonetheless cannot find any scientific study or technical report that supports an argument that the temporary use of motorboats permanently affects the wilderness resource or prevents ultimate wilderness designation.

Instead, Plaintiffs appear to base their case on the impacts of motors on a particular visitor's experience, not on the purported impacts to an enduring resource of wilderness. While it is true that motors might degrade a given individual's visit to the Grand Canyon while the corridor remains in potential wilderness status, nothing about that violates the directive to NPS to manage potential wilderness so as to leave the land and its resources "*unimpaired for future use and enjoyment.*" See Management Policies at § 6.1 (emphasis added); § 6.3.1, SAR 016135-6.

Rather, the upshot of Plaintiffs' argument is that motorboat use may have adverse effects on particular visitors for particular periods of time. To use Plaintiffs' term, motors have a "presence" in the river corridor. Pl. Rep. at 14. (The corollary is that motors also have an absence for the 6 ½ months each year when motor boats are prohibited.) Giving Plaintiffs' argument its due, the most that can be said is that impacts are experienced differently from one visitor to the next. But if the Court visited the river corridor the day this brief is filed, it would find that past use of motors had not changed the wilderness character of the Grand Canyon.

Plaintiffs' reply also does not address GCPBA's point that several other areas became designated wilderness after they had experienced years of motorized boat usage. *See* GCPBA Memo in Support of Summary Judgment at 11-12 (discussing previous motorized use in three wilderness areas).¹ The fact that these areas became officially protected wilderness following extensive motor use stands as compelling evidence that the Park Service's management of the Colorado River corridor and temporary allowance of motor boats is not causing permanent impairment of its wilderness qualities.

Plaintiffs purport to enforce the Management Policies, but also fail to address the point made in GCPBA's opening brief that the Management Policies are aspirational, not mandatory, with respect to management of non-conforming uses such as motors. The Policies provide that NPS "will *seek to remove* from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation." SAR 016137 (emphasis added). Plaintiffs focus on the word "remove" and make it part of their argument, *see* Plaintiffs' reply at 15, but do not even try to reconcile the words "seek to" with their position that motors cannot legally be used in the Colorado River corridor while the corridor is classified as potential wilderness.

¹ On a limited basis, motorized use has been grandfathered in certain designated wilderness areas. *See* GCPBA Memo in Support of Summary Judgment at 11-12.

Finally, Plaintiffs don't attempt to explain their own admission, expressed in their comments on the DEIS, that motorized uses should be "phased out," not eliminated immediately. This position is inconsistent with the contention that motors are causing permanent irreparable harm to the wilderness values of the river now.

B. Because Motors Were Being Used At the Time of NPS's Wilderness Recommendation, NPS May Manage Motorized Rafting as an "Existing" Non-conforming Condition.

Plaintiffs contend on reply that motorized boating needs to have been "established" when the Wilderness Act was passed in 1964 in order for the NPS to treat motors on the river as an existing, non-conforming use. This is an incorrect statement of the guiding standard.

The NPS Management Policies indicate in several places that non-conforming uses are identified as of the time that NPS makes a determination of the area's suitability for wilderness designation. SAR 016135. The Management Policies do not require NPS to examine whether an existing development right or nonconforming use existed as of 1964 when the Wilderness Act was passed.

The NPS identified the Colorado River corridor as potential wilderness in 1980. Defts. Jt. Facts ¶ 18. There is no dispute that motorized boating was occurring as of 1980 in sufficient volume to cause an issue about their eventual phase out. Pltfs. Facts ¶ 12.

Chapter 6 of the Management Policies focuses entirely on conditions at the time NPS makes its wilderness recommendation, not on some earlier time. SAR

016135, *et seq.* The NPS first determines if lands within its jurisdiction are “suitable” for inclusion in the wilderness system, *i.e.*, if they have wilderness qualities. *Id.*, § 6.2.1. At the time NPS makes that determination, it makes two other contemporaneous determinations under the Management Policies. First, NPS may include lands that have been logged, farmed, grazed, mined or otherwise developed “if, *at the time of assessment*, the effects of these activities are substantially unnoticeable...” *Id.*, § 6.2.1.2 (emphasis added).² Second, “*in the process of determining wilderness suitability*,” NPS is not to exclude lands “because of *existing* rights or privileges,” such as development activities. *Id.* (emphasis added). Finally, NPS manages identified potential wilderness, such as the Colorado River corridor, “as wilderness to the extent that *existing* non-conforming conditions allow.” SAR 016137 (emphasis added). Nothing in the Management Policies directs NPS to look at whether a nonconforming use was established in 1964 when the Wilderness Act passed.

II. THE NATIONAL PARK SERVICE HAS NOT VIOLATED ITS DUTIES UNDER THE ORGANIC ACT IN ALLOCATING ANNUAL USER-DAYS EVENLY BETWEEN COMMERCIAL AND NON-COMMERCIAL BOATERS

Plaintiffs complain that the nearly even split of user days between private boaters and commercial boaters in the CRMP is inequitable. Pl. Rep. at 28-34. NPS considered three types of allocation models in the EIS: “Split Allocation,”

² Plaintiffs have not cited any study in the administrative record substantiating that there are lasting impacts (“substantially noticeable effects” in the parlance of the Management Policies) of the past use of motors.

“Common Pool Allocation,” and “Adjustable Split Allocation.” AR 093686-88. Of the three, plaintiffs prefer the common pool allocation model, instead of the hybrid split allocation model that the agency chose.

The Ninth Circuit has established the standard to apply in litigation challenging the National Park Service’s decisions on allocation. The applicable standard authorizes NPS to decide as it did in this matter: “Where several administrative solutions exist for a problem, courts will uphold any one with a rational basis, but the Secretary’s balancing of competing uses must not be an arbitrary one.” *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1252 (9th Cir. 1979) (considering challenge to allocation in the NPS’s 1973 Interim Management Plan for the Colorado River). Thus, under the standard articulated in *Wilderness Public Rights Fund*, the NPS could fairly and permissibly adopt the split allocation model even if the common pool model might also be a rational choice.

The NPS took extensive comment on the merits and demerits of the possible allocation models. *See, e.g.*, AR 050534-41 (comments of GCPBA, GCROA, *et al.*); AR 050222 (comments of plaintiff RRFW *et al.*); Pltfs. Facts ¶ 172. The agency resolved the allocation issue by taking the comments into consideration and refining the split allocation model in response. This process of consideration, refinement and decision, applying the four objective criteria set forth in the DEIS, AR 093686, satisfies the *Wilderness Public Rights Fund* test.

While Plaintiffs' preferred common pool allocation model has the appearance of fairness, it has much vulnerability in practice. For example, under this type of allocation model, demand can be manipulated significantly. Specifically, such a model would respond to advertising and pricing and press campaigns. It seems safe to assume that the commercial sector is more likely than the private boating community to have the resources and motivation to use advertising, pricing and the media to affect demand. Further, there is a structural disparity built into such a system that would actually favor the commercial sector. Private boaters take relatively few people on very long trips, while commercial outfitters take large groups on what are generally much shorter trips. The expected effect is that the commercial boating sector would bring a greater number of individual applicants to the gate, at least initially and possibly ongoing, and thus obtain more river usage than private boaters. Thus, Plaintiffs' preferred allocation model might backfire on the interests of private boaters, whereas the chosen model guarantees private boaters roughly equal numbers of launches and user-days on the river.

In conclusion, the CRMP contains a rational basis for choice of the split allocation model, and the Court should reject Plaintiffs' request to set it aside.

A. Creation of a No-Motors Winter Season and Allocating all of the Winter Use to Private Boaters Has a Rational Basis.

Plaintiffs lament that private boaters have all of the winter season allocation and a correspondingly lower allocation, vis-à-vis commercial users, in the summer

season. Pl. Rep. at 35-7. Plaintiffs' argument against the winter season fails to account for the fact that having a non-commercial winter season creates benefits to private boaters that balance any disadvantage of having relatively fewer trips in the summer.

Most obviously, the NPS has created a 6 ½ month long motor-free season from September 15 until April 1 of each year. For more than half the year, Plaintiffs and all private boaters can enjoy precisely the conditions that Plaintiffs seek.

Winter trips also involve no encounters with commercial trips and the larger groups that are found on commercial trips. There are also fewer other private trips and therefore more solitude. Competition for campsites and other special features is limited. The private trips during this time of year are longer, and thus can accommodate more off-river exploring and hiking.

While winter weather is distinctly cooler than in other seasons, this too is a boon to the many private boaters who use their trips to access the fine hiking in the inner Grand Canyon. The Co-Director of plaintiff RRFW has written a guide to hikes that are accessible by boating the Colorado River. Martin, *Day Hikes From the River*, Vishnu Temple Press, Flagstaff, AZ (2002). Of the 100 hikes described, 33 are deemed inappropriate or dubious for the summer (*e.g.*, "It's too hot a place to walk in the summer, but this is a great way to spend a winter exchange day at Phantom"). *Id.* at 84.

The record shows that in the recent past, the Park Service has experienced a 90% - 100% winter launch rate. AR 9752 (results of a study of winter launches 1998-2002). This refutes Plaintiffs' contention that winter trips are undesirable or unwanted. The winter allocation has a rational basis and is not a reason to invalidate the CRMP, despite Plaintiffs' protestations to the contrary.

B. Private Boaters Have Achieved an Equitable Allocation of Motor-Free Conditions and Rafting Opportunities on the River.

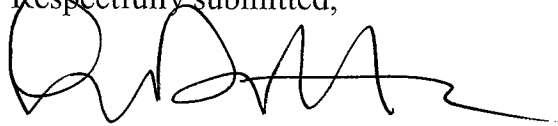
The CRMP creates a motors-free Colorado River environment for more than half of the year. It gives non-commercial boaters approximately 50% of the total user days. It allocates private boaters 46% of the total launches. Record of Decision at 3, AR 109593. Each of those splits of the resource represents a significant gain for the private boating community over the prior CRMP. By most measures, the CRMP would be considered a success for private boaters with the interests that Plaintiffs espouse.

The CRMP needed to resolve a number of contentious resource issues involving the nature, extent and time of boating uses on the Colorado River. The legal framework for the decisions made in the CRMP required an exquisite balance of human access to the river with protection of the Park's resources, of commercial with non-commercial boating, and of motorized with non-motorized uses. AR 102426-8; 104615-7. Plaintiffs have taken up the cudgel to show that the outcome is not perfect, but that is not the Court's inquiry. Based on the careful

and thorough administrative record, the CRMP surely has a rational basis, and that is what the law requires.³

Dated this 3rd day of October, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lori Potter', written over a horizontal line.

Lori Potter (CO Bar No. 12118)
KAPLAN KIRSCH & ROCKWELL LLP
1675 Broadway, Suite 2300
Denver, CO 80202
Telephone: 303-825-7000
Facsimile: 303-825-7005

Attorneys for Intervenor Grand Canyon
Private Boaters Association

³ The CRMP has a shelf life of 10 years, and can be amended to address major changes. Record of Decision at 6, AR 109596.