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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RIVER RUNNERS FOR WILDERNESS, et al., Plaintiffs, v. STEPHEN P. MARTIN, et al.,[1] Federal Defendants, GRAND CANYON RIVER OUTFITTERS ASSOCIATION; GRAND CANYON PRIVATE BOATERS ASSOCIATION, Defendant-Intervenors.	Civ. No. 06-0894-PCT-DGC **FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

[1] Pursuant to Fed. R. Civ. P. 25(d), Stephen P. Martin, the current Superintendent of Grand Canyon National Park, is substituted for his predecessor, Joseph F. Alston.

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Pursuant to Federal Rule of Civil Procedure 56, Federal Defendants, by and through counsel of record, submit this combined brief in support of Federal Defendants' August 6, 2007 "Motion for Summary Judgment," filed herewith, and in response to Plaintiffs' May 25, 2007 "Motion for Summary Judgment," Dkt. No. 55, and "Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment," Dkt. No. 57.

INTRODUCTION

Plaintiffs challenge the Colorado River Management Plan ("CRMP") that the United States Department of the Interior, National Park Service ("NPS" or "Park Service") adopted on February 17, 2006. The 2006 CRMP governs recreational use of the Colorado River corridor in Grand Canyon National Park ("GRCA" or "Park"), and allocates use between commercial and noncommercial boat trips. According to Plaintiffs, the 2006 CRMP violates NPS's "duty" to preserve the wilderness character of the River because it, like the previous plan from 1989, allows commercial use of motorboats, helicopter passenger exchanges, and generators. Plaintiffs also allege that the decision to allow commercial and motorized uses in the 2006 CRMP violates various provisions of the National Park Service Concessions Management Improvement Act ("CMIA" or "Concessions Act"), 16 U.S.C. §§ 5951-66, the National Park Service Organic Act, 16 U.S.C. §§ 1 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*[2] The premise underlying Plaintiffs' claims is that NPS is required by law to grant members of the public who have the equipment, time, and skill to navigate the Colorado River in the Grand Canyon without the aid of motors or a commercial operator *exclusive* use of the River and, conversely, that members of the public needing the assistance, expertise, and flexibility that commercial operators provide should be denied access to the River.

Plaintiffs' claims are without merit. The Ninth Circuit has rejected the notion that members of the public requiring commercial assistance to take a trip on the River cannot be

[2] Because Plaintiffs' claims challenge a federal agency action, they are subject to judicial review--if at all--only pursuant to the highly deferential "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

afforded that assistance. See Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253-54 (9th Cir. 1979). Accordingly, NPS's decision to allow a continuation of commercial services, including the use of motors, complies with the agency's broad discretion under the Concessions Act and Organic Act, because NPS reasonably determined that those services are necessary and appropriate for public use of the Park and will not impair Park resources, including its wilderness characteristics and natural soundscape. The 2006 CRMP also fairly apportions River use between commercial and noncommercial boaters, allocating annual "user-days" evenly between the two groups, while allowing noncommercial uses for all 12 months of the year, but limiting commercial uses to seven months and commercial motorized trips to only five-and-a-half months.

Moreover, although NPS has recommended the Colorado River corridor in the Park as "potential wilderness," Congress has not designated the area as wilderness or potential wilderness pursuant to the Wilderness Act, 16 U.S.C. §§ 1131-36. NPS thus has no legal "duty" to manage the area as wilderness, and Plaintiffs' attempt to create such a duty from the Park Service's Management Policies ("MPs"), management guidance, and inapplicable provisions of the Wilderness Act fails. Even if these documents were legally enforceable, the 2006 CRMP is consistent with the MPs and other guidance, allowing only limited motorized use of the River that is necessary to promote public access with only temporary and transient, minimal disturbances of wilderness values that will not prevent Congress from designating the area as wilderness. NPS also complied with NEPA by preparing a detailed environmental impact statement ("EIS") based on a massive body of relevant information (as evidenced by the size of the EIS and Administrative Record), including detailed analyses of cumulative impacts on wilderness character, natural soundscape, and other park resources and visitor experience of the River.

In sum, Plaintiffs cannot establish that NPS's decision is arbitrary, capricious, or otherwise contrary to law. Therefore, the Court should deny Plaintiffs' motion for summary judgment and grant summary judgment in favor of Federal Defendants.

BACKGROUND

The National Park Service ("NPS") administers Grand Canyon National Park ("GRCA" or "Park") as a unit of the national park system in accordance with what is commonly known as the NPS Organic Act, 16 U.S.C. §§ 1, 2-4; with other laws applicable generally to the national park system, including NPS's concessions authority;[3] and with GRCA's park-specific authorizing legislation.[4] SOF ¶ 2.[5] Section 1 of the Organic Act directs NPS to "promote and regulate the use of the [national parks] . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. Section 3 directs the Secretary of the Interior to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." Id. § 3. A later statute, enacted as part of the Act of October 7, 1976, Pub. L. No. 94-458, 90 Stat. 1939, authorizes the Secretary to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a–2(h),

Acting under its various statutory authorities, NPS has promulgated regulations specifically governing the use of the Colorado River within GRCA. See 36 C.F.R. § 7.4(b).

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[3] NPS's current concessions authority, the National Park Service Concessions Management Improvement Act of 1998 ("CMIA" or "Concessions Act"), 16 U.S.C. §§ 5951-66, repealed the former NPS concessions authorization law, 16 U.S.C. §§ 20-20g.

[4] GRCA was established by the Act of February 26, 1919, ch. 44, 40 Stat. 1175, and enlarged by the Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975), both of which are codified at 16 U.S.C. §§ 221-228j.

[5] Citations to "SOF" refer to Federal Defendants' and Defendant-Intervenors' August 6, 2007 "Joint Statement of Material Facts in Support of Summary Judgment," and "RSOF" refers to Federal Defendants' and Defendant-Intervenors' August 6, 2007 "Joint Response to Plaintiffs' 'Statement of Material Facts in Support of Motion for Summary Judgment.'"

NPS also has entered into concession contracts with 16 entities to provide motorized and non-motorized boat trips on the Colorado River within GRCA.[6] In litigation brought in the late 1970s, the Ninth Circuit generally upheld NPS's authority to regulate river use within GRCA, NPS's regulations specifically governing river use within GRCA, and NPS's allocation of permits and user-days between commercial and noncommercial users. Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979).

Use of the Colorado River within GRCA increased substantially after completion of the Glen Canyon Dam in 1963 resulted in a steady flow of water in the River and made river-running feasible on a year-round basis. SOF ¶ 12. Because of resource concerns and user conflicts resulting from this increased use, NPS initiated the first in a series of river planning and management efforts, culminating in a River Use Plan issued in December 1972. SOF ¶¶ 12-13. During the following decades, the 1972 Plan was superseded by a number of other river planning and management documents analyzing the impacts of visitor use on the Colorado River corridor's resources and attempting to establish the corridor's "carrying capacity." SOF ¶ 13. In all of the previous plans (1979-80, 1981, and 1989), NPS allocated the number of user-days between professionally outfitted and guided (i.e., commercial) boaters and self-outfitted and self-guided (i.e., private or noncommercial) boaters. ¶¶ 13-16.

In the 1979-80 CRMP, NPS announced a plan to phase out the use of motorized watercraft on the Colorado River within GRCA over a five-year period. SOF ¶ 18. In response to congressional legislation targeted at that restriction, NPS issued the 1981 CRMP, which removed the five-year phase-out of motorized watercraft. Id. The 1989 CRMP also did not call for the phase-out of motorized watercraft. Id.

In August 1995, NPS approved a general management plan ("1995 GMP") setting direction and goals for management and use of the entire GRCA. SOF ¶ 19. The 1995 GMP states that one of the management objectives for the Park is to "[p]rovide a wilderness river

[6] These concession contracts were scheduled to expire on December 31, 2002, but were extended pending completion of a new CRMP. NPS has issued new concession contracts, consistent with its recently revised CRMP, for the 2007 boating season.

experience on the Colorado River" but that "this objective will not affect decisions regarding the use of motorboats on the river." Id. The 1995 GMP also indicates that the 1989 CRMP "will be revised as needed to conform with the direction" in the 1995 GMP, and that "[t]he use of motorboats will be addressed in the revised plan, along with other river management issues identified through the scoping process." SOF ¶ 20.

Planning for the 2006 CRMP began in 1997 with public scoping workshops and comments on river issues. SOF ¶ 22. After this process was suspended and restarted following the filing of two lawsuits, id., NPS published in the Federal Register a notice of intent to prepare an environmental impact statement ("EIS") for a revised CRMP on June 13, 2002, and held seven additional public scoping meetings and stakeholder workshops. SOF ¶¶ 23-24. Following this intensive period of identifying issues, developing management alternatives, and conducting analyses, NPS released for public review a draft environmental impact statement ("DEIS") for the revised CRMP in the fall of 2004. SOF ¶ 27. The DEIS presented eight alternatives (Alternatives A-H) for managing the river from Lees Ferry (River Mile 0) to Diamond Creek (River Mile 226) and five alternatives (Alternatives 1-5) for managing the river from Diamond Creek (River Mile 226) to Lake Mead (River Mile 277). Id. The various alternatives (and combinations of alternatives) incorporated a wide range of options to accommodate, address, allocate, and analyze both commercial and noncommercial uses, as well as motorized and nonmotorized activities. Id.

Based on another extensive public input period, NPS modified the DEIS to address public concerns. SOF ¶ 27. Among the public input was a set of joint comments received from a coalition of groups representing both commercial *and* noncommercial users of the Colorado River within GRCA supporting equal allocation of annual commercial and noncommercial use, the continued authorization of an appropriate level of motorized use, seasonal adjustments that would result in fewer river trips occurring at one time, and improvements to the noncommercial permit system. SOF ¶ 28. In November 2005, NPS released the three-volume Final Environmental Impact Statement ("FEIS"), SOF ¶ 29, and

on February 17, 2006, the NPS Regional Director approved the Record of Decision ("ROD") for the revised CRMP. SOF ¶ 30. In the ROD, NPS selected for implementation the preferred alternatives for the CRMP described in the FEIS--Modified Alternative H (Lees Ferry to Diamond Creek) and Modified Alternative 4 (Diamond Creek to Lake Mead)--each of which was consistent with the mix of components sought by the coalition of commercial and noncommercial use groups. Id.

As compared to the 1989 CRMP, the number of commercial boat launches and passengers will decrease under the 2006 CRMP, whereas the number of noncommercial launches and passengers will nearly double. SOF ¶ 36. The 2006 CRMP reduces maximum group size for commercial trips; continues to require the use of four-stroke outboard motors, which are cleaner and quieter than the two-stroke outboard motors used during the 1970s and 1980s; prohibits the use of generators, except in emergency situations and for inflating rafts; and authorizes motorized trips during only five and a half months of the year. SOF ¶¶ 42, 46, 48. NPS also imposes additional restrictions on passenger exchanges to reduce impacts from helicopter transports. SOF ¶¶ 49-52.

As with previous plans, the 2006 CRMP caps commercial use at 115,500 user-days annually, all of which will occur between April 1 and October 31. SOF ¶ 17. The 2006 CRMP allows noncommercial use year-round and does not cap noncommercial user-days, but estimates that noncommercial boaters will use a total of 113,486 user-days annually. Id. Therefore, as measured in user-days, the 2006 CRMP allocates approximately 50.3 percent of annual use to commercial boaters and 49.7 percent to noncommercial boaters, with noncommercial users enjoying the River alone without commercial users for 5 months of the year and without commercial motorized use for 6.5 months of the year. Id.

In sum, through the exhaustive NEPA process, NPS reviewed and considered an extensive body of analyses, information, and public input on a variety of alternatives uses and impacts to various resources and values, including the natural soundscape, visitor experience, and wilderness character of the Colorado River corridor. See, e.g., SOF ¶¶ 43-52

(natural soundscape); SOF ¶¶ 53-55 (wilderness character). The resulting CRMP thus satisfies NPS's dual mandate to provide for the use of the Colorado River corridor while at the same time preserving its outstanding resource values for future generations.

STANDARD OF REVIEW

I. JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Because the statutes underlying Plaintiffs' claims do not provide for a private right of action against the United States, Plaintiffs' challenges to the NPS's adoption of the CRMP are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1114 (9th Cir. 2000); see also Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994) (challenge to EIS reviewed pursuant to APA); Glacier Park Foundation v. Watt, 663 F.2d 882, 885-86 (9th Cir. 1981) (Concessions Policy Act claims reviewed under APA). While recognizing that the APA governs the scope and standard of judicial review for their claims, see Pls. SJ Mem. at 1-2, Plaintiffs fail to advise the Court that judicial review of federal agency actions is extremely limited and highly deferential.

Under the APA, the federal agencies' decisions may be overturned only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). Under this deferential standard, an agency's decision "will only be overturned if the agency committed a clear error in judgment." Wetlands Action Network, 222 F.3d at 1114-15 (quotations omitted); see also Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 573 (9th Cir. 1998) (considerable deference must be accorded to the agency with regard to the manner in which it examines the environmental consequences of a project). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974); see also Friends of the Earth v. Hintz,

800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action.").

The APA does not allow a reviewing court to overturn an agency action because it disagrees with the agency's decision or even with its conclusions about the scope, breadth or effect of the environmental impacts of the project at issue. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978). "The [agency's] action . . . need be only a reasonable, not the best or most reasonable, decision." National Wildlife Fed. v. Burford, 871 F.2d 849, 855 (9th Cir. 1989). Thus, the reviewing court's task is simply "to ensure a fully-informed and well considered decision, not necessarily a decision that [the court] would have reached had [it] been a member of the decisionmaking unit of the agency." Vermont Yankee, 435 U.S. at 558.

Agencies are accorded particular deference with respect to scientific questions within their expertise. Southwest Center for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). "Because analysis of the relevant documents 'requires a high level of expertise,' we must defer to the 'informed discretion of the responsible federal agencies.'" Id. at 378 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)). A court is not required to weigh conflicting expert opinions or to consider whether the agency employed the best scientific methods. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985).

II. SUMMARY JUDGMENT STANDARD

The Ninth Circuit has endorsed the use of Rule 56 motions for summary judgment in reviews of agency administrative decisions, under the limitations imposed by the APA. See, e.g., Northwest Motorcycle Assn. v. U.S. Dept. of Ag., 18 F.3d 1468, 1471-72 (9th Cir. 1994) (discussing the standards of review under both the APA and Fed. R. Civ. P. 56).

Pursuant to Rule 56, "[t]he moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute." Id. at 1472. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Because the role of the Court under the APA is not to "find facts" but is limited to reviewing the Administrative Record to determine whether the federal agencies considered the relevant factors and reached conclusions that were not arbitrary and capricious, there can be no genuine issue of material fact, and summary judgment is the appropriate process to resolve this case. See Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985).

ARGUMENT

I. PLAINTIFFS' CLAIMS THAT NPS VIOLATED A "DUTY" TO MANAGE THE COLORADO RIVER CORRIDOR AS WILDERNESS ARE NOT COGNIZABLE

Plaintiffs' central claims are that, by adopting a CRMP that allows motorized activities along the Colorado River corridor, NPS violated a "duty" to restore and protect wilderness characteristics in the Grand Canyon. Indeed, Plaintiffs' arguments in support of these claims occupy nearly half of Plaintiffs' summary judgment brief, see Pls. SJ Mem. at 2-18, and Plaintiffs' other claims flow from these initial arguments, id. at 18-38. The foundation for Plaintiffs' arguments concerning NPS's "duty" to preserve the Colorado River corridor as wilderness, however, is fundamentally flawed because it rests on agency policies that are not legally enforceable and on statutory provisions that do not apply.

A. The 1976 Master Plan, 1995 General Management Plan, and 2001 Management Policies Are Park Service Policy Statements And, As Such, Are Not Enforceable Against The Agency In Federal Court

As Plaintiffs note, in accordance with the Wilderness Act, 16 U.S.C. § 1132(c), and the Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228i-l, NPS prepared a wilderness recommendation in 1977 and updated it in 1980 and again in 1993. RSOF ¶ 43,

78, 117. In this recommendation, NPS proposed the Colorado River corridor in the Grand Canyon as "potential wilderness." RSOF ¶ 44, 79, 117. Based on this proposal, Plaintiffs argue that "the Park Service's 1976 Master Plan, 1995 General Management Plan ('GMP') and Management Policies ('MP') all mandate that the agency manage the Colorado River corridor for its wilderness character." Pls. SJ Mem. at 3-4. None of these NPS guidance documents and policy statements are legally binding on the agency or enforceable against NPS in federal court.

It is well-established that while "an agency must adhere to its own regulations . . . it need not adhere to mere 'general statement[s] of policy.'" Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536 (D.C. Cir. 1986) (quoting Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974)). For example, in Western Radio Services Co., Inc. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996), the Ninth Circuit determined that the Forest Service's Manual and Handbook--which are similar to the NPS documents at issue here--did not have independent force and effect of law. The Court found that the Manual and Handbook were not substantive, noting that the Manual merely established guidelines for the exercise of the Forest Service's administrative discretion, and did not act as a binding limitation on the Service's authority. Id. The Ninth Circuit also noted that the Manual and Handbook were not promulgated in accordance with the APA's procedural requirements, and were not promulgated pursuant to independent congressional authority. Id.

As with the Forest Service Manual and Handbook, NPS Management Policies ("MPs") and the 1995 GMP do not have independent force and effect of law. Applying the same factors as the Ninth Circuit did in Western Radio, the Court of Appeals for the District of Columbia recently held that the 2001 MPs--and particularly the wilderness management provisions in Chapter 6--are "a statement of policy, not a codification of binding rules," and therefore are not enforceable against the agency. The Wilderness Society v. Norton, 434 F.3d 584, 595 (D.C. Cir. 2006).

The Wilderness Society Court noted that "NPS did not issue its Management Policies

through notice and comment rulemaking under 5 U.S.C. § 553 of the APA[, and a]lthough the agency twice gave notice in the Federal Register of proposed policies, it never published a final version of the Policies in either the Federal Register or, more significantly, in the Code of Federal Regulations." Id. at 595-96. In addition, "the Introduction to the Policies . . . makes it clear that the agency has retained unfettered discretion to act as it sees fit with respect to the actions outlined in the Policies, including the development of wilderness management plans." Id. at 596.

> The Introduction states: 'Adherence to policy is mandatory unless specifically waived or modified in writing by the Secretary, the Assistant Secretary, or the Director.' This language does not evidence an intent on the part of the agency to limit its discretion and create enforceable rights. Rather, the agency's top administrators clearly reserved for themselves unlimited discretion to order and reorder all management priorities. This supports the Government's contention that the Policies is no more than a set of internal guidelines for NPS managers and staff.

Id. (quoting MP Introduction at 5 (see SAR 016079)).[7] Moreover, the MPs do not emanate from a congressional mandate because "[n]either the Wilderness Act nor the agency's organic act requires wilderness management plans." Id. Based on these considerations, the Wilderness Society Court stated that "the conclusion is inescapable that the Management Polices is a nonbinding, internal agency manual intended to guide and inform Park Service managers and staff" and are not "judicially enforceable at the behest of members of the public who question the agency's management." Id.[8]

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[7] The Introduction to the Policies states that the "volume is the basic Service-wide *policy* document of the National Park Service." SAR 016081 (emphasis added). The following page explains that "policy sets the framework and provides direction for all management decisions." Id. 016082. Neither setting a "framework" nor providing "direction" creates or modifies enforceable rights. See Vietnam Veterans of America v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) ("A binding policy is an oxymoron."). Indeed, the Introduction expressly recognizes that some provisions of the MPs are inconsistent with existing regulations, and provides that the regulations remain in effect until they are changed through rulemaking. SAR 016082.

[8] When NPS formulated the MPs (as well as Reference Manual # 41), it explained that it was "converting and updating its current system of *internal* instructions," and described the MPs as "general statements" that revised and updated previous policies. 63 Fed. Reg.

Wilderness Society is also consistent with Lake Mojave Boat Owners Ass'n v. National Park Service, 78 F.3d 1360 (9th Cir. 1995). In Lake Mojave, the Ninth Circuit determined that notice and comment rulemaking was not required for NPS-48, a 900-page NPS management manual that established guidelines for concession rates, because this document "guides NPS personnel in their application" of statutory requirements. Id. at 1369. The Lake Mojave Court based this determination on "the distinction between directives that guide agency personnel in the exercise of discretionary authority, and those that establish a 'binding norm,'" concluding that NPS-48 is a general statement of policy. Id. (quoting Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1015 (9th Cir. 1987)). In a subsequent appeal, the Ninth Circuit determined that NPS's deviation from NPS-48 was not arbitrary and capricious because an "agency's deviation from its own guidelines is not per se arbitrary or capricious." Lake Mojave Boat Owners Ass'n v. National Park Service, 138 F.3d 759, 763 (9th Cir. 1998); see also Jackson Hole Cons. Alliance v. Babbitt, 96 F. Supp.2d 1288, 1297 (D. Wyo. 2000) (holding that NPS-2 and NPS-12 did not have the force of law and created no substantive rights, as they were "designed, not to regulate the conduct of the general public, but to assist NPS officials in complying with their discretionary duties arising under various other statutes, regulations and internal policies."); Isle Royale Boaters Ass'n v. Norton, 154 F. Supp.2d 1098, 1113 (W.D. Mich. 2001) (holding that plaintiffs lacked standing to assert violation of NPS-12 because it was "merely an unenforceable statement of policy by [NPS]"), aff'd, 330 F.3d 777 (6th Cir. 2003); Lewis v. Lujan, 826 F. Supp. 1302, 1307-08

49713-01 (Sept. 17, 1998) (emphasis added). Further, in the notice announcing the availability of the draft 2001 MPs, NPS explained that "[p]ark superintendents, planners, and other NPS employees use management policies as a *reference source* when making decisions that will affect units of the national park system." 65 Fed. Reg. 2984-01 (Jan. 19, 2001) (emphasis added). To remove any doubt, the current version of the MPs expressly state that they are not legally binding: "The policies contained within this document are intended only to improve the internal management of the National Park Service; they are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person." MPs Introduction at 4 (found at http://www.nps.gov/policy/MP2006.pdf).

(D. Wyo. 1992) (holding that NPS Guidelines are "general statements of policy" that "do not create a duty enforceable at law against the NPS"), aff'd, 998 F.2d 880 (10th Cir. 1993).

Like the MPs, the 1995 GMP for Grand Canyon National Park does not create binding legal obligations enforceable against the Park Service. The GMP does not affect individual rights or entitlements to government benefits. Moreover, there is no evidence that NPS intended to bind itself or limit its discretion through the GMP. The Plan was developed in compliance with the general laws governing the Park, which require the formulation of a general management plan *to be submitted to Congress*. See 16 U.S.C. § 1a-7. As outlined in Section 1a-7, GMPs are designed to provide information and guidance about park activities, resources, boundaries, and development plans, and also to articulate general management policies for the park. Id. Because GMPs are prepared for Congress, Section 1a-7 does not create "any procedural rights granted to members of the public" in the preparation of GMPs. Jackson Hole, 96 F. Supp.2d at 1297.

Consistent with this statutory directive, the GMP for the Grand Canyon National Park states that it "*guides* the management of resources, visitor use, and general development of the park over a 10- to 15-year period." SAR 010132 (emphasis added). The GMP is not set out as regulatory provisions, and was not published in the Federal Register or--more importantly--in the Code of Federal Regulations. Moreover, the parts of the GMP that Plaintiffs seek to enforce further demonstrate that NPS did not intend to bind itself. For example, the guidance on managing wilderness and the Colorado River corridor are contained in a section titled "Management Objectives" that states that "[t]he management objectives for Grand Canyon National Park, which are based on the park visions, set the direction for future park management. The objectives describe desired conditions to be achieved." SAR 010138. Plainly, "objectives" based on "visions" for "desired" conditions do not establish a regulatory framework enforceable in federal court.

The Supreme Court's decision in Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. 55 (2004), is instructive on this point. The plaintiffs in SUWA alleged

that the Bureau of Land Management ("BLM") had failed to carry out a statutory duty to manage wilderness study areas "so as not to impair the suitability of such areas for preservation as wilderness," id. at 59 (quoting 43 U.S.C. § 1782(c)), and that BLM failed to comply with a statutory requirement that it manage the lands within its jurisdiction "in accordance with land use plans." Id. at 67 (quoting 43 U.S.C. § 1732(a)). The Supreme Court held that Section 706(1) of the APA did not provide for review of the plaintiffs' claim that sought to compel BLM to carry out certain provisions in its land use plans.

> Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated. *** A statement by BLM about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for suit under § 706(1).

SUWA, 542 U.S. at 71. The Court also recognized that allowing such a suit would cause BLM to produce vaguer land use plans, frustrating coordination with other agencies and deprive the public of information about the agency's long-range intentions. Id. at 71-72.

Like the land use plans at issue in SUWA, the "will-do" statements in the Grand Canyon GMP can not be plucked out of context and made the basis for a legal claim. SUWA, 542 U.S. at 71. Indeed, the GMP is even further removed from being enforceable, because while BLM is required by statute to manage the lands within its jurisdiction in accordance with land use plans, id. at 67, 43 U.S.C. § 1732(a), whereas NPS is not.

The conclusion that NPS is not bound by the GMP is consistent with other cases in which courts have found that GMPs for other units of the National Park System do not create binding obligations on the agency that remove agency discretion. In Isle Royale Boaters, 154 F. Supp.2d at 1113, the court found that plaintiffs had no standing to sue NPS for alleged violation of provisions in the GMP for Isle Royale National Park that were "merely general policy statements by Defendants, not sources of positive rights for Plaintiffs." Similarly, in Whalen v. United States, 29 F. Supp.2d 1093, 1098 (D.S.D. 1998), the court found that

internal guidance documents for the Badlands National Park, including a GMP, mandated little and did not remove agency discretion. Taken together, these cases support the conclusion that the general and conceptual statements contained in the 1995 GMP do not constitute binding rules that Plaintiffs may enforce in court.

Plaintiffs cite two District of Arizona cases in support of their "duty" arguments, but neither case is persuasive authority. See Pls. SJ Mem. at 4, 5. In Sierra Club v. Lujan, 716 F. Supp. 1289, 1293 (D. Az. 1989), the district court's conclusions of law include a statement that NPS must adhere to its Management Policies unless waived by the Secretary, Assistant Secretary, or the Director of the Park Service. The Lujan court was apparently paraphrasing the language in an earlier version of the MPs similar to the language that the Wilderness Society Court explained indicated the agency's intention *not* to be bound by the MPs. This conclusion, which was not final and was offered in the context of a preliminary injunction decision in a largely NEPA case, contained no analysis and does not say the MPs are legally enforceable by a third party. Sierra Club v. Dombeck, 161 F. Supp.2d 1052 (D. Az. 2001), involved a land exchange decision *by the Forest Service* to allow a private development near the Grand Canyon. The district court held only that the Forest Service violated NEPA because "the FEIS fails to achieve its stated goal of implementing the GMP for the Grand Canyon National Park." Id. at 1071. The district court did not have occasion to address whether NPS was legally bound to follow the 1995 GMP, because NPS was not a party to the litigation, and the court indicated that it was "troubled by the use of the GMP as a determinative criteria for deciding what is in the best interest of the Grand Canyon National Park." Id. at 1070-71. Dombeck thus is not applicable to the facts of this case.

The Park Service's MPs, GMPs, and other policy guidance documents[9] do not create legally enforceable rights. Because the purported "duty" to protect wilderness characteristics and values in the Colorado River corridor arises from these NPS policy statements, Plaintiffs'

[9] Plaintiffs also base their arguments of a "duty" on the 1976 Master Plan, but this document was superceded by the 1995 GMP. RSOF ¶ 36. Even if it were in effect, the 1976 Master Plan would not be legally binding on the agency for the same reasons the GMP is not.

claims that NPS violated this "duty" do not present cognizable claims and must be rejected.

B. The Wilderness Act Does Not Govern The Park Service's Management Of The Colorado River Corridor In The Grand Canyon National Park

In addition to asserting that NPS policy directives create a "duty" to protect wilderness characteristics of the Colorado River corridor, Plaintiffs also argue that the 2006 CRMP violates or is inconsistent with various provisions of the Wilderness Act. See Pls. SJ Mem. 11-12 (asserting Section 4(c) of the Wilderness Act prohibits "all 'motorized equipment or motorboats' in wilderness areas, however temporary") (quoting 16 U.S.C. § 1133(c)); id. at 12-14 (asserting that the use of motors does not qualify under the "established use" exception of Section 4(d)(1)) (quoting 16 U.S.C. § 1133(d)(1)); id. at 14-18 (asserting that the Park Service's decision to allow commercial services on the Colorado River is not "necessary" or "proper," in violation of Section 4(d)(5)) (quoting 16 U.S.C. § 1133(d)(5)).

All of these claims fail, of course, because the Wilderness Act applies only to wilderness areas designated by Congress, and there are no such areas in the Park, including Colorado River corridor. Plaintiffs do not allege that any designated wilderness areas are affected by the CRMP, and recognize that NPS only has only recommended the Colorado River corridor as "potential" wilderness, but that Congress has not acted on that recommendation. Pls. SJ Mem. at 2-3.[10] The provisions of the Wilderness Act on which

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[10] As the Court in Wilderness Society, 434 F.3d at 591 (citations omitted), noted:

> No legal consequences flow from the recommendations. Even if the court were to order NPS to forward its recommendations to the President, it would still be up to Congress to decide whether to designate the cited lands as wilderness. Congress has no obligation to consider the President's recommendations, should he offer any, let alone act upon them. And no order from this court requiring NPS to submit recommendations to the President in the hope that he will in turn forward them to Congress will change this situation.

Plaintiffs assert, without citation, that the 1977 wilderness recommendation including the Colorado River corridor as "potential wilderness" is "still pending." Pls. SJ Mem. at 3. It is unclear what basis Plaintiffs have for claiming that a recommendation that is now 30 years old is still pending before Congress. There is nothing in the Record that indicates that the Department of the Interior ever forwarded any of NPS's wilderness recommendations to the President, who then must forward it to Congress for consideration.

Plaintiffs rely, however, expressly apply only to *designated* wilderness areas. See 16 U.S.C. § 1133(c) (prohibiting certain activities "within any wilderness area designated by this chapter"); id. § 1133(d)(1) (identifying exception for "established" uses "[w]ithin wilderness areas designated by this chapter"); id. § 1133(d)(5) (allowing "necessary" commercial uses "within the wilderness areas designated by this chapter"); see also id. § 1133(b) (stating that "each agency administering any area *designated as wilderness* shall be responsible for preserving the wilderness character of the area") (emphasis added).

Because there are no designated wilderness areas--or even designated "potential" wilderness areas--at issue in this litigation, Plaintiffs' claims that NPS has violated or acted inconsistently with provisions of the Wilderness Act that expressly apply only to designated wilderness areas are not cognizable. There is no legal requirement for NPS to manage any part of GRCA as wilderness. See Wilderness Society, 434 F.3d at 593 (holding that nothing in the Wilderness Act (or MPs) requires NPS to "manage wilderness-suitable areas as if they were designated wilderness, i.e., conforming to the prohibitions and protections of the Wilderness Act"). Therefore, Plaintiffs' arguments that NPS has violated a "duty" based on an alleged failure to comply with these provisions fail as a matter of law.

II. EVEN IF NPS HAD A LEGALLY ENFORCEABLE "DUTY" TO MANAGE THE COLORADO RIVER CORRIDOR AS POTENTIAL WILDERNESS, THE 2006 CRMP FULFILLS THAT DUTY

Although it was not legally required to do so, NPS did in fact develop the 2006 CRMP consistent with treating the Colorado River corridor as "potential wilderness." The FEIS indicates that, until Congress acts on any wilderness recommendation for GRCA, NPS will manage the Colorado River corridor within GRCA as "potential wilderness" in accordance with internal NPS guidance, including the NPS Management Polices. SOF ¶ 10.[11] Only Congress can designate areas as "wilderness" or "potential wilderness,"

[11] Because NPS was not legally required to treat the Colorado River corridor as potential wilderness, its statement of intent to do so does not create a legally-enforceable commitment. See, e.g., Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980) (court would not consider whether an EIS that an agency was not required to

however, and thus NPS's statement does not and cannot convert the Colorado River corridor into a designated wilderness or potential wilderness area. See SUWA, 542 U.S. at 58-59 ("The designation of a wilderness area can be made only by Act of Congress."). Nonetheless, Plaintiffs seize on this statement of intent and attempt turn it into a legal obligation to manage the Colorado River corridor as an actual designated wilderness area. Plaintiffs' attempt to apply the Wilderness Act to an area that Congress has not designated as wilderness or potential wilderness leads to incongruous results and should be rejected.

A. NPS Reasonably Considered The Use Of Motorboats A Temporary Or Transient Disturbance That Does Not Preclude Wilderness Designation

For example, Plaintiffs argue that the Wilderness Act does not allow "temporary or transient" disturbances, but instead "includes a blanket prohibition on the use of all 'motorized equipment or motorboats' in wilderness areas, however temporary." Pls. SJ Mem. at 11 (citing 16 U.S.C. § 1133(c)). As noted above, however, this provision expressly applies only to "any wilderness area designated by this chapter." 16 U.S.C. § 1133(c). In contrast to designated wilderness--as even Plaintiffs acknowledge--"potential" wilderness is an area "slated for '*future* designation as wilderness [once] the non-conforming use has been removed or eliminated.'" Pls. SJ Mem. at 3 (citing MP 6.2.2.1) (emphasis added here). Thus, "potential" wilderness is not the same as "designated" wilderness.

According to the MPs, potential wilderness will "be managed as wilderness *to the extent that existing non-conforming conditions allow*," and NPS "will *seek* to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation." MP 6.3.1 (emphases added). In accordance with this guidance, NPS correctly determined that "the continued use of motorboats does not preclude wilderness designation because this use is only a temporary or transient disturbance of wilderness values on the river, and it does not permanently impact wilderness resources or permanently denigrate wilderness values." RSOF ¶ 194. Plaintiffs' assertion that disturbances from motorized boats

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prepare complied with NEPA); SUWA, 542 U.S. at 63 ("[T]he only agency action that can be compelled under the APA is action legally *required*.") (emphasis in original).

are not temporary or transient because "for the entire summer and shoulder seasons, motorized boats are a permanent and illegal disturbance to the river's wilderness character," Pls. SJ Mem. at 11, is akin to (and as illogical as) asserting that a lightning flash is a permanent disturbance of the darkness of the night sky for the moment it is visible. Plaintiffs contradict themselves in the very next paragraph, conceding that the "Colorado River qualifies as potential wilderness *because* transient motorboat use can be phased out." Id. at 12 (emphasis in original). NPS's interpretation and application of its own MP as allowing continued but limited use of motors in the 2006 CRMP as a "temporary or transient disturbance" in an area treated as potential wilderness is far more reasonable than Plaintiffs' approach, and is neither arbitrary nor capricious under the APA standard of review. See, e.g., Voyageurs Region Nat'l Park Ass'n v. Lujan, 966 F.2d 424, 427 (8th Cir. 1992) (upholding decision to allow snowmobile use in a wilderness study area on national park, based on NPS's conclusion that snowmobile use "would not permanently change the area and thus, would not preclude the area from future designation as wilderness").

B. Motorboat Use Has Long Been Established In The Colorado River Corridor, And Congress Could Allow It To Continue If It Designated The Area As Wilderness

Plaintiffs' argument that motorboat use cannot be considered an "established use" that would not prevent wilderness designation is similarly misplaced. Pls. SJ Mem. at 12-14. Again, the "established use" provision applies only to "wilderness areas designated by this chapter." 16 U.S.C. § 1133(d)(1). Plaintiffs' attempt to apply this provision, *as if it were already in effect*, plainly fails. NPS reasonably concluded that elimination of motorboats was not a *prerequisite* to wilderness designation because the Wilderness Act allows established uses to continue and, in any event, if Congress were to designate the area as wilderness, Congress could allow motorized uses to continue or ban them as it sees fit. See, e.g., Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1297-98 (8th Cir. 1976) (construing special provision of Wilderness Act pertaining to Boundary Waters Canoe Area, which also allowed "established use of motorboats," to permit commercial logging).

In attempting to apply this inapplicable provision, Plaintiffs argue that only the Secretary of *Agriculture* may permit established uses to continue, even on lands administered by an agency of the Department of the Interior, Pls. SJ Mem. at 12; that NPS has "illegally authorize[d] non-conforming motorboats" even though the Wilderness Act has never applied to the Colorado River corridor, id. at 13; that a use that has been in place for decades is not an "established" use because some individuals object to it, id.; that an NPS policy that motorized equipment or mechanical transport will be prohibited "in wilderness" somehow precludes NPS from permitting an established use to continue, even temporarily, in recommended *potential* wilderness, id. at 13-14; and that motorized use would have had to have been established at the current levels in 1964, the year the Wilderness Act was enacted, even though there has been no act of Congress to date designating the area as wilderness, id. at 14.[12] These arguments are divorced from the reality of the actual circumstances in GRCA, illogical on their face, and should be rejected. NPS reasonably considered motorized use of the Colorado River corridor in the Grand Canyon as an established use.

C. NPS Reasonably Determined That Commercial Services Are Necessary For A Proper Use Of The Colorado River Corridor

Plaintiffs argue that NPS can allow commercial, motorized boating on the Colorado River only if such commercial operations are "necessary" and "proper" for realizing the recreational or wilderness purposes of the area. Pls. SJ Mem. at 14-18 (citing 16 U.S.C.

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[12] Generally, the acceptable level of an established use is measured on the date of a wilderness area's designation. See, e.g., Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734, 748 (10th Cir. 1982) (noting that Act designating wilderness area permitted already established uses to continue "in the manner and degree in which the same *was* being conducted on [October 19, 1976]," the date the Act was enacted, not the date of the original Wilderness Act) (quoting Act of October 19, 1976, Pub. L. No. 94-557, 90 Stat. 2633 § 3(d)); Wilderness Watch v. U.S. Forest Service, 143 F. Supp.2d 1186, 1192 (D. Mont. 2000) (stating that Act designating wilderness area "expressly recognized that '[t]he use of motorboats (including motorized jetboats) within [the designated] segment of the Salmon River shall be permitted to continue at a level not less than the level of use' during 1978," the year of enactment) (quoting Pub. L. No. 96-312, 94 Stat. 948 § 9(a)). Here, where there is no actual designation, it was reasonable for NPS to consider motorboats on the Colorado River an established use at the time of its statement of intent in the FEIS.

§ 1133(d)(5)). As with their other arguments, however, this claim must fail because the provision of the Wilderness Act on which the claim relies applies only to "wilderness areas designated by this chapter," and says nothing about "potential" wilderness. See 16 U.S.C. § 1133(d)(5). Indeed, the two cases on which Plaintiffs rely for this argument both involved commercial uses in designated wilderness areas. See High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 646-48 (9th Cir. 2004) (assessing whether the Forest Service complied with the provisions of the Wilderness Act in allowing commercial packstock operations in the John Muir and Ansel Adams Wilderness Areas); Wilderness Watch v. Mainella, 375 F.3d 1085, 1088-93 (11th Cir. 2004) (analyzing whether the Park Service appropriately offered motorized transportation to park visitors "across the designated wilderness area").

As with their temporary use and established use arguments, Plaintiffs' attempt to shoe-horn NPS's management of an area that is not designated as wilderness into provisions governing areas that have been designated as wilderness leads to nonsensical results. Had Congress actually designated the Colorado River corridor as potential wilderness as NPS has recommended, motorized use could be identified as an established use, expressly allowed in the designation, or recognized as a nonconforming use to be phased out. Or, if Congress had designated the corridor as wilderness, it presumably would have addressed the issue of existing motorized uses, as it typically does. See, e.g., Rocky Mountain Oil, 696 F.2d at 748 (noting that Act designating wilderness area permitted established uses to continue in the same manner and degree as of the date the Act, October 19, 1976).

But because Congress has *not* designated the Colorado River corridor as either wilderness or potential wilderness, NPS reasonably determined in the FEIS that continued use of motorboats does not preclude future wilderness designation because 1) the use is transient and does not permanently impact wilderness characteristics, and 2) that motorboats are an established use that Congress could recognize or allow to continue. See RSOF 154. Either determination is consistent with allowing commercial motorboat use to continue pursuant to NPS's statement that it would treat the area as *potential* wilderness, and

identifying as transient or established negates any need for a "necessary and proper" finding.

Nonetheless, NPS also made a determination that continuing to allow commercial motorboat use pursuant to the limitations set forth in the CRMP is necessary and proper for the Colorado River corridor. Based on extensive public comments it received on the DEIS and its various impact analyses, NPS made the following determination with respect to the necessity and appropriateness of continuing to authorize commercial river guides and trips:

> A river trip through the Grand Canyon can be a life-shaping experience. Thousands of visitors each year seek to experience the Grand Canyon in this intimate and adventurous way. Since many visitors who wish to raft the Colorado River through Grand Canyon possess neither the equipment nor the skill to successfully navigate the rapids and other hazards of the river, the NPS has determined that it is necessary and appropriate for the public use and enjoyment of the park to provide for experienced and professional river guides who can provide such skills and equipment.

SOF ¶ 41 (quoting AR 104606 (FEIS Vol. I at 19)); see also RSOF ¶ 200 ("NPS has determined that the services provided by commercial outfitters, which enable thousands of people to experience the river in a relatively primitive and unconfined manner and setting (when many of them otherwise would be unable to do so), are necessary to realize the recreational or other wilderness purposes of the park.") (quoting AR 104606 (FEIS Vol. I at 19)). The conclusion that commercial services were necessary and appropriate was not made in isolation, but was an integral aspect of the NEPA process:

> The [CRMP] addresses issues related to commercial activities on the river. Description and analysis of potential impacts on the affected environment resulting from commercial operations are found throughout the Final EIS. Determinations of the types and levels of commercial services necessary and appropriate for the Colorado River through Grand Canyon National Park were determined through this analysis.

AR 104562 (FEIS Vol. I at vii).

Despite these statements, Plaintiffs assert that NPS failed to assess whether *motorized* commercial use is necessary and appropriate and, if so, at what levels. Pls. SJ Mem. at 15-18. Given that one of the key issues addressed throughout the FEIS is the extent that motors should be allowed under the CRMP, Plaintiffs' assertion strains credulity. The major distinguishing features of the different CRMP alternatives analyzed in the FEIS were various

allocations of commercial and noncommercial trips, and motorized and non-motorized trips. See AR 104562-69 (FEIS at vii to xiv) (summary of alternatives). The alternatives include a range of allocations for commercial and non-commercial trips, as well as a range of motorized and non-motorized use, including alternatives that would have reduced or eliminated motors. Because each alternative was analyzed and compared throughout the FEIS for its impacts on Park resources including wilderness characteristics, visitor experience, and natural soundscape, the analysis of the types (motorized or non-motorized) and levels of commercial services necessary and appropriate for the Colorado River corridor in the Grand Canyon National Park is embedded within the fabric of the entire FEIS.[13]

The FEIS also defined objectives for managing use on the Colorado River in Grand Canyon National Park. AR 104598-99 (FEIS Vol. I at 11-12). These objectives are grounded in the Park's enabling legislation, mandates, purpose and significance, as well as the GMP and other management documents. Id. One of the objectives for Visitor Use and Experience is to "provide a diverse range of quality recreational opportunities for visitors to experience and understand the environmental interrelationships, resources and values of Grand Canyon National Park." AR 104600 (FEIS Vol. I at 13). After analyzing the non-motorized alternatives B and C, NPS found that neither non-motorized alternative met this management objective, because the diversity and range of recreational opportunities was decreased, and they did not provide opportunities for visitors to experience a shorter, full-canyon river trip or allow an increase in noncommercial use. AR 104658 (FEIS Vol. I at 71) (Table Summary); AR 104687-88 (FIS Vol. I at 100-01); AR 105642-733 (FEIS Vol. II at 605-96) (detailed analysis of impacts). NPS also recognized that shorter motorized trips fill a particular market niche and can alleviate crowding and competition at popular attraction

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[13] See, e.g., AR 105385 (FEIS Vol. II at 348) (identifying "[m]otorized versus nonmotorized trips" as one of the "[m]ajor issues and concerns regarding natural soundscapes"); AR 105385-441 (FEIS Vol. II at 348-404) (56 pages of the FEIS focused on analyzing and comparing impacts from different levels of motorized use, including prohibiting motors, on the natural soundscape).

sites and campsites because they have more flexibility to travel to alternate locations with minimal impact to the trip schedule. See, e.g., AR 105139-40 (FEIS Vol. III at 302-03).

The FEIS as a whole provides a basis for NPS to determine whether continuation of motorized uses is necessary and appropriate, and at what levels motorized uses could be allowed consistent with the preservation of Park resources, including wilderness characteristics. See, e.g., AR 104604 (FEIS Vol I at 17) ("This environmental impact statement evaluates the appropriate level of motorized raft use on the river, including analyzing two no motor alternatives."). As NPS concluded in selecting the preferred alternatives for the CRMP based on the extensive analysis in the FEIS:

> The Colorado River Management Plan addresses commercial activities on the river. Description and analysis of potential impacts on the affected environment resulting from commercial operations are found throughout the FEIS. Determination of the *types and levels* of commercial services that are necessary and appropriate for the Colorado River through Grand Canyon National Park were determined through these analyses. New contracts for commercial operations will be issued in 2006. These contracts will be issued in accordance with the [Concessions Act] and implementing regulations at 36 CFR 51. Concession contracts and operating plans will reflect management decisions reached in this Record of Decision and will provide quality visitor experiences consistent with the preservation of the park's natural and cultural resources.

(ROD at 6) (emphasis added). Based on these considerations, NPS determined that its preferred alternatives (Modified Alternative H and Modified Alternative 4) best met its management objectives as described in the FEIS. AR 109604-11 (ROD at 14-21); AR 109614-109619 (ROD at 24-29).

Because motorized use is a "type" of commercial service analyzed throughout the FEIS, NPS reasonably determined through the NEPA process that continuation of motorized uses at the levels selected in the CRMP, as well as the other commercial services described in the selected alternatives in the ROD, were "necessary and appropriate" and consistent with preservation of Park resources, including wilderness characteristics. In Blackwell, the Ninth Circuit faulted the Forest Service's decision to allow commercial services in a wilderness area because the agency "granted the permits without going through the required NEPA analysis" and "made its decision to grant the permits without the required public analysis and

without consideration of the impact its decision would have on its ultimate responsibilities under the Wilderness Act." 390 F.3d at 648. Here, in contrast to the circumstances in Blackwell, NPS completed an exhaustive and very public NEPA process that took these considerations into account in great detail. Therefore, NPS's decision adopting the CRMP is entitled to great deference, and easily passes muster under the arbitrary and capricious standard. Even if Plaintiffs' claim that motorized commercial services are not necessary and proper is cognizable, it must fail.

III. COMMERCIAL USE OF THE COLORADO RIVER CORRIDOR UNDER THE 2006 CRMP DOES NOT VIOLATE THE CONCESSIONS ACT

The congressional policy announced in the Concessions Act empowers NPS to authorize only those commercial services that are "necessary and appropriate for public use and enjoyment" of the Park and that "are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit." 16 U.S.C. § 5951(b). "To make visits to national parks more enjoyable for the public, Congress authorized NPS to grant privileges, leases, and permits for the use of land for the accommodation of visitors." National Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 805 (2003) (internal quotations and citation omitted). As with their argument that NPS failed to make a "necessary" and "proper" determination for commercial services in accordance with the Wilderness Act, Plaintiffs claim that NPS violated the Concessions Act by allowing motorized commercial services on the Colorado River in the Grand Canyon. Pls. SJ Mem. 18-21. This claim is also without merit.

The "necessary and appropriate" standard for allowing commercial services pursuant to the Concessions Act is analogous to the "necessary" and "proper" standards under the Wilderness Act. Plaintiffs again assert that NPS "never found that commercial *motorized* use of the Colorado River corridor is necessary or appropriate for the public to realize the recreational and other wilderness purposes of the river." Pls. SJ Mem. at 19 (emphasis in original). As demonstrated in response to Plaintiffs' Wilderness Act argument, however, this assertion is flatly wrong: Determining whether and what level of commercial motorized use

was necessary and appropriate was a central feature of the NEPA process that NPS considered in great detail.

Discussions of the necessity and propriety of commercial services are embedded throughout the FEIS, particularly in the discussions of the criteria for developing alternatives, e.g., AR 104614-21 (FEIS Vol. I at 27-35); AR 105002-13 (FEIS Vol. III at 165-76); in the discussions and analyses of visitor use and experience, e.g., AR 104769-71 (FEIS Vol. I at 182-84); AR 105645 (FEIS Vol. II at 608); AR 105137-53 (FEIS Vol. III at 300-16); in the discussions and analyses of allocation of use, e.g., AR 104889-905 (FEIS Vol. III at 52-68); and in the discussions and analyses of motorized trips (which are mostly commercial) vs. non-motorized trips (which are mostly noncommercial). E.g., AR 104771-73 (FEIS Vol. I at 184-86), AR 105650-90 (FEIS Vol. II at 613-53), AR 104925-41 (FEIS Vol. III at 85-101). Based on this extensive review and analysis, NPS determined that the level and types of commercial uses approved in the ROD, including commercial motorized trips, are "necessary and appropriate" in accordance with the Concession Act. AR 109596 (ROD at 6). Thus, NPS did, in fact, consider in detail the amount of motorized use that was necessary and appropriate as part of the commercial services based on substantial information in the FEIS, and selected alternatives that meet the standards of the Concessions Act.

As with any obligations it may have under the Organic Act and Wilderness Act, NPS enjoys great deference in its determination as to whether a particular commercial service is "necessary and appropriate," and at what levels. See, e.g., Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979) (NPS decision allocating uses under Concessions Act entitled to "judicial presumption favoring the validity of administrative action" and reviewed under deferential "arbitrary and capricious" standard). Here, NPS exercised its discretion with great care and on the basis of an enormous body of information generated through the NEPA process. NPS's conclusion concerning commercial use of the Colorado River is reasonable and supported by substantial, and may not be set aside and supplanted with Plaintiff's preferred determination, even if that determination is also

reasonable or even "more reasonable." See National Wildlife Fed. v. Burford, 871 F.2d 849, 855 (9th Cir. 1989) ("The [agency's] action . . . need be only a reasonable, not the best or most reasonable, decision.").

Plaintiffs rely on statements and studies from the 1970s to assert that allowing motorized commercial uses on the Colorado River in the Grand Canyon is neither necessary nor appropriate. Pls. SJ Mem. at 20. NPS considered this information in reviewing the CRMP, but focused its analysis on more recent studies that build on the 1970s work. For example, in 1998, Drs. Troy Hall and Bo Shelby conducted a sociological study on river runners and river running in the Grand Canyon "to obtain information about boaters' experiences, and especially how social conditions affect experiences. One goal was to evaluate conditions (encounters) in relation to NPS management standards. Another was to replicate a 1975 study to assess how conditions and visitor attitudes had changed." SAR 015426. In their detailed 194-page June 15, 2000 report, SAR 015411-624, these experts find that visitors are able to experience the river as wilderness in the presence of motorized uses. See, e.g., SAR 015427 (finding that "90% of commercial passengers 'would consider the Grand Canyon a wilderness'"); SAR 015428 (finding that "85% of private boaters and 73% of commercial passengers frequently or often experienced solitude on the river"). The 1998 study also demonstrated that among individuals who took commercial trips, those who took motorized trips were significantly more likely than those who took oar trips to stress safety and trip length as the most important factors in choosing the type of commercial trip they took. SAR 015529. These results, among others, support NPS's determination that commercial motorized trips were necessary to make "more enjoyable" for members of the public. National Park Hospitality Ass'n, 538 U.S. at 805.

In 2004, NPS also received from Dr. Shelby and another researcher, Dr. Doug Whittaker, a draft "technical memorandum" titled "River Running in the Grand Canyon: Current Situation and Social Impacts of Alternatives." AR 107899-8079. This report summarized the older and more recent research, and provided detailed information about

social and visitor experience issues related to recreational river running. AR 107908. NPS used the 2004 technical memorandum to develop the descriptions and analyses of visitor use and experience in both the DEIS and FEIS. AR 107908; AR 106047 (FEIS Appendix G). In addition, commercial operators switched from two-stroke motors to much cleaner and quieter four-stroke motors in the late 1990's, significantly changing the conditions on the river evaluated by the 1970s era studies. See, e.g., AR 000416, AR 105330).

NPS thus based its analyses and decisions on relevant, *current* information that took into account the 30-year-old studies but provided more pertinent and up-to-date analyses. Indeed, had NPS relied solely of the 1970s studies as advocated by Plaintiffs here, instead of the newer information based on current circumstances on the River, its decision would have been subject to claims that it was arbitrary and capricious because it relied on outdated information. See, e.g., Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704-05 (9th Cir.1993) (setting aside an agency decision when it rested on "stale scientific evidence").[14] NPS did not err by relying on recent studies in its decision-making process.

Plaintiffs also argue that the CRMP violates the Concessions Act policy that Park resources should be protected "to the highest possible degree." See 16 U.S.C. § 5951(b). Plaintiffs assert that because NPS has stated in the past the motorized use is not consistent with the wilderness character of the Colorado River corridor, that such use must be banned under this standard. This assertion suggests that any adverse impact on a Park resource from a commercial activity disqualifies that activity from consideration as an accepted use in the Park. Plainly, this is not the intent of law, as it would thwart the Park Service's ability to use commercial services to help meet the agency's Organic Act mandate to "promote . . . the use of the Federal areas known as national parks." 16 U.S.C. § 1. If the Organic Act and the

[14] Ironically, in the earlier cases challenging NPS's allocation of Colorado River permits between commercial and noncommercial users in the late 1970s, the noncommercial river runners plaintiffs claimed that this allocation was "arbitrary and unreasonable" because it was based on "seven-year-old data" from 1972. Wilderness Public Rights Fund, 608 F.2d at 1254. The Ninth Circuit found this claim was moot, however, because NPS was preparing a new CRMP that relied on updated information. Id.

Concessions Act prohibited adverse impacts completely, the implied premise underlying Plaintiffs' assertion, the National Parks would be off limits to public use. Such a result is contrary to the Organic Act mandate to promote and regulate use.

The CRMP alternatives selected (Modified Alternative H and Modified Alternative 4), which allow both commercial and noncommercial motorized uses, are actually the "environmentally preferred alternatives" pursuant to standards set forth by NEPA. See AR 109514-19 (ROD at 24-29). Thus, the thesis underlying Plaintiffs' claims in this case--that the non-motorized alternatives (Alternatives B and C) are more protective of Park resources than a motorized alternative like Modified Alternative H--is too simplistic and incorrect. Indeed, all three of these alternatives have the same overall impact levels with regard to wilderness character: "Overall, beneficial and adverse, localized to regional, short- to long-term, seasonal to year-round, negligible to moderate effects." AR 104651 (EIS Vol. I at 65).

Based on the detailed analysis in the FEIS and as supported by substantial evidence in the Administrative Record, NPS reasonably determined that commercial services of the types and levels analyzed in relation to Modified Alternative H and Modified Alternative 4, were "necessary and appropriate" and protected Park resources "to the highest possible degree." Plaintiffs' Concession Act claims are without merit.

IV. THE 2006 CRMP IS CONSISTENT WITH THE NPS ORGANIC ACT

The Organic Act directs NPS to "promote and regulate" the use of the national parks "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The Organic Act also authorizes NPS, through the Secretary of the Interior, to "make and publish such rules and regulations" as are deemed "necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." Id. at § 3. These provisions give NPS broad discretion to weigh competing interests in the management of the national parks. See Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253

(9th Cir. 1979) (holding that the Secretary, acting through NPS, has "wide ranging responsibility of managing the national parks"); Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996) (noting that "the Organic Act is silent as to the specifics of park management and that 'under such circumstances, the Park Service has broad discretion in determining which avenues best achieve the Organic Act's mandate.'") (quoting National Wildlife Fed'n v. National Park Service, 669 F. Supp. 384, 390 (D. Wyo. 1987)).

As a result of this broad discretion, the Ninth Circuit has held that NPS "is empowered with the authority to determine what uses of park resources are proper and what proportion of the park's resources are available for each use." Bicycle Trails Council, 82 F.3d at 1454 (quotation and citation omitted); see also Miccosukee Tribe v. United States, 980 F. Supp. 448, 462 (S.D. Fla. 1997) (holding that NPS "has broad discretion in determining how best to protect public lands, weigh competing uses of federal property, and allocate park resources."), aff'd, 163 F.3d 1359 (11th Cir. 1998). This authority is so broad that federal courts are reluctant to intervene in NPS decisions concerning the use of national park resources. See, e.g., Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1070 (9th Cir. 1997) (rejecting claim that NPS's "failure to prevent commercial fishing in [Glacier Bay National] Park derogates the [Organic] Act's purpose of conservation" because "[w]hether conduct derogates long-term goals of conservation is a factual question that we are not prepared to reach"); Sierra Club v. Babbitt, 69 F. Supp.2d 1202, 1247 (E.D. Cal. 1999) (holding that because the Organic Act "does not mandate that the balance in any particular decision reflect one value over the other," the Act "does not serve as basis for a cause of action when the issue is confined to the Agency's exercise of discretion in attempting to balance valid, competing values"). Against this backdrop, Plaintiffs' Organic Act claims are easily denied as an attempt to have the Court substitute Plaintiffs' views for those of NPS.

A. NPS Fairly Allocated Colorado River Corridor Use In The Grand Canyon Between Commercial And Noncommercial Users

Plaintiffs' first claim under the Organic Act is that NPS's method of allocating use levels of the Colorado River corridor between commercial and noncommercial users is

inequitable, in violation of 16 U.S.C. § 3. Pls. SJ Mem. at 22-28. Plaintiffs complain that NPS's "split allocation" system favors "use by commercial concessionaires at use levels that interfere with free access to the river by the public." Pls. SJ Mem. at 22.[15] The Ninth Circuit has already rejected this premise:

> Throughout these proceedings Wilderness Public Rights Fund has persisted in viewing the dispute as one between the recreational users of the river and the commercial operators, whose use is for profit. It asserts that by giving a firm allocation to the commercial operators to the disadvantage of those who wish to run the river on their own the Service is commercializing the park. The Fund ignores the fact that the commercial operators, as concessioners of the Service, undertake a public function to provide services that the NPS deems desirable for those visiting the area. The basic face-off is not between the commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.

Wilderness Public Rights Fund, 608 F.2d at 1253-54. Based on this clarification of the actual dispute, the Court concluded that "allocation between the two classes of recreational users is not per se an arbitrary method of recognizing and accommodating the interests of the two classes." Id. at 1254.

Although the Ninth Circuit never reached the claim that the allocation was inequitable because the claim was moot, Plaintiffs rely on Wilderness Public Rights Fund for the proposition that a court may determine "whether allocation has been fairly made pursuant to appropriate standards." Id. at 1254. The Ninth Circuit noted, however, that "[w]here several administrative solutions exist for a problem, courts will uphold any one with a rational basis," as long as NPS's "balancing of competing uses" is not an "arbitrary one." Id. (citation omitted).

Here, NPS considered an equitable allocation of use between commercial and noncommercial boaters without exceeding the Colorado River corridor's carrying capacity. SOF ¶ 34. The 2006 CRMP adjusts the allocation of use between commercial and

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[15] In the same sentence, Plaintiffs incorrectly assert that NPS is allowing the Colorado River to be "leased" to the concessionaires when, in fact, neither the concessionaire contracts nor the permits issued under them constitute leases. "The public" uses the services of concessioners as regulated by NPS on behalf of public access.

noncommercial users that was in effect under the 1989 CRMP. The 1989 CRMP allocated 115,500 user-days to commercial users and 54,450 user-days to noncommercial users annually, or a ratio of 67.9 percent commercial to 32.1 percent noncommercial. SOF ¶ 34. The 2006 CRMP continues to cap commercial use at 115,500 user-days annually, but does not cap noncommercial user-days. Id. Based on expected number of launches and group size, NPS estimates that noncommercial boaters will use 113,486 user-days annually. Id. Therefore, as measured in user-days, the 2006 CRMP allocates approximately 50.3 percent of annual use to commercial boaters and 49.7 percent to noncommercial boaters. Therefore, based on annual user-days, NPS has evenly distributed Colorado River use between commercial and noncommercial users.

In order to increase available use for noncommercial users, NPS decreased the number of commercial launches. From 1998 through 2002 an average of 640 commercial launches and 18,891 commercial passengers embarked on the river annually under the 1989 CRMP. SOF ¶ 36. Under the 2006 CRMP, those numbers will decrease to 598 commercial launches with an estimated 17,600 passengers. Id. Under the 1989 CRMP, an average of 253 noncommercial launches and 3,570 noncommercial passengers embarked on the River annually, but under the 2006 CRMP those numbers will nearly double to a total of 503 launches and an estimated 7,051 passengers. Id.

Despite NPS's efforts to distribute user days evenly, Plaintiffs complain that to increase noncommercial user days, the 2006 CRMP unfairly allocates much of this use in the less "preferred" winter months. Pls. SJ Mem. at 24. Plaintiffs claim that NPS had no evidence to support its conclusion that 1,855 noncommercial users would run the River under the new plan, when on average only 318 did so in past winters. Id. at 26. Plaintiffs are wrong. The 2006 CRMP increases the overall noncommercial use by increasing the number of launches in each use season, and the estimated number of user-days is based on the number of launches multiplied by group size/trip and trip length. Although the trip length was decreased by two days for the summer season, 56 additional launches were made

available for noncommercial users. NPS also increased the number of noncommercial launches in the spring and fall (also very favorable seasons) by 53 percent, and increased trip length by 3 days for most of the shoulder seasons. NPS reasonably found that while there are many reasons why recreational river runners (commercial and noncommercial) would prefer to take a summer river trip (i.e., typical summer vacation, kids in school, etc.), there also are many reasons why individuals would prefer other seasons (longer trips, more solitude, cooler weather (more conducive to off-river hiking), etc.). RSOF ¶ 222. Moreover, from 1998 through 2002 the Park made available additional launches during the winter months to noncommerical boaters: more than 90 percent of the 153 launch dates offered were used--100 percent when they were made available six months in advance--and the cancellation rate for those launches was lower than for launches in the spring, summer, and fall. Id. Winter has a greater increase in user days than other seasons, at least partly because trip lengths increase to 25 days, AR 104646 (FEIS Vol. I at 59), and because under the past allocation system, the majority of user days were used up when winter arrived.

Plaintiffs also assert that the allocation system is unfair because noncommercial users are subject to a long wait to obtain a permit for a run, whereas commercial users can gain access through the concessionaires at any time. Pls. SJ Mem. at 24-25. The ROD, however, eliminates the old waiting list system, and the new system simplifies the application process, favors River access for applicants who have been unsuccessful in recent attempts to gain a permit, fairly expedites the transition from the waitlist to the new system, and encourages people to apply for trips only in the years that they are interested in taking a trip. RSOF ¶ 233. Plaintiffs also ignore that the wait associated with obtaining a noncommercial permit applies to trip leaders, not to trip participants, and individuals seeking to join noncommercial or commercial trips may join up to one trip per year, based on availability, by contacting other noncommercial boaters or commercial outfitters. Id. Plaintiffs' reliance on the waiting list system to assert inequities in the allocation system is also misplaced because many people on the wait list were acquainted with others on the wait list with whom they might

have shared a trip, so it is impossible to say how many members of the public were "represented" by the waiting list. Under the waiting list system many people were able to take repeated noncommercial trips down the Colorado River. RSOF ¶ 235. For instance, a 1998 study found that "80% of commercial passengers were on their first Colorado River trip, compared to 39% of private boaters." Id.

Plaintiffs argue that it is arbitrary for NPS to make any allocation between commercial and noncommerical users without knowing the actual demand for river trip for both groups. Nothing in the Organic Act requires that an allocation of limited access to a resource be based on relative demand to satisfy any "standards of fairness." During the planning process, NPS determined that assessing relative demand was neither feasible nor necessary:

> In January 2003 two expert panels were held and covered some of the important and controversial subjects included in the *Colorado River Management Plan*. The purpose of the panels was to provide the park with input from academics, researchers, practitioners, and the like. One of the questions asked to this panel of experts concerned what could be done to determine relative demand for commercial versus noncommercial trips. In short, the expert panel's response was that a survey would probably cost around $2 million and be of limited use.

AR 105014 (FEIS Vol. III at 177).

Therefore, instead of attempting to develop an allocation based on relative demand, NPS looked at different allocations scenarios for commercial and noncommercial uses in the various alternatives analyzed in the FEIS, and "[e]ach of these scenarios was analyzed for its potential to have environmental consequences and for its potential to balance use and resource preservation." AR 104951 (FEIS Vol. III at 111). "The interconnectivity of management variables such as user-days, trip lengths, total passengers, group size, and total launches and their potential to affect the resources of the canyon (as well as visitor experience) is represented throughout the FEIS." Id. Based on the analyses in the FEIS, "NPS believes that the Modified Preferred Alternative H represents the best balance of those variables." Id.

NPS's allocation of use between commercial and noncommercial users is rational and based on a reasonable methodology that balances public access with protection of the Park.

Under these circumstances, this allocation--which will result in a nearly identical number of annual user days between the two groups--easily demonstrates NPS's reasonable exercise of discretion under the Organic Act.

B. NPS Reasonably Concluded That Use Of Motors At Levels Allowed In The 2006 CRMP Would Not Impair Park Resources

Plaintiffs' second Organic Act claim is that NPS arbitrarily determined that motorized activities in the Colorado River corridor do not "impair" the natural soundscape. Pls. SJ Mem. at 28-34. The Organic Act directs NPS to "promote and regulate the use" of national parks "and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.

"Neither the word 'unimpaired' nor the phrase 'unimpaired for the enjoyment of future generations' is defined in the [Organic] Act." Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 819 (10th Cir. 2000). Moreover, "[i]t is unclear from the statute itself what constitutes impairment, and how both the duration and severity of the impairment are to be evaluated or weighed against the other value of public use of the park." Id. Accordingly, this Court's inquiry must be guided by the NPS's interpretation of the no-impairment standard in its 2001 Management Policies. See Southern Utah Wilderness Alliance v. National Park Service, 387 F. Supp.2d 1178, 1192 (D. Utah 2005) (holding that the interpretation of the "no-impairment" mandate of the Organic Act set out in section 1.4 of the 2001 MPs is entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)). The 2001 MPs define "impairment" as "an impact that, *in the professional judgment of the responsible NPS manager*, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values." SAR 016086 (emphasis added). Thus, the Policies make clear that whether a particular impact rises to the level of impairment is a determination reserved to the discretion of the responsible NPS manager. Id.

Notwithstanding the MPs, Plaintiffs argue that NPS violated the Organic Act by determining that the impacts from motorized uses would not "impair" the natural soundscape.

Plaintiffs assign four errors in support of this argument, and each is without merit.

1. Baseline

Based on the MPs and Director's Order 47, Plaintiffs assert that NPS was required to measure effects on the natural soundscape form motorized uses against a baseline of "the environment of sound that exists *in the absence of human-caused* noise," but failed to do so. Pls. SJ Mem. at 29 (quoting MP 8.2.3 (emphasis added by Plaintiffs); citing Director's Order 47. In the first instance, Plaintiffs' attempt to enforce an MP and Director's Order is misplaced because they represent policy statements and are not legally binding on the agency. See *supra* Part I.A. Moreover, as noted in the FEIS, Director's Order 47 expired in 2004, and is therefore inapplicable. See AR 105388 (FEIS Vol. II at 351).

In any event, Plaintiffs' statement that "[t]he Park Service measured its authorization of motorized activities against 'natural ambient sound levels . . . *in the presence* of audible human-caused noise including aircraft overflights," Pls. SJ Mem. at 30 (quoting AR 104729 (FEIS Vol. I at 142), is factually incorrect. The data presented in the first column of Table 3-4 on that page of the FEIS are instances where the human-caused sources were not audible, as compared to other times measured during the same measurement sessions when human noise was audible. The two sets of data were separated, and only the natural ambient reported in the FEIS table. The soundscape impact analysis used audibility and noise-free intervals based upon natural ambient sound levels unaffected by human sources. See AR 105388-98 (FEIS Vol. II at 351-61). Thus, Plaintiffs are simply incorrect: NPS did in fact use as a baseline the natural ambient sound levels that exist in the absence of human-caused noise. AR 105389-90 (FEIS Vol. II at 352-53).

2. Cumulative Effects

Plaintiffs argue that NPS was required to take into account the cumulative impacts of "related actions" in assessing whether allowance of motorized uses impaired the natural soundscape. Pls. SJ Mem. at 31-32. As with their "baseline" argument, this argument is flawed because it relies solely on an unenforceable MP *and inapplicable NEPA regulations*

and case law to establish the creation and violation of the alleged "requirement."

As described below, however, NPS did complete an analysis of potential cumulative impacts on the natural soundscape. See *infra* Part V.A. Noting that aircraft overflights have a major cumulative effect on the Park's natural soundscape, NPS contrasted that contribution to cumulative effects with that of the motorized uses from Modified Alternative H, which would be adverse but "short-term" and "minor to moderate," except for the helicopter exchange noises at Whitmore, which would be "major" but highly localized. AR 105423-24 (FEIS Vol. II at 386-87). Based on the detailed analysis of noise impacts in the FEIS, see SOF ¶¶ 44-52, NPS therefore reasonably concluded that Modified Alternative H "would contribute an adverse, *negligible* increment to cumulative effects." AR 105423 (FEIS Vol. II at 386) (emphasis added). "[E]ven if all noise from all river recreation was eliminated from the park . . ., the cumulative effects of aircraft noise would still be adverse, short- to long-term, and major." See AR 105424 (FEIS Vol. II at 387). Therefore, NPS's determination that motorized uses in the CRMP "would not result in the impairment of the natural soundscape in the Grand Canyon National Park," is supported by substantial evidence and is neither arbitrary nor capricious.

Application of Plaintiffs' position concerning cumulative effects on the natural soundscape would also lead to incongruous results. If Plaintiffs' argument was correct, NPS could not have adopted *any* of the alternatives analyzed in the FEIS--including the nonmotorized use alternatives--because they *all* contribute incrementally to the cumulatively major impacts of aircraft overflights on the natural soundscape. See, e.g., AR 105406 (FEIS Vol. II at 369) (stating that "the cumulative effects of Alternative B [which would prohibit motors] would continue to be regional, adverse, long-term, [and] major"); AR 104408 (FEIS Vol. II at 371) (same for Alternative C). Indeed, taken to its logical extreme, NPS could not allow a single noncommercial, nonmotorized trip, because the human noises (voices, oar banging, etc.) would contribute to the significant cumulative impacts thereby, according to Plaintiffs, impairing the natural soundscape in violation of the Organic Act. NPS's

application of this provision and determination that motorized use would not impair the natural soundscape in the context of cumulative effects is plainly far more reasonable.

3. Previous NEPA Documents and Scientific Studies

Plaintiffs' claim that NPS was required to explain 30-year-old NEPA documents and "relevant" studies is based on a "requirement" from an MP which, once again is not legally enforceable. Moreover, the "29 studies" and the EISs from the 1970s are no longer relevant in the context of determining whether motorized boat trips "impair" the natural soundscape as the studies that actually addressed the issue (most did not) were based on two-stroke motors in use at the time. In contrast, current motorized boat trips on the Colorado River use four-stroke motors, which are quieter (and cleaner) than the old two-stroke motors. See, e.g., AR 000416, AR 105330. Therefore, the studies from the 1970s and the EISs that rely on them are outdated and no longer relevant.

Plaintiffs' assertion that NPS was required to explain a "reverse in position" with regards to the use of motors on the Colorado River corridor is about 27 years too late, and should have been raised in 1980 when NPS issued its revised CRMP. The current CRMP is consistent with the position that NPS has taken for almost three decades, and thus does not represent a change in position. In fact, none of the earlier EISs determined that motorized river rafting on the Colorado River was impairing the natural soundscape. See AR 105069 (FEIS Vol. III at 232) (stating that "there has never been a determination by the NPS of impairment of the natural soundscape or other resources at Grand Canyon in any EIS or *Record of Decision* or other decision document"). Nonetheless, the FEIS for the 2006 CRMP contains an extensive analysis of impacts on the natural soundscape, supported by current, relevant studies. AR 105385-441 (FEIS Vol. II at 348-404). Thus, to the extent it was required to explain any alleged "change in position," it plainly did so.

4. Impairment

Plaintiffs' final impairment argument is that NPS had no choice but to conclude that the authorization of motorized uses in the 2006 CRMP impairs the natural soundscape. This

argument impermissibly asks the Court to substitute Plaintiffs' judgment for that of the agency, which is not a permissible result under the APA, particularly on a scientific determination. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (stating that under the deferential standard of review of the APA "[t]he court is not empowered to substitute its judgment for that of the agency").

Moreover, Plaintiffs' attempt to equate any adverse impact to impairment is unavailing. The mere fact that an activity has an adverse impact does not mean that it rises to the level of "impairment:"

> Impairment that is prohibited by the NPS Organic Act . . . is an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. In determining whether impairment would occur, park managers examine the duration, severity, and magnitude of the impact; the resources and values affected; and direct, indirect, and cumulative effects of the action. According to NPS policy, "an impact would be more likely to constitute an impairment to the extent that it affects a resource or value whose conservation is: a) Necessary to fulfill specific purposes identified in the establishing legislation or proclamation of the park; b) Key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park; or c) Identified as a goal in the park's general management plan or other relevant NPS planning documents." *This policy does not prohibit all impacts to park resources and values.* The National Park Service has discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impacts do not constitute impairment.

AR 109611 (ROD at 21) (emphasis added).[16]

Based on the extensive analyses in the FEIS, NPS concluded that the alternatives selected for the 2006 CRMP (Modified Alternative H and Modified Alternative 4) would not impair Park resources and values. Id. After noting that the selected alternatives "are intended to protect and enhance the park's natural and cultural resources and provide for high-quality visitor experiences," id., the ROD provides a lengthy summary of the "duration, severity, and magnitude" of the impacts that supported its determination on impairment. AR 109611-14 (ROD at 21-24); see also AR 109612 (ROD at 22) (noting that "[i]mpacts to

[16] See also Director's Order 12 ("In managing units of the national park system, the Service may undertake actions that have both beneficial and adverse impacts on park resources and values.").

natural soundscape will be highly localized and will be reduced in the summer season, but slightly increase in the shoulder and winter seasons due to increased use levels").

Because it is based on extensive evidence and analyses contained in the FEIS, NPS expert judgment that the 2006 CRMP will not impair Park resources and values, including the natural soundscape, is eminently reasonable and entitled to deference. Plaintiffs' "impairment" claims must fail.

C. The 2006 CRMP Is Consistent With The Organic Act's Call To Conserve Park Resources And Values

Plaintiffs' final Organic Act claim is that the 2006 CRMP fails to "conserve" Park resources. Pls. SJ Mem. at 35. This argument, however, is not distinct from Plaintiffs' other claims, as they expressly tie it to the "necessary and appropriate" claim under the Concessions Act. Id. Because Plaintiffs' Concessions Act claim fails, see *supra* Part III, this "conservation" claims also fails. NPS properly exercised its expert judgment, as demonstrated by the FEIS and the extensive Administrative Record, to balance the needs of providing reasonable access to the Colorado River corridor to a broad spectrum of the public, while at the same time protecting to the extent possible the resources of the Park.[17]

In City of Sausalito v. O'Neill, 386 F.3d 1186, 1227 (9th Cir. 2004), the Ninth Circuit held that, because the development allowed by NPS was not "fundamentally at odds with the directives of the Organic Act," the Court was "satisfied that the Park Service has balanced the potential harms of development with its responsibilities for conservation, preservation, and public service." Plaintiffs cannot demonstrate that the 2006 CRMP is "fundamentally

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[17] In another attempt to enforce a nonbinding MP, Plaintiffs also assert briefly that NPS was required to "attempt to restore the Grand Canyon's natural soundscape," and should have adopted either Alternative B or C. Pls. SJ Mem. at 35. As noted above, however, even under these alternatives the adverse cumulative effects would still have been major, regional, and long-term. See, e.g., AR 105406 (FEIS Vol. II at 369) (Alternative B). Plainly, restoring the natural soundscape of the Grand Canyon was beyond the scope of NPS's decision concerning recreational river management. Moreover, Plaintiffs singular focus on one resource impact is at odds with NPS's obligations to consider all impacts. When appropriately looking at all resource values, Modified Alternative H, and not Alternative B or C, is the "environmentally preferred alternative." See AR 109614-17 (ROD at 24-27).

at odds" with the Organic Act, and NPS properly considered and weighed potential harms against its responsibility for protecting the Park. Plaintiffs' Organic Act claims are without merit and should be denied.

V. NPS COMPLIED WITH NEPA IN ANALYZING THE POTENTIAL ENVIRONMENTAL IMPACTS OF THE 2006 CRMP

Under NEPA, federal agencies prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As a threshold matter, NEPA imposes only procedural requirements, not substantive ones: "NEPA does not work by mandating that agencies achieve particular substantive environmental results." Marsh v. ONRC, 490 U.S. 360, 371 (1989). Moreover, a court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) (citations omitted). "NEPA's goal is satisfied once . . . information is properly disclosed; thus, NEPA exists to ensure a process, not to ensure any result." Inland Empire Pub. Lands Council v. United States Forest Service, 88 F.3d 754, 758 (9th Cir. 1996); see also Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976) ("The purpose of NEPA is not to require an objection free document, but rather to give Congress, the responsible agencies, and the public a useful decision-making tool.").

Thus, judicial review of an EIS is "extremely limited." National Parks & Conservation Ass'n v. U.S. Dep't of Transp., 222 F.3d 677, 680 (9th Cir. 2000). A court evaluates an EIS only to determine whether it "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a challenged action. Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987) (internal quotes omitted). A court "need not 'fly-speck' the document and 'hold it insufficient on the basis of inconsequential, technical deficiencies,' but will instead employ a 'rule of reason'" Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996).

Under this standard, even if the court disagrees with the agency's conclusions, it must approve the EIS if it is satisfied that the EIS process fostered informed decision-making and

public participation. See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992). Courts must "review the EIS as a whole, and where there is conflicting evidence in the record, the [agency's] determination is due deference-especially in areas of agency expertise" National Parks, 222 F.3d at 682 (internal citation omitted). Once a court finds that the agency took a "hard look" at environmental impacts, then its review is at an end. Mumma, 956 F.2d at 1519; see also National Parks, 222 F.3d at 682 ("So long as the agency has made an informed decision, we cannot intervene.").

A. NPS Took The Requisite "Hard Look" At The Cumulative Impacts Of The 2006 CRMP On Wilderness Characteristics

NEPA requires federal agencies to consider the cumulative impacts of their actions. Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1075-76 (9th Cir. 2002). Pursuant to the NEPA regulations, a "cumulative impact" is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency * * * or person undertakes such other actions." 40 C.F.R. § 1508.7. According to the cases cited by Plaintiffs, a NEPA document's cumulative impact analysis "must identify and discuss the impacts that will be caused by each successive [project], including how the combination of those various impacts is expected to affect the environment, so as to provide a reasonably thorough assessment of the projects' cumulative impacts." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 974 (9th Cir. 2006) (quoting Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 1001 (9th Cir.2004)).

Plaintiffs allege that NPS violated NEPA by failing to adequately analyze cumulative effects on wilderness characteristics, arguing that the cumulative impacts analysis in the FEIS is "conclusory" and lacking "detail." Pls. SJ Mem. at 35-36. Id. at 36. Ironically, it is Plaintiffs' argument on this claim that is "conclusory" and lacking "detail." While Plaintiffs identify a list of activities that they assert NPS was required to evaluate in a cumulative impact analysis on wilderness character, Plaintiffs fail to offer any Administrative Record citations or argument as to why these activities should have been addressed or as to how the

cumulative impact analyses in the FEIS were inadequate. Plaintiffs' conclusory argument deprives Defendants an opportunity to rebut--or the Court to address--any specific issues Plaintiffs may have with the cumulative impacts analyses, and thus Plaintiffs' claim is inadequately supported and should be rejected. See, e.g., Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir.1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim.") (internal citation omitted); Maryland Cas. Co. v. Knight, 96 F.3d 1284, 1291 (9th Cir.1996) (deeming issue raised in brief abandoned where appellant failed to present substantive argument in support).

In any event, contrary to Plaintiffs' conclusory statement, the FEIS does contain detailed analyses of cumulative impacts relative to wilderness character. As the FEIS states, "[c]umulative impacts on wilderness character were determined by combining the impacts of each alternative with other past, present, and reasonably foreseeable future actions [and] are described for each alternative for natural and cultural resources and visitor use and experience." AR 105818 (FEIS Vol. II at 781).[18] Specific activities that reasonably might contribute to cumulative impacts for various resource topics are identified, AR 105286 (FEIS Vol. II at 249), and each of the sections analyzing impacts on these other resources includes detailed analyses for relevant cumulative impacts.

For example, in the "natural soundscape" section, the FEIS first identifies potential activities that might combine for cumulative impacts on the soundscape, AR 105394 (FEIS Vol. II at 357) and analyzes for Alternative A (Existing Condition) the relevant human noise

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[18] Plaintiffs complain that the DEIS did not contain a separate wilderness character section. Pls. SJ Mem. at 36 n.20. While this statement is true as far as it goes, it ignores the fact that all the potential impacts to wilderness character were addressed in each of the other resource sections. Thus, adding a wilderness character section to the FEIS represented only a restructuring of the DEIS to summarize potential impacts on wilderness character in one place. The underlying analyses of impacts to the various resources, however, were always present. AR 105816 (FEIS Vol. II at 779) ("The analysis of impacts to wilderness character incorporates the impact analyses for all natural and cultural resources, and visitor use and experience.").

impacts that adversely affect the Park's natural soundscape in addition to the activities authorized under the CRMP. AR 105401-03 (FEIS Vol. II at 364-66). This analysis includes an assessment of specific, relevant data for these sources, and concludes that "[a]ircraft overflights thus represent major adverse cumulative impacts on the park's natural soundscape for about 245 days per year in most of the park, and they are frequent and periodic, depending upon location." AR 105403 (FEIS Vol. II at 366). The analysis concludes that "[n]oise from river recreational activities [including motorboat and nonmotor boat noise] contributes additional noise to the natural soundscape; however, even if all noise from all river recreation was eliminated from the park (including river-related flights at Whitmore), the cumulative effects of aircraft noise would still be an adverse, major impact." AR 105404 (FEIS Vol. II at 367). For each of the other Lees Ferry alternatives, the cumulative impact analysis compares the level of impacts to the levels addressed for Alternative A and addresses how they differ accordingly. See AR 105405 (FEIS Vol. II at 368) (Alternative B); AR 105407 (FEIS Vol. II at 370) (Alternative C); AR 105410 (FEIS Vol. II at 373) (Alternative D); AR 105413 (FEIS Vol. II at 376) (Alternative E); AR 105416 (FEIS Vol. II at 379) (Alternative F); AR 105420 (FEIS Vol. II at 383) (Alternative G); AR 105423 (FEIS Vol. II at 386) (Modified Alternative H).

A similar cumulative impacts analysis is presented for each of the Lower Gorge alternatives. See AR 105428 (FEIS Vol. II at 391) (Alternative 1); AR 105431 (FEIS Vol. II at 394) (Alternative 2); AR 105434 (FEIS Vol. II at 397) (Alternative 3); AR 105438 (FEIS Vol. II at 401) (Modified Alternative 4); AR 105440 (FEIS Vol. II at 403) (Alternative 5). This approach is followed for each of the other resource topics. See, e.g., AR 105294-95, 105298, 105300, 105302, 105303, 105305, 105306, 105308, 105309, 105312, 105314, 105316, 105318, 105320 (FEIS Vol. II at 257-58, 261, 263, 265, 266, 268, 269, 271, 272, 275, 277, 279, 281, 283) (cumulative impacts to soils).

Combined, these cumulative impact analyses for each resource and all alternatives, provide a detailed assessment of cumulative impacts on natural and cultural resources

relating to wilderness character. The FEIS thus easily surpasses the Ninth Circuit's standard for providing a "reasonably thorough assessment" of cumulative impacts. Great Basin Mine, 456 F.3d at 974. Plaintiffs have failed to identify, let alone articulate, any relevant information missing from these analyses.

B. The FEIS Is Based On High-Quality Information And Scientific Analysis

Plaintiffs' final claim is that the FEIS violates NEPA because it "is not based on either high-quality information or accurate scientific analysis about the need for, propriety of or equity in allocation of commercial uses." Pls. SJ Mem. at 37. Plaintiffs offer no specific factual basis or argument for this conclusory assertion and, as with their conclusory "cumulative impacts" argument, it must be rejected.

Nonetheless, the exhaustive FEIS demonstrates the fallacy of Plaintiffs' assertion. The FEIS includes a bibliography of more than 500 technical and scientific references, as well as numerous "personal communications" with resource experts. AR 105866-98 (FEIS Vol. II at 829-61). The analyses for each resource relating to wilderness character (e.g., natural soundscape, AR 105385-441 (FEIS Vol. II at 348-404)) is comprehensive and detailed, and the wilderness character section ties these analyses together to present a meaningful assessment of potential effects on wilderness character. AR 105815-37 (FEIS Vol. II at 778-800). The FEIS for the CRMP easily satisfies NEPA's "hard look" test.

CONCLUSION

Plaintiffs have failed to meet their heavy burden under the APA of demonstrating that NPS's decision adopting the CRMP was "arbitrary, capricious, or otherwise contrary to law." NPS's decision-making process and decision was reasonable and entitled to deference. Therefore, this Court should deny Plaintiffs' Motion for Summary Judgment and grant summary judgment in favor of Federal Defendants.

Dated: August 6, 2007.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Fling to the following CM/ECF registrants:

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