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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] Defendants.	No. CV-06-0894 PCT-DGC INTERVENOR-DEFENDANT GRAND CANYON RIVER OUTFITTERS ASSOCIATION'S REPLY IN SUPPORT OF ITS CROSS-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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INTRODUCTION

In this case, Plaintiffs have challenged the National Park Service's ("NPS") decisions to authorize certain visitor services and motorized activities in Grand Canyon National Park (the "Park"). Plaintiffs' challenge, however, fails to recognize that Congress vested NPS with broad authority to determine how to best implement its dual mandate to protect park resources and provide for public use and enjoyment of the parks, and that NPS's decisions in this regard are entitled to substantial deference. It also fails to appreciate the breadth of issues NPS must consider in carrying out this authority, and erroneously seeks to treat the Park's river corridor as if Congress already has designated it as wilderness under the Wilderness Act. Although Plaintiffs have made clear that they disagree with NPS's decisions, this is not sufficient for them to prevail in their challenge. For these, and other reasons discussed herein, Plaintiffs' challenge should be denied.

ARGUMENT

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT NPS'S MANAGEMENT OF THE COLORADO RIVER CORRIDOR VIOLATES ANY APPLICABLE JUDICIALLY ENFORCEABLE REQUIREMENT REGARDING MANAGEMENT FOR WILDERNESS CHARACTER

A. NPS Has No Judicially Enforceable, Mandatory Duty To Manage The River Corridor For Wilderness Character

Throughout this case, Plaintiffs' filings have served to obfuscate the issues regarding the NPS's management of the river corridor as an area that has not been designated by Congress as wilderness, but rather one that only has been *proposed* by the NPS for

designation by Congress as *potential wilderness*.[2] Although Plaintiffs aver that they do not allege any violations of the Wilderness Act in this case, Pl. Reply at 4, they continue to be widely inconsistent on this point. *See, e.g.*, Pl. Reply at 14-15 (citing cases addressing Wilderness Act's general prohibition on motorized uses in *designated* wilderness areas in support of argument that temporary or transient disturbances are not allowed in an area *proposed* as *potential* wilderness); *id.* at 15 (quoting document asserting that motorized equipment in the river corridor "violate[s] the letter and intent of the Wilderness Act"); *id.* at 18-19 (suggesting violation of Wilderness Act § 4(d)(5)). Moreover, Plaintiffs continue to misrepresent the status of the river corridor as "potential wilderness," when in reality it only has been proposed by NPS as such. *Id.* at 5.

As Plaintiffs concede, neither the Wilderness Act nor the Organic Act contain any requirement that areas not designated as wilderness be managed for wilderness values and characteristics. The first relevant question, therefore, is whether the NPS 2001 Management Policies ("MPs") and 1995 General Management Plan ("GMP") create any judicially enforceable, mandatory duty for NPS to manage the Park's river corridor for wilderness character. Because they do not, Plaintiffs' claim must be denied.[3]

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[2] Contrary to Plaintiffs' Reply, Pl. Reply at 4 n.4, Defendants correctly stated that the *1980 wilderness recommendation*, which proposes the river corridor for designation as potential wilderness, and is the only recommendation potentially relevant to this case, never was forwarded to the President. *See* AR 093675; AR 095089. Plaintiffs cite to the earlier, 1977 version of the document, which is not relevant here.

[3] Plaintiffs' statement that denying their claim would mean that NPS "can do as it pleases" as a result, Pl. Reply at 6, is a gross exaggeration and improperly ignores the other authorities—such as the Organic Act and the Concessions Management Improvement Act ("CMIA")—that *do* create the NPS's legal duties.

As the D.C. Circuit has explained, the MPs "is a nonbinding, internal agency manual intended to guide and inform Park Service managers and staff . . . that does not create enforceable regulations or modify existing legal rights." *Wilderness Soc'y v. Norton*, 434 F.3d 584, 596-97 (D.C. Cir. 2006). Although Plaintiffs argue that *Wilderness Society* is inapplicable because it was brought under § 706(1) rather than § 706(2)(A) of the Administrative Procedure Act ("APA")—as the case here—this argument is unconvincing. Such a distinction should have no bearing upon whether or not an agency pronouncement is judicially enforceable, and no case cited by Plaintiffs gives reason for this Court to find otherwise.[4] Thus, Plaintiffs have failed to show why this Court should follow the flawed opinion of the district court in *Southern Utah Wilderness Alliance v. NPS*, 387 F. Supp. 2d 1178 (D. Utah 2005) ("*SUWA*"), over the D.C. Circuit's well-reasoned and more recent decision in *Wilderness Society*.

First, as Plaintiffs and the *SUWA* court acknowledge, the 2001 MPs were not implemented pursuant to formal rulemaking procedures. *SUWA*, 387 F. Supp. 2d at 1188. Although NPS did publish notice in the Federal Register regarding the 2001 MPs, it also did so for the 2006 MPs,[5] despite explicitly stating that the new MPs "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 . . . or any other person." 2006 MPs at 4, found

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[4] Plaintiffs' argument here is particular unavailing given the similarity between their attempts to establish the existence of a mandatory duty with which they allege NPS has failed to properly comply, and a plaintiff's need to "identify a statutory provision mandating agency action" to be entitled to judicial review under § 706(1) of the APA.

[5] *See Notice of Availability of Draft National Park Service Management Policies*, 70 Fed. Reg. 60,852 (Oct. 19, 2005).

at http://www.nps.gov/policy/MP2006.pdf. In fact, agencies now often publish notice of internal policies and directives as a matter of practice. Thus, such notice should be given little, if any, weight in considering whether the MPs are judicially enforceable.[6]

Second, the *SUWA* court erroneously, and with little analysis, concluded that the 2001 MPs are "substantively similar" to formal regulations. To have the independent force and effect of law like formal regulations, an agency pronouncement must "prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency organization, procedure or practice." *W. Radio Serv. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996); *see also Chrysler Corp. v. Brown* , 441 U.S. 281, 301 (1979). "To satisfy th[is] requirement the rule must be legislative in nature, affecting individual rights and obligations." *W. Radio Serv.*, 79 F.3d at 901. NPS clearly characterized the 2001 MPs as *interpretive*. *Notice of Availability of Draft National Park Service Management Policies*, 65 Fed. Reg. 2984 (Jan. 19, 2000) (describing MPs as including NPS's "interpretation of the key legislation that underlies the policies, and chapters that address" the various aspects of park planning and management). Moreover, although *SUWA* and Plaintiffs read much into the Introduction's statement that adherence to the MPs is "mandatory," they disregard the fact that the same statement reserved unfettered discretion by the agency to unilaterally, and without any formal procedure, waive or modify any of the policies. SAR016079. NPS's reservation of such broad discretion to except itself from

[6] Notably, unlike in *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136 (9th Cir. 2007), where the underlying statute expressly required public notice and comment for the creation and modification of the policy at issue,

the provisions of the MPs strongly suggests that it did not intend them to affect individual rights and obligations as if they were binding, judicially enforceable requirements.[7]

B. Even If Such A Duty Were To Exist, NPS Has Complied With That Duty

1. The MPs Impose No Obligation To Immediately Discontinue Uses That Cause Only Temporary Or Transient Disturbances

Once again, Plaintiffs obfuscate the issues in this case by conflating the standards for management of designated wilderness areas with those for areas, like the river corridor, only proposed for potential wilderness.[8] Indeed, Plaintiffs' claim that NPS would read a temporary, motorized use exception into the Wilderness Act for areas, like the river corridor, that have not been designated by Congress as wilderness once again illustrates their apparent unwillingness to accept that the Wilderness Act's prohibitions are limited to designated wilderness areas. In fact, nothing in either the Wilderness Act or the MPs requires NPS to immediately remove motorized uses that cause only temporary or transient disturbances from the river corridor.

Plaintiffs have not shown that NPS has committed itself to managing the river corridor as if it is wilderness. In fact, nothing in the Wilderness Act—and, indeed, nothing

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Congress did not direct NPS to issue the 2001 MPs or the 2005 GMP or to do so in any particular manner.

[7] The distinction between the MPs and formal regulations is further illustrated by the fact that NPS deems the MPs as the top level of NPS's three-tier system of park guidance, above Director's Orders at level 2, and handbooks and manuals at level 3. Formal regulations are considered separate from this system. *See* SAR016079.

[8] In this regard, Plaintiffs' reference to *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 646 (9th Cir. 2004) is misplaced, as well as miscited. Not only did that case, unlike the case here, involve *designated* wilderness (as does 16 U.S.C. § 1133(c), which Plaintiffs also reference), but it did not in any way involve motorized uses in such areas, as Plaintiffs suggest. Pl. Reply at 14.

in the MPs—requires this. MP 6.3.1 provides that "[NPS] will take no action that would *diminish the wilderness suitability* of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed." SAR016136 (emphasis added). The D.C. Circuit looked at this provision in *Wilderness Society* and concluded: "We do not view this policy statement as a commitment by NPS to manage areas as if they *are wilderness* once the agency commences review of lands for wilderness suitability. And there is certainly no statutory or case law support for this contention." *Wilderness Society*, 434 F.3d at 593 ("[I]t is clear that NPS has wide discretion to decide how to proceed to 'take no action that would diminish the wilderness suitability of an area possessing wilderness characteristics.'") (quoting MP 6.3.1). Thus, having determined that motorized use of the types and at the levels authorized in the CRMP does not diminish the wilderness suitability of the river corridor because the impacts of such use are only temporary and transient—a determination that Plaintiffs have not disputed, nor can they, lest they concede that the river corridor is no longer suitable for wilderness designation—NPS acted reasonably and consistently with its MPs in authorizing such activities pending designation of the river corridor by Congress.

In addition, as the Defendants have argued, NPS has reasonably exercised its discretion with regard to the MPs' statement that NPS "will seek to remove from potential wilderness the temporary, nonconforming conditions that preclude wilderness designation." SAR016137 (MP 6.3.1). Plaintiffs' interpretation of this provision to mean that NPS must

eliminate motorized use because temporary or transient disturbances are not allowed goes too far and fails to afford NPS the discretion it is due under the APA.

2. Motorized Use In The Grand Canyon's River Corridor Is "Established" Within The Meaning Of § 4(d)(1) Of The Wilderness Act Of 1964

Plaintiffs continuing effort to assert that § 4(d)(1) of the Wilderness Act is inapplicable to the national parks and that motorized use in the Grand Canyon's Colorado River corridor has not been "established" is without merit. First, Plaintiffs have failed to refute the authorities cited in GCROA's Memorandum of Points and Authorities supporting its cross-motion for summary judgment ("GCROA Memo") reflecting the well-accepted view that the provision applies to lands managed by the Department of the Interior. *See* GCROA Memo at 13. Second, Plaintiffs' suggestion that motorized use on the river cannot be considered "established" under § 4(d)(1) because it is "highly controversial" and therefore not "accepted" is untenable and would effectively eviscerate the established use exception of § 4(d)(1). Finally, Plaintiffs' contention that a plain reading of the Wilderness Act means that, in order to be "established," a use must be established prior to the enactment of that Act in 1964, rather than prior to the designation of the particular area as wilderness by Congress, is neither correct nor supported by applicable precedent. *See, e.g.*, SAR016142 (MP 6.4.3.3); *contrast* 16 U.S.C. § 1133(d)(4) (allowing grazing of livestock to continue "where established prior to September 3, 1964," the date of enactment of the Wilderness Act). Thus, as Congress and the President have taken no action to designate the river corridor as wilderness, NPS appropriately determined that motorized use of the river corridor would nevertheless qualify as an established use.

Consequently, Plaintiffs' claims that NPS has somehow violated the 1976 Master Plan, the 1995 GMP, or the 2001 MPs, lack merit and should be dismissed.

II. NPS FULLY COMPLIED WITH APPLICABLE LEGAL OBLIGATIONS RELATING TO ITS DETERMINATION OF THE TYPES AND AMOUNTS OF COMMERCIAL SERVICES TO BE AUTHORIZED IN THE PARK

As GCROA explained in its cross-motion, the Administrative Record demonstrates that NPS reasonably exercised its discretion and complied with applicable law in authorizing the types (*i.e.*, motorized and non-motorized) and amount of concessions services set out in the FEIS and ROD. As an initial matter, as explained above, the MPs and GMP impose no judicially enforceable duty on NPS in this regard. Moreover, NPS's decisions to authorize concessions services are entitled to substantial deference. The CMIA's "necessary and appropriate" provision, 16 U.S.C. § 5951(b), like § 4(d)(5) of the Wilderness Act (which, as discussed further below is not itself applicable to this case), "is framed in general terms and does not specify any particular form or content for such an assessment." *Blackwell*, 390 F.3d at 646-47. As GCROA has explained, the FEIS clearly addressed what types and level of commercial services are necessary and appropriate. AR 105209 (FEIS Vol. III at 372); *see* Jt. Facts ¶ 38. Therefore, as the Ninth Circuit held in *Blackwell*, the Court should defer to the agency's decision under the broad terms of the governing statute, here, the CMIA. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

Importantly, while *Blackwell* is useful to help illustrate the vagueness of the "necessary and appropriate" standard in the CMIA and the significant discretion that standard therefore leaves to the agency, Plaintiffs' reliance on *Blackwell* to make their case

that NPS has violated some legal duty to make specific findings regarding the types and amount of commercial services that are necessary is misplaced. *Blackwell* involved an interpretation of § 4(d)(5) of the Wilderness Act, which has no relevance here because the applicability of that section is limited, by its terms, to congressionally-designated wilderness. Notably, Plaintiffs did not respond to GCROA's argument in its Memo regarding the applicability of *Blackwell*, and have not shown why the Court should consider it as relevant in ruling in the present action.

Plaintiffs' continuing obfuscation of the requirements applicable in areas *proposed* for designation as *potential wilderness*, their failure to be clear that the Wilderness Act does not in any way govern management of the river corridor, and their resulting misplaced reliance on *Blackwell* leads Plaintiffs to inappropriately conclude that "[NPS] must show that the amount of commercial services authorized is no more than is necessary to achieve the goals of managing the river for its wilderness character and for primitive and unconfined recreation." Pl. Reply at 19, 20. This is not at all accurate, given the inapplicability of § 4(d)(5) to the river corridor and the fact that § 5951(b) of the CMIA nowhere mentions wilderness character or values.[9]

Moreover, as noted above, Plaintiffs' statement that "[t]he Park Service . . . never made a finding that commercial motorized services are necessary or essential," Pl. Reply at 21 n.12, is refuted by the Record. The FEIS clearly states that "the NPS has determined that

[9] Plaintiffs' statement in their Reply that "authorizing motorized commercial services fails to preserve the wilderness values of the river to the 'highest practicable degree' consistent with the Concessions Act" thus once again illustrates their apparent confusion with what the CMIA does and does not require. Pl. Reply at 23.

the *motorized* trips provided by commercial outfitters . . . are necessary and appropriate for the public use and enjoyment of the park." AR 105209 (FEIS Vol. III at 372) (emphasis added); *see* Jt. Facts ¶ 38. As GCROA explained in its Memo, this finding reflects a reasoned determination that the outfitter and guide services authorized under the CRMP—including motorized trips—are consistent with, and advance, the policies set out in the CMIA, and it is supported by substantial evidence in the Record.[10] In contrast, Plaintiffs have presented no record evidence in support of their claim that motorized use "is merely a convenience for some and allows commercial outfitters to take larger groups on larger boats and make larger profits." Pl. Reply at 24.

Plaintiffs' argument that the types and levels of use authorized in the CRMP, including motorized use, are not "necessary and appropriate" remains based upon an improperly narrow view of the NPS's governing authorities and management objectives, ignoring the agency's statutory responsibilities to provide for the use and enjoyment of the parks by the public. Indeed, under Plaintiffs' interpretation (based upon one of their many looks to the dictionary to attempt to define the ambiguous standards in the NPS's governing statutes, which are more appropriately resolved by giving deference to the agency under

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[10] *See, e.g.*, AR 104606 (FEIS Vol. I at 9) (necessary and appropriate for the public use and enjoyment to provide for experienced and professional river guides who can provide such skills and equipment that many visitors do not have); AR 105210 (FEIS Vol. III at 373) (no-motors alternatives found to violate the basic premise of the planning effort, *i.e.*, "reducing congestion, crowding and impacts without reducing access of visitors to the Colorado River in Grand Canyon."); AR 104924 (FEIS Vol. III at 87) (eliminating motorized use would "force the NPS to significantly lower current levels of authorized use to minimize crowding and conflicts in accordance with the NPS's stated management objectives for visitor use and experience" and "significantly limit[] the wide spectrum of

Chevron), no commercial use would be "necessary" to reduce crowding, because NPS could instead accomplish the same goal by not allowing anyone on the river. Such a result, of course, is absurd, and simply emphasizes the fact—which Plaintiffs seem unwilling to accept—that NPS's decisions regarding the management of the river corridor must reflect a balancing of multiple and often competing objectives. Thus, Plaintiffs' suggestion that "motorized services" may not be allowed because they "are not necessary to protect the resource" once again misses the point. Pl. Reply at 21 n.12.

Plaintiffs also continue to improperly overstate the relevance of certain e-mails and other documents in the record reflecting the thoughts of the former Deputy Wilderness Program Coordinator for the Park. These documents do not reflect official Park policy, but only the personal thoughts and biases of a single individual. Many are outdated and superseded by the more recent planning process. But perhaps as important, Plaintiffs' defense of these statements once again shows their confusion over the NPS's governing statutes, associating two separate references to "minimum requirements" that have nothing to do with each other in an apparent, and flawed, effort to bolster their case. The CMIA does not, as Plaintiffs assert, "prohibit[] commercial services that fail to meet the minimum requirements test for preserving the values of the resource, which include wilderness character." Pl. Reply at 24. Contrary to Plaintiffs' interpretation, the phrase "minimum requirements" as used in the CMIA, 16 U.S.C. § 5952(4)(A)(iii), has nothing whatsoever to do with the "minimum requirements" test under the Wilderness Act, *see* 16 U.S.C. §

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use and range of visitor services currently available to the general public, contrary to the NPS's management objectives").

1133(c), which of course is not applicable in the river corridor in any event because the area has not been designated wilderness. Rather, as used in the CMIA, "minimum requirements" simply refers to a set of minimum qualifications or criteria that a prospective bid for a concessions contract must meet in order to be considered responsive, which includes "[m]easures necessary to ensure the protection, conservation, and preservation of resources of the unit of the National Park System." 16 U.S.C. § 5952(4)(A). Thus, once again, Plaintiffs argue that the statute requires more than it does.

On the basis of the above, and the arguments of GCROA and the other Defendants in their respective cross-motions, Plaintiffs have failed to show that NPS's determination that the river outfitter and guide concessions in the Park authorized under the CRMP and ROD are "necessary and appropriate" is arbitrary and capricious, an abuse of discretion, or otherwise in violation of law. Plaintiffs' claim cannot be sustained based upon the Record, and therefore it should be dismissed.

III. NPS'S MANAGEMENT OF THE COLORADO RIVER CORRIDOR IS FULLY CONSISTENT WITH ITS OBLIGATIONS UNDER THE ORGANIC ACT

A. Plaintiffs Have Failed To Demonstrate That NPS Interfered With Their Free Access To The Park In Violation Of The Organic Act

Plaintiffs continue to misunderstand and misrepresent the "free access" provision of the Organic Act, erroneously asserting that the Act requires NPS to "equitably allocate use between commercial and noncommercial users" and mandates that NPS allocate use either (1) through a single allocation (*i.e.*, common pool) system or (2) through a split allocation system based on the relative demand for access between commercial and noncommercial

users. Pl. Reply at 27. Any other means of allocation, Plaintiffs assert, is arbitrary and capricious and contrary to the requirements of the Organic Act. Of course, the Organic Act does not limit NPS's discretion in so strict a manner. Contrary to Plaintiffs' claims, there is no "legal requirement of equitable allocation." Pl. Reply at 30. And there certainly is no law limiting NPS to Plaintiffs' two options. Again, NPS is entitled to substantial deference under *Chevron*.

As an initial matter, Plaintiffs have made no effort to explain why the Court should consider their "free access" claim in light of the rejection of similar arguments in *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979) and *Randall v. Norton*, No. 00-349, 2004 U.S. Dist. LEXIS 29870 (D.N.M. Apr. 19, 2004), or to otherwise respond to the precedent cited by GCROA in its cross-motion. *See* GCROA Memo at 18-19. This can only be because Plaintiffs have no response for how to distinguish their "free access" claim in light of this substantial, contrary precedent.

Plaintiffs further continue to press their myopic view of the many factors that NPS must consider in allocating access to a limited national park resource, wrongly assuming that the only relevant consideration in allocating use is relative demand. In so doing, Plaintiffs' Reply continues to show any lack of pretense explaining the statutory mandates governing the use of the Colorado River in the Grand Canyon.[11] In fact, there is no legal requirement that obligates NPS to allocate commercial and noncommercial use on an equal

[11] Plaintiffs also continue to persist in mischaracterizing the allocation issue as a trade-off between the concessioners and the public. *See* Pl. Reply at 3 (stating NPS allows concessioners to "control much of the access to the river at the public's expense"); *id*. at 29 ("The laws at issue in this case plainly require that commercial services be limited

or equitable basis, or to determine the relative demand for commercial and noncommercial trips as part of its allocation decision.[12] To the contrary, accepting Plaintiffs' argument would fundamentally alter the very statutory regime that Congress developed in the CMIA to govern NPS's authorization and management of concessions services in the national parks, adding a new requirement that concessions services may only be authorized to the extent NPS provides equal access to limited park resources for private persons. Such a requirement, clearly not provided for under the CMIA, could potentially affect NPS administration of park use across the National Park System.

Plaintiffs cannot support their claim that the public pays concessioners not only for the services they provide, but for river access. Pl. Reply at 29. Similarly, Plaintiffs' claim that the concessioners receive an "economic rent" on the "access" they provide to the river, and their suggestion that the concessioners might receive 10 percent more user days than they require, is misleading. Pl. Reply at 31.[13] The fact of the matter is that the CMIA grants NPS broad discretion to authorize concessions services in the National Park System,

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so that people, not companies, retain access to their public lands . . . .").

[12] Similarly, contrary to Plaintiffs' claim, Pl. Reply at 33 n.21, nothing in the CMIA requires NPS to evaluate demand for commercial services to determine whether those services are necessary and appropriate.

[13] The Walls Declaration—which Plaintiffs have attempted to put forth in an effort to support their claims in an absence of supporting evidence in the Administrative Record, and which should be struck from this case—suffers from critical flaws, including an apparent fundamental lack of understanding of the laws and regulations governing the management of concessions services in the National Park System. This is perhaps most evident in Mr. Walls' failure to appreciate the fact that prices for concessioner-run trips are tightly regulated by NPS. The concessioners *cannot*, as he asserts, "charge whatever the market will bear for not only their services but for 'access' to the river." Walls Declaration at 6. This point is fundamental to his analysis, and the fact that it is untrue renders the Declaration of little value in helping to prove Plaintiffs' claims.

and that demand by the public for professionally-guided and outfitted trips is more than sufficient to utilize the entire "commercial use" allocation of user days.[14]

Plaintiffs also inappropriately mischaracterize GCROA's concerns with basing the allocation of use on relative demand. GCROA neither "fear[s] the results of a demand study" nor "suspects the result [of such a study] would be a decrease in commercial services and an increase in noncommercial permits." Pl. Reply at 32 n.20. In fact, GCROA is confident that a properly-designed study of relative demand among the overall public would show that the demand for professionally-outfitted and guided trips exceeds that for self-guided trips. However, as reflected in the Record and NPS's decision, there are very serious problems with measuring relative demand. *See* GCROA Memo at 21-23. To equate these concerns to fear is to seriously misrepresent GCROA's position and to selectively disregard evidence in the Record.

Moreover, GCROA's "bold[] assert[ion]" that basing allocation primarily "on the relative demand for self-outfitted versus professionally-outfitted trips would be inconsistent with the long history of management at GCNP and contrary to the NPS's governing authorities" is, in fact, fully supported by the Record. Pl. Reply at 32 n.20. The Record shows that, historically, NPS has based the commercial/noncommercial allocation of use on various factors, in accordance with its various governing authorities, and *not* on

[14] Plaintiffs wrongly persist in misrepresenting that not all of the concessions allocation is used, Pl. Reply at 27, ignoring GCROA's explanation that the language in the record that Plaintiffs rely on to support this statement does not support this erroneous assertion at all. GCROA Memo at 23 n.25. To the contrary, the record shows that the commercial allocation is "consistently used." AR 106594 (FEIS Vol. III at 157).

demand. GCROA Memo at 22; *see*, *e.g.*, AR 104593 (FEIS Vol. I at 6), SAR000934, SAR007530, SAR007120, SAR008673, SAR007819. Plaintiffs have pointed to no evidence to the contrary.

In sum, Plaintiffs have failed to demonstrate that the CRMP's allocation of use is arbitrary or capricious or in violation of the Organic Act. Plaintiffs' arguments not only ignore fundamental principles governing the use of national parks in general, and the Grand Canyon in particular, but also mischaracterize the Record and the issues before the NPS. NPS provided reasonable explanations, with sound basis in evidence in the Record, for rejecting the "common pool" system and for not conducting a study of relative demand. As such, Plaintiffs' arguments are without merit and must be rejected.

B. NPS's Determination That Motorized Activities In The River Corridor Do Not Impair The Park's Natural Soundscape Is Not Arbitrary And Capricious

Plaintiffs have failed to show that NPS's determination that the motorized activities in the river corridor authorized in the CRMP do not impair the Park's natural soundscape is arbitrary and capricious. Plaintiffs have not shown why this court should effectively ignore the substantial body of jurisprudence recognizing the broad discretion that Congress delegated to the NPS in managing the national parks under the Organic Act. And Plaintiffs have entirely failed to respond to GCROA's argument that the Court should find this claim nonreviewable, lest it become the task of this Court, rather than NPS, to work out compliance with the Organic Act's broad statutory mandate in a manner that is not contemplated by the APA. As such, Plaintiffs' claim should be denied.

As Defendants showed in their respective cross-motions, Plaintiffs' argument that

NPS violated the Organic Act by using the wrong baseline to evaluate impairment to the Park's natural soundscape should be rejected. Because the Organic Act does not in any way direct NPS's choice of baseline and the MPs do not establish judicially enforceable standards, NPS's selection of baseline thus is entitled to *Chevron* deference. As that selection enabled the agency to accurately assess the incremental contribution of its proposed action to existing conditions affecting the natural soundscape, it cannot be said to be arbitrary and capricious or a violation of law and should be upheld. *See Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 2000).

As Defendants further demonstrated in their respective cross-motions, Plaintiffs' argument that NPS failed to adequately considered the cumulative impacts to the Park's natural soundscape in violation of the Organic Act similarly should be rejected. Although Plaintiffs apparently now concede that the FEIS does, in fact, include an analysis of the cumulative impacts to the Park's natural soundscape, they complain that NPS "never applied this analysis and its findings to the impairment decision making process." Pl. Reply at 42. Again, however, Plaintiffs' argument is flawed: the Organic Act contains no such requirement; the MPs on which it relies are unenforceable; and the NEPA regulations and case law on which it further relies are inapplicable in the context of the Organic Act claim. Regardless, contrary to Plaintiffs' claim, the FEIS impacts analysis clearly seeks to satisfy both NEPA and the Organic Act. AR 105385-105441 (FEIS Vol. II, § 4.2.4). Demonstrating a rational connection between the cumulative impact analysis and NPS's no-impairment findings, each non-impairment determination follows from a detailed discussion of relevant criteria, including, but not limited to, the severity, duration, and

timing of the impact; and the direct, indirect, and cumulative effects of the impact. AR 105423-24 (FEIS Vol. II at 386-87 (modified Alternative H)). Again, NPS cannot be said to have acted arbitrarily and capriciously or otherwise in violation of applicable law.

In addition, Plaintiffs have failed to show that NPS's decision not to rely on studies and public comments from the *1980 CRMP* process in making its no-impairment determination is arbitrary and capricious. In fact, in their Reply, Plaintiffs entirely failed to respond to GCROA's argument that NPS acted reasonably in preparing the CRMP and ROD upon the basis of more up-to-date and accurate information and studies and comments, rather than relying upon the materials cited by Plaintiffs that are now over 25 years old and contain stale information.[15] *See* Pl. Reply at 43-44.

Finally, even in their Reply, Plaintiffs have failed to cite to any evidence in the record to support their theory that the authorization of motorboats, generators, and helicopter passenger exchanges—of the type and at the level authorized in the CRMP and ROD—impairs the Park's natural soundscape. This is not, as Plaintiffs claim, a "death by a thousand cuts" scenario, but instead a situation where the agency rationally considered existing environmental conditions in the Park, and reasonable concluded that, given those conditions, *the proposed activities* would not impair the natural soundscape. Once again, NPS's reasoned decision is entitled to deference.

[15] *See, e.g.*, SAR001787 (31-year old summary of research program); SAR003715 (30-year old synthesis of research program); SAR004602, SAR004607 (1979 FEIS); SAR005918 (27-year old paper).

C. Plaintiffs Have Failed To Show That NPS Failed To Conserve The River Corridor's Natural Soundscape And Wilderness Characteristics

Plaintiffs' argument that NPS has failed to conserve the Park's natural soundscape and wilderness characteristics suffers from many of the same flaws as their other arguments. For the reasons stated in GCROA's Memo, this argument should be rejected.

IV. NPS'S DEVELOPMENT AND ADOPTION OF THE REVISED CRMP IS FULLY CONSISTENT WITH THE REQUIREMENTS OF NEPA

As explained in GCROA's Memo, the Record shows that NPS clearly identified and took a hard look at cumulative impacts, including impacts relating to wilderness character. The FEIS evaluates the cumulative impacts associated with major past, present, and reasonably foreseeable future actions on each relevant resource in detail. Recognizing the relationship between impacts on wilderness character and impacts on other resources such as natural soundscape and visitor use and experience, the FEIS's analysis of cumulative impacts on wilderness character then explains that those effects are similar to those described for the other resources in the relevant FEIS sections. Thus, this is not a case where the agency has simply made "general statements about possible effects and some risk" or provided a "perfunctory" analysis, merely cataloging relevant past projects in the area. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006) (citation omitted). Rather, NPS took a hard look at cumulative impacts on each resource, and, rather than repeating the analysis for wilderness character impacts, to avoid redundancy, chose to direct the reader back to that analysis of cumulative impacts for related resources where the effects would be the same. This is not unreasonable.

Finally, Plaintiffs' claim that NPS failed to use high-quality information and accurate

scientific analysis as the basis for its decision with respect to the allocation of use similarly should be rejected. This vague, generalized claim of arbitrariness and capriciousness is belied by the Record, and cannot be sustained. GCROA Memo at 30.

CONCLUSION

WHEREFORE, GCROA respectfully requests that the Court grant its Cross-Motion for Summary Judgment, reject the Plaintiffs' Motion for Summary Judgment, and dismiss all of Plaintiffs' claims.

Respectfully submitted this 3rd day of October, 2007,

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