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Appearing for Grand Canyon River Outfitters Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

River Runners for Wilderness, et al.	)	No. CV-06-0894 PCT-DGC
Plaintiffs,	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR-DEFENDANT GRAND CANYON RIVER OUTFITTERS ASSOCIATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
v.	)	
Stephen P. Martin, et al.,[1]	)	
Defendants.	)	

[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 challenge the National Park Service's ("NPS") issuance of the Record of Decision ("ROD") and Final Environmental Impact Statement ("FEIS") for the 2006 Colorado River Management Plan ("CRMP"), which authorized certain visitor services and motorized activities in Grand Canyon National Park (the "Park"). Plaintiffs maintain, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, that NPS's actions violate, *inter alia*, the Concessions Management Improvement Act ("CMIA"), 16 U.S.C. §§ 5901, *et seq.*, the NPS Organic Act ("Organic Act"), 16 U.S.C. §§ 1, *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C §§ 4321, *et seq.*, as well as the NPS's older management plans and 2001 Management Policies.

Defendants' actions in this case were not arbitrary and capricious and were otherwise in accordance with the APA, CMIA, Organic Act, NEPA, and other applicable law. Defendants acted reasonably in exercising their discretion to manage the Park under governing law. As required under NEPA and the APA, they took a "hard look" at the environmental consequences of their actions in preparing the CRMP and ROD. Similarly, they acted reasonably in developing the CRMP in light of NPS's older management plans and 2001 Management Policies, neither of which are judicially enforceable. For these reasons, and as further discussed herein, Defendants' and Defendant-Intervenors' cross-motions for summary judgment should be granted, and Plaintiffs' request that this Court grant their motion for summary judgment, issue a declaratory judgment, and adjudicate remedies should be denied.

STANDARD OF REVIEW

Because the statutes under which Plaintiffs seek to challenge administrative action do not contain separate provisions for judicial review, this Court's review is governed by the APA. *See, e.g., City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004). Under the APA, the Court may reverse agency action only if it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 471 (9th Cir. 2000). While the Court must be "searching and careful" in its inquiry, *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989), it "must uphold agency decisions so long as the agencies have 'considered the relevant factors and articulated a rational connection between the factors found and the choice made.'" *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9th Cir. 2003) (quoting *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990)); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. PLAINTIFFS CANNOT ESTABLISH THAT NPS'S MANAGEMENT OF THE COLORADO RIVER CORRIDOR VIOLATES ANY APPLICABLE STATUTORY OR REGULATORY REQUIREMENT

Plaintiffs' claim that NPS violated its "duty to manage the Colorado River Corridor as wilderness" (Pl. Mem. at 9) overlooks that there is no such statutory or regulatory duty applicable to the Colorado River corridor. Although Plaintiffs' memorandum does not clearly articulate any specific "statutory" or "regulatory"

requirement allegedly being violated, they intermittently suggest (Pl. Mem. at 2 – 18) that NPS's decision to continue to allow the use of motorized watercraft in the ROD and CRMP violates (a) the Wilderness Act of 1964; (b) NPS's 1976 Master Plan and 1995 GMP; and (c) the 2001 NPS management policies ("MP"). Plaintiffs' arguments are flawed for a variety of reasons. First, the Wilderness Act does not prohibit NPS from allowing the continued use of motorized watercraft in an area that has not even been "recommended" as wilderness. Next, NPS's past management plans do not constrain NPS's ability to develop new plans—the purpose of planning—and do not prohibit the use of motorized watercraft. And finally, the management policies do not prohibit the use of motorized watercraft, and the policies nevertheless are not judicially enforceable.

A. The Colorado River Corridor in Grand Canyon National Park is Not "Wilderness" Under the Wilderness Act of 1964

Congress passed the Wilderness Act to close off certain areas of federal land and preserve their wilderness character to secure for present and future generations the benefits of an "enduring resource of wilderness." 16 U.S.C. § 1131(a). The Act established the National Wilderness Preservation System, to include lands designated as "wilderness" by Congress. Designated wilderness areas are to "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness." *Id.*

To accomplish this task, the Act required that the Secretary of the Interior make

recommendations to the President as to the suitability of existing national park lands for preservation as wilderness, and provided that the President could then make a recommendation to Congress. 16 U.S.C. § 1132(c). Congress may then designate such lands as wilderness through the normal legislative process. *Id*.; *see* Jt. Facts ¶ 5.[2]

Pursuant to the Wilderness Act and the Grand Canyon Enlargement Act of 1975, 16 U.S.C. § 228i-1, NPS in 1977 recommended over one million acres of the Park for designation as wilderness. NPS revised this recommendation in 1980, again proposing that most of the backcountry area of the Park be designated by Congress as wilderness. It also proposed that the Park's river corridor—roughly one percent of the total area—be designated as "potential wilderness," pending the elimination of motorized rafts, which the Park had proposed as part of its then-ongoing river management planning process. It was believed that the "potential wilderness" designation, *if accepted and enacted by Congress*, would mean that the Secretary would in the future eliminate motorized use and, once eliminated, that the river corridor would become part of the Wilderness Preservation System automatically without any further action by Congress.[3] *See* Jt. Facts ¶ 7.

The Park's proposed recommendation, although not submitted to the President or to Congress, nevertheless generated substantial controversy. Congress responded by passing an amendment that prevented NPS from moving forward with its proposed phase-

[2] In lieu of its own statement of facts, Defendant-Intervenor Grand Canyon River Outfitters Association joins in a joint statement of facts with Defendants and Defendant-Intervenor Grand Canyon Private Boaters Association ("Jt. Facts").

out of motorized river trips. In response, NPS implemented a CRMP and subsequently issued river running concession contracts requiring motorized trips. *See* Jt. Facts ¶ 18.

The over 20-year old NPS wilderness recommendation remains outstanding today. Since 1981, no Secretary of the Interior or President has ever received or forwarded a formal recommendation on the suitability or non-suitability of any areas within the Park for possible inclusion in the Wilderness Preservation System. AR 093675; AR 095089. *See* Jt. Facts ¶ 9.

Plaintiffs' memorandum, therefore, obfuscates the fundamental fact that the prescriptions of the *Wilderness Act* do not apply here, because the Secretary has not forwarded any recommendation to the President, the President has not recommended that the Park be designated as wilderness, and Congress has not designated the Park's river corridor as wilderness. It is only "[o]nce federal land has been designated as wilderness, [that] the Wilderness Act places severe restrictions on commercial activities, roads, motorized vehicles, motorized transport, and structures within the area." *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1089 (11th Cir. 2004). Consequently, Plaintiffs' reliance on cases involving *congressionally designated wildernesses* that are then covered by the Wilderness Act[4] is misplaced. Indeed, Plaintiffs would have this Court rewrite the

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[3] AR 104820 (FEIS Vol. I at 233). In 1993, the Park updated the 1980 recommendation; the update did not affect the NPS's proposed classification of the river corridor as "potential wilderness." AR 093675; SAR 008292.

[4] *See, e.g.*, *Wilderness Watch* (Cumberland Island wilderness area); *Wilderness Society v. U.S. Fish and Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003), *amended by* 360 F.3d 1374 (9th Cir. 2004) (Kenai wilderness); *High Sierra Hikers Ass'n v. Blackwell*, 390

Wilderness Act to have it apply to lands that are not congressionally designated or even recommended as wilderness in accordance with the statutory process.

Next, Plaintiffs overlook that, even in congressionally designated wilderness areas, motorized uses are allowed, particularly when, as here, that use is an historic use. Congress always remains free to decide whether to designate an area as wilderness and/or allow continued motorized uses in designated wilderness areas. Section 4(d)(1) of the Wilderness Act, moreover, specifically allows for the continuation of motorboat use in designated wilderness if that use was established *prior to the area's designation as wilderness*. Plaintiffs' assertion that only lands in the National Forest System may qualify under § 4(d)(1) ignores the well-accepted view to the contrary.[5] *See* Jt. Facts ¶ 6. Indeed, in a variety of instances when Congress has designated wilderness in national parks, it has allowed historic motorized uses to continue.[6] NPS even noted this in its FEIS.[7]

Despite Plaintiffs' opinion to the contrary, the use of motorized watercraft in the Park would be an "established use" within the meaning of § 4(d)(1), if the area were to be recommended and if Congress were to so designate the Park. As Plaintiffs acknowledge,

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F.3d 630 (9th Cir. 2004) (John Muir and Ansel Adams wilderness areas); *Kathy Stupak-Thrall v. Glickman*, 89 F.3d 1269 (6th Cir. 1996) (Sylvania Wilderness Area).

[5] *See* Jt. Facts ¶ 11, 26, 56; Attach. 2 to Fed. Def. Suppl. Notice of Lodging Admin. Record (concluding that NPS can continue to authorize motorized recreational river trips in the Grand Canyon, even with the outstanding proposed wilderness recommendation, explaining that such use would be an established use under § 4(d)(1)); AR 000761-63 (Wilderness Matrix); AR 000764-71 (material on § 4(d)(1)); SAR016142 (MP 6.4.3.3).

[6] Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649, § 4 (1978); Okefenokee National Wildlife Refuge Act, Pub. L. No. 93-429, 88 Stat. 1179, § 2 (1974); and Florida Wilderness Act, Pub. L. No. 98-430, 98 Stat. 1665, § 1(14) (1984).

[7] AR 104822 (FEIS Vol. I at 235).

motorized use of the Colorado River corridor has been occurring for at least 50 years. Pl. Mem. at 13. Plaintiffs' argument that this use is nonetheless not "established" because it is controversial strains credulity; indeed, such an interpretation would undermine Congress's intent and render the exception virtually meaningless given the near universal controversial nature of any motorized uses in wilderness areas. Moreover, as the record demonstrates, an "established use" is a use that was established prior to designation of a particular area as wilderness, and not necessarily prior to enactment of the Wilderness Act itself. *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). Here, as Congress and the President have taken no action to designate the river corridor as wilderness, NPS appropriately determined that motorized use of the corridor would nevertheless qualify as an established use.

Finally, Plaintiffs' argument that § 4(d)(5) of the Wilderness Act requires that NPS make a "necessity determination" with respect to the river-running concessions operations authorized in the Park (Pl. Mem. at 6) is belied by the clear language of that provision. Section 4(d)(5) only applies within *congressionally designated* wilderness areas. 16 U.S.C. § 1133(d)(5). As such, it does not even apply to the Park. Accordingly, NPS could not, as Plaintiffs allege, illegally have allowed certain commercial uses of the Colorado River corridor in violation of this section. Pl. Mem. at 14.

Plaintiffs' reliance on *Blackwell* (Pl. Mem. at 14) is misplaced. Like the statute itself, that case involved a congressionally designated wilderness area. However, the case

illustrates that, even if § 4(d)(5) were to apply, NPS would have satisfied its obligations under the section. The *Blackwell* court interpreted § 4(d)(5) to require the agency, before authorizing commercial services in designated wilderness areas, to (1) make a finding of "necessity"; and (2) show that the services authorized are only "to the *extent* necessary." *Blackwell*, 390 F.3d at 646-47. The court observed that the agency is entitled to substantial deference as to how it chooses to make any "necessity" finding: "The Wilderness Act is framed in general terms and does not specify any particular form or content for such an assessment; therefore the finding of 'necessity' requires this court to defer to the agency's decision under the broad terms of the Act." *Id.* at 646. With respect to the "extent" of the services authorized, the court stated that the agency must show that the amount of use authorized was no more than was necessary. *Id.* at 647.[8] Here, the ROD and FEIS describe the need underlying the authorized services, and articulate why the extent of the authorized services are necessary.[9]

Consequently, Plaintiffs have failed to present any credible argument that the ROD and FEIS are arbitrary and capricious or otherwise violate the *Wilderness Act*.

B. The NPS's Old Management Plans and Management Policies Neither Require That Motorized Use be Discontinued Nor Are Judicially Enforceable

Plaintiffs' suggestion (Pl. Mem. at 5-6) that NPS's management policies "mandate

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[8] *See also Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (9th Cir. 1992).

[9] *See infra* § II (discussing NPS findings concerning need for concessions services, including benefits of motorized use). The *Wilderness Watch* case, advanced by Plaintiffs to support their argument, is not instructive. *See* Pl. Mem. at 16-17. That case did not

that the Colorado River be managed as wilderness" not only ignores the nature of the "policies" but also misconstrues them. The NPS proposal submitted to the Secretary's office recommended that the Secretary forward to the President a recommendation that the Park be recommended to Congress as "potential wilderness." "Potential wilderness" is not a concept under the *Wilderness Act*, but rather is an NPS-created category of lands that NPS believes ultimately could be included in the wilderness system even though the lands contain non-conforming uses. As such, if and when Congress accepts a recommendation from the President or otherwise designates national park lands as "potential wilderness," any such identified non-conforming uses are allowed to continue in those areas until the Secretary determines that it is appropriate to discontinue those uses. When the Secretary does so, then the lands receive full *Wilderness Act* protection. *See Wilderness Watch*, 375 F.3d at 1088.

Nothing in the policies suggests a binding obligation to manage the type of lands at issue here as if they are presently wilderness. To begin with, the policies are not judicially enforceable unless it is clear that NPS has intended to create a binding obligation. *Wilderness Soc'y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006).[10] Plaintiffs have

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involve § 4(d)(5), but rather § 4(c), 16 U.S.C. § 1133(c), which is not relevant here.

[10] "We find that . . . the conclusion is inescapable that the MANAGEMENT POLICIES is a nonbinding internal agency manual intended to guide and inform Park Service managers and staff. There is no indication that the agency meant for these internal directives to be judicially enforceable at the behest of members of the public who question the agency's management." *Wilderness Soc'y*, 434 F.3d at 596. Indeed, the weight of authority is that guidance documents are not enforceable—and indeed are not judicially reviewable. *Cement Kiln Recycling Coal. v. EPA*, 2007 U.S. App. LEXIS 16711, *54 (D.C. Cir. July 13, 2007).

pointed to no clear language in the policies that "mandates" that lands that have not yet been recommended by the President or designated by Congress as "potential wilderness" must somehow be presently managed as if they are wilderness and that all allegedly non-conforming uses must be eliminated.[11]

Even to the extent that NPS intends that its management policies would provide a specific mandatory—albeit generic and general—obligation, it strains logic to conclude that broad policies, which can always be altered, amended or changed, would somehow override NPS's established planning process. And NPS specifically addressed its management policies during the instant planning process, and concluded that the policies did not dictate a contrary result, because nothing about the new CRMP and the continued use of motorized watercraft would preclude the area's ultimate suitability for inclusion in the wilderness system.[12] Indeed, the management policies necessarily embodied the earlier understanding of the NPS's legal counsel that the principal question is whether any uses in the Park would preclude an area's ultimate suitability for inclusion into the system, if so recommended by the President and under consideration by Congress. AR

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[11] *See* SAR016136-37 (MP 6.2.2.1, 6.3.1). Although MP 6.3.1provides that NPS will seek to remove non-conforming uses from "potential wilderness," that general directive can only mean once the lands have been so designated by Congress, otherwise the entire notion of having a congressionally designated potential wilderness area, as contemplated by MP 6.2.2.1, puts the cart before the horse.

[12] AR 104604 (FEIS Vol. I at 17) ("It is important to note that the continued use of motorboats does not preclude possible wilderness designation because such use is only a temporary or transient disturbance of wilderness values and does not permanently impact wilderness resources or permanently denigrate wilderness values."). This is consistent with NPS Director's Order No. 41, which favors managing lands identified as potentially

000761-63. Here, NPS provided a reasoned explanation, with considerable support, that the use of motorized rafts would not diminish the future suitability of the river corridor as wilderness, if ultimately recommended by the President and under consideration by Congress. AR 105412 (FEIS Vol. III at 375).[13]

In fact, the record demonstrates that authorizing the use of motorized watercraft offers important benefits for management of the river corridor and providing opportunities for visitor experiences, and contributes significantly and positively to NPS's efforts to comply with its statutory mandate to simultaneously conserve Park resources and provide for the enjoyment of those resources in a manner that will leave them unimpaired for the enjoyment of future generations. *See* AR 050540 (joint statement of GCROA, Grand Canyon Private Boaters Association, American Whitewater, and Grand Canyon River Runners Association explaining the importance of motorized use, and "support[ing] the continuation of an appropriate type and level of both motor and non-motor recreational use . . . throughout the life of the . . . CRMP"); Jt. Facts ¶ 28. For instance, because motorized rafts can move at more variable speeds than human-powered watercraft, authorizing recreational motorized use helps enable the NPS to minimize crowding and avoid conflicts, thereby enhancing the visitor experience. AR 104294

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suitable for inclusion into the wilderness system in a manner that would not preclude their ultimate inclusion into the system, if so desired by Congress. SAR012397.

[13] Indeed, if such use did impair suitability for wilderness designation, after decades of motorized use (most of which occurred using the since-replaced two-stroke motors complained of by Ginger Harmon in her Declaration, Pl. Mem., Exh. 4, P. 7), certainly the Park's river corridor would no longer be suitable. Yet, wilderness advocates maintain that it does remain suitable. If so, it can only be because motorized use does not diminish

(FEIS Vol. III at 87); AR 105210 (FEIS Vol. III at 373). In addition, motorized trips are the principal reason why, today, the Grand Canyon river experience is widely available to a very broad range of people. Three out of four professionally-outfitted river trip passengers now depend upon motorized rafts for their trips, which take place using newly-developed quiet, low-emission, low-powered, environmentally-friendly motors. AR 104647 (FEIS Vol. I at 60); *see* Jt. Facts ¶ 46. Eliminating motorized river trips would severely and dramatically reduce the number of people able to enjoy a professionally-outfitted Grand Canyon river experience each year. AR 104606 (FEIS Vol. I at 19); AR 105209 (FEIS Vol. III at 372).

Finally, Plaintiffs' suggestion—albeit in passing and without any support—that the 1976 Master Plan and 1995 General Management Plan somehow dictate the outcome of this more recent planning process reflects a misunderstanding of NPS's entire planning process. To begin with, general land use plans provide a broad overview of the management of the public lands. *Cf. Norton v. SUWA*, 542 U.S. 55 (2004). NPS is free to amend these plans, and indeed this most recent planning process was restarted pursuant to a settlement agreement that required NPS to update its plan for the management of the river corridor. Jt. Facts ¶ 19. That is precisely what NPS has now done, after a lengthy and deliberative process. To somehow suggest that this process is now irrelevant because of the 1976 Master Plan or the "general" plan from 1995 is to deny NPS the ability to develop specific plans for particular areas or uses in its parks—the well-accepted

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suitability for any possible future designation by Congress as wilderness.

approach used by NPS nationwide.[14]

Consequently, Plaintiffs' claims that NPS has somehow violated the 1976 Master Plan, the 1995 General Management Plan, or its Management Policies, lack merit and should be dismissed.

II. NPS'S AUTHORIZATION OF COMMERCIAL SERVICES IN THE PARK IS FULLY CONSISTENT WITH THE CMIA

Plaintiffs' argument that NPS violated the CMIA by authorizing outfitter and guide concessions on the Colorado River through the Park "that are inappropriate and inconsistent with preserving the resources and values of the Colorado River," Pl. Mem. at 18, lacks merit and should be dismissed. NPS has broad discretion to manage the use of Park resources and authorize concessions for the benefit of the public under its Organic Act and the CMIA.[15] The provision upon which Plaintiffs rely, 16 U.S.C. § 5951(b), states the "policy of the Congress" that the development of public accommodations and services in the national parks shall be limited to those that are "necessary and appropriate for public use and enjoyment of" the park and "consistent to

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[14] Plaintiffs misread *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052 (D. Ariz. 2001), *appeal dismissed*, 2002 U.S. App. LEXIS 27243 (9th Cir. Dec. 4, 2002). There, the court simply held that the Forest Service's decision was not supported by the record. The agency there had not explained why its chosen alternative would accomplish its stated objectives in the FEIS (*i.e.*, to implement the plan at issue there). *Sierra Club*, 161 F. Supp. 2d at 1072. The court even noted that, although it supported the plaintiffs' argument that the decision was not supported by the record, it was troubled by the use of the plan as a "determinative criteria." *Id.*

[15] *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that

the highest practicable degree with the preservation and conservation of the resources and values of the unit." 16 U.S.C. § 5951(b).[16] Contrary to Plaintiffs' assertions, the record demonstrates that NPS reasonably exercised its discretion and complied with any requirements imposed upon it by § 5951(b) in authorizing the types (*i.e.*, motorized and non-motorized) and amount of concessions services set out in the FEIS and ROD.

The FEIS's analysis of the proposed action and alternatives clearly addresses what types and level of commercial services are necessary and appropriate.[17] As the FEIS states: "Description and analysis of potential impacts on the affected environment resulting from commercial operations [on the river] are found throughout the Final EIS. Determination 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, Executive Summary, at vii); *see also* AR 104606 (FEIS Vol. I at 19) (explaining how NPS determines what services are "necessary" and "appropriate"). Thus, the FEIS makes clear that the "necessary and appropriate" standard colors NPS's entire decisionmaking process, and that the decisions made in the CRMP and ROD reflect the agency's determination of what services at what levels are deemed to meet that standard. The FEIS even explains: "Furthermore, the NPS has determined that the motorized trips provided by commercial outfitters, which enable thousands of people

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level of conservation is to be attained.").

[16] NPS's regulations reiterate and interpret this policy at 36 C.F.R. § 51.2.

[17] AR 104889 (FEIS Vol. III at 52) ("The Final EIS on the [CRMP] determines the types and levels of commercial services that are necessary and appropriate for the Colorado River through Grand Canyon National Park.").

to experience the Colorado River in a relatively primitive and unconfined manner (when many of them otherwise would be unable to do so), are necessary and appropriate for the public use and enjoyment of the park; will be provided in a manner that furthers the protection, conservation, and preservation of the environment; and will enhance visitor use and enjoyment of the park without causing unacceptable impacts to park resources or values." AR 105209 (FEIS Vol. III at 372); *see* Jt. Facts ¶ 38.

In fact, the CRMP and ROD reflect a reasoned determination that the outfitter and guide services authorized under those documents are consistent with, and advance, the policies set out in the CMIA. Although opinions varied widely, many commenters in fact urged the NPS to continue to authorize motorized trips. *See, e.g.*, AR 050534-41; AR 047187; AR 057654; AR 057567; Jt. Facts ¶ 39. And, the FEIS is replete with statements supporting NPS's decision to authorize concessions operations using motorized watercraft. For instance, as the FEIS explains, "Since many visitors who wish to raft on 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." AR 104606 (FEIS Vol. I at 14); *see* Jt. Facts ¶ 41. As the FEIS further explains, "The NPS did examine a subset of no-motors alternatives and found that they violated the basic premise of this planning effort; that of reducing congestion, crowding

and impacts without reducing access of visitors to the Colorado River in Grand Canyon.") AR 105210 (FEIS Vol. III at 373). The NPS further determined:

> To preserve the quality of the visitor experience that all Grand Canyon river runners are able to enjoy today, 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. Reducing or eliminating motorized recreational use would have the further effect of significantly limiting the wide spectrum of use and range of visitor services currently available to the general public, contrary to the NPS's management objectives.

AR 104924 (FEIS Vol. III at 87). Therefore, Plaintiffs' claim 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," Pl. Mem. at 19, is belied by the Administrative Record and simply cannot be sustained.

The same can be said for Plaintiffs' claim that NPS failed to identify the specific amount of commercial services that are "necessary and appropriate." The amount of commercial use authorized in the CRMP and ROD is based upon an exhaustive analysis of carrying capacity and levels of different types of visitor use, considering daily launches, trips at one time, crowding at launches and attraction sites, and other relevant criteria, based upon models, past experience, and other relevant data and information. *See* Jt. Facts ¶ 33. This amount reflects what NPS deems "necessary and appropriate."

Finally, Plaintiffs' claim that NPS allegedly failed under § 5951(b) to preserve the wilderness character of the river to the highest practicable degree also lacks merit and should be dismissed. As an initial matter, although *Norton v. SUWA*, 542 U.S. 55 (2004),

addressed a claim brought under § 706(1) of the APA, similar reasoning warrants a determination by this Court that this claim is nonreviewable under § 706(2) of the APA. In the *SUWA* case, the Court ruled that it lacked jurisdiction under § 706(1) of the APA to review the plaintiffs' claim that BLM had violated its nonimpairment obligation under 43 U.S.C. § 1782(c) by failing to act to protect public lands from damage caused by off-road vehicle use and thereby allowing degradation in certain wilderness study areas.[18] In so holding, the Court explained that, while § 1782(c) was mandatory as to the object to be achieved, it left BLM a great deal of discretion in deciding how to achieve it. "It assuredly does not mandate, with the clarity necessary to support judicial action under §706(1), the total exclusion of [off-road vehicle] use."[19] Similarly, nothing in the CMIA (or any other provision of law) requires NPS to close areas proposed as "potential wilderness" to motorized use; whether to do so is left to NPS's considerable discretion over how it might address activity causing impairment. Ordering NPS to take action to eliminate such use because it is not consistent with preservation and conservation of the resources and values of the Park "to the highest practicable degree," therefore, would not direct NPS simply to act, but how to act, substituting the court's discretion for the agency's. This is neither intended nor permissible under the APA.[20] And, even if this provision were to be reviewable under the APA, as demonstrated by the record, NPS

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[18] *Norton*, 542 U.S. at 66.

[19] *Id.* at 66-67 (discussing limits on APA jurisdiction and danger of empowering courts to enter "general orders compelling compliance with broad statutory mandates").

[20] Under the APA, "[t]he court may require agencies to act, but may not . . . tell them how to act in matters of administrative discretion." S. Doc. No. 248 at 40 (1946).

reasonably complied with its requirements.

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

A. NPS's Allocation of Use Does Not Interfere With Plaintiffs' Free Access to a Natural Wonder of Grand Canyon National Park

Plaintiffs cannot establish any right to free access to the Grand Canyon that NPS has violated in establishing the allocation of use in the ROD and CRMP. Pursuant to the Organic Act, the Secretary of the Interior is directed 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." 16 U.S.C. § 3. This grant of authority is subject to the prohibition that: "No natural, curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public . . . ." *Id.*

Plaintiffs' "free access" claim is the same claim brought and rejected by the Ninth Circuit in *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1972), as well as by the U.S. District Court for the District of New Mexico in *Randall v. Norton*.[21] In *Wilderness Public Rights Fund*, the plaintiffs asserted that there was no justification for allocating between commercial and noncommercial use, and that such an allocation denied them "free access" to the river, contrary to 16 U.S.C. § 3. *Wilderness Public Rights Fund*, 608 F.2d at 1253. The court rejected their argument, noting that the NPS *can* and necessarily *must* allocate use. *Id.*; *see also Universal Interp. Shuttle v. WMATA*,

393 U.S. 186 (1968) (explaining that Department of the Interior may exclude or allocate traffic on NPS-administered lands as it so chooses). It is now well-accepted that national parks allocate and restrict the use of certain park resources. Although parties in appropriate circumstances might argue that an allocation or restriction is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, they cannot claim they are entitled to "free access." *See Christianson v. Hauptman*, 991 F.2d 59 (2nd Cir. 1993); *Conservation Law Found. v. Sec'y of Interior*, 864 F.2d 954 (1st Cir. 1989).

Plaintiffs' "free access" claim further suffers from a failure to appreciate that Congress has passed specific laws addressing visitor services and concessions in the national parks. These laws, such as the Concessions Policy Act of 1965 and the CMIA (repealing the 1965 Act), reflect clear congressional policy to permit services in national parks and to facilitate control of public use through concessioners.[22] Accordingly, Plaintiffs' claim that NPS's allocation of use interferes with the public's free access to the river is without merit and must be dismissed.

B. NPS's Allocation of Use is Not Arbitrary and Capricious or Otherwise in Violation of the Organic Act

Plaintiffs have failed to demonstrate that NPS's allocation of use of the Colorado River through the Park is arbitrary or capricious. Plaintiffs' arguments not only ignore fundamental principles governing the use of national parks in general, and the Grand

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[21] No. 00-349, 2004 U.S. Dist. LEXIS 29870 (D.N.M. Apr. 19, 2004).

[22] *See Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 805-06 (2003) ("To make visits to national parks more enjoyable for the public, Congress

Canyon in particular, but also mischaracterize the Administrative Record and the issues confronting the NPS. As such, these arguments are without merit and must be rejected.

Plaintiffs' brief lacks any pretense of explaining the statutory mandates governing the use of the Colorado River in the Grand Canyon. In fact, there is no legal requirement that the use of the river be allocated, or that the use be allocated in any particular way. Plaintiffs simply have no authority for their underlying proposition that concessions use "must be allocated equitably with noncommercial uses." Pl. Mem. at 22. Rather, NPS must administer the Park in accordance with the Organic Act, Park enabling legislation,[23] and the CMIA. It is the combination of these and other laws that informs whether and how the river will be allocated among various user groups. *See generally Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000) (reversing district court injunction barring NPS from implementing provision of management plan allowing motorized vehicle travel in a portion of park, noting that proper question for the court was whether NPS's actions were "inconsistent with a clear intent of Congress expressed in the Organic Act and the [Park's] enabling legislation"). Thus, as the Ninth Circuit has stated, "Allocation of the limited use between [professionally-guided and self-guided boaters] is one method of assuring that the rights of each [group] are recognized and, if fairly done

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authorized [the Park Service] to 'grant privileges, leases, and permits for the use of land for the accommodation of visitors.'") (citation omitted).

[23] Act of February 26, 1919, ch. 44, 40 Stat. 1175 (1919); Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975); Act to Amend the Grand Canyon National Park Enlargement Act, Pub. L. No. 94-31, 89 Stat. 172 (1975) (together, codified as amended at 16 U.S.C. §§ 221-228j); *see also* National Parks Overflights Act,

pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary." *Wilderness Public Rights Fund*, 608 F.2d at 1254.

Plaintiffs' memorandum presents a myopic view of the many issues that NPS must consider when it allocates a scarce and important resource such as the use of the Colorado River through the Grand Canyon. Plaintiffs' apparent assumption that relative "demand" is the only relevant factor for NPS consideration ignores the relevant mandates for managing the Park, and is inconsistent with the record. As required by its organic statute, NPS regulates river use "to ensure that the level and types of use are sustainable and that resource impacts are within acceptable limits for long-term resource preservation." AR 104593 (FEIS Vol. I at 6). Thus, in the past, NPS has stated that it "reserves the right to add or subtract, allocate or reallocate user days based on review of all relevant factors" and has based the commercial/noncommercial allocation of use on various factors, including "[s]cientific research, public input, historic considerations, and legislative mandates;" existing acceptable levels for the quality of the natural resources and visitor experience; the condition of the natural and social resources within the river corridor; and historic use levels and their impact on park resources. SAR000934; SAR007530; SAR007120. In addition, because "[t]he allocation is administered in the interest of the greatest good to the general public," it has reflected Park management's long-held belief that concessioners provide the only practical means of access to the river for the vast majority of Americans. SAR008672 (explaining that the then-current allocation

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Pub. L. No. 100-91, 101 Stat. 674 (1987) (codified at 16 U.S.C. § 1a-1 note); 36 C.F.R. §

authorized "private river runners, who are a very small percentage of the interested public, to utilize a fairly large percentage (32 percent) of the total allocation").[24] "The opportunities must be evaluated in respect of the recreational desires of all publics in relation to the need for resource protection." SAR008673. As the NPS Chief of Concessions has stated, the allocation decision is "really a question of what is best for the Park and the overall public." SAR007819. Thus, to suggest that the NPS must base the allocation primarily, or entirely as Plaintiffs appear to suggest, on the relative demand for self-outfitted versus professionally-outfitted trips would be inconsistent with the long history of management of GCNP and contrary to the NPS's governing authorities.

Plaintiffs' focus on demand (and conclusion that relative demand favors private use) and their attempt to argue that the NPS acted in an arbitrary and capricious manner in allocating use is flawed for two additional reasons. First, the wait list for private boaters under the *old* CRMP and permit system, which Plaintiffs prominently highlight, is not

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7.4.
[24] Plaintiffs' statement to the contrary that, "In fact, the Park Service has long understood that the 'primary user group that most needs access, and constitutes a broader range of economic levels, is the private [public] user.'" is misleading at best. Pl. Memo at 28 (citing Pl. Facts at ¶ 170). Not only does the statement rely solely on a September 1988 e-mail from Kim Crumbo to various recipients, including Tom Martin, Co-Director of Plaintiff RRFW, but Plaintiffs added the word "public" in an apparent and misguided effort to suggest that the commercial use allocation does not serve the public as well. As the Ninth Circuit admonished in response to a similar argument made by the plaintiffs in *Wilderness Public Rights Fund*, "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*

only irrelevant to the new CRMP, but, as NPS and others long have recognized, a poor indicator of actual demand for private river trips. AR 105723 (FEIS Vol. II at 686). Second, Plaintiffs' argument ignores the fact that demand has no doubt also increased over the years for those interested in professionally-outfitted trips.[25] *See* Jt. Facts ¶ 34.

The ROD and CRMP reflect the considered and not arbitrary or capricious judgment of the NPS. NPS's management objectives for visitor use and experience included "provid[ing] a diverse range of quality recreational opportunities for visitors to experience and understand the environmental interrelationships, resources, and values of Grand Canyon National Park" and establishing "[l]evels and types of use [that] enhance [the] visitor experience and minimize crowding, conflicts, and resource impacts." AR 105644 (FEIS Vol. II at 607). Having examined all relevant factors pertaining to the allocation issue, the FEIS concluded that: "the Modified Preferred Alternative H meets the standards of fairness (by providing for an approximately 50/50 allocation of user days between commercial and non-commercial users) and provides for a range of experience

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Fund, 608 F.2d at 1254; *cf. Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1282 n.16 (10th Cir. 1991) (citing *Wilderness Public Rights Fund*).

[25] Plaintiffs' statement that "there is generally greater supply of than demand" for commercial services, Pl. Memo at 24, is unsupported. Indeed, the one authoritative cite that Plaintiffs reference to support this argument—referenced by Pl. Facts at ¶ 228 (citing AR 106089)—does not support that argument but instead simply explains that because the concessioners are required to adhere to NPS-established user-day limits, not all of their trips are of the maximum group size or maximum trip length. Plaintiffs' other two cites are to newspaper articles—Pl. Facts at ¶ 229 (citing AR 000370, 000392-000393)—that do not support the proposition either. Instead, as NPS recognized, the commercial allocation is "consistently used" and "it is probably true that numbers of people who could participate in a non-commercial trip is smaller than numbers of people who could become commercial passengers." AR 106594 (FEIS Vol. III at 157); *see* AR 107999.

for a variety of park visitors and best meets management objectives for the CRMP." AR 104889 (FEIS Vol. III at 52); *see* Jt. Facts ¶¶ 17, 35. For the reasons discussed above, the Administrative Record amply demonstrates that NPS's allocation decision was well-justified, and Plaintiffs' claim to the contrary should be dismissed.[26]

C. NPS's Determination that Motorized Activities in the River Corridor Do Not Impair the Park's Natural Soundscape is Not Arbitrary and Capricious

NPS's determination that motorized use of the Colorado River corridor, of the nature and at the levels set out in the CRMP and ROD, does not impair the Park's natural soundscape is fully consistent with the Service's obligations under the Organic Act. As courts routinely have observed, Congress, in the Organic Act, delegated broad discretion to the NPS in managing the national parks.[27] 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 . . . 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

[26] The reasonableness of NPS's commercial/noncommercial allocation in the new CRMP is reflected in the fact that the two intervenors in this case, together with two other major recreational user groups—together representing and constituting a diverse assembly of Grand Canyon river users that includes outfitters, private boaters, and citizens who utilize the professional river services that the concessioners exist to provide—were able to submit *joint recommendations* in response to the draft EIS generally supporting the allocation that was adopted in the final CRMP. AR 050534-41. This coming together of interests who historically had been embroiled in deep conflict over this issue was a major and historic achievement, and is testament to the fairness of NPS's new plan.

[27] *See Organized Fishermen of Fla. v. Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985); *see also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996); *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 391 (D. Wyo. 1987); *Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265, 1279 (D. Colo. 1986). *See generally Alaska*

manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1; *see also* 16 U.S.C. § 1a-1. Congress's clear direction that the parks be open and accessible for visitor enjoyment shows that not all activities or uses that have an impact on park resources rise to the level of impairment. Thus, under the Organic Act, Congress gave NPS the management discretion to allow activities within parks—even those that may have an adverse impact on park resources—so long as the impact does not constitute impairment of the affected resources and values. AR 104595 (FEIS Vol. I at 8); SAR016086 (MP 1.4.3); *see also* AR 105287 (FEIS Vol. II at 250).[28]

Plaintiffs' claim that NPS's determination that motorized activities in the Colorado River corridor do not impair the Park's natural soundscape is arbitrary and capricious is flawed in numerous respects. As a threshold matter, for similar reasons as discussed above at pages 16-17, *supra*, this Court should find this claim nonreviewable based upon *Norton v. SUWA*, 542 U.S. 55 (2004). Accepting Plaintiffs' argument would make it 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.

Plaintiffs' argument that NPS violated the Organic Act by using the wrong baseline to evaluate impairment to the Park's natural soundscape similarly should be rejected. Plaintiffs' argument relies upon a Director's Order (No. 47) that expired on

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Wildlife Alliance v. Jensen, 108 F.3d 1065, 1073-74 (9th Cir. 1997) (noting cases confirming the general principle that NPS enjoys broad discretion under its Organic Act).

[28] *See, e.g.*, *Bicycle Trails Council*, 82 F.3d at 1468 (stating that the authority of the NPS to strike balances among "the sometimes competing goals of recreation, safety, and

December 1, 2004 and is no longer in effect, as well as upon the agency's management policies, which Plaintiffs have not proven to be judicially enforceable against the agency. The Organic Act contains no legal requirement with respect to the agency's choice of baseline. NPS's choice of baseline is fully consistent with its obligations under NEPA. *See* Jt. Facts ¶ 44.

Next, Plaintiffs' claim that NPS failed to consider the cumulative impacts to the natural soundscape before making a final impairment determination fails for several reasons. Not only does the Organic Act contain no such requirement, but as discussed below in response to Plaintiffs' NEPA claims, the FEIS, in fact, presents a thorough analysis of the cumulative impacts of the proposed action and alternatives on the natural soundscape. This analysis combines the incremental impacts of each alternative—including motorboats and helicopter exchanges—with other past, present, and reasonably foreseeable future actions, including commercial air tours, commercial jet traffic, military aircraft, general aviation, and administrative aircraft activities, and clearly is sufficient to meet NEPA's requirements. AR 105394-105424 (FEIS Vol. II at 357-87).[29]

Plaintiffs' argument that NPS failed to "consider any environmental assessments or environmental impact statements . . . relevant scientific studies, and other sources of

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resource protection" as well as among "sometimes competing recreational interests . . . inheres in the Organic Act and the [park's establishment act]").

[29] Plaintiffs'assertion that "The Park Service's own Wilderness Coordinator notes there has been an 'incremental erosion of [the Colorado River corridor's] wilderness resource' since 1977" is misleading and of no persuasive value. Pl. Memo at 31 n.17. The cited document, yet *another* document prepared by Kim Crumbo, is a memo that was prepared in 1991 and that therefore fails to capture any changes in circumstances that

information; and public comments" also must be rejected. SAR016087 (MP 1.4.7). Not only does this argument again inappropriately ask this Court to judicially enforce a non-binding agency policy, but it does so by finding fault with NPS's decision not to rely on studies and public comments from the development of the *1980* CRMP—materials which are now *over 25 years old*. Rather than relying on such stale information, the CRMP and ROD reflect the development and consideration of more up-to-date and accurate information and studies and comments. Plaintiffs further suggest that the NPS must take special care here to explain some reversal of its position, but fail to appreciate that, rather than reflecting a reversal of NPS's position, the CRMP and ROD continue to allow motorized activities that the NPS has authorized for more than 25 years. This is far from a reversal of position that needs to be reconciled with prior Service policy and practice.

Finally, Plaintiffs point to no 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. Indeed, rather than "concede[] as much," Pl. Mem. at 34, the FEIS explains that "even if all noise was eliminated from the park ***(including river-related helicopter flights at Whitmore)***, . . . [t] here would still be 'significant adverse effects' on the natural soundscape due to frequent, periodic and noticeable noise from overflights, and 'substantial restoration of natural quiet' would not be achieved . . . ." AR 105424 (FEIS Vol. II at 387)*; see also* AR 105423 (FEIS Vol. II at 36).

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have occurred over the past 16 years, including the transition to four-stroke motors.

D. 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 river corridor's natural soundscape and wilderness characteristics suffers from many of the same flaws as their other arguments. In addition to relying upon non-binding management policies that they cannot demonstrate are judicially enforceable, Plaintiffs once again fail to appreciate NPS's broad discretion under the Organic Act, as well as ignore the evidence in the record showing that the type and level of motorized use authorized is "necessary and appropriate" and "does not constitute impairment." SAR016086 (MP 1.4.3). Further, Plaintiffs ignore the fact that NPS determined that it *is* impossible to restore the Park's natural soundscape through the CRMP, which has no control over the overflights that do impair that soundscape. *See* Jt. Facts ¶ 50. Thus, Plaintiffs' argument must be rejected.

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

The FEIS shows that NPS took the requisite "hard look" at the environmental consequences of the proposed action and provided sufficient analysis such that it "foster[s] both informed decision-making and informed public participation." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citations omitted) (explaining that 9th Circuit applies "rule of reason" in reviewing EIS adequacy). In particular, the record demonstrates that, in addition to the direct and indirect effects of the proposed action (including authorization of motorized watercraft and other river use), the FEIS clearly identified and took a hard look at the cumulative impacts of the proposed

action, as defined under 40 C.F.R. § 1508.7, including impacts relating to wilderness character. The FEIS specifies that the "[m]ajor past, present, and reasonably foreseeable future actions considered" in the cumulative impact analysis includes, *inter alia*: operation of Glen Canyon Dam; tribal activities; and overflights. AR 105286 (FEIS Vol. II at 249). The FEIS evaluates the cumulative impacts associated with each of these activities on each relevant resource—*e.g.*, soils, water quality, air quality, natural soundscape, wildlife, visitor use and experience, and wilderness character—in great detail. *See, e.g.*, AR 105386 (FEIS Vol. II at 349) (discussing activities contributing to cumulative noise impacts); AR 105424 (FEIS Vol. II at 387 ("Although ***Modified*** Alternative H would contribute to the overall cumulative effects of noise on the park natural soundscape, even if all noise from all river recreation was eliminated from the park ***(including river-related helicopter flights at Whitmore),*** the cumulative effects of aircraft noise would still be adverse, short- ***to long***-term, and major."); Jt. Facts ¶ 31. Recognizing the clear relationship between impacts on wilderness character and impacts on other resources such as natural soundscape and visitor use and experience (*see, e.g.*, AR 105825 (FEIS Vol. II at 778), the FEIS's analysis of cumulative impacts on wilderness character explains that those effects are similar to those described for the other resources in the relevant FEIS sections. *See* AR 105815 (FEIS Vol. II § 4.8); AR 105817 (FEIS Vol. II at 780); AR 105828 (FEIS Vol. II at 791). It is therefore inappropriate to, as Plaintiffs do, read the FEIS's discussion of cumulative impacts on wilderness character in a vacuum, disregarding related analysis elsewhere in the document.

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. Plaintiffs provide no indication whatsoever specifically what information they would have NPS consider that it did not, dispensing of this argument in essentially one page of their brief. Such a generalized claim of arbitrariness and capriciousness simply cannot be sustained, particularly in light of the contrary and voluminous evidence in the record. *See, e.g.*, AR 105866-98 (FEIS Vol. II at 829-61) (selected bibliography); AR 105276-87 (FEIS Vol. II § 4.1) (describing Grand Canyon River Trip Simulator and User Discretionary Time Model); Jt. Facts ¶ 25.

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 6th day of August, 2007,

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