

No. 08-15112

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

STEPHEN MARTIN, et al.,
Defendants-Appellees,

and

**GRAND CANYON RIVER OUTFITTERS ASSOCIATION, et al., and
GRAND CANYON PRIVATE BOATERS ASSOCIATION,**
Defendants-Intervenors-Appellees.

**ANSWER BRIEF OF APPELLEE
GRAND CANYON PRIVATE BOATERS ASSOCIATION**

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STATEMENT OF THE CASE/INTRODUCTION

The Grand Canyon Private Boaters Association (“GCPBA”) is a non-profit, all-volunteer public interest group formed in 1996. Supp. Exc. 143.¹ Its purpose is to represent and advocate for the interests of recreational river runners in regard to management issues at the Grand Canyon. *Id.* More than 1,000 river runners belong to GCPBA by paying its dues or subscribing to its member list-serve. *Id.*

GCPBA commenced litigation in 2000 to require the National Park Service (“NPS”) to resume river management planning after NPS cancelled that effort in 2000. NPS settled the case by agreeing to restart the planning process and complete a new Colorado River Management Plan (“CRMP”) by 2004. *Id.*

GCPBA filed joint comments on the Draft Environmental Impact Statement (“DEIS”) supporting the Park Service’s proposed action, along with Grand Canyon River Outfitters Association, American Whitewater, and the Grand Canyon River Runners Association. *Id.* at 142-49. The joint comments were “a product of ... a major and historic achievement, the coming together of Grand Canyon user groups that traditionally have been embroiled in deep conflict regarding core Colorado River management issues.” *Id.* at 142.

¹ We will refer to the Supplemental Excerpts of Record that accompany this brief as “Supp. Exc. XXX.”

Appellant River Runners for Wilderness organized in 2002 and filed this challenge to the NPS's final action approving the new CRMP in 2006. The district court upheld the CRMP and EIS in 2007. Exc. 1-31.²

STATEMENT OF FACTS

GCPBA adopts the district court's statement of the facts, Section I of the opinion. Exc. 1-4.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291.

ARGUMENT

I. THE NATIONAL PARK SERVICE IS PROPERLY MANAGING THE COLORADO RIVER CORRIDOR FOR WILDERNESS CHARACTER CONSISTENT WITH APPLICABLE AUTHORITIES

Appellants, River Runners for Wilderness, et al. ("RRFW") argue that the National Park Service ("NPS") is violating a duty imposed under the agency's 2001 Management Policies to preserve the Colorado River's wilderness character until the legislative process for wilderness designation is completed. Specifically, RRFW claims that the NPS has failed to manage the Colorado River corridor for potential wilderness designation because the authorization of motorized activities impairs the wilderness character of the river corridor. RRFW ignores the fact that

² We will refer to the Excerpts of Record that accompanied Appellants' Opening Brief as "Exc. XX."

motors are a temporary, pre-existing non-conforming use that does not disqualify the river corridor from eventual designation as wilderness.

A. THE NPS IS MANAGING THE COLORADO RIVER CORRIDOR IN ACCORDANCE WITH APPLICABLE AUTHORITIES.

- i. The CRMP complies with the NPS Management Policies' requirement that the NPS "seek to remove" non-conforming uses from proposed potential wilderness areas.

The NPS Management Policies guide management of all lands in the NPS system. Chapter Six of the Management Policies, "Wilderness Preservation and Management," governs the management of wilderness areas and areas with wilderness characteristics within national parks. Supp. Exc. 82-91. In adopting the Management Policies, the National Park Service extended its duty to all lands under its administration that exhibit some wilderness character. *Id.* at 83. The Management Policies define wilderness to "include the categories of suitable, study, proposed, recommended, and designated wilderness. Potential wilderness may be a subset of any of these five categories." *Id.* at 84.

While potential wilderness areas are included in the agency's definition of wilderness, the Management Policies explicitly recognize the unique challenges of administering them. Potential wilderness includes lands "that do not ... qualify for immediate [wilderness] designation due to temporary, non-conforming, or incompatible conditions." *Id.* The general policy for management of wilderness resources requires the NPS to:

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. Until that time, management decisions pertaining to lands qualifying as wilderness will be made in expectation of eventual wilderness designation. *Id.*

In managing proposed potential wilderness, however, the Policies mandate that the NPS manage it “as wilderness *to the extent that existing non-conforming conditions allow.*” Supp. Exc. 85 (emphasis added). In addition, the NPS “*should seek to remove* from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation.” *Id.* (emphasis added).

The plain language of the Management Policies sets only an aspirational standard for the removal of non-conforming uses from potential wilderness areas. The Management Policies do not state that the NPS “*shall*” remove all non-conforming uses immediately. Rather, the NPS must attempt, *i.e.*, “*seek to remove,*” those uses. *Id.*

There is a long history of potential wilderness areas with nonconforming or incompatible but temporary uses—much like the motors in the Grand Canyon—eventually being designated as wilderness. For example, Congress has authorized the designation of wilderness areas in numerous monuments and parks after cessation of nonconforming uses. PUB. L. No. 94-567; PUB. L. No. 95-625. In these areas, the Secretary of the Interior exercised the authority to designate wilderness areas when the nonconforming uses prohibited by the Wilderness Act had ceased.

See 48 Fed. Reg. 12,842 (March 28, 1983) (designating 138 of 231 acres of potential wilderness in Isle Royale National Park as wilderness); 62 Fed. Reg. 28,729 (May 27, 1997) (designating 3,502.2 acres of potential wilderness as wilderness in Joshua Tree National Park); 67 Fed. Reg. 6,944 (Feb. 14, 2002) (designating 5,449 acres of potential wilderness as wilderness in Haleakala National Park). Thus, areas with temporary, non-conforming uses can “graduate” to full wilderness status. The prior conflicting uses do not disqualify them.

The CRMP greatly limits the temporary, non-conforming use of motorized boats from the potential wilderness of the Colorado River corridor, fulfilling the NPS’s duty under the Management Policies. In the CRMP, the NPS has decreased the presence of motorized boats in the river corridor by creating a 6 ½ month motor-free period each year. Supp. Exc. 8. The NPS has also reduced the maximum group size and maximum duration of motorized trips. *Id.* Whereas the previous plan prohibited motors only from September 15 to December 15, the current CRMP prohibits motors from September 16 to March 31. *Id.* The maximum group size, including guides, for commercial motor trips was decreased from 43 to 32 in the summer season (May to August) and 24 in the remainder of the motor season. *Id.* In addition, maximum trip length of commercial motor trips was shortened by eight days in the summer and by six days in the shoulder seasons.

Thus, NPS has met the Management Policies' prescription to "seek to remove" non-conforming motorized use.

- ii. The CRMP fulfills the requirements of the Grand Canyon planning documents, including the General Management Plan, regarding preservation of wilderness character.

RRFW claims that the NPS violated its duty to protect the wilderness character, as required by the Grand Canyon General Management Plan ("GMP"), by allowing motorized uses in the CRMP. RRFW App. Br. 27-32. RRFW ignores the fact that the GMP sets the broad management objectives but leaves it to the CRMP to set the specific standards for the Colorado River corridor.

The GMP "provides a foundation from which to protect park resources while providing for meaningful visitor experiences." Supp. Exc. 60. The NPS issued the Grand Canyon General Management Plan in 1995. In accordance with the NPS Management Policies, the GMP requires that the NPS "treats all proposed wilderness areas as wilderness ..." Exc. 246. Additionally, a Management Objective states: "Manage areas meeting the criteria for wilderness designations as wilderness." Supp. Exc. 96. Finally, the GMP states that the management of proposed wilderness areas "should preserve the wilderness values and character." *Id.* at 95.

However, the GMP defers the duty for management of the Colorado River corridor to the CRMP. Exc. 246. Regarding the relationship between the two plans, the FEIS states that "the management objectives in the *General Manage-*

ment Plan were developed with the presumption that discrete objectives would be developed specifically for the *Colorado River Management Plan*.” Supp. Exc. 2. Furthermore, the GMP expressly recognizes that only the CRMP will address the use of motorized boats on the Colorado River. Exc. 246 (“The use of motorboats will be addressed in the revised [Colorado River Management] plan, along with other river management issues identified in the scoping process.”); Supp. Exc. 100 (“Provide a wilderness river experience on the Colorado River (this objective will not affect decisions regarding the use of motorboats on the river).”).

The district court correctly found that “[b]ecause the 1995 GMP expressly declines to require the elimination of motorized uses in the Corridor, and in fact defers a decision on such issues to the 2006 CMRP, it plainly does not render the 2006 CMRP’s resolution of the issue arbitrary and capricious.” Exc. 15. This court should uphold the decision of the district court.

B. AUTHORIZATION OF TEMPORARY NONCONFORMING USES SUCH AS MOTORS DOES NOT PERMANENTLY INJURE WILDERNESS CHARACTER OR PROHIBIT EVENTUAL WILDERNESS DESIGNATION.

- i. Areas with non-conforming uses remain eligible for wilderness designation.

RRFW argues that the NPS violated its Management Policies by authorization of “temporary or transient” motor use on the Colorado River. The Policies provide, however, that the NPS may allow non-conforming uses in potential wil-

derness areas if eventual elimination of these uses will leave areas “unimpaired for future use and enjoyment as wilderness.” Supp. Exc. 83.

The definition of wilderness under the Wilderness Act requires only that “the imprint of man’s work is substantially unnoticeable.” 16 U.S.C. § 1131(c)(3). The NPS Management Policies state that when lands are being reviewed for wilderness suitability,

[L]ands that have been logged, farmed, grazed, mined, or otherwise utilized in ways not involving extensive development or alteration of the landscape may also be considered suitable for wilderness designation, if, at the time of assessment, the effects of these activities are substantially unnoticeable or their wilderness character could be maintained or restored through appropriate management actions.

Supp. Exc. 83. Furthermore, the Management Policies instruct that lands should not be excluded from review for wilderness suitability “solely because of existing rights or privileges ...” *Id.* Instead, if the lands “possess wilderness character, they may be ... considered for designation as wilderness or potential wilderness.” *Id.*

- ii. Ample precedent exists for designation of wilderness with prior nonconforming uses.

The following examples further illustrate the principle that areas with nonconforming uses may be designated as wilderness following cessation of those uses.

In 1976, Congress designated 17,019 acres in Shenandoah National Park as wilderness and 560 acres as potential wilderness. PUB. L. No. 94-567(1)(m). The wilderness areas included land that had returned to “a primarily forested condition after having been extensively logged, burned, farmed, grazed, mined, and inhabited and built upon by several generations of people.” Shenandoah National Park Backcountry/ Wilderness Plan, August 1998, Chap. 5, p. 2, *available at* <http://wilderness.nps.gov/document/shenandoah.pdf> at 55 (last visited July 3, 2008). In designating the Shenandoah Wilderness, among other wilderness designations, Congress recognized that “wilderness values could be restored to the landscape.” Supp. Exc. 130.

When it designates wilderness areas, Congress has the option of completely prohibiting any prior conflicting use as long as the impaired wilderness characteristic is restored. This was the case in the designation of the Boundary Waters Canoe Area Wilderness, the River of No Return Wilderness, and the Sylvania Wilderness. In each of those places, prior use of motorboats did not impair or prohibit wilderness designation.

The Boundary Waters Canoe Area Wilderness is located along the Minnesota-Canada border and contains a network of over 1,000 lakes. *Minnesota v. Block*, 660 F.2d 1240, 1245 (8th Cir. 1981). There, prior motorized use did not inhibit restoration of wilderness characteristics when motors were removed from cer-

tain areas. *Friends of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 819 (8th Cir. 2006). In response to “‘threatened deterioration of wilderness from excessive use,’ Congress enacted the Boundary Waters Canoe Area Wilderness Act,” which prohibited motorboat use on approximately three-quarters of the waters within the wilderness area.³ *Id.*

In the Frank Church River of No Return Wilderness, Congress restricted the use of motorboats to only one section of the Salmon River. Central Idaho Wilderness Act of 1980, PUB. L. No. 96-312, § (9). Motorboats on this section of the Salmon River are permitted “at a level not less than the level of use which occurred during calendar year 1978.” *Id.* Motorboats are not allowed on any other waterways within the Frank Church River of No Return Wilderness, including the Middle Fork of the Salmon River. *Id.*

Finally, the elimination of motorboats that previously plied the lakes in the Sylvania Wilderness in Michigan demonstrates that Congress often designates wilderness with the full awareness that motorized, non-conforming uses existed prior to the time of designation. Congress designated the Sylvania Wilderness in the Michigan Wilderness Act of 1987. PUB. L. No. 100-184 § (3)(b). Testimony be-

³ GCPBA does not, by its citation to the limited use of motors in the Boundary Waters wilderness, endorse this result in Grand Canyon National Park. It uses this and the other examples provided above only to show that the current use of motors on the Colorado River does not disqualify the area from eventual designation as wilderness.

fore Congress revealed that motorboats had been used on several lakes within the area. 133 Cong. Rec. H1813-06 (statements of Mr. Marlenee) (“the area designated as the Sylvania Wilderness contains several lakes on which motorboats are currently used.”). Currently, motorboats are prohibited on the lakes within the Sylvania Wilderness Area, with the exception of electric motors on one lake that is only partially within the wilderness boundary. *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055, 1065 (W.D. Mich. 1997).

As shown above, previous use—or even continuing use—of motors does not hinder Congress’ ability to designate an area as wilderness under the Wilderness Act. The Colorado River corridor remains suitable for unqualified wilderness designation upon complete removal of the non-conforming motorized use.⁴

- iii. The temporary use of motorboats does not impair the Colorado River so to preclude eventual wilderness designation.

RRFW argues that the current use of the Colorado River by motorized boats constitutes a failure by the NPS to preserve the wilderness character of the river. Motorboats in the Colorado River corridor have been recognized as a temporary, non-conforming use since 1976. Exc. 218. It is precisely because of the motorboats that the corridor has the status of a “potential”—i.e., contingent -- wilderness

⁴ GCPBA notes that Congress could act to provide that the Colorado River remain potential wilderness, with the authority in the Secretary to elevate it to full wilderness after eliminating motors. Congress could also designate the River as wilderness with an exemption for established motor use under § 4 (d)(1) of the Wilderness Act, 16 U.S.C. § 1131 et seq. GCPBA does not endorse either option at this time.

addition. As discussed above, the characterization as potential wilderness presumes that the non-conforming or incompatible use is temporary and can be removed. Because the CRMP specifically limits motorized use to 5 ½ months of the year, the NPS has obeyed the Management Policies' guidance to "seek to remove" the non-conforming, temporary use.

The FEIS demonstrates that motors have minimal impact on wilderness characteristics such as water quality and air quality. In its analysis of impacts on water quality, the FEIS found that the CRMP "would not result in the impairment of water quality in Grand Canyon National Park." Supp. Exc. 50. Additionally, the FEIS recognizes that conversion to four-stroke motors from two-stroke motors, completed in 2001, "is thought to have substantially reduced water pollution from exhaust." *Id.* at 49. Air quality impacts are also minimal. *Id.* at 52-54. The FEIS concluded, "[e]missions from recreational use of the Colorado River under [the CRMP] would result in a generally small (less than 5%) contribution to air pollution produced in the Grand Canyon." *Id.* at 54.

The FEIS also finds that the soundscape of the Colorado River corridor "would benefit overall under [the CRMP] compared to Alternative A⁵ during the peak season, but impacts would be slightly greater in the shoulder and winter seasons, due primarily to increased use levels." *Id.* at 58. The increased use levels

⁵ Alternative A is the "No-Action Alternative" or status quo.

will occur because of the additional noncommercial permits awarded during these periods. Thus, the CRMP does not adversely affect the soundscape at Grand Canyon National Park.

In conclusion, the Colorado River corridor remains suitable for wilderness designation, and current motorized uses do not constrain Congress from designating the area as wilderness in the future.

C. MANY COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT RECOGNIZED THAT IMMEDIATE REMOVAL OF MOTORIZED USE IS NOT REQUIRED.

RRFW's own comments on the DEIS recognized that immediate removal of motorized boats from the Colorado River corridor is not required by law or regulation. Instead, the comments endorse a plan to "phas[e] out motorized use over a reasonable time period not to exceed 10 years." Supp. Exc. 157.

Amici curiae in support of RRFW argue that "elimination of motorized use is the only reasonable and non-arbitrary decision ..." Amicus Br. of Sierra Club et al., 10. However, many of the groups signing on to this amicus brief submitted public comments on the CRMP and the Draft EIS that acknowledged—as did RRFW's comment—that immediate removal of motors is not required.

Amicus Curiae Great Old Broads for Wilderness made a request identical to that of RRFW in its public comment. Namely, the group requested "phasing out motorized use over a period not to exceed 10 years." Supp. Exc. 158.

Similarly, Amici Curiae Sierra Club and Center for Biological Diversity, in a jointly issued public comment, stated that “[motorboats] should be phased out over a reasonable but expedited period of time, such as four years but certainly no more than ten years.” *Id.* at 162. In support of the efficacy of a phased withdrawal of motors, the comment provided: “The phase out will give outfitters time to convert to non-motorized equipment.” *Id.* at 163.

Several other comments on the DEIS by conservation groups acknowledged that motors do not need to be immediately removed from the park to fulfill the NPS’ management duties. For instance, the Grand Canyon Trust stated:

The Park Service’s preferred Alternative H cuts the period of time in which motorized uses are permitted from nine to six months. This is a step in the right direction. We appreciate the highly charged politics of the wilderness/motors issue and the complexity of decision making involved. Nonetheless, we encourage the park to gradually phase-out motorized use, a policy that is consistent with wilderness management and use. *Id.* at 155.

The Wilderness Society also promoted the phase-out of motorized use over time. While opining that the preferred alternative is insufficiently strict on phase-out, the Wilderness Society recognized “the controversy with motorized use in the Colorado River corridor and the historic difficulty in implementing the mandate of the Wilderness Act.” *Id.* at 152. Accordingly, the Wilderness Society endorsed “phasing out motorized use over a reasonable time period.” *Id.* at 153.

II. THE NATIONAL PARK SERVICE HAS NOT VIOLATED ITS DUTIES UNDER THE ORGANIC ACT

RRFW argues that the National Park Service has violated the Organic Act with respect to allocation of river permits and the determination of non-impairment to the Grand Canyon's natural soundscape. First, RRFW claims that the allocation of river permits between commercial and private boaters interferes with free access to the Colorado River. Second, RRFW claims that the NPS' determination of non-impairment of the natural soundscape is arbitrary and capricious.

The National Park Service Organic Act mandates that the NPS:

promote and regulate the use of the Federal areas known as national parks ... by such means and measures as conform to the fundamental purposes of the said parks ... which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 16 U.S.C. § 1.

The National Park Service has complied with the mandate of the Organic Act by providing for the enjoyment of the park through many types of river rafting experiences—non-commercial, commercial, motorized, oar powered, paddle powered, hybrid motor-supported, self-outfitted, rental outfitted, and more—while conserving the scenery of the Colorado River corridor for future generations. The breadth of experiences made available by the NPS goes well beyond RRFW's view and definition of the river experience.

Upon consideration of RRFW's argument on this point, the district court concluded that the NPS' action was not arbitrary and capricious. *See* Exc. 24-29. In light of the following considerations, the district court was correct in this finding.

A. THE NPS' RIVER PERMIT ALLOCATION SYSTEM IS BASED ON APPROPRIATE AND IDENTIFIABLE STANDARDS AND THEREFORE IS NOT ARBITRARY AND CAPRICIOUS.

RRFW argues that 50-50 split of user days established by the CRMP is arbitrary and capricious because it inequitably favors access, in volume and by season, by private commercial users who can afford to pay for guided trips. *See* RRFW App. Br. 44-46. Specifically, RRFW claims that the NPS "failed to identify any reasonable standard by which to measure the fairness of allocations," and that the allocation is inequitable. RRFW App. Br. 35.

The Organic Act mandates 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." 16 U.S.C. § 3. However, the Organic Act does not prescribe how the NPS should carry out its twin mandates of providing for enjoyment of the parks while conserving park resources. 16 U.S.C. § 1. Courts have recognized that achieving these competing mandates requires agency discretion:

[T]he Organic Act is silent as to how the protection of park resources and their administration are to be effected. Under such circumstances, the Park Service has broad discretion in determining which avenues best achieve the Organic Act's mandate.

National Wildlife Federation v. National Park Service, 669 F. Supp. 384, 391 (D. Wyo. 1987) (citations omitted). The "Secretary of Interior, acting through the National Park Service, has the authority to determine what use of park resources are appropriate public uses, and what proportion of a park's limited resources are available for such use." *Eiseman v. Andrus*, 433 F. Supp. 1103, 1106 (D. Ariz. 1977) (citing 16 U.S.C. § 3). Thus, Congress has granted the NPS considerable discretion in carrying out the allocation.

The Organic Act also requires the Secretary of the Interior to promulgate rules regarding the "use and management of the parks ..." 16 U.S.C. § 3. Pursuant to this mandate, the Secretary promulgated 36 C.F.R. § 7.4(b), which regulates whitewater boat trips on the Colorado River. The regulation states:

The National Park Service reserves the rights to limit the number of [river] permits issued, or the number of persons traveling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area. 36 C.F.R. § 7.4(b)(3).

In 1973, in response to "the greatly increased and intensified use of the Colorado River for rafting and boating, and the resulting ecological threat to the River, the National Park Service began to limit the number of user days allowed ..." *Eiseman*, 433 F. Supp. at 1104. The NPS capped the total user days at 96,600

and allocated 89,000 of those days to commercial boaters and 7,600 to private boaters as part of an interim management plan—a 92-8 split. *Id.* The plaintiff, a group of private boaters, challenged the apportionment between private and commercial boaters. *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1252 (9th Cir. 1979). In this case, the private boaters claimed:

[T]here is no justification for allocating between commercial and noncommercial use, and that to do so amounts to arbitrary action; that it denies them “free access” to the river contrary to 16 U.S.C. § 3.

Id. at 1253. The plaintiff further claimed that “noncommercial applicants receive unfair and unequal treatment at the hands of the Service” because they “must apply ... for permits and thus must plan their trips well in advance,” whereas those “who make the trip under a guide may deal directly with the concessioners and make trip arrangements at the last minute.” *Id.* at 1254. The court rejected this claim, stating that the requirement for advance permits by noncommercial boaters “comports with the NPS’ right to regulate river trips in the interest of safety.” *Id.* (citing 36 C.F.R. § 7.4(h)(3)).

The court also recognized the allocation system as a valid mechanism for fulfilling the obligation of the NPS to “protect the interests” of both private and commercial boaters. *Id.* The court stated:

If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the ‘free access’ of any user must be limited to the extent necessary to accommodate the access rights of others.

Id. at 1253. The *Wilderness Public Rights Fund* court did not reach the issue of the arbitrariness of the 92-8 split allocation in the interim management plan because the NPS issued a new plan with a 70-30 split allocation while the case was pending. *Id.* at 1254. It did, however, outline the standard of review to decide such an issue: “Where several administrative solutions exist for a problem, courts will uphold any one with a rational basis, but the Secretary’s balancing of competing uses must not be an arbitrary one.” *Id.*, citing *Udall v. Washington, Virginia, & Maryland Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968). “The question ... is whether allocation has been fairly made pursuant to appropriate standards.” *Id.*

Here, the Park Service considered three alternative allocation systems before deciding to implement a hybrid version of the split allocation system. Supp. Exc. 4-6. The alternatives included “Split Allocation;” “Common Pool Allocation;” and; “Adjustable Split Allocation.” *Id.* In addition, the NPS identified four reasonable objectives to use in making a fair allocation:

- (1) Address use perception of allocation inequity;
- (2) Maintain or improve the quality of commercial services offered to river users;
- (3) Minimize costs to river users while adequately funding river operations, and;
- (4) Minimize complexity for people seeking river trip opportunities.

Id. at 4. In choosing the split allocation, the NPS analyzed how well each alternative met the stated objectives. *Id.* at 6. None of the alternatives fulfilled each objective, although the split allocation and adjustable split allocation alternatives sat-

isfied three of the four objectives. *Id.* The adjustable split allocation failed to “minimize complexity for people seeking river trip opportunities.” *Id.* The chosen split allocation system met all objectives with the exception of eliminating “user perception of allocation inequity.” *Id.*

The NPS also set objectives and analyzed alternatives for a noncommercial permit system and established a procedure for transition from the old to the new system. Supp. Exc. 11-18. The “hybrid weighted lottery for trip leaders” uses a lottery system that awards additional chances to applicants based on “the most recent time any potential leader had been on a commercial or noncommercial river trip.” *Id.* at 14. In order to accommodate applicants currently on the waiting list, the NPS adopted a “three stage expedited transition.” *Id.* at 17-18. This transition seeks to provide to those who have waited longest on the old waitlist the greatest opportunity to obtain a river permit. *Id.* Ultimately, the transition system will “immediately benefit approximately 33% of waitlist members with launch dates, and result in most others obtaining launches in 10 years.” *Id.* at 18. Under the previous CRMP, the wait for a private permit could exceed 20 years. *Id.* at 12.

While RRFW contends that the length of the waitlist for trip permits is evidence of inequity in permit allocations, the district court noted that the length of the waitlist alone is misleading. Surveys show that 61% of those on the waitlist

have floated the Colorado River Corridor before, while only 20% of commercial boaters were on repeat trips. Exc. 25 at n. 15.

Overall, the CRMP greatly increases private boating opportunities and ap-
portions the river permits between private and commercial boaters in a 50-50 split
of user-days.⁶ Supp. Exc. 10. The total commercial use is capped at 115,000 user-
days, but the private allocated use is nearly doubled from 58,058 to 113,486 (with
no cap). Supp. Exc. 7, 9. In addition, the CRMP almost doubles the number of
private boaters per year (from 3,570 to 7,051). *Id.* The total number of annual
launches by private boaters almost doubled (from 253 to 503) and the total number
of shoulder season launches more than doubled (from 97 to 199). *Id.* Therefore,
the 2006 CRMP greatly increases private boater access relative to prior plans. Ac-
cordingly, the NPS has based the CRMP on identifiable and appropriate standards.

⁶ RRFW claims that the split allocation system provides the majority of the allo-
cated use to *motorized* commercial use. RRFW App. Br. 34 (emphasis added). This
statement is misleading. The total number of user-days on the river equals 228,986 user-
days (113,486 + 115,500). Supp. Exc. 9. Of these, only 76,913 user-days are allocated
for commercial *motorized* use. *Id.* The total number of trips launching equals 1,101 trips
(598 + 503). *Id.* Of these, 429 are allocated for commercial motor use. *Id.* Finally, the
total number of recreational passengers equals 24,657 (17,606 + 7,051). *Id.* This is the
only category in which more than half of the allocation is given to commercial motor use,
with 13,177 total passengers participating in a motorized commercial trip. *Id.* While the
other categories favor non-motorized trips, the total number of motorized commercial
passengers is greater because of the larger group size allowed on commercial trips. *Id.*
Therefore, the CRMP concentrates the commercial motorized passengers in larger boats
with shorter trip-lengths. Motorized trips are not, as RRFW would have the court be-
lieve, the majority of all allocated use.

The FEIS offers a reasoned and rational explanation for each aspect of an allocation that equitably apportions use between private and commercial boaters. As such, the chosen allocation does not interfere with “free access” to the Colorado River. Finally, the allocation falls within the broad discretion of the National Park Service to balance its twin mandates of resource conservation and providing for public use and enjoyment of the park.

B. CREATION OF A NO-MOTORS WINTER SEASON AND ALLOCATION OF ALL WINTER USE TO PRIVATE BOATERS HAS A RATIONAL BASIS.

RRFW laments that private boaters have all of the winter season allocation and a correspondingly lower allocation, vis-à-vis commercial users, in the summer season. RRFW App. Br. at 45. RRFW’s argument that winter season allocations are inequitable fails to account for the fact that having a non-commercial, no-motors winter season creates benefits to private boaters that balance the potential disadvantages of having relatively fewer summer allocations.

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

Winter trips avoid encounters with commercial outfitters and other large groups. Because there are also fewer private trips during the winter season, there is more opportunity for quiet solitude. Accordingly, competition for campsites and

other special features is limited. Thus, private trips during winter months tend to be longer, offering unparalleled opportunities for off-river exploring and hiking.

The distinctly cooler weather in the winter season is desirable for many private boaters seeking to hike the inner Grand Canyon. The Co-Director of RRFW has written a guide to hikes that are accessible by boaters taking trips on the Colorado River. Tom Martin, *Day Hikes From the River*, Vishnu Temple Press, Flagstaff, AZ (2002). Of the 100 hikes described, 33 are deemed inappropriate or dubious for the summer due to extreme heat (e.g., “It’s too hot a place to walk in the summer, but this is a great way to spend a winter exchange day at Phantom”). *Id.* at 84.

The administrative record shows that in the recent past, the Park Service has experienced winter launch rates of 90% - 100%. Supp. Exc. 166 (results of a study of winter launches 1998-2002). This statistic weighs against RRFW’s contention that winter trips are less desirable than those in the summer season. Accordingly, winter allocation has a rational basis and does not warrant invalidation of the CRMP.

The district court recognized the potential benefits of winter allocations in its opinion. In light of the considerations mentioned above, the court concluded that “the Park Service had a reasonable basis for concluding that winter trips would be used by non-commercial boaters.” Exc. 25 at n. 15.

C. PRIVATE BOATERS HAVE ACHIEVED AN EQUITABLE ALLOCATION OF MOTOR-FREE CONDITIONS AND RAFTING OPPORTUNITIES ON THE RIVER.

The CRMP creates a motors-free Colorado River environment for more than half of the year. It gives non-commercial boaters approximately 50% of the total user days. It allocates private boaters 46% of the total launches. Supp. Exc. 70. Each of those splits of the resource represents a significant gain for the private boating community over the prior CRMP. By most measures, the CRMP would be considered a success for private boaters with the interests that RRFW espouses.

To the contrary, RRFW argues that “[t]his system favors concessionaires over the public and results in the illegal sale of river access to people who are entitled by law to freely access their public lands.” RRFW App. Br. 46. As the district court found, RRFW “tend[s] to characterize the dispute as one between commercial companies and private citizens.” Exc. 26. However, this characterization ignores the fact that commercial operators, as concessionaires to the NPS, undertake a public function to provide services that the NPS deems desirable for many private citizens visiting the area. *Id.* (quoting *Kleppe*, 608 F.2d at 1253-54).

The CRMP sought to resolve a number of contentious resource issues involving the nature, extent and time of boating uses on the Colorado River. The decisions made in the CRMP required careful consideration of a number of factors, including the balance between human access to the river and protection of the Park's resources; the interests of commercial and non-commercial boating, and

reconciliation of motorized and non-motorized uses. Supp. Exc. 62-68. At bottom, RRFW's arguments go to whether the outcome is imperfect, but that is not the Court's inquiry. Rather, the Court must determine whether the agency's decision is "founded on a rational connection between the facts and the choices made ... and whether [the agency] has committed a clear error of judgment." Exc. 7 (quoting *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir. 2001)). Based on the careful and thorough administrative record, the CRMP surely has a rational basis, and the district court did not err in reaching this conclusion.⁷

D. THE NPS CORRECTLY FOUND THAT THE RIVER CORRIDOR IS NOT IMPAIRED BY THE RECREATIONAL ACTIVITY AUTHORIZED IN THE CRMP.

RRFW argues that the NPS has made an improper non-impairment finding because it failed to address the effects of aircraft overflights in the impairment analysis. RRFW App. Br. 49-50, 56-57. In effect, RRFW contends that the CRMP must disallow river recreation sounds simply because overflights already make the area noisy. If RRFW were to prevail on this contention, the river corridor would remain significantly affected by continuing overflight noise, but the non-impairing sounds associated with river use would be disallowed. As the district court noted, "if a cumulative analysis were to result in the elimination of all sounds that can be eliminated by the Park Service—in this case, all sounds other

⁷ The duration of the CRMP is 10 years, at which time it is revised. Moreover, it can be amended to address major changes. Supp. Exc. 71.

than aircraft overflights, which are not within the jurisdiction of the Park Service—then all human activity in the Park would be eliminated.” Exc. 28. Even such drastic relief would fail to redress RRFW’s complaints about an impaired soundscape, however, because aircraft overflights would remain unaffected.

RRFW challenges the CRMP despite the fact that the CRMP has no bearing on the flight paths or noise of overflying aircraft. Supp. Exc. 59. Congress addressed aircraft impacts in the National Park Overflights Act of 1987. Supp. Exc. 55. The Overflights Act recognized that “noise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park ...” PUB. L. No. 100-91, § 3(a), 101 Stat. 674. Aircraft noise sources include “high-altitude commercial jet traffic, military training activity, general aviation use, NPS administrative operations ..., and commercial air tours.” Supp. Exc. 19. Pursuant to the Overflights Act, the NPS has been collaborating with the Federal Aviation Administration “to address the aircraft noise issue and to work together to ‘substantially restore natural quiet’ to Grand Canyon National Park.” *Id.* at 56.

Accordingly, it is the presence of aircraft overflights in Grand Canyon National Park—not river-related recreation—that significantly affects the park’s natural soundscape. If RRFW seeks to challenge the adverse impacts to the natural soundscape from aircraft—the only impacts the NPS found to be significant—then

RRFW must avail itself of any rights it may have under the Overflights Act. It cannot, however, bring such a claim by challenging the CRMP.

The Organic Act requires the NPS to provide for the use and enjoyment of park resources “in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. This mandate of non-impairment “is inherently ambiguous.” *S. Utah Wilderness Alliance v. Nat’l Park Serv.*, 387 F. Supp. 2d 1178, 1187 (D. Utah 2005). Pursuant to the authority granted to it by Congress, the NPS has interpreted the non-impairment mandate in the 2001 Management Policies.

The Management Policies recognize that the NPS has the “discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park ...” Supp. Exc. 76. The NPS may not, however, allow impacts that “constitute impairment of the affected resources and values.” *Id.* The Management Policies define impairment as:

An impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. *Id.*

As part of the impairment determination, all environmental impact statements generated by the NPS must “include an analysis of whether the impacts of a proposed activity constitute impairment of park natural resources or values.”

Supp. Exc. 81. The park resources or values to be protected include the “natural soundscape.” Supp. Exc. 77.

With respect to the impact on the natural soundscape associated with Modified Alternative H, the selected alternative for the upper section of the river (from Lees Ferry to Diamond Creek), the NPS concluded that overall noise intrusions would be of “minor to moderate intensity (at high-use areas and gathering points). It is likely that impacts can be reduced to minor levels or less with adequate funding and staffing for a monitoring and mitigation program.” Supp. Exc. 59. The NPS also noted that, even if all noise from all river recreation were 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 [non-river-related] overflights.” *Id.*

The NPS Management Policies provide:

Overflights do not make an area unsuitable for wilderness designation. The nature and extent of any overflight impacts, and the extent to which the impacts can be mitigated, would need to be addressed in subsequent wilderness studies.

Id. at 84. The National Park Service has made an appropriate non-impairment finding regarding the natural soundscape of the Colorado River corridor. *Id.* at 59. As directed by the Management Policies, the NPS has determined within its professional judgment that no impairment to the natural soundscape would result from the CRMP.

In addition, a non-impairment determination “falls well within the NPS’s broad grant of discretion ...” *S. Utah Wilderness Alliance*, 387 F. Supp. at 1193 (deferring to NPS’s impairment determination). In the FEIS, the NPS has provided a detailed analysis and rational basis for this finding.

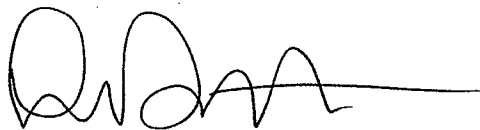
E. THE NEPA AND CONCESSIONS ACT CLAIMS HAVE NO MERIT.

These claims are addressed by the other appellees in their briefs.

CONCLUSION

For the reasons stated above, the Grand Canyon Private Boaters Association respectfully requests the Court to affirm the district court’s entry of summary judgment in favor of defendants.

July 31, 2008

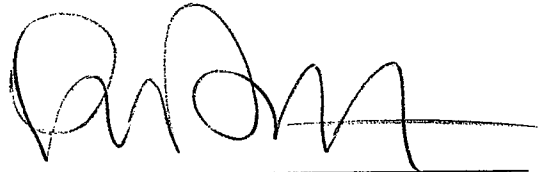


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CERTIFICATE OF COMPLIANCE

I, Lori Potter, certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attaching Answering Brief is proportionally spaced, has a typeface of 14 points, consists of 29 pages and contains 6,400 words.

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

Lori Potter

CERTIFICATE OF SERVICE

I certify that two true copies of the foregoing ANSWER BRIEF OF APPELLEE GRAND CANYON PRIVATE BOATERS ASSOCIATION as well as one copy of the SUPPLEMENTAL EXCERPTS OF RECORD have been served upon counsel this 3/08 day of July, 2008, by United States first class mail addressed to:

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