No. 08-15112

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

JOSEPH F. ALSTON, et al.,
Defendants-Appellees,

and

GRAND CANYON RIVER OUTFITTERS ASSOCIATION and
GRAND CANYON PRIVATE BOATERS ASSOCIATION,
Intervenors-Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. CV-06-894-PCT-DGC

INTERVENOR-DEFENDANT-APPELLEE GRAND CANYON RIVER OUTFITTERS ASSOCIATION'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor-Defendant-Appellee Grand Canyon River Outfitters Association states that it is a non-profit corporation exempt from taxation pursuant to the Internal Revenue Code. The Association has no parent corporations, and there is no publicly held corporation that owns 10% or more of the stock in the Association.

STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2(c), Intervenor-Defendant-Appellee Grand Canyon River Outfitters Association agrees with the statement of jurisdiction contained in Appellants' Initial Brief.

STATEMENT OF FACTS

In 1997, the National Park Service ("NPS") commenced a planning process to develop the Grand Canyon National Park ("Park" or "GRCA") 2006 Colorado River Management Plan ("CRMP") being challenged here, hosting public scoping workshops and inviting written public comments on river issues. SER 342-43. That review process continued until February 2000, when then-Superintendent Robert Arnberger suspended it. SER 344-468. This decision precipitated two lawsuits: *Randall v. Babbitt*, No. CIV 00-349, 2004 U.S. Dist. LEXIS 29870 (D.N.M., Apr. 19, 2004), and *Grand Canyon Private Boaters Ass'n v. Arnberger*, No. CIV 00-1277 (D. Ariz.). NPS settled the Arizona case by agreeing to restart the planning process and complete a new CRMP. SER 75-76.[1]

On June 13, 2002, NPS published in the Federal Register a notice of intent to prepare an environmental impact statement ("EIS") for a revised CRMP. SER 330. During the scoping process, NPS hosted a series of public meetings, attended

[1] On April 19, 2004, the New Mexico court denied the *Randall* plaintiffs' request to adjust the allocation between commercial and noncommercial boaters, but ordered NPS to complete a plan review within a reasonable time.

by more than a thousand people, and received approximately 13,770 written submissions containing approximately 55,165 comments. SER 330-31.

In fall 2004, NPS released for public review the draft environmental impact statement ("DEIS") for the revised CRMP. SER 332-33. The DEIS presented eight alternatives for managing the river from Lees Ferry to Diamond Creek and five alternatives for managing the river from Diamond Creek to Lake Mead. SER 63-69. The various alternatives incorporated a wide range of options to accommodate both commercial and noncommercial users. After an extended 115-day comment period, NPS reviewed, coded, and organized the approximately 6,000 substantive comments it received into subject-matter categories, including allocation, concessions, natural soundscape, visitor use and experience, and wilderness. SER 101-03, 332-33. NPS then analyzed and responded to those comments, modifying the DEIS where appropriate. *See, e.g.*, SER 224 (adding "wilderness character" as impact topic).

Among the comments were a set of joint comments from a coalition of groups representing both commercial and noncommercial users of the Colorado River within GRCA regarding how best to revise the CRMP in a manner that would resolve longstanding river management controversies. SER 29-36. These comments supported equal allocation of use between commercial and noncommercial use on an annual basis, the continued authorization of an

appropriate level of motorized use, seasonal adjustments that would result in fewer river trips occurring at one time, and improvements to the noncommercial permit system. SER 28, 47-54. Many others also urged NPS to continue to authorize motorized trips. *See, e.g.*, SER 18, 45, 46.

In November 2005, NPS released the three-volume Final EIS ("FEIS") for the new CRMP. On February 17, 2006, the NPS Regional Director approved the Record of Decision ("ROD") for the revised CRMP. ER 415-51. In the ROD, NPS announced that it had selected for implementation the preferred alternatives—Modified Alternative H and Modified Alternative 4—described in the FEIS. ER 417.

The 2006 CRMP adjusts the allocation of use between commercial and noncommercial users previously in effect under the 1989 CRMP. The 1989 CRMP allocated 115,500 user-days to commercial users and 54,450 user-days to noncommercial users annually, or a ratio of 67.9 percent commercial to 32.1 percent noncommercial. SER 338. The 2006 CRMP caps commercial use at 115,500 user-days annually, but does not cap noncommercial user days. Based on expected number of launches and group size, the CRMP estimates that noncommercial boaters will use 113,486 user-days annually, resulting in an allocation of approximately 50.3 percent of annual user days to commercial boaters and 49.7 percent to noncommercial boaters. ER 417-18; SER 87.

NPS also specifically considered whether to continue to authorize guided, commercial trips down the Colorado River within the Park. SER 82-84. Based on NPS's consideration of extensive public comments and its various impact analyses, the CRMP continues to authorize commercial trips, including motorized trips, but imposes additional restrictions on them. Among other things, the new CRMP authorizes motorized trips during only five and a half months of the year, compared to nine months under the prior plan. SER 88. It also continues to require the use of four-stroke outboard motors, which are cleaner burning and quieter than two-stroke outboard motors, and prohibits the use of generators, except in emergency situations and for inflating rafts. ER 422; SER 228, 229.

NPS also analyzed the impact of the various proposed alternatives on natural soundscape along the Park's river corridor, and considered appropriate mitigation measures to reduce any such impacts. SER 90-92, 230-86. With respect to the selected alternative for the upper section of the river corridor, NPS concluded that overall noise intrusions would be of minor to moderate intensity, and likely could be reduced to minor levels or less with a monitoring and mitigation program. SER 269.

Despite NPS's exhaustive planning effort and extensive analyses and consideration of public comments, on March 28, 2006, River Runners for Wilderness, Rock the Earth, Wilderness Watch, and Living Rivers (together,

"Appellants" or "RRFW") challenged NPS's actions in issuing the new CRMP in the U.S. District Court in Arizona. In a November 26, 2007 decision, that court denied all of RRFW's claims, finding that RRFW had "not satisfied the high threshold required to set aside federal agency actions under the APA." ER 1. RRFW subsequently appealed the District Court's decision to this Court.

SUMMARY OF ARGUMENT

In this case, RRFW has put forth various theories challenging NPS's decisions to authorize certain visitor services and limited motorized activities in GRCA. These theories are flawed in critical respects, and should be denied.

In general, RRFW's claims suffer from fundamental misinterpretations of NPS's governing statutes, as well as a failure to appreciate that NPS's planning decisions necessarily reflect consideration of many, sometimes competing management objectives, and not only those objectives that may be most important to RRFW. RRFW fails to recognize that Congress vested NPS with discretion to determine how to best implement its dual mandate to protect park resources and provide for public use and enjoyment of the national parks. It also fails to appreciate the breadth of issues NPS must consider in carrying out this authority, and erroneously seeks to treat the Park's river corridor as if Congress already has designated it as wilderness under the Wilderness Act.

Although RRFW has made clear that it disagrees with NPS's decisions, this is not sufficient for it to prevail in its challenge. And, in fact, if RRFW's views were to prevail, the result would dramatically impair NPS's ability to continue to authorize the wide range of visitor services that currently facilitate the public's use and enjoyment of our National Park System and that are otherwise critical to NPS's efforts to preserve and maintain the parks.

ARGUMENT

I. NPS'S AUTHORIZATION OF CONCESSIONS SERVICES IN THE PARK IS FULLY CONSISTENT WITH THE CMIA.

RRFW raises four unsubstantiated claims that NPS violated the Concessions Management Improvement Act ("CMIA"), 16 U.S.C §§ 5951, *et seq*. Br. 9-10. These claims are premised upon an erroneous assumption that Congress "mandated" that commercial services in the National Park System "must be limited to" those services that are "essential" to the public's use and enjoyment of the national parks, and only where NPS determines that such services are "consistent 'to the highest practicable degree' with preserving river resources and values." *Id.* These claims overlook a long history of the administration of concessions operations in the national parks, as well as NPS's reasoned decision here.

RRFW's reliance on the CMIA disregards the facts and misreads Congress's policy direction in allowing concessions operations in the national parks. RRFW relies upon 16 U.S.C. § 5951(b) of the CMIA, which has as its genesis similar language in the earlier concessions statute and even earlier NPS policy. Section 5951(b) sets forth "the policy of the Congress" that the development of public accommodations, facilities, and services in the national parks shall be limited to those that are "necessary and appropriate for public use and enjoyment" of the particular park and "consistent to the highest practicable degree with the preservation and conservation of the resources and values" of that park. 16 U.S.C.

§ 5951(b).[2] Nothing about this policy statement, or Congress's intent in first passing the Concessions Policy Act of 1965, Pub. L. No. 89-249, 79 Stat. 969 (1965) ("1965 Act") or thereafter in passing the CMIA, limits NPS's discretion to manage the use of Park resources and authorize concessions for the public benefit under the Organic Act and the CMIA.[3] Contrary to RRFW's assertions, the record demonstrates that NPS reasonably exercised its discretion and complied with any requirements imposed upon it by the CMIA, and in particular, 16 U.S.C. § 5951(b), in authorizing the types (*i.e.*, motorized and non-motorized) and amounts of concessions services provided for in the FEIS and ROD.

A. RRFW Misinterprets the Requirements of the CMIA.

RRFW's CMIA claim rests upon an unreasonable interpretation of Congress's statement of policy. RRFW argues that, because the CMIA does not define the term "necessary," this Court should use its common meaning of "indispensable," "essential" or "required to be done." Br. 10 (quoting *The Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir.

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

3 *See, e.g.*, *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 level of conservation is to be attained."); *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1253-54 (9th Cir. 1979) (recognizing the "administrative discretion" granted NPS and invoking "a judicial presumption favoring the validity of administrative action").

2003); NEW OXFORD AMERICAN DICTIONARY at 1143 (2001)). Yet, RRFW ignores fundamental canons of statutory construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme, *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133,* (2001) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)), and that even the apparent plain meaning of a statute should not limit a reasonable construction if interpreting it otherwise would lead to absurd or impracticable consequences. *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004).

The legislative history of the policy statement does not suggest a limit on NPS's exercise of discretion to allow concessions operations in the Park System. The 1950 Concessions Policies statement, a precursor to current concessions law, marked the first articulation of the balance that NPS must strike between enjoyment and preservation:

> [I]t shall be the policy of the Department to permit the development of accommodations within the areas administered by the National Park Service . . . only to the extent that such accommodations are necessary and appropriate for the public use and enjoyment of the areas, consistent with their preservation and conservation.[4]

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[4] *Concessions Policies of the National Park Service (1950), reprinted in Park Concession Policy: Hearings on H.R. 5872 and H.R. 5886 Before the Subcomm. on National Parks of the House Committee on Interior and Insular Affairs*, 88th Cong. 127, at 26-31 ("1964 Hearings").

Although the policy statement provided no clear definition of the "necessary and appropriate" standard, the policy, the primary purpose of which was to *encourage* more facilities overall, sanctioned several non-essential uses. Specifically, the sale of souvenirs and jewelry associated with park areas was to be encouraged by the Department of the Interior[5] and NPS was given the authority to permit the sale of alcohol within the parks.[6]

Subsequently, Congress enacted the 1965 Act, the principal purpose of which was to codify existing concessions policies and to encourage the development of accommodations and other facilities for visitors. *See* S. REP. NO. 89-765 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3489, 3490-92; 111 CONG. REC. 23,636 (1965) (statement of Rep. Aspinall, Chairman, House Comm. on Interior & Insular Affairs). Although the 1965 Act did not specifically define "necessary and appropriate," it used the phrase in the context of discussing the development of physical structures in the parks and affirmed the management strategy embodied in the 1950 policy statement, again supporting an interpretation of the clause that is not limited to what is only "essential." Facilities such as barber shops, fish tackle shops, curio centers, and laundry and vending machines were all contemplated at the time of enactment. *See* 111 Cong. Rec. 23,641 (1965) (statement of Rep.

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5 *Id.* at 29.

6 *Id.* at 30.

Udall); *id.* at 23,636; and 1964 Hearings, at 15-16 (letter from J. Carver, Ass't Sec'y of the Interior, to Rep. Aspinall, dated Feb. 26, 1964).

In 1998, Congress enacted the CMIA, which repealed the 1965 Act and governs the granting of commercial concessions within the Park System today. Congress once again did not define the clause "necessary and appropriate." However, the CMIA continued the fundamental policies regarding concessions activities as expressed in the 1965 Act. S. REP. NO. 105-202, at 29 (1998); H. REP. NO. 105-767, at 31 (1998). The CMIA continues the delegation to NPS of broad authority and discretion to reconcile the conservation of natural and cultural resources with the public use and enjoyment, as opposed to restricting NPS to the intractably narrow interpretation offered by RRFW. Thus, NPS's regulations implementing the CMIA broadly define the scope of "visitor services" to be permitted pursuant to concession contracts to include, among other services, "lodging, campgrounds, food service, merchandising, tours, recreational activities, guiding, transportation, and equipment rental," as well as "the sale of interpretive materials or the conduct of interpretive programs." 36 C.F.R. § 51.3.

Indeed, RRFW's argument would lead to impractical results throughout the Park System. By RRFW's logic, NPS authorization of visitor lodging services throughout the System should be found to be illegal, because such services are not essential; visitors simply can pitch their own tents. Snack bar and restaurant

services similarly should be found to be illegal, because visitors can bring their own food and beverages. Despite Congress's clear intent that NPS grant commercial concessions to facilitate public use and enjoyment of the parks, very few types of currently-authorized visitor services in very few park areas could pass such an inappropriately restrictive test. If RRFW's over-simplistic, dictionary-based interpretation were to prevail, the resulting impact on NPS's ability to authorize all sorts of visitor services throughout the nearly 400 units of the Park System would be nothing short of staggering.

B. RRFW's Reliance on *Blackwell* and Other Precedent Interpreting the Wilderness Act is Misplaced

The district court correctly observed that RRFW's CMIA argument inappropriately relies upon *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004), a case involving the Wilderness Act. ER 17. As that court indicated, RRFW's reliance on *Blackwell* is misplaced, because that case involved an interpretation and application of the Wilderness Act with respect to a designated wilderness area, not the circumstances here. *Id.*[7]

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[7] Nonetheless, *Blackwell* illustrates that, even if the Wilderness Act construction were to apply, NPS is entitled to substantial deference as to how it chooses to make any "necessity" finding, and NPS would have satisfied its obligations. *See Blackwell*, 390 F.3d at 646-47 ("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.").

In *Blackwell*, the court held that, prior to granting permits to commercial packstock operators in certain *designated* wilderness areas in California, the U.S. Forest Service was required to find that "the number of permits granted was no more than was necessary to achieve the goals of the [Wilderness] Act." *Id.* at 647. As they did before the district court, "[RRFW] argue[s] that *Blackwell* requires a similar Park Service finding for the number of motorized raft trips permitted in the 2006 CRMP." ER 17. Yet, *Blackwell* involved an application of section 4(d)(5) of the Wilderness Act, of little relevance here because that section is, by its terms, applicable only to congressionally-designated wilderness. As the district court found, "[i]t is significant . . . that the court in *Blackwell* was applying the Wilderness Act, not the Concessions Act." ER 17; *see also id.* at 19 n.11 (finding that the two Acts "are appropriately treated differently").

RRFW's confusion of the requirements applicable in areas *proposed* for designation as *potential wilderness*, its failure to be clear that the Wilderness Act does not in any way govern management of the Park's river corridor, and its resulting misplaced reliance on *Blackwell* leads RRFW to inappropriately conclude that "[NPS] must make a specific finding that the type and amount of services authorized on the river is 'limited' to those that are 'necessary and appropriate' for the public to use and enjoy the river." Br. 11. In contrast to *Blackwell*, this case does not concern a *designated* wilderness area. The prescriptions of the

Wilderness Act, therefore, do not apply. 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, RRFW's reliance on *Blackwell* or other Wilderness Act cases is unavailing.[8]

C. <u>NPS Expressly and Reasonably Found that Motorized Concessions Services are Necessary and Appropriate</u>.

Moreover, the record demonstrates that, contrary to RRFW's assertion, NPS found that motorized concessions services are necessary and appropriate.[9] The FEIS states: "Description and analysis of potential impacts on the affected environment resulting from commercial operations [on the river] are found

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[8] *See, e.g.*, *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004) (Cumberland Island wilderness); *Wilderness Soc'y 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 F.3d 630 (9th Cir. 2004) (John Muir and Ansel Adams wilderness); *High Sierra Hikers Ass'n v. Weingardt*, 521 F. Supp. 2d 1065 (N.D. Cal. 2007) (John Muir and Ansel Adams wilderness).

[9] SER 104 ("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."). *See, e.g.*, ER 303 (finding it necessary and appropriate for the public use and enjoyment to provide for experienced and professional river guides who can provide skills and equipment that many visitors do not have); ER 305-312 (criteria for developing alternatives); SER 93-95 (visitor use and experience); SER 193-204 (range of alternatives); ER 359 (importance of determining range of opportunities for various trip types); SER 104-20, 205-21 (allocation of use); SER 95-97, 122-38, 288-328 (motorized trips versus non-motorized trips).

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." ER 297 (emphasis added); *see also* ER 303 (explaining how NPS determines what services are "necessary" and "appropriate"). The FEIS illustrates that the "necessary and appropriate" policy informed NPS's entire decisionmaking process, and that the decisions made in the CRMP and ROD reflect the Service's determination of what services, at what levels, are deemed to satisfy that standard. The FEIS even explains: "Furthermore, the NPS has determined that the motorized trips provided by commercial outfitters, which enable thousands of people 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." SER 225.

The CRMP and ROD reflect a reasoned determination that the outfitter and guide services authorized—including services using motorized watercraft—are consistent with, and advance, the policies set out in the CMIA and other governing law. Many commenters urged NPS to continue to authorize motorized trips, and

the record contains substantial evidence supporting motorized use. *See, e.g.*, SER 17-18, 29-36, 45-46, 55-61, 85-86, 121-22, 222-23, 470, 474 (increased opportunities for visitation); SER 19-27, 37-44 (special needs and other groups); ER 311-12, SER 24, 207 (alleviating overcrowding); SER 217 (safety). Moreover, NPS examined several no-motor alternatives, but "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." SER 226. 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.

ER 347. Therefore, RRFW's claims that NPS never found that *motorized* commercial services are "necessary and appropriate" and that it could not have reasonably done so are belied by the record and cannot be sustained.

RRFW's claim that NPS failed to identify the specific *amount* of commercial services that is "necessary and appropriate" is similarly unsupportable. The FEIS clearly addresses what level of commercial services is "necessary and

appropriate."[10] The amount of authorized commercial services 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* SER 70-72; ER 308-10. This amount reflects what NPS deems "necessary and appropriate."[11]

Based on this extensive review and analysis, NPS reasonably found that the level and types of commercial uses approved in the ROD, including commercial motorized trips, are "necessary and appropriate" in accordance with the policy set forth in the CMIA. RRFW has presented no record evidence in support of its claim that motorized use is "not necessary or appropriate for the river." Br. 16. Instead, RRFW references outdated documents that have since been superseded by current NPS policy and never carried the force of law.[12]

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[10] *See* note 10, *supra*.

[11] RRFW wrongly persists in misrepresenting that not all of the concessions allocation is used. *See* Br. 21. The record shows that the commercial allocation is "consistently used." SER 334.

[12] For example, RRFW states "In NPS's own words, 'motorized boat use is not necessary for the use and enjoyment of this area but is a convenience which enables the trip to be made in less time.'" Br. 16. Further, RRFW asserts that "the record confirms that motorized commercial services are not necessary for the public to use or enjoy the river." *Id.* However, RRFW quotes from a 1976 preliminary wilderness proposal and a 1980 wilderness recommendation, and further relies on a response to a February 1978 letter (ER 191) and the FEIS for the *1979* CRMP (ER 190, the document underlying ER 53).

D. Authorization of Motorized Concession Services is Consistent with Protecting the Values of the Park to the Highest Practicable Degree.

RRFW's claim that NPS allegedly failed, under § 5951(b), to protect the wilderness character of the river to the "highest practicable degree" also lacks merit. Br. 21-23. First, the CMIA does not, as RRFW asserts, *in the context of a management planning process*, prohibit NPS from "consider[ing] a proposal for a concessions contract that fails to meet minimum requirements for preservation of the values of the park unit," including "the wilderness river experience, the natural soundscape, primitive and unconfined recreation, and the experience of solitude." Br. 22. RRFW erroneously conflates the reference to "minimum requirements" in the CMIA with the "minimum requirements" test under the Wilderness Act, 16 U.S.C. § 1133(c), while these two different statutory provisions are wholly unrelated. As used in the CMIA, "minimum requirements" refers only to a set of minimum qualifications that a prospective bid for a concessions contract must meet to be considered responsive. 16 U.S.C. § 5952(4)(A). The CMIA, therefore, did not require that NPS undertake any "minimum requirement analysis" in preparing the FEIS, and RRFW's argument suggesting otherwise lacks any foundation.[13]

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[13] Notably, RRFW ignores the fact that the FEIS also found that "[f]or visitors seeking outstanding opportunities for solitude or a primitive and unconfined type of experience," there would be "beneficial" impacts "during the longer non-motorized use period." ER 410.

RRFW also overstates the relevance of certain e-mails and other documents reflecting the thoughts of a former NPS employee, which do not reflect official Park policy, but only the personal thoughts and biases of a single individual. Many are outdated and superseded by the most recent planning process. And some also are irrelevant to RRFW's arguments, such as the document referencing the Wilderness Act's "minimum requirements" test that apparently led to RRFW's misinterpretation of the CMIA's requirements. *See* ER269a-70 ("DRAFT" document from former Deputy Wilderness Program Coordinator on Wilderness Act and its implications on the CRMP).

RRFW further incorrectly states that "NPS may only '[p]rovide a range of recreational opportunities consistent with the preservation of wilderness character." Br. 22. RRFW quotes from one of many, sometimes competing CRMP management *objectives* contained in the FEIS, which also include, among others, the objective to "provide a diverse range of quality recreational opportunities for visitors to experience . . . and minimize crowding." SER 80. As the FEIS notes, "Objectives define what must be achieved to a large degree for the action to be considered a success (NPS 2001a). Those alternatives carried forward for analysis must meet project objectives to a large degree, although not necessarily

completely." SER 78 (emphasis omitted). They are not, as RRFW suggests, outright limitations on NPS's discretionary authority.[14]

Consequently, NPS reasonably determined—to the extent it was even required to do so—that concessions services of the types and levels analyzed in the selected alternatives were "necessary and appropriate for public use and enjoyment" of the Park and "are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the" Park.

II. RRFW CANNOT ESTABLISH THAT NPS'S MANAGEMENT OF THE RIVER CORRIDOR VIOLATES ANY LEGAL OBLIGATION TO PRESERVE THE RIVER'S WILDERNESS CHARACTER.

A. RRFW's Suggestion that NPS has Failed to Preserve the Wilderness Character of the River Corridor Ignores the Status of the Grand Canyon National Park and the River Corridor, as Well as NPS Management Policies.

RRFW presents an unsubstantiated argument that NPS failed to preserve the river's wilderness character. Br. 24-31. First, RRFW obscures the fact that neither the Park nor its river corridor is a designated wilderness area. Second, it erroneously suggests that NPS violated its 2001 Management Policies ("MPs") by not "preserv[ing] the river's wilderness character and prohibit[ing] motorized uses in recommended or potential wilderness areas." Br. 26. This argument rests upon several false premises: the area is neither a recommended wilderness area nor a

[14] The NPS regulations specifically addressed the need for examining whether services are necessary and appropriate on a case by case basis, with public input. 65 Fed. Reg. 20630, 20637 (2000).

congressionally-designated "potential" wilderness area; furthermore, there is no suggestion that motorized uses would preclude the area's suitability for inclusion into the wilderness system if ever considered by Congress. RRFW, instead, seeks to have this Court declare that the area should be treated as *de facto* wilderness, ignoring the law and long history of the Park. Lastly, RRFW's argument rests upon an erroneous assumption that the MPs are judicially enforceable.

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 the Secretary of the Interior to 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 could then designate such lands as wilderness through

the normal legislative process. *Id.* Although NPS approximately thirty years ago identified portions of the Park as potentially suitable for recommendation by the President as wilderness and the river corridor as an area that might be recommended to Congress as a "potential" wilderness area, 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 never designated the Park's river corridor as wilderness.[15]

Several reasons demonstrate why RRFW errs in suggesting that motorized uses are somehow not permitted in the river corridor or, for that matter, in the entire backcountry similarly identified by NPS over thirty years ago.[16] To begin

[15] 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 GRCA for designation as wilderness. NPS revised this recommendation in 1980, again proposing that most of the Park's backcountry area be designated 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. *See* SER 100. 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." *Id.*

[16] In fact, if RRFW was correct, the argument is perforce more acute with respect to the backcountry, because that area had been identified as a possible wilderness area, while the river corridor had been identified only as a possible "potential" wilderness area that necessarily contemplated continued motorized uses.

with, RRFW again conveniently obfuscates the fundamental fact that the prescriptions of the Wilderness Act do not apply here, because the river corridor is not a congressionally-designated wilderness area. As explained above, the Wilderness Act's restrictions on commercial activities and motorized activities only apply if and when federal land has been designated by Congress as wilderness. *Wilderness Watch*, 375 F.3d at 1085. Consequently, once again, RRFW's reliance on cases such as *Wilderness Watch*, *supra*, Br. 26 n.8, involving congressionally designated wildernesses that *are* covered by the Wilderness Act is misplaced.

Next, RRFW ignores the record and NPS's considered judgment—from the mid-1990s—that motorized uses do not affect the suitability of the river corridor for potential future inclusion into the wilderness system. Indeed, in a January 20, 1999 document, entitled "Grand Canyon Wilderness Matrix," the Department of the Interior's Office of the Solicitor, headed by John Leshy, concluded that "[t]he use of motors is not an irretrievable commitment of resources that would foreclose meaningful congressional consideration of a wilderness proposal." SER 1-3. *see also* SER 484-87 (stating concurrence of the Assistant Secretary for Fish and Wildlife and Parks with Superintendent's conclusion, based on advice provided by Solicitor's Office, that in preparing the new CRMP he could consider alternatives permitting the continued use of motors without violating the Wilderness Act or any

written NPS policy, and stating that motorized use does not does not "permanently impact wilderness resources or permanently denigrate wilderness values"). The FEIS again specifically addressed this issue when it concluded, consistent with other evidence in the record, 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." SER 81.[17]

And RRFW's brief does not challenge the adequacy of NPS's FEIS, the product of many years of effort, but instead suggests that motorized uses prevent a *present* wilderness experience.[18] This, therefore, is not like a challenge to the

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[17] RRFW, moreover, overlooks that, even in congressionally-designated wilderness areas, motorized uses frequently are allowed, particularly when, as here, that use is historic. Congress itself may 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 specifically allows for the continuation of motorboat use in designated wilderness, if that use was established prior to the area's designation as wilderness. *See* SER 2-3; *see also* SER 486 (determining that it is "undisputable" that motorboat use on the Colorado River within the Park has already become established under section 4(d)(1)). Indeed, Congress has allowed historic motorized uses to continue in various wilderness designations. 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); Florida Wilderness Act, Pub. L. No. 98-430, 98 Stat. 1665, § 1(4) (1984).

[18] RRFW's brief does not argue, as in *Oregon Natural Desert Ass'n v. BLM*, CV-03-01017-JJ (9th Cir. July 14, 2008), that the agency failed to examine wilderness characteristics. RRFW also selectively misuses a record that includes documents dating back to the early 1970s. For instance, RRFW quotes from an early 1970s document regarding motorized uses, Br. 29 (citing ER 68), but fails to

adequacy of an EIS that allegedly overlooks whether an activity might preclude a future wilderness designation by Congress.[19] Notably, 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), certainly the Park's river corridor would no longer be suitable for wilderness designation. Yet, wilderness advocates maintain that it does remain suitable. If so, that can only be because motorized use does not diminish suitability for any possible future designation by Congress as wilderness.

Finally, RRFW's suggestion that NPS's MPs mandate that the Colorado River be managed as wilderness not only ignores the nature of the "policies" but also misconstrues them. Nothing in the policies, even assuming they are judicially enforceable, suggests a binding obligation to manage the type of lands at issue here as if they are presently wilderness. RRFW's argument ignores that "potential wilderness" is not a concept under the Wilderness Act but rather 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 Congress accepts a recommendation from the President or otherwise designates national park lands as "potential wilderness," any such identified non-conforming uses would be

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inform this Court that the motors in the early 1970s were quite different from today's motors, and the Park is managed quite differently than in the early 1970s.

[19] *Cf. Lands Council v. Martin*, 2008 U.S. App. LEXIS 13366 (9th Cir. June 25, 2008).

allowed to continue in those areas until the Secretary determines that it is appropriate to discontinue those uses. When the Secretary does so, only then would the lands receive full Wilderness Act protection. *See Wilderness Watch*, 375 F.3d at 1088.

RRFW, therefore, misreads the MPs when it suggests that lands that have neither been designated by Congress nor even recommended by the President to Congress for inclusion into the system would have to be managed as if they were congressionally-designated wilderness areas. NPS specifically addressed its MPs in the instant planning process, and it concluded that the policies did not require otherwise, because nothing about the new CRMP and the continued authorization of motorized uses would preclude the area's ultimate suitability for inclusion in the wilderness system. SER 1-3, 81. And RRFW points to no 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.[20] Here, NPS provided a reasoned explanation, with considerable

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[20] *See* SER 472-73. Although MP 6.3.1 provides 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.

support, that motorized uses would not diminish the future suitability of the river corridor as wilderness, if ever considered for designation by Congress. SER 257.

RRFW's argument, moreover, overlooks the many difficult issues associated with attempting to enforce agency policy guidance documents. These issues range from whether a guidance document, when issued, is a final agency action subject to judicial review, whether any such challenge would be ripe, whether the agency acted in a rulemaking fashion contrary to the notice-and-comment procedures under the Administrative Procedure Act ("APA"), and whether to afford an agency deference in an interpretation of a statute or rule contained in a guidance document, to whether an agency can be forced to follow a guidance document as if it were a regulation published in the Code of Federal Regulations. These issues are all somewhat interrelated and, unfortunately, occasionally confused, such as RRFW's singular reference to one case, *Southern Utah Wilderness Alliance v. National Park Service*, 387 F. Supp. 2d 1178 (D. Utah 2005), Br. 31, involving agency deference. But RRFW curiously ignores that the weight of authority provides that such guidance documents are not judicially enforceable. *Wilderness Soc'y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006).[21] And RRFW's reference to

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[21] "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

Terbush v. U.S., 516 F.3d 1125 (9th Cir. 2008) is unhelpful. In that case involving the Federal Tort Claims Act, the court rejected an argument that NPS's MPs established a mandatory duty to implement safety reviews in the parks. *Terbush*, 516 F.3d at 1131.

Consequently, RRFW's claim that NPS has somehow illegally or arbitrarily and capriciously acted in a manner that fails to preserve the wilderness character of the Colorado River corridor lacks merit and should be rejected.

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

A. RRFW Has Failed to Demonstrate That NPS has Allowed the Park's Authorized River Outfitting and Guide Concessioners to Interfere With the Public's Free Access to the Park in Violation of the Organic Act.

1. The Organic Act Does Not Require That Public Use Through Concessioners Be Allocated Equitably With Private Use.

RRFW cannot establish that NPS violated any right under the Organic Act to "free access" to the Grand Canyon 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

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596. *See also Cement Kiln Recycling Coal v. EPA*, 493 F.3d 207 (D.C. Cir. 2007); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798 (D.C. Cir. 2006).

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.*

RRFW misrepresents this provision when it erroneously asserts that the Act requires NPS to equitably allocate use between "commercial users" and "noncommercial users" and mandates that NPS allocate use either (1) through a single allocation (*i.e.*, common pool) system or (2) through a split allocation system based on the relative demand for access between commercial and noncommercial users. Br. 34-35, 38-39. Any other means of allocation, RRFW argues, is arbitrary and capricious, and contrary to the Organic Act. The Organic Act, however, does not so strictly constrain NPS's discretion. Contrary to RRFW's assertions, Br. 32-34, no legal requirement directs that the use of the river be allocated, or that the use be allocated in any particular way. And, no legal authority supports RRFW's underlying proposition that concessions use must be allocated equitably with noncommercial uses.

RRFW's "free access" claim is reminiscent of the claim brought and rejected by the Ninth Circuit in *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), as well as by the U.S. District Court for the District of New

Mexico in *Randall v. Norton*.[22] In *Kleppe*, this Court, rejecting the plaintiffs' argument that the allocation of use between commercial and noncommercial use denied them "free access" to the river contrary to 16 U.S.C. § 3, held:

> 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. We must confine our review of the permit system to the question whether the NPS has acted within its authority and whether the action taken is arbitrary. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 414, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). Allocation of the limited use between the two groups is one method of assuring that the rights of each are recognized and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary.

Kleppe, 608 F.2d at 1253; *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).

RRFW's effort to distinguish its arguments in this case from those rejected by this Court in *Kleppe* is unavailing. RRFW here urges that the Organic Act and CMIA "require that commercial services be limited so that the public, not *for-profit companies*, retain access to its public lands." Br. 34 (emphasis added). A similar argument in *Kleppe* prompted this Court to observe:

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

> 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.

Kleppe, 608 F.2d at 1254; *cf. Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1282 n.16 (10th Cir. 1991). RRFW attempts to distinguish this case by arguing that, while appellants in *Kleppe* argued that "noncommercial users should have priority over commercial users," RRFW here asserts "that 'free access' for the public should not disadvantage access by commercial users." Br. 33. Not only was this distinction not relevant to the court's decision in *Kleppe*, but only in one of the two cases decided in the *Kleppe* appeal did the appellants argue that noncommercial users be given priority over commercial users; in the other, like RRFW here, the appellants sought "equal access" to the river. *Kleppe* at 1252, 1254.

Consequently, this Court should reject RRFW's claim that NPS's "apportionment between commercial and noncommercial users" using a split allocation (without a demand study) is arbitrary and capricious and denies them "free access" to the river contrary to 16 U.S.C. § 3.

2. NPS's Allocation of Use is Reasonable, and Neither Arbitrary and Capricious Nor Otherwise in Violation of the Organic Act.

RRFW fails to demonstrate that NPS's allocation of use of the Park's river corridor is arbitrary or capricious or otherwise in violation of the Organic Act. Although RRFW makes several arguments against NPS's allocation decision, these arguments not only ignore fundamental principles governing the management of the national parks in general, and Grand Canyon in particular, but also mischaracterize the record and the issues before NPS.

a. RRFW Ignores Fundamental Principles Governing the Management of the Park.

RRFW fails to appreciate that, while the Organic Act may have provided NPS its primary authority to administer the National Park System, NPS also must look to other relevant statutory mandates in making decisions affecting park management.[23] In making decisions involving visitor use of the river corridor in GRCA and, if so, how to allocate such limited use, NPS must comply not only with the Organic Act, but also with specific Park enabling legislation,[24] the CMIA, as well as other governing law.[25]

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[23] Notably, the first sentence of RRFW's argument quotes statutory language that was explicitly repealed by the CMIA in 1998. CMIA, Pub. L. No. 105-391, § 415(b), 112 Stat. 3497, 3515 (1998).

[24] 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*

Congress has passed specific laws addressing visitor services and commercial concessions in the national parks. In the CMIA, for instance, Congress directed NPS to use concessions contracts throughout the Park System to authorize "person[s], corporation[s], or entit[ies] to provide accommodations, facilities, and services to visitors in units of the National Park System." 16 U.S.C. § 5952; *see* 36 C.F.R. §§ 51.1, 51.3. And, in the very act establishing GCRA, Congress specifically required NPS to grant commercial concessions "for hotels, camps, transportation, and other privileges of every kind and nature for the accommodation or entertainment of visitors." Act of February 26, 1919, 40 Stat. 1175, 1177, § 2 (codified at 16 U.S.C. §§ 221, *et seq.*). These laws reflect congressional policy to permit services in national parks and to facilitate control of public use through concessioners.[26]

RRFW's failure to appreciate the entirety of NPS's governing authorities leads it to disregard the breadth of issues that NPS must consider when it allocates

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National Parks Overflights Act, Pub. L. No. 100-91, 101 Stat. 674 (1987) (codified at 16 U.S.C. § 1a-1 note); 36 C.F.R. § 7.4.

[25] *See generally S. 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").

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

a scarce and important resource, such as the use of the Park's river corridor. RRFW's conclusion that it is arbitrary and capricious for NPS to adopt a split allocation system without knowing the actual demand for river trips for each group is simply not supported by any authority in the Organic Act or any other law. No legal requirement obligates NPS to allocate commercial and noncommercial use on an equal or equitable basis, or to determine the relative demand for commercial and noncommercial trips as part of its allocation decision.[27]

In fact, as a practical matter, accepting RRFW's argument would fundamentally alter the very statutory regime that Congress developed in the CMIA to govern NPS's authorization and management of concessions services in the national parks, adding a new requirement that concessions services may only be authorized to the extent NPS provides equal access to limited park resources for private persons. Such a requirement, not provided for under the CMIA, could potentially affect NPS management of park use across the National Park System.

b. RRFW Errs in Assuming that Relevant Demand is the Only Relevant Factor for Allocating the Limited Use of the Park's River Corridor.

RRFW's apparent assumption that relative "demand" is the only relevant factor for NPS consideration ignores the relevant mandates for managing the Park,

[27] In other programs, allocation decisions are reviewed to determine whether the process of selecting the allocation was arbitrary or capricious, not whether the ultimate decision is one that a court, sitting in lieu of NPS, might render. *See U. S. v. Garren*, 893 F.2d 208, 211 (9th Cir. 1989).

and is inconsistent with the record. The record shows that, historically, NPS has based the commercial/noncommercial allocation of use on various factors, consistent with its various governing authorities, and *not* on demand. RRFW references no evidence to the contrary, and nothing in the relevant governing statutes requires otherwise.

As required by its Organic Act, 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." SER 75. 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 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. SER 336-38. 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. SER 340 (explaining that the allocation 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"). "The opportunities must be evaluated in respect of the recreational desires of all publics in relation to the need for resource protection." SER 341. 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." SER 339. To suggest that NPS must base the allocation primarily, or entirely as RRFW appears to suggest, on the relative demand for self-outfitted versus professionally-outfitted trips would be inconsistent with the long history of management of GRCA and contrary to NPS's governing authorities.

Moreover, other than a self-serving and flawed affidavit that it submitted before the district court, RRFW does not provide this Court with any support for its theory that "[i]n order to fairly allocate use in a split system, relative demand is an essential factor." Br. 39 (citing exclusively to Declaration of Donald W. Walls). Importantly, the Walls Declaration—which RRFW put forth in an effort to support its claims in an absence of supporting evidence in the record—suffers from critical flaws, including ignoring the myriad laws and regulations governing the management of concessions services in the National Park System. This is perhaps most evident in Mr. Walls' failure to appreciate the fact that prices for concessioner-run trips are tightly regulated by NPS. The concessioners *cannot*, as he asserts, "charge whatever the market will bear for not only their services but for 'access' to the river." Walls Declaration at 6. This point is fundamental to his

analysis, and the fact that it is untrue renders the Declaration of little value in helping to prove RRFW's claims.[28]

RRFW's argument also is replete with misleading and inaccurate references to the record. For instance, RRFW states: "NPS planners determined they needed information on the '*relative demand*' for motor trips vs. oar trips" and "relative *demand* for different types of use over different *seasons* within the year (i.e. commercial, noncommercial, educational, research, etc.). ER 265-266 (emphasis original). However, the FEIS never made any such determinations." Br. 40. First, although "*[u]nderstand[ing]*" such relative demand was identified very early on in the planning process in a matrix (attached to an August 2002 document) identifying issues and setting forth a wide range of information needs, ER 265-66 (emphasis added), NPS never indicated that it saw need to make any *determinations* regarding such demand. Second, as the FEIS itself explains (not *post hoc*, as Appellants claim), in January 2003, an expert panel subsequently advised NPS that a relative demand survey would probably cost around $2 million and be of limited use. ER 350.

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[28] RRFW cannot support its argument that the public pays concessioners not only for the services they provide, but for river access, or that the concessioners receive an "economic rent" for river access. Br. 33-34, 40. RRFW's suggestion is misleading and contrary to the CMIA, and ignores that the rates that concessioners receive in return for providing professional outfitting and guide services are regulated by NPS, in accordance with federal law and regulation. *See* 16 U.S.C. § 5955; 36 C.F.R. § 51.82; *see also* ER 342.

Indeed, RRFW's statement that "experts upon whom NPS relied stated that even with their inherent flaws, '[demand] studies should be done' for a split allocation system and gave a range of options costing from $150,000 to $2.1 million," is similarly misleading and incorrect. Br. 40 n.15. Although the record indicates one individual comment that studies should be done, the overwhelming bulk of expert comments reflected inherent problems with undertaking such a study, *i.e.*, that a demand study would be "[t]oo expensive," "[e]xtremely difficult in this case," and "unreliable," or that it would produce results of "suspect" validity and certainty. ER 277. Also, the comments did not, as Appellants assert, present a range of options costing from $150,000 to $2.1 million for a demand study in Grand Canyon, but rather simply cited several examples of other studies and their costs. *Id.* As the FEIS stated, "[s]ocial scientists have speculated that it would cost Grand Canyon National Park around $2.5 million to conduct a demand study to adequately determine demand and the results would still not be absolutely definitive." ER 406. So, although understanding relative demand may have been identified as *an* issue at the outset of the planning process, NPS provided reasonable and fully supported explanations for ultimately not conducting a study of relative demand.[29]

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[29] Moreover, once again, RRFW inappropriately attempts to rely on outdated documents that have been superseded by newer documents. *See* Br. 40 n.15.

c. NPS's Rationale for its Allocation Decision is Not *Post Hoc*.

RRFW's claim that NPS's statement that "based on annual user-days, NPS has evenly distributed Colorado River use between commercial and noncommercial users" is a *post hoc* rationalization and is arbitrary and capricious is equally without merit. ER 46; *see* Br. 39. First, RRFW's characterization of NPS's rationale as *post hoc* is wrong. The FEIS clearly explains that the selected alternative will achieve "[p]arity between commercial/private user-day allocation (50/50)" and "*meets the standards of fairness* (by providing for an approximately 50/50 allocation of user days between commercial and non-commercial users)." SER 89, 104 (emphasis added). This rationale, then, was clearly part of the agency's decisionmaking process at the time the decision was made and therefore cannot legitimately be characterized as *post hoc*.

d. NPS's Use of "User Days" to Measure the 50/50 Split Allocation Was Not Arbitrary and Capricious.

Appellants also cannot show that the 50/50 split allocation based on a measure of user days is arbitrary and capricious or a violation of the Organic Act. RRFW alleges that "[i]n response to public comments, NPS made clear that measuring allocation in terms of user days disadvantages noncommercial users and is a financial boon for commercial companies." Br. 41. This is not accurate.

Regardless of what NPS may have concluded in the *1979* CRMP and FEIS, the agency clearly reached a different conclusion here.

RRFW's referenced FEIS page actually states, after acknowledging that each measure of allocation "offers advantages and disadvantages," that "[f]or commercial companies, user-day allocations generally result in faster trips and more passengers. Noncommercial users tend to focus on their launch (i.e. launch limits), not cumulative user-days or cumulative passengers." ER 342. This does not, as RRFW asserts, mean that an allocation based on a user-day measure "disadvantages" noncommercial users. Nor does it mean that such a measure is a "financial boon" for concessioners, particularly when, in reality, NPS strictly dictates rates charged by concessioners on the river in accordance with federal law and regulation. The record also illustrates that NPS's decision was based not only on user-days, but on launches (and numbers of passengers, group size, length of trips, and seasons of use) as well.[30] NPS, for instance, notes that "both noncommercial and commercial users are limited by launch schedules." ER 342. Accordingly, RRFW cannot demonstrate that NPS's use of "user days" to measure the 50/50 split allocation was arbitrary and capricious.

RRFW also mischaracterizes the record and issues in other ways. For instance, RRFW erroneously asserts that "the key criteria for developing the alternatives did not incorporate standards for fairness or equity. ER 308-313." Br. 35. Notably, RRFW erroneously focuses on section 2.2.2 of the FEIS,

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[30] *See*, *e.g.*, SER 73-74; ER 311-16.

"CARRYING CAPACITY AND KEY CRITERIA FOR DEVELOPING LEES FERRY ALTERNATIVES," which do not purport to set forth the criteria for the *allocation*, but for *carrying capacity*, *i.e.*, "the type and level of visitor use that can be accommodated while sustaining acceptable resource and social conditions that complement the park." ER 308. A resource-based carrying capacity determination is indifferent to human perceptions of fairness or equity. Had RRFW instead referenced section 2.2.1 of the FEIS, "ALLOCATION OF USE," it would have found that NPS explicitly identifies "user perception of allocation inequity" as one of the objectives for allocating use. ER 306. And, although RRFW takes issue with this objective, Br. 36, "fairness"—in terms of a result—is inherently subjective and a matter of perception and, here, properly committed to the reasonable discretion of NPS.

e. <u>The Record Supports that the Allocation was "Fairly Done."</u>

Next, RRFW erroneously claims that NPS's allocations are unfair for three reasons: "(1) the significant inequity in the time it takes noncommercial users to gain river access; (2) the ability of anyone (irrespective of need) to pay concessioners for river access; and (3) the disparity in seasonal allocations between the two groups." Br. 43. RRFW's arguments are without merit.

At the outset, RRFW's argument that NPS's allocation must be "fair" has no basis in the law. The Organic Act contains no such requirement. And to suggest

that *Kleppe* requires such a result misconstrues this Court's judgment in that case. *Kleppe* focused on the fairness of the process—*i.e.*, whether the "method" of arriving at the allocation was "fairly done pursuant to appropriate standards"—not the result. *Kleppe*, 608 F.2d at 1253. In this regard, the standard established in *Kleppe* reflects an application of the APA's "arbitrary and capricious" standard. The APA requires that a court examine *whether* the allocation decision was properly arrived at, not *where* the agency arrived.

Next, RRFW erroneously asserts that "if visitors cannot reserve space for noncommercial use about as readily as they can reserve it if they pay a concessioner, they are being denied free public access." Br. 45. Of course, the Organic Act contains no such requirement. Further, this oversimplification ignores a fundamental distinction between commercial and private trips. Commercial trips generally consist of unrelated individuals and/or groups drawn from the general public, providing additional opportunities for individuals to secure places on trips until the maximum allowed group size is reached. In contrast, with a private trip, a permit is issued to a trip leader who will assemble a group of family members and friends without concern about using the fully-allocated group size; and, in fact, many leaders prefer smaller groups. Given that NPS limits the number of launches for both commercial and private trips, the result is that private trips frequently occur with empty spaces, depriving trip opportunities to individuals who might be

interested in a private trip and falsely enhancing the perception, such as that held by RRFW, that the commercial-noncommercial allocation is inherently unfair.[31] Although RRFW suggests that the only alternative if an individual has difficulty in obtaining a private *trip leader* permit is to arrange a trip through a concessioner, Br. 44, and that "[m]embers of the public who are not already on the noncommercial waitlist and who cannot afford to pay a commercial outfitter and/or do not wish to take a commercial trip . . . are highly unlikely to be able to take a trip down the Colorado River," Br. 44 n.18, nothing prevents that person from seeking a place on another private trip, so long as trip leaders are willing to make their extra places "publicly" available.[32]

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31 The wait list for private boaters under the *old* CRMP and permit system, which RRFW alleges provides additional evidence that the allocation is inequitable, is not only irrelevant to the new CRMP, but, as NPS and others long have recognized, a poor indicator of actual demand for private river trips. SER 62, 329, 469.

32 RRFW errs in suggesting that, based on its review of concessioners' websites (which review, of course, is outside of the record and therefore irrelevant), the commercial allocation exceeds demand for concessioner trips and therefore is unfairly high. Br. at 45. To the extent these sites even purport to provide any information on availability, they provide no indication as to the number of spaces available (if any are even truly available), and therefore cannot support RRFW's conclusion that there is "plenty of vacant space." In fact, to the extent any such availability does remain, it generally is due to recent cancellations or is only for small parties. Also, were a similar review of *noncommercial* trips possible, it would certainly show space available (*i.e.*, trips at below maximum group size) for many of those trips. 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." SER 334-35.

Furthermore, RRFW cannot support its claims that the public pays concessioners for river access or that "concessioners control the vast majority of summer river access." Br. 44-45.[33] Appellants mischaracterize the allocation issue as a trade-off between concessioners and the public. The fact of the matter is that the CMIA grants NPS broad discretion to authorize concessions services, and demand by the public for professionally-guided and outfitted trips is more than sufficient to utilize the entire "commercial use" allocation of user days. SER 334. In fact, although relative demand for commercial and noncommercial trips is difficult, if not impossible, to measure, multiple sources indicate that demand exceeds supply for both commercial and noncommercial trips. SER 98-99.

Finally, NPS reasonably explained why many individuals might prefer trips in the shoulder or winter seasons (*e.g.,* longer trips, greater opportunities for quiet and solitude, enhanced wildlife viewing, cooler temperatures more conducive to off-river hiking). ER 312.[34] The record indicates that, when NPS offered such trips in the past, more than 90 percent of the launch dates offered were used (100 percent when made available six months in advance), showing clear demand for winter launches. ER 346, 413-14.

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[33] Notably, one of the record excerpts relied on by RRFW shows, instead, that 61 percent of non-commercial boaters had already taken at least one Grand Canyon trip before, and 24 percent had taken three or more Grand Canyon trips, further damaging its claims regarding "free access" to the river. ER 273.

[34] Of course, such trips also provide an opportunity for individuals to take trips without encountering motorized watercraft on the river.

The record also shows that many people affected by the split allocation *support* NPS's allocation decision. Indeed, the reasonableness of the new CRMP's split allocation 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 assemblage of Grand Canyon river users that includes outfitters, private boaters, and members of the public who utilize the professional river services that NPS has authorized the concessioners to provide—submitted *joint recommendations* in response to the draft EIS generally supporting the allocation that was adopted in the final CRMP. SER 29-41. This coming together of interests that historically had been embroiled in deep conflict over this issue remains a major and historic achievement, and is testament to the fairness of NPS's new plan.

Consequently, the ROD and CRMP reflect the considered and not arbitrary or capricious judgment of 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." SER 287. Having examined all relevant factors relating to apportioning the limited use of the river corridor, 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 for a variety of park visitors and best meets management objectives for the CRMP." SER 104 (emphasis added). NPS's conclusion is reasonable, supported by substantial evidence in the record, and within the agency's discretion under the Organic Act and other governing law. RRFW's claim to the contrary should be denied.

B. NPS's Determination That Motorized Activities in the River Corridor do not Impair the Park's Natural Soundscape is Neither Arbitrary Nor Capricious.

RRFW's claim that NPS somehow acted "illegally" in continuing to allow motorized rafts ignores the considerable law and even academic commentary surrounding NPS's management of the national parks. Br. 50-51. RRFW argues, first, that NPS failed to follow appropriate *procedures* in determining that motorized rafts do not "impair" the Park's natural soundscape; and second, they assert that the use of motorized rafts illegally "impairs" that soundscape. Both arguments are flawed and reflect a misunderstanding about the nature of NPS's mandate 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 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.[35]

Courts recognize that Congress delegated broad discretion to NPS in the management of national parks.[36] As one commentator notes, "Congress did not specify by what means the Park Service was to 'conserve' 'unimpaired' the national parks while providing for their 'enjoyment.'"[37] Similarly, in a seminal law review article on recreational policy in the parks, Professor Joseph Sax aptly observed that "[e]very human use impairs the natural setting to some extent and whether [, for instance,] a tramway impairs it 'too much' is a question of policy, not science." Joseph L. Sax, *Fashioning A Recreation Policy for Our National Parklands: The Philosophy of Choice and the Choice of Philosophy*, 12 CREIGHTON L. REV. 973, 974 (1979). After all, "[t]o assert that solitude is the

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35 Similarly, the legislation establishing GRCA provides for various concessions "for the accommodation or entertainment of visitors." 16 U.S.C. § 222.

36 *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. Dep't of Interior*, 634 F. Supp. 1265, 1279 (D. Colo. 1986). *See generally Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1073-74 (9th Cir. 1997) (noting cases confirming general principle that NPS enjoys broad discretion under Organic Act).

37 Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates; Power Founders, and the Rise and Fall of Agency Discretion*, 74 DEN. U. L. REV. 625, 629 (1997).

essence of the park experience is to state a preference, not a fact." *Id.* at 975. There will, therefore, be those parks or areas in our national parks where roads are allowed, and those where they are not, where off-road vehicles are allowed, and those where they are not, and where cars are allowed, and again those areas where they are not. *See generally* DAVID G. HAVLICK, ROADS AND MOTORIZED RECREATION ON AMERICA'S PUBLIC LANDS (2002).

The decision in each management instance is a decision that must be made by NPS in the exercise of its considered, professional judgment.[38] *See, e.g.*, *Bicycle Trails Council*, 82 F.3d at 1468 (stating that the authority of NPS to strike balances among "the sometimes competing goals of recreation, safety, and resource protection" as well as among "sometimes competing recreational interests . . . inheres in the Organic Act and the [park's establishment act]"). The limit on NPS's discretion is that it may not prevent future generations from enjoying the resources of our nation's parks.[39]

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[38] *See generally* RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY (1997) (providing one of the best histories of NPS).

[39] The continued viability and protection of our National Parks is no doubt dependent upon the public visiting and appreciating these resources and, as such, willing to continue to fund and protect them for future generations to enjoy as well. This is implicit in Congress's early establishment of the Grand Canyon and reference to concessions, in the development of the 1965 Act and the CMIA, and in the establishment of urban parks, 16 U.S.C. §§ 2301-2306, as well as in the promotion of tourism in national park museums. 16 U.S.C. §§ 18-18a.

RRFW neither has nor could claim that NPS's decision to allow motorized rafts, generators, and helicopter passenger exchanges somehow impairs the ability of future generations to enjoy the resource. To begin with, RRFW has not challenged the adequacy of NPS's FEIS—the product of many years of effort by NPS and the public to update the management plan for the Park's Colorado River corridor.[40] And the FEIS contains a comprehensive analysis of the impacts of these activities on Park resources, including its natural soundscape.[41] SER 230-86.

Next, RRFW's selective and inaccurate references to outdated documents in the record, which are further taken out of context, do not establish that motorized rafts "impair" the resource. In fact, RRFW uses and discusses noise from overflights (*see, e.g.*, Br. 56), not noise from the modern motorized rafts which, as the FEIS notes, are below the existing ambient noise level and, moreover, relatively quiet.[42] In fact, the FEIS explains that the decibel level for motorized

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[40] Notably, RRFW did not appeal the district court's denial of its earlier National Environmental Policy Act ("NEPA") claims.

[41] It would seem that Congress's passage of such statutes as NEPA, the National Historic Preservation Act, the Archeological Resources Protection Act, and even the CMIA, as well as park authorizing statutes, all now help inform the 1916 Organic Act and the management of the parks.

[42] RRFW improperly conflates national parks with wilderness areas. Congressionally-designated wilderness areas require solitude. Parks may afford areas that include natural solitude, but also allow automobiles, buses, trolleys, off-road vehicles and other machines like radios or music players. Admittedly, some parks are noisier than others, and recently some retired NPS officials identified five parks facing noise problems, and GRCA was not on list because of overflights (nor was Yellowstone apparently because of snowmobiles). NPS Vets Name Five Quiet

rafts is similar to the decibel level of a conversation, and, as such, that motorized and non-motorized trips produce similar noise levels, although it recognizes that the visitor experience between the two types of trips is different. SER 234; *see also* SER 4-16 (acoustic data report). And the record does not support any suggestion that river-related noise including the motorized use authorized under the CRMP, or even the existing ambient sound level including noise from overflights, has any lasting effect on the Park or its resources.

RRFW, therefore, would have this Court inappropriately substitute its judgment for that of the agency. As described above, NPS considered the impacts of the proposed activities in the FEIS, and based on its analyses, concluded that the activities allowed under the 2006 CRMP would not impair Park resources and values. ER 436. This is a situation where the agency rationally considered existing environmental conditions in the Park, and reasonably concluded that, given those conditions, the proposed activities would not impair the natural soundscape. SER 77, 471; *see also* SER 227. Under these circumstances, NPS's decision cannot be said to be arbitrary and capricious, or a violation of the Organic

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Parks and Five Not So Quiet, Vol. 26, No. 12 Federal Parks & Recreation 8 (June 20, 2008).

Act. *Lands Council v. McNair*, 2008 U.S. App. LEXIS (9th Cir. July 2, 2008) (en banc).[43]

Finally, RRFW's more lengthy allegations regarding impairment, therefore, focus not on impairment itself but rather on trying to establish that NPS did not follow some illusory procedure. Br. 46-55. RRFW here raises three strained arguments: they argue that NPS failed to consider a human-free soundscape baseline as allegedly suggested by the MPs and a Director's Order; they argue that the ROD did not sufficiently incorporate the cumulative impact analysis of ambient noise levels addressed in the accompanying FEIS; and lastly, they argue that NPS should have relied upon outdated and older studies rather than the more recent information gathered and discussed in the FEIS, which included a review of all available information.

1. <u>NPS Did Not Violate Any Procedural Requirement</u>.

RRFW's procedural argument that NPS should have measured the impact to the Park's natural soundscape against a human-free baseline, Br. 49, is neither analytically sound nor supported by any legal authority. At the outset, RRFW's argument that NPS should have employed a human-free natural soundscape baseline is not based upon any claim that the FEIS was in any way inadequate, but

[43] This Court's recent decision in *Oregon Natural Desert Ass'n v. BLM*, CV-03-01017-JJ (9th Cir. July 14, 2008), has no bearing on this case: the issue there involved the application of the Federal Land Policy and Management Act of 1976 and whether the agency complied with NEPA, an issue not raised here.

rather rests upon assertions that NPS acted arbitrarily and capriciously by allegedly ignoring the 2001 MP and Director's Order 47. *Id.* Several reasons undermine RRFW's argument.

First, as RRFW apparently concedes, the Organic Act itself contains no legal requirement with respect to the agency's choice of baseline. Absent such a requirement, RRFW seeks to create enforceable legal obligations out of MPs and other internal policy documents that are not legally binding and cannot be enforced against the agency. Moreover, to the extent that RRFW's argument relies upon a Director's Order 47, that Order expired on December 1, 2004 and is therefore inapplicable. *See* SER 233.

Second, RRFW's incorrectly state that NPS "looked only at the additive impacts to the river's natural soundscape 'in the presence of audible human-caused noise including aircraft overflights.'" Br. 49. NPS used noise free intervals, the time between human noise events, to quantify impacts to the natural soundscape. SER 235-36. NPS compared percent time audible (the amount of time human noise is audible over a particular day) and noise free intervals to determine the impact of river related recreation and river related aircraft. *Id.* This allowed NPS to assess the contribution of its proposed action to existing conditions affecting the natural soundscape, and cannot be said to be contrary to the 2001 MPs or the

expired Director Order, even if they were enforceable. *See Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 2000).

2. NPS Rationally Connected its Cumulative Impacts Analysis and its No Impairment Determination.

RRFW's next argument that NPS never connected its cumulative impacts analysis in the FEIS to its no impairment determination in the ROD is equally flawed. As an initial matter, RRFW barely discusses the administrative record. Br. 51-53. It cites to the FEIS, which includes a discussion of the cumulative effects and impairment, Br. 52-53 (citing ER 355), but then only briefly references the ROD, Br. 52 (citing to ER 436). Again, RRFW has not challenged the adequacy of the FEIS, but instead argues that the ROD itself should have repeated and explained the analysis contained in the FEIS. Br. 53. Yet, the ROD, at ER 415-51, examines and explains NPS's decision, in light of the FEIS. This is all that is required in the ROD, and the ROD clearly may reference and summarize what is contained in an accompanying EIS. *See, e.g., Forty Most Asked Questions Concerning CEQ's NEPA Regulations,* 46 Fed. Reg. 18026 (March 23, 1981) (Answers to Question 34).

The ROD, moreover, throughout, addresses NPS's decision to adopt one of the alternatives analyzed and discussed the FEIS, and the purpose of the ROD is not to restate what has been addressed in the FEIS. The record, therefore, belies RRFW's claim that NPS's explanation in its ROD was somehow deficient. ER

436-44. In fact, each non-impairment determination in the FEIS follows from a detailed discussion of relevant criteria that RRFW argues must be carefully considered, including, but not limited to, the severity, duration, and timing of the impact; and the direct, indirect, and cumulative effects of the impact. ER 386-87. In its ROD, NPS rationally determined that there would be no impairment "[a]fter analyzing the environmental impacts described in the *Final Environmental Impact Statement/Colorado River Management Plan* and public comments received . . . ." ER 436. This discussion provided a clear "rational connection between the facts found and the choice made." *Pac. Coast Fed'n of Fisherman's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001).

RRFW's only legal authorities, *Sierra Club v. Flowers*, 423 F. Supp. 2d 1273 (S.D. Fla. 2006), and *Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006), are inapposite. Br. 53. While the Eleventh Circuit vacated the former case after Appellants filed their brief, *Sierra Club v. Flowers*, 526 F.3d 1353 (11th Cir. 2008), the district court case involved a challenge to the adequacy of a NEPA document. Appellants also surprisingly invoke *Sierra Club v. Mainella* and yet overlook that Circuit and court's opinion holding that the MPs are not judicially enforceable. 459 F. Supp. 2d at 79 n.1. *Mainella*, moreover, undermines RRFW's principal argument. There, plaintiffs claimed that "under the Organic Act . . . NPS disregarded its statutory duty to prevent impairment of park resources and values

by issuing each of the three FONSI and exemption decisions "without considering whether the surface activities pose a threat to Park resources." 459 F. Supp. 2d at 94*; see also id.* at 97 (stating that "[t]he Court will thus limit its review to the claim presented – whether NPS's exemption decisions and FONSIs are consistent with the impairment mandate of the Organic Act based on the administrative records"). The court refused to require a separate impairment decision, noting that NPS's environmental assessments ("EAs") included such a determination. *Id.* at 95-96. The problem with NPS's action, however, was that neither its findings of no significant impact ("FONSIs") nor its EAs contained *any* explanation for why the admitted long-term impacts to park resources from the exemption decision on drilling activities would not impair the resource, and the court remanded it back to the agency for further explanation. *Id.* at 100-103. Tellingly, one of the principal reasons for the lack of any analysis in *Mainella* was NPS's decision that an EIS was unnecessary because it could not review certain activities outside of its jurisdiction—a conclusion rejected by the court. Those simply are not the facts here.

3. <u>NPS Considered Recent and Accurate Information, Studies, and Comments</u>.

RRFW's third, two paragraph, procedural argument that NPS improperly failed to "consider any environmental assessments or environmental impact statements required by . . . NEPA; relevant scientific studies, and other sources of

information; and public comment" is belied by the record. Br. 53-54. First, the basis for this argument is not apparent, as Appellants have not suggested that the FEIS is inadequate. Second, Appellants apparently fault NPS's decision not to rely simply 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. Indeed, the planning effort that led to this new plan began in 1997 and then, after being halted in 2000, produced a lawsuit and an agreement by NPS to engage in a new effort that would examine how best to manage the Park's river corridor. RRFW fails to show that NPS's decision not to rely on outdated studies and public comments from the 1980 CRMP process in making its no-impairment determination is arbitrary and capricious.

RRFW further suggests that NPS must take special care to explain its "radical shift in view," Br. 54-55, but fails to appreciate that, rather than reflect a reversal of position, the CRMP and ROD continue to allow motorized activities that NPS has authorized consistently for over 25 years, albeit now at lower levels and with newer restrictions. This is far from a "radical shift in view," Br. 54-55, that needs to be reconciled with prior Service policy and practice. Updated planning processes are precisely that, new plans for the management of our

national parks; their purpose is to replace outdated and old information and ensure that the parks are managed consistently according the most current and scientifically available principles.

CONCLUSION

Intervenor-Defendant-Appellee GCROA respectfully requests that this Court declare that NPS's actions in issuing its new CRMP were not arbitrary and capricious and did not otherwise violate the CMIA, Organic Act, or any other applicable law, and thus affirm the district court judgment.

Respectfully submitted this 30th day of July, 2008.

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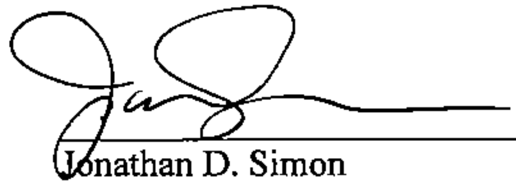
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, undersigned counsel of record for Grand Canyon River Outfitters Association hereby certifies that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,963 words.



Jonathan D. Simon

STATEMENT OF RELATED CASES

GCROA is unaware of any pending cases related to this matter.

CERTIFICATE OF SERVICE

I certify that true copies of the foregoing Opening Brief of Intervenor-Defendant-Appellee Grand Canyon River Outfitters Association, and additional Excerpts of Record, have been served upon counsel this 30th day of July, 2008, by United States First Class Mail addressed to:

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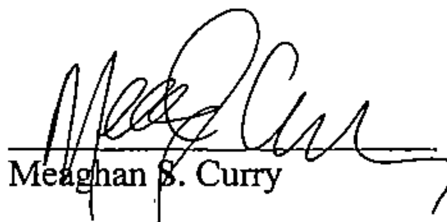

Meaghan S. Curry