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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

River Runners for Wilderness, *et al.*,

Plaintiffs,

v.

Joseph F. Alston, *et al.*,

Federal-Defendants; and

Grand Canyon River Outfitters Association; Grand Canyon Private Boaters Association,

Defendant-Intervenors.

No. CV-06-0894 PCT-DGC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs River Runners for Wilderness, *et al.*, organizations committed to protecting and preserving Grand Canyon National Park's natural resources and wilderness values, submit this memorandum in support of their motion for summary judgment. At issue in this case is the National Park Service's ("Park Service") decision to authorize certain commercial services and the use of motorboats, helicopter passenger exchanges, and generators in the Grand Canyon's Colorado River corridor – a wild river gorge that flows through the heart of the Grand Canyon and the largest and possibly most diverse wilderness on the Colorado Plateau. See AR 109590 (Record of Decision or "ROD").[1]

As outlined below, and evidenced by the record, in authorizing motorized activities and commercial services, the Park Service has violated its duty to preserve the wilderness character of the Colorado River corridor, and its duties under the National Park Service Concessions Management Improvement Act ("Concessions Act"), 16 U.S.C. §§ 5901 *et seq*., the National Park Service Organic Act ("Organic Act"), 16 U.S.C. §§ 1 *et seq*., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

STANDARD OF REVIEW

Plaintiffs challenge under section 706(2)(A) of the Administrative Procedure Act ("APA") the Park Service's ROD adopting the 2006 Colorado River Management Plan

[1] Pursuant to Local Rule 56.1(e), in this memorandum, Plaintiffs cite to specific paragraph numbers in the attached statement of undisputed material facts. Plaintiffs' statement of undisputed material facts includes specific citations to documents included in the administrative record ("AR") and supplemental administrative record ("SAR").

("CRMP") and Final Environmental Impact Statement ("FEIS"). The Court may review Plaintiffs' claims under the APA and "may direct that summary judgment be granted to either party based upon . . . review of the administrative record." 5 U.S.C. § 702(a); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 961 (9th Cir. 2006). The APA provides that the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Center for Biological Diversity v. Norton, 254 F.3d 833, 837-38 (9th Cir. 2001). Judicial review must be "searching and careful." Ocean Advocates v. U.S Army Corp. of Engineers, 402 F.3d 846, 858 (9th Cir. 2005). The Court must "not rubber-stamp" agency decisions but "ensure that [the] agency has taken the requisite 'hard look' at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is 'founded on a reasoned evaluation of the relevant factors.'" Wetlands Action Network v. U.S. Army Corp. of Engineers, 22 F. 3d 1105, 1114 (9th Cir. 2000) (citations omitted).

ARGUMENT

I. THE PARK SERVICE VIOLATED ITS DUTY TO MANAGE THE COLORADO RIVER CORRIDOR AS WILDERNESS

A. The Park Service Has a Duty to Preserve the Colorado River Corridor's Wilderness Character

Pursuant to § 3 (c) of the Wilderness Act, 16 U.S.C. § 1132 (c), and § 228i of the Grand Canyon National Park Enlargement Act ("Grand Canyon Protection Act"), 16 U.S.C. § 228i-1, the Park Service prepared a wilderness recommendation and proposal to

Congress to designate 980,088 acres within the Grand Canyon for "preservation as wilderness." See SAR 005799 (Grand Canyon Protection Act); AR 104820 (FEIS). This proposal included an additional 131,814 acres of the Grand Canyon as "potential wilderness," including the entire 226 mile stretch of the Colorado River, from Lees Ferry to Diamond Creek (the upper gorge) and an additional 51 miles from Diamond Creek to Lake Mead (hereinafter "Colorado River corridor"). AR 104823; SAR 005770 (Wilderness Recommendation); SAR 008307 (1993 Update). The proposal is still pending.

By definition, potential wilderness are areas within the National Park system that possess wilderness characteristics, i.e., are essentially untrammeled by man, natural, undeveloped, and provide outstanding opportunities for solitude or a primitive and unconfined type of recreation, but do not "qualify for immediate designation due to temporary, non-conforming, or incompatible [uses]." 2001 NPS Management Policies ("MP") at 6.2.2.1. Potential wilderness areas, therefore, are slated for "future designation as wilderness [once] the non-conforming use has been removed or eliminated." Id.; see also Wilderness Watch v. Mainella, 375 F. 3d 1085, 1088 n. 2 (11th Cir. 2004) (discussing potential wilderness areas and Park Service policy). Here, the Colorado River corridor was "identified as a potential wilderness due to the existing motorized raft use." AR 104820. In the Park Service's own words, motorized boat use is "inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive

and unconfined type of recreation." SAR 005804. Accordingly, "the river corridor would become wilderness upon phase-out of the use of motors." AR 104820.

Having classified the Colorado River corridor as "potential wilderness," the Park Service's 1976 Master Plan, 1995 General Management Plan ("GMP") and Management Policies ("MP") all mandate that the agency manage the Colorado River corridor for its wilderness character.[2]

The Park Service cannot ignore the Master Plan and the GMP's prescriptions because they dictate all development and management of the Grand Canyon, including the Colorado River corridor. See e.g., Sierra Club v. Dombeck, 161 F. Supp.2d 1052, 1071 (D. Ariz. 2001) (land exchange, that failed to achieve the goals of the 1995 GMP for the Grand Canyon, was arbitrary and capricious). The 1976 Master Plan outlines the overall objectives and proposals for managing the Grand Canyon and states that the "goals for management of the Colorado River in the Grand Canyon will be to *perpetuate the wilderness river-running experience*, and to attempt to mitigate the influences of man's manipulation of the river." SAR 002367 (emphasis added). To meet this goal, the

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[2] The term "wilderness character" is defined in the FEIS. See AR 104822. Wilderness areas are undeveloped lands that retain their "primeval character [and] influence without permanent improvements or human habitation . . .[g]enerally appear to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable" and provide "outstanding *opportunities for solitude or a primitive and unconfined type of recreation*." AR 104822-23 (emphasis added). Preserving "wilderness character" includes two components: (1) protecting the wilderness resources (i.e., water, land, solitude, wildlife, natural setting and sound); and (2) providing an opportunity for a primitive wilderness experience. See Wilderness Watch, 375 F. 3d at 1093.

Master Plan states that "mechanized access below the rims [of the Grand Canyon]" will be limited. SAR 002352.[3] Likewise, pursuant to the 1995 GMP, the Park Service must "protect the natural quiet and solitude" of the Grand Canyon and "manage areas meeting the criteria for wilderness designation as wilderness." SAR 010138. Relevant here, the GMP "treats all proposed wilderness areas as wilderness" and states that the Park will be managed in accordance with the Park Service's "1993 wilderness proposal." SAR 010147, 010188. With respect to the Colorado River corridor, the GMP directs the Park Service to "protect and preserve the resource in a wild and primitive condition" and ensure that all management plans for the Colorado River be "consistent with NPS wilderness policy requirements." SAR 010138; 010188. Similar mandates to preserve the Colorado River's wilderness character are found in Park Service Directives.[4]

The Park Service's Management Policies likewise mandate that the Colorado River be managed as wilderness. See SAR 016073; *MP 6.3.1. As the Park Service

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[3] A year after adopting the Master Plan, the Park Service decided to "ban motor use" in the Colorado River corridor to achieve the Master Plan's goals. See SAR 003026; SAR 005244 (calling for the phase out of motorized boats). This decision was based on consideration of "relevant National Park policies, wilderness proposals, the park master plan, interpretation, noise, and research, as well as other considerations . . ." SAR 001444.

[4] In Special Directive 95-2, the Director of the Park Service states that all potential wilderness areas "will be managed under the provisions of the Wilderness Act and NPS policies to maintain wilderness characteristics and values until Congress decides on the potential for inclusion in the National Wilderness Preservation System." SAR 009150; see also SAR 013520, 13523, 13524 (other directives to protect wilderness resources and eliminate non-conforming uses); see also Wilderness Watch, 375 F.3d at 1088 n.2 (discussing Reference Manual 41 which was adopted by Director's Order 41).

itself has determined, its Management Policies are binding and mandatory. See SAR 016078; Sierra Club v. Lujan, 716 F.Supp. 1289, 1293 (D. Ariz. 1989). In the FEIS, the Park Service assures the public that the Colorado River corridor will be "managed as potential wilderness in accordance with the NPS Management Policies." AR 104821. This means that the Park Service must manage the Colorado River corridor "for the preservation of physical wilderness resources . . .[and] ensure that the wilderness character is likewise preserved." SAR 016136. Thus, the Park Service may allow recreational uses in the Colorado River corridor only that enable the area to retain its "primeval character . . . and provide outstanding opportunities for solitude or primitive and unconfined types of recreation." SAR 016141. Recreational "uses that do not meet the purposes and definitions of wilderness should be prohibited." Id. Specifically, the use of "motorized equipment or any form of mechanical transport *will be prohibited* in wilderness except as provided for in specific legislation." SAR 016142 (emphasis added). Moreover, in planning for the use of potential wilderness areas, the Park Service is required to "seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation." SAR 016137; see also Wilderness Watch, 375 F. 3d at 1088, n.2; AR 104821 (FEIS) (same); SAR 013524. Last, any commercial services authorized in areas to be managed as wilderness must meet the exception provided in section 4(d)(5) of the Wilderness Act, which requires a necessity determination. MP at 6.4.4*; 16 U.S.C. § 1133(d)(5).

B. The CRMP and ROD Violate the Park Service's Duty to Preserve the Colorado River Corridor's Wilderness Character

Despite the explicit duty to preserve the Colorado River corridor's wilderness character – including the duty to prohibit motorized equipment and mechanized transport – in this case, the Park Service decided to do just the opposite. On February 17, 2006 the agency signed the ROD for the CRMP and authorized continued use of motorboats, helicopter passenger exchanges and generators in the potential wilderness area of the Colorado River corridor. See AR 109592 -109597. Without question, these motorized activities, individually and in the aggregate, are "non-conforming uses" that have impacted, and will continue to impact, the corridor's wilderness character.[5]

In fact, the Park Service concedes in the FEIS that "motorized raft use" is a "temporary, non-conforming or incompatible use." AR 104820. The "Colorado River was identified as potential wilderness due to the existing motorized raft use." Id.; see also SAR 005804 (1980 Wilderness Recommendation). As explained by the Superintendent, "the non-conforming use identified in the 1980 Wilderness Recommendation was motorboat use that was to be phased out by 1985." SAR 008133. It would be phased out

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[5] Plaintiffs do not suggest that there is something wrong with appreciating natural beauty from a motorboat, helicopter, or motor vehicle. Indeed, "there are many . . .categories of public land administered by the federal government [that] appropriately offer this opportunity." Wilderness Watch, 375 F. 3d at 1094. In fact, "[m]otorized whitewater river trips are currently available on other sections of the Colorado River system, as well as on other western whitewater rivers." SAR 004619 (listing other rivers). This type of motorized use, rather, is simply not the "type of 'use and enjoyment'" promoted or allowed by the Park Service's plans, wilderness policies or the Wilderness Act. See id.

because "motorized boat use [ ]is inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation." SAR 008155; see also SAR 008307. In addition, since 1980, "additional non-conforming uses that contradict the intent of wilderness management policy have either developed or increased." SAR 008133. These "non-conforming uses consist of . . . increases in motorized traffic, increases in helicopter exchanges, non-emergency administrative use of motorboats, and exacerbation of crowding and congestion through user day pools." SAR 008155.

By the Park Service's admission, therefore, these motorized uses of the Colorado River corridor are non-conforming uses that are contrary to preserving its wilderness character. By definition, "non-conforming uses" are uses that do not comport with wilderness. Non-conforming uses are "contrary to the definitions of wilderness included within the Wilderness Act." SAR 014841. Indeed, these motorized uses have a profound impact on the River's wilderness character. Such uses impact both its wilderness resources and the opportunity for people to have a wilderness experience. See AR 104823. In fact, the administrative record in this case is replete with evidence that motorized uses have had, and continue to have, a significant impact on the corridor's wilderness character. In the Park Service's own words:

> The use of *motors pollutes the river with gasoline and oil, the air with smoke, and assaults the senses with sound* and should be eliminated as soon as possible from the river environment. Their elimination will also qualify the river to be officially included in the wilderness areas of Grand Canyon National Park.

SAR 000917 (emphasis added).

In 1973, the Park Service proposed phasing out all motorized use of the Colorado River "by the end of the 1976 season" to protect the wilderness resource. SAR 001033. However, because this decision sparked controversy from concessioners, the agency decided to research and study the impacts of motorized use before making a final decision. See SAR 001033. This effort resulted in approximately *twenty-nine* "ecological and social studies" on the carrying capacity of the Colorado River corridor and the use of motorized boats. See SAR 001787 (listing all studies); SAR 003715 (synthesis of all studies); cf. FEIS at 14 (referencing "twenty-eight" studies).

Notably, these studies reveal that oar and motor trips are "equally safe" and that the impacts to the Colorado River corridor's wilderness character from motorized uses are significant. See SAR 004587 (safety); SAR 004573 to 004590 (impacts). In terms of impacts to water quality, for instance, the Park Service notes that "[p]ollutants added to the river as a result of motorized travel include approximately 5,750 pounds of petroleum residue annually, as well as gasoline from leaking tanks and oil spills." SAR 004598; see also FEIS at 284 ("Motorboat use introduces contaminants such as hydrocarbons and burned and unburned fuel and motor oil" to the Colorado River corridor). Noise from motorboats, helicopter passenger exchanges, and generators also invade the natural sounds of the Colorado River corridor. See e.g., SAR 001157 (study on the sound-level of motor noise in the Grand Canyon); 001449 (motor analysis); 004049 (motor and oars study); 002644 (same); 003715 (synthesis of research).

In terms of impacts to the wilderness experience, extensive research and studies reveal that overall "non-motorized trips are more pleasing to the visitor." SAR 004607. "[O]ar travel is seen as more consistent with a natural or wilderness experience. Passengers who had experience with both motor and oar trips preferred the oar trip. They enjoyed the slower pace, could relax; they become more aware of natural sounds in the canyon; they were able to observe more closely the unique features along the river and more easily ask questions of their guide." Id; see also SAR 004602.

Accordingly, in 1979, the Park Service again sought to improve visitor's "wilderness experience" and decided to eliminate motorized boat use. See SAR 004610. In the Park Service's own words, "[s]tudies over the past several years show that the use of motorboats . . .is incompatible with overall visitor enjoyment and resource management objectives." SAR 002814; see also SAR 005244 (the use "of motorized watercraft . . .will be phased out over a 5 year period. This will achieve the objective . . . to make available the high quality wilderness river-running experience.").

The Park Service's 1979 decision to phase out motorboats was ultimately thwarted by a one-year rider attached to an appropriations bill (see SAR 005901). Nonetheless, the agency remained concerned about the "incremental erosion of [the Colorado River corridor's] wilderness resource," the "resulting . . . degradation of wilderness values along the Colorado River in the Grand Canyon," and its own failure to fulfill its "responsibility of wilderness protection." SAR 008033 (Park Service memo). In 1993, for instance, the agency noted that "the current levels of motorized boat use probably

contradict the intent of wilderness designation [and] . . . is *inconsistent with the wilderness criteria* of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation." SAR 008307 (emphasis added). Ten years later, the Park Service reiterated this sentiment: "the continued use of [motorized] equipment within [the Colorado River corridor] violate[s] the letter and intent of the Wilderness Act and NPS management policies and director's orders addressing wilderness." AR 000813.

In the most recent FEIS, the Park Service does not discuss in detail its earlier findings and determinations, or the approximately twenty-nine studies on carrying capacity and motorized use of the River. But the agency does acknowledge that noise intrusions to the natural soundscape of the Park are "adverse, localized, and regional" and that, when viewed in combination with other sources of noise intrusions (i.e., aircraft overflights) would be a "*significant adverse effect*" on the Colorado River corridor's natural soundscape. FEIS at 387 (emphasis added). The Park Service also concedes that "impacts to wilderness character . . . will be detectable and measurable during most of the year, but more apparent during the higher mixed-use period, at the frequently visited areas and passenger exchange points along the river corridor." AR 109612. "For visitors seeking outstanding opportunities for solitude or a primitive and unconfined type of experience [i.e., a wilderness experience], the impacts would be adverse and of moderate intensity during the peak use motorized periods." FEIS at 792.

C. The Park Service's Rationale for Authorizing Motorized Activities in the Colorado River Corridor is Arbitrary and Capricious

As outlined above, the Park Service concedes that motorized activities are nonconforming uses that have adverse impacts on the river's wilderness character. In the FEIS and ROD, the Park Service asserts for the first time, however, that such uses do not violate their duty to manage for wilderness because they: (1) are only a "temporary or transient" disturbance of wilderness and (2) are "established uses" pursuant to section 4(d)(1) of the Wilderness Act. See AR *104822, FEIS at 234-235. The Park Service is incorrect.

1. "Temporary or transient" disturbances are not allowed

The Park Service's assertion that motorized use of the river corridor should be allowed because it results in only a "temporary or transient" disturbance of wilderness values is wrong. There is no "temporary or transient" disturbance exception in the Wilderness Act or Park Service policy. On the contrary, section 4 (c) of the Wilderness Act includes a blanket prohibition on the use of all "motorized equipment or motorboats" in wilderness areas, however temporary. 16 U.S.C. § 1133(c); High Sierra Hikers Association v. Blackwell, 390 F.3d at 646 (noting that the Act "generally proscribes" activities, and "allows only [ ] narrow exceptions[s]" to the prohibitions); accord The Wilderness Society, 353 F.3d at 1062; see Wilderness Watch v. Mainella, 375 F. 3d 1085, 1089 (11th Cir. 2004) (discussing prohibitions). While there are a few narrow exceptions to this blanket prohibition, no exceptions for temporary or transient uses that disturb wilderness values exist. See 16 U.S.C. § 1133 ("special provisions").

Further, there is nothing temporary nor transient about the disturbances caused by motorized boats, which occupy the Colorado River every day during the summer and shoulder seasons. As discussed above, *supra*, p.*, motorized uses directly conflict with a wilderness experience on the river and as discussed below, *supra*, p.*, impair the natural soundscape of the river corridor. Thus, for the entire summer and shoulder seasons, motorized boats are a permanent and illegal disturbance to the river's wilderness character.

Moreover, by definition, the non-conforming uses that the Park Service must "seek to remove" from potential wilderness areas include any bona fide "temporary or transient" uses. <u>See</u> SAR 016137. As explained by the Eleventh Circuit, "[p]otential wilderness areas contain certain *temporary conditions* that do not conform to the Wilderness Act." <u>Wilderness Watch</u>, 375 F. 3d at 1088 n.2. As such, these are precisely the types of uses that the Park Service must "seek to remove." <u>Id</u>. (<u>citing</u> Ref. Manual 41); <u>see also</u> SAR 014841 (non-conforming uses are "contrary to the definitions of wilderness [but are] . . . considered of a temporary nature which, once removed, should not preclude" wilderness designation); <u>see</u> SAR 005770 (Colorado River qualifies as potential wilderness *because* transient motorboat use can be phased out); SAR 005804 (same).

Finally, the Park Service's temporary disturbance argument fails to take into account that the agency has an *existing* duty to manage and preserve the river corridor's wilderness values and provide a "primitive wilderness experience" now. Indeed, thousands of people each year have been, and will now continue to be, deprived of a true

wilderness experience because of the Park Service's continued authorization of such nonconforming, motorized uses.

2. The "established use" exception does not apply

In the FEIS, the Park Service maintains that the continued use of motorboats will not preclude wilderness designation because it qualifies as an "established use" pursuant to section 4(d)(1) of the Wilderness Act, 16 U.S.C. § 1133(d)(1). See AR 104822. The Park Service misreads the plain language of the Wilderness Act. First, on its face, section 4(d)(1) *applies only* to the Department of Agriculture, not to the Department of Interior. See 16 U.S.C. § 1133 (d)(1) (uses that "have already become established, may be permitted . . . [by] the Secretary of Agriculture); Stupak-Thrall v. U.S., 89 F. 3d 1269, 1282 n.14 (6th Cir. 1996) (section 4(d)(1) permits the Secretary of Agriculture to allow motorboat use where already established). The Park Service apparently agrees, stating in the record that "the pre-existing use exception for the Forest Service *does not apply* to the Dept of Interior units." SAR 008725 (emphasis added); see also SAR 011286 (established use exception "not extended to the Secretary of Interior"); 007300 (same); 011416 (same); AR 00813 (same).

Second, the Park Service cannot illegally authorize non-conforming motorboats and then claim that they are properly excepted from the clear prohibition on the use because they have already become established.

Third, motorized use of the Colorado River corridor is not "established" in the ordinary sense of the word. See The Wilderness Society, 353 F.3d at 1061 (applying

common sense meaning to words in statute). Rather, by definition, established uses are those that are "recognized *and accepted* in a particular capacity." NEW OXFORD DICTIONARY at 580 (2001) (emphasis added). Here, while motorized use of the Colorado River corridor has occurred over the last 40 years, it is by no means an established or "accepted" use of the wild river corridor. On the contrary, motorized use of the river has been, and continues to be, a highly controversial issue. Indeed, in *two* previous river planning processes the Park Service decided to phase out motorized boat use. See SAR 000721 (phase out by 1977); SAR 005244 (phase out by 1985). Both of these decisions were never implemented. See SAR 001035 (1973 political interference); SAR 005901 (1981 one-year appropriations rider).

Fourth, even if one assumes, *arguendo*, that the established use exception applies, other agencies may retain discretion over whether to allow pre-existing uses to continue. See 16 U.S.C. § 1133(d)(1) (use "*may* be permitted to continue"). But, here, the Park Service's "extensive public review process [for the Colorado River] and the existing NPS planning documents" *do not* permit such uses to continue. SAR 010275. Instead, the agency's policies state that "[p]ublic use of motorized equipment or any form of mechanical transport *will be prohibited* in wilderness *except as provided for in specific legislation*." SAR 016142 (emphasis added); SAR 007300 (same). While Congress can extend the established use exception to wilderness units within the National Park system (if it decides to do so), absent a statutory exception, the Park Service's plans and policies prevent it from invoking the section 4(d)(1) exception. See id.

Finally, if motorboats are deemed an "established" use pursuant to section 4(d)(1), a plain reading of the Wilderness Act means that such uses would have to have been established *before* the September 3, 1964 Wilderness Act was enacted. See 16 U.S.C. § 1133 (d)(1) (referring only to uses that "have already become established"); United States v. Gregg, 290 F. Supp. 706, 708 (W.D. Wash. 1968) (use must have been established "before the passage of the Act"); see also SAR 010275 ("strict interpretation of the Wilderness Act supports pre-1965 use, not subsequent motorized levels, as the established use"). In 1964, total river use was "about 550 people." SAR 010275. In 2007, the Park Service estimates that over 24,000 people will use the river. AR 109592.

D. The Park Service Allows Commercial Services on the Colorado River that Are Not Necessary and Proper for Realizing the Recreational or Wilderness Purposes of the Area

The Park Service may allow concessioners to operate in potential wilderness only if they meet the Wilderness Act's exception for commercial services. *MP 6.4.4. The narrow exception, adopted by the MP and relevant here, provides:

> Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

16 U.S.C. § 1133(d)(5); see MP* 6.4.4; Blackwell, 390 F.3d at 646. The Park Service has illegally allowed certain commercial uses of the Colorado River without a determination that such uses are necessary for activities which are proper for recreating in wilderness or consistent with managing the area as wilderness. Further, the agency has illegally allowed certain commercial uses of the area that are inconsistent with managing the area

as wilderness. Even the levels of appropriate commercial services authorized by the ROD exceed what is necessary and proper to enable the public to recreate on the Colorado River.

1. The Park Service Illegally Allows Motorized Commercial Uses Without Finding that they Are Necessary

In Blackwell, the Ninth Circuit interpreted section 4(d)(5) to require two things. First, an agency must make a finding of "necessity" before authorizing commercial services in wilderness. 390 F.3d at 647. Second, the "finding of necessity is a specialized one. The [agency] may authorize commercial services only 'to the *extent* necessary.'" Id. at 648 (emphasis original) (ruling that the Forest Service violated the Wilderness Act, because it did not establish that the extent of packstock services it authorized was necessary). Here, the Park Service illegally allows commercial motorized uses of the Colorado River without determining that such uses are necessary for activities that are proper for realizing the recreational or other wilderness purposes of the park. As discussed below in an analogous claim under the Concessions Act, infra at *, the agency has found only generally that "the service provided by commercial concessioners, which enable thousands of people to experience the river in a relatively primitive and unconfined manner and setting (when many of them otherwise would be unable to do so), are necessary to realize the recreational and other wilderness purposes of the park." FEIS Vol. I at 19. But, the Park Service has illegally never found that *motorized* commercial services, which make up roughly 75 percent of the allocated commercial use, are necessary. See FEIS at 60 (75 percent of use).

2. Motorized Commercial Uses are Not Necessary or Consistent with Managing the Area as Wilderness

The record proves that motorized commercial services are not necessary. During preparation of the CRMP, GCNP Deputy Wilderness Program Coordinator wrote:

> The NPS has no current authority to allow motorized equipment use within the Colorado River Corridor except that which might be "necessary to meet minimum requirements of the administration of the area for the purpose of [the Wilderness Act]." By any measure, the current concession operations using motorized equipment exceeds that which is needed to meet established "minimum requirement" tests. The continued use of this equipment within wilderness violated the letter and inten[t] of the Wilderness Act and NPS management policies and director's orders addressing wilderness.

AR 01 000813. The Park Service has also previously found that commercial motorized uses of the Colorado River are not necessary to realize the recreational or other wilderness purposes of the park. SAR 005804 (motorized boats are unnecessary); SAR 005100 (special needs groups can access the river on oar-powered trips); see also SAR 002647 (study for NPS finding that "eliminating motor . . . trips would not appear to exclude any specific group"); AR 092571 (passengers on self-guided and commercial trips range in age between 10 and 82 years old). Studies show that oar trips (non-motorized) are as safe or safer than motorized trips. AR 092572 (showing lower risk of fatality on oar-powered rafting trips).

Even where the Park Service, in another instance, found that motorized uses were necessary in wilderness, a court disagreed. In Wilderness Watch v. Mainella, the Eleventh Circuit set aside a Park Service decision to allow members of the public who wished to reach certain wilderness destinations to ride agency motor vehicles. 375 F.3d

at 1092. The agency asserted that it could do so, despite the Act's prohibition on motor vehicles, because the trips were "'necessary to meet minimum requirements for the purpose of [the Wilderness Act].'" Id. The Eleventh Circuit rejected the argument, ruling that the decision to "administer" the wilderness by "using a fifteen-passenger van filled with tourists simply cannot be construed as 'necessary' to meet the 'minimum requirements' for administering the area 'for the purpose of [the Wilderness Act].'" Id. The Eleventh Circuit stated that "of course there is nothing wrong with appreciating natural beauty from inside a passenger van, and many other categories of public land administered by the federal government appropriately offer this opportunity. It simply is not the type of 'use and enjoyment' promoted by the Wilderness Act." Id. at 1093.

Thus, given these facts and the prohibition against motorized uses in wilderness, the Park Service cannot legally authorize commercial motorized services on the Colorado River.

3. The Amount of Overall Commercial Use is Not Necessary to Realize the Recreational or Wilderness Purposes of the River

The Park Service must not only prove that commercial services it authorizes are necessary, but also that it authorizes such services only "'to the *extent* necessary.'" Blackwell, 390 F.3d at 648 (emphasis original). This "limitation on the [agency's] discretion to authorize commercial services only to 'the extent necessary' flows directly out of the agency's obligation to protect and preserve wilderness areas." Id. The Park Service "must show that the number of permits granted was no more than was necessary to achieve the goals of the Act." Id. at 647.

Because neither the MP nor the Wilderness Act define "necessary," the first step in interpreting the word is to determine its common sense meaning. The Wilderness Society, 353 F.3d at 1061. "Necessary" means "indispensable" or "essential." WEBSTERS NINTH NEW COLLEGIATE DICTIONARY 790 (1989). Thus, commercial services may be necessary for certain people who cannot row themselves or do not have able trip leaders who can take them on a non-commercial trip down the Colorado River. Indeed, the Ninth Circuit noted that certain commercial services "needed to provide access to people who would otherwise not be able to gain access for themselves or their gear, can support a finding of necessity." Blackwell, 390 F.3d at 647. However, in the FEIS, the Park Service never links the amount of commercial services authorized with a finding that the amount is essential.

As described more fully below, the demand for public access to the Colorado River greatly exceeds the supply of available permits, a situation resulting from the need to protect the resource from overuse and degradation. Infra, p.*. Evidence also demonstrates that the concessioners do not use all of their commercial allocation. Infra, p.*. Further, because of the historic long waits for the public to gain access to the Colorado River on a noncommercial trip, some people who use the concessioners would prefer to take a noncommercial trip if they were able to obtain permits. See e.g. AR 033403, 027553, 027700, 39452, 40394, 40946 (people hire commercial outfitters because they cannot get a noncommercial permit). Thus, at least some of the commercial allocation is unnecessary.

Without an analysis of the amount of commercial services that are necessary, which considers the incompatibility of motors in wilderness, protecting the resource, unused allocation by the concessioners, the number of commercial users who would rather take a noncommercial trip and the relative demand for noncommercial trips, there is no "rational validity" to the Park Service's decision to allocate the amount of use in the CRMP to the concessioners. See Blackwell, 390 F.3d at 647-648.

II. THE PARK SERVICE AUTHORIZES COMMERCIAL SERVICES IN VIOLATION OF THE CONCESSIONS ACT.

The CRMP and ROD violate the Concessions Act by authorizing unnecessary commercial services and services that are inappropriate and inconsistent with preserving the resources and values of the Colorado River. Congress has mandated that in national parks, commercial services "shall be limited to those . . . that are [ ] necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located; and [ ] are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit." 16 U.S.C. § 5951(b); see also MP at 6.4.4. Thus, the Park Service must limit commercial services on the Colorado River to only those that are necessary, but also to those that preserve the wilderness character of the river. See supra, p.** (discussing the value of wilderness and requirement of wilderness preservation).

The ROD contends that the CRMP analyzed the types and level of commercial services that are necessary and appropriate for the Colorado River through the Park. ROD at 6. However, the only specific discussion of the necessity or propriety of

commercial services is found on three pages of the CRMP. There, the CRMP states that "since visitors who wish to raft on the Colorado River through the Grand Canyon possess neither the equipment nor the skill to successfully navigate the rapids and other hazards of the river, the [Park Service] has determined that it is necessary and appropriate for the public use and enjoyment of the park to provide for experienced and professional river guides who can provide such skills and equipment." FEIS Vol. 1 at 19. The Park Service also "determined that the service provided by commercial concessioners, which enable thousands of people to experience the river in a relatively primitive and unconfined manner and setting (when many of them otherwise would be unable to do so), are necessary to realize the recreational and other wilderness purposes of the park." FEIS Vol. I at 19; <u>see also</u> App L, p.3 (minimum tools analysis).

Notably, the Park Service never found that commercial *motorized* use of the Colorado River corridor is necessary or appropriate for the public to realize the recreational and other wilderness purposes of the river. Without a finding of necessity, it may not authorize this unnecessary commercial service. *See* 16 U.S.C. § 5951(b). Moreover, even if the Park Service's general statement of need for professional guides could suffice for a finding of necessity for motorized services, the evidence shows that commercial motorized use of the Colorado River corridor is not necessary and appropriate for the public to realize the recreational and other wilderness purposes of the river. The public can recreate and enjoy the wilderness character of the area by taking a non-motorized commercial trip or a non-motorized non-commercial trip down the river.

As early as 1976, the Park Service found that "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 and permits the use of large boats, accommodating larger groups. This use is inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation."[6] SAR 005804. Park studies have demonstrated that most people prefer smaller groups on the river and when commercial passengers took an experimental combination "motor-oar" trip, "92% reported that oar trips better enabled them to 'experience the Grand Canyon environment.'" App. G-16. Even for special needs groups, the Park Service has found, since at least the late 1970s, that "[o]ar-powered rafts [ ] provide safe trips for aged, handicapped, and young people." SAR 5100. Indeed, the agency found that eliminating motor trips "would not appear to exclude any specific group." SAR 002647. Nor would it sharply reduce use. See SAR 011164.

The Park Service also failed to identify in the ROD or CRMP any specific amount of commercial services that meet its finding of "necessary and appropriate" commercial services. The ROD authorizes set amounts of commercial use independent of any finding regarding the necessity of the amount of use. Without stating a quantity of appropriate and necessary commercial services on the river, the Park Service violates Congress' mandate that commercial services "shall be *limited* to those . . . that are [ ] necessary

[6] Even for administrative resource trips, Park Service experts have said that "[t]here is no reason to use motors, other tha[n] to placate the motor heads." SAR 011163.

and appropriate . . ." 16 U.S.C. § 5951(b) (emphasis added); *MP 6.44, p.71); see FEIS at 19*; AR 93677 ("The decision as to whether a service is necessary and appropriate, and at what level, is a management decision based on park planning."). The FEIS's analysis of the allocation system does not account for what level of commercial services are necessary and appropriate. See FEIS at 27-30. Nor does the discussion of alternatives or carrying capacity address what level of commercial services are necessary and appropriate. *See e.g.* FEIS v. 1, 30-35, 58-60. But the Park Service has known for years that it must address "[h]ow 'necessary and appropriate' is the current concession allocation level" and the "National Park Service preference for motorized concession operations." SAR 009145; AR 000334 (planning document for CRMP). The current levels of commercial services authorized by the Park Service's ROD and CRMP go beyond what is "necessary and appropriate" to enable the public to realize the recreational and other wilderness purposes of the Park. Supra, p.*.

In further violation of the Concessions Act, the Park Service's authorization of continued commercial motorized use fails to preserve the wilderness character of the river to the highest practicable degree as required by law. See 16 U.S.C. § 5951 (b). Repeatedly, throughout its management of the river, the Park Service has conceded that allowing motorized boats on the river is inconsistent with protecting its wilderness character and inconsistent with providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation. Supra, p.*. Studies, relied upon by the Park Service, make clear that non-motorized trips not only better protect the wilderness

experience of all, but better enable visitors to experience the river as wilderness. Supra, p.*. Accordingly, the Park Service's authorization of commercial services on the Colorado River is "arbitrary and capricious, an abuse of discretion, and not in accordance with law." 5 U.S.C. § 706 (2).

III. THE PARK SERVICE VIOLATED THE ORGANIC ACT

A. The Park Service's Inequitable Allocation of River Permits to Commercial Operators Interferes With Free Access to the Colorado River by the Public.

Congress directed that the Secretary of the Interior "may [ ] grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments or other reservations [ ] but for periods not exceeding thirty years." 16 U.S.C. § 3. However, the Organic Act mandates that "[n]o 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. (emphasis added).

The ROD and CRMP violate the Organic Act by allowing the Colorado River to be leased for use by commercial concessioners at use levels that interfere with free access to the river by the public. In other words, to the extent that commercial services are necessary and appropriate under other laws, they must be allocated equitably with noncommercial uses.

Because the overall use of the river must be limited to protect its natural resources and the wilderness character of the Colorado River corridor, user access must necessarily be limited. The Park Service has chosen to limit and allocate use in a split allocation

system between commercial and noncommercial user groups, providing the majority of the allocated use to motorized commercial use. FEIS v. 1, p. 58-60. Pursuant to the ROD and CRMP, the public gains access to travel down the river by either: (1) applying for a non-commercial permit through the lottery system and coordinating a public river trip[7]; or (2) paying a commercial concessioner, which already has guaranteed allocated use of the river, to take people on a commercial trip down the river via motorized or non-motorized raft. ROD at 3. Members of the public who have the financial means and inclination to gain river access by paying for a private commercial trip are assured a trip down the river.[8] SAR 011158 (commercial trips are priced to keep demand below supply); SAR 011161 ("the [split allocation commercial] access system favors the affluent); SAR 9145 (a commercial user can generally go in the summer she chooses). Members 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, however, have no guarantee they will be able to take a trip down the Colorado River, ever. See e.g. FEIS v.1, p.113 (the new permit system would favor those who have been unsuccessful in

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[7]The ROD eliminates the waiting list for non-commercial permits and replaces it with a weighted lottery system. ROD at 20-21. Under the new system, trip leaders on the old waitlist would obtain launch dates within 10 to 20 years. *Id.* at 20.

[8] The reality is that commercial river travelers are a select group with high incomes and educational levels. SAR 2646. A commercial motorized trip down the river costs approximately $300 per day. AR 092571. Studies show that "[f]orty seven percent of commercial passengers have a household income over $100,000 while only 12% of the national population have a household income over $100,000. The household income of self-guided boaters i[s] very close to the national average." Id.

obtaining a permit in prior years, but does not guarantee a permit); ROD at 19 (noncommercial demand has exceeded supply of permits since 1973); FEIS v.2, p.678 ("Based on the exponential growth of the waitlist, demand undeniably exceeds supply.")

The Ninth Circuit has found that the pertinent issue in protecting free access by the public in 16 U.S.C. § 3 is "whether allocation has been fairly made pursuant to appropriate standards." Wilderness Preservation Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1972).

> 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.

Id. at 1253.

The Park Service has not fairly allocated use pursuant to any identifiable or appropriate standards. The resulting inequity in the allocation system interferes with free access by the public because there is generally greater supply of than demand for expensive commercial services, but unquestionably greater demand for than supply of noncommercial permits. Rather than limiting use fairly among user groups, the noncommercial users bear the brunt of the capacity limits intended to protect the resource and are allocated roughly one-quarter of their use in the far less preferred winter season.

The waiting period on the old permit system provides evidence of the inequity in allocation. Under the old permit system, a member of the public (a trip leader) would wait between 10 and 20 years to obtain a permit to take a non-commercial trip down the river. FEIS v.1, p.110. At the time of the FEIS, there were approximately 8,000 trip leaders on this list who were waiting to obtain a permit, and roughly 1000 new applicants each year. Id; ROD at 19. Based on an average group size of 13, these 8,000 trip leaders represent approximately 104,000 members of the public who would go down the river on permits for noncommercial trips. See SAR 009145. Under the new system, the Park Service estimates that over half of these waitlist applicants will receive a launch date within ten years and in twenty years, the majority of the waitlist will have successfully obtained a launch date. FEIS v.2, p.695. However, river runners not on the old waitlist might have to reapply for years to gain a permit through the lottery and still, may never obtain one.

In contrast, there is no evidence in the FEIS that commercial river runners have had to wait to obtain access through the concessioners' user days. In 1995, the Park's wilderness coordinator wrote that, noncommercial boaters represent "a broad spectrum of the 'general public' which has a much more difficult time obtaining a river trip than the commercial passenger who can generally purchase a trip for the summer season." SAR 009145. Other evidence also supports the fact that a commercial passenger can generally take a trip in the year she wants. See AR 000370, 000392-393. In fact, the FEIS indicates that the commercial outfitters do not even use their full allocation of use. *App.

K, p.2. Worse still, the record shows that members of the public who do not need a guide pay concessioners to gain access to the river because they are unable to gain access through the noncommercial permit system. See e.g. AR 33403, 27553, 27700, 39452, 40394, 40946. In assessing impacts to visitors from the allocation system, the FEIS also finds that "noncommercial groups generally believe their proportion of the overall allocation is unfairly small," while "[c]ommercial users generally believe their allocation is either appropriate, somewhat below where it should be, or slightly higher than it needs to be." FEIS v.2, p.678.

While the FEIS and ROD eliminate the non-commercial waiting list, the use allocated for commercial and non-commercial remains inequitable. Before the 2006 ROD, an average of 18,891 commercial passengers took trips down the river annually, while 3,570 noncommercial passengers took trips. FEIS v.1, p. 45 (no action alternative). Commercial use was capped at 115,500 user-days and noncommercial use was capped at 54,450 user days annually.[9] FEIS v.1, p.45. Of the commercial passengers, 14,487 took motorized trips, accounting for 74,260 user-days. FEIS v. 1, p.45. The FEIS continues to cap commercial user-days at 115,500, finding that approximately 17,606 passengers will take a commercial trip annually, but allows for an increase in commercial motorized use.[10] FEIS v.1, p.59-60; ROD at 3. The FEIS does not cap noncommercial user days,

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[9] User-days and numbers of passengers are a function of the launches per day, group sizes and trip lengths. See FEIS v.1, p.58-59 (key trip variables).

[10] One way in which the Park Service provides greater commercial access is by allowing 32 people on each commercial trip during the summer season and 24 people

but estimates they will reach 113,486 per year for an estimated 7,051 passengers. FEIS v.1, p.60. However, these estimates are based upon allocating noncommercial use primarily in the less-preferred winter season and in the shoulder seasons of spring and fall and by reducing the trip length for noncommercial oar-powered trips in order to increase the number of launches.[11] FEIS v.1, p.60; ROD at 3; AR 065795 (summer is preferred and winter is not). Thus, all commercial users will be able to take their river trips in the summer and shoulder seasons, but over one-quarter of the annual noncommercial users will be forced to take a winter trip in order to float the river. FEIS v.1, p.60. In the past, only an average 318 noncommercial passengers per year have run the river in the winter. FEIS v.1, p.45. Without evidence to support its assumption, the Park Service estimates that 1,855 noncommercial passengers will now want to run the river in the winter.[12]

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during the shoulder season, in contrast to 8 and 16 people for noncommercial trips. FEIS at 59. This level of commercial access is inequitable from an allocation standpoint, but also harms the wilderness character of the River because of the large group sizes.

[11] For summer trips, the FEIS estimates that an additional 387 noncommercial passengers will be able to run the river. However, the majority of the theoretical increase in noncommercial passengers comes in the winter with an estimated 1,537 additional passengers and in the shoulder season with an estimated 1,556 additional passengers. Compare FEIS v.1, p.60 and p.45. Thus, nearly 89 percent of the estimated increase in noncommercial passengers annually is allocated to the winter and shoulder seasons, while the commercial users maintain the majority of their allocation in the summer. Id. (91,909 of 115,500 commercial user days in summer season).

[12] Another inequitable result of the allocation system is that the CRMP allows all recreational passengers to take one trip per year. But this only benefits commercial users who can gain river access on a yearly basis. The yearly allowance is essentially meaningless to those who must participate in the hybrid weighted lottery system, which gives preference to those who have not taken a river trip in the last *four* years. ROD at 5, 9.

The Park Service's methodology for estimating use levels for all of its alternatives was premised upon actual launch data between 1998 and 2003. App.K, p.1. The range of alternatives was developed by setting separate limits for the different variables (such as launches per day, group size limits, trip length) for each type of trip. Id. The Park Service does not disclose how it arrived at these separate limits. However, the agency never factored into its analysis the relative demand for commercial and noncommercial trips and methods for fairly allocating use between those two user groups. See AR 023285 ("because we do not have and cannot obtain concrete data on relative demand from user groups, we can expect a lawsuit both if we change and if we do not change the allocations."); FEIS v.2, p.679 (speculating that it would cost the Park around $2.5 million to conduct a demand study). There is no analysis or discussion anywhere in the FEIS of how to fairly allocate use between commercial and noncommercial users, even though equitable allocation is legally required and was one of the primary issues raised during public scoping for the CRMP. 16 U.S.C. § 3; see FEIS v.1, p.4. Even in its internal planning document for the CRMP, the Park Service determined it 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.)." AR 000354-355 (emphasis original). The Park Service may have discretion to choose a split allocation system, but it must allocate use fairly under appropriate standards. Wilderness Preservation Fund v. Kleppe, 608 F.2d

at 1254 (finding the question of equity moot because of a new management plan superseding interim allocation levels on the Colorado River).

Individuals who develop the skill to take a trip down the river should not be penalized because they do not want to pay a commercial outfitter to row them or motorboat them down the river. It is just as important to protect access to wild places for members of the public who want to engage in primitive recreation and use their skills of self-reliance in a place of wilderness as it is to allow access for people who need (and can afford) commercial assistance. In fact, the Park Service has long understood that the "primary user group that most needs access, and constitutes a broader range of economic levels, is the private [public] user." SAR 011162. The ROD and CRMP's allocation system - a system that inequitably favors access, temporally and in quantity, by private commercial users who can afford to pay for guided trips -- is therefore arbitrary and capricious, an abuse of discretion, and not in accordance with the Organic Act. 5 U.S.C. § 706 (2).

B. The Park Service's Determination that Motorized Activities in the Colorado River Corridor Do Not "Impair" the Grand Canyon's Natural Soundscape is Arbitrary and Capricious.

Pursuant to the Organic Act, the Park Service must leave the Grand Canyon's resources and values "unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. No impairment or derogation to the Grand Canyon's resources or values is allowed. See

AR 109611 (ROD); AR 003247 (Director's Order 12).[13] In the Park Service's own words, "[w]hile Congress has given the [agency] the management discretion to allow certain impacts within parks, that discretion is limited by the statutory requirement (enforceable by the federal courts) that the Park Service must leave park resources and values unimpaired." MP at 1.4.4. This no impairment mandate is the "cornerstone of the Organic Act" which "establishes the primary responsibility of the . . . Park Service." Id.[14] Among the resources and values that cannot be impaired is a park's "natural soundscape." See MP at 1.4.6. Indeed, the natural sounds of the Grand Canyon are considered to be "an inherent component of the scenery, natural and historic properties, wildlands, and recommended wilderness that constitute the bulk of the park (94%)" and a "key component of the wilderness river experience." FEIS at 141; SAR 016067 (same).

In this case, the Park Service determined that its continued authorization of motorboats, generators, and helicopter passenger exchanges in the Colorado River corridor does not "result in the impairment of the [Grand Canyon's] natural soundscape." FEIS at 387. This determination is illegal for four reasons.

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[13] Congress supplemented and clarified the Organic Act's no impairment mandate through enactment of the General Authorities Act in 1970, and again through enactment of a 1978 amendment (the "Redwood Amendment"). Both the General Authorities Act and the Redwood Amendment use the word "derogation" instead of impairment. The Park Service treats the mandate to avoid "impairment" and "derogation" of park resources and values as "a single standard for the management of the national park system." MP at 1.4.2.

[14] The Park Service notes that "[i]mpairment may occur from visitor activities; NPS activities in the course of managing a park; or activities undertaken by concessioners, contractors, and other operating in the park." MP at 1.4.5.

1. Wrong baseline

Pursuant to Park Service policy and Director's Order 47, the "natural ambient sound level – that is, the environment of sound that exists *in the absence of human-caused* noise – is the baseline condition, and the standard against which current conditions in soundscape will be measured and evaluated." MP at 8.2.3 (emphasis added); SAR 016067 (Director's Order 47). In the Grand Canyon, the baseline condition is the natural sound of the river corridor in the absence of human-caused noise, i.e., the flowing water and rapids of the river, wind, storm activity, wildlife activity, and other natural sound generation such as rock and mud slides. See FEIS at 141; see also SAR 016069 -72. When evaluating the impairment to the Grand Canyon's natural soundscape, however, the Park Service failed to apply the proper natural ambient sound level or baseline standard. See FEIS at 142.

The Park Service measured its authorization of motorized activities against "natural ambient sound levels . . . *in the presence* of audible human-caused noise including aircraft overflights." FEIS at 142 (emphasis added). By lumping the presence of human-caused noise levels from aircraft into the baseline standard, and conceding that such "outside" sources are already impacting the Park's natural soundscape, the Park Service asserts that the contribution of additional sources of noise intrusion from motorboats, helicopters, and generators in the river corridor is relatively minor, insignificant, and does not result in any "impairment" to the Park's natural soundscape.

See e.g., FEIS at 386 (“even if all river-related noise was removed from the park,” the impacts would still be severe); 387.

This defeatist approach to protecting the Grand Canyon’s natural soundscape is as illogical as it is illegal. See Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988) ("[w]ithout establishing the baseline conditions that exist . . . there is simply no way to determine what effect [an action] will have on the environment . . .”). The Park Service must do what it can to protect and preserve the Park’s natural soundscape (see MP at 4.9). At the very least, this means making an accurate impairment determination and measuring the impacts of authorizing continued motorboat use, generators, or helicopter passenger exchanges – in conjunction with other sources of noise intrusions (i.e., aircraft tours) – against the *natural* sounds of the river. See MP at 8.2.3; SAR 016067 (Director’s Order 47).

2. Failure to consider the cumulative effects

The Park Service is required to take into account the *cumulative* impacts to the Grand Canyon’s natural soundscape before making a final impairment determination. See MP at 1.4.5; AR 109611 (ROD) (same). This is because “the cumulative impacts of related actions may result in impairment to resources even though the effects associated with a single event might not constitute impairment.” AR 023178. By definition, cumulative effects are “the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such

other actions." 40 C.F.R. § 1508.7. Cumulative impacts can result from "individually minor but collectively significant actions taking place over a period of time." Id. The requirement to consider cumulative impacts, therefore, is designed to avoid the "combination of individually minor" effects – to avoid the "tyranny of small decisions" or "death by a thousand cuts" scenario. See e.g., Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002); see also Section II.A. below (cumulative impacts discussion)

In the Colorado River corridor, for instance, motorboats, generators, helicopters (including passenger exchanges at Whitmore and Quartermaster), commercial air tours, commercial jets, military jets, administrative and tribal aircraft operations, and continued visitor crowding and congestion all have a combined effect on the Grand Canyon's natural soundscape. Collectively, the impacts of all of these activities – whether conducted by private individuals, concessioners, state agencies, or other federal and tribal entities – may rise to the level of impairment, and, as such, must be considered when making an impairment determination. See MP at 1.4.5. [15]

The Park Service failed to analyze and consider the overall, combined effects from *all* noise intrusions on the Park's natural soundscape. See FEIS at 357; at 386-87. The

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[15] The Park Service's own Wilderness Coordinator notes there has been an "incremental erosion of [the Colorado River corridor's] wilderness resource" since 1977. SAR 008033-34. The incremental impacts are from a "76% increase" in the total number of visitors, an approximately "500% increase in helicopter exchanges," the installation of new cable cares at three locations, exacerbation of crowding through implementation of "user-day pools," aircraft use over the corridor, and motorized boat use of the River. See id.; see also SAR 008133 (Superintendent Memo discussing concerns over cumulative impacts to wilderness character).

agency never assessed how its authorization of motorboats, generators, and helicopter exchanges in relation to other past, present, or future actions occurring in, above, or adjacent to the river *impair* the its natural soundscape. See id. In response to comments, for instance, the Park Service states that "no impairment of park resources or values is expected to occur from activities *associated with river recreation* under any of the alternatives." FEIS at 229 (emphasis added). This statement illustrates how the Park Service artificially limited the scope of its analysis to impacts associated with river recreation. See also AR 005821 (e-mail regarding the need to limit the scope of the impairment determination). In the FEIS, the Park Service does provide a *partial list* of other sources of noise pollution (see FEIS at 249, 357) and even concedes that its authorization of motorboats will "contribute to the overall cumulative effects of noise on the park's natural soundscape." See FEIS at 249; at 386-87. The Park Service, however, never takes the next step and applies and evaluates these findings when making its impairment determination. Nor is the perfunctory cumulative impacts analysis in the FEIS enough. See Great Basin Mine Watch v. Hankins, 456 F. 3d 955, 971 (9th Cir. 2006) (when assessing cumulative impacts, some "quantified or detailed information" must be provided – "general statements about possible effects and some risk" is not enough); Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 993 (9th Cir. 2004) (same).

3. Failure to consider previous NEPA documents and relevant scientific studies

In making an impairment determination, the Park Service must "consider any environmental assessments or environmental impact statements . . . relevant scientific

studies, and other sources of information; and public comments." MP at 1.4.7. Here, the Park Service failed to comply with this obligation. As mentioned earlier, in issuing a final decision to phase out motorboats in 1980, the Park Service extensively researched and studied the issue, reviewed twenty-nine studies, and ultimately found that the impacts to the river's natural soundscape and wilderness character from motorized use were significant. Supra, p.*; see SAR 004573 to 004590 (impacts). Yet, in this case, when issuing its impairment determination, the agency inexplicably failed to consider (let alone reference) these findings, the earlier EIS, or the overwhelming amount of public support for its phase out decisions. See FEIS at 387; SAR 002693-94. Nor does the Park Service provide *any* convincing statement of reasons, rationale, or explanation for abandoning its earlier EIS and CRMP which called for the phase out of motorboats to preserve the river's wilderness character. See The Wilderness Society, 353 F.3d at 1068; see also Louisiana Public Service Corp. v. FERC, 184 F. 3d 892, 897 (D.C. Cir. 1999) ("for the agency to reverse its position in the face of precedent it has not persuasively distinguished is quintessentially arbitrary and capricious").[16] Instead, the Park Service simply

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[16] The Park Service's 1980 EIS/CRMP calling for the phase out of motorboats (see SAR 00522) was revised in 1981 following the Hatch rider and again in 1989. These revisions to the 1980 CRMP were "politically driven . . . [and] done in the absence of additional public involvement" or NEPA compliance. SAR 011283. As described by the Superintendent of the Grand Canyon, the 1989 revision to the 1980 EIS/CRMP "did not provide a rationale to explain the incongruity of motorized rivercraft being used with the river corridor's potential wilderness designation. We can only state that the 1989 [Revision] was developed in response to the perceived regional political environment at that time. The [Revision], however, is clearly contrary to the instructions provided by the Wilderness Act and the Service's own management policies concerning the use of motorized equipment within wilderness and the responsibility of the agency to administer

concludes without *any* supporting documentation that the authorization of motorboats, generators, and passenger helicopter exchanges "would not result in the impairment of the natural soundscape in Grand Canyon National Park." Id.

4. The Park Service's authorization of motorboats, generators, and helicopter passenger exchanges "impairs" the Grand Canyon's natural soundscape

The record in this case reveals that if the Park Service had properly defined the baseline standard, adequately analyzed the cumulative impacts, and considered previous NEPA documents and relevant scientific studies, it would have had no choice but to determine that the authorization of these motorized uses "harms the integrity" of the Grand Canyon's natural soundscape and results in "impairment." See MP at 1.4.5.

Indeed, in the FEIS, the Park Service concedes as much – noting that the "Grand Canyon's natural soundscape is considered a *disappearing resource* that requires restoration, protection, and preservation." FEIS at 141-42 (emphasis added). The Park Service even admits that there continues to be a "*significant adverse effect*" on the Grand Canyon's "natural soundscape" that will not be alleviated by its decision to authorize motorboats, generators, and helicopters in the Colorado River corridor. See FEIS at 387. In fact, the Park Service's own "criteria" for defining impairment notes that an action that causes an "unacceptable [noise] disturbance" or results "in sound pollution that intrudes upon the tranquility and peace of visitors" results in impairment. See AR 023176-77.

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potential wilderness areas so as not to degrade their wilderness values." SAR 011066.

C. The Park Service's Failure to *Conserve* the Colorado River Corridor's Natural Soundscape and Wilderness Characteristics

The "fundamental purpose" of the Organic Act and the creation of the National Park System is to "conserve" park resources and values. See 16 U.S.C. § 1. This conservation "mandate is independent of the separate prohibition on impairment, and so applies all the time, with respect to all park resources and values," including a park's natural soundscape and wilderness characteristics. MP at 1.4.3. Pursuant to this conservation duty, the Park Service has "discretion to allow impacts to park resources and values." Id. Such discretion, however, is not unlimited. Rather, impacts to park resources and values are *only* allowed "when *necessary and appropriate* to fulfill the purposes of the park, so long as the impact does not constitute impairment." Id. As mentioned above, these motorized activities are not "necessary and appropriate."

Moreover, the Park Service is directed to "preserve, *to the greatest extent possible*, the natural soundscapes of parks" and, when impacts exist, "restore degraded soundscapes to the natural condition *wherever possible*." MP at 4.9 (emphasis added). Here, the agency cannot claim that it is impossible to, at the very least, attempt to restore the Grand Canyon's natural soundscape. Indeed, there are two viable, non-motorized alternatives (Alternatives B and C) presented in the FEIS. See AR 109601 (ROD); FEIS at 46-50.

IV. THE PARK SERVICE VIOLATED NEPA

A. The Park Service Failed to Take a Hard Look at the Cumulative Impacts to the Colorado River Corridor's Wilderness Character

Pursuant to NEPA, the Park Service must take a "hard look" at the cumulative impacts to the river's wilderness character. See 40 C.F.R. §§ 1502,1508.7; AR 104822 (defining wilderness character). The Park Service must provide "quantified or detailed information" of past, present and future projects in the EIS. Great Basin Mine Watch, 456 F. 3d at 971 (citing Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 993 (9th Cir. 2004)). When assessing cumulative impacts, the Park Service cannot "isolate the proposed project, viewing it in a vacuum." Grand Canyon Trust, 290 F.3d at 342-343, 346 (discussing impacts to Zion National Park).

Here, this means that the Park Service must provide a careful analysis of how collectively motorboats, generators, helicopters, administrative and tribal use of motorized vehicles (for both emergency and non-emergency service), aircraft tours, commercial jets, military jets, existing structures and improvements, congestion and crowding (from large groups and six launches per day), and the operation of Glen Canyon Dam impact the river's wilderness character. See id; see Wilderness Watch, 375 F. 3d at 1093.[17] Such an evaluation, however, is missing from the FEIS.[18] The FEIS' analysis of

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[17] The Park Service notes that helicopter passenger exchanges at Whitmore, *by themselves*, severely impact the River's wilderness character and create "dramatic contrast" to the river-running experience. Nearly "11,000 commercial passengers currently put-in or take-out at the Whitmore helipad (mile 187) via helicopter shuttles from the rim." AR 024083. The adverse impacts from helicopters include noise, physical impacts (downwash from rotors blows sand and gear), visual impacts, congestion, safety risks from low flying aircraft, camp competition for sites near the helipad, and creation of an artificial end to the trip. See AR 024087. In the Quartermaster area (between Diamond Creek and Lake Mead), the impacts are even more severe where "approximately 600 to 800 helicopter flights per week land and take off at 15 helipads." AR 017319 (EPA letter expressing concern about water quality impacts from helicopters and pontoon jet boats in

cumulative impacts on wilderness character is conclusory and does not detail the factors listed above even though there are "*huge* cumulative effects" to the resource. AR 015344; see FEIS at 791; see also FEIS at 781.

B. The FEIS Does Not Use High-Quality Information or Accurate Scientific Analysis.

The FEIS is not based on either high-quality information or accurate scientific analysis about the need for, propriety of or equity in allocation of commercial uses. An EIS must contain "high-quality information and accurate scientific analysis." The Lands Council v. Powell, 395 F.3d 1019, 1027, 1031 (9th Cir. 2005), citing 40 C.F.R. § 1500.1(b). This requirement applies in the context of programmatic plans. See Natural Resources Defense Council v. United States Forest Serv., 421 F.3d 797, 812-813 (9th Cir. 2005) (finding inaccurate economic analysis in Forest Plan EIS); Ecology Center v. Austin, 430 F.3d 1057, 1065 (9th Cir. 2005) (finding inadequate data and analysis in Forest Plan EIS). "If there is incomplete or unavailable relevant data, the EIS must

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the Quartermaster area).

[18] Notably, the Park Service's "wilderness character" section of the FEIS was not included in the draft EIS ("DEIS") which was submitted and circulated for public review and comment. See AR 001003 (e-mail regarding how section was dropped from DEIS, likely for political reasons). Rather, the wilderness section was only added later, "[i]n response to comment" on the DEIS. See FEIS at 370. As such, the public was never given the opportunity to review and submit meaningful comment on the Park Service's impacts analysis on wilderness character. The Park Service's failure in this regard, undermines their claim to have taken a "hard look" at the impacts to wilderness character. See 40 C.F.R. § 1500.1 (purpose of NEPA); Fund for Animals v. Norton, 281 F. Supp.2d 209, 226 (D.D.C. 2003) (lack of meaningful public review and comment undermined agency's hard look argument).

disclose this fact. 40 C.F.R. § 1502.22." The Lands Council, 395 F.3d at 1031. The CRMP acknowledges protecting wilderness and visitor's experience as goals, but fails to provide a proper analysis, based on high quality data, of how those goals are achieved in light of ongoing harm to the wilderness character of the river and evidence of the inequitable and unnecessary allocation of use for commercial services. Without supporting information and scientific analysis, "general statement[s] regarding the possible impact and risk involved 'do[es] not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." Ecology Center, 430 F.3d at 1067 (finding that the Forest Service's general conclusions about impacts to black-winged woodpeckers were not supported by meaningful explanation and evidence).

CONCLUSION

Wherefore, Plaintiffs respectfully request that the Court grant its motion for summary judgment, issue a declaratory judgment that the Park Service has violated its duty to preserve the Colorado River corridor's wilderness character, the Organic Act, Concession's Act, and NEPA as described above, and, pursuant to the Court's February 2, 2007 Case Management Order (Docket # 48), schedule a new Rule 16 conference to address the remedy phase of this litigation.

Respectfully submitted this 25th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, I electronically transmitted a complete copy of Plaintiffs' motion for summary judgment, statement of material facts, and memorandum of points and authorities in support of Plaintiffs' motion for summary judgment to the following CM/ECF registrants:

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