IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-15112

RIVER RUNNERS FOR WILDERNESS et al.,

Plaintiffs-Appellants,

v.

STEPHEN P. MARTIN et al.,[*]

Defendants-Appellees,

v.

GRAND CANYON RIVER OUTFITTERS ASSOCIATION and GRAND CANYON PRIVATE BOATERS ASSOCIATION,

Intervenors-Defendants-Appellees.

BRIEF FOR THE FEDERAL APPELLEES

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[*] Grand Canyon National Park Superintendent Stephen P. Martin is substituted for former Park Superintendent Joseph F. Alston pursuant to Fed. R. App. P. 43(c)(2).

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants River Runners for Wilderness et al. ("River Runners") invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered judgment in favor of Federal Appellees Supervisor Martin et al. and the Intervenor-Defendant-Appellees on November 27, 2007. ER 1.[1/] River Runners' Notice of Appeal was timely filed under Fed. R. App. P. 4(a)(1)(B) on January 11, 2008. ER 33. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

The National Park Service ("NPS") manages the Grand Canyon National Park ("Park") and the Colorado River within it ("Colorado River Corridor" or "CRC") in accordance with the Park Service Organic Act, 16 U.S.C. §§ 1, 2–4, the Concessions Act, 16 U.S.C. § 5951–66,[2/] NPS's 2001 Management Policies ("2001 Policies" or "MP"), and other applicable law. This case involves NPS's 2006 Colorado River Management Plan ("CRMP"), and presents four issues:

[1/] "ER" refers to the Plaintiffs-Appellants Excerpts of Record. "SER" refers to the Federal Appellees' Supplemental Excerpts of Record.

[2/] The National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. §§ 5951–66, repealed the Concessions Policy Act of 1965, 16 U.S.C. §§ 20–20g. *See* Pub. L. No. 105-391, 112 Stat. 3497 (1998). But the statutory standards pertinent in this case remain unchanged since 1965; for simplicity's sake, the regime is simply referred to as the "Concessions Act.

1. Whether NPS reasonably determined that the 2006 CRMP's authorization of commercial rafting concessions—including a certain amount of motorized rafting—was necessary and appropriate for public use and enjoyment of the CRC, and consistent to the highest practicable degree with the Park's preservation and conservation, as required by the Concessions Act.

2. Whether the 2001 Policies are enforceable against the agency, and, if so, whether the 2006 CRMP was consistent with their direction that "potential wilderness" be managed so as not to diminish suitability for eventual wilderness designation.

3. Whether NPS's allocation of river access between commercial and non-commercial visitors was valid under the Organic Act's "free access" standard.

4. Whether NPS reasonably determined that noise associated with motorized rafting would not have an impact on the Park's natural soundscape rising to the level of "impairment" under the Organic Act.

STATEMENT OF THE CASE

In managing the national parks, NPS must consider the needs of a variety of visitors. The 2006 CRMP allocates rafting[3/] access in the CRC between commercial visitors (customers of concessioners) and non-commercial visitors,

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[3/] "Rafting" in this brief encompasses all authorized watercraft use.

and places restrictions on rafting trips that use motors. The 2006 CRMP marked the culmination of a lengthy process in which NPS considered how to provide for all visitors' enjoyment while preserving Park resources and values for the enjoyment of future generations. Overall, the number of non-commercial "user-days" was increased to near-equality with commercial user-days. The number, size, duration, and season for motorized rafting trips all were reduced. And the non-commercial waiting-list was replaced with a weighted lottery designed to improve access for visitors who have not been on a trip recently.

River Runners sued NPS in March 2006, contending the 2006 CRMP was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). They alleged that: (1) NPS violated its duty to manage the CRC as wilderness; (2) NPS authorized commercial rafting concessions that were not "necessary and appropriate," in violation of the Concessions Act; (3) NPS failed to prevent impairment of the Park's natural soundscape, in violation of the Organic Act; (4) the 2006 CRMP's allocation of non-commercial rafting violated the Organic Act's "free access" standard; and (5) NPS failed to take a "hard look" at the environmental consequences of the 2006 CRMP, in violation of the National Environmental Policy Act ("NEPA").

Two separate groups that had supported the 2006 CRMP—Grand Canyon River Outfitters Association (representing concessioners) and Grand Canyon

Private Boaters Association (representing non-commercial visitors)—intervened as defendants. On cross-motions, the district court granted summary judgment for NPS and the intervenors on November 27, 2007. This appeal followed.

STATEMENT OF THE FACTS

I. The Grand Canyon National Park and Its Statutory Regime

Established in 1919, the Park consists of 1.2 million acres on the southern end of the Colorado Plateau in Arizona. The Colorado runs through it for 277 miles, from Lees Ferry to Lake Mead. SER 246, 267 (map). The CRC provides a unique combination of whitewater rapids and magnificent vistas, and a rafting trip through the Grand Canyon is one of the most sought-after backcountry experiences in America: over 22,000 visitors run the river annually, SER 265; "[m]ultiple sources indicate that demand exceeds supply for both commercial and noncommercial trips." SER 344. NPS must balance the needs of all visitors in meeting this demand, while preserving the CRC for future generations.

The Organic Act, as amended by the 1978 "Redwood Amendment," instructs NPS to "to provide for the enjoyment of the [national parks] 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 id.* § 1a-1 (noting statute is directed "to the common benefit of all the people of the United States"). The Organic Act authorizes the Secretary of the Interior to "make and publish such rules and

regulations as he may deem necessary or proper for the use and management of the parks," *id.* § 3, including for boating, *id.* § 1a–2(h). It also authorizes NPS to issue concessions, *id*., but the Concessions Act provides their specific management scheme, *id.* § 5951–66.

II. The Park and Wilderness

There has been debate over whether to designate the Park as wilderness. Consistent with the Wilderness Act, 16 U.S.C. § 1132(c), the Grand Canyon National Park Enlargement Act of 1975 required the Secretary of the Interior to report to the President "his recommendation as to the suitability or nonsuitability of any area within the [Park] for preservation as wilderness," *id.* § 228i-1. Only Congress may designate wilderness, and there is no timetable according to which Congress must act on recommendations. *See id.* § 1132. In 1977, NPS proposed the entire CRC and more than one million acres in the Park for wilderness designation. SER 16–18, 21–22. The Department of Interior held this proposal in abeyance until the first CRMP's completion in 1980. SER 276, 350. NPS then proposed that 235 miles of the CRC be designated as "*potential* wilderness pending the phase out of non-wilderness uses by motorized craft." SER 60 (emphasis added). In 1993, NPS again proposed designating 235 miles as "potential wilderness . . . pending resolution of the motorized riverboat issue." SER 99.

Congress has never designated any portion of the Park as wilderness. SER 276, 350–53, 376. Until Congress acts, NPS will continue to manage the CRC as "potential wilderness," SER 351, meaning, *inter alia*, that NPS "will take no action that would diminish the [CRC's] wilderness suitability" and "will seek to remove . . . the temporary, non-conforming conditions that preclude wilderness designation," Addendum 10–11 (MP 6.3.1). NPS and the Department of the Interior have determined that the 2006 CRMP's authorization of motorboat use does not preclude wilderness designation. SER 164, 276, 352. Nor would eventual wilderness designation preclude continued use of motorboats in the CRC, because the Wilderness Act states: "Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue . . . ." 16 U.S.C. § 1133(d)(1); *see, e.g.*, *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1119–20 (8th Cir. 1999) (discussing motorboat use in Boundary Waters Canoe Area Wilderness); *see also* Addendum 14 (MP 6.4.3.3) (contemplating "continuation of motorboat and airboat use under certain circumstances in which those activities were established prior to wilderness designation").

In 2004, the Department of the Interior's Assistant Secretary for Fish and Wildlife and Parks issued a policy guidance memorandum stating that, "in developing the [2006] CRMP the NPS may consider alternatives that permit the

continued use of motorboats on the Colorado River in the park without violating the Wilderness Act or any written NPS policy." SER 165.

III. History of NPS's Management of the Colorado River Within the Park

Use of the CRC increased substantially after completion of the Glen Canyon Dam in 1963 made river-running feasible year-round. SER 265. Because of resource concerns and user conflicts, NPS issued a River Use Plan in 1972, SER 1, 265, the first in a series of management efforts addressing visitor use impacts and the CRC's "carrying capacity," *see* SER 10–12, 37, 69, 81–86; *see also* ER 432–33; SER 281–83 (discussing carrying capacity). NPS has issued three previous CRMPs, in 1980, 1982, and 1989. All allocated a limited number of"user-days" between professionally-guided (i.e., commercial) visitors and self-guided (i.e., non-commercial) visitors, with commercial visitors receiving roughly two-thirds (115,500 vs. 54,450). SER 50, 76–80, 90.

In the 1980 CRMP, NPS announced a motorboat phase-out, believing this consistent with its earlier wilderness proposal. SER 44. But in response to an appropriations bill provision targeting the phase-out, Pub. L. No. 96-514, § 112(a), 94 Stat. 2957, 2972 (1980), NPS promulgated a new CRMP in 1982 that abandoned it. SER 74. In so doing, it stated that the Wilderness Act's exception allowing established motorboat use to continue "clearly applies to motor use on the Colorado river." SER 84. The 1989 CRMP likewise did not call for phasing

out motorboats. SER 89–90.

In August 1995, NPS approved a general management plan setting direction and goals for management and use of the entire Park. SER 113. One objective was to "[p]rovide a wilderness river experience on the Colorado River," but NPS noted that "this objective will not affect decisions regarding the use of motorboats on the river." SER 119. It directed that the 1989 CRMP would "be revised as needed to conform with the direction" in the general management plan, and that "[t]he use of motorboats will be addressed in the revised [CRMP], along with other river management issues identified through the scoping process." SER 120.

IV. The 2006 CRMP Planning Process

The lengthy, complex process of developing the 2006 CRMP required NPS to consider the needs and enjoyment of visitors seeking a variety of river experiences, while preserving Park resources for future generations.

Planning began in 1997 with public scoping workshops and comments. ER 444–45. In 2002, NPS published a notice of intent to prepare an environmental impact statement ("EIS"), in accordance with NEPA. 67 Fed. Reg. 40,749 (June 13, 2002). The agency held seven additional public scoping meetings and stakeholder workshops, ER 444–45, and a draft EIS ("DEIS") was released for public comment in the fall of 2004, 69 Fed. Reg. 58,947 (Oct. 10, 2004). The DEIS focused on making an equitable allocation of river use between commercial

and non-commercial visitors without exceeding the CRC's carrying capacity. SER 207–09. It analyzed eight alternatives for managing the upper stretch of the river, from Lees Ferry (River Mile 0) to Diamond Creek (River Mile 226) and five alternatives for managing the Lower Gorge of the river, from Diamond Creek (River Mile 226) to Lake Mead (River Mile 277).[4/] SER 199–206.

Notably, NPS received joint DEIS comments from a coalition representing both concessioners (and their customers) and non-commercial visitors. ER 188. This Court has recognized that "[b]alancing the competing and often conflicting interests of motorized water craft users . . . and non-motorized water craft users . . . is no easy task." *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1173 (9th Cir. 2000). The coalition here characterized its effort as "the coming together of Grand Canyon river user groups that traditionally have been embroiled in deep conflict." SER 188. They supported equal allocation of annual commercial and non-commercial use, continued authorization of appropriate levels of motorized use, seasonal adjustments resulting in fewer simultaneous trips, and improvements

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[4/] This case focuses more on the upper stretch, where most of the proposed potential wilderness is located. The Park adjoins the Hualapai Indian Reservation for 108 miles along the Lower Gorge. The tribe is authorized to make and enforce laws within the exterior boundaries of its reservation for the benefit of tribal members. SER 270. NPS and the tribe signed a Memorandum of Understanding for management of the Lower Gorge of the CRC in 2000, SER 348, and the tribe helped develop the 2006 CRMP EIS as a cooperating agency, SER 268.

to the non-commercial permit system. SER 188–95. *Cf.* SER 171, 197 (River Runners action alert and DEIS comments stating NPS must eliminate motors).

NPS modified the DEIS's preferred alternative somewhat in response to comments by the coalition and others, ER 445, SER 248, but did not adopt all proposed suggestions. In November 2005, the agency released a three-volume Final EIS ("FEIS"). SER 245, *available at* http://www.nps.gov/archive/grca/crmp/documents/index.htm. On February 17, 2006, the NPS Intermountain Regional Director signed the Record of Decision ("ROD") for the 2006 CRMP. ER 415.

V. The 2006 CRMP's Allocation of River Access

The 2006 CRMP increased non-commercial access and reduced commercial motorized rafting. The ROD's selected alternatives—Modified Alternative H for Lees Ferry to Diamond Creek, Modified Alternative 4 for the Lower Gorge—were chosen for the mix of visitor uses they provided while preserving Park resources.

There had been a roughly two-to-one ratio of commercial to non-commercial user-days in the three previous CRMPs (115,500 commercial user-days, 54,450 non-commercial user-days). SER 46, 77, 90. The 2006 CRMP left the cap on commercial user-days unchanged, but *removed* the non-commercial cap. ER 418; SER 304. By doubling the annual number of non-commercial launches (from 253 to 503), NPS estimated that non-commercial user-days would

increase to 113,486—almost equal to commercial user-days. *Compare* SER 290 (status quo) *with* SER 305 (preferred alternative). The overall ratio during the summer (May–August) and "shoulder" (March–April; September–October) seasons was estimated at 59.3% commercial (115,500 user-days) to 40.7% non-commercial (79,399 user-days). *See* ER 418; SER 305. Non-commercial launches increased in *all* seasons. *See* SER 290; 305.

Commercial motorized rafting was reduced. Annual commercial motorized launches decreased from 473 (with 14,487 total passengers) to 429 (with 13,177 passengers). ER 418; SER 290, 305. Maximum group size and trip length for commercial motorized trips were reduced. *See* SER 304–06. Whereas motorized trips had previously been allowed during nine months out of the year, the 2006 CRMP only allowed them during five-and-a-half months; no commercial trips at all were allowed during the winter season (November–March). *See* SER 303–06. NPS imposed additional restrictions on passenger exchanges by helicopter, to reduce noise impacts. *See* ER 418–19; SER 288, 306. NPS rejected alternatives that would have increased motorized and overall commercial user-days and launches, allowed motorized rafting eight months out of the year, and allowed larger motorized commercial trip lengths and group sizes. *See* SER 249–53.

The 2006 CRMP also changed the non-commercial permit process, instituting a weighted lottery system in which trip leaders' chances of obtaining a

permit vary depending on whether they have been on a CRC trip in the last four years. SER 255. Non-commercial permits for the Lower Gorge are still distributed on a first-come-first-served basis. SER 326.

SUMMARY OF ARGUMENT

River Runners contend that commercial motorized rafting is inconsistent with the CRC's wilderness values and must be eliminated. But there is no designated wilderness in the Park, rendering the Wilderness Act inapplicable. While a 1993 NPS wilderness update is technically pending, Congress has taken no action to designate wilderness in the Park in over thirty years since designation was first proposed.

Unable to use the strict Wilderness Act, River Runners seek to advance their agenda by manufacturing stringent requirements out of (1) what is in fact a highly deferential statutory scheme that authorizes NPS to issue concessions for public enjoyment of the national parks, and (2) an unenforceable policy guidance document for NPS staff. These efforts are fruitless, because NPS fully complied with applicable law and policy in developing and promulgating a CRMP that addresses the needs and enjoyment of all visitors, reduces motorized access, and protects Park resources and values.

Acting within its broad Concessions Act discretion, NPS reasonably determined that authorization of commercial rafting, including a certain amount of

motorized rafting, was necessary and appropriate to accommodate all visitors and provide for public use and enjoyment of the CRC. NPS's determination was based on analyses of actual past use and carrying capacity, achievement of a range of management objectives, and assessment of impacts on Park resources (including wilderness character) and visitor experience (including primitive recreation opportunities). Authorization of commercial rafting was consistent to the highest degree practicable with preservation and conservation of the Park's resources and values, including wilderness character.

The 2001 Policies are not judicially enforceable against NPS under the law of this Circuit, and in any event do not contain the prohibition on motorized rafting that River Runners seek. Furthermore, the 2006 CRMP is consistent with their statement that "potential wilderness" such as the CRC be managed so as not to diminish its suitability for designation. Motorized rafting is a temporary and transient use that does not permanently impact wilderness resources and values. Nor would wilderness designation require NPS to prohibit motorized rafting in the CRC, because the Wilderness Act contains an exception for established uses.

The 2006 CRMP is also valid under the deferential standards of the Organic Act. It improves "free access" for non-commercial visitors: annual user-days for commercial and non-commercial visitors are expected to be almost equal, non-commercial launches have been increased in all seasons, motorized rafting has

been reduced, and the non-commercial permit system has been revised. NPS also reasonably determined that motorized rafting would not have an impact on the Park's natural soundscape that rises to the level of "impairment" under the statute. River Runners' contrary argument would absurdly require NPS to prohibit human activity causing any noise at all.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo, viewing NPS's action from the same position as the district court. *Bader v. N. Line Layers, Inc.*, 503 F.3d 813, 816 (9th Cir. 2007).

Review under the APA's arbitrary and capricious standard "is narrow and deferential. A reviewing court must consider whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . [It] is not empowered to substitute its judgment for that of the agency.'" *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *see also Lands Council v. McNair*, ___ F.3d ___, No. 07-35000, 2008 WL 2640001, at *4 (9th Cir. July 2, 2008) (en banc). Agency action is valid if there is a reasonable basis for it; a reasonable basis exists where the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made. *Arrington*, 516 F.3d at 1112. A court may "uphold a decision

of less than ideal clarity if the agency's path may reasonably be discerned," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983), but review is confined to the administrative record, *id.* at 50. Like the "substantial evidence" test for review on the record of agency hearings, the "arbitrary or capricious" standard is akin to, if not more deferential than, the "clearly erroneous" test for appellate court review of trial court decisions. *See Dickinson v. Zurko*, 527 U.S. 150, 162–63, 164 (1999).

ARGUMENT

I. The 2006 CRMP's Allocation of Commercial Motorized Rafting Was Valid Under the Concessions Act

The Concessions Act states:

> [T]he development of public accommodations, facilities, and services in units of the National Park System shall be limited to those accommodations, facilities, and services that—
>
> (1) are necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located; and
>
> (2) 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). This reflects NPS's complicated task of meeting a broad range of visitor needs while preserving the Park for the enjoyment of future generations. In developing the 2006 CRMP, NPS appropriately determined that commercial motorized rafting concessions were "necessary and appropriate" for

public use and enjoyment of the CRC. Motorized rafting is a temporary and transient use, and NPS's allocation was consistent to the highest practicable degree with preservation and conservation of the Park.

A. The Concessions Act's "Necessary and Appropriate" Standard Is More Deferential to NPS than the Inapplicable Wilderness Act

Over and above the APA's narrow standard of review, this Court and others have shown considerable deference to NPS's determinations under the Concessions Act. *See* George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 Denv. U. L. Rev. 729, 741 (1997) ("[NPS] discretion to limit recreational activities and facilities by commercial enterprises has been upheld in every litigated instance located. . . . Research has disclosed only a single instance in which NPS discretion in allowing more intensive recreation through facility development has been judicially disturbed.");[5] *see, e.g.*, *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1254 (9th Cir. 1979) (upholding NPS's allocation of commercial and non-commercial CRC rafting permits under Concessions Act, and stating that "[w]here several administrative solutions exist for a problem, courts will uphold any one with a rational basis"); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1227 (9th Cir.

[5] The "single instance" did not turn on the Concessions Act, but on NPS's failure to perform NEPA analyses before construction of a hotel. Coggins & Glicksman, *Concessions Law and Policy in the National Park System*, 74 Denv. U. L. Rev. at 741 (citing *Sierra Club v. Lujan*, 716 F. Supp. 1289 (D. Ariz. 1989)).

2004) (holding location of conference center did not violate Concessions Act's limitation of development to sites consistent with preservation and conservation, despite inconsistency with state coastal zone management plan's development limitations). The statute's legislative history confirms NPS's discretion, noting the importance—subject to a "necessary and appropriate" showing—"of encouraging private concessions to provide such facilities *as the Secretary finds desirable* for the accommodation of visitors." S. Rep. No. 89-765, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3489, 3493 (emphasis added).

Contrary to River Runners' argument, Br. 10, the Wilderness Act's stringent requirement of a "specialized" necessity finding for commercial services is inapplicable, because the Park contains no designated wilderness. *Cf.* 16 U.S.C. § 1133(d)(5) ("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.") (emphasis added); *see also Wilderness Soc'y v. Norton*, 434 F.3d 584, 593 (D.C. Cir. 2006) (stating "[n]othing in the statute" provides "that NPS must manage wilderness-suitable areas as if they were designated wilderness").

In marked contrast to its deferential Concessions Act approach, this Court has strictly construed the Wilderness Act's "to the extent necessary" standard. In *High Sierra Hikers Association v. Blackwell*, 390 F.3d 630 (9th Cir. 2004), the

Forest Service issued permits to commercial packstock operators who facilitated public access to designated wilderness areas. This Court held that issuing the permits without a "specialized" necessity finding violated the Wilderness Act. *See id.* at 647 ("The finding of necessity required by the Act is a specialized one. The Forest Service may authorize commercial services only 'to the *extent* necessary.' Thus, the Forest Service must show that the number of permits granted was no more than was necessary to achieve the goals of the Act.") (citation omitted). The Court emphasized that its holding was based on and limited to the Wilderness Act: "The limitation on the Forest Service's discretion . . . flows directly out of the agency's obligation under the Wilderness Act to protect and preserve wilderness areas." *Id.*; *see also Sierra Club v. Lyng*, 662 F. Supp. 40, 43 (D.D.C. 1987) (holding Secretary of Agriculture lacks typical "broad management discretion . . . when he takes actions within [designated] Wilderness Areas for the benefit of outside commercial and other private interests.").

While the Wilderness Act allows commercial services only "to the extent necessary for activities which are proper for realizing . . . wilderness purposes," 16 U.S.C. § 1133(d)(5), the Concessions Act focuses on enhancing visitor experience, requiring NPS to "provid[e] for . . . enjoyment [of park resources] in a manner that will leave them unimpaired." *Id.* § 5951(a); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 805 (2003) (stating Congress authorized NPS to

issue concessions in order "[t]o make visits to national parks more enjoyable for the public"). The Concessions Act omits the Wilderness Act's "to the extent necessary" language, despite the fact that the statutes were enacted months apart. *See* Pub. L. No. 89-249, § 1, 79 Stat. 969, 969 (1965) (Concessions Act); Pub. L. No. 88-577, § 4(d)(6), 78 Stat. 890, 895 (1964) (Wilderness Act). NPS's broad Concessions Act discretion in allocating commercial motorized rafting access to the CRC reflects the balancing of visitor needs it must perform.[6/]

B. NPS Assessed Whether Its Allocation of Commercial Rafting Access Was Necessary and Appropriate Through Analyses of Use Levels, Carrying Capacity, and Visitor Experience

NPS properly determined that commercial rafting concessions, including a certain amount of motorized commercial rafting, were "necessary and appropriate." As the ROD explained, "[d]escription and analysis of potential impacts on the affected environment resulting from commercial operations are

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[6/] NPS did not "concede" before the district court, River Runners Br. 10, that the Wilderness Act standard applies to Concessions Act claims. NPS used the term "analogous" in its briefing. ER 45. But, as the district court recognized, NPS did so in the context of arguing that (1) the Wilderness Act did not apply and (2) "the 2006 CRMP survives a challenge under the Concessions Act for the same reasons it would survive a challenge under the Wilderness Act if that Act applied." ER 19. The Wilderness Act and Concessions Act standards are textually different, and this Court has emphasized that the Wilderness Act's requirement of a "specialized" finding of necessity "flows directly out of the agency's obligation under the Wilderness Act." *Blackwell*, 390 F.3d at 647. Regardless, NPS's determination that commercial services were "necessary and appropriate" here would survive a challenge under either statute. *See infra* at 29–30.

found throughout the FEIS. Determination of the *types and levels of commercial services that are necessary and appropriate* for the [CRC] were determined through these analyses." ER 421 (emphasis added). The FEIS clearly determined that commercial rafting trips were necessary and appropriate:

> Since many visitors who wish to raft on the Colorado River through Grand Canyon possess neither the equipment nor the skill to successfully navigate the rapids and other hazards of the river, [NPS] has determined that it is necessary and appropriate for the public use and enjoyment of the park to provide for experienced and professional river guides who can provide such skills and equipment.

SER 278; *see also* SER 454.

NPS based its allocation of necessary commercial rafting concessions on thorough analyses of known and estimated use levels. Consideration of past use was useful in assessing need, because "[m]ultiple sources indicate that demand exceeds supply for both commercial and noncommercial trips in the Grand Canyon." SER 344. In developing action alternatives that allocated varying amounts of rafting access between different groups (commercial and non-commercial, motorized and non-motorized), NPS relied "upon a database containing details of every trip that launched from Lees Ferry between 1998 and 2003." SER 448; *see also* ER 434 (describing "computer model using artificial intelligence applied to behavioral data collected from actual existing trips"); SER 365 ("The visitor use and experience analysis describes patterns of existing use

and impact levels that help define the range of recreation opportunities available under existing management or other management strategies.") (citations omitted).

NPS also gauged need by soliciting public input. During scoping, the agency received more than 55,000 public comments, held 7 public meetings, and conducted stakeholder workshops. ER 444–45. It received 36,000 comments, including many on the allocation issue, during the DEIS public comment period. ER 445; 69 Fed. Reg. at 58,947; *see, e.g.*, SER 361 ("Many people advocated strongly for a 50:50 commercial to noncommercial user-day allocation ratio, and the FEIS allocation proposal conforms closely to this ideal."); SER 355–56, 358, 364, 370–75 (addressing comments on commercial rafting concessions and discussing both need and resource impacts).

Additionally, NPS's alternatives analysis was guided by consideration of whether key management objectives would be met, including: (1) "Provid[ing] a diverse range of quality recreational opportunities for visitors to experience and understand the environmental interrelationships, resources, and values of" the Park; and (2) ensuring that "[l]evels and types of use enhance visitor experience and minimize crowding, conflicts, and resource impacts." ER 433. NPS also considered whether alternatives satisfied NEPA criteria for an EIS's environmentally preferred alternative, which include attaining a wide range of

beneficial uses without degradation, and providing for diversity and variety of individual choice. *See* SER 319–24 (citing 42 U.S.C. § 4331(b)).

The "appropriateness" of commercial rafting concessions, including motorized commercial rafting, was taken into account through examination of the CRC's carrying capacity, visitor experience, and resource impacts. *See* SER 281–86 (describing carrying capacity analysis); SER 334–36, 380–81, 412 (describing visitor use and experience values); SER 367 ("NPS has strived to find equitable solutions for all our users, recognizing that the river can only sustain a certain number of users at one time. Alternatives were created within the constraints of the physical and social carrying capacities of the [CRC]."); *see also* SER 447 (providing detail on impact measures, relevant literature, assumptions, and research findings relevant to visitor use and experience impact analysis). The various alternatives' impacts on Park resources, as well as visitor use and experience, were exhaustively analyzed in Volume II of the FEIS. *See* SER 378–79 (analyzing impacts on natural resources); SER 380–81 (analyzing impacts on visitor experience).

C. NPS Determined That Its Allocation of Motorized Rafting Concessions Was Necessary and Appropriate

River Runners contend that "NPS failed to ever find that motorized commercial services are necessary." Br. 12. Predictably, this is contradicted by

the administrative record, because the 2006 CRMP was *designed* to address motorized access. *See* SER 120, 266 ("The use of motorboats will be addressed in the revised plan . . . ."). Motorized trips have made up 77% of the commercial rafting trips in the CRC, SER 336, and determination of "[a]ppropriate levels of motorized and nonmotorized boat use" was identified as a pressing issue during public participation, *see* SER 266, 355, 358–60. "[E]valuat[ion of] the appropriate level of motorized raft use" was a fundamental component of the FEIS. SER 276. Overall, the 2006 CRMP *reduced* the number, size, duration, and season for motorized trips, indicating that NPS was weighing the need for such trips with the need for other visitor experiences, while preserving Park resources. *See* ER 418; SER 250, 290, 303–05, 344.

1. NPS Determined That Its Allocation of Motorized Rafting Concessions Was Necessary to Satisfy Visitor Experience Objectives

The FEIS's action alternatives allocated varying levels of access to commercial and non-commercial users, both motorized and non-motorized, based on extensive analyses, including actual and estimated use levels. *See* SER 306 (summarizing alternatives); SER 325 ("The development of alternatives involved decisions about use levels, types of trips, group sizes, trip length, commercial and noncommercial use, and whether motorized boats or helicopter shuttles would be allowed."). Collectively, the alternatives involved the following ranges of

commercial motorized allocations: 70,104–83,076 user-days; 338–508 daily launches; and 9079–15,256 total passengers. *See* SER 289–305. Various maximum trip lengths, maximum group sizes, and seasons were evaluated. *See* SER 288.

The starting point for analysis was a database of actual past trips, i.e., the level of access, including motorized boat access, that had been necessary to meet past demand. *See also* SER 344 (indicating that demand exceeds supply for all trips). In evaluating existing use levels, NPS divided past trips into "four key types": motorized commercial trips; non-motorized commercial trips; large non-commercial trips; and small non-commercial trips. SER 448. It derived a series of monthly values (including average launches, trip length, and simultaneous trips) "from the actual trips in the database" for "each of the four trip types." SER 448. FEIS alternatives were then developed by setting limits on certain variables (such as daily launches and trip length) "for each type of trip." SER 448.

The FEIS specifically "evaluate[d] the appropriate level of motorized raft use on the river, including analyzing two no-motor alternatives." SER 276. But NPS noted that, while the no-motor alternatives (B and C) met some 2006 CRMP management objectives, they did not meet the objective of providing a diverse range of quality recreational opportunities for visitors, or NEPA's individual choice criterion. *See* SER 316, 323. That is, these alternatives failed to provide

the level of motorized boat access necessary to meet visitor-use-experience objectives. While they were feasible and received serious consideration and analysis, the no-motor alternatives were ultimately rejected in favor of the preferred alternative, which better met the full list of management objectives. NPS explained this balancing:

> [R]eductions in daily launches, trips at one time, trip length, and group size contribute to resource preservation through reductions in impacts. These reductions, however, must be balanced with the ability of each alternative to offer the widest range of appropriate river experiences. Alternatives would contribute to the achievement of this element of the criterion based on the degree to which they would offer a balanced variety of trip types and characteristics (motorized and nonmotorized, varied group sizes, seasonal access to commercial and noncommercial trips, varied exchange options and trip lengths, and opportunities for solitude or social experience).

SER 320; *see also* SER 368 ("In creating alternatives, the NPS has attempted to provide the greatest access to the greatest number of users consistent with resource protection. The NPS believes it is important to provide diverse trip types and opportunities.").

The FEIS did not only analyze whether motorized rafting access was sufficient to meet the needs of visitors seeking motorized trips. It also explained why *limiting* motorized rafting to appropriate levels was important for providing a diverse range of recreational opportunities, including catering to non-motorized visitors' needs. *See, e.g.*, SER 336 (noting that user-day limits are designed to

reduce the social impacts of motorized trips on other visitors' desire for primitive recreation).

2. The Record Demonstrates That Motorized Rafting Concessions Are Necessary for Public Use and Enjoyment of the CRC

River Runners acknowledge the "general need for the commercial services providing professional guides who offer equipment and skills to take people, who would otherwise not have the skill or equipment, rafting down the river." Br. 12. But they insist that "the record confirms that motorized commercial services are not necessary or appropriate for the public to use or enjoy the river," providing twelve citations to what are actually only three superseded NPS statements (all from the 1970s) and one public comment. Br. 16.

In the first place, APA arbitrary and capricious review does not allow plaintiffs' views to supplant an agency's reasonable judgment based on substantial evidence in the administrative record before it, even if a reviewing court actually prefers the plaintiffs' views. *See Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996) ("We cannot substitute our judgment of what might be a better regulatory scheme . . . ."); *see also Lands Council*, ___ F.3d at ___, 2008 WL 2640001, at *4 (stating court may "not substitute [its] judgment for that of the agency"). This is especially so given courts' deference to NPS on Concessions Act claims. *See supra* at 16–19. In developing the 2006 CRMP, NPS considered

the 1970s documents, *see, e.g.*, SER 445, but focused on more recent data and analyses that built upon earlier research, *see, e.g.*, SER 121, 133–35, 148, 211, 237–42, 447.

Second, the record shows that motorized trips *are* necessary. The FEIS analyses support NPS's determination that the selected mix of motorized and non-motorized opportunities best satisfy management objectives and NEPA criteria, allowing more people to enjoy the river in diverse ways with less impact on the resources. *See supra* at 21–22. Concessioners and non-commercial visitors alike supported the 2006 CRMP. *See* SER 188; *supra* at 9–10.

Record evidence also indicates that motorized trips are indeed necessary for many visitors, whether because of time, cost, or special needs. Motorized trips have accounted for 77% of all commercial trips, SER 336, and many non-commercial trips are motorized, too. As the FEIS explained, motorized trips move faster than non-motorized trips, allowing visitors with less time at their disposal to run more of the river. *See, e.g.*, SER 338 ("This allows most motorized trips to travel from Lees Ferry to Whitmore in six days, or Lees Ferry to Lake Mead in seven."); SER 159; *see also* SER 142, 342 (indicating trip length is among most important factors for visitors selecting motorized commercial trips). Because motorized trips tend to take less time, they also tend to be cheaper. *See* SER 221 ("Motor trips are generally shorter and offered for a lower total price."); SER 347

("For trips of the same length, those using motors typically charge a lower price per day than those using oars."). And another benefit of temporally shorter motorized trips is that they allow substantially more visitors to run the river overall, because the river can accommodate only a certain number of trips at one time. *See* SER 159, 359, 368–69. Because they are able to travel quickly to alternative campsites and attractions, they can also alleviate overcrowding. SER 284–85, 359.

Time and money aside, motorized rafting provides opportunities for many visitors that oar-powered trips do not. The district court's examination of the administrative record showed that "motorized trips are frequently chartered for special-needs groups, educational classes, family reunions, or to support kayaks or other paddle trips." ER 23; *see* SER 172–74, 177–87; *see also* SER 146 (study listing "Less strenuous/easier" and "Allows kids/elderly/disabled" among reasons why certain visitors prefer commercial motorized trips); SER 156–57 (study noting that average age of commercial rafters has increased over time, and attributing trend in part to "comfort and accessability" for "older individuals"); SER 342 (noting that commercial motor passengers reported interest in "hiking easier trails than oar passengers"). Finally, while "motorized and nonmotorized rafts are about equally safe," SER 366, some visitors feel safer in motorized rafts, SER 143, 146–47, 156, 220.

3. NPS's Necessity Determination Would Satisfy This Court's Reading of the Wilderness Act, Were It Applicable

River Runners contend NPS failed to make a "specialized" finding that the specific amount of commercial motorized rafting authorized by the 2006 CRMP was necessary, relying on *Blackwell*. Br. 17. This argument fails for two reasons.

First, the "specialized" necessity finding in *Blackwell* was required by the Wilderness Act's "'to the extent necessary'" language, and "flow[ed] directly out of the agency's obligation under the Wilderness Act to protect and preserve wilderness areas." 390 F.3d at 647 (quoting 16 U.S.C. § 1133(d)(5)). The Wilderness Act is inapplicable here, and NPS is entitled to broad discretion under the Concessions Act, which does not contain the "to the extent necessary" language. *See supra* at 16–19.

Second, NPS's authorization of commercial motorized rafting would be valid even under the inapplicable Wilderness Act standard. In *Blackwell*, this Court concluded that it was arbitrary and capricious for the Forest Service to issue commercial special-use permits at pre-existing levels despite acknowledging environmental damage and failing to perform required NEPA analyses. Here, by contrast, NPS performed extensive analyses of past use, visitor experience, and resource impacts in its voluminous FEIS. *See supra* at 19–22. Furthermore, NPS *reduced* motorized access in the 2006 CRMP: while total commercial user-days

remained unchanged, the numbers of motorized commercial launches and total passengers decreased, as did maximum trip lengths and group sizes. *See* SER 288, 290, 305. Motorized trips had previously been allowed for nine months of the year, but the 2006 CRMP reduced that to five-and-a-half months. SER 288. In making these reductions, NPS rejected other alternatives that would have allowed more commercial motorized user-days and launches, SER 300, larger group sizes, and a longer motor season, SER 288; *see also* SER 249–53. NPS's determination that the 2006 CRMP authorized motorized rafting concessions at necessary levels was thus far better supported than the Forest Service's finding in *Blackwell*, and easily passes muster under the deferential Concessions Act standard.

D. NPS's Authorization of Commercial Motorized Rafting Was Consistent with Protecting the Values of the CRC to the Highest Degree Practicable

The Concessions Act requires that concessions be "consistent to the highest practicable degree with the preservation and conservation of the resources and values" of the Park. 16 U.S.C. § 5951(b)(2). This is not an all-or-nothing command, and the textual emphasis on practicability shows that NPS is entitled to deference. *See, e.g.*, *City of Sausalito*, 386 F.3d at 1227 (holding NPS did not violate "preservation and conservation" standard even when locating conference center in area where state coastal zone management plan only allowed commercial recreation facilities incidental to park use).

River Runners contend that the allocation of commercial motorized rafting access was inconsistent with "the wilderness river experience, the natural soundscape, primitive and unconfined recreation, and the experience of solitude," again relying largely on NPS documents from the 1970s. Br. 22. But the 2006 CRMP's management objectives, which "must be achieved to a large degree for the action to be considered a success," SER 272, specifically provided for protection of these values. *See* SER 273–75 (listing objectives for natural soundscape, "provid[ing] a wilderness river experience," and preservation of wilderness character). NPS reasonably concluded that the allocation of motorized commercial rafting met these objectives. SER 312, 317–18.

NPS analyzed the various alternatives' impacts on the values listed by River Runners, *see* SER 378, 388 (natural soundscape); SER 382–83, 428–42 (wilderness character, including opportunities for solitude and primitive recreation); SER 307–310 (table summary), as well as their compliance with management objectives and NEPA criteria, *see* SER 311–18, 322–24 (table summaries); *see also* SER 127–28 (study showing that 90% of commercial users would consider the CRC wilderness, and that 85% of non-commercial users were able to experience solitude often or frequently). For visitors seeking "outstanding opportunities for solitude or a primitive and unconfined type of experience," NPS stated that its preferred upper stretch alternative would have "adverse [impacts] of

moderate intensity during the peak use motorized periods, [but] beneficial and negligible impacts during the longer non-motorized use period with smaller group size." SER 442. The preferred alternative reduced the number of motorized launches and passengers (as well as their maximum group sizes and trip lengths), and barred motorized trips for six-and-a-half months of the year while increasing non-commercial launches in all seasons. *See* SER 288, 290, 305. It was reasonable for NPS to conclude that the allocation met the objectives identified by River Runners.

II. NPS's 2001 Policies Are Not Enforceable Against the Agency, and the 2006 CRMP Nevertheless Complied with Them

As River Runners concede, the Wilderness Act is inapplicable because Congress has designated no wilderness areas in the Park in the thirty-one years since NPS's proposal. *Cf.* 16 U.S.C. § 1133(b). To the contrary, when NPS suggested in 1980 that motorized rafting be phased out, Congress responded with legislation mandating that "[n]one of the funds appropriated [to NPS] be used for the implementation of any management plan for the [CRC] which reduces . . . commercial motorized watercraft excursions for the preferred use period." Pub. L. No. 96-514, § 112(a), 94 Stat. 2957, 2972 (1980). This prompted NPS to abandon the phase-out. SER 74; *see also* 126 Cong. Rec. S14,466–70 (daily ed. Nov. 14, 1980) (statement of Sen. Hatch); SER 62–68; *Flick v. Liberty Mut. Fire Ins. Co.*,

205 F.3d 386, 394 (9th Cir. 2000) (noting "the simple, but powerful command of the Appropriations Clause"). While River Runners characterize a wilderness recommendation as "pending," it has been fifteen years since NPS's last "update," SER 91, and there has never been any congressional action suggesting that designation is likely.

With the statute unavailable, River Runners seek to impose Wilderness Act-like duties on NPS through the 2001 Policies, Br. 25–26, which state that NPS "will encourage and facilitate those uses of wilderness that are in keeping with the definitions and purposes of wilderness and do not degrade wilderness resources and character." Addendum 14 (MP 6.4). But, as the district court found, the 2001 Policies are not judicially enforceable against NPS, because they "do not prescribe substantive rules, nor were they promulgated in conformance with the procedures of the APA." ER 11. Furthermore, the 2006 CRMP *was consistent with* the 2001 Policies, because seasonal motorized rafting does not preclude wilderness designation or otherwise diminish wilderness suitability.

A. The 2001 Policies Are Not Enforceable Against NPS

The 2001 Policies are not enforceable against NPS because they neither purport to create substantive rules, nor were they promulgated in conformance with rulemaking requirements. *See W. Radio Services Co. v. Espy*, 79 F.3d 896,

900 (9th Cir. 1996) ("[W]e will not review allegations of noncompliance with an agency statement that is not binding on the agency.").

"To be judicially enforceable, [an agency] pronouncement must 'prescribe substantive rules—*not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice,' and must have been 'promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.'" *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003) (quoting *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982)) (emphasis in *Lowry*). The 2001 Policies satisfy neither requirement.[7]

1. The 2001 Policies Contain Policy Statements and Internal Guidance, Not Substantive Rules

The 2001 Policies do not prescribe substantive rules. To satisfy this requirement, an agency pronouncement "must be legislative in nature, affecting

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[7] The district court extensively explained why the 2001 Policies are not judicially enforceable against NPS, ER 7–13, but River Runners declined to engage the issue in their opening brief, failing even to cite *Eclectus Parrots*. Accordingly, they have waived the argument that the 2001 Policies *are* judicially enforceable. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). River Runners' argument on appeal is that NPS must adhere to the 2001 Policies because of a regulation stating that permitted activities in national parks "shall be consistent with applicable legislation, Federal regulations and administrative policies." 36 C.F.R. § 1.6(a) (2007). This regulation has no bearing on the enforceability of the 2001 Policies themselves, and cannot be used to eviscerate the *Eclectus Parrots* test.

individual rights and obligations." *Eclectus Parrots*, 685 F.2d at 1136. As the D.C. Circuit explained in holding that the 2001 Policies are not enforceable:

> [T]he [2001 Policies are] a statement of policy, not a codification of binding rules.
>
> While the text . . . on occasion uses mandatory language, such as "will" and "must," the document as a whole does not read as a set of rules. It lacks precision in its directives, and there is no indication of how the enunciated policies are to be prioritized.

Wilderness Soc'y, 434 F.3d at 595. This Court recently came to a similar conclusion in rejecting the argument that a prior version of the 2001 Policies imposed certain mandatory duties on NPS. *See Terbush v. United States*, 516 F.3d 1125, 1131 (9th Cir. 2008) (stating portions relied on by plaintiffs "vest considerable discretion in the NPS that is clearly grounded in the broad mandate to balance conservation with access and safety").

The portions of the 2001 Policies relied upon by River Runners are general statements of policy, not substantive rules. The statement that NPS "will seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation" falls under the heading, "General Policy." Addendum 10 (MP 6.3.1). Elsewhere, language clearly does not impose a precise substantive rule, such as the statement that recreational uses of wilderness "will be of a type and nature that ensure that its use and enjoyment will leave it unimpaired for future use and enjoyment as wilderness, and provide for the preservation of

wilderness character." Addendum 14 (MP 6.4.3.1); *cf. Terbush*, 516 F.3d at 1132 ("This provision is not a mandatory and specific policy, and the language itself implicates the NPS's broader mandate . . . ."). The only arguably concrete substantive rules River Runners identify refer to statutes, such as the statement that "[a]ctivities such as guide services for . . . river trips" may be authorized "if they meet the 'necessary and appropriate' test[] of the [Concessions Act]." Addendum 14 (MP 6.4.4).

Rather than quasi-legislative rules affecting individual rights and obligations, the 2001 Policies are intended to provide internal guidance within NPS. *See Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000) (holding agency manual was not judicially enforceable because text showed it to be "an internal guidance tool, providing policy and procedural guidelines to . . . staff members"). The introduction describes the 2001 Policies as a "basic Service-wide policy document," as a "guidance document[]," and as a statement of policy "designed to provide [NPS] management and staff with clear and continuously updated information . . . that will help them manage parks and programs effectively." Addendum 4. When NPS published a notice of availability for the 2001 Policies, it explained that "Park superintendents, planners, and other NPS employees use management policies as a reference source." 65 Fed. Reg. 2984, 2984 (Jan. 19, 2000). The 2001 Policies also state that "[a]dherence to policy is mandatory

unless specifically waived or modified in writing," Addendum 4,[8] which induced the D.C. Circuit to state: "This language does not evidence an intent on the part of the agency to limit its discretion and create enforceable rights. . . . This supports the . . . contention that the [2001 Policies are] no more than a set of internal guidelines for NPS managers and staff." *Wilderness Soc'y*, 434 F.3d at 596.

2. The 2001 Policies Were Not Promulgated Through Legally Sufficient Procedures

The second requirement of *Eclectus Parrots* is that agency pronouncements must be promulgated in accordance with the procedural requirements of the APA or some other congressional authorization. *W. Radio Servs.*, 79 F.3d at 901. This Court has consistently found publication in the Federal Register necessary for enforceability. *See, e.g.*, *Lowry*, 329 F.3d at 1022; *Moore*, 216 F.3d at 869. While NPS published a notice of availability of a draft version of the 2001 Policies in the Federal Register, 65 Fed. Reg. at 2984, it never published the 2001 Policies themselves or provided for APA notice-and-comment rulemaking, *Wilderness Soc'y*, 434 F.3d 595–96; *see also W. Radio Servs.*, 79 F.3d at 901 (holding Forest Service Manual and Handbook, neither published in Federal Register nor promulgated through notice-and-comment rulemaking, were not enforceable).

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[8] No waiver was required here: the NPS Director and Assistant Secretary of the Interior determined that motorized rafting in the CRC would not violate the 2001 Policies. SER 162–65.

The 2001 Policies were never published in the Code of Federal Regulations. The D.C. Circuit found this factor "particularly noteworthy," because "'[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations.'" *Wilderness Soc'y*, 434 F.3d at 595–96 (quoting *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986)). That NPS did not consider the 2001 Policies equivalent to enforceable regulations is reflected in the 2001 Policies' statement that any regulations with which they are inconsistent continue to govern "until the regulations are formally revised through the rulemaking procedure." Addendum 6.

River Runners argue that the 2001 Policies have the "force of law," Br. 31, and cite a district court case from another Circuit. But *Southern Utah Wilderness Alliance v. NPS*, 387 F. Supp. 2d 1178, 1187 (D. Utah 2005) ("*SUWA*"), addressed whether the 2001 Policies' interpretation of the Organic Act's "non-impairment" mandate was entitled to judicial deference. The question of whether a court should grant deference *to* an expert agency's interpretation of a statute is fundamentally different from whether an agency pronouncement is judicially enforceable *against* the agency. The deference inquiry asks whether Congress can have been expected to authorize an agency to speak with the force of law when interpreting statutory ambiguity, and whether the agency promulgated an interpretation in exercise of that authority. *United States v. Mead Corp.*, 533 U.S.

218, 229 (2001).[9] If so, the interpretation is binding on courts. *Id.* The judicial enforceability inquiry, on the other hand, asks whether the agency promulgated a substantive rule by which it intended to be bound *by* courts. *See, e.g.*, *James v. U.S. Parole Comm'n*, 159 F.3d 1200, 1205–06 (9th Cir. 1998) (relying on *Eclectus Parrots* to hold that alleged non-compliance with internal guidelines could not give rise to due process claim against Parole Commission). The "force of law" has very different meanings in the two inquiries.

Applying this Court's *Eclectus Parrots* standard, the 2001 Policies are not enforceable against NPS. River Runners thus cannot wield them as a club to challenge the agency's authorization of commercial motorized rafting concessions.

B. The 2006 CRMP Complied with the Unenforceable 2001 Policies' Provisions on Wilderness Resource and Use Management

Regardless, River Runners' reliance on the 2001 Policies is misplaced: the 2006 CRMP's authorization of commercial motorized rafting was consistent with them. River Runners argue that the 2001 Policies require NPS to "prohibit"

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[9] *SUWA* relied on the procedures through which NPS issued the "non-impairment" interpretation, calling it "an almost-complete, formal notice-and-comment process" sufficient for deference. *SUWA*, 387 F. Supp. 2d at 1188 (citing *Mead*, 533 U.S. at 221). But this section of the 2001 Policies was issued separately and through more extensive procedures. *See* 65 Fed. Reg. 56,003, 56,003 (Sept. 15, 2000) ("'Director's Order #55: Interpreting the National Park Service Organic Act' . . . adopts section 1.4 of NPS 'Management Policies' . . . ."). Notably, NPS responded to the public comments it received on § 1.4, *see id.* at 56,003–04, which it never did for the remainder of the 2001 Policies.

motorized rafting in the CRC because of its status as proposed potential wilderness. Br. 27. But the 2001 Policies contain no such command, and motorized rafting does not preclude wilderness designation (nor does wilderness designation necessarily preclude motorized rafting). Instead, motorized rafting is a temporary or transient disturbance that does not permanently affect wilderness resources or denigrate wilderness values.

In its most recent "update" on wilderness (15 years ago), NPS proposed that 235 miles of the CRC be designated as potential wilderness. SER 98–99. The 2001 Policies provide the following guidance with respect to management of potential wilderness:

> [NPS] will take no action that would diminish the wilderness suitability of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed. . . . This policy also applies to potential wilderness, requiring it to be managed as wilderness *to the extent that existing non-conforming conditions allow*. [NPS] will seek to remove from potential wilderness the temporary, non-conforming conditions *that preclude wilderness designation*.

Addendum 10–11 (MP 6.3.1) (emphases added). The FEIS declared that the CRC "will be managed as potential wilderness," SER 351, but added:

> It is important to note that the continued use of motorboats does not preclude possible wilderness designation because such use is only a temporary or transient disturbance of wilderness values and does not permanently impact wilderness resources or permanently denigrate wilderness values.

SER 276; *see also* SER 164 (memorandum from Assistant Secretary of the Interior concluding 2001 Policies "do not require the NPS to seek to remove motorboat use from the [CRC]"); SER 84 (1982 CRMP ROD).

1. Motorized Rafting Does Not Diminish the CRC's Wilderness Suitability

The FEIS specifically analyzed motorized rafting's effects on the CRC's "wilderness character" and concluded that the preferred alternative would have both "beneficial and adverse" seasonal effects on wilderness character that would be "negligible to moderate" and "short- to long-term." SER 442. No permanent impacts that would diminish the CRC's wilderness suitability were identified. *Cf.* SER 430 (defining "moderate" effects as those where there "would be no permanent visual improvements or human occupation"). The effects of motorized rafting on visitor experience cited by River Runners, Br. 28–31, are likewise temporary in nature, and could be eliminated (should Congress choose to do so) when designating wilderness.

Motorized rafting does not diminish the CRC's wilderness suitability for future designation. If it *did* have such an effect, the motorized rafting authorized by previous management plans would have precluded the CRC's designation decades ago. *See also Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 427 (8th Cir. 1992) (upholding snowmobile use in wilderness study area based on

NPS's conclusion that it "would not permanently change the area and thus, would not preclude . . . future designation as wilderness"); *Utah v. Andrus*, 486 F. Supp. 995, 1007 (D. Utah 1979) ("[I]t is consistent with . . . the Wilderness Act . . . to find that if a given activity will have only a temporary effect on wilderness characteristics and will not foreclose potential wilderness designation then that activity should be allowed to proceed.").

2. Motorized Rafting Is an Established Use of the CRC

Motorized rafting does not "preclude wilderness designation" of the CRC within the meaning of the 2001 Policies, because the Wilderness Act allows motorized rafting to continue even if Congress should designate the CRC as wilderness. *See* 16 U.S.C. § 1133(d)(1) ("Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of [the Interior] deems desirable."); *see also* Addendum 14 (MP 6.4.3.3) (acknowledging Wilderness Act "allow[s] the continuation of motorboat . . . use under certain circumstances"); *Friends of Boundary Waters Wilderness*, 164 F.3d at 1119–20 (discussing motorboat use in certain areas of Boundary Waters Canoe Area Wilderness). Motorized rafting is clearly "established" in the CRC, having begun in 1949, SER 36; in 1972, 90% of all rafting on the CRC was

motorized, ER 66; *see also* SER 164 (stating motorboat use is established in CRC and does not preclude wilderness designation); SER 84 (1982 CRMP ROD).

The 2001 Policies do not contain the prohibition that River Runners want,[10/] but rather a statement that recreation in potential wilderness areas "will be of a type and nature that ensure that its use and enjoyment will leave it unimpaired for future generations, provide for protection of the area as wilderness, and provide for the preservation of the wilderness character." Addendum 13 (MP 6.4.3); *cf. Terbush*, 516 F.3d at 1132 ("This provision is not a mandatory and specific policy, and the language itself implicates the NPS's broader mandate . . . ."). NPS analyzed motorized rafting's effects on the CRC's wilderness character, SER 428–42, and selected an alternative that met the management objectives of

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[10/] River Runners' argument that NPS must prohibit motorized rafting is ultimately based less on the 2001 Policies than on NPS's 1980 recommendation that motorized rafting be phased out. *See* River Runners Br. 27–31 (citing 1979–80 CRMP and associated documents, including five studies and one synthesis of studies). But NPS abandoned the phase-out in 1981 in response to legislation, *see supra* at 7–8, 32–33, and the agency has never stated that motorized rafting should be *eliminated* in the nearly thirty years since, including in its 1993 wilderness proposal update, *see* ER 235 ("[T]he current levels of motorized boat use probably contradict the intent of wilderness designation."). NPS considered 1970s studies in developing the 2006 CRMP, *see, e.g.*, SER 444–46 (selected bibliography), but relied on more recent studies that built upon the earlier research, *see, e.g.*, SER 121, 133–35, 148, 211, 237–42, 447. In the FEIS, NPS explained that motorized rafting does not preclude the CRC's designation as wilderness because it is only a temporary or transient use. SER 276. To the extent that there is any inconsistency with NPS's prior wilderness proposals, NPS has provided a reasoned explanation that is entitled to deference. *See Motor Vehicle Mfrs.' Ass'n*, 463 U.S. at 57.

preserving wilderness character and providing wilderness recreation opportunities, SER 274–75, 317–18. The 2006 CRMP complied with the unenforceable 2001 Policies.

III. The 2006 CRMP Was Valid Under the Organic Act

A. NPS's Allocation of Access Between Commercial and Non-Commercial Rafters Did Not Violate the "Free Access" Standard

While the Concessions Act sets the standard that NPS must follow in issuing concessions, the agency's *authority* to issue concessions comes from the Organic Act. *Nat'l Park Hospitality Ass'n*, 538 U.S. at 805–06. The statute provides: "No natural, curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public," 16 U.S.C. § 3. This standard, too, reflects the complicated task NPS must perform in providing for the needs and enjoyment of a range of visitors. NPS is entitled to substantial deference to exercise of its Organic Act concessions authority. *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996) ("Courts have noted that the Organic Act is silent as to the specifics of park management and that 'under such circumstances, the Park Service has broad discretion in determining which avenues best achieve the Organic Act's mandate.'") (citing cases); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65–67 (2001) (holding APA does not empower courts to direct specific

compliance with broad land management mandates). The 2006 CRMP's allocation of rafting access was valid under the "free access" standard.

1. NPS's Allocation of Commercial and Non-Commercial User-Days Was Valid Under the "Free Access" Standard as Applied by This Court

River Runners argue that NPS violated the Organic Act's "free access" standard by allocating rafting access inequitably. While River Runners attempt to transform "free access" into an absolute parity mandate, the 2006 CRMP's allocation was consistent with this Court's interpretation of the standard.

The Court has shown deference to NPS's allocation of rafting user-days between commercial and non-commercial users in the CRC under its Organic Act authority. In the 1972 River Use Plan, NPS allocated 92% of user-days on the CRC to commercial concessioners, and 8% to non-commercial users (based on actual use of the CRC in 1972). SER 2–7. Two groups sued, one seeking equal access for non-commercial users, the other a declaration that non-commercial users are entitled to priority; in the consolidated appeals, this Court upheld NPS's allocation system. *Kleppe*, 608 F.2d at 1250. It specifically rejected the argument that NPS was required to issue rafting permits through a need-based, first-come-first-served system such as the one River Runners advocate, holding that allocation of user-days between commercial and non-commercial users did not constitute a denial of "free access." *Id.* at 1253 (9th Cir. 1979). The Court stated:

> In issuing permits, [NPS] has recognized that those who make recreational use of the river fall into two classes: those who have the skills and equipment to run the river without professional guidance and those who do not. [NPS] recognizes its obligation to protect the interests of both classes of users. . . . 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. 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. (citation omitted). Examining the allocation system , the Court concluded "there is no showing here of arbitrary action or abuse of [Organic Act] authority." *Id.* at 1254.[11/]

Kleppe is directly on point and shows that there has been no violation of the "free access" standard, because NPS's allocation of user-days was "fairly done pursuant to appropriate standards." *Id.* As NPS stated in its FEIS, "[e]quity can be measured in a number of ways, including passengers, launches, and user-days." SER 357; *see also* SER 320 ("Reductions in crowding . . . must be balanced with parity in access to a wide variety of people, including both the commercial and noncommercial boating communities.").

[11/] By the time the Court ruled in 1979 (a period of "rapid change" in use of the CRC) NPS was in the process of developing the 1980 CRMP, which used a roughly two-to-one user-day allocation based on more recent data. *See supra* at 7. So the Court held that challenges to the specific allocation in the 1972 River Use Plan were moot. *Kleppe*, 608 F.2d at 1254.

Like the system upheld in *Kleppe*, the 2006 CRMP looks to actual past use as the starting point for allocating user-days between commercial and non-commercial visitors. *See supra* at 20–21, 24. But the 2006 CRMP eliminates the cap on non-commercial user-days entirely, increases non-commercial launches in all seasons (with the total nearly doubling, from 253 to 503), and estimates that annual commercial and non-commercial user-days will be roughly equal. SER 290, 304–05; *supra* at 10–11.[12/] As a result, non-commercial user-days are estimated to increase from 58,048 to 113,486, and the overall number of non-commercial users from 3571 to 7051. SER 290, 305. In comparison, total commercial launches, trip lengths, and group sizes have been reduced, and commercial rafting is barred for five months of the year (motorized rafting for more than six). SER 290, 303, 305–06; *see supra* at 10–11. Thus, the 2006 CRMP has *enhanced* non-commercial visitors' "free access" compared to commercial visitors', SER 358, even though "demand exceeds supply for both commercial and noncommercial trips," SER 344, and even though "since the late

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[12/] The overall ratio during the summer and shoulder seasons was estimated at 59.3% commercial (115,500 user-days) to 40.7% non-commercial (79,399 user-days). *See* ER 418. But allowing only non-commercial trips during the winter enhances the opportunities for solitude and primitive recreation that River Runners seek. SER 285; *see also* SER 345 ("Even in winter there is considerable demand for noncommercial trips."). Non-commercial launches have been increased in *all* seasons. *See* SER 290, 305.

1980s the number of river users has been relatively static for both sectors." SER 343.

NPS's adherence to the Concessions Act's "necessary and appropriate" standard, as well as its extensive analyses of past trips and impacts on visitor experience, *see supra* at 19–25, 30–32, all support the conclusion that this enhancement of non-commercial access "has been fairly made pursuant to appropriate standards," *Kleppe*, 608 F.2d at 1254.

2. The "Free Access" Standard Did Not Require NPS to Conduct Additional Studies and Abandon the Allocation System It Has Always Used

Much like the unsuccessful plaintiffs in *Kleppe*, River Runners argue that its members will be denied "free access" unless NPS conducts costly new studies or implements a first-come-first-served "common pool" allocation system. Br. 34–40. But the deferential Organic Act does not allow River Runners to dictate allocation methodology, which is "well within the area of administrative discretion granted to the NPS." *Kleppe*, 608 F.2d at 1253; *see also id.* at 1254 ("Where several administrative solutions exist for a problem, courts will uphold any one with a rational basis . . . .") (citation omitted); *also Bicycle Trails Council*, 82 F.3d at 1454 ("'[NPS] has broad discretion in determining which avenues best achieve the Organic Act's mandate. . . .'").

The Organic Act adds another layer of deference to the APA's arbitrary and capricious standard, which also does not allow plaintiffs to dictate methodology to expert agencies. *See Lands Council*, ___ F.3d at ___, 2008 WL 2640001, at *8 (overruling precedent because it "defied well-established law concerning the deference [courts] owe to agencies and their methodological choices"); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1077 (9th Cir. 2003) ("'[Courts] defer to agency expertise on questions of methodology unless the agency has completely failed to address some factor, consideration of which was essential to a truly informed decision . . . .'"); *Hells Canyon Alliance*, 227 F.3d at 1184 (holding methodology for allocating recreation uses among motorized and non-motorized river users was within agency discretion, and that additional studies were not required).

NPS considered conducting a relative demand study and adopting a common pool allocation system, but reasonably decided against both. The FEIS explained that a new study could cost up to $2.5 million while providing inconclusive results. SER 414; *see also* SER 227 ("We don't believe there is an accurate way to measure relative demand for commercial and non-commercial use in Grand Canyon."); SER 168 ("Too expensive. Extremely difficult in this case. The validity and certainty of the results would be suspect . . . ."); SER 362 (discussing expert panel). Absent such a study, the nearly-equal allocation of

annual user-days that the 2006 CRMP adopted "seems more fair." SER 168; *see also* SER 361 ("[T]here are 18,891 actual users on the commercial side and approximately 11,570 potential trip leaders on the noncommercial side. . . . Many people advocated strongly for a 50:50 commercial to noncommercial user-day allocation ratio, and the FEIS allocation proposal conforms closely to this ideal.").

NPS also considered replacing the "split" allocation system it has used since 1972 (in which commercial and non-commercial users compete for permits in separate pools with different distribution mechanisms) with a common pool system where all users compete for permits, as well as an "adjustable split" system that combines features of both. SER 254. NPS extensively analyzed all three options, with reference to whether they would meet objectives of minimizing cost and complexity for visitors, addressing perceptions of inequality, and maintaining or improving the quality of commercial services. *See* SER 223–36, 279–81, 413–16. NPS ultimately decided to continue using a split allocation system, even though it might not address *perceptions* of allocation inequality. SER 281. NPS found that a common pool system (which is essentially what the unsuccessful plaintiffs in *Kleppe* demanded, *see* 608 F.2d at 1253) would reduce such perceptions, but could ultimately result in "a lowered quality of visitor services" by creating uncertainty for concessioners. SER 414. An adjustable split system would lead to similar uncertainty, as well as complexity, and had never been used

before. SER 414–15. This thorough analysis of allocation options satisfies the Organic Act standard and easily survives arbitrary and capricious review.

3. The Non-Commercial Permit Allocation System Does Not Constitute a Denial of Free Access

River Runners characterize the 2006 CRMP allocation system as favoring concessioners over non-commercial visitors, suggesting it is "extortion," Br. 34, that non-commercial users must enter a permit lottery while concessioners may simply sell rafting access to those able to pay for it, Br. 45. Just as in *Kleppe*, however, River Runners incorrectly "view[] the dispute as one between the recreational users of the river and the commercial operators . . . . [River Runners] ignore[] the fact that the commercial operators, as concessioners of [NPS], undertake a public function to provide services that the NPS deems desirable for those visiting the area. The basic face-off is . . . between those who can make the run without professional assistance and those who cannot." *Kleppe*, 608 F.2d at 1253–54; *see also Nat'l Park Hospitality Ass'n*, 538 U.S. at 805 (stating Congress authorized NPS to issue concessions in order "[t]o make visits to national parks more enjoyable").

River Runners argue 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. But *Kleppe*

rejected just this argument. River Runners' members may possess the skills, equipment, and time to raft the CRC without assistance, but the majority of visitors rely on concessioners. *See* SER 343 (comparing numbers of commercial and non-commercial users since 1960s). A recent study found that 80% of commercial users were first-time CRC rafters, compared to 39% of non-commercial users. SER 139. The Organic Act authorizes NPS to issue rafting concessions so that those commercial visitors may enjoy rafting the CRC. It is unreasonable for River Runners to argue that any allocation system that allows these commercial visitors to take a guided rafting trip without going through the same permit system as non-commercial visitors is a fundamentally unfair denial of free access to the CRC.

The 2006 CRMP also improves "free access" for non-commercial visitors by replacing the old waiting list with a hybrid weighed lottery that simplifies the application process, provides for a transition from the waiting-list, and favors users who have been unsuccessful in recent attempts to gain a permit. SER 327; *see also* SER 327–30, 416–27 (analyzing options). Moreover, the weighted lottery (like the waiting list) for non-commercial permits applies only to trip *leaders*, not all trip participants; individuals who do not seek or obtain a permit through the lottery may join another leader's trip or may reserve a space on a commercial trip. ER 435–36. All visitors (commercial and non-commercial) are

limited to one annual trip. SER 287. River Runners may not simply rely on the existence of a waiting list or lottery for non-commercial rafting permits to argue that there has been a denial of "free access," especially not one that rises to the level of extortion.

B. NPS Reasonably Concluded That the Authorization of Commercial Motorized Rafting Concessions Would Not Impair the CRC's Natural Soundscape

NPS found that the 2006 CRMP would have no impacts on the Park's resources—including its natural soundscape—that rose to the level of impairment under the Organic Act. ER 436; *see also* SER 249–50, 388–89, 390–406, 408–11 (analyzing impacts on natural soundscape). This conclusion was committed to the professional judgment of the Park Superintendent and reached through adherence to non-binding NPS policy.

The Organic Act requires that NPS "shall . . . regulate the use of the . . . national parks [in conformance with the purpose of] conserv[ing] the scenery and the natural and historic objects and the wild life therein and . . . provid[ing] for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The statute does not define "unimpaired." The 2001 Policies, which are entitled to deference on their interpretation of the non-impairment mandate, *SUWA*, 387 F. Supp. 2d at 1187–89; *supra* at 39, define "impairment" as:

> an impact that, *in the professional judgment of the responsible NPS manager*, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. Whether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.

Addendum 7 (MP 1.4.5) (emphasis added). "Park resources and values" include "natural soundscapes." Addendum 8 (MP 1.4.6).

Analyzing the preferred alternative's natural soundscape impacts, NPS found that noise from rafting trips (motorized and non-motorized, commercial and non-commercial), as well as related "off-river" noise (e.g., from campsites) would have adverse, short-term minor-to-moderate impacts during peak periods. SER 408–11. A limited number of "passenger exchanges" by helicopter during certain hours in the motorized season (April 1–September 15) would have highly-localized, adverse, short-term, major impacts. SER 409–10. Overall, "the natural soundscape would benefit [compared to the status quo] during the peak season, but impacts would be slightly greater in the shoulder and winter seasons" because of increased non-motorized trips. SER 410. NPS concluded that the preferred alternative "would not result in the impairment of the natural soundscape." SER 411.

River Runners make four arguments why NPS's non-impairment determination was arbitrary and capricious. All lack merit.

1. NPS Applied the Proper Baseline in Assessing Soundscape Impacts

First, River Runners argue that NPS applied the wrong "baseline" against which to measure natural soundscape impacts. They rely on section 8.2.3 of the 2001 Policies (*not* section 1.4, which interprets the Organic Act's non-impairment standard and is entitled to deference), which states:

> [T]he least impacting [motorized] equipment, vehicles, and transportation systems should be used . . . . 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 a soundscape will be measured and evaluated.

Addendum 19 (MP 8.2.3). They also cite NPS Director's Order #47, which includes essentially the same language. ER 262. River Runners contend that NPS improperly used a baseline that included human-caused noise. Br. 49. This is incorrect.

As an initial matter, neither the 2001 Policies nor Director's Order #47 are binding on the agency. The 2001 Policies are not enforceable under *Eclectus Parrots*. *See supra* at 33–39. Director's Order #47 expired in 2004, and is inapplicable. SER 390.

Furthermore, River Runners' argument is based on a misreading of the

FEIS, which shows that NPS used the proper baseline. The second column of the table (3-4) on which River Runners rely lists typical measured decibel ("dBA") levels measured in selected Park locations in a 1993 study, including when human-caused noise was *not audible*. SER 332. *Compare* SER 332 (listing "typical measured soundscape ambient level" for Bright Angel Point as 17–25 dBA) *with* SER 112 (stating background sound level at Bright Angel Point is usually 20–25 dBA in absence of aircraft, 17–18 dBA in absence of all human-caused noise). The third and fourth columns list maximum and predominant (i.e., exceeded 90% of the time) dBA levels measured at the same locations, including "in the presence of human noise from aircraft or other human-caused noise sources." SER 332; *see also* SER 105–12 (explaining recorded sound was synchronized with a "continuous observer log" that indicated whether sound at any given time was human-caused or natural). The FEIS's soundscape impact analysis used audibility and noise-free intervals based on natural ambient sound levels unaffected by human sources. *See* SER 390–400 (explaining methodology); SER 161 (2003 study). Thus, River Runners are incorrect: NPS did in fact use as a baseline the natural ambient sound levels that exist in the absence of human-caused noise.

2. NPS Properly Assessed Cumulative Effects on the Natural Soundscape

The 2001 Policies state that determination of whether an impact rises to the level of "impairment" depends partly on cumulative effects. Addendum 7 (MP 1.4.5). In the FEIS, "[c]umulative impacts on the natural soundscape were determined by combining the incremental impacts of each alternative with other past, present, and reasonably foreseeable future actions." SER 396. NPS stated that existing aircraft use over the Park (i.e., high-altitude commercial jet traffic, Park administrative flights, commercial air tours, and military and general aviation aircraft use) "is causing a 'significant adverse effect' and an adverse, long-term, major impact on the natural soundscape." SER 403. This effect would remain unchanged "even if all noise from all river recreation was eliminated from the park." SER 411. In finding no impairment, NPS explained that the preferred alternative's soundscape impacts (which, but for the highly localized helicopter exchanges, would be short-term and minor-to-moderate) "would contribute an adverse, *negligible* increment to cumulative effects." SER 410 (emphasis added).

River Runners argue that NPS must have ignored the "significant adverse effect" from existing aircraft use in finding no impairment from the preferred alternative. But the fact that existing aircraft use is having an effect that is "significant" under NEPA does not mean that *any* additional sound impact will

impair the natural soundscape within the meaning of the Organic Act. Determination of whether there is impairment is committed to the professional judgment of the Park Superintendent. Addendum 7 (MP 1.4.5); *see also Norton*, 542 U.S. at 66 (finding "a great deal of discretion" in another non-impairment mandate). In finding no impairment, NPS analyzed the 2006 CRMP's incremental effects and reasonably explained that they are negligible. It also noted that "[t]he natural soundscape would benefit overall" in comparison with the status quo. SER 410.

River Runners' approach to cumulative effects on the natural soundscape has absurd results: because existing aircraft use is causing a "significant adverse effect," *any* additional human-caused noise would "impair" the natural soundscape by making an incremental contribution (however negligible) to that existing effect. NPS would thus have been barred from adopting any of the alternatives analyzed in the FEIS, including the two non-motorized alternatives. *See, e.g.*, SER 407 (stating that "the cumulative effects of [non-motorized] Alternative B would continue to be regional, adverse, long-term, [and] major"). Taking the approach to its logical conclusion, NPS could not allow a single non-commercial, non-motorized trip, because the sounds of conversation or oars banging would impair the Park's natural soundscape in violation of the Organic Act.

3. The Non-Impairment Determination Properly Considered Prior Analyses

The 2001 Policies direct the Park Superintendent to "consider any [NEPA] analyses," as well as "relevant scientific studies, and other sources of information," in determining whether an impact rises to the level of impairment. Addendum 8 (MP 1.4.7). River Runners argue that NPS violated this provision by failing to consider the 1980 CRMP, its Final Environmental Impact Statement, and twenty-nine scientific studies upon which it relied. Br. 53–54. NPS complied with this provision of the non-binding 2001 Policies.

As stated, NPS's non-impairment determination was based on extensive analyses of natural soundscape impacts in the FEIS. *See* SER 332–33, 385–86, 388–89, 390–406, 408–11. It relied in part on 1993 and 2003 studies that measured ambient sound levels in the Park. *See* SER 100, 161. On the other hand, none of the earlier documents River Runners cite had even considered the issue. *See* SER 363 ("[T]here has never been a determination by the NPS of impairment of the natural soundscape or other resources at Grand Canyon in any EIS or [ROD] or other decision document."). The FEIS for the 1980 CRMP did not address soundscape impairment, but discussed motor noise in the context of the experience of motorized raft passengers, SER 25–26, 30, 33, as did the 1979–80 CRMP itself, SER 41–43. As discussed, *supra* at 19–32, the FEIS for

the 2006 CRMP extensively analyzed whether motorized rafting was necessary and appropriate, addressing its effects on visitor experience and wilderness character. This analysis considered the 1970s documents, *see, e.g.*, SER 443–46 (selected bibliography), but relied upon more recent studies that built upon the earlier research. *See, e.g.*, SER 121, 133–35, 148, 211, 237–42, 447.[13/]

Because NPS had never previously addressed the issue of whether motor noise impairs the natural soundscape, the argument that a non-impairment determination represents a "radical shift in view," Br. 55, is misguided. NPS abandoned its motor phase-out in 1982, SER 74, 84 so the argument also comes roughly twenty years after the statute of limitations expired, *see* 28 U.S.C. § 2401.

4. NPS's Non-Impairment Determination Was Not Arbitrary and Capricious

Finally, River Runners reiterate that NPS *must* find that motorized rafting impairs the Park's natural soundscape when added to the existing aircraft use that NPS concedes is having a significant adverse impact. Br. 57. But River Runners may not substitute their views for NPS's expert judgment that the 2006 CRMP

[13/] Only one of the twenty-nine studies repeatedly referred to by River Runners focused on noise, *see* ER 74 (listing Thompson study), and it addressed outboard motor noise's effects on passengers (e.g., hearing loss and preventing conversation), not impairment of the natural soundscape. *See* SER 15; *see also* ER 146–47. Research on outboard motors from the 1970s is of questionable utility, because the two-stroke motors then in use have been supplanted by cleaner, quieter four-stroke motors. *See, e.g.*, SER 387.

would not impair the natural soundscape and would, in fact, benefit it. *See Overton Park*, 401 U.S. at 416; *Lands Council*, ___ F.3d at ___, 2008 WL 2640001, at *4. Moreover, River Runners' argument has absurd implications: because existing aircraft use is already having a significant adverse impact, NPS may not authorize *any* use of the Park that will add noise (including non-commercial, non-motorized rafting by River Runners' members) without violating the Organic Act. Such a ban would surely violate the same statute's requirement to provide for the public's enjoyment of its national parks.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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August 2008
90-1-4-11876

STATEMENT OF RELATED CASES

The Federal Appellees are unaware of any cases pending in this Court that are related to this appeal within the meaning of 9th Cir. R. 28-2.6.

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7) AND 9TH CIR. R. 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, the foregoing Brief for the Federal Appellees is proportionately spaced, has a typeface of 14 points more, and contains 13,991 words.

_____ _____

Date Charles R. Scott

CERTIFICATE OF SERVICE

I certify that I have caused two copies of the foregoing Brief for the Federal Appellees, and one copy of the Federal Appellees' Excerpts of Record, have been served upon counsel this 1st day of August, 2008, by United States First Class Mail addressed to:

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