No. 08-15112

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

and

GRAND CANYON RIVER OUTFITTERS ASSOCIATION, et al.,
Defendant-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
D.C. No. CV-06-00894-DGC

PLAINTIFFS–APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants River Runners for Wilderness ("River Runners") brought this civil action for declaratory and injunctive relief against Defendants-Appellees Joseph F. Alston ("NPS," or "Agency") for violating the National Park Service Organic Act ("Organic Act"), 16 U.S.C. §§ 1 *et seq*., the National Park Service Concessions Management Improvement Act ("Concessions Act"), 16 U.S.C. §§ 5951 *et seq*., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. The district court issued a final judgment that disposed of all claims with respect to all parties. ER 32. River Runners timely filed a notice of appeal on January 11, 2008. ER 459. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether NPS violated the Concessions Act by failing to determine that motorized commercial services in the Colorado River corridor in the Grand Canyon ("river") are "necessary and appropriate" before authorizing them.

2. Whether NPS violated the Concessions Act by authorizing unnecessary and inappropriate motorized commercial services on the river.

3. Whether NPS violated the Concessions Act by failing to determine

amounts of commercial services that are "necessary and appropriate" before authorizing them on the river.

4. Whether NPS violated the Concessions Act by authorizing motorized commercial services that are inconsistent with preserving the wilderness values and resources of the river, to the highest extent practicable.

5. Whether NPS violated its management policies when it failed to preserve the wilderness character of the river by authorizing motorboats, helicopter passenger exchanges, and generators ("motorized uses") on the river.

6. Whether NPS violated the Organic Act when it failed to protect "free access" by the public to the river, in allocating river use between commercial and noncommercial users.

7. Whether NPS violated the Organic Act when it failed to properly define baseline conditions and consider cumulative impacts and previous impact studies when making a "no-impairment" determination.

8. Whether NPS violated the Organic Act when it authorized motorized uses on the river that impair the natural soundscape.

STATEMENT OF THE CASE

River Runners filed suit to challenge NPS's decision to adopt the Colorado River Management Plan ("CRMP"), which authorizes motorized uses in the river

corridor, and allocates by permit uses of the river. The district court allowed Grand Canyon River Outfitters Association and Grand Canyon Private Boaters Association ("Intervenors') to intervene as Defendants-Intervenors. ER 455. All parties filed motions for summary judgment. ER 456-457. The district court issued a final judgment and order granting NPS's and Intervenors' motions for summary judgment and denying River Runners' motion for summary judgment. ER 1-32.

STATEMENT OF FACTS

The Colorado River from Lee's Ferry to Lake Mead in Arizona flows through 277 miles of the heart of America's Grand Canyon. ER 298, 416. It is "the largest and possibly most diverse wilderness on the Colorado Plateau," and one of the most beautiful, unique, and immense canyon systems in the world. ER 247. The river "provides a unique combination of thrilling whitewater adventure and magnificent vistas of a remarkable geologic landscape, including remote and intimate side canyons." ER 298. For these reasons, "a river trip through the Grand Canyon is one of the most sought after backcountry experiences in the country, [with] nearly 22,000 visitors run[ning] the river annually." Id.

Use of the river "has increased exponentially" since the Glen Canyon Dam was constructed in 1963. Id. In "1967, 2,100 recreationists ran the river . . . by

1972 that number had risen nearly eightfold to 16,500, exceeding total use during the 100 year period from 1870 through 1969." ER 299. This "sudden increase in use caused noticeable changes to the vulnerable inner canyon ecosystem and adverse effects on cultural resources. It has also caused dramatic changes in visitor experiences, especially during the peak [summer] season when the river may be crowded and groups compete for access to campsites and attraction sites." Id.

After preparing a final environmental impact statement ("FEIS"), in February, 2006, NPS issued a record of decision ("ROD") adopting the CRMP to decide how the river may be used in the face of increasing use and more disruptive types of use. See ER 415-425.[1] The CRMP allows three types of motorized uses on the river: motorboats (including pontoon boats in the Lower Gorge), helicopter passenger exchanges at Whitmore and the Quartermaster Area, and generators.

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[1] The CRMP is the fourth plan prepared for the river. The first was prepared in 1972 (ER 58-67) and called for the phaseout of motorboats by 1977. ER 67. The second CRMP was issued in 1980 (ER 192-211) and also called for the phaseout of motors – this time by 1985. ER 213. This decision was "based on the extensive Colorado River Research [Program]." Id.; see ER 113-159 (synthesis of research). In 1981, NPS revised the 1980 CRMP (without any NEPA analysis or public input) in response to the Hatch Amendment. ER 219. The 1981 CRMP "retained motorized use and the increase in user-days that had been intended as compensation for the phase-out of motors." Id. In 1989, NPS prepared a third CRMP to address resource impacts caused by the 1981 CRMP. See ER 223. The 1989 CRMP retained motorized use of the river. ER 252.

ER 417-425. The cumulative impacts on the Grand Canyon's natural soundscape from these types of motorized uses and other, pre-existing uses are significant. ER 410, 334, 355.

The CRMP also allocates commercial and noncommercial uses of the river. ER 418. The CRMP authorizes 14,385 commercial users to run the river in the summer, compared to 2,270 noncommercial river runners. ER 316. The CRMP allocates the majority of popular summer user-days to commercial users and, in contrast, allocates no winter user-days for commercial users. Id. The CRMP allocates approximately one-third of noncommercial user-days to the winter months. Id.

The CRMP eliminates the prior waiting list for noncommercial permits, and replaces it with a weighted lottery system. ER 435-436. Under this system, most trip leaders on the old waitlist would obtain launch dates within 10 to 20 years. ER 345, 409. However, more than 500 would not obtain a permit even within 20 years. ER 409. The permit allocation system favors commercial passengers who can afford to pay for a trip on the river. ER 57 (¶¶ 229-230). NPS considered but rejected two other methods of allocating use, including a common pool system and an adjustable split allocation with a single reservation system, both of which would have been more equitable to noncommercial users of the river. ER 406-

408.

SUMMARY OF THE ARGUMENT

River Runners make eight arguments. First, NPS violated the Concessions Act by failing to make a requisite finding that motorized commercial use of the river is "necessary and appropriate" for the public's use and enjoyment. Instead, NPS merely identified a general need for commercial services to provide professional guides and equipment to people who would otherwise not have the skill or equipment to raft the river.

Second, NPS violated the Concessions Act by authorizing unnecessary and inappropriate motorized commercial services on the river. Motorized commercial services are not necessary because people who need professional guides and equipment can take a non-motorized commercial trip down the river.

Third, NPS violated the Concessions Act by failing to make the requisite finding that the amount of commercial services it authorized is "necessary and appropriate" for members of the public to use and enjoy the river. NPS never demonstrated that the number of permits granted to commercial outfitters was no more than is necessary.

Fourth, NPS violated the Concessions Act by authorizing motorized commercial services that do not preserve the wilderness values and resources of

the river "to the highest extent practicable." Authorizing motorboats and helicopters in the river corridor fails to preserve wilderness values.

Fifth, because the river qualifies for designation as wilderness, NPS's authorization of motorized uses in the river violates directives in chapter 6 of the agency's 2001 Management Policies ("MPs") to preserve the river's wilderness character until the legislative process for wilderness designation is completed.[2] These directives state, *inter alia*, that NPS is to seek to remove non-conforming, motorized uses from the river, only authorize recreational uses that enable the river to retain its primeval character, and prohibit the use of mechanical transport on the river unless provided for by specific legislation.

Sixth, NPS's allocation of permits to commercial outfitters violates the Organic Act because it interferes with the public's "free access" to the river. NPS's allocation of river permits unfairly favors concessioners at the public's expense. Indeed, often the only way for members of the public to gain access to the river is by paying commercial concessioners for a trip.

Seventh, NPS violated the Organic Act by failing to properly define baseline conditions and consider cumulative impacts and previous studies from the Colorado River Research Program in making a "no-impairment" determination.

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[2] Relevant portions of the 2001 MP are reproduced in the addendum.

Eighth, NPS violated the Organic Act by authorizing motorized uses that combined with other uses of the river impair the Grand Canyon's natural soundscape. The river is subjected to noise from motorboats (including pontoon boats), generators, helicopter passenger exchanges, vehicle and tour buses at launch and retrieval sites, air tours (both fixed wing and helicopter), commercial overflights, and military jets. These significant actions combine to impair the natural sounds and solitude of the canyon.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews de novo the grant of summary judgment. The Wilderness Society v. U.S. Fish & Wildlife Service, 353 F.3d 1051, 1059 n.5 (9th Cir. 2003). Under the APA, this Court may determine whether NPS violated federal statutes. 5 U.S.C. § 706(2)(A); Clouser v. Espy, 42 F.3d 1522, 1527 n.5 (9th Cir. 1994). This Court owes no deference to NPS as to the plain meaning of any law. The Wilderness Society, 353 F.3d at 1059. Conversely, if any law is ambiguous, this Court must defer to the agency only if it concludes that the agency's interpretation has the "force of law." Id. Otherwise, this Court may give the agency's view "respect" only if it is persuasive based on factors recited in Skidmore v. Swift & Co., 323 U.S. 134 (1944), and endorsed in U.S. v. Mead

Corp., 533 U.S. 218 (2001). Id.

II. NPS VIOLATED THE CONCESSIONS ACT.

Congress enacted the Concessions Act to address how and when commercial services may be authorized within a national park. Congress found:

> that the preservation and conservation of park resources and values requires that such public accommodations, facilities, and services as have to be provided within such units should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that-
>
> (1) visitation will not unduly impair these resources and values; and
>
> (2) development of public accommodations, facilities, and services within such units can best be limited to locations that are consistent to the highest practicable degree with the preservation and conservation of the resources and values of such units.

16 U.S.C. § 5951(a). To achieve these objectives, Congress mandated that commercial services in the national park system must be limited to those 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." Id. § 5951(b). Here, NPS violated these mandates by: (1) failing to make the requisite "necessary and appropriate" determination before authorizing motorized commercial services on the river; (2) authorizing motorized commercial services that are unnecessary and inappropriate for the public's use

and enjoyment of the river; (3) failing to establish amounts of "necessary and appropriate" commercial services, and authorizing unnecessary amounts of those services; and (4) authorizing motorized commercial services that are not consistent "to the highest practicable degree" with preserving river resources and values.

A. NPS Never Found that Motorized Commercial Services are Necessary or Appropriate.

NPS must find that motorized commercial services at certain levels are "necessary and appropriate" to the pubic's use and enjoyment of the river before authorizing their use. 16 U.S.C. § 5951(b). Because the Concessions Act does not define the term "necessary," this Court uses its common meaning of "indispensable," "essential" or "required to be done." See The Wilderness Society, 353 F.3d at 1061; NEW OXFORD AMERICAN DICTIONARY at 1143 (2001).

As NPS conceded in the district court, "[t]he 'necessary and appropriate' standard for allowing commercial services pursuant to the Concessions Act is analogous to the 'necessary' and 'proper' standards under the Wilderness Act." ER 45. This Court has held that the "necessary and proper" standard in the Wilderness Act means the finding of statutory "need" for a commercial service on public lands is a specialized one, requiring an explicit finding of both types and amounts of certain commercial services. High Sierra Hikers Assoc. v. Blackwell,

390 F.3d 630, 647-648 (9th Cir. 2004). Thus, NPS must make a specific finding that the type and amount of services authorized on the river is "limited" to those that are "necessary and appropriate" for the public to use and enjoy the river. 16 U.S.C. § 5951(b); See Blackwell, 390 F.3d at 647.[3]

NPS failed to comply with these mandates. The ROD states only that the "[d]etermination of the types and levels of commercial services that are necessary and appropriate for the Colorado River through Grand Canyon National Park were determined through [the FEIS]." ER 421. But the ROD never specifies any types or amounts of commercial services are necessary or appropriate, or provide a rational basis for its conclusion. Similarly, in the FEIS, NPS merely notes that "[s]ince many visitors who wish to raft on the Colorado River through the Grand Canyon possess neither the equipment nor the skill to successfully navigate the rapids and other hazards of the river, . . . it is necessary and appropriate for the public use and enjoyment of the park to provide for experienced and professional

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[3] In Blackwell, this Court held that a finding of necessity must include a finding related to the amount of a commercial service that is needed because the the Wilderness Act includes the clause, "to the *extent* necessary." 390 F.3d at 647 (quoting section 4(d)(5), emphasis original). The Concessions Act includes an analogous quantitative limit, requiring that commercial services "shall be *limited to those* . . . that are [ ] necessary." 16 U.S.C. § 5951(b) (emphasis added). Thus, both laws require a finding of the amount of specific types of commercial services that are necessary.

river guides who can provide such skills and equipment." ER 303. The FEIS explains "that the services provided by commercial outfitters, which enable thousands of people to experience the river in a relatively primitive and unconfined manner and setting (when many of them otherwise would be unable to do so), are necessary to realize the recreational or other wilderness purposes of the park." ER 303.

Thus, NPS merely identified a general need for the commercial services of providing professional guides who offer equipment and skills to take people, who otherwise would not have the skill or equipment, rafting down the river. Id. But NPS failed to ever find that *motorized* commercial services are necessary to allow visitors who otherwise did not have the skill or equipment to raft the river. In contrast to the need for commercial services in Blackwell, where people have a physical need for packstock services because some are unable to carry their own gear or cannot on foot ascend steep slopes in wilderness, NPS never identified any equivalent need for any type of motorized commercial services on the river. See ER 303.

In the district court, NPS made *post hoc* rationalizations to justify its failure to make required findings. Cf. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d. 1208, 1214 (9th Cir. 1998) (stating that the agency's

position must be found in the NEPA analysis, not in its arguments in court). First, NPS argued that it did find that commercial services are necessary and that such a finding is "embedded within the fabric of the entire FEIS," specifically the sections on alternatives and environmental consequences. ER 43-44. The FEIS belies this assertion. Whether and to what extent motorized commercial services are necessary was not even part of the criteria for developing alternatives. Instead, the "key criteria" for developing all of the alternatives included carrying capacity considerations and a variety of key trip variables such as launches per day, group size and trip length, but never necessity. ER 308-313. Carrying capacity is an essential criteria for protecting the river's resources, but it is a different factor than whether, and what quantity of, a commercial service is necessary. The alternatives also never address necessity, but instead analyze different allocation levels for both commercial and noncommercial use across other parameters such as impacts on cultural resources or soils and vegetation. ER 317-329. That the FEIS evaluated a range of commercial motorized use levels does not mean that any were based on a valid, predicate needs assessment, particularly when no assessment exists.

NPS also argued in the district court that not everyone can afford to take the time to float the river without the assistance of motors, which allow for shorter

trips through the canyon. ER 44. But NPS never found that artificially quick trips constitute a "need" for motorized commercial services, and such a finding would flatly conflict with NPS's admission that short trips are a convenience for some but not necessary for anyone. ER 218, 50-51(¶42). Indeed, a desire for short motorized commercial trips (if it exists), does not make them necessary or appropriate. See High Sierra Hikers Assn. v. Weingardt, 521 F.Supp.2d 1065, 1078-1079 (N.D. Cal. 2007). This is especially true in this case, where one of the primary values of the river is the "wilderness river experience" where people hope to experience the river on its own terms and in a primitive manner. See ER 300. Moreover, even if artificially short trips are necessary, motorized services are not necessary to accommodate a short trip because these same visitors can take an oar-powered trip from Lees Ferry to Phantom Ranch and the Bright Angel Trail (88 miles of the river) in merely six to seven days. ER 332, 336, 284.

Intervenors asserted that artificially quick trips are necessary because they can accommodate more people with fewer impacts, since motorboats move quickly down the river. But NPS never documented any necessity for motorized services to move people down the river for this reason. Cf. ER 302-304. Further, a desire to accommodate more people on motorboats is not the kind of rationale that can support a finding of necessity. In contrast, NPS can always reduce or

control use where it may be necessary to eliminate crowding, or resource impacts.

Further, the Intervenors' rationale is unsupportable because NPS never made any findings about amounts of necessary motorized commercial services. NPS has not established a need to accommodate more visitors than commercial oar boats would allow on the river. Indeed, the record does not even indicate *any* waiting period for visitors to hire commercial services to raft the river. See ER 57 (¶230), 240, 267-269, 412. Instead, people can generally take a commercial raft trip in the year they want to take it and have no waiting period equivalent to that for noncommercial boaters. Id.[4]

The district court ruled for NPS on this issue, not on the basis of any finding by NPS, but instead on the basis of a public comment on the draft EIS. ER 20. Based on that inappropriate source of evidence, the district court ruled that the agency found that motorized services are "essential." ER 20. But even the public comment in fact requests that NPS somehow make a finding of necessity. ER 347. And NPS's response to the comment states that it "believes it has adequately addressed the effects of motor trips. The choice of the preferred alternative

[4] The fact that the NPS eliminated motorized commercial services for 6.5 months of the year demonstrates that the amount of use motorized services allow NPS to accommodate is not relevant to establishing the necessity of the services. ER 417. Indeed, the fact that motorized services are disallowed for half the year begs the question of their necessity for the other half.

reflects in part the NPS[‘s] desire to provide a range of service types and levels.” ER 348. Accordingly, NPS never even concurred with the commenter that motorized commercial services are necessary, nor did it ever assert that the alternatives considered or established the necessity of such services.

B. Motorized Commercial Services are not Necessary and Appropriate for the Public to Use and Enjoy the River.

Motorized commercial services are not necessary or appropriate for the river. In NPS’s own words, “motorized boat use is not necessary for the use and enjoyment of this area but is a convenience which enables the trip to be made in less time.” ER 218; 108, 50-51(¶ 42). Indeed, the record confirms that motorized commercial services are not necessary for the public to use or enjoy the river. ER 218 (NPS’s wilderness recommendation), 53. Rather, any person who could take a motorized commercial trip can take an oar-powered commercial trip. See ER 191, 53 (¶ 205-206, special needs groups can access the river on oar-powered trips), 97, 54 (¶ 208, NPS finding that “eliminating motor or oar trips would not appear to exclude any specific group”); ER 54 (passengers on self-guided and commercial trips range in age from 10 and 82 years old). Indeed, studies show that non-motorized oar trips are as safe or safer than motorized trips. ER 292, 49(¶ 32, showing lower risk of fatality on non-motorized oar trips). With the

assistance of experienced commercial oar guides, a wilderness river experience can be had by anyone able to go rafting who can afford to pay for it.

C. NPS Illegally Authorized Commercial Services Without Establishing Any Amounts That May Be Necessary or Appropriate.

NPS concedes that it must address "[h]ow 'necessary and appropriate' is the current concession allocation level" and the "National Park Service preference for motorized concession operations." ER 240, 264. And yet NPS never specified any amount of any particular commercial services that may be necessary and appropriate to enable those who do not have the skill or equipment to raft the river. ER 303 (necessity discussion does not address amount); ER 54-55(¶¶ 211-212). Without stating a quantity of any appropriate and necessary commercial services, NPS violated Congress' mandate that commercial services "shall be limited to those . . . that are [ ] necessary and appropriate . . ." 16 U.S.C. § 5951(b); 36 C.F.R. § 52.1. Because any finding of necessity is a specialized one, NPS "must show that the number of permits granted was no more than was necessary." Blackwell, 390 F.3d at 647.

The district court was correct that NPS's decision regarding the amount of commercial services to authorize was made after considering competing alternatives and a number of variables. ER 22. But NPS's decision is illegal

because none of those variables is "necessity" as the Concessions Act mandates. NPS never posed nor answered the critical question of how much commercial services are necessary on the river. There is no basis for why the amounts of commercial services authorized in the preferred alternative are necessary as compared to lesser amounts in different alternatives.

Indeed, public comments on the DEIS reveal that commercial services are used by those who do not even need nor want commercial guides, but hire services merely to gain river access, due to the long waits for the noncommercial permits.[5] See, e.g., ER 283 ("A[merican] W[hitewater]'s President Barry Tuscano, as well as other board members, have hired commercial outfitters to let them tag along in their personal kayaks or rafts since they could not get a private boater permit."); ER 281("I would like to let you know that I signed up with a rather expensive outfitter so I would be able to get to paddle the Colorado River through the Grand Canyon. I feel that the commercial outfitter is my only chance to get to run the river while I am still young enough to paddle it. I believe there ought to be many more opportunities for private boaters than the current system allows."); ER 282 ("I have pretty much written it off as impossible due to the 10 year waiting list to

[5] The district court ignored the evidence of people taking commercial trips because they did not want to wait indefinitely for a self-guided trip.

get in unless you pay thousands of dollars to a guide company."); ER 286 ("Eliminate commercial outfitters offering 'kayak support trips.' Kayakers have a huge and unfair loophole in the system. They are literally buying private access to run their own boats. If kayakers can do this, why can't rafters buy 'rafting support trips?'"); ER 287 ("I've twice payed to kayak this river – I hope to have my waiting list number come up before I'm too old to paddle – or I die while waiting!"). As such, any authorization of amounts of commercial services for this end-run around the permit system, when professional guide services and equipment are unnecessary, is illegal.

Notably, after this Court's ruling and remand in Blackwell, that district court rejected the agency's allocations of commercial services where the agency failed to consider use of commercial services that amounted to an end-run around the non-commercial permit system. High Sierra, 521 F.Supp.2d at 1079. Here too NPS provided no analysis of the numbers of people needing commercial services to form a basis for the allocated amounts. NPS never explained why it may be necessary to authorize amounts of commercial services, which allow anyone to take a commercial trip in the year they choose, regardless of whether they need commercial assistance, when noncommercial users wait years if not decades to raft the river. NPS never accounted for what level of commercial services are

necessary and appropriate. ER 302-308. Nor does NPS discuss in the alternatives or carrying capacity disclosure any level of commercial services that may be necessary and appropriate.

The district court found that the FEIS and ROD lack any specific discussion of the amount of motorized commercial services needed for public use and enjoyment of the river. ER 20. Nonetheless, it ruled for NPS because its "consideration of the amount of motorized traffic required in the River can reasonably be discerned from the FEIS." ER 21. It then upheld NPS's decision because: (1) motorboats can run the river in 10 days compared to 16 for oar boats allowing more people to see the river; (2) motorized trips are frequently chartered for special-needs groups, educational classes, family reunions, or to support kayak or other paddle trips; (3) motorized trips help alleviate overcrowding at popular cites on river and (4) some people feel safer in a motorized raft. ER 23. But it is inappropriate for the district court to provide rationales for NPS that the agency lacked. Further, none of these arguments links the amount of services authorized to the amount of commercial services needed. As in Blackwell, nowhere in its FEIS or ROD does NPS "articulate why the extent of such [commercial] services authorized . . . is 'necessary.'" 390 F.3d at 647. "[A]t some point in the analysis, the factors must be considered in relation to one another." Id.

Moreover, even if River Runners must respond to the district court's rationales, short trips can be taken on non-motorized oar boats. ER 332, 336, 284. Second, special groups can also take a non-motorized trip because no groups are excluded in the absence of motors. ER 191, 53. Third, with proper management of launches, group size, campsite reservations, education, and use levels, overcrowding at popular sites can be avoided. See ER 423, 432-433. And fourth, whether "some" undefined number of people feel safer in motorized boats is not a justification for authorizing any amount of commercial services. See ER 293. Indeed, in evaluating necessity, "preference" cannot be equated to "need." High Sierra, 521 F.Supp.2d at 1078-1079.

Without an analysis of the amount of specific types of commercial services that are necessary, which considers the unused allocation by the concessioners, the number of commercial users who do not need commercial assistance and would rather take a noncommercial trip and the demand for commercial services, NPS's decision to allocate the amount of use to the concessioners has no rational validity.

D. Authorization of Motorized Commercial Services is Inconsistent with Protecting the Values of the River to the Highest Practicable Degree.

Under the Concessions Act, in order to authorize motorized commercial services, the FEIS must establish that such services are consistent to the highest

practicable degree with protecting the river's resources and values. 16 U.S.C. § 5951(b). In fact, NPS may not consider a proposal for a concessions contract that fails to meet minimum requirements for preservation of the values of the park unit. 16 U.S.C. § 5952(4)(A)(iii). Here, the resources and values include the wilderness river experience, the natural soundscape, primitive and unconfined recreation, and the experience of solitude. ER 300. To preserve these resources, NPS may only "[p]rovide a range of recreational opportunities consistent with the preservation of wilderness character." ER 301. And yet NPS has repeatedly conceded that allowing motorized uses on the river is inconsistent with protecting the resources and values of the river, including its wilderness character and providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation. See e.g., ER 235, 108; Section III, below. The FEIS minimum requirement analysis for motorized commercial services unambiguously found that "[f]or visitors seeking outstanding opportunities for solitude or a primitive and unconfined type of experience, the impacts would be adverse and of moderate intensity during the peak use motorized periods," which also happen to be the peak use periods for all river users. ER 410, see ER 340 (stating location for minimum requirements analysis). Thus, NPS never disputed its former wilderness coordinator's findings that "[b]y any measure, the current concession operations

using motorized equipment exceeds that which is needed to meet established 'minimum requirement' tests. The continued use of this equipment within [potential] wilderness violated the letter and inten[t] of the Wilderness Act and NPS management policies and director's orders addressing wilderness." ER 269a-270.

By any reasonable definition, motorboats and helicopters are not "primitive" modes of river access.[6] NPS provides no analysis of how motorized equipment is consistent to any degree with protecting the primitive experience of the river. Further, as described below, in authorizing motorized uses, NPS acted contrary to its own binding 2001 MPs on preserving wilderness values and resources. Acting inconsistently with its MPs is another reason NPS has no rational basis to support its decision under the Concessions Act. In sum, the record proves that motorized commercial services are unnecessary and fail to preserve the river's resources and values to the highest extent practicable. As a result, NPS violated two mandates of the Concessions Act.

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[6] "Primitive" means "of or relating to the earliest age or period," "little evolved," or belonging to or characteristic of an early stage of development: CRUDE RUDIMENTARY [technology]." NEW OXFORD AMERICAN DICTIONARY at 1354 (2001).

III. NPS FAILED TO PRESERVE THE RIVER'S WILDERNESS CHARACTER.

A. NPS Must Preserve the River's Wilderness Character Because the River Qualifies for Wilderness Designation.

Pursuant to the Wilderness Act, 16 U.S.C. § 1132(c), and the Grand Canyon National Park Enlargement Act ("Grand Canyon Protection Act"), 16 U.S.C. § 228i-1, in 1977, NPS recommended to the President that 1,004,0066 acres within the Park, including the entire free-flowing part of the Colorado River from Lee's Ferry to River Mile 277, be designated as wilderness.[7] See ER 98-103, 160, 112. NPS's Director stated:

> The Colorado River . . . is now recommended as wilderness so as to perpetuate the primitive qualities of the canyon with increased opportunities for solitude and enjoyment of the beauty and natural significance of the Grand Canyon. To achieve this, all visitor use will be without motors, and more nearly like the experience of earlier explorers. A three year study of the river with public participation has shown that visitor appreciation, understanding, and enjoyment of the Grand Canyon will be enhanced by this type of use.

ER 103. Later, NPS recommended that the river's status be changed from "recommended" to "potential" wilderness, to accommodate NPS's 1980 decision

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[7] The 1977 wilderness recommendation followed an extensive wilderness inventory of all lands within the Grand Canyon, an EIS, the Colorado River Research Program (twenty-nine studies on impacts to and use of the river), and input from members of the public and federal, state, and tribal entities. See e.g., ER 79-96, 104-106,73-78, 109-110, 227-230.

to phase out motors on the river over a five year period. ER 214-217, 228-229 (1980 rec.); ER 338, 341, 231-235 (1993 rec.). In the 1993 update, NPS states:

> While there is no question that the Colorado River passes through some of the most scenic wilderness characteristic of Grand Canyon, the current levels of motorized boat use probably contradict the intent of wilderness designation. This use is inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation. It is recommended that the river corridor be designated a potential wilderness addition, pending resolution of the motorized riverboat question.

ER 235. Legislative action on the recommendation is still pending, but NPS treats the corridor as potential wilderness. ER 338, 341.

Under the ROD, NPS will issue permits for uses of the river. ER 297, 418, 421, 435. NPS's regulations require that "any activity authorized by a permit shall be consistent with . . . administrative policies." See 36 C.F.R. § 1.6. Thus, in issuing permits for commercial and noncommercial use of the river – a recommended or potential wilderness – NPS must comply with the 2001 MPs, which are designed to preserve the river's wilderness character pending a final decision from Congress on wilderness designation. MP 6.3.1 ("wilderness" includes all categories of wilderness including recommended and potential).[8]

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[8] The FEIS defines "wilderness character." Wilderness areas are undeveloped lands that retain their "primeval character [and] influence without permanent improvements or human habitation . . .[g]enerally appear to have been affected primarily by the forces of nature . . ." and provide "outstanding

The MPs provide that NPS must allow only those recreational uses in the river that enable the corridor to retain its "primeval character," with opportunities for solitude or primitive and unconfined types of recreation (MP 6.4.3); prohibit recreational uses "that do not meet the purposes and definitions of wilderness" (MP 6.4.3.1); and prohibit the "use of motorized equipment or any form of mechanical transport . . .in wilderness except as provided for in specific legislation." (MP 6.4.3.3). Moreover, only "wilderness-oriented commercial services that contribute to public education and visitor enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized" in the river and only if they "meet the 'necessary and appropriate' tests of the [Concessions Act]." MP 6.4.4. These requirements mean that NPS must preserve the river's wilderness character and prohibit motorized uses in recommended or potential wilderness areas. 36 C.F.R. § 1.6; see Terbush v. United States, 516 F. 3d 1125, 1132 (9th Cir. 2008) (noting that NPS MPs may contain mandatory directives, but rejecting that the policies at issue in that appeal

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opportunities for solitude or a primitive and unconfined type of recreation." ER 340-341. Preserving "wilderness character" includes: (1) protecting the wilderness resources (i.e., water, land, solitude, wildlife, natural setting and sound); and (2) providing an opportunity for a primitive wilderness experience. Wilderness Watch v Mainella, 375 F.3d 1085, 1093 (11th Cir. 2004).

include "an explicit call" to conduct certain safety and hazard reviews).[9]

B. NPS Failed to Preserve the River's Wilderness Character.

Despite the mandates to preserve wilderness character and prohibit motorized equipment and mechanized transport in the recommended or potential wilderness, NPS did just the opposite, authorizing motorboats, helicopter passenger exchanges, and generators in the river corridor. ER 417. These motorized activities are inconsistent with managing for wilderness values and character. ER 108.[10] NPS found that "motorized boat use . . . is inconsistent with

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[9] The district court incorrectly held that the MPs did not apply. ER 15, n. 9. MP 6.4.3 (recreational uses), MP 6.4.3.3 (motorized equipment), and MP 6.4.4 (commercial services) apply to the river as recommended or potential wilderness. MP 6.3.1 (providing that the policies apply to all wilderness categories). Further, the provision that potential wilderness be "managed as wilderness to the extent that existing non-conforming conditions allow," does not give NPS carte blanc to re-authorize new, non-conforming uses in the river. See ER 297, 421. Moreover, even if the district court was correct that specific provisions conflict with the general policy, "[f]undamental maxims of statutory construction require that a specific section be found to qualify a general section. A specific statutory provision will govern even though general provisions, if standing alone, would include the same subject." Smith v. Califano, 597 F. 2d 152, 157 (9th Cir. 1979).

[10] River Runners do not suggest that one cannot appreciate natural beauty from motorized transport. "[T]here are many . . .categories of public land administered by the federal government [that] appropriately offer this opportunity." Wilderness Watch, 375 F.3d at 1094. In fact, motorized river trips are currently available on other sections of the Colorado River, as well as on other western whitewater rivers. This type of motorized use, rather, is simply not the "type of 'use and enjoyment'" allowed by NPS's wilderness policies. See id.

the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation." Id. In fact, NPS concedes that "motorized raft use" is a "temporary, non-conforming or incompatible use" that is inconsistent with managing for wilderness values and character. ER 338; Since 1980, "additional non-conforming uses that contradict the intent of wilderness management policy have either developed or increased." ER 226. These "non-conforming uses consist of . . . increases in motorized traffic, increases in helicopter exchanges, non-emergency administrative use of motorboats, and exacerbation of crowding and congestion through user day pools." Id.

Accordingly, NPS admits that motorized uses are "non-conforming" and inconsistent with its duty to preserve the river corridor's wilderness values and character.[11] Indeed, motorized uses have a profound impact on the river's physical wilderness resources and the chance for people to have a wilderness experience. See ER 437 ("impacts to wilderness character . . . will be detectable and measurable during most of the year"); ER 410 ("for visitors seeking outstanding opportunities for solitude or a primitive and unconfined type of experience the impacts would be adverse"). The record is replete with evidence that motorized

[11] "[N]on-conforming uses" are uses that do not comport with wilderness. Non-conforming uses are "contrary to the definitions of wilderness included within the Wilderness Act." ER 256.

uses have had, and continue to have, a significant impact on the corridor's wilderness character. For example, NPS found:

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

ER 68.

As a result, to protect the river's wilderness resource, NPS has repeatedly proposed phasing out all motorized uses. ER 67 (phase out by 1976); ER 192-213 (phase out by 1985). In fact, objections by concessioners in the 1970s resulted in the Colorado River Research Program and roughly 29 "ecological and social studies" on the carrying capacity of the river and the impact of motorized boats. ER 68 & 70; 73-75, 113-159. The research program found that motorized uses seriously impact the river's wilderness character. ER 169-186. In terms of water quality, NPS found that "[p]ollutants added to the river as a result of motorized travel include approximately 5,750 pounds of petroleum residue annually, as well as gasoline from leaking tanks and oil spills." ER 187; ER 352 ("Motorboat use introduces contaminants such as hydrocarbons and burned and unburned fuel and motor oil" to the River). Noise from motorboats also invade the natural sounds of the River corridor. ER 146-147 (noise factors); ER 220 (study contrasting

recreational experiences); ER 72 (study on the sound-level of motor noise).

Overall, "non-motorized trips are more pleasing to the visitor." ER 188. Reasons "given suggest that oar travel is seen as more consistent with a natural or wilderness experience." Id. Passengers who had been on motor and oar trips preferred oar trips. They enjoyed the slower pace, could relax; they become more aware of natural sounds in the canyon; they were able to observe more closely the unique features along the river and more easily ask questions of their guide." Id; ER 220-222 ("motor-oar experiment"). Accordingly, after completing an FEIS in 1980, soliciting public review and comment, and completing the research program, NPS once again decided to preserve the "wilderness experience" by eliminating motorized boat use. ER 192-213. NPS found that "[s]tudies over the past several years show that the use of motorboats . . .is incompatible with overall visitor enjoyment and resource management objectives." ER 111. The use "of motorized watercraft . . .will be phased out over a 5 year period. This will achieve the objective . . . to make available the high quality wilderness river-running experience." ER 213.

In its FEIS, NPS does not discuss its earlier findings and determinations but does acknowledge that noise intrusions to the natural soundscape of the river are "adverse, localized, and regional" and that, when combined with other sources of

noise (i.e., aircraft overflights) would have a "significant adverse effect" on the river's natural soundscape. ER 355. NPS concedes that "impacts to wilderness character . . . will be detectable and measurable during most of the year, but more apparent during the higher mixed-use period, at the frequently visited areas and passenger exchange points along the river corridor." ER 437. "For visitors seeking outstanding opportunities for solitude or a primitive and unconfined type of experience [i.e., a wilderness experience], the impacts would be adverse and of moderate intensity during the peak use motorized periods." ER 410.

In the district court, NPS asserted that the MPs are not enforceable. But the agency's regulations state that it must comply with its MPs when issuing permits for uses of the river. 36 C.F.R. § 1.6. In turn, the MPs state that "[a]dherence to policy is mandatory unless specifically waived or modified by the Secretary ." MP Introduction. No such waiver or modification has been granted for the CRMP. Further, the 2001 MPs "are the type of agency decision that Congress intended to 'carry the force of law.'" SUWA v. National Park Service, 387 F. Supp. 2d 1178, 1187-1189 (D. Utah 2005) (citing Mead, 533 U.S. at 221). Moreover, even if the 2001 MPs do not have the force of law, because NPS committed to comply with them in the FEIS, it is "arbitrary and capricious" for it to now ignore them. ER 339 (river will be managed in accordance with MP). This Court has explained that

an agency, haven chosen to promulgate a policy, "must follow that policy." N.A.H.B. v. Norton, 340 F.3d 835 (9th Cir. 2003); Ecology Center v. Austin, 430 F. 3d 1057, 1069 (9th Cir. 2005) (Forest Service cannot ignore own guidance); Resources Ltd. v. Robertson, 35 F. 3d 1300, 1304 n.3 (9th Cir. 1994) (agency cannot treat guidelines as optional where decision was contingent on adherence).

IV. NPS VIOLATED THE ORGANIC ACT.

A. NPS Violated the Organic Act's Requirement that Commercial Operations Not Interfere With Free Access by the Public.

1. The Organic Act Mandates Fair Use Allocations.

Under the Organic Act, the Secretary of the Interior "may [ ] grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks . . . for periods not exceeding thirty years." 16 U.S.C. § 3. The Act also mandates that "[n]o natural, curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public." Id. This Court has determined that whether an agency has protected free access by the public is "whether allocation has been fairly made pursuant to appropriate standards." Wilderness Preservation Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979). When reviewing a challenge to a 1972 NPS decision allocating use of the river, this Court held:

> If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the 'free access' of any user must be limited to the extent necessary to accommodate the access rights of others. We must confine our review of the permit system to the question whether the NPS has acted within its authority and whether the action taken is arbitrary. Allocation of the limited use between the two groups is one method of assuring that the rights of each are recognized and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary.

Id. at 1253 (citations omitted). NPS has discretion to choose the system by which it reasonably allocates use, but it still must fairly allocate use under appropriate standards. Kleppe, 608 F.2d at 1254.

The district court improperly aligned River Runners' legal arguments here with arguments of the appellants in Kleppe. ER 26. There, the appellants argued that noncommercial users should have priority over commercial users, and this Court held that they were wrong. Kleppe, 608 F.2d at 1252. In contrast, here, River Runners assert that "free access" for the public should not disadvantage access by commercial users who need guides to fulfill necessary and appropriate services under the Concessions Act. 16 U.S.C. § 5951. Rather, free public access is equally important for commercial users in need of guide services as it is for noncommercial users. Neither commercial users nor noncommercial users should pay for *access* to the Colorado River (beyond reasonable administrative costs paid to the agency for permitting). See H. REP. NO. 700, 64th Cong., 1st Session, 5

(1916) (in section three of the Organic Act, Congress intended to protect the public from such "extortion or unreasonable charge" in using their National Parks, by requiring NPS to control concessioners). In paying concessioners, commercial users who need guides should pay only for the service of a guided trip down the river and noncommercial users should not have to pay concessioners to gain equal access to the river. Read together, the Organic and Concessions Acts require that commercial services be limited so that the public, not for-profit companies, retain access to its public lands; so that people may freely use and enjoy the very special places that Congress set aside for them and that, consistent with preservation, only necessary and equitable amounts of commercial services are provided to assist those who otherwise would not have an opportunity to enjoy a wilderness river experience in the Grand Canyon. 16 U.S.C. § 3, 16 U.S.C. § 5951.

2. NPS Allocated Use Between Concessioners and Noncommercial Users Without a Rational Basis in Equity and Appropriate Standards.

NPS violated the Organic Act by failing to fairly allocate use pursuant to any identifiable or appropriate standards. Because overall use must be limited to protect the river's resources and the wilderness river experience, access must be limited. Here, NPS chose to limit and allocate use in a split allocation system between commercial and noncommercial user groups, with the largest allocation

going to motorized commercial use. ER 314-316. NPS authorized the public to gain access to travel down the river by either: (1) applying for a non-commercial permit through the lottery system;[12] or (2) paying a commercial concessioner, which has been allocated use of the river, to take people on a guided trip via motorized or non-motorized raft. ER 418. NPS developed the range of alternatives for split allocations by setting separate limits for different variables, such as launches per day, group size limits and trip length, for each type of trip. ER 411. Notably, the key criteria for developing the alternatives did not incorporate standards for fairness or equity. ER 308-313.

In fact, NPS failed to identify any reasonable standard by which to measure the fairness of allocations. Preceding the DEIS, experts advised NPS that it could measure fairness by whether the percent of disappointment (failure to gain river access) for each user group was equal. ER 276, 274-275. But NPS chose not adopt this or any other appropriate standard by which to fairly allocate use. On its face, the lack of such a standard, which this Court ruled is required, means there is no rational basis for the NPS's split allocation decisions. Kleppe, 608 F.2d at 1253.

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[12] NPS created a noncommercial permitting system which transitions from the noncommercial waitlist to a hybrid-weighted lottery system. ER 435-436.

Moreover, even if NPS established a standard by which to measure fairness, it failed to evaluate whether any of its alternatives fairly allocate use and thus, it has no rational basis for asserting that its decision is fair. ER 356-404 (analysis of alternatives' impacts on visitor use and experience includes no discussion of fairness). NPS stated one objective for allocating use of "[a]ddress[ing] user perception of allocation inequity." ER 306. But even this misstates its duty. NPS must "fairly allocate use," not just address "perceptions" of equity. Kleppe, 608 F.2d at 1253. Evaluating perceptions of equity does not "accommodate the access rights" of noncommercial boaters vis-a-vis commercial boaters in order to ensure the 'free access' of both user groups, as required by this Court. Id.

NPS did prepare an "Allocation Options Impact Analysis," but it discusses only the differences between three ways of allocating use: split allocation; common pool allocation and adjustable split allocation with a single reservation system. ER 405-408. The FEIS states:

> The drawback of a split allocation system lies precisely in determining the appropriate allocations for the various sectors. If a significant number of people affected by the split allocation feel their proportion of the allocation is unfairly disproportional to their demand, then they would feel the allocation system isn't fair and doesn't work. This is indeed what the NPS heard from the public during 2002 public scoping. Commercial users generally believe their allocation is either appropriate, somewhat below where it should be, or slightly higher than it needs to be. On the other hand, noncommercial groups generally believe their proportion of the overall

> allocation is unfairly small and point to the waitlist as "proof" of this. Based on the exponential growth of the waitlist, demand undeniably exceeds supply.

ER 405 (emphasis omitted). Ultimately, NPS concedes that the split allocation system fails to address user perception of allocation inequity. ER 408. On the other end, the common pool approach, "would avoid the potential perceptions of allocation inequities between commercial and noncommercial sectors and ultimately ensure relative use levels that adjust automatically relative to sector demand levels," but was not selected because it may have adverse planning and economic impacts for concessioners. ER 406.

In contrast, under an adjustable split allocation approach with a single registration system, NPS would still allocate use between the user groups so that concessioners had a reliable allocation level, but it could adjust allocations under established standards to reflect the measured demand from the single reservation system. Id. "Information obtained through this system would be used by the NPS to make demand-responsive transfers between commercial and noncommercial sector allocations." Id. NPS concluded that the beneficial impacts included the agency's ability to adapt and respond to changes in demand between user groups and to offer more security for user groups than the common pool. ER 407. The only disadvantage of this approach to allocation "is it requires implementing an

all-user registration system, which has never been tested on another river," which could create "fear of the unknown" by both user groups. Id. But NPS identified mitigation measures and safeguards to alleviate this potential "fear." Id.

In sum, NPS chose a split allocation system, which requires some mechanism for ensuring fair allocations - like a demand study; then it chose not to study demand (ER 280, 406), or establish any other standard by which to measure fairness; it conceded that the system did not meet its objectives of addressing user perceptions of equity (ER 408); and finally, it failed even to evaluate in the FEIS the fairness of its allocation levels (ER 356-404). As a result, its approach to allocation and the allocations themselves are arbitrary and capricious. Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953, 965 (9th Cir. 2005) (requiring "a satisfactory explanation supported by the record showing the necessary rational basis for [a numeric] calculation."). NPS has no discretion to choose an allocation system by which it cannot fairly allocate use, or not to invest in the information necessary to fairly allocate use, under that system.

NPS had a reasonable alternative in the adjustable split allocation single reservation system, which it found would protect both user groups and lead to

demand-based adjustable allocations.[13] In adopting an allocation system that does not ensure fairness over one that would, NPS abdicated its duty to ensure fairness. Kleppe, 608 F.2d at 1253.

3. NPS's *Post Hoc* Rationalizations Fail.

Before the district court, NPS defended its decision with a *post hoc* rationalization that "based on annual user-days, NPS has *evenly* distributed Colorado River use between commercial and noncommercial users." ER 46 (emphasis added). The agency does not explain why a near 50-50 split of annual user days is fair.[14] Such a split is arbitrary when it does not account for the disparity in demand for access between the groups, when the user-days are not allocated evenly across the year and when user-days alone are a less important measure of use for noncommercial users.

In order to fairly allocate use in a split system, relative demand is an essential factor. ER 36, 39, 41. For instance, if 100 noncommercial users seek permits and 50 commercial users seek permits, but only 100 permits are available,

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[13] In fact, the single reservation system approach to allocation was the NPS's preferred alternative in the DEIS. ER 350.

[14] Commercial user-days are capped annually at 115,500. ER 315-316. Noncommercial user-days are not capped but based on the number of launches and group size. The NPS estimates that noncommercial boaters will use 113,486 user-days annually. Id.

it would be unfair to allocate 50 permits to noncommercial users and 50 to commercial users. A fair split would be 67/33, a two-thirds apportionment to each user group based on a supply/demand ratio of two-thirds. Id.; Kleppe, 608 F.2d at 1253. If NPS gives concessioners 50 percent of user days, but demand from people seeking commercial services is for only 40 percent of total user days, concessioners receive 10 percent more user days than they require, and thus earn an "economic rent" on "access". ER 38-40. Indeed, NPS planners determined they needed information on the "relative demand for motor trips vs. oar trips" and "relative demand for different types of use over different seasons within the year (i.d. commercial, noncommercial, educational, research, etc.)." ER 265-266 (emphasis original). However, the FEIS never made any such determinations. And yet NPS argued, *post hoc*, that it would be infeasible to determine relative demand because a survey would cost around $2 million and be of limited use. ER 47. However, the FEIS and ROD did not state that NPS could not afford such a necessary survey. ER 350, 406. [15]

[15] In fact, the experts upon whom NPS relied stated that even with their inherent flaws, "[demand] studies should be done" for a split allocation system and gave a range of options costing from $150,000 to $2.1 million. ER 277; cf. ER 350. The most expensive demand study counted all users of the Forest Service, a vastly larger project than the one before the NPS. ER 277. Indeed, in the 1979 CRMP and FEIS, NPS admitted that it was feasible to monitor actual relative demand between user groups and make adjustments in the allocations accordingly,

Further, even if it were true that "even" user-days reasonably measured equity, then user-days should be evenly distributed throughout the year to each user group. But they are not. Commercial users have no allocation in the winter (ER 316) when demand plummets because it can be cold and shaded along the river with short days (ER 333, 337, 294, 295). In contrast, the NPS allocated one-third of noncommercial user-days to these months. ER 316.[16] Thus, the 50-50 user-day split is not "even," much less fair.

But user-days alone are not a fair measure of use between commercial and noncommercial groups. In response to public comments, NPS made clear that measuring allocation in terms of user days disadvantages noncommercial users and is a financial boon for commercial companies. ER 342 (A4). In fact, "[t]he FEIS does not use user-days to allocate noncommercial use. It only uses

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every few years. ER 189, 168, 272. In public comments, a former river outfitter operator suggested another way to measure demand "just by checking how far in advance space is booked up, under reservation systems that are quite similar [and then] compare waiting times for commercial and noncommercial space, under similar reservation systems, and transfer enough space so that noncommercial waiting times are not longer." ER 290-291; see e.g. ER 406-407 (adjustable split allocation system alternative with single registration system).

[16] The FEIS estimates 32,407 user-days in the summer, 46,992 user-days in the shoulder seasons and 34,087 user-days in the winter for noncommercial users. See ER 316. Conversely, commercial users have access to 91,909 user-days in the summer and 23,591 user-days in the shoulder season. Ibid.

launches." ER 346 (A52). In contrast, the agency flatly admitted:

> Daily launches are probably the most important use measure for measuring impacts to visitor use and experience because launches (or trips) are the "units of use" that have encounters, occupy campsites, or influence the probability of encounters at attraction sites. The daily number of people launching would probably provide similar information because the number of trips and people are highly correlated [...], but launches are easier to track.

ER 343.

User-days are only one factor of a multi-faceted allocation system. In response to public comments, NPS states that "[e]quity can be measured in a number of ways, including passengers, launches, and user-days." ER 344 (A36), 349. In fact, all of these ways of limiting use are important factors to consider in evaluating whether allocations are equitable. NPS's *post hoc* rationalization addresses only one mechanism–user days--which is most significant to concessioners and least important for noncommercial boaters. NPS illegally ignored relevant factors that are important for river access, including numbers of passengers, launches, group size, length of trips and seasons of use.

NPS claims that "instead of attempting to develop an allocation based on relative demand, NPS looked at different allocations scenarios" and evaluated each alternative for its potential consequences on use and preserving resources. ER 47. But the FEIS completely lacks any discussion of fairness in any of the

alternatives, all of which use the split allocation system. NPS's final defense is that its "allocation of use between commercial and noncommercial users is rational and based on a reasonable methodology that balances public access with protection of the Park." Id. The FEIS, however, does not describe any methodology under the split allocation system for ensuring fairness. While balancing public access with preservation is one NPS objective, it does not address the duty to "fairly allocate use pursuant to appropriate standards." Kleppe, 608 F.2d at 1253.[17]

4. The Record Shows That the Allocations Are Not Fair.

NPS's allocations are unfair for at least three reasons: (1) the significant inequity in the time it takes noncommercial users to gain river access; (2) the ability of anyone (irrespective of need) to pay concessioners for river access; and (3) the disparity in seasonal allocations between the two groups.

NPS admits that there are no equivalent waiting times for commercial users to access the river (ER 57), and that even under the new allocations it could take 10 to 20 years for noncommercial users, who were on the old waitlist, to obtain

[17] The district court upheld NPS's allocations primarily on the basis that Intervenors decided that NPS's allocations were reasonable, and because noncommercial allocations were increased above past levels. See ER 25-26. But the district court never identified any place in the FEIS or ROD where a rational basis for NPS's allocation decisions can be found.

launch dates. ER 345 (A47) ("NPS predicts that over half of those [on the old waitlist] who transfer to the new [hybrid-weighted lottery] system and compete every year will receive a trip within 10 years."); ER 409 ("The Park also predicts that in twenty years, no more than 561 of these people [on the old waitlist] will continue to have been unsuccessful in obtaining a launch date."). This means that even 20 years later, more than 500 noncommercial trip leaders still will not have obtained a permit to raft the river. As a result of the inequities, members of the public pay concessioners to gain access even when they do not need the services and would prefer to arrange their own noncommercial trips. See e.g. ER 281-282, 286-287.[18]

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[18] The waiting period under the former permit system provides additional evidence of the inequity in allocation. Under that system, a member of the public (a trip leader) would wait between 10 and 20 years to obtain a permit to take a noncommercial trip down the river. ER 330. At the time of the FEIS, there were approximately 8,000 trip leaders on this list waiting to obtain a permit, and roughly 1000 new applicants each year. ER 330, 434. Based on an average group size of 13, these 8,000 trip leaders represent potentially 104,000 people who would go down the river on noncommercial permits. ER 240. In NPS's own words, noncommercial boaters represent "a broad spectrum of the 'general public' which has a much more difficult time obtaining a river trip than the commercial passenger who can generally purchase a trip for the summer season." ER 240, 52. Other record evidence also supports the fact that a commercial passenger can generally take a trip in the year she wants. See ER 267-269, see ER 289 (independent research by former river outfitter). Members of the public who are not already on the noncommercial waitlist and who cannot afford to pay a commercial outfitter and/or do not wish to take a commercial trip, however, are highly unlikely to be able to take a trip down the Colorado River. See ER 331 (the

Further, concessioners control the vast majority of summer river access and dominate everyone's experience with motors, the predominate commercial use of the river. ER 273, 56 (¶218). NPS has argued that there is "interest" in winter use by noncommercial users, but the agency never addressed whether noncommercial users would choose to use one-third of their estimated user-days to take a winter river trip if they had other options. ER 312 ("Historically, winter use has been low."); ER 315 (accommodated winter use of 318 people under old plan and 1,855 under new plan). There is far more demand than supply for summer trips and more supply than demand for winter trips. ER 413-414, 294-295.

In sum, 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. In effect, NPS is saying to prospective park visitors, "at this point in time there is still plenty of vacant space, but it is only available to you if you agree to pay a concessioner."[19] The freedom and equity of public access does not

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new permit system would favor those who have been unsuccessful in obtaining a permit in prior years, but does not guarantee a permit); at ER 434 (noncommercial demand has exceeded supply of permits since 1973); at ER 405 ("Based on the exponential growth of the waitlist, demand undeniably exceeds supply.") The FEIS does not claim that these inequities will be redressed by the new allocations.

[19] A review of concessioner websites illustrates that even for the 2008 summer season, there are still plenty of river trips available to the paying public. See http://www.azraft.com/gc_datesprices.cfm; http://www.diamondriver.com;

pertain to theoretical user-days, but to real people who seek to take a trip of a lifetime on the Colorado River. It is inequitable, and a violation of the Organic Act, that an individual can go to the NPS and seek access and be told that for the right price, he can pay a concessioner this year to take a trip down the Colorado River at a time of his choosing *or* he can wait for the backlog of waitlisters to take trips and play the lottery, where he will have a slim chance of obtaining a permit, but might get lucky one day, 10 to 20 years from now. This system favors concessioners over the public and results in the illegal sale of river access to people who are entitled by law to freely access their public lands.

B. NPS's "No-Impairment" to the Natural Soundscape Determination is Arbitrary and Capricious.

Pursuant to the Organic Act, NPS must leave the Grand Canyon's resources and values "unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.[20] This no impairment mandate is the "cornerstone of the Organic Act . . . [which]

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http://www.oars.com/grandcanyon/rafting/; http://www.riveradventures.com/grand-canyon/rates.cfm (last visited May 8, 2008).

[20] Congress supplemented and clarified the Organic Act's no impairment mandate in the General Authorities Act in 1970, and the 1978 Redwood Amendment. Both use the word "derogation" instead of impairment. NPS treats the mandate to avoid "impairment" and "derogation" of park resources and values as "a single standard for the management of the national park system." MP 1.4.2.

establishes the primary responsibility of the . . . Park Service." MP 1.4.4. An "impairment" is an "impact that, in the professional judgment of the responsible [Park Service] manager, would harm the integrity of the park resources or values." MP 1.4.5. Impairment "may occur from visitor activities; [NPS] activities in the course of managing a park; or activities undertaken by concessioners, contractors, and others operating in the park." MP 1.4.5. In order to determine whether an impact rises to the level of impairment NPS must carefully consider a number of factors including: (1) the severity, duration, and timing of the impact; (2) the direct and indirect effects of the impact; (3) the cumulative effects of the impact; (3) the baseline conditions; (4) all NEPA documents; and (5) all relevant scientific studies. See MP 1.4.5; MP 8.2.3; MP 1.4.7; see also ER 436 (findings on impairment); SUWA, 387 F. Supp. 2d at 1193 (citing MP 1.4). After considering these factors, NPS must decide whether the impact(s) associated with the action – in this case the motorized use of the river – rise to the level of an impairment. See ER 436. An "impact would be more likely to constitute impairment to the extent that it affects a resource or value whose conservation is . . .[n]ecessary to fulfill specific purposes identified in the establishing legislation, . . .[k]ey to the natural and cultural integrity of the park or to opportunities for enjoyment of the park; or [i]dentified as a goal in the park's [GMP] or other relevant [Park Service] planning

documents." MP 1.4.5.

The Grand Canyon's "natural soundscape" is precisely this type of resource or value. MP 1.4.6; ER 334, 257-262 (Soundscape Preservation and Noise Management). The natural sounds of the Grand Canyon are considered to be "an inherent component of the scenery, natural and historic properties, wildlands, and recommended wilderness that constitute the bulk of the park (94%)" and a "key component of the wilderness river experience." ER 334.

In this case, NPS's "no-impairment" determination for the CRMP is arbitrary and capricious because: (1) NPS failed to follow its own procedures for making impairment determinations; and (2) if NPS had followed such procedures, the Agency would have no choice but to conclude that motorized uses in the river corridor impairs the Grand Canyon's natural soundscape.

1. NPS Failed to Follow its Procedures in Determining No Impairment.

In concluding that motorboats, helicopter passenger exchanges, and generators in the river corridor "will not constitute an impairment to Grand Canyon National Park's [natural soundscape]" NPS failed to follow its own procedures for determining impairment in three significant respects.

a. NPS applied the wrong baseline.

First, NPS applied the wrong baseline or standard upon which to measure impacts to the Park's natural soundscape. The "natural ambient sound level – that is, the environment of sound that exists in the absence of human-caused noise – is the baseline condition, and the standard against which current conditions in soundscape [are to] be measured and evaluated." MP 8.2.3; ER 257 (Director's Order 47). In the Grand Canyon, this baseline condition is the natural sound of the river corridor in the absence of human-caused noise, i.e., the flowing water and rapids of the river, wind, storm activity, wildlife activity, and other natural sound generation such as rock and mud slides. ER 334.[21] Instead of measuring the total impacts of its ROD against the baseline natural sounds of the river, NPS adopted an incremental approach that looked only at the additive impacts to the river's natural soundscape "in the presence of audible human-caused noise including aircraft overflights." ER 335.[22] Thus, when NPS refers to "natural ambient sound

[21] A "system-wide survey of park visitors revealed that nearly as many visitors come to national parks to enjoy the natural soundscape (91 percent) as come to view the scenery (93 percent)." ER 257.

[22] Human noise sources within the river include "motorized watercraft, vehicle and tour bus noise from roads at launch/retrieval sites, camp activities, and aircraft overflights, with aircraft noise being the dominant noise source most often noticed by visitors." ER 334. Aircraft noise occurs from commercial air tours and their support operations, commercial jet traffic, military aircraft, general aviation,

levels" throughout the FEIS, NPS actually refers to the already degraded, existing impacts to the river's natural soundscape from audible human-caused noise. ER 335 (Table 3-4). By taking this approach, NPS masked the real, aggregate impacts (and thus impairment) to the river's natural soundscape.

This approach is illegal. In Grand Canyon Trust v. FAA, 290 F. 3d 339 (D.C. Cir. 2002), an agency attempted to minimize impacts to Zion National Park's natural soundscape by only evaluating proposed increases in overflights due to a new airport against Zion's already degraded, "existing" natural soundscape. Id. at 343. Like NPS here, the agency maintained that "there is little discernable increased noise intrusion to the Park . . .as compared to the existing airport, and that 'the increase in noise levels that would result from the [replacement airport] . . .is negligible." Id. The D.C. Circuit rejected this incremental approach, requiring the agency to take a hard look at the total, aggregate impacts to Zion's natural soundscape. Id. at 347; see Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988) ("[w]ithout establishing the baseline conditions that exist . . . there is simply no way to determine what effect [an action] will have on the environment . . .").

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and administrative use of aircraft. ER 353.

Moreover, the sound study upon which NPS relied for its "baseline condition" was not intended or designed to measure the impacts of motorized uses of the River against the natural ambient sounds of the Park. ER 237-238. The purpose of the study, rather, was to "develop an acoustic profile at specific sites in Grand Canyon National Park." ER 2377. Data from 23 sites were transformed into an "acoustic profile" which documents the various sounds, i.e., aircraft, vehicles, wind, water, visitor voices, animals, at each location. Id. NPS mistakenly took these "acoustic profiles" or snapshot of the existing sounds along the river to be the environmental baseline upon which impacts to the Park's natural soundscape are measured. ER 239 ("These acoustic profiles provide a baseline presentation of the sound environment for each of the sites"); ER 335 (discussing impacts to natural ambient sound levels).

b. NPS failed to incorporate the cumulative impacts to the Grand Canyon's natural soundscape when making its impairment determination.

Second, NPS's no-impairment determination is illegal because it failed to make a rational connection between the facts found in the FEIS, i.e., that the cumulative impacts to the Grand Canyon's natural soundscape are "significant," and the choice made, i.e., that there is no impairment to the Park's natural soundscape. Pacific Coast Fed. Of Fisherman's Assoc. v. Nat'l Marine Fisheries

Serv., 265 F.3d 1028, 1034 (9th Cir. 2001) (we must ask whether the agency "articulated a rational connection between the facts found and the choice made"). Before making an impairment determination, NPS must take into account the "cumulative effects of the impact in question." MP 1.4.5; ER 436 (ROD); SUWA, 387 F. Supp. 2d at 1190 (quoting MP 1.4.5).[23] While an "analysis" of cumulative impacts to the Grand Canyon's natural soundscape from aircraft overflights, air tours, and motorized use of the River is included in the FEIS, the NPS never took the logical next step and applied this cumulative impacts analysis to its impairment determination. See ER 436. The FEIS, for instance, concludes that the "cumulative effects [to the Grand Canyon's natural soundscape]. . .would be regional, adverse, long-term, and major." ER 355. Even with the additive impacts associated with motorized use of the River corridor, there "would still be 'significant adverse effects' on the [Grand Canyon's] natural soundscape." ER 355. Having acknowledged that significant cumulative, adverse effects on the Park's natural soundscape are occurring, NPS then summarily concludes, without

[23] Cumulative impacts are "the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Cumulative impacts can result from "individually minor but collectively significant actions taking place over a period of time." Id.

rationale, that there would be no "impairment of the natural soundscape in Grand Canyon National Park." Id.[24]

When making an impairment determination, NPS must do more than merely reference a NEPA analysis and then ignore its findings. It must provide an adequate explanation – a rationale – for finding that the cumulative impacts do not rise to the level of impairment. Sierra Club v. Flowers, 423 F. Supp. 2d 1273, 1322 (S.D. Fla. 2006) ("The analysis of wetlands . . .was extensive; however the results were not applied in the Corps' decision making process"). As one court recently explained, "[m]erely describing an impact and stating a conclusion of non-impairment is insufficient, for this merely sets forth 'the facts found' and 'the choice made,' without revealing the 'rational connection – the agency's rationale for finding that the impact described is not impairment." Sierra Club v. Mainella, 459 F. Supp. 2d 76, 100 (D. D.C. 2006).

c. NPS ignored the Colorado River Research Program, previous EISs, and previous CRMPs.

Third, NPS's impairment determination should be set aside because NPS failed to "consider any environmental assessments or environmental impact

[24] Response to comments in the FEIS suggest that NPS artificially limited the scope of its decision on impairment to "activities associated with river recreation." ER 351.

statements required by . . .NEPA; relevant scientific studies, and other sources of information; and public comment" when making an impairment determination. See MP 1.4.7. In deciding to phase out motorboats in 1980, NPS prepared an FEIS and relied on findings from the Colorado River Research Program's 29 studies and ultimately found that the impacts to the Grand Canyon's natural soundscape and wilderness character from motorized uses were unacceptable and needed to be removed. See ER 113-159 (synthesis of findings); ER 73-78 (listing studies); ER 161-167 (1979 FEIS); ER 192-213(1979 CRMP).[25] However, when deciding that no-impairment to the Grand Canyon's natural soundscape will occur in this case, NPS inexplicably failed to consider (let alone reference) any of the 29 studies, earlier EISs, CRMPs, or the overwhelming amount of public support for the decision to remove motorized uses from the River corridor.

Nor does NPS provide any convincing statement of reasons, rationale, or explanation for abandoning the findings of its 1980 FEIS and CRMP which called for the phaseout of motorboats to comply with the MPs and preserve the river's wilderness character and natural soundscape. See ER 213, 167. Such a radical

[25] The district court stated that River Runners failed to "identify [the 29] specific studies for the Court to consider." ER 29. In fact, all 29 studies are included in the record, and River Runners referred to and discussed them in their briefs and statement of facts.

shift in view, without apparent justification, is illegaly. See Bush-Qualye '92 Primary Comm. v. Fed. Election Comm'n, 104 F. 3d 448, 453 (D.C. Cir. 1997); Louisiana Public Service Corp. v. FERC, 184 F.3d 892, 897 (D.C. Cir. 1999).[26]

2. NPS's Authorization of Motorized Uses (Added to Other Noise) Impairs the Grand Canyon's Natural Soundscape.

Grand Canyon National Park is no longer "a place with unusual and noticeable natural quiet [with] . . .direct access to numerous opportunities for solitude." ER 243. It is no longer a place where one can get away from the "effects of modern civilization" and experience "outstanding opportunities for solitude or a primitive and unconfined type of recreation." See ER 341. Rather, according to NPS, the Grand Canyon's natural soundscape is "a disappearing resource that requires restoration, protection, and preservation." ER 334-335. Indeed, on any given summer day, the river is subjected to noise from motorboats

[26] In the district court, NPS defended its failure to consider the earlier NEPA documents and Colorado River Research Program on the basis that they were all premised on use of "two-stroke motors" and not the current "four-stroke motors" which are quieter (and cleaner). This statement is incorrect. Even a cursory review of the previous EISs, CRMPs, and Colorado River Research Program reveals that their scope, value, and relevance extends well-beyond the impacts of two-stroke engines. See ER 113-159. Moreover, the "1993 and 2003 studies" relied on by the district court (see ER 28-29) to support the NPS's analysis are not impact assessments that contradict the Colorado River Research Program, previous EISs, or previous CRMPs. Rather, they "provide acoustic data results from measurements taken along the Colorado River." ER 263, 236-237.

(including pontoon boats), generators, helicopter passenger exchanges, vehicle and tour buses at launch and retrieval sites, air tours (both fixed wing and helicopter), commercial overflights, military jets, camping activities, and crowds. These collectively significant actions all combine to disrupt, destroy, and impair the natural sounds and solitude of the Grand Canyon. ER 334,355; MP 1.4.5 (defining impairment); ER 278-279 (an action that causes an "unacceptable [noise] disturbance" or results "in sound pollution that intrudes upon the tranquility and peace of visitors" results in impairment). In short, the Grand Canyon's natural soundscape has, and continues, to die the proverbial death by a thousand cuts. Grand Canyon Trust, 290 F.3d at 343-347 (discussing similar impacts to Zion National Park).

NPS fails to improve the situation or even recognize that "impairment" is occurring. Rather, it adds insult to injury by authorizing motorboats, generators, and passenger helicopter exchanges in the river corridor. NPS asserts that more motors in the Grand Canyon is fine because "[e]ven if all river-related noise was removed from the park, the park would still experience adverse, major effects from aircraft overflights independent of [the] river management plan." ER 354. In other words, NPS contends that since the Grand Canyon's natural quiet is already adversely impacted by aircraft overflights (air tours, commercial planes, and

military jets), there is no harm in authorizing additional motorized uses.

This piecemeal and defeatist approach to managing the natural soundscape and avoiding "impairment" is illogical and illegal. Grand Canyon, 290 F.3d at 256-261 (agency cannot ignore incremental impacts to park); Pacific Coast, 265 F.3d at 1036-1037 (rejecting agency's attempt to dilute impacts to avoid jeopardy); Hanly v. Kleindienst, 471 F. 2d 823, 831 (2nd Cir. 1972) (sometimes "even slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant"). Not only is this approach inconsistent with MP 1.4.5, which requires NPS to take into account cumulative impacts when determining impairment, and NPS' own ROD (ER 436), but taken to its logical conclusion, its position would render superfluous Congress' prohibition on impairment in the Organic Act. As NPS concedes, there continues to be a "significant adverse effect" on the Park's "natural soundscape." ER 355.[27] This significant adverse effect constitutes impairment.

[27] The district court's treatment of the impairment issue conflates River Runners' request for declaratory relief that NPS violated the Organic Act with what type of injunctive relief is appropriate. ER 28 ("Plaintiffs contend that this cumulative analysis should have caused the NPS to eliminate sounds from motorized river traffic."). The Parties agreed at the district court level to bifurcate the liability and remedy phases. As such, should this Court find impairment, it should remand the to the district court for injunctive relief proceedings.

CONCLUSION

River Runners respectfully request that this Court declare that NPS violated the Concessions Act, the Organic Act, and its MPs, and remand this matter to the district court with instructions to consider appropriate injunctive relief.

Respectfully submitted this ___day of May, 2008.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. Rule 32 (A)(7)(C), undersigned counsel of record for River Runners hereby certifies that this opening brief is proportionally spaced, has a typeface of 14 points or more and contains 13,615 words. River Runners' counsel relied on Corel Word Perfect 12 to obtain the word count.

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Julia A. Olson

STATEMENT OF RELATED CASES

River Runners are unaware of any pending related cases to this matter.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2008, I served two true and correct copies of Plaintiffs-Appellants' Opening Brief and one copy of Plaintiffs-Appellants' Excerpts of Record, Volumes I-III on the following counsel of record, via First Class U.S. mail, postage prepaid:

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