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

PLAINTIFFS–APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

Pursuant to Ninth Cir. R. 40-1 and 35-1, Plaintiffs-Appellants River Runners for Wilderness et al. ("River Runners"), respectfully file this petition for panel rehearing and rehearing en banc of the panel's July 21, 2009 opinion and order. *See* Slip Op. (attached), published as *River Runners for Wilderness v. Martin*, – F. 3d –, 2009 WL 2151356 (9th Cir. 2009). The panel adopted without modification "as the opinion of our court" the district court's order affirming the National Park Service's ("NPS's") Colorado River Management Plan ("CRMP") for Grand Canyon National Park. Slip Op. at 9279. As a result, the panel adopted an opinion that (1) resolves substantive issues that the parties did not raise, brief, or argue on appeal, (2) conflicts with other decisions of this Court,(3) fails to address or resolve important legal issues presented to it and (4) overlooks or misapprehends material points of fact and law of exceptional importance. This Court should reconsider and amend the panel's opinion, allow for rehearing, or at the very least make its opinion and order unpublished.

1. The Panel Improperly Resolved Issues Never Before the Court.

The panel improperly resolved whether NPS violated the National Environmental Policy Act ("NEPA") when it prepared an environmental impact statement for the CRMP. Slip Op. at 9314-9315. River Runners was the sole

appellant in this case and River Runners did not appeal the district court's ruling on the NEPA claim. *See* Dkt. No. 4 (docketing statement); Dkt. No. 14 (opening brief); Dkt. No. 35 (reply brief). No party briefed or argued whether NPS violated NEPA. Similarly, but of less consequence in terms of establishing precedent of this Court, River Runners did not argue on appeal that the 1976 Master Plan or the 1995 GMP created binding obligations on NPS, but the Court's adoption of the district court's order establishes precedent on those issues as well. *See* Slip Op. at 9288. It is improper for the panel to establish precedent on claims or issues that were never appealed, briefed, or argued before this Court.

2. The Panel's Opinion Holding that NPS's Management Policies are Unenforceable Conflicts with Another Decision of this Court Evaluating the Enforceability of NPS Management Policies.

The panel adopted a 2007 decision of the district court that ruled that all provisions of NPS's management policies are non-binding. Slip Op. at 9287-9294. This ruling conflicts with this Court's 2008 ruling that provisions of the policies may be binding and enforceable, depending on the language used. In *Terbush v. U.S.*, 516 F.3d 1125 (9th Cir. 2008), this Court found that the specific "sections of the polices to which [plaintiff's] cite" do not bind the Agency because they do not include "an explicit call for a safety and hazard 'review.'" *Id.* at 1132. But this Court recognized that the Agency's policies may be binding and

enforceable "where the language so indicates." *Id.* This Court noted that, "[u]nlike wetlands and floodplains, for which NPS elsewhere provides further requirements to be met prior to development, no further requirements are provided" for safety and hazard reviews, and that "[a]bsent further mandatory and specific directives . . . NPS is left to balance its various policy mandates of access, safety, and conservation." *Id.* The *Terbush* approach of looking to the language of the policies to determine if specific directives exist is consistent with the Supreme Court jurisprudence that the plain language of agency documents can "create a commitment binding on the agency." *Norton v. Southern Utah Wilderness Alliance,* 124 S.Ct. 2372, 2384 (2004).

Here, the plain language of NPS's policies demonstrates its intent to bind itself.[1] In this respect, NPS's policies differ from the Forest Service Manual and

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[1] The policies provide: "Adherence to [the MPs] is mandatory unless specifically waived or modified by the Secretary. . . Park Superintendents will be held accountable for their, and their staff's adherence to [the MPs]." MP (Introduction). The policies' impairment section, for instance, includes binding, mandatory language and "decision-making requirements to avoid impairment." MP § 1.4.7; *see also* MP § 1.4.4 (prohibition on impairment); MP § 4.9 (NPS "will preserve . . .the natural soundscapes"); MP § 6.3.1 (NPS "must ensure that the wilderness character is . . .preserved"); MP § 6.4.3 ("Recreational uses . . .will be of a nature that enable the areas to retain their primeval character . . .[and] provide outstanding opportunities for solitude"); MP § 6.4.3.3 ("use of motorized equipment or any form of mechanical transport will be prohibited in wilderness"); MP § 6.4.4 (only "wilderness oriented commercial services . . .may be authorized if they meet the 'necessary and appropriate' tests").

Handbook at issue in *Western Radio Services Company v. Espy,* 79 F. 3d 896 (9th Cir. 1996) and the U.S. Customs Manual at issue in *U.S. v. Fifty Three (53) Eclectus Parrots*, 685 F. 2d 1131 (9th Cir. 1982). Unlike the internal agency pronouncements in those cases, the NPS policy provisions include binding, mandatory language indicative of a substantive rule. *See Southern Utah Wilderness Alliance v. NPS,* 387 F. Supp. 2d 1178, 1189 (D. Utah 2005) (NPS's policies "are not a general statement of policy, but prescribe substantive rules"). Indeed, since the district court issued its opinion in 2007, NPS has conceded in court "that § 1.4 [of the policies] serves as NPS's official interpretation of the Organic Act and is therefore enforceable against NPS." *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp. 2d 183, 190 n.1 (D. D.C. 2008). This Court should therefore reconsider and amend the panel's order, allow for rehearing, or make unpublished its adoption without modification of the district court's opinion, because it conflicts with *Terbush, Norton*, and NPS's concession in *Greater Yellowstone Coalition*.

3. The Panel Overlooked a Binding Regulation Requiring NPS to Comply with its Management Policies.

In adopting the district court's order without modification, the panel overlooked an NPS regulation that requires compliance with its management

policies. Pursuant to the Record of Decision ("ROD") adopting the CRMP, NPS will issue both commercial and non-commercial permits to use the Colorado River in the Grand Canyon. *See* ER 297, 418, 421, 435; *see also* 36 C.F.R. § 7.4 (permit requirement). NPS's regulations mandate that such permits "shall be consistent with applicable legislation, Federal regulations and administrative policies . . ." 36 C.F.R. § 1.6. This regulation creates an enforceable duty for NPS to comply with its policies. Even though River Runners raised and briefed this issue in the district court and on appeal, the panel's order never addresses or resolves it.

4. The Panel's Holding that NPS Management Policies are Unenforceable is Fundamentally Unfair and Inconsistent with the *Chevron* Deference Cases.

The panel held that NPS' management policies are binding on the courts but not binding on NPS. Slip Op. at 9294. According to the panel, it is appropriate for NPS to use its management policies as a shield to uphold its decisions, i.e., to give *Chevron* deference to the Agency's interpretation of its policies on the ground that Congress delegated authority to NPS to interpret its statutory authority and fill gaps, but it is inappropriate to use the same policies as a sword to determine whether NPS decisions are inconsistent with the policies. *Id*. In other words, courts are to defer to and uphold NPS projects that are consistent with the policies but not set aside projects inconsistent with the same policies.

This reasoning is fundamentally unfair and inconsistent with the Supreme Court's decision in *United States v. Mead*, 533 U.S. 218 (2001) and this Court's holding in *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service*, 475 F. 3d 1136 (9th Cir. 2007), interpreting *Mead*. In these cases, no distinction is made between administrative interpretations of statutory authority that qualify for *Chevron* deference and the binding nature of those interpretations. Agency interpretations qualify for *Chevron* deference "when it appears that Congress delegated authority to the agency to generally make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-227. In this case, NPS should not be allowed to have it both ways: The management policies are either entitled to *Chevron* deference and binding on the courts and NPS or entitled to no *Chevron* deference and non-binding on the Courts and NPS.

5. The Panel Overlooked Mandatory NPS Directives to Manage and Protect the River's Wilderness Character.

The panel held that even if NPS had to comply with the management policies, the Agency did so in this case because the statement of policy section – § 6.3.1 – requires NPS to manage the River corridor only to the "extent that existing non-conforming uses allow." Slip. Op. at 9295-9296. More specific provisions of

the policies regarding how the River corridor is to be managed, however, supersede general policy statements. *See Smith v. Califano*, 597 F. 2d 152, 157 (9th Cir. 1979) ("A specific statutory provision will govern even though general provisions, if standing alone, would include the same subject."). The specific policy provisions mandate that NPS prohibit "use of motorized equipment or any form of mechanical transport . . .in wilderness except as provided for in specific legislation." *See* MP § 6.4.3.3. Moreover, only "[w]ilderness oriented commercial services that . . . provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the 'necessary and appropriate' tests." MP § 6.4.4. The policies state that these provisions apply to all classifications of wilderness, including potential wilderness. MP § 6.3.3. NPS's decision to authorize motorized uses of the River is inconsistent with these requirements. NPS reached this very conclusion in 1993. *See* ER 235 (motorized use "is inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation"). Notably, the panel's order overlooks and does not discuss these specific directives. Slip. Op. 9295-9296.

6. The Panel Overlooked the Pertinent Fact that NPS Authorized New Motorized Commercial Services and Issued New Permits in Violation of § 6.3.1

Even if the panel was correct that section 6.3.1 of the policies was the sole provision applicable to potential wilderness areas, the order disregards the legally significant fact that all of the contracts for motorized commercial services had expired at the end of 2006 and NPS issued new ten-year contracts for motorized commercial services in 2007 in accordance with the ROD, when it had no duty to issue those contracts or allow for such services. ER 297. Thus, there is no factual basis to conclude that NPS was managing the potential wilderness "to the extent that existing non-conforming conditions allow" or that it was seeking "to remove from potential wilderness the temporary, non-conforming conditions," as required by section 6.3.1. MP § 6.3.1. The panel interprets section 6.3.1 to require "the Park Service to manage the Colorado River Corridor as wilderness to the extent possible given the existing use of motors." Slip. Op. at 9296. But, when the contracts expired there was no longer an "existing use of motors" in the potential wilderness area. Likewise, when NPS issued new ten-year contracts for motorized commercial services in a potential wilderness area, it was in no way "seek[ing] to remove from potential wilderness the temporary, non-conforming conditions" as required by the policies. On the contrary, in issuing new contracts, NPS affirmatively authorized another 10-year, non-conforming condition over which it has complete control. The policies do not allow NPS to reauthorize non-

conforming uses when such uses have expired.

7. The Panel Mistakes the Concessions Act as the Governing Statute for National Parks.

The panel incorrectly concludes that the Concessions Act provides the governing legal standard for activities in the National Park System. Slip. Op. at 9300. The Organic Act not the Concessions Act, provides the legal standard for managing National Park resources, just as the Wilderness Act provides the legal standard for managing wilderness areas. *See Bicycle Trails of Marin v. Babbitt*, 82 F.3d 1445, 1453 (9th Cir. 1996). Further, the panel fails to explain or reconcile how determining what is "necessary" to protect potential wilderness within National Parks under the Organic Act at issue in this case differs sufficiently from what is "necessary" to protect designated wilderness under the Wilderness Act at issue in *High Sierra Hikers Assn. v. Blackwell*, 390 F.3d 630 (9th Cir. 2004). These are material points of law that the panel failed to address.

8. The Panel's Necessity Ruling Under the Concessions Act is Premised on Improper Evidence.

The panel makes two significant errors of material fact in ruling that NPS found that motorized services are necessary. Slip Op. at 9302-03. First, the panel fails to recognize NPS's own admission that motorboats are a convenience, not a necessity. *See* ER 218, 108, 50-51. Second, the panel's ruling is based upon

improper evidence. The panel's order states:

> '[a]s demonstrated by the Park Service's analysis of the no-motor alternatives, a decision by the Park Service to eliminate the motorized trip option would cause a dramatic reduction in the public availability of professionally outfitted river trips[.] Id. at 87. The Park Service explained that 'continued authorization of motorized use for recreational river trips in the [Park] is essential . . . to meeting the . . . management objectives' for the 2006 CRMP. Id. Thus, the Park Service quite clearly concluded that motorized commercial services were 'necessary and appropriate for public use and enjoyment' of the Corridor.

Slip. Op. at 9303. But each of these quotes is a public comment, not any analysis or determination by NPS. *See* ER 347 (Public Comment C8); *compare* ER 348 (NPS Response to Public Comment C8). At oral argument, counsel for NPS argued that the Agency had found that these services are necessary, but he too cited the public comments, not any agency finding or explanation. The panel is correct that a "necessity" finding is a prerequisite to authorizing such services, but it is incorrect that NPS ever found that they are necessary. The panel's adoption of this mistake by the district court compounds the error.

9. The Panel's Order Holding that NPS Complied with the Concessions Act Conflicts with the Law of this Circuit that an Agency's Rationale Must be Contained in the FEIS.

The panel recognizes that "the FEIS and ROD do not contain a specific discussion of the amount of motorized traffic found necessary and appropriate for public use and enjoyment of the Corridor." Slip. Op. at 9303. The panel

nonetheless upheld NPS's finding on the grounds that "the Park Service's decision concerning the amount of motorized trips on the river was made after considering competing alternatives and a significant number of variables." Slip. Op. at 9306. But none of the variables or alternatives considered by NPS, and presented in the FEIS, considered need. As such, NPS's FEIS is devoid of the requisite necessity determination and this is where the agency's defense of its position must be found. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

10. The Panel Mistakenly Equates the Mandate to Conserve the River's Values to the Highest Practicable Degree with the Organic Act's Non-Impairment Mandate.

The panel acknowledges the adverse effects of NPS's decision on the Grand Canyon's natural soundscape, but apparently concludes that the Park's natural soundscape is conserved to the "highest practicable degree" as required by the Concessions Act because it remains "unimpaired." Slip. Op. at 9308. The duty to conserve park resources to the highest practicable degree, however, is a separate and distinct duty from the duty to prevent impairment under the Organic Act. *See* 16 U.S.C. § 1; MP §§ 1.4.3, 1.4.4. Neither the panel nor NPS has cited a single page in the record where the Agency explains how the major adverse impacts from motorized services to the soundscape and other adverse impacts to visitors

opportunities for solitude and primitive and unconfined recreation is consistent with protecting the values of the river to the highest practicable degree.

11. The Panel Misinterprets River Runners' Impairment Claim and Does Not Address the Critical Legal Issue.

The panel upheld NPS's conclusion that increased motorized use of the River corridor (i.e., motorboats, helicopter passenger exchanges, and generators), in conjunction with existing aircraft overflights would not impair the Grand Canyon's natural soundscape. In so doing, the panel overlooked and misinterpreted River Runners' claim. River Runners do not argue that the motorized river traffic – by itself – causes impairment or that motorized river traffic must be eliminated in order to restore the Grand Canyon's natural soundscape. (The Parties, in fact, agreed to bifurcate the liability and remedy phases of this civil action).

On the contrary, River Rivers maintain that NPS's impairment determination is arbitrary and capricious because NPS failed to provide a rational connection between the facts found in the FEIS, i.e., that the cumulative impacts to the Grand Canyon's natural soundscape are "major" and "significant," and the decision made, i.e., that authorizing more motorized use to an already degraded environment will not cumulatively impair the Grand Canyon's natural soundscape.

See Pacific Coast Fed. Of Fisherman's Assoc. v. NMFS, 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"). Much like the Agency's approach to snowmobiling in Yellowstone National Park which was rejected by the D.C. District Court in *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp. 2d 183, 195 (D. D.C. 2008), NPS never explained how it could find "major" and "significant" cumulative impacts to the Grand Canyon's natural soundscape from aircraft overflights, air tours, and motorized use of the River in the FEIS and still reach a no-impairment determination. After all, there "is no higher level than 'major' on the impact scale." *Greater Yellowstone Coalition*, 577 F. Supp. 2d at 202. 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. As noted by one court "[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).

12. The Panel's Order Conflicts with *Wilderness Preservation Fund v.*

Kleppe, which Establishes the Legal Standard for the Free Access Claim.

The panel does not state nor apply the relevant legal standard articulated in *Kleppe* that "allocation [be] fairly made pursuant to appropriate standards." 608 F.2d 1250, 1254 (9th Cir. 1979); *see* Slip. Op. at 9308-9311. Instead, the panel appears to adopt a new legal standard, which is: whether or not intervenors, who represent the commercial outfitters and a subset of private boaters, believe that the allocation is fair. Slip. Op. at 9308-9311 (twice stating, including in conclusion, that certain organizations thought the allocation was fair.) That is not a standard of fairness anymore than it would be to state that the allocations are unfair simply because River Runners may not like them. The court never articulates any standard of fairness used by NPS in allocating use in a split system.

13. The Panel Overlooks Material Facts Demonstrating that the Allocations are Unfair.

Evidence in the record demonstrates that people who do not want nor need commercial services have to use such services in order to gain access to the Colorado River. *See* ER 281-283, 286 -287. The panel's order does not address this evidence in the context of the Concessions Act claim where River Runners argue that unnecessary amounts of commercial services are authorized nor in the context of River Runners' Organic Act free access claim where we argue that the

allocations are inequitable, forcing the public to pay commercial outfitters for access to their public lands and waters. In fact, this crucial evidence is not discussed or mentioned anywhere in the panel's order. Slip. Op. at 9277-9316.

CONCLUSION

River Runners respectfully request that this Court reverse the panel's decision or restore the case to the calendar for re-argument or re-submission. In the alternative, this Court should issue a new or modified opinion, rectifying and addressing the errors stated above. Finally, if this Court chooses to affirm without modification the district court's decision, it should do so in an unpublished opinion that does not establish new and conflicting precedent within the Court.

Dated: September 3, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Cir. R. 40-1 and 35-1, undersigned counsel of record for River Runners hereby certifies that this Petition for Panel Rehearing and Rehearing En Banc is proportionally spaced, has a typeface of 14 points or more, contains 3413 words and is within the 15 page limit. River Runners' counsel relied on Corel Word Perfect 12 to obtain the word count.

/s/ Julia A. Olson
Julia A. Olson

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2009, I electronically served Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc on the following counsel of record, via the Electonic Case Filing system of the Ninth Circuit Court of Appeals:

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