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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

River Runners for Wilderness, *et al.*, Plaintiffs, v. Stephen P. Martin, *et al.*, Federal-Defendants; and Grand Canyon River Outfitters Association; Grand Canyon Private Boaters Association, Defendant-Intervenors.	No. CV-06-0894 PCT-DGC PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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> In the Grand Canyon, Arizona has a natural wonder which, as far as I know, is in kind absolutely unparalleled throughout the rest of the world. I want to ask you to do one thing in connection with it in your own interest and in the interest of the rest of the country – to keep this great wonder of nature as it now is . . . .Leave it as it is. You cannot improve on it. The ages have been at work on it, and man can only mar it. What you can do is keep it for your children, your children's children, and for all who come after you, as the great sight which every American . . . .should see.
>
> - THEODORE ROOSEVELT (SAR 002345).

INTRODUCTION

Grand Canyon National Park is no longer "a place with unusual and noticeable natural quiet [with] . . .direct access to numerous opportunities for solitude." SAR 010134. 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 AR 104823 (FEIS Vol. II at 236). Rather, as the National Park Service ("Park Service" or "agency") admits, the Grand Canyon's natural soundscape is "a disappearing resource that requires restoration, protection, and preservation." AR 104728 (FEIS Vol. I. at 141-42). At present, there are "significant adverse effects" on the Grand Canyon's natural soundscape. AR 105424 (FEIS Vol. II at 387).

Indeed, on any given summer day, the Colorado River corridor ("river corridor") – the heart of the Grand Canyon– is subjected to noise from motorboats (including pontoon boats), generators, helicopter passenger exchanges, vehicle and tour buses at launch and retrieval sites, commercial aircraft overflights, military jets, camping activities, crowds, and air tours. These collectively significant actions combine to disrupt and destroy the natural sounds, wilderness values, and solitude of the Grand Canyon. See AR 104728. In short, the Grand Canyon's natural sounds and wilderness values are dying the proverbial death by a thousand cuts. See e.g., Grand Canyon Trust v. FAA, 290 F. 3d 339 (D.C. Cir. 2002) (discussing similar impacts to Zion National Park). Despite this fact, the Park Service – entrusted by Congress and the public with managing the Grand Canyon –

refuses to do anything about it. In fact, just the opposite is true: with the backing of the commercial concessioners, the agency adds insult to injury by authorizing motorboats, generators, and passenger helicopter exchanges in the river corridor.[1] According to the agency, 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." AR 105423 (FEIS Vol. II at 386). In other words, the agency's theory is that since the Grand Canyon's natural quiet is already impaired by aircraft overflights, there is no harm in it authorizing even more motorized uses in the river corridor. This defeatist approach to managing our National Parks is as illogical as it is illegal. See e.g., Grand Canyon Trust, 290 F. 3d at 256-261 (FAA cannot ignore incremental impacts to Zion National Park).

The Park Service also maintains it can do as it pleases when it comes to managing the river corridor in the Grand Canyon. In the agency's view, compliance with the 2001 Management Policies ("MPs"), 1995 General Management Plan ("GMP"), and Director's Orders – all of which are designed to protect and preserve the Grand Canyon's values – are purely voluntary and not subject to judicial review. See Federal Defendants' Brief in Support of Motion for Summary Judgment and in Response to Plaintiffs' Motion for

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[1] The Park Service's assertion that it has no control over helicopter passenger exchanges is misleading. Pursuant to the National Park Service Concessions Management Improvement Act ("Concessions Act"), 16 U.S.C. § 5951, the Park Service enjoys broad authority to limit, restrict, or if necessary prohibit commercial services to protect the Grand Canyon's natural resources and values, including the river corridor's natural soundscape. Indeed, the Park Service is exercising this authority with its "Modified Preferred Alternative H [which] restricts [helicopter] passenger exchanges at Whitmore to before 10AM (April through September), [to protect] the natural soundscape." AR 105066; see also AR 109593 (ROD). Surely, if the Park Service has the authority to prohibit passenger exchanges from October to March to protect the Grand Canyon's natural soundscape and restrict exchanges to before 10AM the remainder of the year, it has the ability – either indirectly (by including permit conditions, limits, or restrictions on the use of passenger exchanges at Whitmore) or directly (by prohibiting passenger exchanges at Whitmore) – to control the use of helicopters.

Summary Judgment ("NPS Mem.") at 9-16.[2] Indeed, under the agency's logic even the new Colorado River Management Plan ("CRMP") would remain unenforceable. See id. at 15. The Park Service even suggests that the Court should be "reluctant to intervene in [Park Service] decisions concerning the use of national park resources." Id. at 30.

In addition, the Park Service allows the commercial interests of the concessioners, who contribute to impairing the natural soundscape, to control much of the access to the river at the public's expense, even when their services are unnecessary. The Park Service misrepresents that Plaintiffs advocate that do-it-yourself boaters should have "*exclusive* use of the River and, conversely, that members of the public needing the assistance, expertise, and flexibility that commercial operators provide should be denied access to the river." NPS Mem. at 1. To be clear, in enforcing the legal duties of the Park Service, Plaintiffs seek first to protect the wilderness character of the river and its natural resources. Second, Plaintiffs seek to protect "free public access" and to the extent that the Park Service chooses to allocate use between two user groups (those who need commercial outfitters and those who do not), that allocation is fair and equitable and not aimed at dramatically favoring concessioners at the expense of free public access. In fact, Plaintiffs never disputed that there is a legitimate need for professional guides to assist some because not all people have the skills necessary to navigate the river. In the absence of a demand study, the equitable way to grant access without favoring one constituency over another, is to give everyone equal opportunity to obtain these highly sought after permits in a single allocation system. However, the agency chose a different and biased allocation system. Plaintiffs do not seek an advantage for noncommercial boaters over boaters needing commercial assistance: Plaintiffs seek equity in river access. Plaintiffs seek to eliminate a situation where the public must pay concessioners for river access even when they do not need commercial services. And Plaintiffs seek to have the motorized uses, which violate the law and impair the wilderness character, eliminated

[2] Page citations correspond to NPS Mem. page numbers, not the ECF numbering.

from the river.

Plaintiffs respectfully request that the Court reject Defendants'[3] arguments and conduct a "thorough, probing, in-depth review" of the legal issues and administrative record presented in this case. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Ocean Advocates v. U.S Army Corp. of Engineers, 402 F.3d 846, 858 (9th Cir. 2005). As outlined below, this type of careful, searching review of the issues and record will reveal that the Park Service: (1) failed to comply with its duty to preserve the river corridor's wilderness character; (2) never determined that motorized uses (as opposed to non-motorized uses) and amounts of commercial services are "necessary" for the public to experience and enjoy the Colorado River; (3) failed to comply with the Organic Act; and (4) failed to comply with NEPA.

ARGUMENT

I. PARK SERVICE FAILED TO MANAGE FOR WILDERNESS CHARACTER.

A. Plaintiffs Do Not Allege Violations of the Wilderness Act.

Plaintiffs do not allege that the Park Service's authorization of motorized uses in the river corridor, *i.e.*, motorboats, generators, and helicopter passenger exchanges, violates the Wilderness Act, 16 U.S.C. §§ 1131-1136. Rather, because the river corridor in the Grand Canyon is classified as "potential wilderness" pursuant to the Park Service's 1993 Wilderness Recommendation (see AR 104820 to 104823),[4] the agency has an

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[3] "Defendants" refers collectively to the federal defendants and the defendant-intervenors.

[4] Defendants' assertion that the Park Service's wilderness recommendation was never forwarded to the President is contradicted by evidence in the administrative record. See SAR 004459 (wilderness study report "was sent to President and OMB [on] 3-8-77"). Indeed, President Carter included the wilderness recommendation in his May, 1977 Presidential address. See SAR 008233. According to one source, the "Grand Canyon Wilderness legislation was in the OMB in March, 1977 and in the presidential message in May." See Jeff Ingram, Hijacking a River, A Political History of the Colorado River in

express duty and obligation pursuant to the MPs and 1995 GMP to preserve the corridor's wilderness values. See Part I.B, below. In fact, it is the Park Service who implicates the Wilderness Act by alleging that the agency's authorization of motorized use is consistent with "wilderness" management pursuant to the Act. See NPS Mem. at 19; AR 104822 (FEIS Vol. I at 235). However, because the MPs use identical language as the Wilderness Act, case law interpreting the Act's provisions is relevant here.

B. The Duty: As "Potential Wilderness," The Park Service Must Manage the Colorado River Corridor for its Wilderness Values.

Because the Colorado River corridor is "potential wilderness" (see AR 104820), pursuant to the MPs the Park Service is required to: (1) ensure that the "wilderness character" of the river corridor is preserved (MP 6.3.1); (2) take "no action that would diminish the wilderness suitability" of the river corridor until the legislative process is completed (MP 6.3.1); (3) manage the river corridor "as wilderness to the extent that existing non-conforming uses allow" (MP 6.3.1); (4) "seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation" (MP 6.3.1); (5) only allow recreational uses in the river corridor that enable the corridor to retain its "primeval character . . .[and] provide outstanding opportunities for solitude or primitive and confined types of recreation (MP 6.4.3); (6) prohibit recreational uses "that do not meet the purposes and definitions of wilderness" (MP 6.4.3.1); and (7) 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). See MP 6.3.1 (applying all wilderness requirements to "potential wilderness" areas).

Likewise, pursuant to the 1995 GMP for the Grand Canyon, the Park Service must "protect the natural quiet and solitude" of the Park and "manage areas meeting the criteria

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the Grand Canyon, p. 203 (Vishnu Temple Press. 2003).

for wilderness designation as wilderness." SAR 010138. Relevant here, the GMP "treats all proposed wilderness areas as wilderness" and states that the Park will be managed in accordance with the Park Service's "1993 wilderness proposal." SAR 010147, 010188. With respect to the river corridor, the GMP directs the Park Service to "protect and preserve the resource in a wild and primitive condition." SAR 010138, 010188.

Faced with these mandates, the agency's primary response is that while the MPs and the GMP include the prescriptions outlined above, they are not "legally binding" on the Park Service or enforceable by the Court. See NPS Mem. at 10. According to Defendants, there is no duty to preserve the river corridor's wilderness values. Instead, Defendants suggest that the MPs and GMP are merely guidance documents that can be ignored by the Agency. In other words, the Park Service – the agency entrusted with managing the Grand Canyon – can do as it pleases because compliance with the MPs, GMP, and even Park Service Directives is purely voluntary and not subject to judicial review. See NPS Mem. at 9-16. Defendants are wrong for two reasons.

1. The Park Service's 2001MPs carry the force and effect of law.

The MPs carry the force of law. It is well-established that agency interpretations of statutory provisions carry the force and effect of law "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation . . .was promulgated in the exercise of that authority." Northwest Ecosystem Alliance (NEA) v. U.S. Fish & Wildlife Service, 475 F. 3d 1136, 1141 (9th Cir. 2007) (quoting U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001)). Delegation of "such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." Mead Corp., 533 U.S. at 227. Congress "contemplates administrative action with the effect of law when it provides for

a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." Id. at 230. Thus, while notice-and-comment rulemaking and formal adjudications are a good indication of Congress' intent, "the want of [such] procedure . . does not decide the case." Id. at 231. Rather, agency statements made "through means less formal than notice-and-comment rulemaking" can still carry the force of law. Southern Utah Wilderness Alliance (SUWA) v. National Park Service, 387 F.Supp.2d 1178, 1187 (D. Utah 2005) ; Mead, 533 U.S. at 230-231 (same); NEA, 475 F.3d at 1142 (agency policy adopted without strict compliance with Administrative Procedure Act ("APA") rulemaking has force of law).

The salient issue with respect to the Park Service's MPs, therefore, is not whether strict compliance with formal rulemaking procedures of the APA was adhered to, but rather, whether the MPs "are the type of agency decision that *Congress intended to 'carry the force of law*.'" SUWA, 387 F.Supp.2d at 1187 (citing Mead, 533 U.S. at 221)) (emphasis added); NEA, 475 F.3d at 1141-42. In SUWA, the court correctly reasoned that Congress intended the MPs to carry the force of law because Congress granted the Park Service express authority to issue rules and regulations to manage our National Parks (see 16 U.S.C. § 3) and the "procedural and substantive nature of the MPs are so closely analogous to that of a formal regulation," that Congress would expect the MPs to carry the force of law. See id. at 1188. The Park Service disagrees, relying on the D.C. Circuit's decision in The Wilderness Society v. Norton, 434 F.3d 584 (D.C. Cir. 2006), for the proposition that the MPs do not carry the force of law because: (1) they were not promulgated pursuant to congressional authority; (2) are not substantive rules intended to bind the Park Service; and (3) did not undergo formal rulemaking. See NPS Mem. at 9-

16. The agency is wrong.[5]

First, Congress "unquestionably granted the [Park Service] express authority to manage national parks, including the authority to issue regulations which it 'deems necessary or proper for the use and management of the [national] parks . . ." SUWA, 387 F. Supp. 2d at 1188 (quoting 16 U.S.C. §§ 1, 3); Alaska Wildlife Alliance v. Jensen, 108 F. 3d, 1065 (9th Cir. 1997); U.S. v. Brown, 364 F. 3d 1266, 1272-73 (11th Cir. 2004). It is apparent from this delegation of authority "that Congress expects the [Park Service] to be 'able to speak with the force of law' when issuing rules of a substantive nature pursuant to formal notice-and-comment procedures." SUWA, 387 F.Supp.2d at 1188.

Second, unlike typical agency guidance documents, the plain language of the MPs reads like a substantive rule. See SAR 016078. The "primary distinction between a substantive rule . . . and a general statement of policy . . . turns on whether the agency

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[5] On its face, the agency's reliance on The Wilderness Society suggests there is a split in the courts on whether the MPs carry the force of law. Compare SUWA 387 F. Supp. 2d at 118 with The Wilderness Society, 434 F. 3d at 596. One important distinguishing factor, however, between this case and The Wilderness Society decision is the underlying nature of the claims. This case challenges an affirmative agency decision, *i.e.*, the Park Service's February 17, 2006, Record or Decision ("ROD"), pursuant to section 706(2)(A) of the APA. In contrast, The Wilderness Society decision involved a challenge to "compel agency action unlawfully withheld or unreasonably delayed" under section 706(1) of the APA. Unlike section 706(2)(A) claims such a this, to establish a right of judicial review under section 706(1), a plaintiff "must identify a statutory provision mandating agency action." Center for Biological Diversity v. Veneman, 335 F. 3d 849, 854 (9th Cir. 2003). Because of this differing standard, courts generally refuse to extend holdings in section 706(1) cases to section 706(2)(A) cases. See EPIC v. Blackwell, 389 F.Supp.2d 1174, 1211 (N.D. Cal. 2004) (refusing to extend holding in section 706(1) case to case brought under section 706(2)(A)); Pac. Coast Fed'n of Fishermen's Assoc. v. NMFS, 482 F.Supp.2d 1248, 1264 (W.D. Wash. 2007) (same); Oregon Natural Desert Ass'n v. Shuford, Civ No. 06-242-AA (D. Or. 2007) (same); Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers, 2007 WL 1576317, *6 (D. D.C. 2007) (same). The D.C. Circuit's section 706(1) decision in The Wilderness Society is therefore inapplicable to this section 706(2)(A) case.

intends to bind itself to a particular legal position." Syncor Intern'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997). An agency's intention to bind itself can most easily be found in the plain language of the document. See e.g., Norton v. SUWA, 542 U.S. 55, 71 (2004) (plain language can "create a commitment binding on the agency."); Comm. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) ("mandatory, definitive language is a powerful, even potentially dispositive factor").

Here, the plain language of the MPs evinces the Park Service's intent to bind itself: "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 at Introduction; at 6 (compliance and accountability) (emphasis added); SAR 016078 (same); see also SUWA, 387 F.Supp.2d at 1189 (the Park Service "bound itself" by making the MPs mandatory); Sierra Club v. Lujan, 716 F.Supp. 1289, 1293 (D. Ariz. 1989) (Park Service "must adhere to its Management Policies"); Voyageurs Region National Park Assoc. v. Lujan, 966 F.2d 424, 428 (8th Cir. 1992) (treating and discussing the MPs as a substantive rule). The MPs' impairment section, for instance, includes binding, mandatory language and "decision-making *requirements* to avoid impairment." MP 1.4.7 (SAR 016087) (emphasis added); see also MP 1.4.4 (*prohibition* on impairment); at 4.9 (Park Service "*will* preserve . . .the natural soundscapes"); at 6.3.1 (Park Service "*must* ensure that the wilderness character is . . .preserved"); at 6.3.1 (Park Service "*will* seek to remove from potential wilderness the temporary, non-conforming conditions"); at 6.4.33 ("use of motorized equipment or any form of mechanical transport *will be prohibited* in wilderness").

In this respect, the MPs differ from the Forest Service Manual ("FSM") and Forest Service Handbook ("FSH") at issue in Western Radio Services v. Espy, 79 F.3d 896, 901 (9th Cir. 1996), and the Park Service's "rate-setting guidelines" for marinas in National

Parks at issue in Lake Mojave Boat Owners Ass'n v. National Park Service, 78 F.3d 1360 (9th Cir. 1995). Unlike the FSH, FSM, or the "rate-setting guidelines," the MPs include binding, mandatory language indicative of a substantive rule. SUWA, 387 F.Supp.2d at 1189.

Third, unlike typical agency guidance documents, the Park Service's MPs were implemented only after undergoing an almost-complete formal notice-and-comment process. The Park Service published the "notice of availability" of the draft MPs in the Federal Register on January 19, 2000. See 65 Fed. Reg. 2984-01. In the Federal Register notice, the Park Service invites the public to submit comments on the draft MPs for a 60-day period (ending on March 20, 2000), explains that some of the "policies . . .have been updated . . .by means of 'Director's Orders,' which have been issued following a public notice and comment period," and asks that all comments "be specific as to how a policy might be changed or strengthened." Ibid. The Park Service also commits to reviewing all comments and incorporating all "appropriate suggestions" into a final version of the MPs which will appear in the Federal Register. See ibid.

On September 15, 2000, the Park Service published a "Notice of New Policy Interpreting the National Park Service Organic Act" giving notice to the public that it was adopting the portion of the Management Policies interpreting the Organic Act's "no-impairment" standard. See 65 Fed. Reg. 56003. The new Federal Register notice also explains the legal framework underlying the MPs and the purpose of the revisions. See ibid. In addition, the notice also included a summary of public comments received and the Park Service's response to such comments. See ibid.

Thus, while the procedures used by the Park Service in implementing the MPs do not technically conform to *all* the rulemaking requirements set forth in the section 533 of the APA (most notably, a complete copy of the MPs was not published in the Federal

Register), the procedures followed by the Park Service "satisfy the purpose behind formal rulemaking procedures, which is to 'assure fairness and mature consideration of rules.'" SUWA, 387 F.Supp.2d at 1188 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969)). The notice-and-comment procedures followed by the Park Service "foster the fairness and deliberation that should underlie a pronouncement of . . .force." NEA, 475 F.3d at 1141 (quoting Mead, 533 U.S. at 230).

For these reasons, the Park Service's MPs are more akin to the U.S. Fish & Wildlife Service's ("FWS's") distinct population segment ("DPS") policy at issue in NEA than the FSM and FSH at issue in Western Radio. Like the DPS policy at issue in NEA, the MPs were developed pursuant to Congressional authority (16 U.S.C. § 3), read like a substantive rule, and were developed after undergoing almost complete notice-and-comment rulemaking. See NEA, 475 F.3d at 1142 n. 3 (noting differences between development of the DPS policy and formal rulemaking pursuant to § 533 (e) of the APA); see also 61 Fed. Reg. 4722, 4723 (DPS Policy) (noting that the DPS policy – which the Ninth Circuit recognizes as carrying the force of law – was not developed "under rulemaking procedures of the Administrative Procedures Act").

2. The Park Service's decision to take action inconsistent with the MPs and GMP is arbitrary and capricious.

Second, even if one assumes, *arguendo*, that the MPs are only advisory, the Park Service's decision to ignore its own MPs, as well as the management objectives in the GMP, is by definition arbitrary and capricious. See e.g., Ecology Center v. Austin, 430 F.3d 1057, 1069 (9th Cir. 2005). This is because in the DEIS, FEIS, and ROD the Park Service discusses the MPs as if they are binding and even commits itself to manage the Colorado River corridor "as a potential wilderness in accordance with NPS Management Policies" and the GMP's management objectives. See AR 102418 (DEIS); AR 104821

(FEIS Vol. I at 234); see also AR 104604 (FEIS Vol. I at 17) (Park Service "will manage" river in accordance with 2001 MP); AR 104598 (FEIS Vol. I at 11) (discussing vision for the Colorado River outlined in the GMP); AR 109606 (CRMP derived directly from the "management objectives in the park's 1995 [GMP]"); AR 104615 (same). In fact, in the GMP, the Park Service explicitly states that "[a]ll action proposed in this document, and all future implementation plans based on it such as . . . the Colorado River Management Plan . . . will be consistent with NPS wilderness policy requirements." SAR 010188.[6] The Park Service's litigation position is entirely inconsistent with the position it took during the administrative process of developing the CRMP.

Thus, even if Plaintiffs were to hypothetically agree with Defendants that the MPs and GMP are merely advisory, because the Park Service committed to comply with these documents, it would now be "arbitrary and capricious" for the agency to ignore them. See Ecology Center, 430 F.3d at1069; see also e.g., NAHB v. Norton, 340 F.3d 835 (9th Cir. 2003) (the FWS, having chosen to promulgate the DPS policy, "must follow that policy"); Sierra Club v. Dombeck, 161 F.Supp.2d 1052 (D. Ariz. 2001) (agency's decision is arbitrary and capricious because the "FEIS fails to achieve its stated goal of implementing the GMP for the Grand Canyon"); Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 n. 3 (9th Cir. 1994) (rejecting argument that agency could treat guidelines as

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[6] In the FEIS, the Park Service also commits to manage the river corridor "as potential wilderness in accordance with . . .the Grand Canyon National Park Wilderness Recommendation as updated in 1993." AR 104821 (FEIS Vol. I at 234). The 1993 Wilderness Recommendation, in turn, states that the Colorado River corridor qualifies as potential wilderness because of existing non-conforming uses. See SAR 008306. The "non-conforming use identified [is] . . .motorized riverboat use. . .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." SAR 008307.

optional where FWS made decision contingent on adherence to the guidelines). Indeed, one of the central purposes of the MPs is to ensure compliance with the substantive mandates of the Organic Act. See MP 1.4. The MPs articulate when impacts impair park resources and include specific requirements designed to avoid impairment. See MP 1.4.5 (SAR 016086); 1.4.7 (SAR 016087). Acting in accordance with the MPs is therefore pivotal to complying with the Organic Act. See Ecology Center, 430 F.3d at 1070. It is also pivotal to complying with the Park Service's regulations which state that "any activity authorized by a permit [i.e., motorized boat use of the Colorado River corridor] shall be consistent with . . .administrative policies." 36 C.F.R. § 1.6.

C. The Park Service Failed to Comply with the Duty.

Without question, motorboats, generators, and passenger helicopter exchanges in the river corridor are "non-conforming uses" that have impacted, and will continue to impact, the river corridor's wilderness character. In fact, the Park Service concedes in the FEIS and ROD that "motorized raft use" is a "temporary, non-conforming or incompatible use" that will adversely impact the river corridor's wilderness values "during most of the year, but [especially] . . . during the higher mixed-use period, at the frequently visited areas and passenger exchange points along the river corridor." See AR 109612 (ROD); Pls. Opening Br. at 6-10; see also SAR 008307 (motorized boat use is "inconsistent with the wilderness criteria of providing outstanding opportunities for solitude and for a primitive and unconfined type of recreation.")

The Park Service's primary argument in response, however, is that while impacts will occur from the disruptive "non-conforming" motorized uses, such uses are entirely consistent with managing for wilderness because: (1) they are only a temporary or transient disturbance of wilderness values; and (2) qualify as "established uses" in the river corridor. See NPS Mem. at 18-19. The agency is incorrect.

1. Temporary or transient disturbances are not allowed.

The Park Service maintains motorized uses are consistent with preserving the river's wilderness values because "the continued use of motorboats . . . is only a temporary or transient disturbance of wilderness values on the river, and it does not permanently impact wilderness resources or permanently denigrate wilderness values." NPS Mem. at 18. In the agency's own words, motorboat use is no more a permanent disturbance than a "lightning flash is a permanent disturbance of the darkness of the night sky for the moment it is visible." Id. at 19. This is absurd.

Motorized use in the river corridor *is not akin* to an "Act of God" and the agency's suggestion that it can authorize motorized uses while simultaneously providing "opportunities for solitude or a primitive and unconfined type of recreation" defies logic. Indeed, the agency's interpretation would render the wilderness mandate largely superfluous and completely undermine the integrity of all potential, recommended, or designated wilderness areas. Under the Park Service's interpretation an unlimited amount of motorboat, car, jeep, motorcycle, ATV, generator, helicopter, and even ground disturbing uses would be allowed in potential wilderness so long as the disturbance can be removed and does "not permanently denigrate wilderness values." Even though each motorboat entering the canyon eventually leaves it, for half the year there would be a constant presence of motorboats affecting the wilderness values of primitive recreation, solitude and natural quiet. In effect, the Park Service would read in a temporary, motorized use exception that does not (and should not) exist in either the MPs or the Wilderness Act. See MP 6.3 (wilderness management); 16 U.S.C. § 1133(c) (prohibition on motorized uses); High Sierra Hikers Assoc. v. Blackwell, 390 F.3d 630, 646 (9th Cir. 2004) (noting that the Act "generally proscribes" activities"); accord The Wilderness Society v. U.S. Fish & Wildlife Service, 353 F.3d 1051, 1062 (9th Cir. 2003); see also

Wilderness Watch, 375 F.3d at 1089 (discussing prohibitions).

Moreover, to the extent that motorized uses are "temporary," the Park Service's MPs expressly require the agency to take affirmative steps to remove such disruptive uses: "The National Park Service will seek *to remove* from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation." MP 6.3.1 (SAR 016137) (emphasis added). As explained by the Eleventh Circuit, "[p]otential wilderness areas contain certain *temporary conditions* that do not conform to the Wilderness Act." Wilderness Watch v. Mainella, 375 F.3d 1085, 1088 n.2 (11th Cir. 2004). As such, these are precisely the types of uses that the Park Service must "seek to remove." Ibid. (citing Ref. Manual 41); see also Facts at ¶ 154 (non-conforming uses are "contrary to the definitions of wilderness [but are] . . . considered of a temporary nature which, once removed, should not preclude" wilderness designation); at ¶¶ 80-83 (Colorado River qualifies as potential wilderness *because* transient motorboat use can be phased out); at ¶ 162 ("the continued use of [motorized] equipment within [the river corridor] violate[s] the letter and intent of the Wilderness Act and NPS management policies and director's orders addressing wilderness").[7]

2. Motorized uses are not established.

Next, the Park Service asserts that motorized use is consistent with managing for wilderness values under the misguided theory that the "elimination of motorboats [is] not a prerequisite to wilderness designation *because the Wilderness Act allows for established*

[7] The agency's reliance on Voyageurs Region National Park Assoc., 966 F.2d 424, in support of its temporary use argument is erroneous. In Voyageurs, the enabling legislation creating the park specifically provided for snowmobiling (see 16 U.S.C. § 160h), the Director of the Park Service issued a formal "waiver of policy" from the Park Service's MPs (because he recognized that such a waiver was required), and the Park Service issued regulations (36 C.F.R. § 7.33 (b)) authorizing snowmobiling within the park. See 966 F. 2d at 426-27. None of these factors exists here.

uses to continue." NPS Mem. at 19 (emphasis added); see also AR 104822 (FEIS Vol. I at 235). The agency then attacks Plaintiffs for refuting this *very* argument. See id. at 20 (Plaintiffs' arguments are "divorced from reality" and "illogical"). The agency cannot have it both ways. If the Park Service attempts to justify its decision to allow motorized uses in the river corridor on the grounds that the "Wilderness Act allows for established uses" then Plaintiffs are entitled to explain why the Wilderness Act's established use exception *does not* apply in this case. There is nothing "illogical" about this argument. On the contrary, as explained in Plaintiffs' opening brief, the Park Service's reliance on the Wilderness Act's section 4(d)(1) established use exception is entirely misplaced and inconsistent with the Park Service's prior interpretation of that provision.

First, on its face, section 4(d)(1) *applies only* to the Department of Agriculture, not to the Department of Interior. See 16 U.S.C. § 1133 (d)(1) (uses that "have already become established, may be permitted . . . [by] the Secretary of Agriculture); Stupak-Thrall v. U.S., 89 F.3d 1269, 1282 n.14 (6th Cir. 1996) (§ 4(d)(1) allows the Secretary of Agriculture to allow motorboat use where already established); Facts at ¶ 123 (SAR 008725) (same); at ¶ 141 (SAR 011286) (same); at ¶ 145 (SAR 011416) (same); at ¶ 163 (SAR 00813) (same). Second, the agency cannot illegally authorize non-conforming motorboats and then claim that they are properly excepted from the clear prohibition on the use because they have already become established. Third, motorized use of the river is not "established" in the ordinary sense of the word. See The Wilderness Society, 353 F.3d at 1061 (applying common sense meaning to words in statute). Rather, by definition, established uses are those that are "recognized *and accepted* in a particular capacity." NEW OXFORD AMERICAN DICTIONARY at 580 (2001) (emphasis added). Here, while motorized use of the river corridor has occurred over the last 40 years, it is by no means an established or "accepted" use of the wild river corridor. Rather, motorized

use of the river has been, and continues to be, a highly controversial issue. Indeed, in *two* previous river planning processes the Park Service decided to phase out motorized boat use. See Facts at ¶ 12 (SAR 000721) (phase out by 1977); at ¶ 56 (SAR 004857, 004848) (phase out by 1985). Fourth, even if one assumes, *arguendo*, that the established use exception applies, federal agencies retain discretion over whether to allow pre-existing uses to continue. See 16 U.S.C. § 1133 (d)(1) (use "*may* be permitted to continue"). Here, the Park Service's "extensive public review process [for the Colorado River] and the existing NPS planning documents" *do not* permit such uses to continue. Facts at ¶ 135 (SAR 010272, 010275, 016142, 007300). Instead, the agency's policies state that "[p]ublic use of motorized equipment or any form of mechanical transport *will be prohibited* in wilderness *except as provided for in specific legislation*." Ibid. (emphasis added). Finally, if motorboats are deemed an "established" use pursuant to section 4(d)(1), a plain reading of the Wilderness Act means that such uses would have to have been established *before* the September 3, 1964 Wilderness Act was enacted. See 16 U.S.C. § 1133 (d)(1); U.S. v. Gregg, 290 F.Supp. 706, 708 (D.C. Wash. 1968) (use must have been established "before the passage of the Act"); see also Facts at ¶ 135 (same).[8]

[8] Defendants' additional argument that motorized uses are allowed because "if Congress were to designate the area as wilderness, Congress could allow motorized uses to continue or ban them as it sees fit" deserves little attention from the Court. See NPS Mem. at 19. Saying that Congress has the authority to continue to allow or ban motorized use in the river corridor if and when it decides to enact legislation designating the area as wilderness is a bit like saying the sky is blue. Of course Congress has the authority, when enacting legislation, to do "as it sees fit." This, however, is not the issue in this case. The issue is what level of protection must the Park Service afford the river corridor now, in the interim, *until* Congress makes a final decision on designation.

II. THE PARK SERVICE ALLOWS COMMERCIAL SERVICES THAT ARE UNNECESSARY AND INAPPROPRIATE FOR THE COLORADO RIVER CORRIDOR AND IT HAS NOT MADE REQUIRED FINDINGS ABOUT TYPES AND AMOUNTS OF COMMERCIAL SERVICES IT AUTHORIZED.

The Park Service asserts that it allows "only limited motorized use of the River that is necessary to promote public access." NPS Mem. at 2. But it concedes that motorized commercial trips make up an estimated 71.7 percent of commercial launches, an estimated 74.8 percent of commercial passengers and 66.6 percent of commercial user-days. Joint Response to Pls' Facts ¶ 218. The Park Service concedes that it must make a specific finding that motorized use is necessary: in its brief, it asserts such an analysis is "embedded within the fabric of the entire FEIS" and asks the Court to infer from the entire document that it made such a finding. NPS Mem. at 22. However, the agency never made the required findings and, in fact, evidence in the record proves that motorized use is not necessary for public access or for any other legitimate purpose of the river. Moreover, the agency does not respond to the reality that the public uses the commercial system to gain access to the river even when people would prefer to take a self-guided noncommercial trip, but are unable to obtain a permit. That amount of commercial use is unnecessary and not addressed in the FEIS or in Defendants' briefs.[9]

A. The Legal Duty: The Park Service Must Make Specific Findings of the Type and Amount of Necessary Commercial Services Before Authorizing Them.

The Park Service's legal duty to authorize only necessary and proper commercial services stems from dual legal authority. The MPs and GMP together mandate that the Park Service only allow commercial services to the extent that they are necessary for activities which are proper for realizing the recreational or other wilderness purposes of

[9] GCPBA, in its brief, does not address that the Park Service failed to make the required findings of necessity or that it authorized unnecessary commercial services, deferring to the Park Service's brief on those claims.

the River. MP 6.4.4 (citing 16 U.S.C. § 1133(d)(5)); SAR 010138 (GMP)). The Concessions Act requires the agency, in part, to limit commercial services to those that are necessary and appropriate for public use and enjoyment of the River. 16 U.S.C. § 5951(b). As the agency concedes, "[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." NPS Mem. at 25. Thus, while Plaintiffs have demonstrated that the MPs and GMP are enforceable by this Court, the analogous duty is *statutorily* embedded in the Concessions Act, which the agency agrees it must follow.

The Park Service does not dispute that, at least under the Concessions Act, it must first make a finding of necessity before authorizing types of commercial services. See Blackwell, 390 F.3d at 647 (requiring finding of necessity before commercial service is allowed). Second, the agency must make a finding about how much of that commercial service is needed. Id. at 648 (stating that a finding of need is a specialized one, which includes type and quantity).[10] The Park Service must show that the amount of commercial services authorized is no more than is necessary to achieve the goals of managing the river for its wilderness character and for primitive and unconfined recreation. Id. at 647.

Because the term "necessary" is not defined, this Court should use its common sense meaning of "indispensable," "essential," or "required to be done." The Wilderness

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

Society, 353 F.3d at 1061; NEW OXFORD AMERICAN DICTIONARY at 1143 (2001). Defendants do not dispute that the only commercial services that should be authorized are those that are essential. Defendants also do not dispute that the only appropriate kind of recreation on the Colorado River is primitive and unconfined recreation with opportunities for solitude. The Park Service has also repeatedly conceded in the FEIS that the River must be managed to protect its wilderness character. See, section I, above.

Under these standards, the Court must set aside the Park Service's decisions as arbitrary and capricious or not in accordance with law if the Park Service authorized any amounts of commercial services without explicitly finding that they are necessary. 5 U.S.C. § 706(2)(A). This Court must also set aside any decision to authorize commercial services that do not support managing the River for its wilderness character or that are not essential for providing access for primitive and unconfined recreation.

B. The Park Service Has Not Found that Any Amount of Motorized Commercial Services is Necessary.

Motorized commercial services account for the vast majority of the allocated commercial use. Joint Response to Pl's Facts ¶ 218. Nonetheless, the Park Service does not cite to a single page in the FEIS or ROD where it made a specific finding that any amount of *motorized* services are necessary. Instead, the only specific discussions of *need* for commercial services the agency quotes are the same provisions of the FEIS cited by Plaintiffs, all of which state that undisclosed amounts of commercial services generally are necessary because they enable thousands of people to experience the river in a primitive and unconfined manner. NPS Mem. at 22. But these findings counter the need for motorized commercial services, which are not "primitive" ways of accessing the river and adversely impact wilderness character.[11] Further, these findings of need are

[11] "Primitive" is defined as "of or relating to the earliest age or period," "little evolved," or "belonging to or characteristic of an early stage of development: CRUDE,

inadequate to support a specialized finding that the amounts of allocated motorized commercial services are necessary for appropriate purposes. See Blackwell, 390 F.3d at 647 (requiring a specialized finding of need for type and amount of use).

The Park Service inaccurately claims that its alternatives and environmental consequences discussions addressed the need for motorized commercial services. NPS Mem. at 22-23. 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. See AR104617-106621 (FEIS Vol. I at 30-34). Whether and to what extent motorized commercial services are *necessary* was not part of the criteria for developing alternatives. The Park Service points to the FEIS's NEPA ratings of alternatives as evidence that it found that motorized services are necessary (NPS Mem. at 23), but these are not findings of necessity as the law requires. Analyzing different allocation levels, which have no apparent basis in "need", in various alternatives is not a needs assessment or determination. It is simply a required NEPA analysis.

In addition, the Park Service argues that "shorter motorized trips fill a particular market niche" and that eliminating them would conflict with its objective of providing a diverse range of quality recreational opportunities for visitors.[12] NPS at 23. Specifically,

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RUDIMENTARY [technology]." NEW OXFORD AMERICAN DICTIONARY at 1354 (2001). Thus, motorboats and helicopters cannot reasonably be deemed "primitive."

[12] Defendant-Intervenor GCROA argues that the Park Service's statement that eliminating motorized use would result in lowering current levels of use to minimize crowding implies that motorized commercial services are therefore, necessary. GCROA at 15-16. The Park Service, however, never made a finding that commercial motorized services are necessary or essential. In fact, the very response to comments quoted by GCROA makes clear that the Park Service could lower authorized use levels to minimize crowding to protect the resource. Thus, motorized services are not necessary to protect the resource. Using GCROA's analysis, it might be "necessary" to require all river runners to take motorized trips down the river in order to maximize the number of people the Park Service can move through the canyon in a given season. As discussed below, this contortion of what is essential conflicts with the purpose of the governing laws.

the FEIS stated that non-motorized alternatives provided "[l]imited trip type opportunities (compared to existing conditions)" and "[d]ecreased trip variety and exchange options." AR 104687-88 (FEIS Vol. I at 100-01). It is true that if motorized commercial services were eliminated, the public would not be able to take a motorized commercial trip down the river, but would have to take a primitive trip down the river and float the river on its own time, without the assistance of higher-speed motorized transport. The Park Service's attempt to back into a needs determination through its alternatives analysis illuminates its failure to perform one in the first place. Simply because there may be a desire or a demand for short motorized commercial trips (although this is hypothetical since it has not performed a demand study, and people may simply sign up for trips that are available), does not make them necessary or appropriate.

The Concessions Act and the MPs define the frame of reference for the needs determination. Both require that commercial services be allowed only for public use that is consistent with the preservation of the values of the area, which in this case include a wilderness river experience. AR 104606 (FEIS Vol. I at 19); AR 105644 (FEIS Vol. II at 607). The FEIS defines a "wilderness river experience" as:

> The natural sounds, silence, smells, and sights of the canyon and the river predominate over those that are caused by humans.
>
> Outstanding opportunities are provided for solitude or a primitive and unconfined type of recreation.
>
> The river is experienced on its own terms . . .
>
> The natural and cultural objects in the riparian zone and side canyons are viewed in a state as little affected as possible by people, given the existence of dams on the Colorado River.
>
> The effect of the river runner's presence is temporary rather than long lasting.

AR 105644 (FEIS Vol. II at 607). Thus, the only necessary and appropriate commercial services are those that are consistent with a wilderness river experience and preserving the values of the area, including wilderness character and the natural soundscape. The Park Service must limit the "diversity and range of recreational opportunities" to those

that are consistent with preserving the river's values and cannot juxtapose demand for inappropriate commercial services as a need for those services.[13] By analogy, simply because some people may desire to jet ski down the river or take a gondola ride down to Phantom Ranch does not mean that the Park Service may authorize commercial services for those purposes because they are unnecessary forms of access and they conflict with the agency's duty to protect the natural soundscape, primitive recreation, and the overall wilderness experience.

C. The Record Shows That Motorized Commercial Services Are Unnecessary and an Improper Use of the River.

To meet the objective of protecting wilderness character, the CRMP must "[p]rovide a range of recreational opportunities consistent with the preservation of wilderness character." AR 104601 (FEIS Vol. I at 14). The Park Service has unambiguously found that "[f]or visitors seeking outstanding opportunities for solitude or a primitive and unconfined type of experience, the [cumulative] impacts would be adverse and of moderate intensity during the peak use motorized periods." AR 105829 (FEIS Vol. II at 792). As the Court in Blackwell held, "[t]he [agency's] decision to grant permits at their pre-existing levels in the face of documented damage resulting from overuse does not have rational validity." 390 F.3d at 648.

The Park Service does not dispute that motorized commercial services interfere with a primary value of the river. Nor does it dispute, in its brief, that authorizing motorized commercial services fails to preserve the wilderness values of the river to the "highest practicable degree" consistent with the Concessions Act. 16 U.S.C. § 5951(b). In fact, the FEIS and ROD never make this claim. Instead, the agency makes the red

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[13] In its brief, the Park Service also suggests that commercial motorized services are necessary to make trips "more enjoyable" for certain members of the public who perceive motorboats as safer, but that is not a legitimate reason for authorizing commercial services when it interferes with preserving the natural values of the area. NPS Mem. at 27. Defendants do not dispute that oar-powered trips are just as safe or safer than motorized trips, with a lower fatality rate. Joint Response to Pls' Facts ¶ 32.

herring argument that motorized uses must be acceptable because otherwise any commercial activity that has an adverse impact on a park resource would be disallowed.[14] NPS Mem. at 28. As such, the Park Service fails to dispute the clear record evidence that motorized use is not necessary for the use and enjoyment of the area, but is merely a convenience for some and allows commercial outfitters to take larger groups on larger boats and make larger profits. The Park Service also does not dispute that oar-powered rafts provide safe trips for all types of river users and that eliminating motor trips would not exclude any specific group.

The Park Service contends that the former Grand Canyon Deputy Wilderness Program Coordinator's written memos on these issues should be disregarded as those of a former staff member, but in the absence of a proper analysis in the FEIS to the contrary, his findings are highly relevant. Nothing in the agency's brief or FEIS disputes the 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." Facts at 162. The Concessions Act also prohibits commercial services that fail to meet the minimum requirements test for preserving the values of the resource, which include wilderness character. 16 U.S.C. § 5952(4)(A)(iii) (no proposal for a concessions contract shall be considered which fails to meet minimum requirements for preservation); see also AR 104822 (FEIS Vol. I at 235).

Last, the Park Service dismisses Wilderness Watch v. Mainella, 375 F.3d 1085 (11th Cir. 2004), as a Wilderness Act case, but the court's analysis applies equally to the

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[14] The agency's argument that the preferred alternative is also the environmentally preferred alternative is irrelevant because the Park Service never evaluated an alternative that would authorize only necessary and appropriate amounts of commercial services that preserve the river's values to the highest practicable degree. NPS Mem. at 29.

Park Service's duties under the Concessions Act and MPs. There, the agency had actually performed a minimum requirements analysis and found that motor vehicles were necessary because they provided recreational access. Id. at 1093. The Eleventh Circuit rejected the argument because motorized uses are not the type of recreational use promoted by the Wilderness Act. Id. at 1093. Here, the Park Service has not determined that motorized commercial services meet the minimum requirements for protecting the area, but as an analogue to the Eleventh Circuit's holding, motorized uses are not the type of recreational use promoted by the Concessions Act's or MP's mandates to preserve the river's wilderness values.

D. The Park Service Has Not Made a Finding that the Amount of Other Commercial Services Authorized is Necessary.

While the Park Service states that commercial services are necessary to provide river access to those who do not have the skill or ability to take a self-guided trip, the Park Service assuredly never made any specific finding about the *amount* of commercial services that are necessary and appropriate. The Park Service argues in its brief that the entire FEIS, and particularly the alternatives analysis, contains findings about the necessary *amounts* of commercial services. NPS Mem. at 26. But a review of the pages cited shows that no necessity determination was made as to necessary or appropriate amounts. The Park Service allocated use in the ROD and evaluated different allocations of commercial services and noncommercial permits in its alternatives analysis, but it did not answer the predicate question: how much is necessary and appropriate? In order to limit commercial services to those that are necessary, the Park Service must first determine how much of a particular service is necessary. 16 U.S.C. § 5951(b); see Blackwell, 390 F.3d at 647-48.[15]

[15] The Park Service argues that Blackwell's analysis was different than the present case because there the agency had not prepared a required NEPA analysis. NPS Mem. at 24. However, in Blackwell, the agency did prepare a needs assessment in the context of a Wilderness Plan and EIS. 390 F.3d at 647 ("Nowhere in the Wilderness Plan o[r] the

E. The Park Service Authorized Unnecessary Amounts of Commercial Services.

The Park Service has no response to Plaintiffs' argument that the amount of commercial services it authorized is unnecessary. It ignores explicit record evidence that people who wish to take a noncommercial trip will use and pay for commercial services in order to gain access to the river, rather than wait years to possibly obtain a noncommercial permit.[16] See e.g. Facts 172; AR 033403 ("At present, some companies allow clients to bring their rafts or kayaks; however they do not allow passengers on these boats and do not allow non-owners to paddle kayaks. However, there is a definite demand for these services within the paddling community. For instance, 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."); AR 027553 ("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."); AR 027700 ("I have pretty much written it off as impossible due to the 10 year waiting list to get in unless you pay thousands of dollars to a guide company."); AR 039423 ("This summer I organized a group of 21 canoeists and 3 kayakers on a commercial raft supported trip paddling the Grand Canyon. It is my second such trip, the last being 1999.

2001 Needs Assessment does the Forest Service articulate why the extent of such packstock services authorized by the permits is 'necessary.'"), id. at 637 (stating that agency issued a plan and EIS). The reference to permits being granted without going through the required NEPA analysis referred to the agency's separate decision to issue commercial operators permits, not to the prerequisite necessity determinations in the Wilderness Plan and accompanying Needs Assessment.

[16] The Park Service did not argue that the CRMP allocation levels change this fact. Both the FEIS and its brief ignore this problem and ignore relative demand for access.

I had to wait 3 years to get this commercial trip organized. I have been on the private trip waiting list since 1999. If it goes as it has been, it looks like I'll be 65 before I can organize a trip of my choosing down the canyon."); AR 039452 ("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?'"); AR 040394 ("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!"); AR 040946 ("With commercial companies, we didn't have to wait for years for a permit.").

Thus, even if all of the commercial allocation was used, which it is not (see Facts ¶ 228), at least a portion of the allocation to commercial services reflects use by those who do not need or desire commercial services.[17] All commercial services that are used by members of the public who would rather take a noncommercial trip are *unnecessary* commercial services. The Park Service has an obligation to determine the actual amount of commercial services needed and authorize no more than that.

III. ORGANIC ACT VIOLATIONS

A. The Park Service Violated the Requirement of Equitable Public Access.

The Park Service does not contest that the Organic Act requires it to equitably allocate use between commercial and noncommercial users and thereby protect the

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[17] Defendant-Intervenor GCROA is in a unique position to point to evidence in the record, if any existed, to show that commercial clients do not use their services because they otherwise could not obtain a noncommercial permit. However, GCROA does not dispute the fact that this occurs. See Joint Response to Pls' Facts 172. Given that it occurs, the question the Park Service must answer is how much commercial use is attributable to the public's inability to timely gain access to the river through the noncommercial system. It is illegal for the agency to authorize unnecessary amounts of commercial services that force the public to pay for river access. 16 U.S.C. § 5951(b) (allowing only necessary commercial services); 16 U.S.C. § 3 (protecting free public access against commercial financial interests); see, section III.A, below.

public's right to free access. NPS Mem. at 31; 16 U.S.C. § 3. It also agrees that its allocation decisions must have a rational basis and not be arbitrary. NPS Mem. At 31. However, its arguments about what free access means are inconsistent with the law. Primarily, the Park Service defends its allocation decisions by arguing that it evenly split user-days in a 50-50 ratio between commercial and noncommercial users and that a demand survey is infeasible. These defenses fail to meet the Park Service's burden to demonstrate that its decision has a rational basis in equity and is supported by record evidence.

When use must be limited to protect the resource, there are two ways to fairly allocate use when demand exceeds supply. The Park Service can require everyone to get a permit through a single allocation system, using whatever method the Park Service deems fair, such as a lottery, and then let people chose their method of conveyance. For instance, once a person obtains a river permit, she may take a noncommercial trip or hire a concessioner to take her down the river. Alternatively, the Park Service can allocate use through a split allocation system where it allocates use to different user groups, such as commercial and noncommercial users, based on the relative demand for access from each group. For instance, if 100 noncommercial users seek permits and 50 commercial users seek permits, but only 100 permits are available, the Park Service would allocate 67 permits to noncommercial users and 33 permits to commercial users, a two-thirds apportionment to each user group based on a supply/demand ratio of two-thirds. The Park Service, however, ignores these fair ways to allocate use and instead allocates use arbitrarily in a split allocation system.

1. Free access applies to all members of the public including those needing commercial services.

At the outset, the agency twists the term "free access" to mean "anti-commercial user," which is a misrepresentation both of the law and Plaintiffs' claims. The Organic

Act's requirement to protect free public access is equally as important for commercial users as it is for noncommercial users. Neither commercial users nor noncommercial users should be paying for *access* to the Colorado River (beyond reasonable administrative costs paid to the agency for permitting). In paying the concessioners, commercial users should be paying only for a service: a guided trip down the river by experienced boaters. Noncommercial users should be paying only for the costs of their trip, in the way of food, supplies, boat rentals, etc. Instead, currently, the public (including the public who wishes to take a noncommercial trip) pays concessioners, not only for their guided services, but for river *access*. The laws at issue in this case plainly require that commercial services be limited so that people, not companies, retain access to their public lands; so that people may freely recreate in the special places that are set aside for them and that 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 on the Colorado.

In mischaracterizing "free access," the Park Service and Defendant-Intervenors attempt to pit Plaintiffs against river users who need the assistance of commercial guides. But Plaintiffs support river access by those who need professional assistance and do not believe that the do-it-yourself boaters should have an exclusive market on river access. In fact, Plaintiffs seek equity and free access for all river users engaged in recreation that is consistent with managing the river for its wilderness values. This is why Plaintiffs proposed in public comments that all river users apply for a permit in a single allocation system. See AR 16830-16840. Access would be free and equitable in a system with limited use. Members of the public would then have the ability to choose their own kind of river trip, commercial or not. As it stands now, concessioners control the majority of the permits providing river access and in order to gain access in the year in which one wishes to take a river trip, one must pay a concessioner a high price, whether or not a person wants or needs commercial assistance. This harms not only noncommercial users,

but commercial users too. It is the Park Service, not the Plaintiffs, which has chosen a split allocation system between two user groups. While the Ninth Circuit has previously held that the agency, in its discretion, may do so, the split allocations must be fairly made between those two user groups. Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979). Doing so protects free access by limiting concessioners to selling services and not access to the river.

2. The Park Service fails to account for differing demand for commercial and noncommercial use.

The Park Service does not dispute that it did not factor into its analysis the relative demand for commercial and noncommercial trips. NPS Mem. at 34 ("instead of attempting to develop an allocation based on relative demand, NPS looked at different allocations scenarios ..."). [18] Failing to account for relative demand in a split allocation system, on its face, violates the legal requirement of equitable allocation. The only way to fairly allocate limited access without a demand study is to use a single allocation system and then let people choose their method of conveyance. See Declaration of Donald W. Walls in Support of Plaintiffs' Motion for Summary Judgment ("Walls Dec."), ¶¶ 3, 4, 8, 11, 12. [19] In either scheme, the Park Service implicitly says something about

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[18] Plaintiffs agree that the Park Service analyzed different allocation scenarios in its various alternatives and considered the environmental consequences of those alternatives. However, the Park Service did not establish an appropriate standard by which it would "fairly" allocate use in order to protect free access by the public and explain how each alternative would fairly allocate use.

[19] The focal point of judicial review in an APA case is the record in existence when the ROD was issued. Camp v. Pitts, 411 U.S. 138, 142 (1973). However, to ensure the integrity of the administrative process, the Ninth Circuit allows a court to consider extra-record materials: if necessary to determine whether the agency has considered all relevant factors and explained its decision and when necessary to explain technical terms or complex subject matter. National Audubon Soc. v. U.S. Forest Service, 46 F.3d 1437, 1447 & n.9 (9th Cir. 1993) (allowing extra-record declaration), citing Animal Defense Council v. Hodel, 840 F.2d 1432, 1436-37 (9th Cir. 1988), modified 867 F.3d 1244 (9th Cir. 1989). These exceptions are particularly relevant in NEPA cases, where the plaintiff

demand for use. Id. at ¶ 3. By allocating 50 percent of user days to each group, the Park Service impliedly says that each group's demand for user-days is equal. Id. at ¶¶ 8-9. The current method of evenly allocating user-days between commercial and noncommercial use--unless exactly one-half of all demanded use requires outfitter assistance--assures that concessioners will earn an "economic rent" on the "access" they provide to the river over and above the fair return to their other services. Id. at ¶¶ 5, 9. For example, if the Park Service gives concessioners 50 percent of user days, but there is only a demand from people seeking commercial services for 40 percent of total user days, the concessioners receive 10 percent more user days than they require. Id. at ¶¶ 9-10.

The Park Service argues that it is infeasible to determine relative demand because a panel stated that "a survey would probably cost around $2 million and be of limited use." NPS Mem. at 34 (citing AR 105014 (FEIS Vol. III at 177)). Even if this were true, and where other reasonable alternatives exist, the Park Service should not allocate use in a split allocation system where knowing relative demand is essential. However, in the FEIS and ROD, the Park Service did not state that it could not afford to do the demand survey recommended by the panel. AR 105014. Nor did the Park Service explain how the survey's use would be limited or whether it would allow the Park Service to equitably allocate use. Ibid. Indeed, in the 1979 CRMP and FEIS, the Park Service admitted that it was feasible to monitor actual relative demand between user groups and make adjustments in the allocations accordingly, every couple of years. SAR 004753 (1979 FEIS stating "[u]se allocation is based on the best available information on comparative

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must prove that an agency failed to take a hard look at issues. See Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1473, 1477 (W.D. Wash. 1992); see also Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526-27 (9th Cir. 1997). Plaintiffs properly submit the Declaration of Dr. Walls in response to the Park Service's defense that it fairly allocated use in the absence of any reliable data on demand. These issues were exhaustively raised by Plaintiffs and others in pubic comments. Dr. Walls explains the relevant factors the Park Service disregarded and explains the technical concept of the resulting economic rent that accrues to the concessioners. See generally Walls Dec.

demand for concessioner-guided trips compared to noncommercial river-running demand."); SAR 004514 (1979 FEIS page I-12); AR 4768 (1979 FEIS, p. IX-125). The new CRMP did not point to any changed circumstances that would make doing the same thing infeasible now.

Further, even if a demand survey were infeasible, the Park Service did not consider alternative methods for measuring demand. For instance, a former river outfitter operator suggested in comments to the Park Service that "demand is easy to measure, 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." AR 049925-049926.[20] Yet, the Park Service failed to take

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[20] GCROA vehemently opposes an equitable allocation of available use based upon relative demand, likely because it suspects the result would be a decrease in commercial services and an increase in noncommercial permits. See AR 014138 (GCROA memo on the CRMP planning process discussing the need to have the support of GCPBA in order to avoid being "at loggerheads with the privates over user-days with demand being the leading candidate to serve as the base allocation apportionment criterion on which all will depend, as imperfect as the demand thing is. *We will have no scientific or otherwise credible evidence to support our contention that commercial demand constitutes 68% of the total and that private demand is only 32%. We will only have our intuition to offer, the intuition of a group with a clear profit motive at stake.* This will continue to convince no one.") (underline emphasis original; italics emphasis added); compare AR 000277 (Superintendent requesting data on demand from GCROA). Consequently, GCROA boldly asserts that to base allocation primarily "on the relative demand for self-outfitted versus professionally-outfitted trips would be inconsistent with the long history of management of GCNP and contrary to the NPS's governing authorities." GCROA at 22. Nothing supports GCROA's contention. After establishing how much commercial use is necessary and appropriate and ensuring that the resource is protected, the Park Service has a duty to equitably allocate use. If a relative demand study or a single allocation system caused a shift in the concessioners business, it would demonstrate the inequity in the current system. However, if as they claim in their brief, the Park Service fairly allocated use, they should not fear the results of a demand study.

the hard look.[21]

After stating that it would not study demand, the Park Service claims that demand exceeds supply for both commercial and noncommercial trips, but bases its belief that demand exceeds supply for commercial trips on anecdotal reports from self-interested concessioners rather than more reliable evidence such as an unbiased survey or the concessioners actual reservation sheets or waitlists, if they exist. Joint Response to Pls' Facts 220. The concessioners have conceded that they do not have any credible evidence to support their self-interested "intuition" about demand. AR 014138. The Park Service also claims that it is "impossible to say how many members of the public were "represented" by the waiting list. NPS Mem. at 34. But it would not be impossible to say if they surveyed the waitlist or conducted another demand study.

Ultimately, if a demand study is infeasible, then to comply with the law, the Park Service must use a single allocation system, where members of the public apply for river permits in a fair system, like a lottery, and upon obtaining a permit choose to take a noncommercial or commercial trip. Arbitrarily allocating use, with no basis in relative demand, is not a rational option and does not comply with the Organic Act or the Concessions Act.

3. Evenly Distributing User Days Does Not Protect Free Access.

The Park Service defends its decision by arguing that user-days are "evenly distributed" between commercial and noncommercial users. NPS at 32. But it had no rational basis for its allocation decisions because it illegally fails to explain anywhere in the FEIS or ROD why a 50-50 split in user days is "fair." Native Ecosystems Council v.

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[21] The Park Service has an obligation to evaluate demand in determining the extent to which these commercial services are needed and should be limited under the Concessions Act, but as discussed above, the Park Service has ignored demand there, too, and illegally continues to authorize unnecessary amounts of commercial services. See section II, above.

U.S. Forest Serv., 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."). Further, the "even distribution of user-days" defense fails for several reasons. First, an "even" distribution of user days is not the equivalent of a "fair" or equitable distribution of user days, as required by Wilderness Public Rights Fund, and therefore does not satisfy the Ninth Circuit's test.

Second, user days are not a fair measure of use between commercial and noncommercial groups. In response to public comments, the Park Service makes clear that measuring allocation in terms of user days is a disadvantage to noncommercial users and a financial boon for commercial companies.

> Each type of allocation offers advantages and disadvantages. For commercial companies, user-day allocations generally result in faster trips and more passengers. Noncommercial users tend to focus on their launch (i.e. launch limits), not cumulative user-days or cumulative passengers. In the FEIS both noncommercial and commercial users are limited by launch schedules, and user-day limits are maintained for commercial companies. Noncommercial use no longer has a user-day limitation.

AR 104890 (FEIS Vol. III at 53) (Response to A4). Thus, the Park Service concedes that user days are a meaningless measure of noncommercial use. In fact, "[t]he FEIS does not use user-days to allocate noncommercial use. It only uses launches." AR104904 (FEIS Vol. III at 67) (A52). In contrast,

> *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.

AR 104892 (FEIS Vol. III at 55) (A10 Response) (emphasis added).

Third, user-days are only one factor of a multi-faceted allocation system. The Park Service states that "[e]quity can be measured in a number of ways, including passengers, launches, and user-days." AR 104899 (FEIS Vol. III at 62) (A36); AR 104951 (FEIS Vol. III at 111) ("Equal access depends upon the measure of use. While some believe that passengers per year should be the primary measure for allocation, others believe that

user-days or launches per year should be the primary measure."). In fact, all of these ways of limiting use are important factors to consider in evaluating whether allocation is equitable. The Park Service has chosen to evaluate only one mechanism–user days--which is most significant to concessioners and least important for noncommercial boaters. It is arbitrary and capricious to ignore other relevant factors that are important for river access, including numbers of passengers, launches, group size, length of trips and seasons of use.

Fourth, if it were true that user days alone were a reasonable measure of equity, then the user days should also be evenly distributed throughout the year to each user group. But they are not. Commercial users have no allocation in the cold weather months; whereas, noncommercial users have nearly one-third of their allocation in the winter. To reveal the gross inequity in the seasonal allocations, the Court could inquire of the agency and the defendant-intervenors whether switching the seasons of use between commercial and noncommercial users would make any difference and whether it would affect GCROA's views of equity in this case. Under this scenario, commercial users would be able to use 32,407 user-days in the summer, 46,992 user-days in the shoulder seasons and 34,087 user-days in the winter. See AR 104647 (FEIS Vol. I at 60) (showing the present equivalent for noncommercial users). Conversely, noncommercial users would have access to 91,909 user-days in the summer and 23,591 user-days in the shoulder season. Ibid. Is this 50-50 allocation still equitable? Even if ignoring relative demand and using an even 50-50 split were an appropriate standard to employ, which Plaintiffs dispute, the Park Service has violated the Organic Act in failing to "fairly" allocate use under that standard. Wilderness Public Rights Fund, 608 F.2d at 1254.[22]

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[22] Like the Park Service's and GCROA's briefs, the GCPBA's brief on this claim is unpersuasive. From the outset, it misunderstands that the so-called 50-50 allocation is not of permits, but of user-days. GCPBA at 14:22-24. A 50-50 allocation of permits would greatly increase the number of noncommercial boaters who could access the river because permits are issued for each trip.

Indeed, the real measure of inequity is in Defendants' admissions that commercial river runners do not have to wait to obtain access through the concessioners' user days. Joint Response to Pls' Facts ¶ 230; AR 104555. Defendants also have no counter-evidence to the evidence in the record that a commercial passenger can generally take a trip in the year she wants. Joint Response to Pls' Facts ¶ 229; AR 000370, 000392-393; NPS Response to Pls' Facts ¶ 136; SAR 009145; see also AR 049922 (independent research by former river outfitter). In contrast, some noncommercial users previously on the waitlist will wait up to 10 years and possibly 20 years to obtain a permit through the lottery system, and some people may never gain access. AR 104903, FEIS Vol. III at 66 (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."); AR 105732, FEIS Vol. II at 695 ("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."). As a result of the inequities, members of the public pay concessioners to gain access even when they would prefer to arrange their own noncommercial trip.[23] Joint Response to Pls' Facts ¶ 172. Further, the concessioners control the vast majority of summer access on the river, dominating everyone's river experience with motors.[24] Joint Response to Pls' Facts ¶ 218. If actual prospective

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[23] All Defendants argue that because the CRMP increases noncommercial use over prior plans, it has somehow fairly allocated use. But, as demonstrated here, there is no rational basis for the Park Service's apportionment of use; it was arbitrarily made with the continued institutional preference for commercial services.

[24] Whether noncommercial users would choose to take a winter river trip if they had the option of a summer river trip is speculative because the Park Service has never inquired, but the fact that the concessioners do not want to operate in the winter is telling about public demand for winter access. While the Park Service may have filled 90% of its winter noncommercial launches in past years, it is likely that most of those boaters chose to take a winter trip because it was available, not because it was preferred. The support for that premise comes from the fact that there is far more demand than supply for

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 (not in favor of commercial users, but in favor of the concessioner). In effect, the Park Service 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." In enacting 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 the Park Service to control the concessioners. H. Rep. No. 700, 64th Cong., 1st Session, 5 (1916).

The freedom and equity of public access does not 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 Park Service 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. 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. The Park Service Is Not Entitled to Blind, Unfettered Discretion In Making Impairment Determinations.

The Park Service asserts that it has blind, unfettered discretion when making a no-impairment determination and even suggests that "federal courts [should be] reluctant to intervene in [Park Service] decisions concerning the use of national park resources." See NPS Mem. at 30. While the agency enjoys a certain level of discretion in managing our National Parks, under the APA's arbitrary and capricious standard, the Park Service "like any other agency . . must examine the relevant data and articulate a satisfactory

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summer noncommercial river permits, but less demand than supply for winter launches.

explanation for its action including a rational connection between the facts found and the choice made." Sierra Club v. Mainella, 459 F.Supp.2d 76, 100 (D. D.C. 2006); see also Edmonds Inst. v. Babbitt, 42 F.Supp.2d 1, 15 (D. D.C. 1999) (the Organic Act "gives the Park Service broad, but not unlimited discretion in determining what actions are best calculated to protect Park resources"); Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 965 (9th Cir. 2005). In the MPs, for instance, the Park Service explicitly recognizes that "[w]hile Congress has given the Service the management discretion to allow certain impacts within parks, *that discretion is limited* by the statutory requirement (enforceable by the federal courts) that the Park Service must leave park resources and values unimpaired." MP 1.4.4 (emphasis added). This prohibition on impairment, the "cornerstone of the Organic Act, establishes the primary responsibility of the National Park Service . . .[and] ensures that park resources and values will continue to exist." Ibid. As such, the Park Service has *no discretion* to authorize activities that impair a park's resources or values. See id. at 1.4.3 (Park Service has discretion to allow impacts "so long as the impact does not constitute impairment"); at 1.4.4 (same); at 1.4.5 (same).

C. The Court's Impairment Inquiry Should be Guided by the Park Service's Interpretation of the No-Impairment Standard in the Mps.

In this case, the parties agree that the Court's review of the Park Service's "no-impairment" determination in this case, *i.e.*, the Park Service's determination that continued motorized use of the river corridor does not impair the park's natural soundscape, must be guided by the Park Service's "interpretation of the no-impairment standard in its 2001 Management Policies [MPs]." NPS Mem. at 35 (citing SUWA, 387 F. Supp. 2d at 1192); see also SAR 016073 (complete copy of the MPs).

Pursuant to the MPs, 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. In order to determine whether impairment occurs, the Park Service 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 National Environmental Policy Act (NEPA) documents; and (5) all relevant scientific studies. See id. at 1.4.5, 8.2.3, 1.4.7; see also AR 109611 (ROD's findings on impairment); SUWA, 387 F. Supp. 2d at 1193 (citing section 1.4 of the MPs). After considering these factors, the agency must then decide whether the impact(s) associated with the action – in this case the motorized use of the river corridor – rise to the level of an "impairment" of park resources or values. See MPs at 1.4.5, 8.2.3, 1.4.7. According to the agency, 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 general management plan or other relevant [Park Service] planning documents." MP 1.4.5.

Based on these factors, Plaintiffs' opening brief explains: (1) how the Park Service failed to take into account many of the factors listed above; and (2) why the impacts to the Grand Canyon's natural soundscape from the authorization of motorized uses (*i.e.*, motorboats, generators, and helicopters) rises to the level of impairment. See Pls. Mem. at 28-34. Indeed, here, the Park Service concedes that significant, cumulative adverse impacts to the Grand Canyon's natural soundscape exist (see AR 105424) and that this natural soundscape is a resource and value that is necessary to fulfill the purposes of the Park, key to the public's ability to enjoy the Park, and an identified goal in the Grand Canyon's 1995 GMP. See SAR 010134 ("The Grand Canyon is recognized as a place with unusual and noticeable natural quiet, and direct access to numerous opportunities for

solitude"); at SAR 010138 (Management Objectives: "Protect the natural quiet and solitude of the park and mitigate or eliminate the effects of activities causing excessive or unnecessary noise in, over, or adjacent to the park").

Defendants disagree, arguing in response that if the Court takes a creative, holistic view of the FEIS it will reveal that the agency considered all relevant factors before making a no-impairment determination *and* that its final no-impairment determination that motorboats, generators, and helicopter passenger exchanges merely impact and do not impair the river corridor's natural soundscape is based on "extensive evidence and analyses" and "expert judgment." Defendants are mistaken.

1. Defendants failed to apply the correct baseline before making a no-impairment determination

First, Defendants maintain that they measured and compared the impacts of its decision to authorize motorized uses *against the natural ambient sound level* of the river corridor: against the "environment of sound that exists in the absence of human-caused noise" as required by the MPs. See NPS Mem. at 36; MP 8.2.3.[25] Evidence in the record, however, suggests otherwise.

In preparing the FEIS, for instance, the Park Service conducted a study of the "natural ambient sound levels" at various points along the river in the Grand Canyon. This study, however, only measured natural sound levels "in the *presence of audible human-caused noise* including aircraft overflights." AR 104729 (FEIS Vol. I at 142) (emphasis added). As such, audible human-caused noise from aircraft overflights was included in the environmental baseline. See ibid; see also Grand Canyon Trust, 290 F. 3d

[25] In the Grand Canyon, the natural sound level or baseline condition is the natural sound of the river corridor in the absence of human-caused noise, i.e., the flowing water and rapids of the river, wind, storm activity, wildlife activity, and other natural sound generation such as rock and mud slides. See Facts at ¶ 198.

339 (rejecting FAA's reliance on an incremental analysis that included existing human-caused noise in the environmental baseline). Moreover, even if one assumes, *arguendo,* that the Park Service accurately measured the natural ambient sound levels at various points in the river corridor, the agency never analyzed the impacts of its decision against the natural sound levels. In other words, in making an impairment determination for its decision to authorize motorboats, generators, and helicopters in the river corridor, the agency failed to measure and apply the additive noise impacts against the natural soundscape. Instead, the agency illegally diluted and minimized the impact (and thus impairment) by *only* measuring and comparing the increased noise levels against the pre-existing, human-caused noise. See e.g., AR 105424 (FEIS Vol. II at 387).

2. Defendants failed to adequately consider the cumulative impacts to the Grand Canyon's natural soundscape before making its no-impairment determination

Second, in making an impairment determination, the agency must take into account the "cumulative effects of the impact in question." MP 1.4.5; AR 109611 (ROD) (In "determining whether impairment would occur, park managers examine the . . .cumulative effects of the action"); SUWA, 387 F. Supp. 2d at 1190 (quoting MP 1.4.5). 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." Ibid.; see also Part IV. A, below.

Here, the record reveals that the Park Service failed to consider the overall, cumulative impacts to the Grand Canyon's natural soundscape *when issuing* its no-impairment determination. See AR 109611 (Park Service's "Findings on Impairment of

Park Resources and Values"). While an "analysis" of cumulative impacts to the Grand Canyon's natural soundscape is included in the FEIS, the agency never applied this analysis and its findings to the impairment decision making process. See e.g., 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").

Indeed, in response, the Park Service does not rely on, reference, or cite the actual impairment determination in the Record of Decision ("ROD") (see AR 109611) where the cumulative impacts analysis must be found but instead refer generally to a "detailed noise analysis" in the FEIS and the cumulative impacts section on pages 386-387 of Vol. II of the FEIS. See NPS Mem. at 37. This purported "detailed analysis," however, includes only a general discussion of the additive impacts associated with aircraft overflights (see AR 105394; AR 105423), a laundry-list of other "actions" (see AR 105286; AR 105386), and a statement that the "cumulative effects [to the Grand Canyon's natural soundscape]. . .would be regional, adverse, long-term, and major." AR 105424. The Park Service then summarily concludes, in one sentence, that there would be no "impairment of the natural soundscape in Grand Canyon National Park." Ibid. Without question, this is not enough. When making an impairment determination, the agency must do more than merely reference a NEPA analysis. The agency must provide an adequate explanation – a rationale – for finding that the cumulative impacts do not rise to the level of impairment. The Park Service must actually apply its NEPA "analysis" to the impairment determination. See Flowers, 423 F.Supp.2d at 1322. As explained 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).

3. The Park Service never considered the previous NEPA documents and relevant studies before making its no-impairment determination

Third, in making an impairment determination, the Park Service is required to "consider any environmental assessments or environmental impact statements required by . . .NEPA; relevant scientific studies, and other sources of information; and public comment." MP 1.4.7. Here, the agency maintains that this requirement does not apply because the earlier NEPA documents, management plans, and approximately 29 ecological and social studies on the carrying capacity of the river corridor and the impacts of motorized use (see SAR 003715) were all premised on the use of "two-stroke motors" and not the current "four-stroke motors which are quieter (and cleaner)." NPS Mem. at 38. This statement is incorrect.

Even a cursory review of the previous EISs, management plans, and 29 studies on motorized use and carrying capacity of the river corridor reveals that their scope, value, and relevance extends well-beyond the impacts of two-stroke engines. See SAR 001787 (listing all twenty-nine studies); SAR 003715 (synthesis of all twenty-nine studies). Many of the 29 studies, for instance, reveal that motorized use of the Colorado River *in general* is inconsistent with managing for solitude, disruptive to visitors, and adversely impacts the natural soundscape of the river corridor. See Facts at ¶¶ 24-34. Moreover, in terms of providing an opportunity to experience the Grand Canyon's natural soundscape many of the studies show that overall "non-motorized trips are more pleasing to the visitor." See SAR 004607. Reasons "given suggest that oar travel is seen as more consistent with a natural or wilderness experience." Ibid. Passengers "who had experience with both motor and oar trips preferred the oar trip. They enjoyed the slower pace, could relax; they become more aware of natural sounds in the canyon; they were

able to observe more closely the unique features along the river and more easily ask questions of their guide." Ibid.; see also SAR 004602 (there "is a strong indication that *almost all* those who have had the opportunity to experience both motor and oar trips prefer oar trips over motor trips."); SAR 005918 (the "motor-oar experiment"). Overall, therefore, these relevant 29 studies need to be carefully considered before the Park Service decides that authorizing motorboats, generators, and helicopter passenger exchanges does not impair the Grand Canyon's natural soundscape.

D. Impairment: The Overall, Combined Impacts to the Grand Canyon's Natural Soundscape Rise to the Level of Impairment

Defendants maintain that while continued impacts to the Park's natural soundscape will occur, the Park Service's decision to authorize additional impacts from motorized use of the river corridor does not "impair" the Park's natural soundscape because such use will only have an additive or incremental effect on an already noisy situation. See AR 105423-24 (FEIS Vol. II at 386-87). As such, the agency continues to authorize a myriad of motorized uses that collectively impact the integrity of the Park's natural soundscape all the while avoiding an impairment determination. By this reasoning, the agency authorizes motorized watercraft use, generators, vehicle and tour bus use at launch/retrieval sites, camp activities, helicopter passenger exchanges, aerial tours of the Grand Canyon, and administrative use of motors and aircraft, because when viewed in a vacuum, these activities may have an "individually minor" effect on the Park's natural soundscape relative to overflights. In other words, since the Grand Canyon's natural soundscape is already being severely impacted by aircraft overflights, the agency sees no harm or impairment in making the situation worse by authorizing even more motorized use.

Without question this defeatist, "death by a thousand cuts," approach to managing

the Grand Canyon's natural soundscape and avoiding impairment is arbitrary and capricious. See e.g., Grand Canyon Trust, 290 F.3d at 257, 346 (rejecting the FAA's similar argument with respect to Zion National Park); 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 it inconsistent with MP 1.4.5 (must consider cumulative impacts) and the Park Service's own ROD (AR 109611) but taken to its logical conclusion, the Park Service's position would render Congress' prohibition on impairment largely superfluous. Just like the situation in the Grand Canyon, individually minor but collectively significant impacts would be allowed to occur in all of our National Parks. See AR 105424 (collective impacts to the Park's natural soundscape are significant).

To avoid this scenario, therefore, it is imperative that the Park Service "give a realistic evaluation of the total impacts [of the action] and []not isolate the proposed project, viewing it in a vacuum." Grand Canyon Trust, 290 F.3d at 342. Even "a slight increase in adverse conditions . . . may sometimes threaten harm that is significant. One more factory . . . may represent the straw that breaks the back of the environmental camel." Id. at 343 (quoting Hanly, 471 F.2d at 831). This is precisely the situation in the Grand Canyon. In fact, Defendants recognize that the "Grand Canyon's natural soundscape is . . .a disappearing resource" (AR 104728) and that continued motorized use of the Grand Canyon, including aircraft overflights (i.e., aircraft tours, commercial jets, military aircraft, and administrative use), motorboats, generators, and helicopters are having, and will continue to have a "significant adverse affect" on the Park's natural soundscape. See AR 105424 (FEIS Vol. II at 387). The record also reflects that the Grand Canyon's natural soundscape is necessary to fulfill the purposes of the Park, key to public's ability to enjoy the Park, and an identified goal in the Grand Canyon's 1995

GMP. See AR 104728 (natural sounds are an inherent component of the Grand Canyon); SAR 010134 ("The Grand Canyon is recognized as a place with unusual and noticeable natural quiet, and direct access to numerous opportunities for solitude"); SAR 010138 (natural quiet is a management objective for the Grand Canyon). In other words, the Grand Canyon's natural soundscape is currently being impaired.

The Park Service counters that "application of Plaintiffs' position concerning cumulative effects on the natural soundscape would . . .lead to incongruous results [because] . . .taken to its logical extreme, [the Park Service] could not allow *a single* noncommercial, nonmotorized trip, because the human noises . . .would contribute to the significant cumulative impacts." NPS Mem. at 37 (emphasis added). This argument misses the point. The salient issue is not whether *any* impact constitutes impairment as Defendants allege (Plaintiffs agree not all impacts impair park resources) but rather whether the Park Service is allowed to authorize a handful of individually "minor," incremental impacts to the Grand Canyon's natural soundscape "in a vacuum," without factoring in the overall, combined effects when making an impairment determination. See e.g., Grand Canyon Trust, 290 F.3d at 346; Hanly, 471 F.2d at 831. The agency's actions constitute impairment.

E. The Park Service Failed to Conserve Park Resources and Values.

Plaintiffs' opening brief established that the "fundamental purpose" of the Organic Act and the creation of the National Park System is to "conserve" park resources and values. See 16 U.S.C. § 1. This conservation "mandate is independent of the separate prohibition on impairment, and so applies all the time, with respect to all park resources and values," including a park's natural soundscape and wilderness characteristics. MP 1.4.3. Pursuant to this conservation duty, impacts to park resources and values are allowed *only* "when *necessary and appropriate* to fulfill the purposes of the park, so long

as the impact does not constitute impairment." Ibid. As mentioned above, see Part II, motorized activities are not "necessary and appropriate" to fulfill the purposes of the Grand Canyon. Moreover, the Park Service is directed to "preserve, *to the greatest extent possible*, the natural soundscapes of parks" and, when impacts exist, "restore degraded soundscapes to the natural condition *wherever possible*." MP 4.9 (emphasis added). Here, the agency cannot claim (and has not demonstrated) that it is impossible to take steps towards improving the Grand Canyon's natural soundscape. Indeed, there are two viable, non-motorized alternatives (Alternatives B and C) presented in the FEIS. See Facts at ¶ 177.

IV. NEPA VIOLATIONS

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

The record reveals that, pursuant to NEPA, the Park Service never took a hard look at the overall, combined or cumulative effects of its decision to authorize motorized uses on the river corridor's *wilderness character*. See AR 104822-104823 (FEIS Vol. I at 235-236 (defining wilderness character). The four unique qualities of wilderness character include: (1) untrammeled: wilderness is essentially unhindered and free from modern human control or manipulation; (2) natural, i.e., substantially free from the effects of modern civilization; (3) undeveloped or without permanent improvements or modern human occupation; and (4) outstanding opportunities for solitude or a primitive and unconfined type of recreation. See ibid.

Understanding and taking a "hard look" at the cumulative impacts to these four wilderness qualities is extremely important and should not be overlooked in this case. This is because, as mentioned earlier, there are currently a number of state, private, tribal, and other federal actions taking place in the Grand Canyon that pose a significant threat

to the Park's wilderness values. By themselves, these activities may have "individually minor" effects. A single helicopter passenger exchange at Whitmore may disrupt one group of rafters for an hour, larger group sizes may cause a bottleneck in one segment of the river, motorized boats may buzz by non-motorized rafters three or four times a day, and an occasional commercial plane, military jet, or tour plane may fly overhead. Individually, each of these incidents – though disruptive to the natural quiet of the canyon – may not rise to the level of posing a significant threat to the Grand Canyon's wilderness qualities. Collectively, however, the impacts of all of these and other activities – whether conducted by private individuals, state agencies, tribal officials, or other federal agencies – are significant and must be considered. See e.g., Grand Canyon Trust, 290 F.3d at 346 (discussing collective impacts to Zion National Park); NRDC v. Hodel, 865 F.2d 288 (D.C. Cir. 1988) (discussing collective impacts to migratory whales).

In this case, while the agency certainly uses the term "cumulative impact" in the FEIS, has added "wilderness character" to the affected environment and environmental consequences section of the document, and provides a laundry list of citations that allegedly "combine" to qualify as an analysis (see NPS Mem. at 44), *nowhere* in the FEIS or record does it actually analyze the cumulative impacts to the river corridor's wilderness character as required by NEPA. Instead, the agency states only that "[c]umulative impacts on wilderness character were determined by combining the impacts of each alternative with other past, present, and reasonably foreseeable future actions." AR 105818. For the chosen alternative, the agency claims that "the cumulative effects from Glen Canyon Dam and commercial overflights *are similar to those described for each resource* elsewhere in the document. The cumulative effects of the management of backcountry toilets, trails and facilities described in the Backcountry Management Plan would have adverse, localized, short term, year-round impacts on wilderness character."

AR 105828 (emphasis added).

This is the extent of the agency's cumulative impacts analysis on wilderness character – a few sentences referencing other sections of the FEIS that discuss impacts to *other* resources, i.e., water quality, visitor experience, natural soundscape. Without question, this is insufficient. As explained by the Ninth Circuit, a consideration of "cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971 (9th Cir. 2006). The analysis of cumulative impacts "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects . . . Defendants must do more that just catalogue 'relevant past projects in the area.'" Ibid. (citations omitted). The agency must provide "an adequate analysis about how these projects, and the difference between the projects, are thought to have impacted the environment." Ibid.

B. The Park Service Failed to Use High-Quality Information or Accurate Scientific Analysis

Plaintiffs claim that the FEIS and ROD violate NEPA because the Park Service did not use high-quality information or accurate scientific analysis in evaluating the need for, propriety of, or equity in, allocation of commercial services. The Park Service defends this claim by stating that Plaintiffs offered "no specific factual basis or argument for this conclusory assertion." NPS Mem. at 45. To the contrary, Plaintiffs demonstrated throughout their opening brief, and again in this brief, that the agency failed to analyze the need for specific types and amounts of commercial services in conformance with the Concessions Act and MPs and that it failed to study relative demand for commercial and noncommercial services in using a split allocation system. In their discussion of MPs, Organic Act, and Concessions Act violations, Plaintiffs pointed to the specific

information and analysis that was missing. In the NEPA portion of their opening brief, Plaintiffs establish that under NEPA, the Park Service must use such high-quality information and accurate scientific analysis. Pls' Open at 37. Defendants do not dispute any of the legal authority provided by Plaintiffs. Nor do Defendants cite to any specific location in the record containing the high-quality information and scientific analysis required.[26] This is a violation of NEPA. When available, the Park Service must base its FEIS and ROD on high-quality information and accurate scientific analysis relevant to the decisions and legal duties before the agency. See National Parks Conserv. Assoc. v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001) (where available information can be obtained for an EIS, it must inform the agency's decisions).

Respectfully submitted this 4th day of September, 2007.

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[26] Defendants' argument that the FEIS is large and includes a long bibliography does not establish the location of the specific information and analyses necessary to determine the need for commercial services and equitable amounts of use.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, I electronically transmitted a complete copy of Plaintiffs' Reply in Support of Motion for Summary Judgment and Response in Opposition to Defendants' Cross-Motions for Summary Judgment on the following CM/ECF registrants:

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