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12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE DISTRICT OF ARIZONA

14 RIVER RUNNERS FOR )  
15 WILDERNESS, et al., ) Civ. No. 06-0894-PCT-DGC  
16 Plaintiffs, )  
17 v. ) **FEDERAL DEFENDANTS' REPLY**  
STEPHEN P. MARTIN, et al.,<sup>1</sup> ) **BRIEF IN SUPPORT OF MOTION FOR**  
18 Federal Defendants, ) **SUMMARY JUDGMENT**  
19 GRAND CANYON RIVER )  
20 OUTFITTERS ASSOCIATION; )  
21 GRAND CANYON PRIVATE )  
BOATERS ASSOCIATION, )  
22 Defendant-Intervenors. )  
\_\_\_\_\_ )

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Stephen P. Martin, the current Superintendent of Grand Canyon National Park, is substituted for his predecessor, Joseph F. Alston.

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1 **INTRODUCTION**

2 In this litigation, Plaintiffs seek to have the Court substitute Plaintiffs' self-interested  
3 views for the expert views of the National Park Service ("NPS"). After years of study and  
4 exhaustive review and consideration of wide-ranging public input, NPS issued a reasoned  
5 decision, addressing the public's intense interest in accessing the Colorado River through the  
6 Grand Canyon for rafting trips while protecting this national treasure. NPS considered and  
7 addressed all relevant factors, produced a detailed environmental impact statement ("EIS"),  
8 and made reasonable determinations that the 2006 Colorado River Management Plan  
9 ("CRMP") governing recreational use of the Colorado River corridor in Grand Canyon  
10 National Park ("Park") complies with the NPS Organic Act, the Concessions Management  
11 Improvement Act ("Concessions Act"), the National Environmental Policy Act ("NEPA"),  
12 and the agency's own policy statements.

13 Under the deferential standard for judicial review of federal agency actions under the  
14 "arbitrary and capricious" provision of the Administrative Procedure Act ("APA"), 5 U.S.C.  
15 § 706, NPS's decision easily passes muster. Given the circumstances here, however, the  
16 courts have repeatedly emphasized that NPS is entitled to even greater deference because 1)  
17 the decision involves highly technical matters within NPS's area of expertise;<sup>2</sup> and 2) the  
18 underlying statutory schemes are drafted in general language giving NPS broad  
19 administrative discretion.<sup>3</sup> In contravention of the well-established deference due to NPS in  
20 this context, Plaintiffs attempt to deny NPS any discretion whatsoever in managing the  
21 Colorado River corridor. For example, Plaintiffs argue that NPS's decision on how to  
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23 <sup>2</sup> See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)  
24 ("Because analysis of the relevant documents 'requires a high level of expertise,' we must  
25 defer to the 'informed discretion of the responsible federal agencies.'") (quoting Kleppe v.  
Sierra Club, 427 U.S. 390, 412 (1976)).

26 <sup>3</sup> See, e.g., Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir.  
27 1996) (noting that "the Organic Act is silent as to the specifics of park management and that  
'under such circumstances, the Park Service has broad discretion in determining which  
avenues best achieve the Organic Act's mandate.'") (citation omitted).

1 allocate river use must be reduced to a mathematical formula for which there is but one, or  
2 perhaps two, permissible and precise results. See Pls. SJ Resp. at 30-33. Similarly, Plaintiffs  
3 assert that there is a precise amount of commercial use of the river that is "necessary and  
4 appropriate" under the Concessions Act, and that NPS must determine and authorize only  
5 that precise amount. See id. at 25-27. In other words, under Plaintiffs' formulation, NPS has  
6 no discretion in determining how to allocate river use or in determining the amount and types  
7 of commercial uses, but instead must make a mathematical calculation and mechanically  
8 apply the results. Plaintiffs' approach to National Park management and judicial review of  
9 that management is plainly at odds with the dictates of the Supreme Court and the Ninth  
10 Circuit, and must be rejected.

11 Another fundamental flaw infecting Plaintiffs' arguments is their repeated insistence  
12 that the Colorado River corridor is wilderness, and must be managed as such, without  
13 motorized activities. But the reality is that the Colorado River corridor is not designated  
14 wilderness, but only *recommended* as *potential* wilderness. NPS's policy is to manage  
15 potential wilderness as wilderness, but *only* "to the extent that existing non-conforming  
16 conditions allow." NPS Management Policies ("MPs") 6.3.1, SAR 016136-37. As an  
17 "existing non-conforming condition," the long-standing, well-established use of motorboats  
18 on the River is excepted from NPS's policy of treating potential wilderness as wilderness,  
19 and NPS properly allowed this use to continue, albeit at reduced levels. Because they ignore  
20 this context, Plaintiffs' arguments--that allowing motorized uses to continue violates NPS's  
21 wilderness MPs, the Concessions Act's "necessary and appropriate" standard, and the  
22 Organic Act's "no-impairment" mandate because motorized uses and impacts are inconsistent  
23 with protecting wilderness characteristics--are misplaced.

24 NPS properly exercised its broad discretion and considered and applied the relevant  
25 factors in approving the CRMP. NPS's decision to allow motorized uses to continue and in  
26 allocating use between commercial and noncommercial users is reasonable, entitled to  
27 deference, and should be upheld.

1 **ARGUMENT**

2 **I. PLAINTIFFS' CLAIMS THAT THE NPS VIOLATED ITS WILDERNESS**  
3 **MANAGEMENT POLICIES ARE WITHOUT MERIT**

4 **A. The Wilderness MPs Are Not Judicially Enforceable**

5 As the D.C. Circuit held in The Wilderness Society v. Norton, 434 F.3d 584 (D.C.  
6 Cir. 2006), NPS's MPs, and particularly the wilderness management provisions in Chapter  
7 6, are "a statement of policy, not a codification of binding rules," and therefore are not  
8 enforceable against the agency. Id. at 595. Nonetheless, Plaintiffs attempt to enforce the  
9 wilderness management provisions of the MPs against NPS, relying principally on two cases  
10 to assert that the MPs "carry the force and effect of the law." Pls. SJ Resp. at 6-11 (relying  
11 on Northwest Ecosystem Alliance ("NEA") v. U.S. Fish & Wildlife Service, 475 F.3d 1136  
12 (9th Cir. 2007), and Southern Utah Wilderness Alliance ("SUWA") v. National Park Service,  
13 387 F. Supp.2d 1178 (D. Utah 2005)). Both NEA and SUWA, are distinguishable.

14 In NEA, the Ninth Circuit examined whether the U.S. Fish and Wildlife Service  
15 ("FWS") violated the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, by denying  
16 a petition to classify western gray squirrels in Washington state as an endangered "distinct  
17 population segment" ("DPS") as that phrase is used in the ESA. 475 F.3d at 1137. In NEA,  
18 the plaintiffs alleged that FWS's policy statement interpreting what constituted a DPS was  
19 "unlawfully restrictive," and hence contrary to the ESA. Id. at 1140. In assessing the level  
20 of deference due to the agency's interpretation under Chevron U.S.A., Inc. v. Natural Res.  
21 Def. Council, Inc., 467 U.S. 837 (1984), the Ninth Circuit noted that the DPS Policy was  
22 adopted pursuant to an express delegation of congressional authority in the ESA to issue the  
23 policy and requirements to publish the policy in the Federal Register and to solicit public  
24 comment. 475 F.3d at 1141-42. "These procedural rigors, combined with the express  
25 congressional command to [FWS] to develop guidelines, distinguish the DPS Policy from  
26 garden-variety policy statements that do not enjoy Chevron status." Id. at 1142. The Ninth  
27 Circuit thus held that FWS's interpretation of the DPS provision of the ESA was "legally  
binding" on the Court and entitled to Chevron deference. Id. at 1143.



1 As in NEA, the intervenor in SUWA did not seek to enforce an agency policy  
2 statement, but instead alleged that NPS's MPs interpreting the "no-impairment" mandate of  
3 the Organic Act were inconsistent with that statutory provision, and thus the SUWA Court  
4 was faced with a claim of "whether the [MPs] *violate* the Organic Act." 387 F. Supp.2d at  
5 1186-87 (emphasis added). In addressing this claim, the SUWA Court considered whether  
6 "[t]he Management Policies, *specifically Section 1.4 of the Management Policies*, [which]  
7 constitute the NPS's interpretation of the Organic Act's 'no-impairment mandate,'" were  
8 entitled to Chevron deference. Id. at 1187 (emphasis added). Because the SUWA Court  
9 found that "the 'no-impairment' mandate is inherently ambiguous," it examined whether  
10 Congress had delegated NPS the authority to interpret this provision and whether NPS had  
11 followed public notice and comment procedures in adopting the interpretation. Id. After  
12 answering both of these questions in the affirmative, the SUWA Court concluded that  
13 "[g]iven the importance of the 'no-impairment' standard to the NPS's administration of the  
14 statute . . . and Congress' express intent that the NPS have the force of law to issue  
15 substantive rules pursuant to notice-and-comment rulemaking procedures, the Court finds  
16 that the 2001 [MPs] are the type of agency decision Congress intended to 'carry the force of  
17 law,' and therefore eligible for Chevron deference." Id. at 1189.<sup>4</sup>

18 As Chevron deference cases, NEA and SUWA addressed whether agency policy  
19 statements were permissible and controlling interpretations of an underlying statutory  
20 provision that parties sought to enforce. Here, in contrast, Plaintiffs do not seek to enforce  
21 any statutory provision through the MPs. See Pls. SJ Resp. at 4 ("Plaintiffs do not allege that  
22 the Park Service's authorization of motorized uses in the river corridor . . . violates the  
23 Wilderness Act, 16 U.S.C. §§ 1131-1136."). Instead, Plaintiffs seek to enforce NPS's  
24 wilderness policies in the MPs as *stand-alone* legal requirements. Id. at 4-5.

25 A central factor in both NEA and SUWA was that the policy statements at issue

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26 <sup>4</sup> Although Federal Defendants argued in SUWA that the impairment MPs were  
27 entitled to judicial deference, the SUWA Court went further and incorrectly concluded that  
those MPs carried the force of law.

1 interpreted ambiguous statutory provisions (the DPS provision of the ESA in NEA, and the  
2 "no-impairment" mandate of the Organic Act in SUWA) pursuant to express delegations  
3 from Congress for the agencies to do so. Here, Plaintiffs do not assert that NPS's wilderness  
4 MPs interpret any statutory provision. As noted above, the SUWA Court emphasized that  
5 it was determining only whether Section 1.4 of the MPs carried the "force and effect" of law  
6 in interpreting the "no-impairment" mandate of the Organic Act, an interpretation that is  
7 limited to that Section. See MP 1.4.1, SAR 016086 ("This section 1.4 of Management  
8 Policies represents the agency's interpretation of these key statutory provisions [16 U.S.C.  
9 §§ 1, 1a-1]."). Because Section 6 of the MPs, pertaining to "Wilderness Preservation and  
10 Management," does not interpret any ambiguous statutory language pursuant to an express  
11 grant of Congress to do so, NEA and SUWA are inapplicable here.

12 Plaintiffs concede that the MPs were not "promulgated" in accordance with the  
13 procedural requirements of the APA. Pls. SJ Resp. at 10-11. While public notice and  
14 comment procedures that do not meet APA requirements may entitle a specific policy  
15 statement interpreting an ambiguous statutory provision to Chevron deference, such  
16 procedures plainly cannot elevate general policy statements about how a federal agency will  
17 conduct its business into judicially-enforceable mandates. If such were the case, judicial  
18 review of agency regulations for compliance with APA procedures would be rendered a  
19 nullity, because federal agencies could effect the same regulatory result without complying  
20 with the APA. But this is not the law. To be enforceable in federal court, rules must be  
21 promulgated in compliance with the APA. "Certainly regulations subject to the APA cannot  
22 be afforded the 'force and effect of law' if not promulgated pursuant to the statutory  
23 procedural minimum found in that Act." Chrysler Corp. v. Brown, 441 U.S. 281, 313  
24 (1979); see also Lowry v. Barnhart, 329 F.3d 1019, 1022 (9th Cir. 2003) (holding that  
25 publication in the Federal Register and mandatory language "cannot create substantive rules  
26 where the congressionally prescribed procedures for promulgating such rules have not been  
27 invoked"). Had NPS intended the MPs to carry the force and effect of the law, it would have

1 had to promulgate them as regulations in accordance with the APA.

2 Plaintiffs assert that the manner in which the MPs were adopted distinguish the MPs  
3 from the Forest Service Manual ("FSM") and Forest Service Handbook ("FSH") provisions  
4 that the Ninth Circuit held did not carry the force and effect of law in Western Radio  
5 Services v. Espy, 79 F.3d 896 (9th Cir. 1996). While Section 3 of the NPS Organic Act  
6 authorizes NPS to issue regulations governing the *general* use and management of the  
7 National Park System, the Ninth Circuit recognized that the National Forest Management Act  
8 ("NFMA") authorizes the Forest Service to promulgate regulations *specific* to the  
9 construction of facilities at issue in Western Radio. 79 F.3d at 900 (citing 16 U.S.C.  
10 § 497(c)). But this source congressional authority was not sufficient to render the FSM and  
11 FSH enforceable. In addition, like the MPs, provisions of the FSM and FSH are adopted  
12 after notice in the Federal Register and the acceptance and review of public comment,<sup>5</sup> and  
13 the FSM and FSH provisions at issue in Western Radio use the same mandatory language  
14 as the MPs. See, e.g., 1994 WL 16058610 \*19 ("Authorizations *shall* not be issued until:  
15 . . . (d) acceptable design measures or other satisfactory resolution of potential  
16 incompatibility have been agreed to by the applicant and the existing holders on the site.")  
17 (Plaintiffs' appeal brief in Western Radio quoting FSH 2709.11-93-2, chapter 48.7(a)(3)(d))  
18 (emphasis added). Because the MPs are legally indistinguishable from the FSM and FSH,  
19 Western Radio is controlling and dictates that the MPs are not judicially enforceable.

20 Plaintiffs state that "the plain language of the MPs evinces the Park Service's intent  
21 to bind itself: 'Adherence to [the MPs] *is mandatory unless specifically waived or modified*  
22 *by the Secretary* . . . Park Superintendents will be held accountable for their, and their staff's  
23 adherence to [the MPs].'" Pls. SJ Resp. at 9 (quoting MPs Introduction at 6, SAR 016079;  
24 Plaintiffs' emphasis and modifications). As the D.C. Circuit explained in Wilderness

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26 <sup>5</sup> The Forest Service routinely provides public notice and comment on the adoption  
27 of FSM and FSH provisions, as evidenced in literally dozens of Federal Register notices.  
See, e.g., 59 Fed. Reg. 28714-01, 28714 (June 2, 1994); 57 Fed. Reg. 43180-01, 43180  
(Sept. 18, 1992) (same); 53 Fed. Reg. 26807-01, 26807 (July 15, 1988).

1 Society, however, the "adherence is mandatory" language "does not evidence an intent on  
2 the part of the agency to limit its discretion and create enforceable rights. Rather, the  
3 agency's top administrators [including the NPS Director, whom Plaintiffs removed with their  
4 ellipsis] clearly reserved for themselves unlimited discretion to order and reorder all  
5 management priorities." 434 F.3d at 596.<sup>6</sup> And Plaintiffs offer nothing to explain how  
6 saying that Park Superintendents will be "held accountable" for following the MPs indicates  
7 any role for the courts, as opposed to merely holding Superintendents accountable to higher-  
8 ranking officials in NPS, which is the more natural reading of the language.

9 **B. Plaintiffs' MPs Claim Is Not Cognizable As A Stand-Alone Claim**

10 In the alternative to their argument that the MPs carry the force and effect of law,  
11 Plaintiffs argue that the MPs and the 1995 General Management Plan ("GMP")<sup>7</sup> are

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12  
13 <sup>6</sup> Plaintiffs assert that Wilderness Society is in conflict with SUWA. Pls. SJ Resp. at  
14 8 n.5. Besides being a district court opinion which is not entitled to the same precedential  
15 weight as a published opinion from the D.C. Circuit, SUWA is distinguishable as discussed  
16 above. In contrast, Wilderness Society addressed whether the *wilderness management* MPs  
17 were enforceable against NPS, precisely the claim Plaintiffs make here. Plaintiffs also  
18 attempt to distinguish Wilderness Society on the basis that it involved a claim to compel  
19 agency action under Section 706(1) of the APA, instead of a challenge to affirmative agency  
20 action under Section 706(2)(A) that Plaintiffs' bring here. Pls. SJ Resp. at 8 n.5. Plaintiffs,  
21 citing a vacated Ninth Circuit opinion, assert that "[u]nlike section 706(2)(A) claims such a  
22 this, to establish a right of judicial review under section 706(1), a plaintiff 'must identify a  
23 statutory provision mandating agency action.'" Id. (quoting Center for Biological Diversity  
24 v. Veneman, 335 F.3d 849, 854 (9th Cir. 2003) opinion withdrawn and superseded on  
25 rehearing by 394 F.3d 1108 (9th Cir. 2005)). As discussed below, Plaintiffs are wrong  
26 because they must also identify an underlying statutory provision for Section 706(2)(A)  
27 claims and because the district court opinions distinguishing the Supreme Court's  
jurisdictional decision in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)  
(a Section 706(1) case), did so on the question of jurisdiction, not whether the underlying  
agency plans were enforceable in federal court. In contrast, the D.C. Circuit in Wilderness  
Society held that it did have jurisdiction over the plaintiffs' MPs claim, but denied the claim  
on the merits because the wilderness management MPs do not "embody rules that are  
enforceable against the agency." 434 F.3d at 595. Plaintiffs' claim here and the claim at  
issue in Wilderness Society are legally and factually indistinguishable.

<sup>7</sup> Unlike their arguments concerning the MPs, Plaintiffs do not contend that the GMP  
itself carries the force and effect of the law. Like with the MPs, the GMP policy of

1 judicially enforceable in this instance "because the Park Service committed to comply with  
2 these documents [in the NEPA materials], [and] it would now be 'arbitrary and capricious'  
3 for the agency to ignore them." Pls. SJ Resp. at 12. In support of this argument, Plaintiffs  
4 rely principally on Ecology Center v. Austin, 430 F.3d 1057, 1069 (9th Cir. 2005). In  
5 Ecology Center, the Ninth Circuit held that the Forest Service's failure to demonstrate  
6 satisfaction of a Regional Soil Quality Standard in the FSM violated NEPA and NFMA,  
7 because the Forest Service committed in its EIS to meeting that standard. Id. at 1069-70.

8 Unlike the claims in Ecology Center, Plaintiffs here do not raise their MPs and GMP  
9 arguments in the context of a claim that NPS violated any underlying statutory provision.  
10 See Pls. SJ Memo. at 2-14 (alleging that NPS violated a "duty" created by the MPs and  
11 GMP, but failing to allege any underlying applicable statutory violation); Pls. SJ Resp. at 4  
12 ("Plaintiffs do not allege violations of the Wilderness Act."). Plaintiffs suggest that claims  
13 under Section 706(2)(a) of the APA do not require Plaintiffs to allege a violation of an  
14 underlying statutory provision. Pls. SJ Resp. at 8 n.5. Plaintiffs are wrong. See El Rescate  
15 Legal Serv. v. Executive Office of Immigration Review, 959 F.2d 742, 753 (9th Cir. 1991)  
16 ("There is no right to sue for a violation of the APA in the absence of a 'relevant statute'  
17 whose violation 'forms the legal basis for [the] complaint.'") (citation omitted); National  
18 Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 132 F. Supp.2d 876, 889 (D. Or. 2001)  
19 ("Review under the [APA] requires references to the legal duty set forth in the governing  
20 substantive statute."); Rocky Mountain Oil & Gas Ass'n v. United States Forest Serv., 157  
21 F. Supp.2d 1142, 1145 (D. Mont. 2000) ("Arbitrary and capricious review cannot be  
22 conducted under the APA independent of another statute.").<sup>8</sup>

23 otherwise treating the Colorado River corridor as wilderness recognizes a specific exemption  
24 for motorboat use: "Provide a wilderness river experience on the Colorado River (this  
25 objective will not affect decisions regarding the use of motorboats on the river)." AR 010142  
(1995 GMP at 11).

26 <sup>8</sup> See also Sierra Club v. Martin, 110 F.3d 1551, 1554-55 (11th Cir. 1997) ("As a  
27 procedural statute, the APA does not expand the substantive duties of a federal agency, but  
merely provides the framework for judicial review of agency action. Accordingly, there is

1 In a belated attempt to shoe-horn their MPs claim into the Ecology Center scenario,  
2 Plaintiffs assert that "[a]cting in accordance with the MPs is . . . pivotal to complying with  
3 the Organic Act." Pls. SJ Resp. at 13. In support of this statement, however, Plaintiffs rely  
4 on provisions from Section 1.4 of the MPs which, as noted above, are expressly limited to  
5 that Section, which interprets the "no impairment" mandate of the Organic Act. See MP  
6 1.4.1, SAR 016086 ("This section 1.4 of Management Policies represents the agency's  
7 interpretation of these key statutory provisions [16 U.S.C. §§ 1, 1a-1]."). Plaintiffs offer no  
8 explanation for how implementation of the wilderness MPs of Chapter 6 is necessary to  
9 comply with the Organic Act, particularly when the area at issue is not designated  
10 wilderness. Plaintiffs' attempts to enforce the wilderness management policies of the MPs  
11 and GMP must be rejected.

12 **C. NPS's Decision Is Consistent With The MPs And GMP**

13 Although the provisions of the MPs and GMP are not judicially enforceable, as an  
14 internal matter they state important agency policies, and NPS implements them to the fullest  
15 extent possible. It did so in this case. Even if the MPs and GMPs were judicially enforceable  
16 as some sort of quasi-regulation as Plaintiffs argue, an agency's interpretation and application  
17 of its own regulations is given controlling weight See, e.g., Stinson v. United States, 508 U.S.  
18 36, 45 (1993) ("As we have often stated, provided an agency's interpretation of its own  
19 regulations does not violate the Constitution or a federal statute, it must be given controlling  
20 weight unless it is plainly erroneous or inconsistent with the regulation.") (quotations and  
21 citations omitted).

22 Plaintiffs assert that NPS's "decision to ignore its own MPs, as well as the  
23 management objectives in the GMP, is by definition arbitrary and capricious." Pls. SJ Resp.  
24 at 11. As Plaintiffs' arguments demonstrate, however, NPS did not "ignore" the MPs or  
25 GMP--Plaintiffs only disagree with NPS's conclusions as to how the CRMP meets these

26 \_\_\_\_\_  
27 no right to sue for a violation of the APA in the absence of a relevant statute whose violation  
forms the legal basis for the complaint.") (quotations and modifications omitted).

1 policy statements. See Pls. SJ Memo. at 10-14 (arguing that NPS's "rationale for authorizing  
2 motorized activities in the Colorado River Corridor is arbitrary and capricious" and  
3 attempting to refute the FEIS and ROD's determinations that approved motorized uses are  
4 consistent with the MPs and GMP). Plaintiff do little more than reiterate those arguments  
5 in their present brief, and do nothing to show that NPS's interpretation and application of its  
6 own MPs is inconsistent. Indeed, Plaintiffs arguments are filled with exaggerations,  
7 inconsistencies, and statements that are at odds with the MPs.

8 For instance, Plaintiffs assert that NPS cannot allow motorized activities to continue  
9 in the Colorado River corridor because such activities are not "temporary" and that NPS  
10 "would read in a temporary, motorized use exception that does not (and should not) exist in  
11 either the MPs or the Wilderness Act." Pls. SJ Resp. at 14-15. As noted above, Plaintiffs  
12 have already conceded that they have no claim under the Wilderness Act, and the MPs do  
13 not require NPS to treat recommended potential wilderness as actual wilderness. The MPs  
14 state that NPS will "take no action that would *diminish* the wilderness suitability of an area  
15 possessing wilderness characteristics until the legislative process of wilderness designation  
16 has been completed" and that "[t]his policy also applies to potential wilderness, requiring it  
17 to be managed as wilderness *to the extent that existing non-conforming conditions allow.*"  
18 MP 6.3.1, SAR 016136-37 (emphasis added). Motorized uses of the Colorado River corridor  
19 are plainly an "existing non-conforming condition," and as such as are expressly excluded  
20 from NPS's policy of managing potential wilderness as wilderness. Nor does allowing the  
21 continuation of motorized uses that existed at the time NPS made its wilderness  
22 recommendation (most recently, in 1993) "diminish" the wilderness suitability of the area,  
23 which was determined in the presence of those uses.

24 Moreover, NPS's policy that it "will seek to remove from potential wilderness the  
25 temporary, non-conforming conditions that preclude wilderness designation," MP 6.3.1, SAR  
26 016137, is written permissively ("will *seek*"). NPS also interpreted this provision to allow  
27 motorized uses to continue because "the continued use of motorboats does not preclude

1 wilderness designation because this use is only a temporary or transient disturbance of  
2 wilderness values on the river, and it does not permanently impact wilderness resources or  
3 permanently denigrate wilderness values." AR 104822 (FEIS Vol. I at 235). This conclusion  
4 is consistent with the language of the MPs, and thus is entitled to controlling deference.

5 Plaintiffs' arguments concerning whether motorized uses of the Colorado River  
6 corridor are an "established use" under the Wilderness Act is similarly misplaced and  
7 illogical because it rests on the false premise that the area is already designated as wilderness  
8 under the Act, when in fact it is not. See Pls. SJ Resp. at 15-17. NPS reasonably concluded  
9 that "elimination of motorboats is not a legal *prerequisite* to wilderness designation" because  
10 Section 4(d)(1) of the Wilderness Act allows established uses to continue and because  
11 Congress could expressly allow continued use of motors if it were to designate the area as  
12 wilderness, as it did in the Boundary Waters Canoe Area Wilderness. AR 104822 (FEIS  
13 Vol. I at 235) (emphasis added); see also SAR 011419-25 (determining that motorboat use  
14 on the Colorado River in the Park is an established use and discussing ramifications of this  
15 determination). NPS's conclusion, on its face, does not presume that the area is already  
16 designated as wilderness under the Act, as Plaintiffs assert. Thus, whether it is Congress,  
17 NPS, or (as Plaintiffs contend)<sup>9</sup> the Secretary of Agriculture that would determine whether  
18 motorboat use could continue on the Colorado River *if* it were ever designated as wilderness  
19 under the Act, NPS correctly stated that eliminating motorboat use is not a legal prerequisite  
20 to designation because it could be eliminated at the time of designation or allowed to  
21 continue. As Plaintiffs concede, this conclusion is as obvious as "saying the sky is blue."  
22 Pls. SJ Resp. at 17 n.8. Because continued motorboat use does not prevent wilderness

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23  
24 <sup>9</sup> In every designation of wilderness in a National Park, Congress has substituted the  
25 Secretary of the Interior for the Secretary of Agriculture. See, e.g., 16 U.S.C. § 460ppp-6(b)  
26 ("Subject to valid existing rights, each wilderness area designated by this subchapter shall  
27 be administered by the Secretary in accordance with the provisions of the Wilderness Act,  
except that any reference in such provisions to the effective date of the Wilderness Act shall  
be deemed to be a reference to December 21, 2000 and any reference to the Secretary of  
Agriculture shall be deemed to be a reference to the Secretary of the Interior.").



1 designation, NPS interpretation is consistent with MP 6.3.1.

2 **II. NPS REASONABLY DETERMINED THAT COMMERCIAL USE,**  
3 **INCLUDING MOTORIZED USE, IS "NECESSARY AND APPROPRIATE**  
4 **FOR PUBLIC USE AND ENJOYMENT" UNDER THE CONCESSIONS ACT**

5 The Concessions Act directs NPS to "utilize concessions contracts to authorize a  
6 person, corporation, or other entity to provide accommodations, facilities, and services to  
7 visitors to units of the National Park System." 16 U.S.C. § 5952. The Act also states a  
8 congressional policy of limiting such activities to those that "(1) are necessary and  
9 appropriate for public use and enjoyment of the unit of the National Park System in which  
10 they are located; and (2) are consistent to the highest practicable degree with the preservation  
11 and conservation of the resources and values of the unit." *Id.* § 5951(b). Thus, like the  
12 Organic Act, the Concessions Act delegates to NPS broad authority and discretion to  
13 reconcile the conservation of natural and cultural resources with the public use and  
14 enjoyment. Accordingly, NPS recognizes both conservation of resources and public use and  
15 enjoyment as "values" to be protected and enhanced. MP 1.4.6, SAR 016087.

16 Plaintiffs' Concessions Act claim rests on their assertion that "the Park Service does  
17 not cite to a single page in the FEIS or ROD where it made a specific finding that any  
18 amount of *motorized* services are necessary." Pls. SJ Resp. at 20. Plaintiffs also chastise  
19 NPS for not making specific findings about the amount of commercial services that are  
20 necessary and appropriate. *Id.* at 25. Plaintiffs' assertions are perplexing, as Federal  
21 Defendants discussed this issue extensively in their opening brief and identified numerous  
22 places in both the EIS and ROD where NPS addressed commercial motorized use and made  
23 findings that the types *and* levels approved in the CRMP were necessary and appropriate.  
24 Fed. Dfs. SJ Memo. at 22-29; *see, e.g., id.* at 26 ("Thus, NPS did, in fact, consider in detail  
25 the amount of motorized use that was necessary and appropriate as part of the commercial  
26 services based on substantial information in the FEIS, and selected alternatives that meet the  
27 standards of the Concessions Act."). NPS made this finding explicitly in its ROD:

The [CRMP] addresses commercial activities on the river. Description and

1 analysis of potential impacts on the affected environment resulting from  
2 commercial operations are found throughout the FEIS. Determination of the  
3 *types and levels* of commercial services that are necessary and appropriate for  
the Colorado River through Grand Canyon National Park were determined  
through these analyses.

4 AR 109604 (ROD at 6) (emphasis added); see also AR 104889-90 (FEIS Vol III at 52-53);  
5 AR 013811; AR 105209 (FEIS Vol. III at 372) ("NPS has determined that the motorized trips  
6 provided by commercial outfitters . . . are necessary and appropriate for the public use and  
7 enjoyment of the park."). Plaintiffs themselves recognize that "motorized commercial trips  
8 make up an estimated 71.7 percent of commercial launches, an estimated 74.8 percent of  
9 commercial passengers and 66.6 percent of commercial userdays." Pls. SJ Resp. at 18.  
10 Thus, the explicit finding in the ROD that the "types and levels" of commercial services  
11 analyzed in the EIS "are necessary and appropriate" is plainly the finding concerning  
12 commercial motorized uses that Plaintiffs contend does not exist.<sup>10</sup>

13 As with their MPs claim, Plaintiffs continue their almost singular focus on the premise  
14 that the Colorado River corridor is designated wilderness when, in fact, it is only  
15 *recommended as potential* wilderness. Based on this false premise, Plaintiffs contend that

16 the only necessary and appropriate commercial services are those that are  
17 consistent with a wilderness river experience and preserving the values of the  
18 area, including wilderness character and natural soundscape. The Park Service  
19 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.

20 Pls. SJ Resp. at 22-23. As discussed above, see Part I.C *supra*, existing motorized uses on  
21 the Colorado River are expressly allowed to continue under NPS's policy of treating the area  
22 as potential wilderness. Thus, NPS's continued authorization of those motorized uses in the  
23 CRMP is consistent with the policy of managing the area as potential wilderness.

24 Moreover, Plaintiffs' contention that wilderness characteristics must be preserved at

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25  
26 <sup>10</sup> The fact that commercial trips utilized an average of 97.9 percent of their allocated  
27 user-days under the 1989 CRMP, which is an incredibly high percentage of use given the  
vagaries of a reservation travel system and cancellations, demonstrates that there is not an  
over-allocation of trips to commercial users. See AR 104631-32 (FEIS Vol. I at 44-45).

1 the expense of continued motorized access to the River conflicts with the legal regime that  
2 Congress has imposed on the NPS. Neither the Organic Act nor the Concessions Act directs  
3 NPS to conserve (or preserve) wild places to the exclusion of other values inherent in the  
4 National Park System, including visitor use and enjoyment. On the contrary, in those two  
5 statutes and others, Congress repeatedly has directed the NPS to accommodate visitor use  
6 and enjoyment to the extent that the NPS can do so without impairing the Parks' natural and  
7 cultural resources. Determining what services are "necessary and appropriate for public use  
8 and enjoyment" of a Park necessarily involves the exercise of discretion, the drawing of a  
9 line on a continuous spectrum of possible accommodations, facilities, and services. Drawing  
10 that line involves making a qualitative judgment, but it is not therefore arbitrary.

11 Plaintiffs correctly point out that merely because there is some demand for a facility  
12 or service does not mean that it is "necessary and appropriate." Plaintiffs cite jet skiing down  
13 the river and riding a gondola to Phantom Ranch as examples. Pls. SJ Resp. at 23. But those  
14 contrived, emotionally--charged examples are not particularly helpful or instructive in this  
15 case. Neither example represents an existing use under the MPs. Federal Defendants'  
16 argument that the far less intrusive existing motorized uses may be allowed to continue  
17 plainly does not extend to Plaintiffs' hyperbole.

18 Even though it is not in recommended wilderness, a more appropriate comparison  
19 would be to the existing cabins and canteen at Phantom Ranch. These facilities have  
20 operated for decades as backcountry concessions, the cabins providing shelter, beds, and  
21 other amenities for people who hike or ride mules to the bottom of the Grand Canyon and  
22 the canteen serving them ice-cold drinks, trail snacks, and hearty dinners. See SAR 010152.  
23 Thousands of people use and enjoy those facilities and services every year, and few people--  
24 except, perhaps, Plaintiffs--now would assert that they are not "necessary and appropriate  
25 for public use and enjoyment." And yet, each year many people can and do hike to the  
26 bottom of the Grand Canyon, enjoying both themselves and the Park, without availing  
27 themselves of those facilities and services. The point is that in determining what facilities

1 and services are "necessary and appropriate *for public use and enjoyment*," NPS evaluates  
2 the needs, desires, and expectations of the entire public--not just a subset of the public that  
3 is able-bodied or that possesses certain specialized skills and equipment--and then makes a  
4 qualitative judgment about accommodating those constituencies (within, of course, the  
5 overarching framework of the Organic Act). At its heart, the determination involves the  
6 reasonable exercise of discretion, and Congress has vested that discretion in NPS.

7 Through the public process, NPS concluded, with rationale provided throughout the  
8 EIS, that commercial motorized trips on the river are "necessary and appropriate for public  
9 use and enjoyment."<sup>11</sup> First, because of their shorter duration, motorized trips enable  
10 thousands of people each year to take a river trip and see the Grand Canyon in a manner and  
11 from a perspective that otherwise would not be possible for them. AR 104620-21 (FEIS Vol.  
12 I at 33-34); AR 104937-38 (FEIS Vol. II at 87-88); AR 105165-66 (FEIS Vol. III at 328-29);  
13 AR 019271-72, 019279-82, 066574-80; SAR 015529, 016415; see also AR 048200-01,  
14 048627, 048754, 049025, 049733, 052344, 052424, 053743 (public comments).<sup>12</sup> Second,  
15 because of their relative predictability (in terms of travel time on the river), people frequently  
16 charter motorized trips for special-needs groups, educational classes, family reunions, or  
17 other special occasions, or to support kayak or other paddle trips. See, e.g., AR 048368,  
18 048920, 048972-73, 049081, 050291, 050710, 051222-27, 054067 (public comments).

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19  
20 <sup>11</sup> Both commercial *and* noncommercial trips may be motorized. AR 109592-93  
21 (ROD at 2-3). Plaintiffs fail to explain a legal basis for their argument that a type of access  
22 that is freely available to the public in the noncommercial context, must be singled out for  
23 a *separate* evaluation under the necessary and appropriate standard of the Concessions Act.  
24 See also Lewis v. Lujan, 826 F. Supp. 1302, 1306-7 (D. Wyo. 1992) (holding that NPS  
25 properly subjected "only that the basic service of firewood sales, and not the specific  
26 mechanism of sale, . . . to the necessary and appropriate analysis").

27 <sup>12</sup> Plaintiffs admit that "[i]t 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."  
Pls. SJ Resp. at 22. This admission, however, fails to acknowledge that many people who  
want to take a Grand Canyon river trip do not have available the two or more weeks of time  
required to participate in a non-motorized trip. AR 105165-66 (FEIS Vol. III at 328-29).

1 Third, from a logistical and resource-protection point of view, motorized trips help alleviate  
2 overcrowding at popular campsites and attraction sites, because they are able to travel more  
3 quickly to alternative campsites and attraction sites. AR 104620-21 (FEIS Vol. I at 33-34);  
4 AR 105139 (FEIS Vol. III at 302); AR 019279-82, 050205. Finally, some people--such as  
5 older people and people who do not have the extensive outdoor experience--feel safer when  
6 traveling in a motorized raft, particularly in the River's formidable rapids. AR 105149-50  
7 (FEIS Vol. III at 312-13); SAR 015530-35; AR 047494-95, 048480, 048492, 048926,  
8 049067-68, 050870-71, 053531, 054086-89. Plaintiffs' attempt to impose on others what  
9 they deem to be the "appropriate" way of traveling down the River must be rejected.

10 In sum, the Court should deny Plaintiffs' attempt to establish a detailed regulatory  
11 scheme interpreting the "necessary and appropriate" policy of the Concessions Act that  
12 would effectively eliminate what the Ninth Circuit and other courts have found to be NPS's  
13 exceptionally broad discretion to determine what commercial activities are desirable in  
14 National Parks. Plaintiffs' attempt to impose a strict, mechanical test for implementing a  
15 congressional precatory *policy* statement--with the result of stripping NPS of its ability  
16 exercise its expertise and professional judgment in determining what commercial activities  
17 are desirable for the National Parks--is inappropriate. See, e.g., Yang v. Cal. Dept. of Soc.  
18 Servs., 183 F.3d 953, 958-59 (9th Cir. 1999) (holding that a congressional policy statement  
19 "does not create positive, enforceable law"); Connecticut Light & Power Co. v. Federal  
20 Power Commission, 324 U.S. 515, 527 (1945) (stating that congressional policy statements  
21 are to be used "*as a guide* in resolving any ambiguity or indefiniteness in the specific  
22 provisions which purport to carry out its intent") (emphasis added). Under Plaintiffs'  
23 impossibly restrictive test, it is doubtful that *any* commercial activity on *any* National Park  
24 could qualify as "necessary and appropriate" under the Concessions Act, in direct  
25 contravention of Congress' intent to allow such activities. NPS's interpretation and  
26 application of the Concessions Act to allow continued commercial motorized use of the  
27 River at the levels adopted in the CRMP is reasonable and entitled to deference.

1 **III. NPS COMPLIED WITH THE ORGANIC ACT IN ALLOCATING RIVER**  
2 **USE AND IN DETERMINING THAT SUCH USE WILL NOT IMPAIR PARK**  
3 **RESOURCES**

4 **A. NPS Reasonably Allocated Commercial And Noncommercial Use**

5 Plaintiffs argue that to "fairly" allocate Colorado River use between commercial and  
6 noncommercial users, NPS must either 1) determine relative demand between the groups and  
7 allocate use proportionately to that demand, or 2) use a single "common pool" allocation for  
8 both commercial and noncommercial users. Pls. SJ Resp. at 30-33. Plaintiffs' attempt to  
9 reduce NPS's allocation decision to a mathematical formula in which NPS has no discretion  
10 in allocating use--other than to choose between one of Plaintiffs' two alternatives--has no  
11 basis in law and is contrary to the Ninth Circuit's recognition of NPS's broad discretion in  
12 determining how to manage National Parks pursuant to the Organic Act. See, e.g., Bicycle  
13 Trails Council of Marin, 82 F.3d at 1454. Plaintiffs also fail to recognize that NPS must  
14 consider other factors than just equal opportunity in determining how to allocate use.

15 NPS did in fact consider demand in its split allocation option, did consider a "common  
16 pool" approach, and also assessed a "demand-responsive" adjustable split allocation  
17 approach. See, e.g., AR 104615-17 (FEIS Vol. I at 28-30); AR 105715-18 (FEIS Vol. II at  
18 678-81). NPS compared the relative beneficial and adverse impacts and advantages and  
19 disadvantages for each approach. Id. In doing so, NPS considered and weighed other  
20 relevant factors, including demand, perceived fairness, the need for certainty in allocation,  
21 and the protection of natural resources. Id. NPS expressly rejected Plaintiffs' contention that  
22 determining relative demand was necessary before adopting a split allocation system, noting  
23 that demand exceeds availability for both commercial and noncommercial users, and that the  
24 number of names on the noncommercial waitlist "does not give a clear indication of relative  
25 demand." AR 105716 (FEIS Vol. II at 679). Because conducting a study to determine  
26 demand would be not be definitive and was not a critical factor in determining how to split  
27 the allocation, NPS reasonably concluded that spending \$2.5 million on a demand study was  
not warranted. AR 105715-16 (FEIS Vol. II at 678-79); AR 105014 (FEIS Vol. III at 177).

1 Critical among the factors in selecting the split allocation system was ensuring "the  
2 greatest planning stability." AR 105717-18 (FEIS Vol. II at 680-81). As NPS explained in  
3 discussing the benefits of the split allocation system, certainty in the allocation is important  
4 for commercial companies who must invest in equipment and the hiring of guides, thereby  
5 helping to keep costs down. Id. at 105715 (FEIS Vol. II at 678). In turn, long-term certainty  
6 allows commercial guides to become better trained and more experienced, helping to ensure  
7 the safety of the passengers, a higher-quality visitor experience, and greater protection of  
8 natural resources in the Park. Id. In contrast, the lack of certainty and regularity in a  
9 "common pool" approach could result in "guides being hired on a more temporary or  
10 seasonal basis," thereby reducing or negating the important benefits that permanent,  
11 experienced guides provide. Id. at 105716 (FEIS Vol. II at 679). Based on these relevant  
12 considerations, NPS reasonably concluded that the CRMP's ratio of commercial to  
13 noncommercial use would provide the greatest benefits by providing "the greatest planning  
14 stability for river users and park managers." AR 104617 (FEIS Vol. I at 30). "The NPS  
15 believes that the Modified Preferred Alternative H meets the standards of fairness (by  
16 providing for an approximately 50/50 allocation of user days between commercial and non-  
17 commercial users and provided for a range of experience for a variety of park visitors and  
18 best meets the management objectives for the CRMP." AR 104889 (FEIS Vol. III at 52).

19 Plaintiffs' and their hired economist's myopic focus on a one-to-one match between  
20 allocation and demand as the only measure of fairness is misplaced because it ignores all of  
21 the other factors that NPS must consider in allocating river use between the two groups.<sup>13</sup>

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22  
23 <sup>13</sup> As discussed in Federal Defendants' Motion to Strike, Plaintiffs' extra-record  
24 declaration is not properly before the Court. See Dkt. Nos. 73, 74. In any event, it is  
25 seriously flawed because it looks at a supposed equitable allocation solely from a simple  
26 supply and demand perspective, when the realities of Park management require NPS to look  
27 at a much broader spectrum of factors in determining how to allocate river use, as NPS  
appropriately did here. Moreover, the declaration erroneously assumes that concessionaires  
can capture "economic rents" and "charge whatever the market will bear for not only their  
services but for 'access' to the river they provide that is only available in limited quantities  
elsewhere." Walls Decl. ¶¶ 9-10. However, "price levels are determined by the NPS, rather

1 To be sure, there are undoubtedly innumerable methods for fairly allocating limited river use,  
2 and some may be considered "more" fair than others, particularly when viewed through the  
3 subjective prism of groups such as Plaintiffs desiring more access. But even if Plaintiffs  
4 could demonstrate that their approach takes into account all relevant factors and is fair, such  
5 a result would not render NPS's decision arbitrary and capricious. See, e.g., National  
6 Wildlife Fed'n v. Burford, 871 F.2d 849, 855 (9th Cir. 1989) (under the "arbitrary and  
7 capricious" standard of the APA, a federal agency action "need be only a reasonable, not the  
8 best or most reasonable, decision"). The Ninth Circuit recognized this same principle in  
9 Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979), noting that in  
10 addressing the issue of "whether allocation [of Colorado River use] has been fairly made  
11 pursuant to appropriate standards," and "[w]here several administrative solutions exist for  
12 a problem, courts will uphold any one with a rational basis," as long as NPS's "balancing of  
13 competing uses" is not an "arbitrary one." Id. at 1254 (citation omitted). NPS has adopted  
14 a fair approach to allocating Colorado River use between commercial and noncommercial  
15 users, and that approach takes into account the relevant factors and is entitled to deference.

16 **B. NPS Reasonably Determined That Implementation Of The CRMP Will**  
17 **Not Impair Park Resources**

18 Plaintiffs' "impairment" and "failure to conserve Park resources" arguments do not  
19 cover significant new ground, but largely reiterate the arguments that Plaintiffs made in their  
20 opening brief. See Pls. SJ Resp. at 37-47. Federal Defendants refuted each of these  
21 arguments in their opening brief. See Fed. Dfs. SJ Memo. at 35-41. Federal Defendants will  
22 not reiterate those arguments here, but will address only a couple of points.

23 Plaintiffs allege that NPS violated the Organic Act "no-impairment" mandate by  
24 allegedly failing "to consider the overall, cumulative impacts to the Grand Canyon's natural  
25 than by market equilibrium," and thus trip prices do not change as a result in changes  
26 between supply and demand for use of Park resources. AR 105739 (FEIS Vol. II at 702);  
27 see 16 U.S.C. § 5955(a), (b) (a concessioner's rates and charges to the public must be  
"reasonable and appropriate" and "shall be subject to approval by [NPS]"). The implication  
that the concessionaires are making large profits at the public's expense is simply untrue.



1 soundscape *when issuing* its no-impairment determination." Pls. SJ Resp. at 41 (emphasis  
2 in original). While Plaintiffs admit that an analysis of the cumulative impacts is included in  
3 the EIS, the ROD is "where the cumulative impacts analysis must be found." *Id.* at 42.<sup>14</sup>  
4 This is not the law. The first two volumes of the EIS alone contain more than 800 pages of  
5 analysis, including cumulative impact analyses for each resource, and findings on impairment  
6 for each resource based on these extensive analyses. The ROD carries these findings  
7 forward, focusing on the salient reasoning and conclusions on impairment. AR 109611-14  
8 (ROD at 21-24). Thus, NPS made findings on impairment in *both* the ROD and EIS based  
9 on the thorough analysis of impacts. Under Plaintiffs' theory, NPS would have had to carry  
10 all of the analysis forward and issue an 800-page ROD. Plaintiffs' argument makes no sense.

11 NPS also provides a reasonable rationale for its conclusion that the CRMP (modified  
12 Alternative H in the EIS) "would not result in the impairment of the natural soundscape in  
13 the Grand Canyon National Park." AR 105424 (FEIS Vol. II at 387). In assessing  
14 cumulative impacts, NPS noted that aircraft overflights have a major cumulative effect on  
15 the Park's natural soundscape. *Id.* 105424 (FEIS Vol. II at 387). Plaintiffs do not contest this  
16 conclusion. NPS also concluded that "even if all noise from all river recreation was  
17 eliminated from the park . . . , the cumulative effects of aircraft noise would still be adverse,  
18 short- to long-term, and major." *Id.* Plaintiffs do not contest this conclusion either. Based  
19 on these two uncontested conclusions and the detailed analysis of noise impacts in the FEIS,  
20 NPS reasonably concluded that Modified Alternative H "would contribute an adverse,  
21 *negligible* increment to cumulative effects." AR 105423 (FEIS Vol. II at 386) (emphasis  
22 added). Thus, contrary to Plaintiffs' allegations, NPS provided a rationale for its conclusion  
23 that the CRMP would not impair the natural soundscape, even considering cumulative  
24 impacts. Plaintiffs have provided no basis for this Court to overturn NPS's "professional  
25 judgment" in concluding that there would be no impairment under the Organic Act.

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26 <sup>14</sup> Plaintiffs cite *Sierra Club v. Flowers*, 423 F. Supp.2d 1273, 1322 (S.D. Fla. 2006),  
27 but this case involved claims under NEPA, and nowhere did the court say that a ROD had  
to repeat the environmental analysis contained in an EIS.

1 **IV. PLAINTIFFS HAVE NOT DEMONSTRATED A VIOLATION OF NEPA**

2 Federal Defendants' response to Plaintiffs' opening summary judgment brief asserted  
3 that Plaintiffs had waived their NEPA claims by failing to address them adequately. See Fed.  
4 Dfs. SJ Br. at 42-43, 45. Plaintiffs do not even attempt to rebut this point and thus tacitly  
5 concede it is correct. Therefore, the Court should deny these claims.

6 In their reply, Plaintiffs argue for the first time that NPS's cumulative impacts analysis  
7 on wilderness character is inadequate because the EIS refers the reader to the cumulative  
8 impacts analyses for each of the specific resources elsewhere in the EIS. Pls. SJ Resp. at 47-  
9 49. Plaintiffs cite no legal authority for their proposition that an agency must repeat entire  
10 sections of an EIS analyzing cumulative impacts that apply to more than one resource.  
11 Indeed, the NEPA regulations call for just the opposite result. See, e.g., 40 C.F.R.  
12 § 1500.1(c) ("NEPA's purpose is not to generate paperwork--even excellent paperwork--but  
13 to foster excellent action."); 40 C.F.R. § 1500.4 ("Agencies shall reduce excessive paperwork  
14 by: (a) Reducing the length of [an EIS] [and] (j) Incorporating by reference."); 40 C.F.R.  
15 § 1502.2 (an EIS "shall be kept concise and shall be no longer than absolutely necessary to  
16 comply with NEPA and with these regulations.").

17 Specific resources such as the natural soundscape are part of the "qualities or  
18 characteristics of wilderness" that NPS identified in explaining its methodology for analyzing  
19 effects to wilderness character. See, e.g., AR 105816 (FEIS Vol. II at 779) (explaining that  
20 the wilderness characteristic of "[o]utstanding opportunities for solitude" includes  
21 "opportunities to experience . . . natural sounds"). Thus, the analysis of impacts, including  
22 cumulative impacts, to the natural soundscape in the Colorado River corridor is necessarily  
23 also an analysis of impacts to wilderness character. As Federal Defendants demonstrated in  
24 their opening brief, the cumulative impacts analysis for the natural soundscape is thorough  
25 and complete. Fed. Dfs. SJ Br. at 43-44. Plaintiffs do not challenge this analysis, or the  
26 cumulative impact analysis for any other specific resource. Because the impacts to  
27 wilderness character and specific resources such as natural soundscape are inextricably

1 linked, NPS reasonably related the cumulative impact analyses for wilderness characteristics  
2 to the cumulative impact analyses for specific resources. A federal agency's organization of  
3 an EIS is entitled to great deference. Oregon Environmental Council v. Kunzman, 817 F.2d  
4 484, 492 (9th Cir. 1987) ("The district court must make a pragmatic judgment whether the  
5 EIS's form, content and preparation foster both informed decision-making and informed  
6 public participation [and t]he reviewing court may not 'fly speck' an EIS and hold it  
7 insufficient on the basis of inconsequential, technical deficiencies.").

8 Plaintiffs also argue that NPS violated NEPA because it allegedly "did not use high-  
9 quality information or accurate scientific analysis in evaluating the need for, propriety of, or  
10 equity in, allocation of commercial services." Pls. SJ Resp. at 49. Plaintiffs base this  
11 argument solely on their alleged violations of the MPs, the Organic Act, and Concessions  
12 Act. Id. at 49-50. Because Plaintiffs' arguments in support of these other claims are without  
13 merit, Plaintiffs' derivative NEPA claim is without merit. Moreover, any error in allocating  
14 commercial services would have no effect on the analyses of environmental impacts in the  
15 EIS, because those analyses are based on specific amounts and types of commercial services  
16 as presented in each alternative. Without an allegation that NPS failed to use high-quality  
17 information or accurate scientific analysis in evaluating environmental impacts, Plaintiffs  
18 have failed to raise a cognizable claim under NEPA. See 40 C.F.R. § 1500.1(b) (applying  
19 the "high-quality information" and "accurate scientific analysis" standards in the context of  
20 "*environmental* information") (emphasis added).

## 21 CONCLUSION

22 Plaintiffs have failed to meet their heavy burden under the APA of demonstrating that  
23 NPS's decision adopting the CRMP was "arbitrary, capricious, or otherwise contrary to law."  
24 NPS's decision-making process and decision was reasonable and entitled to deference.  
25 Therefore, this Court should deny Plaintiffs' Motion for Summary Judgment and grant  
26 summary judgment in favor of Federal Defendants.

1 Dated: October 3, 2007.

Respectfully Submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 3, 2007, I electronically transmitted the attached  
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
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