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11

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

14 River Runners for Wilderness, <i>et al.</i> ,)	No. CV-06-0894 PCT-DGC
)	
15 Plaintiffs,)	
)	
16 v.)	PLAINTIFFS' REPLY IN
)	SUPPORT OF MOTION FOR
17 Stephen P. Martin, <i>et al.</i> ,)	SUMMARY JUDGMENT AND
)	RESPONSE IN OPPOSITION TO
18 Federal-Defendants; and)	DEFENDANTS' CROSS-
)	MOTIONS FOR SUMMARY
20 Grand Canyon River Outfitters)	JUDGMENT
Association; Grand Canyon Private)	
21 Boaters Association,)	
)	
22 Defendant-Intervenors.)	
)	
23)	

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1 In the Grand Canyon, Arizona has a natural wonder which, as far as I know, is in kind
2 absolutely unparalleled throughout the rest of the world. I want to ask you to do one
3 thing in connection with it in your own interest and in the interest of the rest of the
4 country – to keep this great wonder of nature as it now isLeave it as it is. You
5 cannot improve on it. The ages have been at work on it, and man can only mar it. What
6 you can do is keep it for your children, your children’s children, and for all who come
7 after you, as the great sight which every Americanshould see.

8 - THEODORE ROOSEVELT (SAR 002345).

9 INTRODUCTION

10 Grand Canyon National Park is no longer “a place with unusual and noticeable
11 natural quiet [with] . . .direct access to numerous opportunities for solitude.” SAR
12 010134. No longer a place where one can get away from the “effects of modern
13 civilization” and experience “outstanding opportunities for solitude or a primitive and
14 unconfined type of recreation.” See AR 104823 (FEIS Vol. II at 236). Rather, as the
15 National Park Service (“Park Service” or “agency”) admits, the Grand Canyon’s natural
16 soundscape is “a disappearing resource that requires restoration, protection, and
17 preservation.” AR 104728 (FEIS Vol. I. at 141-42). At present, there are “significant
18 adverse effects” on the Grand Canyon’s natural soundscape. AR 105424 (FEIS Vol. II at
19 387).

20 Indeed, on any given summer day, the Colorado River corridor (“river corridor”) –
21 the heart of the Grand Canyon– is subjected to noise from motorboats (including pontoon
22 boats), generators, helicopter passenger exchanges, vehicle and tour buses at launch and
23 retrieval sites, commercial aircraft overflights, military jets, camping activities, crowds,
24 and air tours. These collectively significant actions combine to disrupt and destroy the
25 natural sounds, wilderness values, and solitude of the Grand Canyon. See AR 104728. In
26 short, the Grand Canyon’s natural sounds and wilderness values are dying the proverbial
27 death by a thousand cuts. See e.g., Grand Canyon Trust v. FAA, 290 F. 3d 339 (D.C. Cir.
28 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 –

1 refuses to do anything about it. In fact, just the opposite is true: with the backing of the
2 commercial concessioners, the agency adds insult to injury by authorizing motorboats,
3 generators, and passenger helicopter exchanges in the river corridor.¹ According to the
4 agency, more motors in the Grand Canyon is fine because “[e]ven if all river-related noise
5 was removed from the park, the park would still experience adverse, major effects from
6 aircraft overflights independent of [the] river management plan.” AR 105423 (FEIS Vol.
7 II at 386). In other words, the agency’s theory is that since the Grand Canyon’s natural
8 quiet is already impaired by aircraft overflights, there is no harm in it authorizing even
9 more motorized uses in the river corridor. This defeatist approach to managing our
10 National Parks is as illogical as it is illegal. See e.g., Grand Canyon Trust, 290 F. 3d at
11 256-261 (FAA cannot ignore incremental impacts to Zion National Park).

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

18
19 ¹ The Park Service’s assertion that it has no control over helicopter passenger
20 exchanges is misleading. Pursuant to the National Park Service Concessions Management
21 Improvement Act (“Concessions Act”), 16 U.S.C. § 5951, the Park Service enjoys broad
22 authority to limit, restrict, or if necessary prohibit commercial services to protect the
23 Grand Canyon’s natural resources and values, including the river corridor’s natural
24 soundscape. Indeed, the Park Service is exercising this authority with its “Modified
25 Preferred Alternative H [which] restricts [helicopter] passenger exchanges at Whitmore to
26 before 10AM (April through September), [to protect] the natural soundscape.” AR
27 105066; see also AR 109593 (ROD). Surely, if the Park Service has the authority to
28 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.

1 Summary Judgment (“NPS Mem.”) at 9-16.² Indeed, under the agency’s logic even the
2 new Colorado River Management Plan (“CRMP”) would remain unenforceable. See id.
3 at 15. The Park Service even suggests that the Court should be “reluctant to intervene in
4 [Park Service] decisions concerning the use of national park resources.” Id. at 30.

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

27
28 ² Page citations correspond to NPS Mem. page numbers, not the ECF numbering.

1 from the river.

2 Plaintiffs respectfully request that the Court reject Defendants’³ arguments and
3 conduct a “thorough, probing, in-depth review” of the legal issues and administrative
4 record presented in this case. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402,
5 415 (1971); Ocean Advocates v. U.S Army Corp. of Engineers, 402 F.3d 846, 858 (9th
6 Cir. 2005). As outlined below, this type of careful, searching review of the issues and
7 record will reveal that the Park Service: (1) failed to comply with its duty to preserve the
8 river corridor’s wilderness character; (2) never determined that motorized uses (as
9 opposed to non-motorized uses) and amounts of commercial services are “necessary” for
10 the public to experience and enjoy the Colorado River; (3) failed to comply with the
11 Organic Act; and (4) failed to comply with NEPA.

12 ARGUMENT

13 I. PARK SERVICE FAILED TO MANAGE FOR WILDERNESS CHARACTER.

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

15 Plaintiffs do not allege that the Park Service’s authorization of motorized uses in
16 the river corridor, *i.e.*, motorboats, generators, and helicopter passenger exchanges,
17 violates the Wilderness Act, 16 U.S.C. §§ 1131-1136. Rather, because the river corridor
18 in the Grand Canyon is classified as “potential wilderness” pursuant to the Park Service’s
19 1993 Wilderness Recommendation (see AR 104820 to 104823),⁴ the agency has an

21
22 ³ “Defendants” refers collectively to the federal defendants and the defendant-
23 intervenors.

24 ⁴ Defendants’ assertion that the Park Service’s wilderness recommendation was
25 never forwarded to the President is contradicted by evidence in the administrative record.
26 See SAR 004459 (wilderness study report “was sent to President and OMB [on] 3-8-77”).
27 Indeed, President Carter included the wilderness recommendation in his May, 1977
28 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

1 express duty and obligation pursuant to the MPs and 1995 GMP to preserve the
2 corridor’s wilderness values. See Part I.B, below. In fact, it is the Park Service who
3 implicates the Wilderness Act by alleging that the agency’s authorization of motorized
4 use is consistent with “wilderness” management pursuant to the Act. See NPS Mem. at
5 19; AR 104822 (FEIS Vol. I at 235). However, because the MPs use identical language
6 as the Wilderness Act, case law interpreting the Act’s provisions is relevant here.

7
8 B. The Duty: As “Potential Wilderness,” The Park Service Must Manage the
Colorado River Corridor for its Wilderness Values.

9 Because the Colorado River corridor is “potential wilderness” (see AR 104820),
10 pursuant to the MPs the Park Service is required to: (1) ensure that the “wilderness
11 character” of the river corridor is preserved (MP 6.3.1); (2) take “no action that would
12 diminish the wilderness suitability” of the river corridor until the legislative process is
13 completed (MP 6.3.1); (3) manage the river corridor “as wilderness to the extent that
14 existing non-conforming uses allow” (MP 6.3.1); (4) “seek to remove from potential
15 wilderness the temporary, non-conforming conditions that preclude wilderness
16 designation” (MP 6.3.1); (5) only allow recreational uses in the river corridor that enable
17 the corridor to retain its “primeval character . . . [and] provide outstanding opportunities
18 for solitude or primitive and confined types of recreation (MP 6.4.3); (6) prohibit
19 recreational uses “that do not meet the purposes and definitions of wilderness” (MP
20 6.4.3.1); and (7) prohibit the “use of motorized equipment or any form of mechanical
21 transport . . . in wilderness except as provided for in specific legislation.” (MP 6.4.3.3).
22 See MP 6.3.1 (applying all wilderness requirements to “potential wilderness” areas).

23
24 Likewise, pursuant to the 1995 GMP for the Grand Canyon, the Park Service must
25 “protect the natural quiet and solitude” of the Park and “manage areas meeting the criteria
26 _____
27 the Grand Canyon, p. 203 (Vishnu Temple Press. 2003).
28

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

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

15
16 1. The Park Service’s 2001MPs carry the force and effect of law.

17 The MPs carry the force of law. It is well-established that agency interpretations
18 of statutory provisions carry the force and effect of law “when it appears that Congress
19 delegated authority to the agency generally to make rules carrying the force of law, and
20 the agency interpretation . . . was promulgated in the exercise of that authority.”

21
22 Northwest Ecosystem Alliance (NEA) v. U.S. Fish & Wildlife Service, 475 F. 3d 1136,
23 1141 (9th Cir. 2007) (quoting U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

24 Delegation of “such authority may be shown in a variety of ways, as by an agency’s
25 power to engage in adjudication or notice-and-comment rulemaking, or by some other
26 indication of a comparable congressional intent.” Mead Corp., 533 U.S. at 227.

27 Congress “contemplates administrative action with the effect of law when it provides for
28

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

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

1 16. The agency is wrong.⁵

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

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

15 ⁵ On its face, the agency’s reliance on The Wilderness Society suggests there is a
16 split in the courts on whether the MPs carry the force of law. Compare SUWA 387 F.
17 Supp. 2d at 118 with The Wilderness Society, 434 F. 3d at 596. One important
18 distinguishing factor, however, between this case and The Wilderness Society decision is
19 the underlying nature of the claims. This case challenges an affirmative agency decision,
20 *i.e.*, the Park Service’s February 17, 2006, Record or Decision (“ROD”), pursuant to
21 section 706(2)(A) of the APA. In contrast, The Wilderness Society decision involved a
22 challenge to “compel agency action unlawfully withheld or unreasonably delayed” under
23 section 706(1) of the APA. Unlike section 706(2)(A) claims such as this, to establish a
24 right of judicial review under section 706(1), a plaintiff “must identify a statutory
25 provision mandating agency action.” Center for Biological Diversity v. Veneman, 335 F.
26 3d 849, 854 (9th Cir. 2003). Because of this differing standard, courts generally refuse to
27 extend holdings in section 706(1) cases to section 706(2)(A) cases. See EPIC v.
28 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.

1 intends to bind itself to a particular legal position.” Syncor Intern’l Corp. v. Shalala, 127
2 F.3d 90, 94 (D.C. Cir. 1997). An agency’s intention to bind itself can most easily be
3 found in the plain language of the document. See e.g., Norton v. SUWA, 542 U.S. 55, 71
4 (2004) (plain language can “create a commitment binding on the agency.”); Comm.
5 Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (“mandatory, definitive
6 language is a powerful, even potentially dispositive factor”).

7
8 Here, the plain language of the MPs evinces the Park Service’s intent to bind itself:
9 “Adherence to [the MPs] *is mandatory unless specifically waived or modified by the*
10 *Secretary*. . . Park Superintendents will be held accountable for their, and their staff’s
11 adherence to [the MPs].” MP at Introduction; at 6 (compliance and accountability)
12 (emphasis added); SAR 016078 (same); see also SUWA, 387 F.Supp.2d at 1189 (the Park
13 Service “bound itself” by making the MPs mandatory); Sierra Club v. Lujan, 716 F.Supp.
14 1289, 1293 (D. Ariz. 1989) (Park Service “must adhere to its Management Policies”);
15 Voyageurs Region National Park Assoc. v. Lujan, 966 F.2d 424, 428 (8th Cir. 1992)
16 (treating and discussing the MPs as a substantive rule). The MPs’ impairment section, for
17 instance, includes binding, mandatory language and “decision-making *requirements* to
18 avoid impairment.” MP 1.4.7 (SAR 016087) (emphasis added); see also MP 1.4.4
19 (*prohibition* on impairment); at 4.9 (Park Service “*will* preserve . . .the natural
20 soundscapes”); at 6.3.1 (Park Service “*must* ensure that the wilderness character is . .
21 .preserved”); at 6.3.1 (Park Service “*will* seek to remove from potential wilderness the
22 temporary, non-conforming conditions”); at 6.4.33 (“use of motorized equipment or any
23 form of mechanical transport *will be prohibited* in wilderness”).

24
25 In this respect, the MPs differ from the Forest Service Manual (“FSM”) and Forest
26 Service Handbook (“FSH”) at issue in Western Radio Services v. Espy, 79 F.3d 896, 901
27 (9th Cir. 1996), and the Park Service’s “rate-setting guidelines” for marinas in National
28

1 Parks at issue in Lake Mojave Boat Owners Ass'n v. National Park Service, 78 F.3d 1360
2 (9th Cir. 1995). Unlike the FSH, FSM, or the “rate-setting guidelines,” the MPs include
3 binding, mandatory language indicative of a substantive rule. SUWA, 387 F.Supp.2d at
4 1189.

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

16
17 On September 15, 2000, the Park Service published a “Notice of New Policy
18 Interpreting the National Park Service Organic Act” giving notice to the public that it was
19 adopting the portion of the Management Policies interpreting the Organic Act’s “no-
20 impairment” standard. See 65 Fed. Reg. 56003. The new Federal Register notice also
21 explains the legal framework underlying the MPs and the purpose of the revisions. See
22 ibid. In addition, the notice also included a summary of public comments received and
23 the Park Service’s response to such comments. See ibid.

24
25 Thus, while the procedures used by the Park Service in implementing the MPs do
26 not technically conform to *all* the rulemaking requirements set forth in the section 533 of
27 the APA (most notably, a complete copy of the MPs was not published in the Federal
28

1 Register), the procedures followed by the Park Service “satisfy the purpose behind formal
2 rulemaking procedures, which is to ‘assure fairness and mature consideration of rules.’”
3 SUWA, 387 F.Supp.2d at 1188 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759,
4 764 (1969)). The notice-and-comment procedures followed by the Park Service “foster
5 the fairness and deliberation that should underlie a pronouncement of . . .force.” NEA,
6 475 F.3d at 1141 (quoting Mead, 533 U.S. at 230).

7
8 For these reasons, the Park Service’s MPs are more akin to the U.S. Fish &
9 Wildlife Service’s (“FWS’s”) distinct population segment (“DPS”) policy at issue in NEA
10 than the FSM and FSH at issue in Western Radio. Like the DPS policy at issue in NEA,
11 the MPs were developed pursuant to Congressional authority (16 U.S.C. § 3), read like a
12 substantive rule, and were developed after undergoing almost complete notice-and-
13 comment rulemaking. See NEA, 475 F.3d at 1142 n. 3 (noting differences between
14 development of the DPS policy and formal rulemaking pursuant to § 533 (e) of the APA);
15 see also 61 Fed. Reg. 4722, 4723 (DPS Policy) (noting that the DPS policy – which the
16 Ninth Circuit recognizes as carrying the force of law – was not developed “under
17 rulemaking procedures of the Administrative Procedures Act”).

18
19 2. The Park Service’s decision to take action inconsistent with the MPs
20 and GMP is arbitrary and capricious.

21 Second, even if one assumes, *arguendo*, that the MPs are only advisory, the Park
22 Service’s decision to ignore its own MPs, as well as the management objectives in the
23 GMP, is by definition arbitrary and capricious. See e.g., Ecology Center v. Austin, 430
24 F.3d 1057, 1069 (9th Cir. 2005). This is because in the DEIS, FEIS, and ROD the Park
25 Service discusses the MPs as if they are binding and even commits itself to manage the
26 Colorado River corridor “as a potential wilderness in accordance with NPS Management
27 Policies” and the GMP’s management objectives. See AR 102418 (DEIS); AR 104821
28

1 (FEIS Vol. I at 234); see also AR 104604 (FEIS Vol. I at 17) (Park Service “will manage”
2 river in accordance with 2001 MP); AR 104598 (FEIS Vol. I at 11) (discussing vision for
3 the Colorado River outlined in the GMP); AR 109606 (CRMP derived directly from the
4 “management objectives in the park’s 1995 [GMP]”); AR 104615 (same). In fact, in the
5 GMP, the Park Service explicitly states that “[a]ll action proposed in this document, and
6 all future implementation plans based on it such as . . . the Colorado River Management
7 Plan . . . will be consistent with NPS wilderness policy requirements.” SAR 010188.⁶
8 The Park Service’s litigation position is entirely inconsistent with the position it took
9 during the administrative process of developing the CRMP.
10

11 Thus, even if Plaintiffs were to hypothetically agree with Defendants that the MPs
12 and GMP are merely advisory, because the Park Service committed to comply with these
13 documents, it would now be “arbitrary and capricious” for the agency to ignore them.
14 See Ecology Center, 430 F.3d at 1069; see also e.g., NAHB v. Norton, 340 F.3d 835 (9th
15 Cir. 2003) (the FWS, having chosen to promulgate the DPS policy, “must follow that
16 policy”); Sierra Club v. Dombeck, 161 F.Supp.2d 1052 (D. Ariz. 2001) (agency’s
17 decision is arbitrary and capricious because the “FEIS fails to achieve its stated goal of
18 implementing the GMP for the Grand Canyon”); Resources Ltd. v. Robertson, 35 F.3d
19 1300, 1304 n. 3 (9th Cir. 1994) (rejecting argument that agency could treat guidelines as
20

21
22 ⁶ In the FEIS, the Park Service also commits to manage the river corridor “as
23 potential wilderness in accordance with . . .the Grand Canyon National Park Wilderness
24 Recommendation as updated in 1993.” AR 104821 (FEIS Vol. I at 234). The 1993
25 Wilderness Recommendation, in turn, states that the Colorado River corridor qualifies as
26 potential wilderness because of existing non-conforming uses. See SAR 008306. The
27 “non-conforming use identified [is] . . .motorized riverboat use. . .current levels of
28 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.

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

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

12 Without question, motorboats, generators, and passenger helicopter exchanges in
13 the river corridor are “non-conforming uses” that have impacted, and will continue to
14 impact, the river corridor’s wilderness character. In fact, the Park Service concedes in the
15 FEIS and ROD that “motorized raft use” is a “temporary, non-conforming or
16 incompatible use” that will adversely impact the river corridor’s wilderness values
17 “during most of the year, but [especially] . . . during the higher mixed-use period, at the
18 frequently visited areas and passenger exchange points along the river corridor.” See AR
19 109612 (ROD); Pls. Opening Br. at 6-10; see also SAR 008307 (motorized boat use is
20 “inconsistent with the wilderness criteria of providing outstanding opportunities for
21 solitude and for a primitive and unconfined type of recreation.”)

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

1 1. Temporary or transient disturbances are not allowed.

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

9 Motorized use in the river corridor *is not akin* to an “Act of God” and the agency’s
10 suggestion that it can authorize motorized uses while simultaneously providing
11 “opportunities for solitude or a primitive and unconfined type of recreation” defies logic.
12 Indeed, the agency’s interpretation would render the wilderness mandate largely
13 superfluous and completely undermine the integrity of all potential, recommended, or
14 designated wilderness areas. Under the Park Service’s interpretation an unlimited amount
15 of motorboat, car, jeep, motorcycle, ATV, generator, helicopter, and even ground
16 disturbing uses would be allowed in potential wilderness so long as the disturbance can be
17 removed and does “not permanently denigrate wilderness values.” Even though each
18 motorboat entering the canyon eventually leaves it, for half the year there would be a
19 constant presence of motorboats affecting the wilderness values of primitive recreation,
20 solitude and natural quiet. In effect, the Park Service would read in a temporary,
21 motorized use exception that does not (and should not) exist in either the MPs or the
22 Wilderness Act. See MP 6.3 (wilderness management); 16 U.S.C. § 1133(c) (prohibition
23 on motorized uses); High Sierra Hikers Assoc. v. Blackwell, 390 F.3d 630, 646 (9th Cir.
24 2004) (noting that the Act “generally proscribes” activities”); accord The Wilderness
25 Society v. U.S. Fish & Wildlife Service, 353 F.3d 1051, 1062 (9th Cir. 2003); see also
26
27
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1 Wilderness Watch, 375 F.3d at 1089 (discussing prohibitions).

2 Moreover, to the extent that motorized uses are “temporary,” the Park Service’s
3 MPs expressly require the agency to take affirmative steps to remove such disruptive
4 uses: “The National Park Service will seek *to remove* from potential wilderness the
5 temporary, non-conforming conditions that preclude wilderness designation.” MP 6.3.1
6 (SAR 016137) (emphasis added). As explained by the Eleventh Circuit, “[p]otential
7 wilderness areas contain certain *temporary conditions* that do not conform to the
8 Wilderness Act.” Wilderness Watch v. Mainella, 375 F.3d 1085, 1088 n.2 (11th Cir.
9 2004). As such, these are precisely the types of uses that the Park Service must “seek to
10 remove.” Ibid. (citing Ref. Manual 41); see also Facts at ¶ 154 (non-conforming uses are
11 “contrary to the definitions of wilderness [but are] . . . considered of a temporary nature
12 which, once removed, should not preclude” wilderness designation); at ¶¶ 80-83
13 (Colorado River qualifies as potential wilderness *because* transient motorboat use can be
14 phased out); at ¶ 162 (“the continued use of [motorized] equipment within [the river
15 corridor] violate[s] the letter and intent of the Wilderness Act and NPS management
16 policies and director’s orders addressing wilderness”).⁷

17
18 2. Motorized uses are not established.

19
20 Next, the Park Service asserts that motorized use is consistent with managing for
21 wilderness values under the misguided theory that the “elimination of motorboats [is] not
22 a prerequisite to wilderness designation *because the Wilderness Act allows for established*

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24 ⁷ The agency’s reliance on Voyageurs Region National Park Assoc., 966 F.2d 424,
25 in support of its temporary use argument is erroneous. In Voyageurs, the enabling
26 legislation creating the park specifically provided for snowmobiling (see 16 U.S.C. §
27 160h), the Director of the Park Service issued a formal “waiver of policy” from the Park
28 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.

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

12 First, on its face, section 4(d)(1) *applies only* to the Department of Agriculture, not
13 to the Department of Interior. See 16 U.S.C. § 1133 (d)(1) (uses that “have already
14 become established, may be permitted . . . [by] the Secretary of Agriculture); Stupak-
15 Thrall v. U.S., 89 F.3d 1269, 1282 n.14 (6th Cir. 1996) (§ 4(d)(1) allows the Secretary of
16 Agriculture to allow motorboat use where already established); Facts at ¶ 123 (SAR
17 008725) (same); at ¶ 141 (SAR 011286) (same); at ¶ 145 (SAR 011416) (same); at ¶ 163
18 (SAR 00813) (same). Second, the agency cannot illegally authorize non-conforming
19 motorboats and then claim that they are properly excepted from the clear prohibition on
20 the use because they have already become established. Third, motorized use of the river
21 is not “established” in the ordinary sense of the word. See The Wilderness Society, 353
22 F.3d at 1061 (applying common sense meaning to words in statute). Rather, by
23 definition, established uses are those that are “recognized *and accepted* in a particular
24 capacity.” NEW OXFORD AMERICAN DICTIONARY at 580 (2001) (emphasis added).
25 Here, while motorized use of the river corridor has occurred over the last 40 years, it is by
26 no means an established or “accepted” use of the wild river corridor. Rather, motorized
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1 use of the river has been, and continues to be, a highly controversial issue. Indeed, in *two*
2 previous river planning processes the Park Service decided to phase out motorized boat
3 use. See Facts at ¶ 12 (SAR 000721) (phase out by 1977); at ¶ 56 (SAR 004857, 004848)
4 (phase out by 1985). Fourth, even if one assumes, *arguendo*, that the established use
5 exception applies, federal agencies retain discretion over whether to allow pre-existing
6 uses to continue. See 16 U.S.C. § 1133 (d)(1) (use “*may* be permitted to continue”).
7 Here, the Park Service’s “extensive public review process [for the Colorado River] and
8 the existing NPS planning documents” *do not* permit such uses to continue. Facts at ¶ 135
9 (SAR 010272, 010275, 016142, 007300). Instead, the agency’s policies state that
10 “[p]ublic use of motorized equipment or any form of mechanical transport *will be*
11 *prohibited* in wilderness *except as provided for in specific legislation.*” Ibid. (emphasis
12 added). Finally, if motorboats are deemed an “established” use pursuant to section
13 4(d)(1), a plain reading of the Wilderness Act means that such uses would have to have
14 been established *before* the September 3, 1964 Wilderness Act was enacted. See 16
15 U.S.C. § 1133 (d)(1); U.S. v. Gregg, 290 F.Supp. 706, 708 (D.C. Wash. 1968) (use must
16 have been established “before the passage of the Act”); see also Facts at ¶ 135 (same).⁸
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22 ⁸ Defendants’ additional argument that motorized uses are allowed because “if
23 Congress were to designate the area as wilderness, Congress could allow motorized uses
24 to continue or ban them as it sees fit” deserves little attention from the Court. See NPS
25 Mem. at 19. Saying that Congress has the authority to continue to allow or ban motorized
26 use in the river corridor if and when it decides to enact legislation designating the area as
27 wilderness is a bit like saying the sky is blue. Of course Congress has the authority, when
28 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.

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

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

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

21 The Park Service’s legal duty to authorize only necessary and proper commercial
22 services stems from dual legal authority. The MPs and GMP together mandate that the
23 Park Service only allow commercial services to the extent that they are necessary for
24 activities which are proper for realizing the recreational or other wilderness purposes of
25

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

1 the River. MP 6.4.4 (citing 16 U.S.C. § 1133(d)(5)); SAR 010138 (GMP)). The
2 Concessions Act requires the agency, in part, to limit commercial services to those that
3 are necessary and appropriate for public use and enjoyment of the River. 16 U.S.C. §
4 5951(b). As the agency concedes, “[t]he ‘necessary and appropriate’ standard for
5 allowing commercial services pursuant to the Concessions Act is analogous to the
6 ‘necessary’ and ‘proper standards under the Wilderness Act.” NPS Mem. at 25. Thus,
7 while Plaintiffs have demonstrated that the MPs and GMP are enforceable by this Court,
8 the analogous duty is *statutorily* embedded in the Concessions Act, which the agency
9 agrees it must follow.

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

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

23 ¹⁰ The Court in Blackwell reasoned that a finding of necessity must include a
24 finding related to the *amount* of a commercial service that is needed because the relevant
25 provision in the Wilderness Act includes the clause, “to the *extent* necessary.” Blackwell,
26 390 F.3d at 647 (quoting section 4(d)(5), emphasis original). The Concessions Act
27 contains an analogous quantitative limit; it states that commercial services “shall be
28 *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.

1 Society, 353 F.3d at 1061; NEW OXFORD AMERICAN DICTIONARY at 1143 (2001).
2 Defendants do not dispute that the only commercial services that should be authorized are
3 those that are essential. Defendants also do not dispute that the only appropriate kind of
4 recreation on the Colorado River is primitive and unconfined recreation with
5 opportunities for solitude. The Park Service has also repeatedly conceded in the FEIS
6 that the River must be managed to protect its wilderness character. See, section I, above.
7

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

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

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

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27 ¹¹ “Primitive” is defined as “of or relating to the earliest age or period,” “little
28 evolved,” or “belonging to or characteristic of an early stage of development: CRUDE,

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

4 The Park Service inaccurately claims that its alternatives and environmental
5 consequences discussions addressed the need for motorized commercial services. NPS
6 Mem. at 22-23. The “key criteria” for developing all of the alternatives included carrying
7 capacity considerations and a variety of key trip variables such as launches per day, group
8 size and trip length. See AR104617-106621 (FEIS Vol. I at 30-34). Whether and to what
9 extent motorized commercial services are *necessary* was not part of the criteria for
10 developing alternatives. The Park Service points to the FEIS’s NEPA ratings of
11 alternatives as evidence that it found that motorized services are necessary (NPS Mem. at
12 23), but these are not findings of necessity as the law requires. Analyzing different
13 allocation levels, which have no apparent basis in “need”, in various alternatives is not a
14 needs assessment or determination. It is simply a required NEPA analysis.

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

18 _____
19 RUDIMENTARY [technology].” NEW OXFORD AMERICAN DICTIONARY at 1354
20 (2001). Thus, motorboats and helicopters cannot reasonably be deemed “primitive.”

21 ¹² Defendant-Intervenor GCROA argues that the Park Service’s statement that
22 eliminating motorized use would result in lowering current levels of use to minimize
23 crowding implies that motorized commercial services are therefore, necessary. GCROA
24 at 15-16. The Park Service, however, never made a finding that commercial motorized
25 services are necessary or essential. In fact, the very response to comments quoted by
26 GCROA makes clear that the Park Service could lower authorized use levels to minimize
27 crowding to protect the resource. Thus, motorized services are not necessary to protect
28 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.

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

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

17 The natural sounds, silence, smells, and sights of the canyon and the river
18 predominate over those that are caused by humans.

19 Outstanding opportunities are provided for solitude or a primitive and unconfined
20 type of recreation.

21 The river is experienced on its own terms . . .

22 The natural and cultural objects in the riparian zone and side canyons are viewed
23 in a state as little affected as possible by people, given the existence of dams on the
24 Colorado River.

25 The effect of the river runner’s presence is temporary rather than long lasting.

26 AR 105644 (FEIS Vol. II at 607). Thus, the only necessary and appropriate commercial
27 services are those that are consistent with a wilderness river experience and preserving
28 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

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

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

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

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

24 ¹³ In its brief, the Park Service also suggests that commercial motorized services
25 are necessary to make trips “more enjoyable” for certain members of the public who
26 perceive motorboats as safer, but that is not a legitimate reason for authorizing
27 commercial services when it interferes with preserving the natural values of the area.
28 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.

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

9 The Park Service contends that the former Grand Canyon Deputy Wilderness
10 Program Coordinator's written memos on these issues should be disregarded as those of a
11 former staff member, but in the absence of a proper analysis in the FEIS to the contrary,
12 his findings are highly relevant. Nothing in the agency's brief or FEIS disputes the
13 former Wilderness Coordinator's findings that "[b]y any measure, the current concession
14 operations using motorized equipment exceeds that which is needed to meet established
15 'minimum requirement' tests. The continued use of this equipment within [potential]
16 wilderness violated the letter and inten[t] of the Wilderness Act and NPS management
17 policies and director's orders addressing wilderness." Facts at 162. The Concessions Act
18 also prohibits commercial services that fail to meet the minimum requirements test for
19 preserving the values of the resource, which include wilderness character. 16 U.S.C. §
20 5952(4)(A)(iii) (no proposal for a concessions contract shall be considered which fails to
21 meet minimum requirements for preservation); see also AR 104822 (FEIS Vol. I at 235).

22 Last, the Park Service dismisses Wilderness Watch v. Mainella, 375 F.3d 1085
23 (11th Cir. 2004), as a Wilderness Act case, but the court's analysis applies equally to the

24
25 ¹⁴ The agency's argument that the preferred alternative is also the environmentally
26 preferred alternative is irrelevant because the Park Service never evaluated an alternative
27 that would authorize only necessary and appropriate amounts of commercial services that
28 preserve the river's values to the highest practicable degree. NPS Mem. at 29.

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

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

12 While the Park Service states that commercial services are necessary to provide
13 river access to those who do not have the skill or ability to take a self-guided trip, the
14 Park Service assuredly never made any specific finding about the *amount* of commercial
15 services that are necessary and appropriate. The Park Service argues in its brief that the
16 entire FEIS, and particularly the alternatives analysis, contains findings about the
17 necessary *amounts* of commercial services. NPS Mem. at 26. But a review of the pages
18 cited shows that no necessity determination was made as to necessary or appropriate
19 amounts. The Park Service allocated use in the ROD and evaluated different allocations
20 of commercial services and noncommercial permits in its alternatives analysis, but it did
21 not answer the predicate question: how much is necessary and appropriate? In order to
22 limit commercial services to those that are necessary, the Park Service must first
23 determine how much of a particular service is necessary. 16 U.S.C. § 5951(b); see
24 Blackwell, 390 F.3d at 647-48.¹⁵

25
26 ¹⁵ The Park Service argues that Blackwell’s analysis was different than the present
27 case because there the agency had not prepared a required NEPA analysis. NPS Mem. at
28 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

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

3 The Park Service has no response to Plaintiffs' argument that the amount of
4 commercial services it authorized is unnecessary. It ignores explicit record evidence that
5 people who wish to take a noncommercial trip will use and pay for commercial services
6 in order to gain access to the river, rather than wait years to possibly obtain a
7 noncommercial permit.¹⁶ See e.g. Facts 172; AR 033403 ("At present, some companies
8 allow clients to bring their rafts or kayaks; however they do not allow passengers on these
9 boats and do not allow non-owners to paddle kayaks. However, there is a definite
10 demand for these services within the paddling community. For instance, A[merican]
11 W[hitewater]'s President Barry Tuscano, as well as other board members, have hired
12 commercial outfitters to let them tag along in their personal kayaks or rafts since they
13 could not get a private boater permit."); AR 027553 ("I would like to let you know that I
14 signed up with a rather expensive outfitter so I would be able to get to paddle the
15 Colorado River through the Grand Canyon. I feel that the commercial outfitter is my only
16 chance to get to run the river while I am still young enough to paddle it. I believe there
17 ought to be many more opportunities for private boaters than the current system allows.");
18 AR 027700 ("I have pretty much written it off as impossible due to the 10 year waiting
19 list to get in unless you pay thousands of dollars to a guide company."); AR 039423
20 ("This summer I organized a group of 21 canoeists and 3 kayakers on a commercial raft
21 supported trip paddling the Grand Canyon. It is my second such trip, the last being 1999.

22 2001 Needs Assessment does the Forest Service articulate why the extent of such
23 packstock services authorized by the permits is 'necessary.'"), *id.* at 637 (stating that
24 agency issued a plan and EIS). The reference to permits being granted without going
25 through the required NEPA analysis referred to the agency's separate decision to issue
26 commercial operators permits, not to the prerequisite necessity determinations in the
Wilderness Plan and accompanying Needs Assessment.

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

1 I had to wait 3 years to get this commercial trip organized. I have been on the private trip
2 waiting list since 1999. If it goes as it has been, it looks like I'll be 65 before I can
3 organize a trip of my choosing down the canyon.”); AR 039452 (“Eliminate commercial
4 outfitters offering ‘kayak support trips.’ Kayakers have a huge and unfair loophole in the
5 system. They are literally buying private access to run their own boats. If kayakers can
6 do this, why can’t rafters buy ‘rafting support trips?’”); AR 040394 (“I’ve twice payed to
7 kayak this river – I hope to have my waiting list number come up before I’m too old to
8 paddle – or I die while waiting!”); AR 040946 (“With commercial companies, we didn’t
9 have to wait for years for a permit.”).

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

16 III. ORGANIC ACT VIOLATIONS

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

18 The Park Service does not contest that the Organic Act requires it to equitably
19 allocate use between commercial and noncommercial users and thereby protect the
20

21
22 ¹⁷ Defendant-Intervenor GCROA is in a unique position to point to evidence in the
23 record, if any existed, to show that commercial clients do not use their services because
24 they otherwise could not obtain a noncommercial permit. However, GCROA does not
25 dispute the fact that this occurs. See Joint Response to Pls’ Facts 172. Given that it
26 occurs, the question the Park Service must answer is how much commercial use is
27 attributable to the public’s inability to timely gain access to the river through the
28 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.

1 public's right to free access. NPS Mem. at 31; 16 U.S.C. § 3. It also agrees that its
2 allocation decisions must have a rational basis and not be arbitrary. NPS Mem. At 31.
3 However, its arguments about what free access means are inconsistent with the law.
4 Primarily, the Park Service defends its allocation decisions by arguing that it evenly split
5 user-days in a 50-50 ratio between commercial and noncommercial users and that a
6 demand survey is infeasible. These defenses fail to meet the Park Service's burden to
7 demonstrate that its decision has a rational basis in equity and is supported by record
8 evidence.
9

10 When use must be limited to protect the resource, there are two ways to fairly
11 allocate use when demand exceeds supply. The Park Service can require everyone to get
12 a permit through a single allocation system, using whatever method the Park Service
13 deems fair, such as a lottery, and then let people choose their method of conveyance. For
14 instance, once a person obtains a river permit, she may take a noncommercial trip or hire
15 a concessioner to take her down the river. Alternatively, the Park Service can allocate use
16 through a split allocation system where it allocates use to different user groups, such as
17 commercial and noncommercial users, based on the relative demand for access from each
18 group. For instance, if 100 noncommercial users seek permits and 50 commercial users
19 seek permits, but only 100 permits are available, the Park Service would allocate 67
20 permits to noncommercial users and 33 permits to commercial users, a two-thirds
21 apportionment to each user group based on a supply/demand ratio of two-thirds. The
22 Park Service, however, ignores these fair ways to allocate use and instead allocates use
23 arbitrarily in a split allocation system.
24

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

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

1 Act's requirement to protect free public access is equally as important for commercial
2 users as it is for noncommercial users. Neither commercial users nor noncommercial
3 users should be paying for *access* to the Colorado River (beyond reasonable
4 administrative costs paid to the agency for permitting). In paying the concessioners,
5 commercial users should be paying only for a service: a guided trip down the river by
6 experienced boaters. Noncommercial users should be paying only for the costs of their
7 trip, in the way of food, supplies, boat rentals, etc. Instead, currently, the public
8 (including the public who wishes to take a noncommercial trip) pays concessioners, not
9 only for their guided services, but for river *access*. The laws at issue in this case plainly
10 require that commercial services be limited so that people, not companies, retain access to
11 their public lands; so that people may freely recreate in the special places that are set aside
12 for them and that only necessary and equitable amounts of commercial services are
13 provided to assist those who otherwise would not have an opportunity to enjoy a
14 wilderness river experience on the Colorado.

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

28

1 but commercial users too. It is the Park Service, not the Plaintiffs, which has chosen a
2 split allocation system between two user groups. While the Ninth Circuit has previously
3 held that the agency, in its discretion, may do so, the split allocations must be fairly made
4 between those two user groups. Wilderness Public Rights Fund v. Kleppe, 608 F.2d
5 1250, 1254 (9th Cir. 1979). Doing so protects free access by limiting concessioners to
6 selling services and not access to the river.

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

9 The Park Service does not dispute that it did not factor into its analysis the relative
10 demand for commercial and noncommercial trips. NPS Mem. at 34 (“instead of
11 attempting to develop an allocation based on relative demand, NPS looked at different
12 allocations scenarios ...”).¹⁸ Failing to account for relative demand in a split allocation
13 system, on its face, violates the legal requirement of equitable allocation. The only way
14 to fairly allocate limited access without a demand study is to use a single allocation
15 system and then let people choose their method of conveyance. See Declaration of
16 Donald W. Walls in Support of Plaintiffs’ Motion for Summary Judgment (“Walls Dec.”),
17 ¶¶ 3, 4, 8, 11, 12.¹⁹ In either scheme, the Park Service implicitly says something about

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

23 ¹⁹ The focal point of judicial review in an APA case is the record in existence
24 when the ROD was issued. Camp v. Pitts, 411 U.S. 138, 142 (1973). However, to ensure
25 the integrity of the administrative process, the Ninth Circuit allows a court to consider
26 extra-record materials: if necessary to determine whether the agency has considered all
27 relevant factors and explained its decision and when necessary to explain technical terms
28 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

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

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

22 _____
23 must prove that an agency failed to take a hard look at issues. See Seattle Audubon Soc.
24 v. Moseley, 798 F. Supp. 1473, 1477 (W.D. Wash. 1992); see also Oregon Natural
25 Resources Council v. Lowe, 109 F.3d 521, 526-27 (9th Cir. 1997). Plaintiffs properly
26 submit the Declaration of Dr. Walls in response to the Park Service’s defense that it fairly
27 allocated use in the absence of any reliable data on demand. These issues were
28 exhaustively raised by Plaintiffs and others in public 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.

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

5 Further, even if a demand survey were infeasible, the Park Service did not consider
6 alternative methods for measuring demand. For instance, a former river outfitter operator
7 suggested in comments to the Park Service that “demand is easy to measure, just by
8 checking how far in advance space is booked up, under reservation systems that are quite
9 similar [and then] compare waiting times for commercial and noncommercial space,
10 under similar reservation systems, and transfer enough space so that noncommercial
11 waiting times are not longer.” AR 049925-049926.²⁰ Yet, the Park Service failed to take

14 ²⁰ GCROA vehemently opposes an equitable allocation of available use based
15 upon relative demand, likely because it suspects the result would be a decrease in
16 commercial services and an increase in noncommercial permits. See AR 014138
17 (GCROA memo on the CRMP planning process discussing the need to have the support
18 of GCPBA in order to avoid being “at loggerheads with the privates over user-days with
19 demand being the leading candidate to serve as the base allocation apportionment
20 criterion on which all will depend, as imperfect as the demand thing is. *We will have no
21 scientific or otherwise credible evidence to support our contention that commercial
22 demand constitutes 68% of the total and that private demand is only 32%. We will only
23 have our intuition to offer, the intuition of a group with a clear profit motive at stake.
24 This will continue to convince no one.*”) (underline emphasis original; italics emphasis
25 added); compare AR 000277 (Superintendent requesting data on demand from GCROA).
26 Consequently, GCROA boldly asserts that to base allocation primarily “on the relative
27 demand for self-outfitted versus professionally-outfitted trips would be inconsistent with
28 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.

1 the hard look.²¹

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

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

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

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

23

24

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

1 U.S. Forest Serv., 418 F.3d 953, 965 (9th Cir. 2005) (requiring “a satisfactory explanation
2 supported by the record showing the necessary rational basis for [a numeric]
3 calculation.”). Further, the “even distribution of user-days” defense fails for several
4 reasons. First, an “even” distribution of user days is not the equivalent of a “fair” or
5 equitable distribution of user days, as required by Wilderness Public Rights Fund, and
6 therefore does not satisfy the Ninth Circuit’s test.

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

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

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

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

28 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

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

8 Fourth, if it were true that user days alone were a reasonable measure of equity,
9 then the user days should also be evenly distributed throughout the year to each user
10 group. But they are not. Commercial users have no allocation in the cold weather
11 months; whereas, noncommercial users have nearly one-third of their allocation in the
12 winter. To reveal the gross inequity in the seasonal allocations, the Court could inquire of
13 the agency and the defendant-intervenors whether switching the seasons of use between
14 commercial and noncommercial users would make any difference and whether it would
15 affect GCROA’s views of equity in this case. Under this scenario, commercial users
16 would be able to use 32,407 user-days in the summer, 46,992 user-days in the shoulder
17 seasons and 34,087 user-days in the winter. See AR 104647 (FEIS Vol. I at 60) (showing
18 the present equivalent for noncommercial users). Conversely, noncommercial users
19 would have access to 91,909 user-days in the summer and 23,591 user-days in the
20 shoulder season. Ibid. Is this 50-50 allocation still equitable? Even if ignoring relative
21 demand and using an even 50-50 split were an appropriate standard to employ, which
22 Plaintiffs dispute, the Park Service has violated the Organic Act in failing to “fairly”
23 allocate use under that standard. Wilderness Public Rights Fund, 608 F.2d at 1254.²²

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

1 Indeed, the real measure of inequity is in Defendants’ admissions that commercial
2 river runners do not have to wait to obtain access through the concessioners’ user days.
3 Joint Response to Pls’ Facts ¶ 230; AR 104555. Defendants also have no counter-
4 evidence to the evidence in the record that a commercial passenger can generally take a
5 trip in the year she wants. Joint Response to Pls’ Facts ¶ 229; AR 000370, 000392-393;
6 NPS Response to Pls’ Facts ¶ 136; SAR 009145; see also AR 049922 (independent
7 research by former river outfitter). In contrast, some noncommercial users previously on
8 the waitlist will wait up to 10 years and possibly 20 years to obtain a permit through the
9 lottery system, and some people may never gain access. AR 104903, FEIS Vol. III at 66
10 (A47) (“NPS predicts that over half of those [on the old waitlist] who transfer to the new
11 [hybrid-weighted lottery] system and compete every year will receive a trip within 10
12 years.”); AR 105732, FEIS Vol. II at 695 (“The Park also predicts that in twenty years, no
13 more than 561 of these people [on the old waitlist] will continue to have been
14 unsuccessful in obtaining a launch date.”). As a result of the inequities, members of the
15 public pay concessioners to gain access even when they would prefer to arrange their own
16 noncommercial trip.²³ Joint Response to Pls’ Facts ¶ 172. Further, the concessioners
17 control the vast majority of summer access on the river, dominating everyone’s river
18 experience with motors.²⁴ Joint Response to Pls’ Facts ¶ 218. If actual prospective

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

25 ²⁴ Whether noncommercial users would choose to take a winter river trip if they
26 had the option of a summer river trip is speculative because the Park Service has never
27 inquired, but the fact that the concessioners do not want to operate in the winter is telling
28 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

1 visitors cannot reserve space for noncommercial use about as readily as they can reserve it
2 if they pay a concessioner, they are being denied free public access (not in favor of
3 commercial users, but in favor of the concessioner). In effect, the Park Service is saying
4 to prospective park visitors, “at this point in time there is still plenty of vacant space, but
5 it is only available to you if you agree to pay a concessioner.” In enacting section three of
6 the Organic Act, Congress intended to protect the public from such “extortion or
7 unreasonable charge” in using their National Parks, by requiring the Park Service to
8 control the concessioners. H. Rep. No. 700, 64th Cong., 1st Session, 5 (1916).

9 The freedom and equity of public access does not pertain to theoretical user-days,
10 but to real people who seek to take a trip of a lifetime on the Colorado River. It is
11 inequitable, and a violation of the Organic Act, that an individual can go to the Park
12 Service and seek access and be told that for the right price, he can pay a concessioner this
13 year to take a trip down the Colorado River at a time of his choosing OR he can wait for
14 the backlog of waitlisters to take trips and play the lottery, where he will have a slim
15 chance of obtaining a permit, but might get lucky one day. This system favors
16 concessioners over the public and results in the illegal sale of river access to people who
17 are entitled by law to freely access their public lands.

18 B. The Park Service Is Not Entitled to Blind, Unfettered Discretion In Making
19 Impairment Determinations.

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

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

1 explanation for its action including a rational connection between the facts found and the
2 choice made.” Sierra Club v. Mainella, 459 F.Supp.2d 76, 100 (D. D.C. 2006); see also
3 Edmonds Inst. v. Babbitt, 42 F.Supp.2d 1, 15 (D. D.C. 1999) (the Organic Act “gives the
4 Park Service broad, but not unlimited discretion in determining what actions are best
5 calculated to protect Park resources”); Native Ecosystems Council v. U.S. Forest Serv.,
6 418 F.3d 953, 965 (9th Cir. 2005). In the MPs, for instance, the Park Service explicitly
7 recognizes that “[w]hile Congress has given the Service the management discretion to
8 allow certain impacts within parks, *that discretion is limited* by the statutory requirement
9 (enforceable by the federal courts) that the Park Service must leave park resources and
10 values unimpaired.” MP 1.4.4 (emphasis added). This prohibition on impairment, the
11 “cornerstone of the Organic Act, establishes the primary responsibility of the National
12 Park Service . . .[and] ensures that park resources and values will continue to exist.” Ibid.
13 As such, the Park Service has *no discretion* to authorize activities that impair a park’s
14 resources or values. See id. at 1.4.3 (Park Service has discretion to allow impacts “so long
15 as the impact does not constitute impairment”); at 1.4.4 (same); at 1.4.5 (same).

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

19
20 In this case, the parties agree that the Court’s review of the Park Service’s “no-
21 impairment” determination in this case, *i.e.*, the Park Service’s determination that
22 continued motorized use of the river corridor does not impair the park’s natural
23 soundscape, must be guided by the Park Service’s “interpretation of the no-impairment
24 standard in its 2001 Management Policies [MPs].” NPS Mem. at 35 (citing SUWA, 387
25 F. Supp. 2d at 1192); see also SAR 016073 (complete copy of the MPs).

26 Pursuant to the MPs, an “impairment” is an “impact that, in the professional
27 judgment of the responsible [Park Service] manager, would harm the integrity of the park
28

1 resources or values.” MP 1.4.5. In order to determine whether impairment occurs, the
2 Park Service must carefully consider a number of factors including: (1) the severity,
3 duration, and timing of the impact; (2) the direct and indirect effects of the impact; (3) the
4 cumulative effects of the impact; (3) the baseline conditions; (4) all National
5 Environmental Policy Act (NEPA) documents; and (5) all relevant scientific studies. See
6 id. at 1.4.5, 8.2.3, 1.4.7; see also AR 109611 (ROD’s findings on impairment); SUWA,
7 387 F. Supp. 2d at 1193 (citing section 1.4 of the MPs). After considering these factors,
8 the agency must then decide whether the impact(s) associated with the action – in this
9 case the motorized use of the river corridor – rise to the level of an “impairment” of park
10 resources or values. See MPs at 1.4.5, 8.2.3, 1.4.7. According to the agency, an “impact
11 would be more likely to constitute impairment to the extent that it affects a resource or
12 value whose conservation is . . .[n]ecessary to fulfill specific purposes identified in the
13 establishing legislation, . . .[k]ey to the natural and cultural integrity of the park or to
14 opportunities for enjoyment of the park; or [i]dentified as a goal in the park’s general
15 management plan or other relevant [Park Service] planning documents.” MP 1.4.5.

17 Based on these factors, Plaintiffs’ opening brief explains: (1) how the Park Service
18 failed to take into account many of the factors listed above; and (2) why the impacts to the
19 Grand Canyon’s natural soundscape from the authorization of motorized uses (*i.e.*,
20 motorboats, generators, and helicopters) rises to the level of impairment. See Pls. Mem.
21 at 28-34. Indeed, here, the Park Service concedes that significant, cumulative adverse
22 impacts to the Grand Canyon’s natural soundscape exist (see AR 105424) and that this
23 natural soundscape is a resource and value that is necessary to fulfill the purposes of the
24 Park, key to the public’s ability to enjoy the Park, and an identified goal in the Grand
25 Canyon’s 1995 GMP. See SAR 010134 (“The Grand Canyon is recognized as a place
26 with unusual and noticeable natural quiet, and direct access to numerous opportunities for
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1 solitude”); at SAR 010138 (Management Objectives: “Protect the natural quiet and
2 solitude of the park and mitigate or eliminate the effects of activities causing excessive or
3 unnecessary noise in, over, or adjacent to the park”).

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

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

13 First, Defendants maintain that they measured and compared the impacts of its
14 decision to authorize motorized uses *against the natural ambient sound level* of the river
15 corridor: against the “environment of sound that exists in the absence of human-caused
16 noise” as required by the MPs. See NPS Mem. at 36; MP 8.2.3.²⁵ Evidence in the record,
17 however, suggests otherwise.

18 In preparing the FEIS, for instance, the Park Service conducted a study of the
19 “natural ambient sound levels” at various points along the river in the Grand Canyon.
20 This study, however, only measured natural sound levels “in the *presence of audible*
21 *human-caused noise* including aircraft overflights.” AR 104729 (FEIS Vol. I at 142)
22 (emphasis added). As such, audible human-caused noise from aircraft overflights was
23 included in the environmental baseline. See *ibid*; see also Grand Canyon Trust, 290 F. 3d
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25
26 ²⁵ In the Grand Canyon, the natural sound level or baseline condition is the natural
27 sound of the river corridor in the absence of human-caused noise, i.e., the flowing water
28 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.

1 339 (rejecting FAA’s reliance on an incremental analysis that included existing human-
2 caused noise in the environmental baseline). Moreover, even if one assumes, *arguendo*,
3 that the Park Service accurately measured the natural ambient sound levels at various
4 points in the river corridor, the agency never analyzed the impacts of its decision against
5 the natural sound levels. In other words, in making an impairment determination for its
6 decision to authorize motorboats, generators, and helicopters in the river corridor, the
7 agency failed to measure and apply the additive noise impacts against the natural
8 soundscape. Instead, the agency illegally diluted and minimized the impact (and thus
9 impairment) by *only* measuring and comparing the increased noise levels against the pre-
10 existing, human-caused noise. See e.g., AR 105424 (FEIS Vol. II at 387).

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

15 Second, in making an impairment determination, the agency must take into
16 account the “cumulative effects of the impact in question.” MP 1.4.5; AR 109611 (ROD)
17 (In “determining whether impairment would occur, park managers examine the . .
18 .cumulative effects of the action”); SUWA, 387 F. Supp. 2d at 1190 (quoting MP 1.4.5).
19 Cumulative impacts are “the impacts on the environment which result from the
20 incremental impact of the action when added to other past, present, and reasonably
21 foreseeable future actions regardless of what agency (Federal or non-Federal) or person
22 undertakes such other actions.” 40 C.F.R. § 1508.7. Cumulative impacts can result from
23 “individually minor but collectively significant actions taking place over a period of
24 time.” Ibid.; see also Part IV. A, below.

25 Here, the record reveals that the Park Service failed to consider the overall,
26 cumulative impacts to the Grand Canyon’s natural soundscape *when issuing* its no-
27 impairment determination. See AR 109611 (Park Service’s “Findings on Impairment of
28

1 Park Resources and Values”). While an “analysis” of cumulative impacts to the Grand
2 Canyon’s natural soundscape is included in the FEIS, the agency never applied this
3 analysis and its findings to the impairment decision making process. See e.g., Sierra Club
4 v. Flowers, 423 F. Supp. 2d 1273, 1322 (S.D. Fla. 2006) (“The analysis of wetlands . .
5 .was extensive; however the results *were not applied* in the Corps’ decision making
6 process”).

7
8 Indeed, in response, the Park Service does not rely on, reference, or cite the actual
9 impairment determination in the Record of Decision (“ROD”) (see AR 109611) where the
10 cumulative impacts analysis must be found but instead refer generally to a “detailed noise
11 analysis” in the FEIS and the cumulative impacts section on pages 386-387 of Vol. II of
12 the FEIS. See NPS Mem. at 37. This purported “detailed analysis,” however, includes
13 only a general discussion of the additive impacts associated with aircraft overflights (see
14 AR 105394; AR 105423), a laundry-list of other “actions” (see AR 105286; AR 105386),
15 and a statement that the “cumulative effects [to the Grand Canyon’s natural soundscape].
16 . .would be regional, adverse, long-term, and major.” AR 105424. The Park Service then
17 summarily concludes, in one sentence, that there would be no “impairment of the natural
18 soundscape in Grand Canyon National Park.” Ibid. Without question, this is not enough.
19 When making an impairment determination, the agency must do more than merely
20 reference a NEPA analysis. The agency must provide an adequate explanation – a
21 rationale – for finding that the cumulative impacts do not rise to the level of impairment.
22 The Park Service must actually apply its NEPA “analysis” to the impairment
23 determination. See Flowers, 423 F.Supp.2d at 1322. As explained by one court,
24 “[m]erely describing an impact and stating a conclusion of non-impairment is insufficient,
25 for this merely sets forth ‘the facts found’ and ‘the choice made,’ without revealing the
26 ‘rational connection – the agency’s rationale for finding that the impact described is not
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1 impairment.” Sierra Club v. Mainella, 459 F.Supp.2d 76, 100 (D. D.C. 2006).

2
3 3. The Park Service never considered the previous NEPA documents
4 and relevant studies before making its no-impairment determination

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

14 Even a cursory review of the previous EISs, management plans, and 29 studies on
15 motorized use and carrying capacity of the river corridor reveals that their scope, value,
16 and relevance extends well-beyond the impacts of two-stroke engines. See SAR 001787
17 (listing all twenty-nine studies); SAR 003715 (synthesis of all twenty-nine studies).
18 Many of the 29 studies, for instance, reveal that motorized use of the Colorado River *in*
19 *general* is inconsistent with managing for solitude, disruptive to visitors, and adversely
20 impacts the natural soundscape of the river corridor. See Facts at ¶¶ 24-34. Moreover, in
21 terms of providing an opportunity to experience the Grand Canyon’s natural soundscape
22 many of the studies show that overall “non-motorized trips are more pleasing to the
23 visitor.” See SAR 004607. Reasons “given suggest that oar travel is seen as more
24 consistent with a natural or wilderness experience.” Ibid. Passengers “who had
25 experience with both motor and oar trips preferred the oar trip. They enjoyed the slower
26 pace, could relax; they become more aware of natural sounds in the canyon; they were
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1 able to observe more closely the unique features along the river and more easily ask
2 questions of their guide.” Ibid.; see also SAR 004602 (there “is a strong indication that
3 *almost all* those who have had the opportunity to experience both motor and oar trips
4 prefer oar trips over motor trips.”); SAR 005918 (the “motor-oar experiment”). Overall,
5 therefore, these relevant 29 studies need to be carefully considered before the Park
6 Service decides that authorizing motorboats, generators, and helicopter passenger
7 exchanges does not impair the Grand Canyon’s natural soundscape.

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

11 Defendants maintain that while continued impacts to the Park’s natural
12 soundscape will occur, the Park Service’s decision to authorize additional impacts from
13 motorized use of the river corridor does not “impair” the Park’s natural soundscape
14 because such use will only have an additive or incremental effect on an already noisy
15 situation. See AR 105423-24 (FEIS Vol. II at 386-87). As such, the agency continues to
16 authorize a myriad of motorized uses that collectively impact the integrity of the Park’s
17 natural soundscape all the while avoiding an impairment determination. By this
18 reasoning, the agency authorizes motorized watercraft use, generators, vehicle and tour
19 bus use at launch/retrieval sites, camp activities, helicopter passenger exchanges, aerial
20 tours of the Grand Canyon, and administrative use of motors and aircraft, because when
21 viewed in a vacuum, these activities may have an “individually minor” effect on the
22 Park’s natural soundscape relative to overflights. In other words, since the Grand
23 Canyon’s natural soundscape is already being severely impacted by aircraft overflights,
24 the agency sees no harm or impairment in making the situation worse by authorizing even
25 more motorized use.
26

27 Without question this defeatist, “death by a thousand cuts,” approach to managing
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1 the Grand Canyon’s natural soundscape and avoiding impairment is arbitrary and
2 capricious. See e.g., Grand Canyon Trust, 290 F.3d at 257, 346 (rejecting the FAA’s
3 similar argument with respect to Zion National Park); Hanly v. Kleindienst, 471 F.2d 823,
4 831 (2nd Cir. 1972) (sometimes “even slight increase in adverse conditions that form an
5 existing environmental milieu may sometimes threaten harm that is significant”). Not
6 only is it inconsistent with MP 1.4.5 (must consider cumulative impacts) and the Park
7 Service’s own ROD (AR 109611) but taken to its logical conclusion, the Park Service’s
8 position would render Congress’ prohibition on impairment largely superfluous. Just like
9 the situation in the Grand Canyon, individually minor but collectively significant impacts
10 would be allowed to occur in all of our National Parks. See AR 105424 (collective
11 impacts to the Park’s natural soundscape are significant).

12
13 To avoid this scenario, therefore, it is imperative that the Park Service “give a
14 realistic evaluation of the total impacts [of the action] and []not isolate the proposed
15 project, viewing it in a vacuum.” Grand Canyon Trust, 290 F.3d at 342. Even “a slight
16 increase in adverse conditions . . . may sometimes threaten harm that is significant. One
17 more factory . . . may represent the straw that breaks the back of the environmental
18 camel.” Id. at 343 (quoting Hanly, 471 F.2d at 831). This is precisely the situation in the
19 Grand Canyon. In fact, Defendants recognize that the “Grand Canyon’s natural
20 soundscape is . . . a disappearing resource” (AR 104728) and that continued motorized use
21 of the Grand Canyon, including aircraft overflights (i.e., aircraft tours, commercial jets,
22 military aircraft, and administrative use), motorboats, generators, and helicopters are
23 having, and will continue to have a “significant adverse affect” on the Park’s natural
24 soundscape. See AR 105424 (FEIS Vol. II at 387). The record also reflects that the
25 Grand Canyon’s natural soundscape is necessary to fulfill the purposes of the Park, key to
26 public’s ability to enjoy the Park, and an identified goal in the Grand Canyon’s 1995
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1 GMP. See AR 104728 (natural sounds are an inherent component of the Grand Canyon);
2 SAR 010134 (“The Grand Canyon is recognized as a place with unusual and noticeable
3 natural quiet, and direct access to numerous opportunities for solitude”); SAR 010138
4 (natural quiet is a management objective for the Grand Canyon). In other words, the
5 Grand Canyon’s natural soundscape is currently being impaired.

6 The Park Service counters that “application of Plaintiffs’ position concerning
7 cumulative effects on the natural soundscape would . . .lead to incongruous results
8 [because] . . .taken to its logical extreme, [the Park Service] could not allow *a single*
9 noncommercial, nonmotorized trip, because the human noises . . .would contribute to the
10 significant cumulative impacts.” NPS Mem. at 37 (emphasis added). This argument
11 misses the point. The salient issue is not whether *any* impact constitutes impairment as
12 Defendants allege (Plaintiffs agree not all impacts impair park resources) but rather
13 whether the Park Service is allowed to authorize a handful of individually “minor,”
14 incremental impacts to the Grand Canyon’s natural soundscape “in a vacuum,” without
15 factoring in the overall, combined effects when making an impairment determination.
16 See e.g., Grand Canyon Trust, 290 F.3d at 346; Hanly, 471 F.2d at 831. The agency’s
17 actions constitute impairment.
18

19
20 E. The Park Service Failed to Conserve Park Resources and Values.

21 Plaintiffs’ opening brief established that the “fundamental purpose” of the Organic
22 Act and the creation of the National Park System is to “conserve” park resources and
23 values. See 16 U.S.C. § 1. This conservation “mandate is independent of the separate
24 prohibition on impairment, and so applies all the time, with respect to all park resources
25 and values,” including a park’s natural soundscape and wilderness characteristics. MP
26 1.4.3. Pursuant to this conservation duty, impacts to park resources and values are
27 allowed *only* “when *necessary and appropriate* to fulfill the purposes of the park, so long
28

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

11 IV. NEPA VIOLATIONS

12 A. The Park Service Failed to Take a Hard Look at Cumulative Impacts to the 13 Colorado River Corridor’s Wilderness Character

14 The record reveals that, pursuant to NEPA, the Park Service never took a hard look
15 at the overall, combined or cumulative effects of its decision to authorize motorized uses
16 on the river corridor’s *wilderness character*. See AR 104822-104823 (FEIS Vol. I at
17 235-236 (defining wilderness character). The four unique qualities of wilderness
18 character include: (1) untrammeled: wilderness is essentially unhindered and free from
19 modern human control or manipulation; (2) natural, i.e., substantially free from the effects
20 of modern civilization; (3) undeveloped or without permanent improvements or modern
21 human occupation; and (4) outstanding opportunities for solitude or a primitive and
22 unconfined type of recreation. See ibid.

23 Understanding and taking a “hard look” at the cumulative impacts to these four
24 wilderness qualities is extremely important and should not be overlooked in this case.
25 This is because, as mentioned earlier, there are currently a number of state, private, tribal,
26 and other federal actions taking place in the Grand Canyon that pose a significant threat
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1 to the Park’s wilderness values. By themselves, these activities may have “individually
2 minor” effects. A single helicopter passenger exchange at Whitmore may disrupt one
3 group of rafters for an hour, larger group sizes may cause a bottleneck in one segment of
4 the river, motorized boats may buzz by non-motorized rafters three or four times a day,
5 and an occasional commercial plane, military jet, or tour plane may fly overhead.
6 Individually, each of these incidents – though disruptive to the natural quiet of the canyon
7 – may not rise to the level of posing a significant threat to the Grand Canyon’s wilderness
8 qualities. Collectively, however, the impacts of all of these and other activities – whether
9 conducted by private individuals, state agencies, tribal officials, or other federal agencies
10 – are significant and must be considered. See e.g., Grand Canyon Trust, 290 F.3d at 346
11 (discussing collective impacts to Zion National Park); NRDC v. Hodel, 865 F.2d 288
12 (D.C. Cir. 1988) (discussing collective impacts to migratory whales).

14 In this case, while the agency certainly uses the term “cumulative impact” in the
15 FEIS, has added “wilderness character” to the affected environment and environmental
16 consequences section of the document, and provides a laundry list of citations that
17 allegedly “combine” to qualify as an analysis (see NPS Mem. at 44), *nowhere* in the FEIS
18 or record does it actually analyze the cumulative impacts to the river corridor’s wilderness
19 character as required by NEPA. Instead, the agency states only that “[c]umulative
20 impacts on wilderness character were determined by combining the impacts of each
21 alternative with other past, present, and reasonably foreseeable future actions.” AR
22 105818. For the chosen alternative, the agency claims that “the cumulative effects from
23 Glen Canyon Dam and commercial overflights *are similar to those described for each*
24 *resource* elsewhere in the document. The cumulative effects of the management of
25 backcountry toilets, trails and facilities described in the Backcountry Management Plan
26 would have adverse, localized, short term, year-round impacts on wilderness character.”
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1 AR 105828 (emphasis added).

2 This is the extent of the agency’s cumulative impacts analysis on wilderness
3 character – a few sentences referencing other sections of the FEIS that discuss impacts to
4 *other* resources, i.e., water quality, visitor experience, natural soundscape. Without
5 question, this is insufficient. As explained by the Ninth Circuit, a consideration of
6 “cumulative impacts of a project requires some quantified or detailed information;
7 general statements about possible effects and some risk do not constitute a hard look.”
8 Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971 (9th Cir. 2006). The analysis of
9 cumulative impacts “must be more than perfunctory; it must provide a useful analysis of
10 the cumulative impacts of past, present, and future projects . . . Defendants must do more
11 that just catalogue ‘relevant past projects in the area.’” Ibid. (citations omitted). The
12 agency must provide “an adequate analysis about how these projects, and the difference
13 between the projects, are thought to have impacted the environment.” Ibid.
14

15
16 B. The Park Service Failed to Use High-Quality Information or Accurate
Scientific Analysis

17 Plaintiffs claim that the FEIS and ROD violate NEPA because the Park Service did
18 not use high-quality information or accurate scientific analysis in evaluating the need for,
19 propriety of, or equity in, allocation of commercial services. The Park Service defends
20 this claim by stating that Plaintiffs offered “no specific factual basis or argument for this
21 conclusory assertion.” NPS Mem. at 45. To the contrary, Plaintiffs demonstrated
22 throughout their opening brief, and again in this brief, that the agency failed to analyze
23 the need for specific types and amounts of commercial services in conformance with the
24 Concessions Act and MPs and that it failed to study relative demand for commercial and
25 noncommercial services in using a split allocation system. In their discussion of MPs,
26 Organic Act, and Concessions Act violations, Plaintiffs pointed to the specific
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1 information and analysis that was missing. In the NEPA portion of their opening brief,
2 Plaintiffs establish that under NEPA, the Park Service must use such high-quality
3 information and accurate scientific analysis. Pls' Open at 37. Defendants do not dispute
4 any of the legal authority provided by Plaintiffs. Nor do Defendants cite to any specific
5 location in the record containing the high-quality information and scientific analysis
6 required.²⁶ This is a violation of NEPA. When available, the Park Service must base its
7 FEIS and ROD on high-quality information and accurate scientific analysis relevant to the
8 decisions and legal duties before the agency. See National Parks Conserv. Assoc. v.
9 Babbitt, 241 F.3d 722, 737 (9th Cir. 2001) (where available information can be obtained
10 for an EIS, it must inform the agency's decisions).
11

12 Respectfully submitted this 4th day of September, 2007.

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

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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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