

**SUBSTITUTE THE FOLLOWING CASE FOR WILDERNESS PUBLIC RIGHTS FUND**  
**v. KLEPPE, P. 935**

**RIVER RUNNERS FOR WILDERNESS, ET AL, v. MARTIN**

United States Court of Appeals, Ninth Circuit, 2010  
593 F.3d 1064.

**PER CURIAM:**

This case concerns the National Park Service's decision to permit the continued use of motorized rafts and support equipment in Grand Canyon National Park. Plaintiffs contend that such motorized activities impair the wilderness character of the Canyon and that the Park Service's decision violates its management policies and various federal statutes. Plaintiffs asked the District Court to set aside the decision under the Administrative Procedure Act ("APA"). For reasons explained in this opinion, Plaintiffs have not satisfied the high threshold required to set aside federal agency actions under the APA.

**I. Background.**

Grand Canyon National Park ("Park") was established by Congress in 1919 and expanded in 1975. The Park consists of more than 1.2 million acres located on the southern end of the Colorado Plateau in Arizona.

The Park includes a 277-mile stretch of the Colorado River referred to in this order as the "Colorado River Corridor" or the "Corridor." The Park Service regulates the Colorado River Corridor through a periodically-revised Colorado River Management Plan ("Management Plan"). In November of 2005, the Park Service issued a Final Environmental Impact Statement ("FEIS") for the 2006 Management Plan. On February 17, 2006, the Park Service issued a Record of Decision ("ROD") that adopted and approved the 2006 Management Plan. The 2006 Management Plan permits the continued use of motorized rafts, generators, and helicopters in the Colorado River Corridor.

Plaintiffs \* \* \* [are] a coalition of organizations committed to protecting and restoring the Grand Canyon's wilderness character and unique natural resources and ensuring fair access to it. Plaintiffs filed this action against the Park Service and [individual officials; Martin is the Superintendent of Grand Canyon National Park]. \* \* \*

**A. Park Service Management of the Colorado River Corridor.**

The waters of the Colorado River originate in the mountains of Colorado, Wyoming, and Utah and run 1,450 miles to the Gulf of California. The Colorado is the longest and largest river in the Southwestern United States. Once in the Grand Canyon, the river flows some 4,000 to 6,000 feet below the rim of the Canyon through cliffs, spires, pyramids, and successive escarpments of colored stone. Access to the bottom of the Grand Canyon can be gained only by hiking, riding mules, or floating the river. Those floating the river typically do so in motor-powered rubber rafts, oar-or paddle-powered rubber rafts, oar-powered dories, or kayaks. Floating the river through the Grand Canyon is considered one of America's great outdoor adventures and includes some of the largest white-water rapids in the United States.

Use of the Colorado River Corridor increased substantially after Glen Canyon Dam was completed in 1963 and produced a relatively steady flow through the Canyon. Because of this increased use, the Park Service initiated a series of river planning and management efforts, culminating in a December 1972 River Use Plan. The plan concluded that "motorized craft should be phased-out of use in the Grand Canyon." The plan also concluded that 89,000 commercial user days and 7,600 non-commercial user days would be allocated for the 1973 season, but that commercial use would be scaled down to 55,000 user days by 1977.<sup>1</sup>

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<sup>1</sup> "A 'user day' is calculated by multiplying the number of passengers by the number of days. (A 'day' is

[Various studies and documents produced by the Park Service between 1973 and 1980 studied the impact of motorized activities on the river and recommended elimination of motorized use. The Service's 1979 Management Plan called for a phase-out over five years, and also] increased the allocated commercial user days from 89,000 per year to 115,500 and increased the allocated non-commercial user days from 7,600 to 54,450. In September 1980, the Park Service proposed that the Colorado River Corridor be designated as "potential wilderness" and, once motorboat use was phased-out, as "wilderness."

Congress countermanded the 1979 Management Plan in a 1981 appropriations bill for the Department of the Interior. The bill prohibited the use of appropriated funds "for the implementation of any management plan for the Colorado River within the [Park] which reduces the number of user days or passenger-launches for commercial motorized watercraft excursions[.]" Members of Congress sent a letter to the Park Service expressing their "wish that the [1979 Management Plan] be amended to accommodate the 1978 level and pattern of commercial, motorized watercraft access while at the same time protecting the increased non-commercial allocation which the plan provides." The Park Service subsequently revised the 1979 Management Plan to "retain[ ] motorized use and the increase in user-days that had been intended as compensation for the phase-out of motors, resulting in more motorized use of the river."

The Park Service issued a second Management Plan in 1989. The 1989 Management Plan was similar to the revised 1979 Management Plan. It included the same allocation of user days for commercial and non-commercial boaters, but increased the number of non-commercial launches.

## **B. The 2006 Management Plan.**

[In February 2006, the Park Service adopted a new Management Plan. It followed an extensive public outreach and study process that had been initiated in 1997, and included several public meetings attended by more than one thousand people, many thousands of written submissions, and preparation of a three-volume final EIS that had sifted through more than a dozen alternatives, including motorized and non-motorized options. The Plan continued allowing the use of motorized rafts, generators for inflating rafts, and use of one helipad in the lower part of the Canyon to bring rafters in and out.]

## **II. The District Court's Task.**

Plaintiffs argue that the 2006 Management Plan is unlawful and should be set aside. The court's task is not to make its own judgment about whether motorized rafts should be allowed in the Colorado River Corridor. Congress has delegated that responsibility to the Park Service. The court's responsibility is narrower: to determine whether the Park Service's 2006 Management Plan comports with the requirements of the APA, [5 U.S.C. § 701 et seq.](#)

\* \* \*

Plaintiffs assert that the 2006 Management Plan is arbitrary and capricious under the APA because it violates the Park Service's own policies, the National Park Service Concessions Management and Improvement Act ("Concessions Act"), and the National Park Service Organic Act ("Organic Act"). Each of these arguments will be addressed separately \* \* \*.

## **III. Compliance with Park Service Policies.**

### **A. Enforceability of the Policies.**

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defined as any portion of a 24-hour day.) For example, if the [permit] holder has two clients on a two day trip, this would equal four user days." National Park Service, How a Commercial Use Authorization Works, [https:// cms. imr. nps. gov/ bibe/ parkmgmt/ cuaoperations. htm](https://cms.imr.nps.gov/bibe/parkmgmt/cuaoperations.htm) (last updated June 9, 2007).

Even though Congress has never acted on the Park Service's recommendation to designate a substantial portion of the Park as wilderness, Plaintiffs claim that the Park Service's own policies give rise to a legally binding obligation to maintain the wilderness character of the Park. Plaintiffs \* \* \* focus on the 2001 [Park Service Management] Policies, arguing that they are binding because they are written in mandatory language, were mentioned in the Federal Register, and have been found binding in [S. Utah Wilderness Alliance v. Nat'l Park Serv.](#), 387 F.Supp.2d 1178 (D.Utah 2005).

In [United States v. Fifty-Three \(53\) Eclectus Parrots](#), 685 F.2d 1131 (9th Cir.1982), we established a two-part test for determining when agency pronouncements have the force and effect of law:

To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules--not interpretive rules, general statements of policy or rules of agency organization, procedure or practice--and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

[Id.](#) at 1136 (internal quotes and citations omitted).

The 2001 Policies fail the first part of the [Eclectus Parrots](#) test because they do not purport to prescribe substantive rules. As the United States Court of Appeals for the District of Columbia Circuit recently held with respect to these very Policies: “While the text of the Policies on occasion uses mandatory language, such as ‘will’ and ‘must,’ the document as a whole does not read as a set of rules. It lacks precision in its directives, and there is no indication of how the enumerated policies are to be prioritized.” [The Wilderness Soc’y v. Norton](#), 434 F.3d 584, 595 (D.C.Cir.2006).

The text of the 2001 Policies makes clear that they are intended only to provide guidance within the Park Service, not to establish rights in the public generally. The Introduction describes the Policies as a “basic Service-wide policy document,” as a “guidance document[ ],” and as a statement of policy “designed to provide [Park Service] management and staff with clear and continuously updated information ... that will help them manage parks and programs effectively.” That the 2001 Policies are not intended to have the same force as binding Park Service regulations is made clear by the Introduction's explanation that existing, formally-promulgated Park Service regulations will trump inconsistent provisions in the 2001 Policies until such time as the regulations “are formally revised through the rulemaking procedure[.]”

Equally significant, the Introduction to the 2001 Policies provides that Park Service management can choose to waive or modify the Policies: “Adherence to policy is mandatory unless specifically waived or modified in writing by the Secretary, the Assistant Secretary, or the Director.” “Waivers and modifications will be considered on a case-by-case basis,” the Policies explain. Needless to say, policy statements that may be waived or modified by an agency can hardly be said to have the binding force of law. As the D.C. Circuit noted, “this language does not evidence an intent on the part of the agency to limit its discretion and create enforceable rights. Rather, the agency's top administrators clearly reserved for themselves unlimited discretion to order and reorder all management priorities.” [Wilderness Soc’y](#), 434 F.3d at 596.

Nor do the 2001 Policies purport to create substantive individual rights or obligations for persons or entities outside the Park Service. The Policies set forth priorities, practices, and procedures to be followed by Park Service personnel in administering the national park system. In the words of [Eclectus Parrots](#), they are “interpretive rules, general statements of policy or rules of agency organization, procedure or practice[.]” 685 F.2d at 1136 (quotes and citations omitted). See also \* \* \* [Chrysler Corp. v. Brown](#), 441 U.S. 281, 302 (1979) (whether an agency pronouncement affects individual rights and obligations “is an important touchstone for distinguishing those rules that may be binding or have the force of law”).

The 2001 Policies also fail the second part of the [Eclectus Parrots](#) test. The APA requires that “publication or

service of a substantive rule shall be made not less than 30 days before its effective date.” [5 U.S.C. § 553\(d\)](#). The 2001 Policies were not published in the Federal Register. The Park Service did publish a notice of the availability of a draft of the 2001 Policies and a notice of new policy, but never published the 2001 Policies themselves. [See 65 Fed.Reg. 2984 \(Jan. 19, 2000\)](#); [65 Fed.Reg. 56003 \(Sept. 15, 2000\)](#). What is more important, the Policies were never published in the Code of Federal Regulations. This suggests that the Park Service did not intend to announce substantive rules enforceable by third parties in federal court. \* \* \*The D.C. Circuit found this lack of publication “particularly noteworthy” in concluding that the 2001 Policies are not substantive law. [Wilderness Soc’y, 434 F.3d at 595](#); *see also* [Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 \(D.C.Cir.1986\)](#) (“The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations[.]”).

This conclusion is bolstered by the Park Service's own characterization of the 2001 Policies. In its Federal Register announcement that a draft of the 2001 Policies was available for public comment, the Park Service explained that “park superintendents, planners, and other [Park Service] employees use management policies as a reference source when making decisions that will affect units of the national park system.” [65 Fed.Reg. 2984 \(Jan. 19, 2000\)](#). A “reference source,” of course, is not the same as binding substantive law.

In sum, the 2001 Policies are not enforceable against the Park Service in this action. The Policies do not prescribe substantive rules, nor were they promulgated in conformance with the procedures of the APA. The Court therefore may not set aside the 2006 Management Plan because it fails to comply with portions of the 2001 Policies requiring the Park Service to treat the Colorado River Corridor as wilderness or potential wilderness.

\* \* \* [Plaintiffs also argue that the decision to allow continued use of motors is arbitrary and capricious because the Park Service has classified the Colorado River Corridor as “potential wilderness,” and the 2001 Park Service Policies provide] the following guidance with respect to the management of potential wilderness areas:

The National Park Service will take no action that would diminish the wilderness suitability of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed.... This policy also applies to potential wilderness, requiring it to be managed as wilderness to the extent that existing non-conforming conditions allow. The National Park Service will seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation.

2001 Policies § 6.3.1. The FEIS makes this same commitment with respect to the Colorado River Corridor.

The language of § 6.3.1 makes clear that the Park Service is required to manage potential wilderness areas as actual wilderness only “to the extent that existing non-conforming conditions allow.” This language does not require the Park Service immediately to remove existing non-conforming uses—in this case, motorized rafts. It requires the Park Service to manage the Colorado River Corridor as wilderness to the extent possible given the existing use of motors. In light of this clear provision, the court cannot conclude that the 2006 Management Plan is arbitrary and capricious for failing to remove motorized uses in the Colorado River Corridor immediately.

Section 6.3.1 further states that the Park Service “will seek to remove from potential wilderness the temporary, nonconforming conditions that preclude wilderness designation.” Seasonal uses of motors on the river do not preclude wilderness designation. Plaintiffs do not contend that such uses work any permanent change on the Corridor that would preclude later wilderness treatment. Seasonal float trips are not like the construction of a road or other physical improvements that might disqualify an area for wilderness designation in the future. Motorized float trips can readily be eliminated if Congress decides that the Corridor should be designated as wilderness. The FEIS concludes that the use of motors in the Corridor “is only a temporary or transient disturbance of wilderness values” and “does not permanently impact wilderness resources or permanently denigrate wilderness values.” FEIS, Vol. I at 17 \* \* \*.

We note, additionally, that federal agencies are entitled to some leeway when interpreting their own policies and regulations. \* \* \* When that leeway is added to the Management Plan's general consistency with the 2001 Policies, the court cannot conclude that the policies, even if not enforceable in court, render the Management Plan arbitrary and capricious.

Finally, Plaintiffs argue that the 2006 Management Plan is arbitrary and capricious because it contradicts earlier Park Service decisions to phase out motorized boating in the Colorado River Corridor. \* \* \* The Court cannot conclude, however, that the 2006 Management Plan is arbitrary and capricious solely because it differs from earlier Park Service decisions. Part of the discretion granted to federal agencies is the freedom to change positions. As the Supreme Court has explained, “[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.” [Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.](#), 463 U.S. 29, 57 (1983). The question posed by this lawsuit, therefore, is not whether the 2006 Management Plan differs from past Park Service decisions, but whether it is arbitrary and capricious in light of facts in the administrative record and the reasoning of the FEIS. For reasons explained herein, the court finds the 2006 Management Plan sufficiently reasonable to pass APA muster.

#### **IV. The Concessions Act.**

Plaintiffs contend that the 2006 Management Plan is arbitrary and capricious because it fails to comply with the requirements of the Concessions Act. The Act governs the granting of commercial concessions within the National Park System. “To make visits to national parks more enjoyable for the public, Congress authorized [the Park Service] to grant privileges, leases, and permits for the use of land for the accommodation of visitors. Such privileges, leases, and permits have become embodied in national parks concession contracts.” [Nat'l Park Hospitality Ass'n v. Dep't of the Interior](#), 538 U.S. 803, 805-806 (2003). The specific provision of the Act relied on by Plaintiffs articulates a Congressional “policy” for the granting of concessions:

It is the policy of the Congress that the development of public accommodations, facilities, and services in units of the National Park System shall be limited to those accommodations, facilities, and services that-

- (1) are necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located; and
- (2) are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit.

#### [16 U.S.C. § 5951\(b\)](#)

Plaintiffs claim that the 2006 Management Plan is arbitrary and capricious because the Park Service never determined that the types and levels of motorized uses authorized by the Management Plan are necessary and appropriate for public use and consistent with the Park's resources and values. Before addressing this argument, we must address the legal standard that governs review of a Concessions Act claim.

#### **A. Legal Standard Under the Concessions Act.**

In support of their Concessions Act argument, Plaintiffs rely heavily on [High Sierra Hikers Ass'n v. Blackwell](#), 390 F.3d 630 (9th Cir.2004), a case in which we struck down the Forest Service's grant of permits to commercial packstock operators in the Ansel Adams and John Muir Wilderness Areas of California. The court held that the Forest Service must make a finding that “the number of permits granted was no more than was necessary to achieve the goals of the Act.” *Id.* at 647. Plaintiffs argue that [Blackwell](#) requires a similar Park Service finding for the number of motorized raft trips permitted in the 2006 Management Plan.

It is significant, however, that the court in [Blackwell](#) was applying the Wilderness Act, not the Concessions Act. The Wilderness Act places strict limitations on the use of lands formally designated by Congress as wilderness. With narrow exceptions, the Wilderness Act prohibits commercial enterprises, permanent roads, and motorized vehicles in wilderness areas. [16 U.S.C. § 1133\(c\)](#). Federal agencies are obligated to manage such areas to preserve their wilderness character. *Id.* at [§ 1133\(b\)](#). We explained in [Blackwell](#) that the Forest Service's obligation to limit commercial packstock permits “flows directly out of the agency's obligation under the Wilderness Act to protect and preserve wilderness areas.” [390 F.3d at 647](#). It was this “ultimate interest” and “overarching purpose” of the

Wilderness Act--to protect the Ansel Adams and John Muir Wilderness Areas from degradation--that led the Ninth Circuit to hold that the packstock permit decision violated “the Forest Service's statutory responsibility.” *Id.* at 647-48.

This case, by contrast, does not concern a wilderness area. Congress has never acted on the Park Service's recommendation that portions of the Park be formally designated as wilderness. The Park Service, therefore, is not under the same “statutory responsibility” that applied to the Forest Service in *Blackwell*. The court must look to the Concessions Act, not the Wilderness Act, for the governing legal standard.

In *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir.1979), we decided a case under 16 U.S.C. § 20, the statutory predecessor to the Concessions Act. \* \* \* The predecessor statute, like the Concessions Act, stated a Congressional “policy” that commercial concessions in national parks should be “limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located.” *Kleppe*, 608 F.2d at 1253. In rejecting a challenge under this policy to the Park Service's allocation of rafting permits in the Colorado River Corridor, *Kleppe* recognized the “administrative discretion” granted the Park Service and invoked “a judicial presumption favoring the validity of administrative actions.” *Id.* at 1254.

This more deferential standard appears to be warranted. The Park Service is charged with administering almost 400 national parks. The Concessions Act does not impose strict wilderness requirements on those parks, but instead articulates a policy that calls for the Park Service to balance the interests of public use and resource preservation. 16 U.S.C. § 5951(b). The Park Service's balancing of those interests over the broad range and diverse circumstances of hundreds of national parks is appropriately accorded the kind of deference recognized in *Kleppe*. The Court concludes that the deferential approach of *Kleppe*, rather than the statutory application of the Wilderness Act in *Blackwell*, should govern this case.

#### **B. The 2006 Management Plan and the Concessions Act.**

Plaintiffs first contend that the Park Service failed entirely to determine that the types and levels of commercial services authorized by the 2006 Management Plan are necessary and appropriate. We disagree. The Park Service made the following determinations [in its final EIS]:

Since many visitors who wish to raft on the Colorado River through Grand Canyon possess neither the equipment nor the skill to successfully navigate the rapids and other hazards of the river, the [Park Service] has determined that it is necessary and appropriate for the public use and enjoyment of the park to provide for experienced and professional river guides who can provide such skills and equipment.

\* \* \*

[S]ervices provided by commercial outfitters, which enable thousands of people to experience the river in a relatively primitive and unconfined manner and setting (when many of them otherwise would be unable to do so), are necessary to realize the recreational or other wilderness purposes of the park.

Plaintiffs argue that although the Park Service may have found commercial outfitters to be necessary and appropriate generally, it never made such a finding for *motorized* commercial services. Again we disagree. The ROD specifically states that “[d]etermination of the *types and levels* of commercial services that are necessary and appropriate for the Colorado River through Grand Canyon National Park were determined through [the FEIS].” ROD at 6 (emphasis added). Among the eight management alternatives considered by the Park Service in the DEIS and FEIS were two that did not authorize any motorized uses in the Colorado River Corridor (Alternatives B and C). After evaluating these alternatives, the Park Service found that they “violated the basic premise of this planning effort; that of reducing congestion, crowding and impacts without reducing access of visitors to the Colorado River[.]” FEIS Vol. III at 373. “As demonstrated by the Park Service's analysis of the no-motor alternatives, a decision by the Park Service to eliminate the motorized trip option would cause a dramatic reduction in the public availability of professionally outfitted river trips[.]” *Id.* at 87. The Park Service explained that “continued authorization of motorized use for recreational river trips in the [Park] is essential ... to meeting the ... management

objectives” for the 2006 Management Plan. *Id.* Thus, the Park Service quite clearly concluded that motorized commercial services were “necessary and appropriate for public use and enjoyment” of the Corridor. [16 U.S.C. § 5951\(b\)](#).

Plaintiffs contend that even if the Park Service found that motorized services were necessary and appropriate, it made no determination as to the *amount* of such services that are necessary, and therefore failed to “limit” motorized uses to those that are necessary and appropriate as required by the Congressional policy statement of the Concessions Act. It is true that the FEIS and ROD do not contain a specific discussion of the amount of motorized traffic found necessary and appropriate for public use and enjoyment of the Corridor. But the absence of such a specific discussion does not necessarily require the agency's action to be overturned. “While [a court] may not supply a reasoned basis for the agency's action that the agency itself has not given, [the court] will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.” [Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 \(1974\)](#). The Park Service's consideration of the amount of motorized traffic required in the Colorado River Corridor can reasonably be discerned from the FEIS. \* \* \*

[The Park Service studied several alternatives in its EIS process, including one that would] allocate 113,083 user days to commercial operators (74,260 motorized and 38,823 non-motorized) and 58,048 user days to non-commercial users[; one that] \* \* \* would have eliminated all motorized traffic on the river and allocated 97,694 user days to commercial operators and 74,523 to non-commercial[; another that] \* \* \* would have eliminated all motorized trips, but would have increased commercial user days to 166,814 and non-commercial to 115,783, presumably to accommodate sufficient numbers of visitors with the slower non-motorized trips[; and other that] \* \* \* would have permitted motorized uses, but varied the amounts for commercial and non-commercial traffic. The levels of motorized user days for Alternatives D, E, F, and G would have been 70,104, 76,913, 83,076, and 76,913, respectively. *Id.*

User days were not the only variables evaluated by the Park Service. The FEIS also considered months without motors on the river, trip lengths, trip lengths during various parts of the year, group sizes, numbers of launches, numbers of passengers, and helicopter exchanges at the Whitmore helipad. The Park Service evaluated these alternatives against environmental, social, and park-management factors including impacts on soils, water, air, soundscape, caves, vegetation, terrestrial life, aquatic resources, special status species, cultural resources, visitor experience, socio-economic resources, park management and operations, adjacent lands, and wilderness character.

The Park Service ultimately concluded that Alternatives B and C -- the non-motor alternatives -- would not meet the agency's objective of providing “a diverse range of quality recreational opportunities for visitors to experience and understand the environmental interrelationships, resources, and values of Grand Canyon National Park” because of the significantly reduced number of visitors who could experience the Colorado River Corridor. The Park Service evaluated a range of motorized use times in the other alternatives and, after considering all factors and variables, selected Modified Alternative H. That Alternative included specific allocations for motorized and non-motorized uses: a total of 115,500 commercial user days consisting of 76,913 motorized and 38,587 non-motorized, and an estimated 113,486 non-commercial user days.

Modified Alternative H reduced the amount of motorized traffic in the Colorado River Corridor and the months within which it can occur, while significantly increasing the traffic for non-commercial uses. The time period during which it prohibited motorized uses in the Corridor each year is September 16 through March 31 -- 3.5 months longer than under the 1989 Management Plan. Modified Alternative H also reduced motorized commercial launches from 473 per year to 429 per year, and total motorized passengers from 14,487 to 13,177. Maximum group sizes for commercial motor excursions were also reduced from 43 to 32. Commercial user days were held essentially level at 115,500, while non-commercial user days were more than doubled to an estimated 113,486. *Id.* at 60.

In sum, the Park Service's decision concerning the amount of motorized trips on the river was made after considering competing alternatives and a significant number of variables. The Park Service chose an alternative that reduced motorized uses from current levels. The court is satisfied that the Park Service, as stated in the ROD, determined the “type and level” of traffic on the river that was “necessary and appropriate,” including the type and level of motorized uses.

Plaintiffs argue that even if the Park Service made such a determination, the determination was arbitrary and capricious. As noted above, however, the decision occurred only after an extensive analysis of various alternatives. Defendants have identified a number of factors in the Administrative Record that support the Park Service's decision to allow motorized traffic to continue. First, because motorized trips take less time to complete (10 days as opposed to 16 days for non-motorized trips), substantially more people can see the Park each year from the river if motorized trips continue. Second, motorized trips are frequently chartered for special-needs groups, educational classes, family reunions, or to support kayak or other paddle trips. Third, because of their increased mobility, motorized trips help alleviate overcrowding at popular campsites and attractions in the Corridor. Fourth, some individuals feel safer when traveling in motorized rafts. In addition, studies performed as part of the DEIS found that visitors are able to experience the river as wilderness in the presence of motorized uses and that those who took motorized trips were significantly more likely to stress safety and trip length as the most important factors in the choosing the type of trip they took.

Given the “judicial presumption favoring the validity of administrative actions” and the “administrative discretion” granted the Park Service under the Concessions Act, [Kleppe, 608 F.2d at 1254](#), the court cannot conclude that the agency acted arbitrarily and capriciously when it found that the Modified Alternative H levels of motorized uses were “necessary and appropriate for public use and enjoyment” of the Colorado River Corridor. [16 U.S.C. § 5951\(b\)](#). The question is not whether this court agrees with the Park Service's decision, but whether it is reasonably supported by the Administrative Record. In light of the DEIS and FEIS analysis outlined above, we conclude that it is.

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## **V. The Organic Act.**

The Organic Act provides that the Park Service “shall promote and regulate the use of ... national parks ... in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” [16 U.S.C. § 1](#). The Act also provides that “[n]o natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public[.]” [16 U.S.C. § 3](#). Plaintiffs contend that the 2006 Management Plan is arbitrary and capricious because it permits commercial boaters to use the river at levels that interfere with free access by the public, and because it concludes that motorized uses do not impair the natural soundscape of the Park.

### **A. Free Access.**

Plaintiffs argue that the allocation of river access between commercial and non-commercial users is inequitable and thus limits the free access of members of the public. As noted above, however, the Park Service has significantly increased the access of non-commercial users. The 2006 Management Plan allocates 115,500 user days to commercial users and an estimated 113,486 user days to non-commercial users. This is essentially the same allocation commercial users received under the 1989 Management Plan, but a substantial increase from the 58,048 user days that non-commercial boaters received under the 1989 plan. Stated in different terms, the allocation of river time between commercial and non-commercial user days changed from 66.5% commercial and 33.5% non-commercial under the 1989 Management Plan, to 50.4% commercial and 49.6% non-commercial under the 2006 Management Plan. The 2006 Management Plan also reduced the number of launches and passengers for commercial users while nearly doubling both categories for non-commercial users. It is noteworthy that neither GCROA [Grand Canyon River Outfitter Ass'n], which consists of commercial river users, nor GCPBA [Grand Canyon Private Boaters Ass'n, both intervenors in the case], which consists of non-commercial users, agree with Plaintiffs. Both organizations contend that the Park Service's allocation of user days is reasonable.

Plaintiffs argue that non-commercial users are required to wait for permits to run the river -- sometimes for 10 or more years -- while clients of commercial rafting companies usually can book a trip within one year. They also assert that the current allocation favors the wealthy who can afford commercial trips, and they criticize the Park Service for not conducting a demand study that would have revealed the most equitable allocation. The court cannot

conclude on this basis, however, that the Management Plan is arbitrary and capricious. The 2006 Management Plan significantly revised the system for private boaters to obtain permits by establishing a lottery system that is weighted to favor those who have not received a permit in previous years. Moreover, surveys show that 61% of private boaters have floated the Colorado River Corridor before, while only 20% of commercial boaters were on repeat trips. The existence of a waiting list therefore does not necessarily show that more private boaters than commercial customers are awaiting their first river trip. Finally, experts advised the Park Service that a demand study would cost more than \$2 million and likely would be of limited value.

More generally, Plaintiffs tend to characterize the dispute as one between commercial companies and private citizens. This is not the true nature of the issue:

Throughout these proceedings [plaintiff] has persisted in viewing the dispute as one between the recreational users of the river and the commercial operators, whose use is for profit. It asserts that by giving a firm allocation to the commercial operators to the disadvantage of those who wish to run the river on their own the Service is commercializing the park. [Plaintiff] ignores the fact that the commercial operators, as concessioners of the [Park] Service, undertake a public function to provide services that the [Park Service] deems desirable for those visiting the area. The basic face-off is not between the commercial operators and the non-commercial users, but between those who can make the run without professional assistance and those who cannot.

[Kleppe, 608 F.2d at 1253-54.](#)

As noted above, a coalition of commercial and private boater organizations submitted joint comments to the Park Service that supported an equal allocation of river time between commercial and non-commercial users on an annual basis. These users of the river apparently did not believe that such a system would interfere with free access.<sup>2</sup>

## **B. Impairment of the Natural Soundscape.**

Plaintiffs make several arguments in support of their claim that the Park Service acted arbitrarily and capriciously when it concluded that motorized uses of the Corridor do not impair the natural soundscape of the Park within the meaning of the Organic Act. These arguments are unpersuasive. \* \* \*

Plaintiffs contend that the Park Service \* \* \* failed to consider the cumulative effects of noise from river traffic. This also is incorrect. After comparing river traffic noise to natural background sounds, and evaluating noise-free intervals, the Park Service considered the cumulative effect of such noise when added to other sounds in the Park such as aircraft over-flights. The Park Service then reached the following conclusion:

Although Modified Alternative H would contribute to the overall cumulative effects of noise on the park's natural

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<sup>2</sup> In support of their argument, Plaintiffs submitted the affidavit of Donald W. Walls. Dr. Walls opines that an equal allocation between commercial and non-commercial boaters cannot be determined to be fair in the absence of a demand study, and that a lottery system that applies to all users would be more fair. As noted above, however, a panel of experts advised the Park Service in January of 2003 that a demand study was likely to cost \$2 million and be of limited use. Dr. Walls does not address this advice and therefore does not provide a basis for concluding that the Park Service acted arbitrarily and capriciously when it decided not to conduct such a study. Moreover, although Dr. Walls opines that a lottery system would be more fair than the Park Service's equal allocation of days between commercial and non-commercial users, he does not address whether such a system--which would render the yearly demand for commercial services less predictable--would permit the continued operation of commercial river runners that the Park Service has found to be necessary and appropriate. Nor does Dr. Walls address the fact that a coalition of river users, including commercial and private users, supported the equal allocation adopted by the Park Service, or explain why the Park Service's consideration of such representative support was unreasonable. Dr. Walls' opinion, although a legitimate point of view, does not persuade the court that the Management Plan is arbitrary and capricious.

soundscape, even if all noise from all river recreation was eliminated from the park (including river-related helicopter flights at Whitmore), the cumulative effects of aircraft noise would still be adverse, short-to long-term, and major. There would still be “significant adverse effects” on the natural soundscape due to frequent, periodic and noticeable noise from overflights, and “substantial restoration of natural quiet” would not be achieved as required by [Public Law 100-91](#) and other mandates.

Plaintiffs contend that this cumulative analysis should have caused the Park Service to eliminate sounds from motorized river traffic. But if a cumulative analysis were to result in the elimination of all sounds that can be eliminated by the Park Service--in this case, all sounds other than aircraft over-flights, which are not within the jurisdiction of the Park Service--then all human activity in the Park would be eliminated. And still the aircraft overflights would create substantial and adverse sound effects in the Park. Plaintiffs have articulated no principled basis upon which the court can conclude that the Park Service should have eliminated motorized noises on the basis of such cumulative analysis, but not other human-caused noises such as hiking or non-motorized raft trips. The court cannot conclude that the Park Service acted arbitrarily and capriciously when it concluded from a cumulative-effects analysis that motorized river traffic noise was not the source of serious sound problems in the Park and that elimination of such noise would not significantly improve the overall soundscape.

Finally, Plaintiffs argue that the Park Service failed to consider earlier environmental impact statements and a number of studies conducted in the 1970s, some of which found that river use impacted the soundscape within the Park. The Park Service relied primarily on studies conducted by noise experts in 1993 and 2003. These studies included field acoustic measurements, including sounds from motorized and non-motorized raft trips. The studies determined the distance at which motorized rafts could be heard and the length of time they were audible while traveling down-river, when measured from fixed points in the Park. The studies also evaluated the effects of other sounds such as water flow, wind, wildlife, human voices, helicopters, and air-craft overflights. The studies provide a reasonable basis for evaluating sound effects within the Park. \* \* \* [Plaintiffs do not] cite any recent studies that call into question the findings of the 1993 and 2003 studies. Defendants also note that any studies conducted in the 1970s would have concerned louder two-stroke engines rather than the quieter and cleaner four-stroke engines now used in the Corridor. Finally, the 2003 study specifically considered and summarized the earlier studies relied on by Plaintiffs.

Given all of these considerations, the court cannot conclude that the Park Service acted arbitrarily and capriciously when it concluded that motorized uses do not impair the soundscape of the Park within the meaning of the Organic Act. \* \* \*

**AFFIRMED.**

#### **NOTES AND QUESTIONS:**

1. Note that in a 1981 appropriations bill for the Interior Department, the Congress prohibited the use of appropriated funds for implementation of any management plan that reduces “commercial motorized watercraft excursions” within Grand Canyon National Park. Why didn’t that settle the matter of whether the National Park Service could prohibit motors?
2. On whether the 2001 National Park Service Policies were binding on the Park Service and enforceable by outside interests in court, why should an agency adopt such policies unless it is prepared to regard them as binding and enforceable in court? On their face, the policies were “mandatory unless specifically waived or modified in writing by the Secretary, the Assistant Secretary, or the Director.” If no written waiver accompanied the challenged decision, why didn’t the court hold the agency to its word? Compare the discussion in the text on p. 244 on the extent to which agency policies are enforceable in court.

3. Also on the 2001 Policies, did they in fact require the Park Service to ban motors in the River Corridor once NPS had declared the corridor as “potential wilderness”? If not, does the court even have to decide whether the policies are binding?

4. Examine the National Park Service Organic Act quoted at the beginning of Part V of the Opinion. Does it give the Park Service plenary authority to require permits and otherwise regulate visitor conduct? Where in 16 U.S.C. ' 1 or 3 does the Park Service find authority either (a) to limit the total number of raft trips; or (b) to allocate trips between commercial and non-commercial users? By issuing concession contracts to rafting companies, and limiting others, is the agency making a grant of "natural curiosities on such terms as to interfere with free access \* \* \* by the public" (expressly forbidden by 16 U.S.C. ' 3)? Does "free" mean "free" in the same sense that the TAPS case read "50 feet" to mean "50 feet"? *See Wilderness Society v. Morton*, casebook, p. 235.

5. The court views the commercial operators as businesses that fulfill a public function: providing professional assistance for citizens unable to run the river on their own. How, if at all, is that different from the businesses providing commercially guided, four-wheel driving tours of Salt Creek Canyon in Canyonlands N.P. (*SUWA v. Dabney*, casebook p. 922)?

6. What might be the Park Service’s interest in promoting motor trips versus non-motorized trips? Is it relevant that motor trips are about twice as fast through the entire Grand Canyon as oar-powered trips (8-10 versus 16-18 days, approximately) and are also about half as expensive (because the cost to the visitor is measured mostly by time on the river)? Park Service studies have generally shown that, so long as the carrying capacity of the river corridor is not exceeded, the only environmental difference between the two kinds of trips is the (relatively modest) noise of the motors; i.e., all other impacts are basically the same. May the Park Service ban motors to provide a quieter river experience, even if that tends to put these trips beyond the reach of middle-class people? May the Park Service ban non-motorized trips; i.e., require all rafters to go on motor trips? Do the statutes provide any clue to answering that question, or is it a policy judgment for the agency that the courts should not interfere with?

7. The court did not directly address the Park Service’s division of user days between commercial and non-commercial or private trips. See footnotes 3-4 and accompanying text in the opinion. Is that the kind of decision that should be left completely up to the agency? Or should the court require a reasoned explanation for the split in the administrative record? What would a reasoned explanation look like? Is an allocation on the basis of "historical use" defensible? Are there other, better bases? Is the Park Service's legal obligation to ascertain and then meet the "public demand" for outdoor recreational experiences? How would demand be calculated? How would Professor Sax propose to resolve this dispute? *See* excerpts in casebook, pp. 46, 920. At least in areas of unique or scarce scenic or aesthetic resources like here, is some sort of rationing system inevitable? Should the NPS auction river trips to the highest bidders? How would that approach differ from concessioner agreements?

8. What are reasons the Park Service might favor commercial as opposed to non-commercial trips? Health and safety? Risk management? Protecting the environment? Revenues?

9. Could the Park Service ban *all* non-commercial trips? What would it need to show in order to do that? In *Great American Houseboat Co. v. United States*, 780 F.2d 741 (9th Cir. 1986), the court rejected an equal protection attack on a Forest Service regulation banning commercial (under a

time-sharing scheme) but not individual use of houseboats on a recreational lake: "The commercial/personal use distinction served the legitimate statutory purpose of allowing the Forest Service to regulate and accommodate multiple uses on Shasta Lake and to avoid overcrowding \* \* \* and a degrading of the quality of the recreational experience there." 780 F.2d at 748.

10. The court noted that associations of commercial and non-commercial river runners intervened in the case in support of the National Park Service, not the plaintiffs. This shows how diverse the affected interests in these outdoor recreation controversies can be. In this connection, is it relevant to the "oars/motors" controversy, or to the "commercial/private" split, that the rafting experience in the Grand Canyon is not entirely "natural"? The Colorado River in the Grand Canyon has been much manipulated by the Glen Canyon Dam upstream. The dam captures much of the sediment that formerly gave the River its eponymous red color. The water is not only usually clear but cold, a uniform 48 degrees Fahrenheit as released from bowels of Lake Powell behind the dam, compared to pre-dam temperatures as high as the 70s or even 80s in low flow periods. (The temperature change has substantially altered aquatic life in the Canyon, and resulted in the extirpation of some species, and the listing of others as endangered.) Finally, the dam has evened out the flows to a much more dependably uniform level, which has also facilitated the growth of the rafting industry. Mankind is increasingly manipulating nature practically everywhere federal lands are found, sometimes by design, sometimes inadvertently. How should that fact inform how those lands should be managed where the goal is to provide a "natural" recreational experience, or to preserve them (as addressed in the next Chapter)?