IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAMES R. RANDALL, RONALD J. ROMERO, **STANLEY HUCHINSON, RANELL A. GARCIA**, **ALBERT V. VOGEL, SARAH C. MCMAHON**, **MARK C. LEACHMAN, JUDITH L. LOVDOKKEN**, and **KENNETH R. KYLER**,	)
Plaintiffs,	)
5.	) *Case No.* CIV00-0349 (MV/WWD)
BRUCE BABBITT, Secretary of the Interior, and **JOSEPH ALSTON**, Superintendent, Grand Canyon National Park,	)
Defendants.*	)

INTERVENOR GRAND CANYON RIVER OUTFITTERS ASSOCIATION BRIEF OPPOSING PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

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I. INTRODUCTION

The plaintiffs, nine individual private boaters who seek an increased ability to participate in their own self-outfitter trips down the Colorado River through Grand Canyon National Park ("GCNP" or "Park"), initiated this lawsuit challenging the National Park Service's ("NPS") current allocation of river use. Plaintiffs claim that the existing allocation of use reflects an arbitrary and capricious judgment of the NPS, as well as violates the NPS Organic Act and the Due Process Clause of the Fifth Amendment.[1/] They effectively are seeking from this Court an order requiring the NPS to consider whether or not to adjust the current allocation. On June 21, 2000, this Court granted intervention to the Grand Canyon River Outfitters Association ("GCROA"), which represents companies holding contracts with the NPS to provide the public with an opportunity for professionally-outfitted boating trips through the Grand Canyon. Although GCROA and its members understand and appreciate the desire of these nine individual plaintiffs to increase their ability to obtain their own NPS permit to raft through GCNP, the plaintiffs have not presented any legal justification for this Court's intervention into the NPS's park planning process.

II. STATEMENT OF THE FACTS

[1/] Plaintiffs' Brief In Support Of Petition For Judicial Review Of Administrative Action at 1 (hereinafter "Pl. Br." or "brief").

Until the late 1960s, rafting down the Colorado River through the Grand Canyon was limited to only a small percentage of the population. Then, following the much publicized trips of presidential hopeful Robert F. Kennedy in 1965 and the outfall of support against the 1960s proposed damming of Marble Canyon, the number of visitors to the park grew dramatically, prompting NPS restrictions, including a ceiling on the use of the river.[1/] The NPS allocated use of the river by developing the concept of "user days," with members of the public using professional outfitters (concessioners) allocated a certain number of "user days" and members of the public running the river on their own under permit from the NPS also allocated a number of "user days." A "user day" represents one person on the river for one day. In 1973, the NPS reduced the allocation for professionally-guided recreational use from the NPS's existing interim allocation to 89,000 user days,[1/] but maintained the 1972 interim allocation for private use. (Rec. 24-41; Rec. 137-146). Although the NPS recognized at the time that it could set either a higher or lower carrying capacity, this user day level was chosen because the NPS had "observed its impact on the canyon, and no irreversible damage seem[ed] to have occurred." (Rec. 24-22; Rec. 24-44).

The NPS's early position on the allocation of use in the Grand Canyon was expressed in a July

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[2/] From 1960 to 1972, the number of boaters running the river annually grew from 205 to 16,432. (Rec. 137-145) Between 1967 and 1972, commercial use increased from 1,998 to 15,884 users, and private use increased from 101 to 548 users. (Rec. 43-1). In 1972, the NPS regulated use of the river more closely and set a ceiling on recreational use. (Rec. 137-146). As an interim measure, the NPS allotted 105,000 user days for professionally-outfitted (*i.e.*, commercial) recreational use and 7,600 user days for self-outfitted *(i.e.*, noncommercial) recreational use. (Rec. 137-146). In 1973, the NPS froze use at actual 1972 use levels, resulting in a sixteen percent reduction in the allocation of commercial user days. Actual commercial use in 1972 was less than the allotted commercial use because many of the concessioners were still developing and had not used their entire allotments. (Rec. 43-1).

[3/] *See* Rec. 43-1 ("The freezing of use levels resulted in an industry-wide 16 percent reduction in the allocation of commercial passenger/days, inasmuch as many companies were in a development stage and had not used their entire allotments.").

1975 letter from the Chief, Division of Visitor Services, NPS, responding on behalf of the Interior Secretary, to the president of one of the concessioners. The letter stated that the NPS recognized that the concessioner outfitters offered "the only means of access" for those "who do not wish to make a sizeable investment in equipment, have no desire to gain proficiency in boating skills or are not acquainted with a boat owner," and therefore that, "for the majority of Americans, a white water trip is more accessible through a commercial outfitter than by any other means." (Rec. 48-91). The letter further explained that the NPS believed that "[p]art of the apparent disparity in demand is due to the fact that a dynamic growth curve in the private sector is being compared to a static situation in commercial boating where growth was stemmed in 1971 and 1972," and stated that the NPS did not believe there should be any significant changes to the allocation ratio during the term of the then-current concession permits. *Id.* The NPS reiterated its position in an August 1975 letter from NPS Director to Representative Al Ullman, responding to suggestions to modify the allocation of use:

> We believe there may be some cause to adjust the present ratio. However, we are resisting the amount of change proposed by some. This is principally because we believe that the commercial outfitters provide the only practical means of access . . . for the vast majority of Americans. The 50 to 50 ratio proposed by a few would be unfair to people . . . who could make a river trip only with an outfitter. No one has an accurate count of the number of private boaters in the country, but certainly it is negligible as compared to the balance of the populace.

(Rec. 48-63).

In early 1976, following a three-year research program on visitor use and resource impacts, the NPS initiated preparation of a management plan for the river, the Colorado River Management Plan ("CRMP"). (Rec. 113-5). The NPS prepares and revises when appropriate general management plans for each unit of the National Park System, 16 U.S.C. § 1a-7, and under the umbrella of a general

plan it occasionally will prepare specific plans governing the use of particular resources. In June 1976, however, a group representing noncommercial river runners, the Wilderness Public Rights Fund ("WPRF"), as well as several individuals in an action filed in March 1977, challenged in two different cases the allocation of use. Among other relief, WPRF sought an injunction staying the NPS from extending or issuing new concessions permits, as well as an order directing the NPS to revise the allocation, providing for maximum utilization by private users. The individuals' action further alleged that the allocation violated their rights under the Fifth Amendment to the United States Constitution, U.S. CONST. amend. V, and their right to use and enjoy the National Parks under 16 U.S.C. § 3 and the Concessions Policy Act of 1965, 16 U.S.C. § 20. The courts in both cases granted summary judgment for the government, and on appeal the Ninth Circuit consolidated the two cases and affirmed the lower court judgments. *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1252 (9th Cir. 1979).

In 1979, following "an extensive public involvement program," the 1979 CRMP and the accompanying Environmental Impact Statement ("EIS"), prepared pursuant to the National Environmental Policy Act, were completed and approved. (Rec. 113-5). The 1979 CRMP provided for "significant increases in noncommercial participants, number of trips and user days." (Rec. 73-29). It established an allocation apportioning 115,500 user days, or sixty-eight percent, for users contracting with concessioners ("commercial") and 54,450 user days, or thirty-two percent, for private boaters ("noncommercial"). The allocation was "based on the best available information on the demand for commercial and noncommercial trips." (Rec. 73-28). Several factors complicated the NPS's allocation decision, including the absence of a means to count the number of potential passengers turned away by concessioners because certain dates are full, duplicate applications for private trips, and false applications for private trips. *Id.* Consequently, the 1979 CRMP states that "[t]he allocation ratio is,

because of the[se] factors, a best estimate based on experience and on interpretation of the available data." *Id.*

The 1979 CRMP was never finalized and NPS released a revised CRMP in 1981 (Rec. 137-140), which sought to address private boater concerns by providing for the 1979 recommended 616% increase in user days for self-outfitted trips from 1978 use levels (to 54,450 user days). (Rec. 254-37). Professionally-outfitted boaters, in contrast, were granted only a twenty-nine percent increase in user days (to 115,500 user days). *Id.* "These numbers reflected historic use levels, increases for the growing demand for the private, noncommercial allotment, and an across-the-board increase for each concessioner." (Rec. 137-146). In the process of reaching its final decision, the NPS had considered various alternatives, including maintaining use at 89,000 professionally-outfitted boater user days and 7,600 self-outfitted boater user days, increasing use levels, and decreasing use levels. (Rec. 254-37).

In March 1987, the NPS began an extensive review and revision of the 1981 CRMP in response to the need to address resource protection and public access concerns. (Rec. 137-140). It established an interdisciplinary planning team to carry out the planning effort and implemented an extensive public involvement process. The NPS identified the user day allocation, as well as use of the private allocation, as major issues for consideration in the development of a new management plan. (Rec. 113-17 - 113-19). With respect to use of the allocation by private boaters, the NPS expressed concern with what it could do to enhance the full use of the private use allocation, because only an average of 75 percent of that allocation had been utilized since 1984, a situation the NPS attributed to "trips occurring with less than maximum party size and less than maximum trip length" and to deficiencies in the private permitting system. (Rec. 113-8; Rec. 113-17). With respect to the user day allocation, the NPS explained that the current allocations were "based on the existing acceptable levels for the

quality of the natural resources and visitor experience." (Rec. 113-8). The questions presented by the NPS concerned the "condition of the natural and social resources within the river corridor" and whether "the existing visitor use allocations provide for acceptable levels of a quality experience and protection of the natural resources." *Id.* The issue workbook listed a number of possible alternatives for addressing the allocation issue: maintaining the existing allocation but increasing private launches; re-allocating some user days; creating a user-day pool accessible to both sectors; adjusting allocations based on an annual evaluation of demand; establishing a central reservation system for both sectors; and modifying the private permit system to reduce the waiting time for a permit. (Rec. 113-18).[1/]

The NPS issued a draft revised CRMP in November 1988. The NPS, in its draft environmental assessment ("EA") for the revised CRMP, observed that, "[a]lthough the allotments have never been totally utilized, the commercial utilization has reached near-100% levels in recent years due to the use of a user day pool; noncommercial average group size and trip length are below limits, resulting in less than that total utilization of allocation." (Rec. 156-159). Given the fact that a substantial percentage of the existing private allocation was going unused, the draft revised CRMP proposed additional private launches, modifications to the private permitting system, and certain other operational changes to help the private sector more fully use its allocation. (Rec. 156-21 - 156-22).

4/ In addressing this issue, the NPS sought "[t]o enhance utilization of existing allocations by modifying current policies and initiating new programs while maintaining adequate protection of the resource." (Rec. 128-14). In its discussion of current access and allocation policy, the NPS observed that "only an average of 75 percent of the user day allocation has been utilized." *Id.* While "[c]ommercial outfitters, with the advantage of a user day pool, a flexible schedule, and a 110% scheduling window, ha[d] utilized an average of 91% of their user day allocation over the last seven years," the NPS recognized that "deficiencies in the noncommercial permit distribution system have prevented full utilization of available user days." *Id.* Thus, the preferred alternative proposed to keep the allocations intact but adjust their management, noting that access to the Colorado River for all users would be increased through "[m]odifications to the existing distribution systems, administration of new policies regarding the noncommercial waiting list, and changes in commercial operational requirements." *Id.*

The NPS issued the final revised CRMP in September 1989. (Rec. 153.1-1 - 153.1-2). Although the 1989 CRMP maintained the total levels of use and the professionally-outfitted/self-outfitted allocation from the 1981 CRMP, limiting total recreational use to 169,950 user days, 115,500 user days for professionally-outfitted recreational users and 54,450 user days for self-outfitted recreational users, (Rec. 156-10), it included a number of provisions designed to benefit self-outfitted boaters. Specifically, the 1989 CRMP added thirty-eight supplemental private launches for the primary season, established a user day pool, provided for scheduling two years in advance to give additional flexibility for trip planning, and revised the cancellation system, in order to "improv[e] noncommercial access to the noncommercial allocation." (Rec. 149-46; Rec. 254-38). In a summary accompanying the 1989 CRMP, the NPS stated that "the NPS chose this alternative over attempting a reallocation by providing a method which allows for an increase in utilization of the noncommercial allocation."[1/] (Rec. 149-46).

[5/] The Summary of Public Comment noted the receipt of only seventeen comments on the allocation issue during the extended comment period on the draft revised CRMP. (Rec. 153.1-7).

In 1991, as recommended in the EA on the 1989 CRMP, the NPS established the Colorado River Constituency Panel, an advisory panel comprised of representatives of the NPS, other federal resource agencies, the private boating community, concessioners, environmental groups, the scientific community, river guides, and fishermen. The role of the panel was to "[r]epresent the full range of constituent groups in the review of annual monitoring results; [a]ssure that information flows back to constituent groups through the various representatives; [p]rovide park management a means of direct communication with the various constituents and the means of responding to their needs; [and] [p]rovide recommendations to management that will be considered during management's decision making process." (Rec. 165-6). The panel held its first meeting on January 10, 1991,[1/] with meetings held about twice a year thereafter. Although not raised at every panel meeting, the allocation issue was a frequent topic of discussion. (Rec. 165-32; Rec. 165-48; Rec. 165-158).

At the February 25, 1994 meeting, representatives of the private boating community stated that, while "the waiting list for a private permit has increased as demand for private permits has increased the number of people on the waiting list," there was no "equivalent measure of commercial demand." (Rec. 165-158). One commentator responded by stating that "[p]eople don't really have to wait 8 years to go on a non-commercial trip, they only have to wait to be the permit holder" and that a number of people "often go together every 2-3 years by making reverse invitations to each other depending on who gets a permit." *Id.* The truth of this statement was confirmed by one of the founders of Canyon REO, an organization that provides outfitting services to private boaters through the Grand

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[6/] Plaintiffs assert that a "primary topic of discussion" at this meeting was "the complaint from commercial operators that allowing noncommercial users the full amount of their current allocation caused increased contacts and an exacerbation of campsite competition." (Pl. Br. at 13). As discussed *infra*, p.41, this is unsupported by the Administrative Record (GCNP CRMP Administrative Record - 1966-2000 (hereinafter cited as "Rec.")) and simply incorrect. (Rec. 165-21).

Canyon. *Id.* A discussion then ensued about the utilization of the allocations, with a participant suggesting that both groups fully utilized the allocations in 1993. During the discussion, one private boater (not "Park Service personnel" as asserted in plaintiffs' brief, *see* Pl. Br. at 14) suggested that the current allocation system was "preventing equal access to the river." (Rec. 165-160). After a representative of the concessioners disagreed, an NPS official requested anyone to provide a "workable definition of equitable in this situation." *Id.* In response to comments made by representatives of the private boating community, the Chief of Concessions of the NPS indicated that it was "really a question of what is best for the Park and the overall public." *Id.*

In February 1994, in response to conversations with "the noncommercial constituents," River Subdistrict Ranger Mark Law, although highlighted in plaintiffs' brief (Pl. Br. at 14-15) yet simply a committed NPS employee and not necessarily speaking on behalf of the Park or the NPS, developed a draft proposal for increasing private access. The proposal, which purportedly attempted "to reduce th[e] wait, offer more noncommercial trips, and enhance the publics [sic] access to the Colorado River," recommended the following: extending the private boater primary season and moving 5,800 user days from the secondary season to the primary season; reducing launches operated by concessioners, increasing private boater launches, and decreasing the number of professionally-outfitted boaters allowed on the river on a daily basis; transferring 11,053 user days from members of the public interested in professionally-guided trips to self-outfitted boaters; transferring 4,057 user days from administrative use to self-outfitted boaters; and increasing the number of launches in the secondary season for self-outfitted boaters. (Rec. 170-4). NPS officials criticized the proposal as perpetuating the congestion/crowding problem (Rec. 170-19), and the Subdistrict Ranger developed a separate

draft proposal to address the noncommercial waiting list.[1/]

The constituency panel met again on November 25, 1994, the first meeting of the panel attended by then Superintendent Rob Arnberger. At that meeting, the Superintendent stated that, while Park management wanted input and advice from the panel, it was important to recognize that there were serious differences of opinion among the various constituencies. He added that "[r]egardless of the input and advice received, action will not always be the result. NPS has a specific mandate to preserve and protect while allowing use. Any actions taken are not likely to result from or conform to a consensus of this panel." (Rec. 165-147 - 165-148). The Superintendent further urged the members of the panel to accept that the NPS managed the user days on behalf of the American people and explained that the "user days belong to the U.S. public and the NPS acts on behalf of the public to allocate those user days for the benefit of the various publics." *Id.* He explained that it was unrealistic to expect consensus on the user day issue, and that he was going to do his best for the resource. *Id.* The Superintendent stated that he knew that the allocation issue required and deserved "a lot of consideration" and that the issue could be dealt with by the time the CRMP update came up in two years. (Rec. 165-153).

By the end of 1994, the private waiting list, started in 1980, had grown to 4,964, and the wait for new applicants was estimated at eight years. An internal NPS memorandum noted that "[c]ontinuation of [the] current *application/waiting list system* will indemnify the status quo and remove any possibility of changing the system for 10 years following the completion of the CRMP review process." (Rec. 175-1 (emphasis added)). The memorandum concluded that "[t]he *current*

[7/] In addition to suggesting the addition of launches, this proposal suggested: restricting additions to the waiting list; requiring applicants to list all trip participants and allowing only one name per trip to remain on the list, potentially reducing the list by 25%; and increasing "purges" from the list. (Rec. 170-14 - 170-16).

waiting list/permit system has not and is not meeting the requirements of a rapidly growing recreational public and will not improve over time. This system . . . is increasingly the target of complaints due to the unrealistic waiting period." (Rec. 175-2 (emphasis added)).

At the April 10, 1995 constituency panel meeting, representatives of the private boating community, the concessioners, and river guides (representing the guides as well as the professionally-guided public) gave presentations on the access/allocation issue. (Rec. 165-215). Issues discussed included the use allocation, the counting of guide user days, the private waiting list and what constitutes a "quality" trip. *Id.* During the discussion, it was suggested that the allocation issue could not be resolved and that the issue should be put on hold. (Rec. 165-216). The Superintendent also reminded the members of the panel that access/allocation was only one issue, and that the CRMP is *not an allocation plan*, but a *resource management plan*. *Id.*

In September 1997, the NPS formally initiated the process for revising the 1989 CRMP with a series of public scoping workshops. As indicated by the May 1998 issue of Soundings, the newsletter of the CRMP process, the NPS identified several objectives with respect to access and allocation of use: "improve access for all who seek a Grand Canyon river trip; evaluate the impacts of current use levels and seasonal distribution of use; [and] evaluate alternative access systems that serve the public regardless of whether they choose to take a professionally-outfitted or self-outfitted river trip." (Rec. 207-5). Early on in this process, Park management observed that, while it would closely evaluate the "user-day" method of allocating use, and explore alternative methods of launch scheduling that might improve public access and protect resources, "[u]se levels and distribution between groups [would] not be arbitrarily adjusted based on perceptions." (Rec. 207-6; Rec. 238-22). The NPS also declared that the allocation of use issue could not and would not be addressed in isolation. (Rec. 207-6). In a

March 17, 1998 CRMP Team Meeting, Chief of Resource Management Dave Haskell suggested that before the Park could deal directly with the allocation of use among user groups, it would be necessary to look closely at the other inter-related issues. (Rec. 238-16). The NPS noted that "[t]he allocation of use will be determined by the NPS as a by-product of other decisions made." (Rec. 238-22).[1/]

In June 1998, the NPS announced the formation of workgroups to focus on certain issues: alternative access methods or systems; distribution and volume of use; the private permitting system; the spectrum of outfitted trips and services; and resource stewardship. (Rec. 202-1). The role of the workgroups was to describe and evaluate alternatives and provide the NPS with adequate information for decision-making. (Rec. 202-2). As a result of these workgroups, numerous proposals with respect to both access and the private permitting system were submitted to the planning team. Also in the summer of 1998, as part of the CRMP revision process, the NPS initiated a research program, including a visitor use study, trip observation, and a computerized trip simulator. (Rec. 225-8). The trip simulator, which simulates boating traffic on the river, was designed to serve as a management tool to help accommodate demand without impacting park resources.[1/] (Rec. 239-8).

Moreover, in October 1998, the Superintendent implemented an experimental increase in noncommercial use, providing for additional private launches between November 1998 and March 1999. These additional launches were made available exclusively for private boater trips. (Rec. 206-8). This test launch program was repeated for the 1999-2000 secondary season.

8/ These other decisions would relate to issues such as the distribution and volume of use, the noncommercial permit system, the appropriate spectrum of outfitter trips and services, and wilderness management. (Rec. 238-20 - 238-27).

9/ Data for the simulator was compiled from trip reports collected from private trip leaders, commercial guides, park rangers, and others. (Rec. 239-8). The visitor use study was designed "to identify public opinion on current management practices and define the range of experiences that a Grand Canyon river trip should offer." *Id.*

While the CRMP planning process was ongoing, the Park also began to develop a draft Wilderness Management Plan ("WMP") and EA, and it intended to revise the 1988 Backcountry Management Plan ("BMP"). This process began in 1995 and resulted in the release of a draft WMP and EA on June 1, 1998. (Rec. 268-6). The purpose of the WMP was to provide Park guidance on the management of land-based potential wilderness areas. The WMP, however, quickly became confused with wilderness issues associated with the management of the river (Rec. 255-10), and in May 1999 Park management completed its review of public comment on the Draft WMP and determined that "an extensive NEPA process is needed to integrate the land-based and river-based resources of the Park's proposed wilderness areas." (Rec. 268-6). Park management consequently decided to merge its planning efforts into a single EIS/BMP that would address management issues comprehensively. (Rec. 259-2; Rec. 268-6).

On February 23, 2000, the Superintendent temporarily halted work on merging the planning processes into a single planning effort. The Superintendent's suspension of the planning effort was necessitated by a "lack of available fiscal and human resources to complete a comprehensive planning effort," an "inability to resolve many of the issues prior to resolution of the park's wilderness recommendation," polarization among backcountry and river user groups and interests that had intensified to the point of affecting the park's ability to reach an acceptable resolution, and the existence of other projects of "higher importance" that needed to be accomplished and were competing for the Park's limited resources. (Rec. 262-2; Rec. 263-6; Rec. 263-14 - 263-15). The push to merge the BMP and CRMP into a single Wilderness Plan represented "a much different scenario than originally intended and funded," as the plan envisioned at the start of the process was not intended to resolve all of the issues that had been pressed by various constituency groups. (Rec. 261-3). The NPS

concluded that it could not accomplish the comprehensive EIS with the available resources and that, given the limited resources, there were higher priority items concerning management of the GCNP that needed to be addressed. (Rec. 263-6; Rec. 263-15).

The NPS's decision to halt the process, however, was "not a decision to halt progress on the resolution of key issues." (Rec. 262-2). Rather, the NPS understood that significant progress could be made outside of the EIS on many issues, and it expressed its intent to continue to explore improvements that could be made (Rec. 263-6), including on the allocation issue characterized by the Superintendent as "the most problematic of all the issues to solve." (Rec. 263-10).

III. ARGUMENT

Plaintiffs' principal argument in their brief is that they object to the current allocation and claim that it is arbitrary and capricious, and that it denies them of due process and an alleged right of access to the GCNP. They would have this Court order that the NPS adjust, within sixty days, the allocation of use on what plaintiffs perceive to be an "equitable" basis, limited to whatever information that is now before the agency and apparently in disregard of any further public input and the statutory mandates governing the agency, including the fact that there is no such statutory requirement. They also would have this Court enjoin any future concession contracts or enjoin any extensions of the current concession contracts.

Plaintiffs' brief overlooks fundamental principles of administrative law, and it effectively would have this Court manage the Grand Canyon river corridor. To begin with, the plaintiffs' arguments are, in effect, primarily directed at actions that occurred well-over six years ago, and as such cannot even be maintained. Plaintiffs, as a consequence, cannot now complain that the allocation of Colorado River use

in the Grand Canyon is arbitrary and capricious or an abuse of discretion, or otherwise not in accordance with law. Moreover, plaintiffs' arguments are based on virtually no cited authority in their brief, ignore relevant and governing law, and attempt to show that the NPS was arbitrary and capricious but only paint half a picture. And lastly, they would have this Court order exceptional and unjustified relief.

A. <u>The Only Legitimate Issue is Whether the NPS Improperly *Terminated* The CRMP Process or "Unreasonably Withheld Agency Action"</u>

At the outset, the plaintiffs' motion attempts to obscure the relevant "action" that they would have this Court review.[1/] To prevail, the private boaters must first demonstrate that there is a "final agency action" and second that such "action" is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2) (1998); *Colorado Envt'l Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

10/ Indeed, plaintiffs' jurisdictional statement suggests that they are seeking judicial review of "regulations" (Pl. Br. at 1), but there are no "legislative" or binding regulations that the plaintiffs have identified. Plaintiffs are not likely challenging 36 C.F.R. § 7.4 (1999), last amended in 1987. Intervenor GCROA, therefore, presumes that plaintiffs have used the term loosely.

Motor Vehicle Mfrs. Assn v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The arbitrary and capricious standard requires that a court "determine whether the agency considered all the relevant factors and whether there has been a clear error of judgment." *Olenhouse*, 42 F.3d at 1574 (citing *Motor Vehicle Mfrs. Assn*, *supra*). This means that an agency's decision must be both "reasoned" and supported by the facts in the record. *Id.* at 1575; *see also New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Service*, 81 F. Supp.2d 1141 (D. N.M. 1999). "Evidence is substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion. Under the substantial evidence test, we consider conflicts in the record and specifically define those facts which support the agency's decision. 'This requires a plenary review of the record as it existed.'" *Tom Rapp v. United States Dep't of Treasury*, 52 F.3d 1510 (10th Cir. 1995) (citations omitted).[1/] "The court's function is exhausted where a rationale basis is found for the agency action take." *Sabin v. Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975).

Plaintiffs, in their complaint as well as in their brief, are not entirely clear about identifying a "final agency action" that would serve as the fundamental prerequisite for judicial review. "When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). This means that a plaintiff "must direct

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[11/] *See also Hoyl v. Babbitt*, 129 F.3d 1377, 1383 (10th Cir. 1997) ("Evidence is generally substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion. We have further defined substantial evidence as 'such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion'. Although our inquiry into the record is careful and searching, we may not substitute our judgment for that of the agency. Thus, even though we may not agree with the agency's ultimate findings, we will not set them aside if they are supported by substantial evidence.") (citations omitted).

its attack against some particular 'agency action' that causes it harm." *Id.* at 891. In the absence of final agency action, a court has no jurisdiction under APA § 706. *Sierra Club. v. Peterson*, 228 F.3d 559 (5th Cir. 2000); *Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916, 918 (D.C. Cir. 1992).

It would appear that a majority of plaintiffs' arguments relate to their allegation that the allocation is somehow arbitrary and capricious, but, aside from our disagreement with such an assertion, such a claim nonetheless represents an impermissible attack on "actions" that occurred well-beyond the statute of limitations period. And to allow a challenge to the existing allocation itself, would eviscerate the purpose of the statute of limitations. This is because the allocation itself is not an "action" subject to review under the APA, but rather it is the decision (the action) that approved the allocation that, if anything,[1/] is subject to judicial review. Except as explained below, the decisions that established the existing allocation are the NPS's 1972 interim plan, the 1979 CRMP, the 1981 CRMP, and the 1989 CRMP. Yet, the decisions on the allocation contained in each of those agency actions are time-barred; plaintiffs' challenged has been brought more than six years after the causes of action accrued on these actions.

Plaintiffs' claims, brought under the APA, are subject to the six-year statute of limitations period found at 28 U.S.C. § 2401(a). *See Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000) ("In the absence of a specific statutory limitations period, a civil action against the United States under the APA is subject to the six year limitations period found in 28 U.S.C. § 2401(a)."); *Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494-95 (10th Cir. 1997); *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990) (holding that the general

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12/ This, of course, assumes that the matter is not left exclusively to the discretion of the NPS.

six-year statute of limitations of 28 U.S.C. § 2401(a) applies to actions brought under the APA); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (same) (cited in *Nagahi*, 219 F.3d at 1171, and *Chemical Weapons Working Group, Inc.*, 111 F.3d at 1494-95); *Montana Snowmobile Ass'n v. Wildes*, 103 F. Supp.2d 1239 (D. Mont. 2000). Section 2401(a) provides, in relevant part: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (1998).

Plaintiffs' complaint represents a transparent effort to have this Court overturn decisions of the NPS that were made over six years ago. The NPS's decisions to approve or continue the existing allocation all occurred in the context of agency actions taken over six years ago, a fact that plaintiffs appear to acknowledge. Indeed, Section C.I.B of plaintiffs' brief is titled: "The Park Service refused to consider a relevant fact of the issue of allocation in the 1989 Plan and the allocation must be set aside." Pl. Br. at 31.[1/] In that section, plaintiffs seek a finding by this Court that the "allocation between the self guided public and the commercial users is inequitable, arbitrary and capricious, and an abuse of discretion" and an order that the "allocation of use between the self guided public and the commercial users be set aside and that the Park Service establish an allocation based upon current data and information in its possession within a reasonable time not to exceed sixty days." Pl. Br. at 32. Similarly, plaintiffs' request for relief in Section C.I.A. of their brief states: "There is simply no substantial

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13/ *See also* Pl. Br. at 28 ("[T]he record is clear that the Park Service not only failed but consciously refused to consider a relevant factor, an important aspect, of the problem of allocation when it adopted the current allocation in 1989 . . . ."); Pl. Brief at 31 ("There is no substantial Evidence in the Administrative Record to support the current allocation established by the Park Service in 1979 and adopted in 1989 and there is substantial evidence that the Park Service failed and refused to consider the factor of exponential growth in the demand for access for the self guided boating public when it

evidence in the record upon which the allocation established in 1979 and adopted in 1989 without review can be based and the court must set the allocation aside." Pl. Br. at 30. Plaintiffs further state that, among other relief, "Plaintiffs seek judicial review of the Park Service actions which established the allocation in 1979."[1/] Pl. Br. at 4. So too, plaintiffs further request that this Court find that: "there is no substantial evidence in the Administrative Record to support the allocation of use adopted by the Park Service in the 1979 Colorado River Management Plan; there is no substantial evidence in the Administrative Record to support the allocation of use adopted by the Park Service in the 1989 Colorado River Management Plan; the Park Service failed and refused to consider the relevant and important factor of the growth of demand for noncommercial river permits when it adopted the allocation of use established in the 1989 Colorado River Management Plan; [and that] the Park Service failed to follow its own procedure and guidelines set forth in the 1979 Colorado River Management Plan, to review and adjust allocation within three to five years." Pl. Br. at 44-45.

Consequently, plaintiffs cannot now challenge the existing allocation based upon time-barred planning decisions approving or continuing the existing allocation, as judicial review of those actions is barred by the six-year statute of limitations of 28 U.S.C. § 2401(a).

Instead, pursuant to the APA, plaintiffs are limited to identifying a non-time-barred relevant agency action and arguing, if at all, that such an action is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. The decision to suspend temporarily the latest planning process or the alleged unreasonable withholding of reconsideration of, *inter alia*, the allocation are the

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adopted the current allocation in the 1989 CRMP.").

[14/] *See also* Pl. Br. at 24 ("Plaintiffs argue that the allocation established in 1979, still in effect today, was not based on substantial evidence and should be set aside.").

only two colorable non-time-barred actions identified by plaintiffs in their complaint, as well as in their brief.

B. **The NPS Neither Improperly *Terminated* The CRMP Process Nor "Unreasonably Withheld Agency Action"**

Plaintiffs have potentially two, possibly conflicting, theories for seeking review under the APA. First, plaintiffs could be arguing that the decision by the NPS to suspend temporarily its CRMP planning process is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. Conversely, plaintiffs could be arguing that an alleged decision by the NPS not to consider a review of the allocation is somehow arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. In many respects, these may be two sides of the same coin, but the difference should be noted at the outset. To the extent this Court is being asked to review the February 23, 2000 decision by the NPS to suspend its CRMP planning process, plaintiffs would have to establish that such a decision was "final" as well as "ripe for review."

The Supreme Court has identified two criteria that must be satisfied for agency action to be final. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The "action" must be one from "which 'rights or obligations have been determined,' or from which 'legal consequences will flow[,]" and it "must mark the 'consummation' of the agency's decisionmaking process," and not be "of a merely tentative or interlocutory nature." *Id.* (quoting (*Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Plaintiffs have a difficult time establishing that the February 23, 2000 decision represents the consummation of the agency's decisonmaking process, when the decision itself reflects that it is only temporary–and in all likelihood might be restarted sometime in the near future.

Even if this Court concluded that the February 23, 2000 decision is "final" under the APA, this Court should nonetheless require that plaintiffs establish that the February 23, 2000 decision is ripe for

review. As the Supreme Court made clear in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), the ripeness doctrine "protect[s] the agencies from judicial interference until an administrative decision has been formalized." A principal element in whether a matter is fit for review is whether "future administrative proceedings are contemplated." *Id. See also Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665, 1670-71 (1998); *Sierra Club v. Yuetter*, 911 F.2d 1405, 1420 (10th Cir. 1990). As the D.C. Circuit recently observed, a case only becomes fit for review once "there no longer exists the possibility that further agency action will alter the claim in any fashion." *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 51 (D.C. Cir. 1999).[1/] If a case is fit for review, and there would be hardship to the parties from withholding court consideration, *Abbott Laboratories*, 387 U.S. at 148-49, then and only then is the case ripe. *See generally Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998). Here, plaintiffs have not even attempted to demonstrate why the February 23, 2000 "decision" might be an action that is ripe for review.

15/ *See also Public Citizen Health Research Group v. Commissioner, FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984) ("The agency is denied full opportunity to apply its expertise and to correct errors or modify positions in the course of a proceeding, the integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule, and the judicial economy is disserved because judicial review might prove unnecessary if persons seeking such review are able to convince the agency to alter a tentative position.").

This leaves plaintiffs with what, in effect, appears to be their principal underlying concern that the NPS has somehow unreasonably withheld agency action–despite the fact that the NPS has *not* chosen not to act, but rather chosen to act (*e.g.*, the CRMP revision process) and then temporarily suspended that process.[1/]

But the NPS's alleged refusal to review the allocation of use between professionally-guided and self-guided boaters does not constitute action unreasonably delayed. Plaintiffs allege that "the action of the Park Service in halting the review required by the 1979 CRMP, and the refusal of the Park Service to review and consider the allocation established in 1979 for twenty-one years constitutes action 'unreasonably delayed.'" Pl. Br. at 25. Contrary to plaintiffs' argument, and as demonstrated by the Administrative Record, the NPS has reviewed and considered the allocation of use issue over this twenty-one year period. Indeed, it recently began a process to review the allocation in 1997, and it has simply suspended temporarily that review.[1/] And, although the NPS has not modified the allocation between self-outfitted boaters and professionally-outfitted boaters in accordance with plaintiffs' desires,

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16/ This is not to suggest that we believe that plaintiffs can transform a non-final action into an agency's failure to act. *See Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) ("Courts have permitted jurisdiction under the limited exception to the finality doctrine [under 706(1)] only when there has been a genuine failure to act. This court has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act'.") (*citing Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991) (denying jurisdiction where deficiencies in energy guidelines rather than actual failure to act)); *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) ("The agency has acted . . . . Petitioners just do not like what the Commission did. . . . Our acceptance of petitioners' argument would make a nullity of statutory deadlines. Almost any objection to an agency action can be dressed up as an agency's failure to act.").

17/ The NPS also thoroughly reviewed and considered the allocation issue as part of the CRMP revision process that began in 1997 and was put on hold in February 2000. However, rather than making a final decision on the allocation issue, the February 2000 decision temporarily halted the decision-making process.

the NPS has neither acted arbitrarily or capriciously nor ignored the highly sensitive and complex allocation issue, as plaintiffs claim.

1. **Plaintiffs Have Failed To Satisfy The Requisite Criteria for A Finding that the NPS Has Unreasonably Withheld Agency Action**

The APA requires reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1998); *see Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186-87 (10th Cir. 1999); *Southwest Center for Biological Diversity v. Clark*, 90 F. Supp. 2d 1300, 1310-11 (D. N.M. 1999) ("[T]he Tenth Circuit . . . has held that courts may entertain challenges to unreasonably delayed agency action on the basis of Section 1331 jurisdiction and Section 706(1) of the APA."). Where, as here, the "agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions–such as the APA's general admonition that agencies conclude matters presented to them 'within a reasonable time,' . . . a court must compel only action that is delayed unreasonably." *Forest Guardians*, 174 F.3d at 1190 (quoting 5 U.S.C. § 555(b)). This Court has stated that jurisdiction is appropriate in actions alleging unreasonably delayed agency action "if the plaintiff has established (1) a clear duty owed to him or her by the agency; (2) a duty which is mandatory and not discretionary; and (3) a clear right to relief." *Yu v. Brown*, 36 F. Supp. 2d 922, 930 (D. N.M. 1999) (citing *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995)).

Because plaintiffs have not established any of these three conditions, their claim of action unreasonably delayed must be denied. First, plaintiffs cannot establish a mandatory duty to act, because any review, consideration, and adjustment of the allocation of use is a matter within the sound discretion of the NPS. This is not a case, like in *Yu*, where the agency has a mandatory, non-discretionary duty to act and has refused to so act. *See Yu*, 36 F. Supp. 2d at 931 (finding that the Immigration and Naturalization Service had a mandatory, non-discretionary duty to act on the plaintiffs' applications for

special immigrant juvenile status). Rather, this is a case where the plaintiffs are challenging decisions that have been made by the NPS entirely within the exercise of its discretion. The NPS has no non-discretionary duty under any law to allocate, or revisit the allocation of, the use of the Colorado River through GCNP. This is not, then, a case where the agency's alleged inaction results in a violation of the agency's underlying statutory mandates. *E.g.*, *Sierra Club v. Yeutter*, 911 F.2d 1405, 1413-14 (10th Cir. 1990); *Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988).

Moreover, plaintiffs cannot show that there is a clear right to relief. This Court has explained that a "clear and certain" right to injunctive relief "requires first that Plaintiffs have no other adequate remedy available to them, and second that Plaintiffs have established a *prima facie* case that Defendants have violated the non-discretionary duty owed them." *Yu*, 36 F. Supp. 2d at 932. In addition, the court also must consider "whether there are any other impediments to review of plaintiffs' claims, as raised by Defendants, including a lack of finality, failure to exhaust administrative remedies, or ripeness problems." *Id.* In the present case, as discussed above, plaintiffs have not established a mandatory, non-discretionary duty on the part of the NPS.[1/] Nor have they established a *prima facie* case that NPS has breached any duty.

[18/] It should be noted that, although the 1989 CRMP provides that the NPS would undertake a comprehensive plan review within five to ten years, the NPS did begin that review process and has simply suspended it temporarily. Moreover, the language in the plan reflects agency guidance and private or third parties may not seek to bind an agency based upon such guidance documents. *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d. 819 (10th Cir. 2000). Many plans across the country contain broad desires and goals of the agency, which often must succumb to the realities of limited resources, limited budgets, and the difficulties inherent in addressing complex and controversial issues. And, even in instances where agencies are directed by Congress to review their programs from "time to time," courts refuse to impose a nondiscretionary duty. *See NRDC v. Thomas*, 885 F.2d 1067, 1075 (2d Cir. 1989) (Clean Air Act provision requiring revision of a list of air pollutants "from time to time" does not impose nondiscretionary duty); *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 661 (D.C. Cir. 1975) (Clean Air Act provision imposing "time to time" obligation on the Environmental Protection Agency was not a nondiscretionary duty).

Plaintiffs' assertions also obscure the fact that the NPS has considered and reviewed the allocation of use between professionally-guided boaters and self-guided boaters as part of its ongoing management of the Park since 1979. In 1981, the NPS issued a revised CRMP that increased the noncommercial allocation by 616% from 1978 use levels. (Rec. 254-37). Although the NPS's decision on the allocation of use was complicated by a variety of factors, including the lack of a means of counting how many passengers are turned away by concessioners because certain dates are full, as well as the filing of duplicate or false applications for private trips, the NPS established an allocation in the 1981 CRMP "based on experience and on interpretation of the available data." (Rec. 73-28).

In addition, the Administrative Record is replete with evidence that the NPS reviewed and considered the access/allocation issue during its development of the 1989 CRMP. The record is clear that the NPS examined the user day allocation between professionally-outfitted boaters and self-outfitted boaters, and whether the existing allocation provided for acceptable levels of a quality experience and protection of the natural resources, all as part of the issues for consideration in the development of a new management plan. (Rec. 113-8; Rec. 113-17 - 113-19). During the planning process, the NPS identified and considered a number of possible alternatives for addressing the allocation issue, including reallocating user days from "the commercial sector" to "the private sector." (Rec. 113-18). In reviewing and considering the access/allocation issue, however, the NPS found that, while the allocation for professionally-outfitted boaters was being nearly fully utilized, the available allocation for self-outfitted boaters exceeded actual use by self-outfitted boaters by twenty-five percent. The NPS determined that this under-utilization of the private allocation was due to deficiencies in the private permit system and to the fact that self-outfitted boaters were taking smaller and shorter trips than permitted under NPS policy. (Rec. 128-14; Rec. 113-17; Rec. 156-159). Consequently, when the

NPS issued the 1989 CRMP, it decided to improve access for the self-outfitted boating community by addressing the underutilization of the private allocation. It did so by changing aspects of the private permitting system and by modifying certain operational requirements, rather than by reallocating use away from members of the public interested in professionally-outfitted trips (who were nearly fully utilizing the allocation for such trips). (Rec. 115-1 - 115-2; Rec. 128-14; Rec. 149-46; Rec. 156-21 - 156-22; Rec. 254-38). The fact that the NPS considered a reallocation of use is reflected in the NPS's statement at the time that it was choosing "this alternative over attempting a reallocation by providing a method which allows for an increase in utilization of the noncommercial allocation." (Rec. 149-46).

The NPS also considered the allocation issue and the ostensible growth in demand for self-outfitted trips in the CRMP review process that began in 1997 and which subsequently was put on hold by the Superintendent in February 2000. The Administrative Record clearly indicates that, from early-on in the review process, Park management viewed the allocation of use as one of the issues under consideration in the CRMP revision. (Rec. 165-148; Rec. 202-1; Rec. 207-5 - 207-6; Rec. 246-87; Rec. 258-7; Rec. 259-39; Rec. 263-10). A February 1999 letter from the Superintendent states that "[u]nder the current process for the revision of the [CRMP]," Park management is "examining the allocation of use between the commercially-served public and those desiring to take noncommercial, self-outfitted trips." (Rec 254-39). This is further evidenced by the fact that Park management established workgroups to focus on access and on the distribution and volume of use, and implemented a research program, consisting of a visitor use study, observation, and a computerized trip simulator (using data compiled from trip reports submitted by private trip leaders, among others), to develop information relevant to making decisions relating to access and allocation of use. (Rec. 202-1; Rec. 225-8; Rec. 239-8).

Consequently, plaintiffs' claim that the NPS has "unreasonably delayed" agency action cannot be sustained on the basis of the Administrative Record, which demonstrates that the NPS has considered on a number of occasions since 1979 the allocation question. It is true that the NPS has not acted to adjust the allocation, as these plaintiffs would like, but plaintiffs cannot transform the NPS's treatment of this complex and controversial issue over the years as somehow reflective of the narrow circumstances required to justify judicial review under section 706(1) of the APA. As such, jurisdiction is not appropriate and plaintiffs' claim under 5 U.S.C. § 706(1) should be denied.

2. Even Assuming Jurisdiction Is Appropriate, the NPS's Decision Declining to Review at This Time the Current Allocation (Whether As a Consequence of the February 23, 2000 Decision or as a Consequence of Allegedly Not Acting), is Not Arbitrary or Capricious

Even assuming jurisdiction is appropriate, plaintiffs have failed to demonstrate that the NPS's alleged failure to review the allocation of use of the Colorado River through the GCNP is arbitrary or capricious. Plaintiffs' arguments not only ignore fundamental principles governing the use of national parks in general, and the GCNP in particular, but also mischaracterize the Administrative Record and the issues confronting the NPS.

Plaintiffs' brief lacks any pretense of explaining the legislative mandates governing the use of the Colorado River in the Grand Canyon. There is, after all, no requirement that the use of the river be allocated, or that the use be allocated in any particular way. The plaintiffs simply have no authority for their underlying proposition that "[u]nder the law, the Park Service must be compelled to adjust the allocation of use between the self-guided boaters and commercial users quickly and equitably based on

the current data in its possession." Pl. Br. at 35. Rather, the NPS must administer the park in accordance with the NPS organic legislation,[1/] the GCNP enabling legislation,[1/] and the NPS concession laws. It is the combination of these and other public laws, such as the National Environmental Policy Act (42 U.S.C. §§ 4321-4345), that informs whether and how the river will be allocated among various user groups, such as those seeking professionally-guided tours, those undertaking a scientific inquiry, those who are handicapped and seeking a river-rafting experience, and those, like the plaintiffs, who wish to participate in their own self-guided trips. *See generally Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819 (10th Cir. 2000) (discussing the management of Canyonlands National Park, and reversing district court injunction and noting that the question was whether NPS's actions were inconsistent with the clear intent of Congress expressed in the Organic Act

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19/ In 1916, Congress created the NPS when it adopted the Organic Act:

> The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1, 39 Stat. 535 (Aug. 25, 1916). In 1978, Congress attached a rider to the Redwood National Park Expansion Act, which sought, *inter alia*, to strengthen the NPS's ability to protect park resources. 16 U.S.C. § 1a-1.

20/ Act Establishing the Grand Canyon National Park, 40 Stat. 1175, (Feb. 26, 1919); Grand Canyon National Park Enlargement Act, 88 Stat. 2089, Pub. L. No. 93-620 (Jan. 3, 1975); 89 Stat. 172, Pub. L. No. 94-31 (June 10,1975) (amending Enlargement Act); *see also* Pub. L. No. 100-91, 101 Stat. 676 (1987) (codified at 16 U.S.C. § 1a-1 note) (Overflights Act); 36 C.F.R. § 7.4 (1999).

and enabling legislation).[1]

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[21] Courts routinely observe that Congress has delegated to the Department of the Interior broad discretion in managing and choosing among conflicting uses of the public lands. *See Organized Fisherman of Florida v. Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985); *see also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996); *National Wildlife Fed'n v. National Park Service*, 669 F. Supp. 384, 391 (D. Wyo. 1987) ("The Organic Act is silent as to how the protection of park resources and their administration are to be effected. Under such circumstances, the Park Service has broad discretion in determining which avenues best achieve the Organic Act's mandate. Further, the Park Service is empowered with the authority to determine what uses of park resources are proper and what proportion of the park's resources are available for such use.") (citations omitted); *Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265 (D. Colo. 1986) (Secretary exercises broad authority). *See generally Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1073-74 (9th Cir. 1997) (noting cases confirming the general principle that the NPS enjoys broad discretion under its Organic Act).

Plaintiffs' arguments, therefore, present a myopic view of the many issues that the NPS must confront when it allocates a scarce and important resource such as the use of the Colorado River through the Grand Canyon. The history of the national parks is fraught with the never-ending effort to protect park resources for future generations while at the same time allowing public access to those same resources. The mission of the NPS is to protect and preserve the scenic, natural, and historic resources for enjoyment by present and future generations. 16 U.S.C. § 1. And it has been, after all, the public's ability to observe and enjoy the nation's national parks that initially facilitated and has since sustained and expanded the national park system.[1/] Indeed, the Grand Canyon ultimately was protected from being dammed only because the general public learned about the unique recreational and educational experience that was being threatened by a Bureau of Reclamation proposal to dam the river. The public generally became aware of the Grand Canyon experience after concessioners and members of the environmental community publicized the river and what was at risk. It was at this time that the leader of the Sierra Club and others began to write about the unique Grand Canyon experience, and ultimately protected the river from being dammed.[1/]

22/ As one commentator observes, "[e]stablishment of national parks might not have been possible without the tourist industry, and this informal alliance between the preservationists and the tourist industry has endured ever since." Richard J. Ansson, Jr., *Our National Parks-Overcrowded, Underfunded, and Besieged with a Myriad of Vexing Problems: How Can We Best Fund our Imperiled National Park System?*, 14 J. LAND USE & ENVTL. LAW 1, 4-5 (1998). *See generally* RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY (1997).

23/ *See* DAVID LAVENDER, RIVER RUNNERS OF THE GRAND CANYON 129-131 (Grand Canyon Natural History Ass'n 1985). *See generally* ELLIOT POERT, THE PLACE NO ONE KNEW: GLEN CANYON ON THE COLORADO (David Brower, Ed., 1963); FRANÇOIS LEYDET, TIME AND THE RIVER FLOWING: GRAND CANYON (David Brower, Ed., 1964).

Plaintiffs simply ignore that the issue of allocation is not merely a matter of choosing a formula satisfactory to one, two, three or even more interested parties. The issue of the proper allocation of the Colorado River resource through the Grand Canyon for boating use is not, as plaintiffs assert, a dispute between self-guided recreational users of the river on the one hand and profit-seeking, commercial interests on the other. It is a decision that the NPS must make, if at all, in accordance with its legislative mandates and one that is in the ultimate interest of the public–that is, all the people as well as future generations. Indeed, plaintiffs overlook the fundamental principle that concessioners, admittedly commercial companies, are under contract with the NPS to provide a service to the public. Early on, Congress sought to attract the public to the national parks by securing the provision of services and accommodations within the nation's parks. [1/] It did this by adopting policies designed to entice companies to operate in the parks. These policies ultimately became embodied in the Concessions Policy Act of 1965, 16 U.S.C. § 20, which offered concessioners various contractual guarantees in return for taking on the risk of operating in the parks.[1/] Congress recently adopted a new law governing concession operations in the national parks, the Concessions Management Improvement Act of 1998, 112 Stat. 3497, 3503, Pub. L. 105-391 (Nov. 13, 1998), which expressly retained some of the unique aspects of the 1965 Act with respect to outfitters and guides (*e.g.*, concessioners providing guided trips down the Colorado River through Grand Canyon). This law establishes, for instance, how the NPS is to contract for concession services in the parks, the payments to be made to the NPS from concessions operations, as well as the means for transferring concessions contracts or permits. *Id.*

[24/] The Grand Canyon enabling legislation specifically references the use of concessioners to provide services to the public. 40 Stat. 1175, 1177, ch. 44, Sec. 2 (1919).

[25/] *See* Ansson, *supra*, at 31 ("Congress adopted the 1965 Concession Policy Act to entice business entities to locate to our national parks and provide the growing number of visitors with needed services.").

Concessioners, therefore, serve an important public purpose and take considerable offense at plaintiffs' suggestions to the contrary. (Pl. Br. at 36). Many individuals have neither the means nor the skills necessary to organize and operate their own private trips on the river, and the NPS can no more ignore that vast public than it can ignore those in the select group who wish to organize and take their own non-professionally guided trips.[1/] In response to a similar argument by the plaintiffs in *Wilderness Public Rights Fund v. Kleppe*, the Ninth Circuit, in a case curiously absent from plaintiffs' brief, admonished:

> Throughout these proceedings Wilderness Public Rights Fund 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. The Fund ignores the fact that the commercial operators, as concessioners of the Service, undertake a public function to provide services that the NPS deems desirable for

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[26/] Indeed, plaintiffs go to considerable length to characterize the events in the 1970s, often telling only one side of the story, and routinely overlook the NPS continued refrain that:

> We believe that it is wrong to consider the use of recreation areas by persons who use the service of commercial outfitters as somehow less worthy than use by those who do so on their own or as a member of a nonprofit group. In actuality, for the majority of Americans, a white water raft trip is more accessible through a commercial outfitter than by any other means. Few people possess the equipment or skills necessary to raft these rivers on their own or have the necessary connections to participate in a trip sponsored by a nonprofit group. In this perspective, we do not consider the ratio at Grand Canyon to be contrary to 16 U.S.C. 3 dealing with free access. This is not a question of commercial versus private use but of one segment of the public as opposed to another.

Director Dickinson, to Hon. Lloyd Meeds, July 3, 1975 (Rec. 48-95).

> those visiting the area. The basic face-off is not between the commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.

Wilderness Public Rights Fund, 608 F.2d at 1254; *cf. Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1282 n.16 (10th Cir. 1991) (citing *Wilderness Public Rights Fund*). Properly characterized then, the issue is one of allocating recreational use among different segments of the public.

It is not then a simple matter to "adjust" the allocation of use between those offering professionally-outfitted trips (having contracts with the NPS) and those seeking a permit for a self-outfitted trip. The majority of the public that depends upon the availability of professionally-outfitted trips under the auspices of a NPS concessioner could be affected adversely by any allocation decision–despite the assertions by the nine individual plaintiffs to the contrary. A change in allocation of user days for the concessioners, whose prices are regulated by the NPS, also could decrease the revenues to the NPS and have an adverse affect on some, if not all, the concessioners. It could decrease the concessioners' opportunity to earn a reasonable profit, or to operate in accordance with the Concessions Policy Act or the Concessions Management Improvement Act of 1998; they may not be able to increase wages, buy better equipment, or provide better services to the public. In addition, altering the allocation can affect the visitor experience by impacting the frequency of visitor contact, competition for campsites, or attraction site congestion. Consequently, it would be poor public policy, and contrary to law, if the NPS were to respond precipitously as plaintiffs request and merely act as if the matter were simply adjudicating a dispute between only two identified groups.

As such, the decision to suspend temporarily the CRMP process, including another review of

the allocation issue, reflects the considered and not arbitrary or capricious judgment of the NPS. The NPS examined all relevant factors, including the growth in demand for self-outfitted trips, when it adopted the current allocation in 1989 and decided to halt temporarily the CRMP planning process in February 2000. Moreover, the Administrative Record amply demonstrates that the NPS's allocation decision in 1989 and its decision to halt temporarily the planning process in 2000 were well-justified.

Although the NPS did not ultimately adjust the allocation in its revised 1989 CRMP, the Administrative Record demonstrates that, contrary to plaintiffs' assertions that the NPS "consciously refused" to consider "the exponential growth" in demand for self-outfitted trips,[1/] the NPS did, in fact, consider and review the access/allocation issue, and, in so doing, considered the growth in demand for self-outfitted trips. Pl. Br. at 27; Pl. Br. at 23. (Rec. 149-46). The Administrative Record further shows that the NPS's actions in maintaining the existing allocation of use were supported by substantial evidence.

During its development of the 1989 CRMP, the NPS clearly identified "Equity of User-Day Allocation Between the Commercial and Noncommercial Sectors" and whether "the existing visitor use allocations provide for acceptable levels of a quality experience and protection of the natural resources" as a major issue for consideration in the development of the management plan. (Rec. 113-8; Rec. 113-17 - 113-19). The NPS identified a broad range of possible alternatives to address the allocation issue,

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27/ Plaintiffs assert that "Park Service officials have subsequently admitted that the issue of allocation was not directly mentioned or adequately considered in the 1989 CRMP," citing to Rec. 165-172. Pl. Br. at 30. Plaintiffs' brief principally relies upon assertions by one former, apparently disgruntled NPS employee. The "Park Service officials" referred to in plaintiffs' Brief is then-Wilderness Coordinator of GCNP, Kim Crumbo, who is a plaintiff in a pending lawsuit involving similar issues to this case, *Grand Canyon Private Boaters Association, et al. v. Arnberger*, No. CV-00-1277-PCT-PGR (D. Ariz. filed July 5, 2000).

including shifting user days from "the commercial sector" to the "private sector." (Rec. 113-18). During its review of the 1981 CRMP, and specifically its consideration of the access/allocation issue, the NPS nevertheless concluded that, while utilization of the commercial allocation had reached near-100% levels in recent years, the fact that self-outfitted boaters were taking smaller and shorter trips than permitted under NPS policy and "deficiencies in the noncommercial permit distribution system have prevented full utilization of available user days." (Rec. 128-14; Rec. 113-17; Rec. 156-159).

In view of the fact that a substantial percentage–twenty-five percent–of the existing noncommercial allocation was going unused by the self-outfitted boating community, the NPS left the allocations intact, and instead changed the noncommercial permitting system and modified certain operational requirements in order to improve access for the self-outfitted boating community. (Rec. 115-1 - 115-2; Rec. 128-14; Rec. 149-46; Rec. 156-21 - 156-22; Rec. 254-38). Specifically, in the 1989 CRMP, the NPS added thirty-eight supplemental private launches for the primary season, established a user day pool, provided for scheduling two years in advance to give additional flexibility for trip planning, and revised the cancellation system, all to "improv[e] noncommercial access to the noncommercial allocation." (Rec. 149-46; Rec. 254-38). In explaining its decision, the NPS indicated that it chose "this alternative over attempting a reallocation by providing a method which allows for an increase in utilization of the noncommercial allocation." (Rec. 149-46). Its decision to improve access for self-outfitted boaters through improvements to the private permit distribution system and other operational improvements, rather than by means of a reallocation, was a reasoned decision, made in consideration in all of the relevant factors, supported by substantial evidence, and based on the facts in the Administrative Record, and as such is not arbitrary and capricious or an abuse of discretion.

The NPS also appropriately considered the allocation issue and the growth in demand for self-

outfitted trips in the CRMP review process that began in 1997 and was put on hold by the Superintendent in February 2000. As discussed above, the Administrative Record clearly indicates that, from early-on in the review process, Park management treated the allocation of use as a major issue under consideration in the CRMP revision. *See discussion supra,* p. 25. The Administrative Record further demonstrates that, in developing the revised CRMP, the NPS was ever mindful of the growth in demand for self-outfitted trips, as well as for professionally-outfitted trips. During the CRMP revision process, Superintendent Arnberger stated that the NPS "recognizes that the demand for access by *all* members of the public (those who desire self-outfitted trips, and those who desire commercially-outfitted river trips) has increased since the last Colorado River Management Plan revision." (Rec. 254-38 (emphasis added)). In the announcement of its decision to merge the CRMP and WMP planning processes, the NPS, in describing the allocation of use issue, expressly acknowledged that, since the 1989 CRMP was written, demand for river trips had "increased dramatically for *both* commercial and private river trips." (Rec. 259-4 (emphasis added)). And in October 1998, and again in the following year, Park management even implemented an experimental increase in private use, providing for additional private launches. (Rec. 206-8).

The Administrative Record, therefore, demonstrates that the NPS adequately considered the allocation issue and did not "refuse" to consider the increase in demand for self-outfitted trips when it temporarily halted the CRMP revision process in February 2000. The NPS's suspension of the CRMP revision process was not a final decision to disregard these issues, but rather a realistic assessment that interrelated issues had to be addressed before these issues could be properly resolved, and that there was a lack of adequate financial and human resources to properly complete the CRMP revision process.

Next, plaintiffs' brief is premised on an erroneous assumption that "demand" is the only relevant factor for NPS consideration. Not only does this assumption ignore the relevant mandates for managing GCNP, it also fails to reflect the Administrative Record. As required by its organic statute, the NPS regulates "[t]he type and amount of river recreation use . . . to assure that the degree and type of use is sustainable, and that resource impacts are within acceptable limits for long-term resource protection." (Rec. 218-2). The NPS has explained that "[s]cientific research, public input, historic considerations, and legislative mandates have placed the current levels of commercial and noncommercial user days at an aggregate level of 169,950" and that "the NPS reserves the right to add or subtract, allocate or reallocate user days based on review of all relevant factors." (Rec. 156-10). Accordingly, in addition to demand, Park management has, in the past, based the allocation of use on various factors, including: "existing acceptable levels for the quality of the natural resources and visitor experience," (Rec. 113-8; Rec. 149-11); the "condition of the natural and social resources within the river corridor," (Rec. 113-8); and historic use levels and their impact on park resources, (Rec. 24-22; Rec. 24-44; Rec. 137-146). In addition, because "[t]he allocation is administered in the interest of the greatest good to the general public," (Rec. 171-1), the allocation has reflected Park management's long-held belief that concessioners provide the only practical means of access to the river for the vast majority of Americans. (Rec. 48-63; Rec. 46-5; Rec. 171-1). In June 1994, the head of the NPS, Director Roger Kennedy, stated that "[t]he allocation is administered in the interest of the greatest good to the general public." (Rec. 171-1). He continued:

> The present format authorizes private river runners, who are a very small percentage of the interested public, to utilize a fairly large percentage (32 percent) of the total allocation. It does not seem

> appropriate to make a change because of the requirement to endure a wait on the Private River Runner list. A significant alteration to the allocation would still result in a substantial wait while limiting the number of non skilled visitors who could experience such an activity.

Id. The Director then concluded that "[t]he opportunities must be evaluated in respect of the recreational desires of all publics in relation to the need for resource protection." (Rec. 171-2). As the Chief of Concessions of the NPS has stated, the allocation decision is "really a question of what is best for the Park and the overall public." (Rec. 165-160). To suggest that the NPS must base the allocation primarily, or entirely as plaintiffs appear to suggest, on the relative demand for self-outfitted versus professionally-outfitted trips would be inconsistent with the long history of management of GCNP and contrary to the NPS's governing authority.

Plaintiffs' focus on demand and attempt to argue that the NPS acted in an arbitrary and capricious manner is misleading for two additional reasons. To begin with, the "wait list" for private boaters, which plaintiffs prominently highlight, is neither an adequate indication of relative demand, nor necessarily a sound reflection of private demand. Second, plaintiffs' argument and request for relief treats as almost insignificant the fact that demand has no doubt increased for both those interested in professionally-outfitted trips under the auspices of a NPS concessioner and those who wish to acquire a permit and organize their own trip. After all, "[i]n the last thirty years, the number of people visiting our national parks has doubled from 133 million to 239 million." Ansson, *supra*, at 9.

To the extent that relative demand might be a factor considered by the NPS in allocating use, the wait list, as the NPS and other stakeholders have long recognized, is a poor indicator of actual demand for self-outfitted river trips. (Rec. 113-18; Rec. 128-14). One of the primary reasons for this

is that only the trip leader, rather than the names of all trip participants, is placed on the waiting list. This encourages duplicate applications, where individuals interested in taking a trip together will each put his name on the waiting list, thereby enabling the participants to take multiple trips. In addition, the NPS has observed that a significant percentage of people on the waiting list put their names on the list (or are children whose names were placed on the list by their parents) not necessarily ever planning on taking the trip. As the NPS has stated:

> Many private trip applicants have chosen not to accept launch dates at their first opportunity, as indicated by a 50% deferral rate. This indicates that noncommercial users, when faced with the logistical burden of organizing a Colorado River trip, need and want time to prepare. Many others on the waiting list are content to wait while they acquire the skills and equipment necessary to run a Grand Canyon river trip. Entire groups desiring to run the river together have put all their names on the list, hoping to improve the changes that at least one person in the group receives a permit. Several hundred names are removed from the list each year due to failure to continue interest in remaining on the list. *All of these factors artificially inflate the noncommercial waiting list and make it a poor indicator of actual demand.*

(Rec. 128-14 (emphasis added)). The NPS has stated further:

> At the beginning of the revision process, many comments were received expressing concern over the length of the noncommercial waiting list. It has been discovered through the record-keeping

> process in the River Permits Office that individuals wishing to take a noncommercial trip together put all their names on the waiting list at the same time. In addition, many applicants are only casually interested in or are simply not ready or qualified to take a noncommercial trip, as indicated by the relatively high deferral rate and the failure to submit continuing interest cards.

(Rec. 149-31). In December 1997, the NPS observed exactly how widespread this situation had become: a full *twenty-one percent* of the names of the waiting list shared either a common address or phone number.[1/] (Rec. 202-9; Rec. 255-6).

28/ Of the 6,750 names on the waiting list, the NPS found that 764, or over eleven percent, had exact phone number matches. (Rec. 255-6). Another 564, or over eight percent, had exact street address matches. *Id.* Another 87 applicants matched by zip code and last name. *Id.* This totaled 1,415 applicants, or twenty-one percent of the waiting list. *Id.*

These problems with using the wait list as an indicator of demand for self-guided trips also have been observed by stakeholders in the Park management process. It has been suggested that "[p]eople don't really have to wait 8 years to go on a non-commercial trip, they only have to wait to be the permit holder" and that a number of people "often go together every 2-3 years by making reverse invitations to each other depending on who gets a permit." (Rec. 165-128). Some, including members of the private boating community, have observed that a number of private boaters know how to use the system and go every year, one stating that one of the consequences of the existing wait list system is that boaters not on the wait list "frequently run the river annually."[1/] (Rec. 165-205; Rec. 254-65). A January 7, 2000 letter from a private boater to the River District Ranger exemplifies these problems with using the waiting list to infer the level of demand for self-outfitted trips:

> I am the holder of a permit to run a private river trip in the Grand Canyon in May of 2000. . . . Imagine my dismay when I learned that my trip leader was also finally issued a permit . . . . Not only are our permits for the same summer, they're in the same month! As all of the boatmen of my acquaintance are the same as those he will invite on his trip, it becomes effectively impossible for me to organize my trip as I had planned.

(Rec. 254-65).

Statistical analysis of the existing data further illustrates the point. Intervenor GCROA's analysis of self-outfitted boater records contained in the Administrative Record shows that, between April 16, 1995 and September 6, 2000, more than one out of every ten boaters (11.5% or 1,893 out of 16,467)

[29/] Still others have stated that "a lot of those people on the waitlist aren't in any great hurry to get on the river soon." (Rec. 207-58).

running the river on a self-outfitted trip went down the river *more than once in that five-year period alone*, some running the river as many as ten times. (Rec. 290 - 294).[1/]

30/ These numbers were derived from a statistical analysis of data from the noncommercial river trip participant lists included in the Administrative Record and compiled into a database by Intervenor GCROA. Due to the sheer volume of the records in the Administrative Record from which these numbers were derived, those records are not included in the attached Appendix.

Erroneously, plaintiffs assert that the concessioners, Intervenor GCROA's members, oppose allowing self-outfitted boaters to use their full allocation. Specifically, plaintiffs state that "[c]ommercial concessionaires have long complained that allowing noncommercial users their full allocation interferes with commercial operations." Pl. Br. at 40. Not only is this statement unsupported by the Administrative Record,[1/] but it misrepresents the concessioners' true position. In fact, GCROA and its members would be supportive of efforts to develop a new private permit system as well as to consider certain operational changes to help self-outfitted boaters use their full allocation.

31/ As their sole support for this statement, plaintiffs cite page 165-26 of the Administrative Record, which states, in pertinent part, summarizing part of a 1991 meeting of the CRMP Constituency Panel: "Concern was voiced by representatives of the guides community and commercial operators that . . . the addition of 'double' launches *may* be responsible for increased contacts and exacerbation of campsite competition." (Rec. 165-26 (emphasis added)).

Second, plaintiffs' suggestion that the existence of the waiting list demonstrates that user days should be taken from members of the public interested in professionally-outfitted river trips and instead allocated to those interested in self-outfitted trips also ignores the fact that demand for professionally-outfitted trips also has increased substantially since the allocation was last changed in 1989 and outstrips supply for that kind of trip.[1/] There is evidence in the Administrative Record that demand for professionally-guided trips exceeds availability, and that concessioners have turned away members of the public interested in taking a professionally-guided trip or established extensive waitlists (although very few people on those lists actually gain access due to low cancellation rates for professionally-outfitted trips).[1/] (Rec. 165-205; *see* Rec. 173-2 (noting that "the allocation of river days for

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[32/] Although plaintiffs state that "[t]here is also evidence that persons desiring a commercial trip can purchase one for the "next summer season," Pl. Br. at 35, *quoting* Rec. 165-172, and refer to "repeated recognition by Grand Canyon National Park personnel that . . . noncommercial do-it yourself rafters had to wait for years for a permit while commercial passengers could buy a trip for the next summer season," Pl. Br. at 36, the commercial allocation is as fully subscribed as practicable. The only evidence in the Administrative Record cited by plaintiffs for these assertions is a memorandum written by then-GCNP Wilderness Coordinator Kim Crumbo, who, as mentioned above, is a plaintiff in another lawsuit involving similar issues to the present case: "The [private boating community] represents a broad spectrum of the 'general public' which has a much more difficult time obtaining a river trip than the commercial passenger who can generally purchase a trip for the summer season." (Rec. 165-172). If this can be considered evidence, it is scant and untrustworthy at best.

[33/] Even Kim Crumbo has recognized the high demand for professionally-outfitted trips: "Clearly, a high demand for concession-supported river trips exists, as evidenced by the nearly 20,000 visitors transported last year." (Rec. 165-172). Plaintiffs suggestion that crew should count towards the commercial allocation would exacerbate the problem of satisfying demand for professionally-outfitted trips, with no direct benefit to the self-outfitted boating community in terms of improved access to the river. Pl. Br. at 40. Although it is factored into the Park's calculation of total acceptable use (which includes recreational, administrative, and scientific research categories), under longstanding Park policy, use by professional guides, like that of Park personnel and those conducting approved scientific monitoring and research, is not counted toward the recreational user day allocation. This policy recognizes that commercial guides are on the river as part of their jobs and to facilitate the interpretation and public enjoyment of Park resources, and thus are on the river for entirely different reasons than recreational users. The policy also was designed so as not to penalize smaller outfitters and oar-trips, which generally have a higher guide-to-boater ratio than

commercial trips is fully subscribed")). As Park management has found, however:

> [T]here is no way of determining how long a person has waited to arrange their schedule or to save enough money to go on a commercially outfitted trip. There may be many people with the desire to go on a commercial river trip, however no list of such people exists, thus they are not being counted. There is also no way of telling how many commercial passengers have been turned away by one or more river concessioner [sic]. The fact that commercial companies turn prospective customers away every year due to allocation limitations would seem to indicate excess demand in that sector too.

(Rec. 128-14 - 128-15). For the foregoing reasons, it would be wrong to conclude that the mere existence and extent of the wait list for self-outfitted trips demonstrates that the NPS somehow acted arbitrarily or capriciously when it temporarily suspended its CRMP planning process or somehow "unreasonably delayed" an "action" where the allocation issue could be reviewed.

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motorized trips. (Rec. 165-90). Such a policy is fully within the reasonable exercise of NPS's discretion.

C. <u>The NPS's Alleged Refusal to Consider, Review, or Adjust the Allocation of Use Neither Denies Plaintiffs' Rights to Due Process Nor Interferes with Plaintiffs' Free Access to a Natural Wonder of Grand Canyon National Park, and Plaintiffs' Request for Relief is Neither Appropriate Nor Warranted</u>

Plaintiffs offer several other theories, such as a right to due process (Pl. Br. at 36), rights to free access to the Park (Pl. Br. at 38, 39), and a request to enjoin any new NPS contracts or contract extensions with concessioners, yet they do not even refer to applicable law, such as the Concessions Management Improvement Act, or *any* case even involving the Department of the Interior. This is because there simply is no support for a due process or free access right theory. Their due process argument, cryptic as it is, merely recasts their earlier argument under the guise of some unstated Fifth Amendment right to due process, and lacks any of the fundamental indicia for bringing a Fifth Amendment due process claim.

Nor can plaintiffs establish any right to free access to the Grand Canyon (or to any other national park). Pursuant to 16 U.S.C. § 3, the Secretary of the Interior is directed to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. § 3 (1998). This grant of authority is subject to the prohibition that: "No 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 . . . ." *Id.*

Plaintiffs' "free access" claim is the same claim brought by the plaintiffs in *Wilderness Public Rights Fund v. Kleppe* and rejected. In *Wilderness Public Rights Fund*, the plaintiffs asserted that there was no justification for allocating between commercial and noncommercial use,

and that such an allocation denied them "free access" to the river, contrary to 16 U.S.C. § 3. *Wilderness Public Rights Fund*, 608 F.2d at 1253. The court rejected their argument, noting that the NPS *can* and necessarily *must* allocate use. *Id.*; *see also Universal Interp. Shuttle v. WMATA*, 393 U.S. 186 (1968) (Department of the Interior may exclude or allocate as it so chooses traffic on NPS-administered lands). Indeed, it is now well-accepted that national parks throughout the nation allocate and restrict the use of certain park resources, and, although parties in appropriate circumstances might argue that an allocation or restriction is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, they cannot claim that they are entitled to "free access." *See Christianson v. Hauptman*, 991 F.2d 59 (2nd Cir. 1993) (seaplanes); *Conservation Law Found. v. Secretary of Interior*, 864 F.2d 954 (1st Cir. 1989) (off-road vehicles use). Plaintiffs' "free access" claim further suffers from a failure to appreciate that Congress has passed specific laws, most recently in 1998, addressing visitor services and concessioners in the national parks. These laws, such as the Concessions Policy Act of 1965 and the Concessions Management Improvement Act of 1998 (repealing the 1965 Act), reflect clear congressional policy to permit services in national parks through concessioners, and to facilitate control of public use through concessioners.

Plaintiffs' additional request that the NPS be enjoined from entering into new contracts or extending existing contracts with concessioners, which are set to expire in 2002, is wholly unsupported, unwarranted and fails to even acknowledge the law governing concession contracts. Absent such contracts, it is not simply the concessioners who would be harmed, but the general public and the NPS as well. And it would impermissibly expand longstanding principles of administrative law if, as plaintiffs request, this Court was to enjoin a future, unspecified action by the NPS when there has been absolutely no discussion about the legal landscape and the practical aspects of plaintiffs' request. This is because this lawsuit has not been brought directly against the

issuance of any new contracts (or extension of existing contracts); rather, plaintiffs are simply requesting such extraordinary *relief* as part of their underlying case.[1]

Lastly, even if this Court were to conclude that plaintiffs have presented a valid claim, the relief plaintiffs' are requesting fundamentally misconstrues the nature of actions brought under the APA. Plaintiffs are seeking from this Court an order (1) enjoining the NPS from entering into or extending existing concession contracts, (Pl. Br. at 43); (2) requiring the NPS immediately to consider, review; and (3) adjust the allocation–"quickly and equitably based on the current data in [the NPS's] possession," (Pl. Br. at 35), in a period not to exceed 60 days, (Pl. Br. at 44). Such relief would be unprecedented and unwarranted. In APA actions, the appropriate relief, if any, is for a court to address whether the agency acted arbitrarily or capriciously, abused its discretion, or otherwise acted contrary to law, and, if so, to remand the matter back to the agency to reconsider its decision. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Oregon Natural Resources Council v. Harrell*, 52 F.3d, 1499, 1508-09 (9th Cir. 1995) (denying plaintiffs' request for injunction mandating dam removal and allowing Army Corps of Engineers to consider the issues on remand before ordering the injunctive relief sought); *Davis v. U.S. Dep't of Housing*, 627 F.2d 942, 946 (9th Cir. 1980) (stating that the court's role on remand to an agency upon finding a violation of APA § 706(2)(A) should be limited to directing the agency to comply with the statute in a manner deemed appropriate by the agency in the exercise of its own discretion). As this Court has recognized, Section 706(1) does not empower a court to substitute its discretion for that of an agency; rather, it only allows a court to require the agency to act upon a matter, without dictating how the agency should act.

34/ Plaintiffs, for instance, fail to note that new contracts are awarded only after a publically available prospectus is issued, there is a response to the prospectus, and, for most concession contracts, only after the period for congressional review has lapsed. *See generally* 36 C.F.R. Part 51 (2000); 65 Fed. Reg. 20630 (Apr. 17, 2000). Well before any prospectus is even issued, it is highly unlikely that any court would find the matter appropriate for judicial intervention or that a party would have standing to assert a claim.

See Yu, 36 F. Supp. 2d at 931 ("The Court cannot compel an agency to exercise its discretion in a particular manner."). If, therefore, plaintiffs could even demonstrate that they were entitled to relief, the appropriate relief, if any, would be for the NPS to be instructed to consider the issue in light of the public interest and the NPS's statutory mandates.

III. CONCLUSION

For all the foregoing reasons, the claims raised by the nine individual plaintiffs should be denied.

Dated this 14th day of December, 2000.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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Plaintiffs,

2.

BRUCE BABBITT, Secretary of the Interior, and JOSEPH ALSTON, Superintendent, Grand Canyon National Park,

Defendants.

Case No. CIV00-0349 (MV/WWD)

CERTIFICATE OF SERVICE

I certify that on the 15th day of December, 2000, true and correct copies of the accompanying Intervenor-Grand Canyon River Outfitters Association Brief Opposing Petition for Judicial Review of Administrative Action were served on the following by U.S. mail, postage prepaid:

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