

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

JAMES E. RANDALL, RONALD J. ROMERO,
STANLEY HUTCHINSON, RANELL A. GARCIA,
ALBERT V. VOGEL, SARAH C. MCMAHON, MARK
C. LEACHMAN, JUDITH L. LOVDOKKEN, and
KENNETH R. KYLER,

Plaintiffs,

vs.

No. CIV 00-349MV/WWD-ACE

BRUCE BABBITT, Secretary of the Interior, and
ROBERT ARNBERGER, Superintendent, Grand
Canyon National Park,

Defendants,

And GRAND CANYON RIVER OUTFITTERS
ASSOCIATION,

Intervenor.

**PLAINTIFFS' BRIEF IN SUPPORT OF PETITION FOR
JUDICIAL REVIEW OF ADMINISTRATIVE ACTION**

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JURISDICTIONAL STATEMENT

Plaintiffs are citizens who have applied for permits to engage in self guided white water trips on the Colorado River through the Grand Canyon National Park. Plaintiffs are aggrieved and adversely effected by rules and regulations promulgated by the National Park Service which inequitably allocate use between commercial concessionaires who operate Colorado River trips for profit and members of the public who desire to engage in self guided trips (noncommercial users). Pursuant to 5 U.S.C. § 702 and 706(1) plaintiffs seek review of regulations promulgated by the National Park Service under 16 U.S.C. §§ 1a-2(h) and 3 which are arbitrary, capricious, an abuse of discretion and not in accordance with law; are contrary to plaintiffs’ constitutional rights to due process; not supported by substantial evidence; and which deprive plaintiffs of their rights under 16 U.S.C. § 3. Pursuant to 5 U.S.C. § 706(1) plaintiffs seek to compel agency action unlawfully withheld. This court has jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

1. Whether the present allocation of use between members of the self guided boating public and commercial concessionaires is arbitrary, capricious, and an abuse of discretion contrary to 5 U.S.C. § 706(2)(A);
2. Whether the refusal of the National Park Service to consider, review and adjust the ratio of allocation of use between noncommercial and commercial users since 1979 constitutes action “unreasonably delayed” contrary to 5 U.S.C. § 706(1);
3. Whether the refusal of the National Park Service to consider, review and adjust the ratio of allocation of use between noncommercial and commercial users since 1979 despite substantial evidence

that the allocation is inequitable is contrary to plaintiffs' constitutional rights to due process and unlawful under 5 U.S.C. § 706(2)(B);

4. Whether the allocation of use between noncommercial boaters and commercial concessionaires and the refusal of the National Park Service to consider, review and adjust the ratio of allocation of use between them since 1979 despite substantial evidence that the allocation is inequitable constitutes interference with plaintiffs' free access to a natural wonder of the Park in violation of 16 U.S.C. § 3;

5. Whether the National Park Service administers its present system of allocating access to the Colorado River to noncommercial users in an arbitrary, capricious, and unreasonable manner which denies plaintiffs free access to a natural wonder of the Park in violation of 16 U.S.C. § 3; and

6. Whether the National Park Service should be enjoined from entering into new contracts or extending existing contracts with commercial concessionaires until allocation of use between noncommercial boaters and commercial concessionaires is reviewed and adjusted.

STATEMENT OF THE CASE

Plaintiffs are citizens who have applied to the Grand Canyon National Park for permits to engage in self guided and supported trips on the Colorado River and who desire access to the Colorado River for that purpose. They have been placed on a "waiting list" of over 6800 names and there is an estimated "wait time" of twenty years before a permit will be issued.

Plaintiffs seek review of Park Service administrative actions and regulations which have allocated recreational use of the Colorado River between members of the public who desire to engage in self guided trips and commercial concessionaires who transport passengers through the Canyon for a profit. At

present, there are sixteen commercial concessionaires who generate over \$25 million dollars per year during a five month season. Commercial passengers are able to purchase a trip with a commercial concessionaire for the upcoming season.

In 1979, after five years of study and an Environmental Impact Statement, the Park Service adopted the 1979 Colorado River Management Plan. (CRMP). Under the 1979 Plan, the Park Service allocated 69% of the permitted recreational use to the commercial concessionaires and 31% to noncommercial boaters. It allotted substantial additional use to “river guides” employed by the commercial concessionaires but did not include that use within the category of recreational use. The allocation was admittedly based on marginal data and the Plan provided for periodic reviews and adjustment of allocation based on additional information.

In 1981, with no study or public involvement, the Park Service adopted the 1981 Colorado River Management Plan with no review, consideration of, or adjustment in the allocation established in 1979.

In 1989, the Park Service adopted the 1989 Colorado River Management Plan and again adopted the ratio of allocation first established in 1979. During the planning process for the 1989 CRMP the Park Service consciously and intentionally refused to consider or review the issue of allocation despite substantial evidence in the Administrative Record that the existing allocation was unfair, inequitable, and in need of review and adjustment. By its terms, the 1989 CRMP was to undergo a comprehensive review within no more than ten years.

In 1997, the Park Service began the planning process to review the 1989 CRMP and adopt a new plan in January of 2000. Again, despite overwhelming evidence in the record that demand for noncommercial permits had grown exponentially and that the existing allocation between self guided boaters

and commercial concessionaires was grossly inequitable, the Park Service halted the planning process indefinitely in February of 2000 thus leaving in effect the allocation of use first established in 1979.

Plaintiffs seek judicial review of the Park Service actions which established the allocation in 1979 and 1989; the refusal of the Park Service to review, consider, and modify the allocation in light of the most current data and information as required in the 1979, 1981, and 1989 CRMPs; the refusal of the Park Service to complete the planning process and adopt a new plan by the year 2000; the refusal of the Park Service to review, consider, and modify the allocation since 1979 despite substantial evidence in the Administrative Record that the existing allocation is inequitable; and the denial of the Park Service of free access to a natural wonder of the Park through its enforcement of an unfair and inequitable rule and regulation.

STATEMENT OF THE FACTS

I. THE 1972 INTERIM PLAN

During the 1960s, recreational travel on the Colorado River through the Grand Canyon increased dramatically. In 1966, 1,100 persons made the trip. In 1967, the number almost doubled to 2,100. By 1972, the number had increased to 16,500 and in 1973, twenty one commercial concessionaires and noncommercial boaters carried more than 15,000 persons down the river. Use for 1972 alone exceeded the 100 year period from 1870 to 1969. (Rec. 11-1; 156-8).

In 1973, due to the increase in recreational use, the National Park Service placed a ceiling on the number of allowed recreational “user days” per year. One “user day” was defined as equal to one passenger on the river for one day. Based on 1972 use, the Park Service allotted 89,000 user days to commercial use (not including commercial guides) and 7,600 user days per year to

noncommercial boaters. An additional 21,000 user days per year were allotted to commercial guides. (Rec. 22.1-1 to 22.1-10; 73-9; 73-63).

II. THE 1979 COLORADO RIVER MANAGEMENT PLAN (CRMP).

In 1973, to achieve the mandates in the National Park Service enabling legislation, the Park Service initiated a comprehensive research program including 29 studies and six public workshops which addressed numerous issues involved in the management of the Colorado River through the Grand Canyon National Park. One of the principle issues was the allocation of use between commercial and noncommercial use. (Rec. 73-15 to 73-16).

During the interim management period between 1972 and 1976, demand for noncommercial use increased dramatically. In 1972, 47 applications for noncommercial permits were submitted and 47 permits were issued. In 1973, 74 applications were submitted and 49 permits issued. In 1974, 84 applications were submitted and 41 permits issued. In 1975, there were 173 applications and 42 permits issued. In 1976, there were 425 applications and 36 permits issued. In 1976, the Park Service determined that applications for noncommercial permits had reached the point that application seemed futile. (Rec. 4-5).

As early as 1974, it became evident that adjustments in allocation were required to meet increasing demand from noncommercial self guided boaters. In March, an internal memo indicates that as part of the planning process, the Park Service would evaluate the types of use on the river and the percentage of the total use that should be allocated to noncommercial groups. (Rec. 43-4, 45.1-4).

In 1975, in response to complaints about the unfair allocation of 92% commercial and 8% noncommercial, the acting director of the Park Service advised Senator Alan C. Cranston:

We do not necessarily believe that the present allocation ratio at Grand Canyon is the correct one. Until we can arrive at a means of measuring the relative demands for “noncommercial” and “commercial” river trips, we cannot justify any changes in the ratio. (Rec. 48-34 to 48-35).

In mid 1975, the Park Service announced that it was necessary to determine an adequate means of measuring the relative demands for “noncommercial” and “commercial” use in order to determine and adjust allocation of river use between those two groups. (Rec. 48-34 to 48-35; 48-63 to 48-64; 48-91 to 48-92; 48-95 to 48-96; 48-127).

A final Environmental Impact Statement was made available in August of 1979. (Rec. 73-16). The Environmental Impact Statement found that while commercial use had not reached its total allotment level, noncommercial users were being turned away indicating a greater “disappointment factor” in the noncommercial sector than in the commercial sector. Park Service data indicated that while 32,737 commercial user days went unused between 1972 and 1976, noncommercial applicants requested and were denied 76,091 user days. The EIS also found that Park Service files were “replete” with complaints from noncommercial users whereas there were no complaints from citizens stating that they could not find a berth on a commercial trip. (Rec. 60-75 to 60-76).

The 1979 Colorado River Management Plan was adopted in December. (Rec. 73-1 to 73-2). One stated objective of the 1979 CRMP was to “allocate use equitably between commercial and noncommercial users.” (Rec. 73-18). To that end the 1979 CRMP divided recreational use into summer and winter seasons. The summer season was defined as April 16th to October 15th of each year. The winter season was from October 16th to April 15th. For the summer season, the new plan allocated 105,500 user days to the commercial concessionaires and 43,920 user days to noncommercial boaters. For the winter season, 10,000 user days were allocated to commercial users and 10,530 to noncommercial

boaters. (Rec. 73-23 to 73-24). An additional 30,000 user days were allocated to commercial use for “commercial crew” or guides. (Rec. 73-27).

The percentage of use between commercial and noncommercial users, based on user days, was 69% commercial and 31% noncommercial. (Rec. 73-28). The allocation between commercial and noncommercial users was “based on the best available information on the demand for commercial and noncommercial trips. As stated in the Plan:

Figures on potential passengers turned away by commercial concessioners may count individuals more than once as they are turned away by successive companies. When certain dates are full, some companies issue brochures indicating this fact. There is no way to count potential passengers turned away in this manner. Figures on demand for noncommercial trips are complicated by duplicate applications, false applications, failure of interested but discouraged river runners to apply, etc. (Rec. 73-28).

The Plan also promised:

The allocation ratio is, because of the above factors, a best estimate based on experience and interpretation of the available data. This ratio will be reviewed and adjusted as more reliable information becomes available. (Emphasis added). (Rec. 73-28).

The Plan again stated under the section entitled “Environmental Management:”

It must be recognized that demand for commercial vs. noncommercial trips is not static. Continual monitoring and adjustments in allocation will be required. (Emphasis added). (Rec. 73-36).

Finally, under General Guidelines the plan is clear that modifications “will be necessary” and that:

Use, allocation, scheduling, and related matters will normally be modified on a longer term basis of from three to five years. However, in any situation where a critical need for modification arises, the

Superintendent reserves the right to make such a modification whenever it is necessary. (Emphasis added). (Rec. 73-37).

III. THE HATCH AMENDMENT AND THE 1981 CRMP.

The adoption of the 1979 Colorado River Management Plan caused immediate outcry from the commercial concessionaires and Congress. A direct result of this pressure was the passage on November 14, 1980 of the Hatch amendment to the 1980 Interior Appropriations Bill. The Hatch amendment, sponsored by Senator Orin Hatch of Utah, provided:

(a) None of the funds appropriated in this Act shall be used for the implementation of any management plan for the Colorado River within the Grand Canyon National Park which reduces the number of user days or passenger launches for commercial motorized watercraft excursions, for the preferred use period from all current launch points below that which was available for the same period of use in the calendar year 1978.

(b) For the purposes of this section, "preferred use period" denotes the period May 1 through September 30, inclusive. (Rec. 83-1 to 83-5).

The 1979 CRMP was revised in 1981 to conform to the Hatch Amendment. This was done with no new Environmental Impact Statement or Assessment. The principle changes were the deletion of the phase out of motorized trips and the compression of the summer season for commercial use into a five month period from May 1 through September 30. (Rec. 99-12, 99-15). Additionally, commercial users were allotted an additional 656 user days during the summer season for a total of 106,156 user days and their winter season use was reduced to 9,344 user days. Noncommercial use allocation remained as it was under the 1979 CRMP. (Rec. 99-12, 99-14).

The 1981 CRMP also contained the following language concerning revisions of allocation between commercial and noncommercial use:

Studies will be done to assess public interest in commercially guided trips compared to noncommercial trips. The allocation of user days between these two segments of the river running public will continue to be an important management feature.

The NPS will review and analyze the information from the ongoing monitoring program. Based on this information, the Colorado River Management Plan will be updated or modified as necessary. Updating and/or modification could include adjustments in use levels and reallocation of use between commercial and noncommercial trips. (Rec. 99-21 to 99-22).

In 1980, the Park Service instituted a new permit system for noncommercial users. All unsuccessful applicants for the 1980 lottery were placed on a permanent waiting list. The list was to be used to schedule trips for the following season. Anyone desiring a noncommercial permit would request to have his or her name added to the waiting list and wait until the name rose to the top. Following the 1980 lottery, 720 names were added to the initial waiting list. (Rec. 105.1-4 to 105.1-5).

By November of 1981, the waiting list increased to 1,980 names. By December of 1982, the list held 2,700 people. In 1983, the waiting list was closed to applicants except during the month of February. There were 2,760 names on the waiting list when it was closed on March 1, 1983. (Rec. 105.1-5 to 105.1-6).

IV. THE 1989 CRMP.

In early 1987, the National Park Service began preparations for revision of the 1981 CRMP. It prepared a plan review "issue workbook" which identified "the equity of user day allocation between commercial and non-commercial sectors" to be a primary issue for consideration in the new plan. (Rec. 113-11 to 113-12; 113-17 to 113-19). The Planning Guide for the revision of the CRMP

issued in June of 1987 identified “noncommercial/commercial allocation” as one of the four issues to be considered. (Rec. 113-2, 113-8).

Then, only one month later at a professional workshop on July 7 and 8, 1987, it was announced that “management objectives” for the Colorado River were to “maintain the proportion of noncommercial/commercial allocations.” (Rec. 115-1 to 115-2). It was noted at the workshop that the National Park Service did not have data to defend the noncommercial allocation number and did not even have a “clear philosophical rationale” for its allocation. Meeting attendees were also reminded to “keep in mind the political ramifications.” (Rec. 115-5 to 115-6).

The January 1988 Colorado River Management Plan newsletter identified the major concerns raised by public comment. Despite the desire of management to remove the allocation issue from consideration in the revised plan, eighty three comments raised concerns about the equal distribution of allocation between the commercial and noncommercial sectors. This was 2 ½ times more than the number of comments on any other single issue. (Rec. 119.2-4). In a letter dated March 18, 1988 from National Park Service Director Thomas Heberlein to potential “recreation researchers,” Mr. Heberlein noted that the “current allocation of user days is not equitable. Noncommercial users must wait over four years and commercial users can go virtually at will.” (Emphasis added). (Rec. 119.2-5 to 119.2-6).

Despite the overwhelming public support for a review and adjustment of allocation between commercial and noncommercial use and the belief of the Director of the National Park Service that the current allocation was not equitable, management prerogative carried the day. The 1988 Draft of Preferred Alternatives did not include an alternative of adjusting allocation. Instead, it offered the alternative of

instituting a \$100.00 non-refundable, non-transferrable application fee for each new applicant to the noncommercial permit waiting list. (Rec. 128-1, 128-9 to 128-11).

Although Park Service management deleted adjustment in allocation as one alternative for the revised plan, public comment continued to raise the issue. There were ten meetings concerning the review process, six of those were with representatives of the commercial sector; two were at meetings in Telluride, Colorado which included non-commercial and commercial sectors; and three were public meetings. (Rec. 114-22 to 114-24). The Park Service summary of comment letters to the 1988 draft indicate that the two primary issues commented upon were the proposed \$100.00 application fee (70) and “equity of allocation.” (37). Samples from letters addressing the equity issue, which were unsolicited, are:

- Demand has increased significantly and should be reflected in the allocation!
- Independent non-commercial user use continues to be penalized.
- A severe maldistribution of the available river user days.
- The self outfitted boater cannot afford to be pushed aside again. Allocation of use has to be addressed now. (Rec. 130-8 to 130-9).

The National Park Service summary of the public comment to the draft CRMP merely states, “many also commented on the allocation between commercial and non-commercial sectors” ignoring the fact that that single issue received 2 ½ times more comment than any other issue listed. (Rec. 145-12). The Park Service noted that most of the commenters “expressed disappointment that the issue of equity of allocation access” was not addressed in the revised Colorado River Management Plan. The Park Service response was that there would be 38 supplemental noncommercial launches added during the primary season. (Rec. 145-14).

In the end, Park Service management ignored the overwhelming public desire to address the issue of allocation between noncommercial and commercial use. The December 1988 Colorado River Management Plan review briefing statement states in part:

Certain parameters were established which excluded . . . the commercial/noncommercial split of allocations as topics for discussion in the review. (Rec. 114-21).

News articles quoted Park Service officials as stating they would not rectify the unjust allocation ratio without political pressure to do so from members of Congress. (Rec. 150-1).

In September of 1989, the 1989 Colorado River Management Plan became effective. It left in effect, without consideration, adjustment or review, the allocation ratio between noncommercial and commercial use first established ten years earlier in the 1979 Plan. (Rec. 156-2, 156-10). As later noted by Grand Canyon River Ranger Mark Law, the 1989 CRMP “was done under a Superintendent that managed by decree.” (Rec. 165-169).

Although there was no change in allocation, the 1989 CRMP specifically found that:

The waiting list has increased 77% since 1981, even though those on the list must continue their interest to remain on the list annually and those participating in other noncommercial trips are deleted from the list. (Rec. 156-11).

Under “Plan Review and Update” the Plan provided:

The Colorado River Management Plan will be in effect for a five to ten year period. A comprehensive plan review, directed by the Superintendent . . . will occur before the end of this period. (Emphasis added.) (Rec. 156-15).

Although the noncommercial boaters received no additional user days, the 1989 Plan added an additional 38 launches during the primary season in an attempt to obtain full utilization of the noncommercial

allocation. (Rec. 156-20 to 156-21). In 1990, by amendment, the Park Service deleted eight of those launches and instituted a requirement that applicants to the waiting list pay a non-refundable, non-transferable \$100. application fee. (Rec. 162-1, 162-4).

V. THE COLORADO RIVER CONSTITUENCY PANEL AND GROWING DEMAND FOR ADJUSTMENT IN ALLOCATION.

In 1991, the Grand Canyon National Park established the Colorado River Constituency Panel which included commercial concessionaires, noncommercial river runners, environmentalists, and Park Service personnel. The intent was to discuss problems concerning the management of the Colorado River on an ongoing basis. The first meeting was held January 10, 1991 and a primary topic of discussion 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. (Rec. 165-24, 165-26). Additional meetings were held once or twice per year. On March 23, 1991, the panel discussed the equity of the allocation between noncommercial and commercial users. (Rec. 165-30, 165-32). On March 29, 1992, the panel discussed the noncommercial boaters' desire for greater access during the summer months and the current distribution of commercial vs. noncommercial allocation. (Rec. 165-48). At the panel meeting held November 13, 1992, concern was expressed that there were no statistics or data offered for the number of commercial guides on the river. (Rec. 165-86, 165-90). On February 25, 1994, the panel again discussed the adjustment of allocation between commercial and noncommercial users. The noncommercial users expressed concern about the long wait for a permit and the desire for more launches in the primary summer season. It was observed that while the waiting list for noncommercial permits continued to increase, there was "no equivalent measure of commercial demand." It was suggested that

the National Park Service monitor commercial trip passengers to generate comparable demand data. It was also requested that the issue of reallocation of user days between commercial and noncommercial use not be left off the list of proposed alternatives in the next Colorado River Management Plan process. (Rec. 165-126, 165-128 to 165-132).

In February of 1994 in an internal memo to the Park Superintendent, Mark Law, the Grand Canyon National Park River Ranger, submitted a proposal for an adjustment of allocation and observed that “there is an unreasonable wait of eight years.” (Rec. 170-1 to 170-4). In his memo, Mark Law stated that noncommercial users were concerned with the unrealistic wait, the growing demand, and a potential 15 year wait in five years. (Rec. 170-1 to 170-3). Law recommended that the Park Service realign the commercial and noncommercial seasons to correspond with each other; allow two non-commercial launches per day; reduce the number of commercial launches; redistribute some commercial user days to non-commercial use; and “overcome the resistance to dealing with sacred cows (allocation, access, launches, and contracts) which have historically shaped our management strategy.” (Emphasis added). (Rec. 170-1 to 170-4).

At the next constituency panel meeting on February 25, 1994, Mark Law stated that noncommercial river runners were concerned about the long wait on the list and that more launches were not being given in the primary season. (Rec. 165-158). Bill Mooz, a noncommercial river runner, suggested that the Park Service needed to collect data to determine demand for commercial river trips. (Rec. 165-158 to 165-160). Park Service personnel commented that the current allocation system was preventing equal access to the river (Rec. 165-160) and that the user day allocation issue would be addressed in the Colorado River Management Plan update. (Rec. 165-160 to 165-162). Mark Law

commented that the 1989 Colorado River Management Plan “was done by a superintendent that managed by decree and the next effort should be done in a better environment.” (Rec. 165-169).

In March of 1984, the Grand Canyon National Park Wilderness Coordinator drafted a memo to the National Park Service Chief of Resources Management which suggested that resolution of the allocation issue lay outside the current Colorado River Management Plan; that resolution would require tough decisions of the National Park Service; that the National Park Service must establish an equitable allocation system; and that the allocation issue should be resolved before concessionaire contracts were renewed in 1995. (Rec. 170-19 to 170-20).

The Constituency Panel meeting on November 15, 1994 was the first attended by new Grand Canyon National Park superintendent, defendant Robert Arnberger. At that meeting, Superintendent Arnberger stated that he was studying the allocation issue and trying to “figure out how he feels about it.” He knew that the issue required and deserved a “lot of consideration,” and stated that the issue would be “dealt with in detail” during the Colorado River Management Plan update coming up in two years. (Rec. 165-153). At that same meeting, Bill Mooz, again observed that the Park Service would need more data on demand for commercial trips. National Park Service personnel stated that they would be “looking hard” at what additional research would be needed before a decision could be made. (Rec. 165-154).

After the November constituency panel meeting, Superintendent Arnberger requested a delay in the schedule for issuing the new river concessionaire prospectus to allow more time to study the issue of allocation adjustment among others. The Chief of the Division of Concession Program Management suggested instead that the Park Service add the following language to the prospectus for river running operations:

There is a back log of requests for noncommercial (non-commercial) river trip launches. . . . A review will be conducted to determine if the current commercial/non-commercial division of available river user days is appropriate to the needs of the public, who are the users involved in both types of trips. This may mean that commercial operators will experience adjustments in user day allocations during the course of the term of the new concession contract. (Emphasis added). (Rec. 173-1 to 173-2).

The suggestion was apparently accepted.

During this period, the demand for noncommercial use permits was experiencing continued exponential growth. A 1994, internal Park Service memo amply demonstrates the growth of the noncommercial user waiting list. In 1994, there were 4,387 persons on the waiting list and the wait for 1994 applicants was estimated at eight years. Their trips would be scheduled in the years 2003-2004. After additions and purges, the 1995 list would be 4,964. The memo observed that the waiting list grew one to two years for each year of existence and that by 1996, the wait would be between ten and twelve years. The memo estimated that by 2000, the wait would be between fourteen and fifteen years with more than 8,000 persons on the list. The Park Service's prognosis was that the system "has not and is not" meeting the requirements of the rapidly growing recreational public and would not improve over time. It noted that the system "currently represents the longest wait for a public access recreational activity in the country and is increasingly the target of complaints due to the unrealistic waiting period." (Rec. 175-1 to 175-2). (Emphasis added).

On January 20, 1995, Grand Canyon National Park Wilderness Coordinator Kim Crumbo wrote an urgent memo to Superintendent Arnberger. Crumbo reminded Arnberger that the revision of the Colorado River Management Plan was scheduled to begin in two years he urged Arnberger:

[T]o begin an analysis of a major issue . . . not directly mentioned nor adequately dealt with in the 1989 CRMP. This issue is the ever-expanding demand for the non-commercial river trip.” (Rec. 165-172).

Crumbo pointed out that the waiting list represented approximately 60,000 do-it-yourself noncommercial boaters who must wait over seven years to obtain a permit; that the waiting list represented a broad spectrum of the “general public” which had a much more difficult time in obtaining a river trip than a commercial passenger who could purchase a trip for the summer season; that the current policy favored a public that required the services of a concessionaire at the expense of a public that did not; that the Park Service was confronted with an imperative to resolve a difficult and potentially politically explosive issue of allocation reform; and that the issue would be difficult to resolve. (Rec. 165-172 to 165-173). There was no response from Arnberger to this memo nor was there any commencement of the process suggested. At a November 1994 meeting of river concessionaires, Superintendent Arnberger told concessionaires that new issues might include different methods of allocating river user days and he invited outfitters to share ideas and experiences to increase the baseline data. (Rec. 174 -1 to 174-2).

At the next meeting of the Colorado River Constituency Panel on April 10, 1995, Arnberger seemed to distance himself from the allocation issue. He told the Panel that they needed to “concentrate on the high road,” that allocation was only one issue of many, and that the Colorado River Management Plan was not an allocation plan but a resource management plan. (Rec. 165-214 to 165-216).

Finally, on March 10, 1997, the Colorado River Management Plan planning process was issued. There was no mention of resolution of the allocation issue under the stated objectives. However, under the heading “Guiding Principles,” it was stated that:

Public access to river recreation opportunities (use allocation and permitting processes) will be evaluated based on current and projected future conditions and needs. (Rec. 180-1, 180-3).

The process was to take two years and the final draft of the new CRMP was scheduled for release in January of 2000. (Rec. 180-4).

Subsequently, public workshops were held in numerous geographical localities. In a September 1997 evaluation, the Park Service noted complaints that the current allocation was not equitable, that it caused an unequal wait between noncommercial and commercial users, that it concentrated commercial use during the summer months, and that it did not reflect current demand. (Rec. 189-1 to 189-2).

Robert Stanton, Director of the National Park Service acknowledged in a September 10, 1997 letter that “allocation of use of the river may just be the thorniest of the numerous difficult issues.” (Rec. 246-45 to 246-46).

An October 6, 1997 Park Service memo summarizes the comments from the planning “scoping meetings.” It notes the need for data on demand for noncommercial and commercial trips and a need for “reliable sociological data to adequately assess noncommercial allocation and whether the full range of the public is being considered.” (Rec. 190-1 to 190-6). However, at an October 28, 1997 Colorado River Management Plan team meeting, there is no mention of developing or determining the demand for commercial trips. Instead, it is merely observed that, “we are committed to producing a draft by March 1999 and a final plan by January 2000.” (Rec. 238-7 to 238-8).

Newspaper articles clipped by the Park Service in 1998 and 1999 demonstrate that from the public’s perception, the primary issue to be resolved in the Colorado River Management Plan was the allocation between noncommercial and commercial use. Representative newspapers include the *Salt Lake*

City Tribune, The Arizona Republic, The Washington Post, The San Diego Tribune, The Los Angeles Times, The Seattle Times, and the High Country News. (Rec. 182-9 to 182-36).

At the March 17, 1998 Colorado River Management Plan team meeting, it was suggested that evaluation of the allocation issue be done by a National Park Service based work group, “NOT a public work group.” It is also stated that the Colorado River Management Plan could “restructure public access to the river more effectively; provide more equitable access to the river.” (Rec. 238-16 to 238-17).

On March 20, 1998, the National Park Service established parameters for the allocation issue. Despite the obvious and acknowledged need for an equitable adjustment in allocation, the parameters included the following goals: To try to retain the relative split of total launches; that no outfitter’s level would be reduced below the smallest outfitter’s use; and to consult with “stakeholders” as options were developed. (Rec. 191-1 to 191-2).

Beginning in 1998, it appeared that the Park Service was prepared to alleviate the longstanding inequity in the allocation. In May, the Park Service announced that the “user day” method of allocation would be closely evaluated; that “a comprehensive information-gathering process that includes sociological research has been initiated; that the allocation of use between noncommercial and commercial use would be determined by the National Park Service; that the “wait time” for a non-commercial permit was unacceptable; and that a National Park Service objective was to “decrease the disparity of waiting time between the professionally outfitted and the self outfitted public.” (Rec. 207-5 to 207-6).

A proposed agenda for a June 30 meeting with the Grand Canyon River Outfitters Association indicates that the Park Service intended to discuss a new “launch based” rather than “user day based” allocation system and that it intended to propose potential allocation ratios ranging from 60% outfitter/40%

noncommercial to 40% outfitter/60% noncommercial. (Rec. 201-5). The record contains no minutes from the actual meeting with the Grand Canyon River Outfitters Association.

In a September 9, 1998 internal memo, wilderness coordinator, Kim Crumbo noted that the current access system favored the affluent who could afford commercial trips ranging in cost from \$1,000.00 and \$2,000.00 and that the noncommercial user group needed more access and provided access to a broader range of economic levels. He also expressed concern about upcoming congressional hearings apparently called at the request of the concessionaires. (Rec. 205-5 to 205-6). In a subsequent memo dated October 7, 1998, Crumbo notes that “Rob [Arnberger] was beat up” at the hearings and “his dismay is understandable.” (Rec. 205-7).

During a Colorado River Management Plan process review on December 2, 1998, it was noted that the allocation between commercial and noncommercial users was one of the most controversial issues of the plan; that the “system for obtaining a permit for a noncommercial trip on the Colorado River is admittedly flawed;” and that there were now 6,800 names on the noncommercial permit waiting list. It was calculated that with 270 permits issued per year, there was about a 20 year wait to obtain a noncommercial permit. (Rec. 209-1 to 209-4).

Hope for a more equitable allocation continued into 1999. Superintendent Arnberger advised R.J. Stephenson on April 27, 1999:

You are obviously aware that the 1989 Colorado River Management Plan (CRMP) is under review, and that the allocation of use between the noncommercial and commercial sectors is one of the primary issues under consideration in the planning process. . . .

This process includes compiling data from resource monitoring programs, visitor surveys, and other research programs. (Rec. 246-87 to 246-89).

In responding to a complaint to Senator John McCain, Superintendent Arnberger writes Wilbert

Odem on October 8, 1999:

One of the primary issues that we will address in this process is how to update a river permitting system that has outgrown its useful life. (Emphasis added). (Rec. 246-99 to 246-100).

In response to complaints to the Vice President and Superintendent Arnberger about the inequitable allocation, Linda Jalbert, the CRMP Team Leader tells David Yeamans on October 25, 1999:

As you are aware, we are in the second year of a process to address issues through the revision of the 1989 Colorado River Management Plan (CRMP). One of the key issues is the allocation of recreational use between the commercially-guided and self-guided public.

. . . The Grand Canyon river outfitters have concession contracts that expire at the end of 2002. It is through the CRMP process that we will determine what commercial services are necessary and appropriate in the future. (Rec. 246-97, 246-101 to 246-102).

The commercial concessionaires currently include sixteen companies with a collective gross income in excess of \$25 million dollars per year for the five month season. (Rec. 247-138 to 247-139).

With the coming of the new millennium, Park Service management again reneged on its promise to achieve an equitable balance between noncommercial and commercial use allocation. By letter dated January 10, 2000 to Secretary Bruce Babbitt and Superintendent Arnberger, counsel for plaintiffs requested a fair and impartial adjustment in allocation before commencement of the primary use season for the year 2000. By response dated February 9, 2000, Superintendent Arnberger, who as recently as April 27, 1999 had stated that allocation of use between the noncommercial and commercial sectors was one

of the primary issues under consideration in the planning process (See Rec. 246-87to 246-89), stated to counsel:

Currently Grand Canyon National Park is working on a “Backcountry Management Plan” which will replace the 1989 CRMP. As part of this process our Science Center is concerning itself with the question of, “How much use is both appropriate and sustainable within the environment of Grand Canyon?” The question of whether or not to shift allocation between user-groups is at most a secondary question.

* * *

. . . We assure you our efforts to determine appropriate use levels will continue. However, until the CRMP revision process and relevant studies are complete, we believe attempting a major reallocation would be premature. We ask for you [sic] continued patience in this matter. (Supp. Rec. 3-1 to 3-5).

On the very next day, February 10, 2000, Superintendent Arnberger advised the Director of the National Park Service Intermountain Region, by confidential memo, that he intended to halt the planning process until such time as Congress formally acted upon proposed wilderness designation for the Park or until the Park Service had fiscal and human resources “to do proper and unconstrained planning and NEPA compliance pursuant to congressional wilderness direction.” (Rec. 263-13 to 263-16). This decision came when the final revised CRMP was due for adoption. (Rec. 180-4).

Superintendent Arnberger formally announced his decision to halt the CRMP planning process on February 22, 2000. (Supp Rec. 4-1 to 4-3).

As of February 23, 2000 the noncommercial use waiting list contained 6800 names and it was estimated that the most recent names added to the list would be scheduled for launch in the year 2022, a wait of 22 years. (Rec. 246-17 to 246-35).

ARGUMENT AND AUTHORITIES

A. Summary of the Argument.

Defendant Park Service first established the present allocation of use between the self guided boating public and commercial concessionaires in 1979 after five years of study and an Environmental Assessment. The Park Service admitted in the 1979 Colorado River Management Plan that the allocation of use between the two groups was based on nothing more than “a best estimate” and consequently the Plan provided for review and adjustment of allocation within three to five years. Plaintiffs argue that the allocation established in 1979, still in effect today, was not based on substantial evidence and should be set aside.

In 1989, after two years of study and public hearings, the Park Service adopted the 1989 CRMP. Despite an exponential growth in demand for noncommercial river permits and access and despite substantial evidence, and admission by Park Service personnel, that the existing allocation established in 1979 was inequitable, the Park Service, fearing political ramifications, refused to consider the issue of allocation in the 1989 CRMP and simply adopted the allocation established in 1979 without review or consideration. Plaintiffs argue that the allocation adopted in the 1989 Plan was not based on substantial evidence and was adopted without consideration of an important relevant factor, the exponential growth of demand for noncommercial access. The action of the Park Service was arbitrary, capricious, and an abuse of discretion and should be set aside with an order that the Park Service review, consider, and adjust the allocation of use based on current information and data contained in the Administrative Record within a reasonable time not to exceed sixty days.

In 1997, the Park Service began a review of the 1989 CRMP with plans to adopt a new plan in January of 2000. Again, despite overwhelming evidence of ever increasing demand for access by the noncommercial self guided boating public, and acknowledgment by Park Service personnel that the existing allocation was inequitable and required adjustment, the Park Service halted the planning process in February of 2000 leaving in effect the existing allocation first established in 1979 based on studies conducted and data obtained in the mid 1970s. Plaintiffs argue that the action of the Park Service in halting the review required by the 1989 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;” that the existing allocation should set be aside; and the court should order that the Park Service immediately review and adopt an allocation based on current data and information contained in the Administrative Record within a reasonable time not to exceed sixty days.

Plaintiffs also argue that the actions of the Park Service constitute a denial of plaintiffs’ rights to due process. Further, the actions of the Park Service in concurrence with the Park Service grant of use of the river to commercial concessionaires constitute a denial of plaintiffs’ rights to free access to a natural wonder of the Grand Canyon National contrary to 16 U.S.C. § 3.

Plaintiffs argue that as the present system of allocation is administered by the Park Service, plaintiffs do not even receive the allocation of use to which they are entitled during the primary summer months of June, July, and August and request an order of the court that the Park Service administer the existing system in such manner as to give plaintiffs and the self guided boating public the full access which they have been allotted.

Finally, the current commercial concessionaire contracts are due to expire in 2002. When the contracts last expired in 1995, review of allocation was also in issue. The Park Service allowed renewal

of the contracts with the proviso that commercial allocation could be reduced during the term of the contracts. Despite this proviso, the Park Service is reluctant to make any major change in allocation until the current contracts expire. To avoid this problem again, plaintiffs request an order of this court that commercial concessionaire contracts not be renewed or extended until the issue of allocation is reviewed, considered, and adjusted based on the most current data and information available in the Administrative Record.

B. General Standard of Review.

Judicial review of both formal and informal agency action is governed by 5 U.S.C. §706 (Administrative Procedures Act), which provides that a “reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found” not to meet any of six separate standards. Informal agency action must be set aside if it fails to meet statutory , procedural, or constitutional requirements or if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Formal agency action must be set aside not only for failing under any of the “generally applicable” standards, but also if the action is unsupported by “substantial evidence” in the administrative record. The court must engage in a substantial inquiry. An agency’s action is entitled to a presumption of regularity, but that presumption is not to shield the action from a thorough, probing, in-depth review. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971).

In its review the district court is to review the agency decision making process and determine whether the agency examined all relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. It is also required to conduct a plenary review of the record to ascertain whether the agency’s action was supported by “substantial

evidence.” The district court has the affirmative duty to consider conflicts in the record and define specifically those facts which it deems supportive of the agency decision, if that is the court’s resolution of the matter. The district court cannot rely on counsel’s statements of what is in the record. The court itself must examine the administrative record and identify the facts which support the agency decision. *Olenhouse v. Commodity Credit Corp., supra, at 1576.*

C. Argument.

I.

**The allocation of use between self guided boaters
and commercial concessionaires is arbitrary,
capricious, and an abuse of discretion.**

The duty of a court reviewing under the “arbitrary or capricious standard” is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. The reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994); *Gates v. Rowland*, 162 F.3d 1046 (10th Cir. 1998). If the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency expertise, then the action must be set aside. *Olenhouse v. Commodity Credit Corp., supra; Gates v. Rowland, supra.*

In addition to requiring a reasoned basis for agency action, the “arbitrary and capricious” standard requires an agency’s action to be supported by the facts in the record. Agency action will be set aside as

arbitrary if it is unsupported by “substantial evidence.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). As the Tenth Circuit clarified:

Evidence is substantial in the APA sense if it is ‘enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact.’ [Citations omitted]. ‘Substantial evidence’ is more than a mere scintilla; it must be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [Citations omitted]. Evidence is not substantial if is overwhelmed by other evidence, . . . or if it constitutes mere conclusion. *Olenhouse v. Commodity Credit Corp.*, *supra* at 1580-1581.

The Park Service rule establishing the ratio of allocation of use between noncommercial and commercial users is arbitrary, capricious, and an abuse of discretion for two reasons: First, a thorough, probing, in-depth review of the record reveals no substantial basis on which the allocation is based. Second, the 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 and confirmed it in 2000. Specifically it failed to consider the exponential growth in demand for access to the river by the self guided boating public.

A. Substantial evidence.

What evidence is revealed by a “thorough, probing, in-depth review” of the Administrative Record which supports an allocation of 106,500 primary season user days plus an additional 30,000 user days for guides to commercial users and only 43,920 primary season user days to the self guided boating public?

The evidence disclosed in the 1979 EIS is that while commercial use had not reached its total allotment level, noncommercial (self guided) users were being turned away indicating a greater “disappointment factor” in the noncommercial sector than in the commercial sector. The EIS also found numerous complaints from noncommercial users about lack of access while there were no such complaints

from commercial passengers. (Rec. 60-75 to 60-76). This was before the current waiting list for noncommercial permits was even instituted and is evidence which supports a greater allocation of use to the self guided boating public.

The Park Service admits in the 1979 CRMP that it has no count of commercial demand and that figures on demand for noncommercial trips are “complicated.” (Rec. 73-28). The only “numbers” revealed in the record up to 1979 is that applicants for noncommercial permits rose from 47 in 1972 to 425 in 1976. (Rec. 4-5). In reality there is no hard evidence cited in the EIS or the 1979 CRMP which supports the allocation of use established in that plan. The basis for the allocation is, “a best estimate based on experience and interpretation of the available data.” (Rec. 73-28). It is admitted that there is no “data” to interpret so, in reality, the allocation is based solely on “experience.” It is a “mere conclusion” which is not substantial evidence under *Olenhouse*.

The Park Service realized that it had no information or data upon which to base the allocation established in the 1979 CRMP and for that reason it specifically provided in the Plan that the ratio “will be reviewed and adjusted” as more reliable information is available. The Park Service recognized that demand for commercial and noncommercial trips was not static and **required** “continual monitoring and adjustments in allocation.” (Rec. 73-28, 73-36).

The Park Service ignored the mandate of its own Plan. The record is devoid of any evidence of monitoring during the following years and there was no adjustment. Instead the Plan was modified pursuant to Congressional pressure in 1981 to benefit the commercial concessionaires. (Rec. 83-1 to 83-5; 99-12, 99-14 to 99-15). Even then the 1981 Plan provided that studies would be done to assess public interest in commercially guided trips as compared to noncommercial trips; that allocation of user days between commercial and noncommercial users would continue to be an important management feature; and that

“based on this information,” the Plan would be updated or modified as necessary. (Rec. 99-21 to 99-22). There is no evidence in the record that any such studies were performed after 1981, and again there was no adjustment.

When the Park Service began the process to revise the 1981 CRMP in 1987 it was immediately and repeatedly recognized that one of the primary issues for consideration was the equity of allocation between noncommercial and commercial users. (Rec. 113-2 to 113-8; 113-11 to 113-17; 126-40 to 126-61; 119.2-5 to 119.2-6; 130-8 to 130-9). Even the Director of the National Park Service stated that the current allocation of user days was not equitable and that self-guided users had to wait over four years while commercial users could go “virtually at will.” (Rec. 119.2-5 to 119.2-6). Park Service management admitted that it had neither data nor a “clear philosophical rationale” for the allocation ratio. (Rec. 115-5 to 115-6). The only data disclosed in the record is that the “waiting list” for noncommercial permits, instituted in 1980, had grown from 720 in 1980 to over 3500 in 1988, an increase of 486%. (105.1-4 to 105.1-5; 156-11).

The Tenth Circuit requires that “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself,” and that “the grounds upon which the agency acted must be disclosed in, and sustained by, the record. *Olenhouse v. Commodity Credit Corp.*, *supra* at 1575. At least the Park Service recognized the lack of supporting evidence in the 1979 Plan and promised to remedy it. During the planning process for the 1989 Plan, it recognized that it had neither data nor a “clear philosophical rationale” for its allocation between noncommercial and commercial users and simply adopted the allocation established in the 1979 Plan. There is simply no substantial 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.

B. The Park Service refused to consider a relevant factor of the issue of allocation in the 1989 Plan and the allocation must be set aside.

The Park Service did not just “fail” to consider the relevant factor of the exponential growth of demand for noncommercial permits during the planning process for the 1989 CRMP. Consideration of current information and data concerning that growth was intentionally excluded from the process.

Despite the legal mandate to consider all relevant factors of the issue of allocation, Park Service management was more attuned to the “political ramifications” of the issue and announced a management objective of maintaining the current proportion “of noncommercial/commercial allocations.” (Rec. 115-1 to 115-2; 115-5 to 115-6). Despite initial Park Service identification of allocation between commercial and noncommercial users as one of the primary issues to be reviewed and despite repeated and continual public objection over the subsequent failure of the Park Service to include the issue in the planning process, (113-2 to 113-8; 113-11 to 113-12; 113-17 to 113-19; 115-1 to 115-2; 119.2 -4 to 119.2-6; 130-8 to 130-9; 145-12), the 1989 Plan adopted the allocation first established in 1979 without consideration or review of current data and information. (Rec. 114-21; 115-1 to 115-2; 156-1 to 156-176). Park officials reportedly stated that they would not consider the issue or adjust the allocation without political pressure from Congress to do so. (150-1). Park Service officials have subsequently admitted that the issue of allocation was not directly mentioned or adequately considered in the 1989 CRMP. (Rec. 165-172).

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 adopted the current allocation in the 1989 CRMP. In addition, the

Park Service failed to consider the factor of further exponential growth in demand for self guided access to the river since 1988 when it halted the CRMP planning process in 2000.

A review of the Administrative Record justifies a finding that the allocation between the self guided public and the commercial users is inequitable, arbitrary, capricious, and an abuse of discretion. Plaintiffs are entitled to 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.

II.

The refusal of the National Park Service to review and adjust the ratio of allocation of use between noncommercial and commercial users since 1979 constitutes action “unreasonably delayed.”

Administrative agencies do not have the discretion to avoid discharging the duties that Congress intended them to perform. The trial court must compel agency action unreasonably delayed. *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). When an agency’s recalcitrance, inertia, laggard pace, or inefficiency sorely disadvantages the class of beneficiaries Congress intended to protect, judicial review is in order. *Yu v. Brown*, 36 F.Supp. 922, 929 (D.NM 1999).

As observed by the Tenth Circuit, the courts have given little attention to the statutory distinction between agency action “unlawfully withheld” and action “unreasonably delayed,” noting that the Senate report explained only that the judicial review provisions “expressly recognize the right of properly interested parties to compel agencies to act where they improvidently refuse to act.” *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189 (10th Cir. 1999); S. Rep. No. 79-752 (1945). The Tenth Circuit determined that where, as here, an 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," the court must compel only action that is delayed unreasonably. *Forest Guardians v. Babbitt, supra* at 1190. The Tenth Circuit concluded that when an agency is required to act-either by organic statute or by the APA within an expeditious, prompt, or reasonable time, 5 U.S.C. §706 leaves in the court the discretion to decide whether agency delay is unreasonable. *Forest Guardians v. Babbitt, supra*.

Is then the overt refusal of the National Park Service to review, consider, and equitably adjust the allocation of use between noncommercial and commercial users since 1979 unreasonable? The evidence in the Administrative Record is overwhelming. The mere recitation of the summary of facts seems sufficient to support a finding of "action unreasonably delayed" without dispute. If a twenty-one year failure to act is not unreasonable, than what is?

The allocation of use between noncommercial and commercial users established by the 1979 CRMP was based only upon a "best estimate based on experience," and the Plan required "continual monitoring and adjustments in allocation" as discussed in Point I. Despite the requirements of the 1979 CRMP and the reaffirmation in the 1981 Plan that studies would be done to assess interest in commercial as compared to noncommercial trips and the plan would be modified as necessary, no studies were done and no adjustments were made.

During the planning process for the 1989 CRMP it was expressly recognized by the Park Service that a primary issue for consideration was the allocation of user days between commercial and noncommercial users. Even the Director of the National Park Service admitted in 1987, thirteen years ago, that the current allocation of use was not equitable. (See discussion under Point I). Despite this knowledge

and Park Service awareness of the exponential increase in demand for noncommercial access, Park Service management refused to review the issue or adjust the allocation.

Under the 1989 CRMP the Park Service was to initiate a “comprehensive sociological monitoring program” in January of 1990 with results to be “compiled into a baseline report within three years.” (Rec. 156-35). “Sociological research” was reportedly initiated in 1988 to aid in determining allocation between noncommercial and commercial users. (Rec. 207-5 to 207-6). No record of results of any such studies, research, or programs are found in the Administrative Record.

During the early 1990s, Park Service personnel were repeatedly made aware of the ongoing and growing problem of allocation at meetings of the Colorado River Constituency Panel. (Rec.165-30; 165-32; 165-48; 165-126; 165-128 to 165-132; 165-153 to 165-154; 165-158 to 165-162; 165-169; 165-214 to 165-216) In November of 1994, new superintendent Robert Arnberger acknowledged the problem and stated that it would be dealt with in the new CRMP process to begin in two years. (Rec. 165-153)

Park Service personnel repeatedly warned management of the ever growing problem. In 1994 Park River Ranger Mark Law noted the unrealistic wait and growing demand and suggested to management that it “overcome the resistance to dealing with sacred cows (allocation, access, launches, and contracts) which have historically shaped our management strategy.” (Rec. 170-1 to 170-3). In 1995 Park Wilderness Coordinator Kim Crumbo urged Superintendent Arnberger to immediately begin an analysis of this “major issue” which had not been directly mentioned or adequately dealt with in the 1989 CRMP. (Rec. 165-172).

When the planning process for the new CRMP began in 1997, the Park Service acknowledged that allocation of the use of the river was “the thorniest of the numerous difficult issues” faced in the CRMP

revision process. (Rec. 182-?; 179-1 to 179-6; 190-1 to 190-6; 246-45). Since 1988 the number of applicants on the waiting list for noncommercial access has grown from 3500 to over 6800 and the estimated wait for new applicants to the list is 22 years. (Rec. 166-11; 246-17 to 246-35). There is also evidence that persons desiring a commercial trip can purchase one for “the next summer season.” (Rec. 165-172 to 165-173). The Park Service admitted that the “wait time” for a non-commercial permit was “unacceptable” and a stated Park Service objective was to “decrease the disparity of ‘waiting time’ between professionally outfitted and the self outfitted public.” (Rec. 207-5 to 207-6). This disparity was to be alleviated in the new CRMP which was to be released in January of 2000. (Rec. 181-1 to 181-4; 165-153; 246-87 to 246-89; 246-99 to 246-100; 246-97 to 246-102).

However, the more obvious the problem became, the less Park Service management wanted to deal with it. By 1997 the issue had been removed from the list of stated objectives of the new Colorado River Management Plan (Rec. 181-1 to 181-4), and by February 9 of 2000, superintendent Arnberger considered the issue to be at most “a secondary question.” (Supp Rec. 3-1 to 3-5). Instead of a new plan in January, 2000, as promised, the entire planning process was halted. (Supp. Rec. 4-1 to 4-3).

Thus the ratio of allocation between commercial and self guided boaters established in 1979, twenty one years ago, is still in effect despite the growth of the waiting list from 780 in 1980 to over 6800; despite the growth in waiting time for applicants from two or three years in 1980 to over twenty years in 1998; despite the overwhelming public support for review and adjustment of the allocation during the 1989 CRMP planning process and the aborted 1999 CRMP planning process; despite recognition by the Director of the National Parks in 1988 that the current allocation was not equitable (Rec. 119.2-5 to 119.2-6); despite repeated recognition by Grand Canyon National Park personnel that the allocation was unreasonable (Rec. 170-1 to 170-30), that the wait was unrealistic and represented the longest wait for

a public access recreational activity in the country (Rec. 173), and 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 ((Rec. 165-172 to 165-173); and despite acknowledgment in the Administrative Record that the system for obtaining a permit for a noncommercial trip was “admittedly flawed” and had “outgrown its useful life.” (Rec. 209-1 to 209-4; 246-99 to 246-100).

The adjectives “recalcitrance,” “laggard pace,” and “inefficiency” hardly describe the lack of action in this instance. *See Yu v. Brown, supra* at 929. Nor is “Improvident refusal to act” an adequate description of the Park Service’s failure to act in this instance. In the face of overwhelming evidence of a gross inequity in the allocation of use and in the face of constant requests for review, consideration and adjustment for almost twenty years, the Park Service’s refusal to even consider the matter despite numerous opportunities to do so, can only be described as a blatant and conscious disregard of the interests of the self guided boating public in favor of an industry grossing over \$25 million dollars per year for a five month season.

The Park Service should have amassed a substantial amount of data pursuant to the studies required by the 1979 and 1989 CRMPs. More data was collected during the CRMP revision process begun in 1997. The Park Service should now have far more data than it had in 1979 when it determined the first allocation of use. Under 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. As one critic stated in response to the failure of the 1989 CRMP to address the issue, “Allocation of use has to be addressed now!” (Rec. 130-8 to 130-9).

Review of the Administrative Record justifies a finding that the existing allocation of use between commercial concessionaires and noncommercial self guided boaters is inequitable and that the conscious

refusal of the Park Service to review, consider, and adjust current allocation since 1979 is “action unreasonably delayed,” and should be set aside. Plaintiffs are entitled to an order setting aside the current allocation of use and compelling review and adjustment of the present allocation within sixty days of the date of the judgment.

III.

**The refusal of the Park Service to
consider and review the ratio of
allocation of use between noncommercial and
commercial users is a denial of plaintiffs’
rights to due process.**

Where an administrative agency promulgates rules and regulations to serve as guidelines, the guidelines should be followed and failure to do so tends to cause unjust discrimination contrary to fundamental concepts of fair play and due process. *International House v. N.L.R.B.*, 676 F.2d 906 (2nd Cir. 1982). The failure of an administrative agency to follow its own established procedures constitutes a violation of procedural due process. *Bills v. Henderson*, 631 F.2d 1287 (3rd Cir. 1980); *Berends v. Butz*, 357 F.Supp. 143 (D. Minn. 1973). The failure to follow an established guideline is a violation of due process even where the rule or guideline has not attained the status of a formal regulation. *Montilla v. I.N.S.*, 926 F.2d 162 (2nd Cir. 1991). Plaintiffs recognize that the rule of law announced in the cited cases arise from different circumstances than those present in the instant case. However the principle of law derived from these cases should apply across all spectrums of agency procedure.

The allocation of use between commercial users and self guided boaters is a regulation which regulates boating within a National Park. This regulation effects every member of the self guided boating public who desires to access and float the Colorado River through the Grand Canyon National Park. The

existing regulation causes a self guided boater an approximate twenty year wait while allowing a commercial user almost immediate access. When this regulation was adopted in the 1979 CRMP, the Park Service recognized that it had a weak or non-existent factual basis. Consequently the Park Service required, as part of its Plan, “continual monitoring and adjustments in allocation.” (Rec. 73-36). It provided that the allocation would be adjusted as more reliable information became available. (Rec. 73-28). And the Plan made clear that modifications would be necessary and would take place in from three to five years. (Rec. 73-37). The Park Service has ignored these guidelines for over twenty years.

The 1981 CRMP, a revision made for the benefit of the commercial users, provided nevertheless that studies would be done to assess interest in commercial as compared to noncommercial trips, that allocation between commercial and noncommercial users would “continue” to be an important management feature, that the Park Service would review and analyze information from ongoing programs, and that “based on this information,” the Plan would be updated. The Administrative Record reveals no studies assessing interest in commercial compared to noncommercial trips, and no updates or modifications to allocation between the two groups. Not only has there been a failure of the Park Service to follow the mandate of the 1979 and 1981 CRMPs, there was specific and intentional refusal to do so in the planning process for the 1989 CRMP. (See discussion in Point II above.).

The 1989 CRMP, in which the issue of allocation was intentionally ignored, provided that it would be in effect for a five to ten year period and that a “comprehensive plan review, directed by the Superintendent” would occur before the end of 1999. (Rec. 156-15). Even though such a review was begun eight years later in 1977 it was halted without completion in February of 2000. Thus again, there is a complete failure on the part of the National Park Service to follow its own guidelines and as a result, a complete denial to the self guided boating public of any forum or procedure by which to obtain relief from

an allocation and system that has been repeatedly recognized in the Administrative Record as inequitable, flawed, and not meeting the requirements of the recreational public.

The gross failure of the National Park Service to follow the guidelines established in three different plans for a period of twenty years violates plaintiffs' rights to due process and a fair consideration of their interests in obtaining an equitable allocation of access to the Colorado River. Moreover, the 1989 CRMP, by its own provision is no longer effective, its ten year period having passed in September 1999. Plaintiffs are entitled to a finding of this court that the 1989 CRMP is void and without effect, that the allocation between commercial and noncommercial users is inequitable, void and without effect, and that plaintiffs' rights to due process of law have been denied by the defendants' failure to follow their own guidelines and review and update the allocation as required. Plaintiffs are entitled to an order which immediately sets aside the 1989 CRMP, sets aside the allocation of use between commercial and noncommercial users which was adopted by that Plan, and orders the Park Service to immediately establish an equitable allocation between commercial and noncommercial users based on the data and information contained in the Administrative Record.

IV.

The allocation of use between non commercial boaters and commercial concessionaires and the refusal of the Park Service to consider, review, or adjust the allocation constitutes interference with plaintiffs' free access to a natural wonder of the Park.

Pursuant to 16 U.S.C. § 3 the Secretary of Interior *shall make and publish* rules and regulations for the use and management of the parks with the prohibition however 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.

The Park Service has granted to 16 concessionaires the right to use the Colorado River of the Grand Canyon to carry passengers through the Park for profit. These 16 concessionaires gross over \$25 million dollars during a five month season. (Rec. 247-138 to 247-139). As part of its management, the Park Service has allocated over 70.8 % of the summer recreational access to the river to these concessionaires (75.6 % if user days for guides are counted) while requiring noncommercial boaters, (i.e. citizens who do not wish to employ the services of a professional rafting company) to apply to and wait on a list of over 6800 persons for an estimated time of twenty years to gain access to one of the principal natural wonders of Grand Canyon National Park. No argument, no rationalization, can justify such a disparity of access between two user groups. The grant of this use to the concessionaires and the concurrent allocation of use adopted by the 1989 CRMP substantially interferes with the free access to the river by a substantial segment of the public. The refusal of the Park Service to even consider a review or adjustment of this admittedly inequitable allocation is a clear violation of 16 U.S.C. § 3 and should be set aside immediately with an order directing the Park Service to insure equal access to the Park by all members of the public.

V.

The National Park Service administers its system of allocating use between commercial concessionaires and noncommercial boaters in a manner which is unfair, arbitrary, capricious, and an abuse of discretion denying plaintiffs free access to a natural wonder of the park

Pursuant to the 1989 CRMP currently in effect, noncommercial boaters are to receive 43,920 summer user days. The CRMP represents that non commercial boaters receive 31% of the allotted

recreational use. (Rec. 73-28). This of course does not count the additional 30,000 user days allocated to commercial use for “commercial crew”, i.e. guides. (Rec. 73-27).

An internal document titled “Recreational Use Statistics” noted that between 1981 and 1987, allocation was 29.3% noncommercial to 70.7% commercial, but actual use was 24.4% noncommercial and 75.5% commercial. (Rec. 126-40 to 126-41). Commercial concessionaires have long complained that allowing noncommercial users their full allocation interferes with commercial operations, (Rec. 165-24, 165-26), and the 1989 CRMP admits that “summer use is strongly dominated by commercial concession-operated trips.” (Rec. 156-35).

Park management bias in favor of commercial dominated summer use and concessionaire resistance to full use of the noncommercial allocation during the summer months has resulted in a situation where the self guided boating public receives even less of its allocated use in the primary summer months of June, July, and August than it is entitled. This is easily demonstrated by a review of Park Service statistics.

Plaintiffs select the year 1997 for demonstration purposes as this is the year for which the NPS has printed out the most detailed statistics and with which this point is most easily demonstrated. Plaintiffs select the noncommercial use statistics for the months of June, July, and August (Rec. 284-35 to 284-37) and the commercial use statistics for those same months. (Rec. 284-51 to 284-59).

The noncommercial (noncommercial) users are to receive 43,920 use days during the primary season defined as April 16 through October 15, a period of six months. (Rec. 73-27). Dividing this allocation evenly would allow the noncommercial boaters 7,320 user days or 16.6667% of their allotted user days each month during the primary season. The noncommercial (noncommercial) use statistics for the month of June indicate they received only 6,309 user days or 14.3%. (Rec. 284-35). Although the statistics sheet shows a percentage of 11.6%, this is based on the yearly allocation which includes an

additional 10,500 user days during the winter months. The statistics for July show use of 6,798 user days or 15.5% of the allotted use. (Rec. 284-36). For August, they received 7,164 user days or 16.3%, close to but still below the allotted monthly allowance of 7,320 user days. (Rec. 284-37). Then in September, when commercial use drops, the noncommercial users receive 8,727 user days or 19.9% of their allotted summer use. (Rec. 284-38).

A comparison of commercial use with noncommercial use during the prime summer months of June, July, and August is more revealing. The Park Service represents in its 1979, 1981, and 1989 CRMPs that the ratio between commercial and noncommercial use is 69% commercial and 31% noncommercial. (Rec. 73-28). The Park Service statistics for the prime summer months indicate otherwise. Total noncommercial user days for June 1997 is 26,177 user days. (Rec. 284-51 to 284-53). Total noncommercial user days is 6,309. (Rec. 284-35). Total user days for June is 32,486. Noncommercial percentage of use is 19.4%; commercial percentage of use is 80.6%.

Total commercial user days for July is 24,841. (Rec. 284-54 to 284-56). Total noncommercial user days is 6,798. (Rec. 284-36). Total user days is 31,639. Noncommercial percentage of use is 21.5%; commercial percentage of use is 78.5%.

Total commercial user days for August is 20,401. (Rec. 284-57 to 284-59). Total noncommercial user days for August is 7,164. (Rec. 284-57 to 284-59). Total noncommercial user days for August is 7,164. (Rec. 284-37). Total user days for August is 27,565. Noncommercial percentage of use is 26%. Commercial percentage of use is 74%.

Similar patterns can be demonstrated in other years although it is more difficult with the statistics provided by the NPS in the Administrative Record.

Not only is the allocation of use weighted heavily in favor of the concessionaires but the existing system is administered in such a manner that the noncommercial users are denied even the allotment to which they are entitled during the primary summer months of June, July, and August. This is arbitrary, capricious, an abuse of discretion and manifestly unfair. It is a denial of plaintiffs' right to free access to the river under 16 U.S.C. §3 and a denial of plaintiffs' rights to due process under the Constitution. Plaintiffs are entitled to an order that defendants immediately manage the existing system to assure that plaintiffs and all noncommercial boaters receive the full use of the summer user days which have been allocated to them.

VI.

**The Park Service should be enjoined
from entering into new contracts
or extending existing contracts with
commercial concessionaires until
allocation is reviewed and adjusted**

Contracts between the Park Service and the commercial concessionaires who offer trips for profit through the Grand Canyon are scheduled to expire in 2002. (Rec. 246-101).

Contracts with concessionaires were last renewed in 1995. In November of 1994, Superintendent Robert Amberger requested a delay in the process of issuing new contracts to allow more time to study the issue of allocation between commercial and noncommercial users. Rec. 173-1 to 173-2). The request was denied and instead language was inserted in the prospectus for bidding advising prospective concessionaires that a review would be conducted to determine whether the current allocation of use between commercial and noncommercial users was appropriate and that commercial operators "might experience adjustments in river use allocations" during the course of their contracts. (Rec. 173-1 to 173-

2). Despite this language the Park Service has a specific reluctance to adjust allocation during the term of the contracts. (Rec. 263-10 to 263-11).

This problem now arises again. Plaintiffs are requesting a review and adjustment in allocation. Contracts with concessionaires are again due to expire and are up for renewal. Renewal or extension of existing contracts will simply raise another obstacle to any review and adjustment of allocation. Plaintiffs request that this court enjoin defendant Park Service from entering into new contracts or extending existing contracts with the commercial concessionaires until the issue of fair and equitable allocation of use between the commercial users and members of the self guided boating public has been resolved.

CONCLUSION

Pursuant to the mandate announced in *Olenhouse, supra*, plaintiffs request that following judicial review, the district court find that: The current allocation of recreational use between the self guided boating public and commercial concessionaires is inequitable; 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; the Park Service failed to consider the relevant and important factor of the growth of demand for noncommercial river permits when it halted its planning process for a new Colorado River Management Plan in February of 2000; the failure of the Park Service to review, consider, and adjust the allocation of use between noncommercial boaters and commercial concessionaires for twenty-one years, since 1979, despite continuing and substantial evidence of exponential growth in demand for noncommercial access and

despite substantial evidence in the Administrative Record and acknowledgment of Park Service personnel that the existing allocation of use was inequitable is an unreasonable delay; 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; the Park Service failed to follow its own procedure and guidelines set forth in its 1981 Colorado River Management Plan to assess public interest in commercially guided trips as compared to noncommercial trips, to review and analyze information from ongoing monitoring programs, and update and modify the Plan based on that information; the Park Service failed to follow its own procedures and guidelines set forth in its 1989 Colorado River Management Plan to perform a comprehensive review of the 1989 Plan before the end of ten years; the 1989 Colorado River Management Plan is no longer in effect by its own terms; the plaintiffs have been denied due process under the Constitution by the actions of the Park Service; and that the negotiation or execution of new contracts with the commercial concessionaires or the renewal or extension of existing contracts, before the issue of allocation is reviewed, considered, and adjusted, would be prejudicial to the interests of the plaintiffs and all noncommercial boaters desiring access to the Colorado River.

Based on these requested facts, and the argument and authority presented to the court, plaintiffs request an order of this court that: The allocation of use between commercial concessionaires and noncommercial users as established in the 1979 Colorado River Management Plan, as adopted without review in the 1989 Colorado River Plan, and as it still exists be set aside immediately; the Park Service immediately review, consider, and adjust the allocation between noncommercial users and commercial concessionaires based on the most current data and information contained within the Administrative Record within a reasonable time not to exceed sixty days; and enjoins the Park Service from negotiating new contracts or renewing or extending existing contracts with the commercial concessionaires until the Park

Service has reviewed, considered, and adjusted the allocation of use based on the most current information and data available in the administrative record.

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I hereby certify that a true and correct copy of the foregoing pleading was mailed to all counsel of record on October 30, 2000.

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