

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

JAMES R. 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 00-349 MV/WWD-ACE

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

Defendants,

and GRAND CANYON RIVER OUTFITTERS
ASSOCIATION,

Intervenor.

DEFENDANTS' RESPONSE BRIEF ON MERITS

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I. Introduction

This action challenges the allocation of recreational river-use permits between commercial and noncommercial boaters on the Colorado River through Grand Canyon National Park (hereinafter "GRCA" or "park"), a unit of the national park system administered and managed by the National Park Service (hereinafter "NPS"), an agency of the United States Department of the Interior.¹ The NPS announced the current allocation of permits in the 1989 Colorado River Management Plan (hereinafter "1989 CRMP") (Admin. Rec. Doc. No.² 156), which adopted the allocation contained in the 1981 Colorado River Management Plan (hereinafter "1981 CRMP"). Admin. Rec. Doc. No. 99.³ Notice of the 1989 CRMP was published in the Federal Register on January 19, 1990. Admin. Rec. Doc. No. 161.

Plaintiffs seek an "order compelling defendants to adjust and modify the allocation between commercial and non-commercial users in a fair and equitable manner within a reasonable time not to exceed sixty days." Complaint, pp. 12-13. Plaintiffs also seek an injunction "enjoining defendants or their successors from negotiating and entering into new

¹The Grand Canyon is widely acclaimed as one of the wonders of the natural world. The park currently attracts almost five million visitors per year, making it the second most visited national park in the United States, behind Great Smoky Mountains National Park.

²Citations to the administrative record refer to the record lodged with the Court (see Docket No. 22), and when a particular page is referenced it will be shown after a hyphen (e.g. No. 156-159 references page 159 of Admin. Rec. Doc. No. 156).

³In their Complaint and in Plaintiffs' Brief in Support of Petition for Judicial Review of Administrative Action (hereinafter "Plaintiffs' Brief"), Plaintiffs insist on stating that the allocation contained in the 1989 first was announced in the 1979 Colorado River Management Plan (hereinafter "1979 CRMP") (Admin. Rec. Doc. No. 73). That is incorrect. See further discussion in section II below.

contracts or extending existing contracts with the commercial users until the allocation of use between commercial and non-commercial

users has been adjusted in a fair and equitable manner based on the most recent data and information concerning demand for commercial and non-commercial use." Id. at p. 13. As the legal bases for their prayer for relief, Plaintiffs allege that Defendant's regulations governing use of the Colorado River and the existing allocations within GRCA are arbitrary and capricious and constitute an abuse of discretion. Id. at ¶¶ 28-33. Plaintiffs also apparently believe that they have a statutory right of "free access" to the Colorado River within GRCA and a constitutionally protected interest in rafting the river. Id. at ¶¶ 34-35 and 36-37. Finally, Plaintiffs allege that the NPS has violated its own plans for managing the Colorado River within GRCA. Id. at ¶¶ 38-44. Plaintiffs further allege that the Defendants have unreasonably delayed action by failing to adjust the allocations. Plaintiff's Brief at pp. 31-36.

The NPS' regulations governing use of the Colorado River within GRCA, found at 36 C.F.R. § 7.4(b), are not arbitrary and capricious and do not constitute an abuse of discretion, and Defendants have not violated them. Further, Defendants assert that Plaintiffs' claims as to the existing allocation between commercial and non-commercial river rafters are barred by the applicable statute of limitations, 28 U.S.C. § 2401(a). Defendants deny that Plaintiffs have either a statutory right of "free access" to the Colorado River within GRCA or a constitutionally protected interest in rafting the river. Defendants also deny that the NPS has violated its own plans for managing the Colorado River within GRCA or unreasonably delayed action on adjusting the allocations.

More generally, the NPS is vested with broad discretion in managing public access to and use of GRCA, including recreational use of the Colorado River, and has no statutory or regulatory duty to change the allocation or even to issue river-use permits in the first place. The allocation decision announced in the 1989 CRMP was reasonable based on the information available at that time, and the NPS conducted a thorough review of that plan, with public input, from August 1997 to February 2000. Admin. Rec. Doc. Nos. 183 through 254. As a result of that review process, the NPS ultimately decided to suspend the expensive and time-consuming planning effort necessary to amend the 1989 CRMP, which is a prerequisite to adjusting the allocation, and to continue to manage the river under the existing plan. Admin. Rec. Doc. Nos. 264. The NPS's decision not to amend the 1989 CRMP and not to adjust the allocation was a reasonable exercise of the agency's discretionary authority and should not be disturbed by the district court.

For all of the foregoing reasons, Plaintiffs' request, that the district court essentially substitute its judgment for that of the agency and require the reallocation of recreational use permits on the Colorado River within GRCA, should be denied.

II. Defendants' Response to Plaintiffs' Statement of Facts and Alternative Statement of Facts

In their Statement of the Facts (Plaintiffs' Brief, at 4-22), Plaintiffs have extracted from the administrative record carefully selected facts and quotations to support their allegations and their view of the history of the NPS's management of the Colorado River

within GRCA.⁴ However, the Plaintiffs' selection of facts and quotations distorts the reality of the events and processes represented in the administrative record. For example, in their brief Plaintiffs state, "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." Plaintiffs' Brief at 18 (first full paragraph). If one turns to the administrative record, however, one sees that Plaintiffs are selectively quoting flip chart notes taken at public scoping workshops. Admin Rec. Doc. 189. The administrative record discloses that those scoping workshops were only a small part of the initial scoping effort that lasted four months and generated thousands of comments ranging from support for the current allocation to dissatisfaction with it. See Admin. Rec. Docs. Nos. 184 through 191; see also Admin. Rec. Doc. No. 197 (summary of public scoping comments). After concluding that initial scoping effort, the NPS continued to solicit and consider comments (and to receive conflicting opinions) from constituent groups

⁴Plaintiffs have submitted directly to the Court an appendix containing the selected documents they reference. However, as the Supreme Court has stated: "review is to be based on the full administrative record that was before the Secretary at the time he made his decision." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); see also Camp v. Pitts, 411 U.S. 138, 142 (1973) (administrative record is "focal point" of judicial review); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985) ("based on the record the agency presents to the reviewing court"). The Tenth Circuit noted in Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1576 (10th Cir. 1994) that: "the district court may not rely on counsel's statements as to what was in the record; the district court itself must examine the administrative record and itself must find and identify facts that support the agency's action." Thus, the Court is "required conduct a plenary review of the record to ascertain whether the agency's action was supported by 'substantial evidence.'" Id., at 1576. The complete administrative record has been lodged with the Court (See Docket No. 22). Plaintiffs' submission of an appendix of selected documents from the record is improper and the Court should base its review on the entire record submitted by the agency in this matter.

and other members of the public until February 2000. See Admin. Rec. Docs. Nos. 198 through 204, 207, 211, 220, 228, 233 through 237, 243, 246, and 248 through 254.

Furthermore, Plaintiffs' Statement of the Facts contains some misrepresentations or mistakes. For example, in their brief Plaintiffs assert, "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)." Plaintiffs' Brief at 10 (second full paragraph). However, Mr. Heberlein was not the Director of the NPS; he was a researcher from the University of Wisconsin who was allied with the noncommercial users and who was assisting them in their efforts to affect the final shape of the 1989 CRMP; and the quotation in Plaintiffs' Brief is from a letter Mr. Heberlein wrote to his fellow researchers, which was an enclosure to a letter he later wrote to the GRCA Superintendent.⁵ See Admin. Rec. Doc. No. 119-2

Because of numerous defects like the foregoing, Defendants offer the following alternative statement of the facts as disclosed by a review of the administrative record:

In the late 1960s and early 1970s, after a century of stasis or slow growth, river use

⁵That mistake carries over to the following paragraph, where Plaintiffs state, "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." Plaintiffs' Brief at 10. To repeat, Mr. Heberlein was not the Director of the NPS, but an interested member of the public. Admin. Rec. Doc. No. 119-2. Furthermore, if one turns to the administrative record, one sees that the reason why the NPS did not include an alternative of adjusting allocation in the 1988 Draft Preferred Alternatives for the Colorado River Management Plan was that at that time the noncommercial allocation had never been fully utilized. Admin. Rec. Doc. No. 156-159.

within the Grand Canyon increased dramatically. Admin. Rec. Doc. Nos. 24-10, 156-159. In about 1972 the NPS began issuing concession permits (simplified concession contracts) to commercial operators to provide public boat trips on the Colorado River within GRCA. See Admin. Rec. Doc. No. 22.1.⁶ In 1973, according to NPS records, twenty-one commercial boating companies and noncommercial river runners carried more than 15,000 people down the river, an increase of almost 700 percent in only six years. Admin Rec. Doc. No. 73-9. Colorado River use for 1972 alone exceeded the one-hundred-year period from 1870 through 1969. Id. That enormous increase resulted in the expected deleterious impacts on the sensitive riverine ecosystem--increased trash, human waste, and noise, and conflicts between and among diverse users and user-groups. Admin Rec. Doc. No. 73-15.

At that time the NPS, acting pursuant to 16 U.S.C. § 3 and certain provisions in GRCA's authorizing legislation, promulgated the regulations governing use of the Colorado River within GRCA. 36 Fed. Reg. 10,878 (proposed rule) and 36 Fed. Reg. 23,293 (final

⁶It is worth noting that commercial operators, like noncommercial permittees, provide boat trips to members of the public. The primary difference, of course, is that commercial operators charge their passengers for their services. For that reason Plaintiffs apparently view commercial operators as Philistines and the allocation of user days to commercial users as anti-democratic. But consider that in order even to have an opportunity to participate in a noncommercial trip, a person must be a member of a relatively select class: he or she either must have invested a considerable amount of time and money in acquiring the necessary river rafting equipment and skills or must be acquainted with someone who has. The number of persons who occupy that class is small--probably significantly smaller than the number of persons who can afford to pay a commercial operator for his or her services. The point is simply that both commercial and noncommercial users provide members of the public with access to the river, and neither one is necessarily superior to, or more democratic than, the other. See Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir.); denial of reh'g and reh'g en banc, 608 F.2d 1250 (9th Cir. 1979); cert. denied sub nom. Eiseman v. Andrus, 446 U.S. 982, and Wilderness Public Rights Fund v. Andrus, 446 U.S. 982 (1980) .

rule) (1971) (now codified at 36 C.F.R. § 7.4(b)).⁷ Those regulations became effective on January 8, 1972. *Id.* The NPS also initiated the first in a long series of river management planning efforts, culminating in the December 1972 River Use Plan. During the ensuing two decades, that plan was followed, in order, by a number of other river planning documents:

<u>Title of Document</u>	<u>Date</u>	<u>Document Number in Administrative Record</u>
Draft Environmental Statement (Proposed: Establishment of Visitor Use Limits on the Colorado River Through Grand Canyon National Park, Arizona)	2/13/1973	24
Final Environmental Statement (Proposed Colorado River Management Plan)	7/31/1979	69
Colorado River Management Plan 12/1979 (1979 CRMP)		73
Draft Alternatives for the Colorado River Management Plan	6/1981	93
Colorado River Management Plan and Annual Operating Requirements (1981 CRMP)	12/1981	99
Record of Decision, Colorado River Management Plan	1/28/1982	100
Colorado River Management Plan 9/1989 (1989 CRMP)		156

All of those documents were produced with the extensive involvement of interested

⁷The preambles to the proposed and final rules state succinctly, "The proposed regulations have become necessary to protect the wilderness quality and safety of the visitors seeking to enjoy a whitewater river trip." 36 Fed. Reg. at 10,878 and 23,293.

members of the public and within the legal constraints imposed on the NPS by Congress. See, e.g., tit. I, § 112 of the Appropriations Act for the Department of the Interior and Related Agencies for Fiscal Year, 1981, Pub. L. No. 96-514, 94 Stat. 2957, 2972 (commonly referred to as "Hatch Amendment"; prohibiting use of funds appropriated by act for implementation of any river management plan within GRCA "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 in the calendar year 1978").

All of the river planning documents listed above quantify river use in terms of user days. One person using the river for part or all of one day equals one user day. In all of those planning documents the NPS has allocated the number of user days between commercial users (i.e., concessioners) and noncommercial users. The 1989 CRMP allocates 106,156 user days during the primary season and 9,344 user days during the secondary season to the commercial users (a total of 115,500 user days) and 43,920 user days during the primary season and 10,530 user days during the secondary season to the noncommercial users (a total of 54,450 user days).⁸ Admin. Rec. Doc. No. 156-10. That is the same as the allocation contained in the 1981 CRMP.⁹ Admin. Rec. Doc. No. 99-12,

⁸The primary season is defined slightly differently for commercial and noncommercial users. For commercial users it is May 1 through September 30, inclusive; for noncommercial users it is April 16 through October 15, inclusive. Admin. Rec. Doc. No. 156-10.

⁹For both commercial and noncommercial users the 1979 CRMP presented for both summer and winter seasons two different numbers: "projected user days" and "maximum user days." Admin. Rec. Doc. No. 73-24. The "projected user days" for commercial users totaled 115,500 for both summer and winter seasons (the same as the current allocation); however, the "maximum user days" for

99-14.

In the 1989 CRMP the NPS expressly "reserves the right to add or subtract, allocate or reallocate user days based on review of all relevant factors." Admin. Rec. Doc. No. 156-10. However, any adjustment of the allocation must be accomplished by amending the 1989 CRMP and only after complying with other legal requirements (such as those imposed by the National Environmental Policy Act ("NEPA") of 1969, 42 U.S.C. § 4331, et seq., and the National Historic Preservation Act ("NHPA") of 1966, 16 U.S.C. § 470, et seq.). See further discussion below.

The 1989 CRMP also states:

The Colorado River Management Plan will be in effect for a five to ten year period. A comprehensive plan review, directed by the Superintendent through the Division of Visitor and Resources Protection and the Division of Resources Management and Planning, will occur before the end of this period.

This comprehensive review process will incorporate public meetings and comments, data from monitoring/research projects, visitor use statistics, NPS policies, federal rules and regulations, and legislated mandates. The purpose of the review will be to fully examine evolving public concerns and develop far-reaching programs needed to protect natural and cultural resources and environmental processes, thereby enhancing the opportunity for park visitors to have a quality experience.

The Colorado River Management Plan will also be responsive, on an annual basis, to results of research, monitoring programs, and public and constituent

commercial users totaled 185,175. Id. The "projected user days" for noncommercial users totaled 54,450 (the same as the current allocation); the "maximum user days" totaled 61,595. Id. Although the 1979 CRMP stated that "maximum user days will not be allowed to happen," the plan did not foreclose the possibility that the NPS would permit numbers greater than the "projected user days." Id. at 18. Thus, under the 1979 CRMP the numbers of user days actually used by commercial and noncommercial users (and the ratio of those numbers) may have been significantly different from those numbers (and the ratio of those numbers) under the current allocation/plan.

group input. This annual review will primarily be concerned with the annual Noncommercial and Commercial Operating Requirements [which include the allocation of user days], which are dynamic in nature. Public input and research or monitoring program results may indicate that occasional changes in operational procedures may be necessary. These changes, after consideration by the park, will be initiated with the issuance of the Annual Operating Requirements prior to April 1st of each year. Changes that affect visitor safety or preservation of park resources may be initiated at the discretion of the Superintendent at any time.

Admin. Rec. Doc. No. 156-15. In August 1997 the NPS undertook the comprehensive plan review described in the 1989 CRMP. During the review process the NPS hosted public scoping workshops in Portland, Oregon, Salt Lake City, Utah, and Phoenix, Arizona (September 1997) (see Admin. Rec. Docs. Nos. 183, 184, 185, 187, and 189); invited written public comments on river issues (August-December 1997) (see Admin. Rec. Doc. No. 188); produced a written summary of river issues (April 1998) (see Admin. Rec. Doc. No. 197); hosted a public meeting in Flagstaff, Arizona (May 1998) (see Admin. Rec. Doc. No. 198); conducted at least three public work groups on specific issues (June-September 1998 (see Admin. Rec. Docs. Nos. 202, 203 204); produced approximately ten newsletters and a website on river issues (see Admin. Rec. Docs. Nos. 239, 240 and 255); attended meetings hosted by various interest groups (see Admin. Rec. Docs. Nos. 200, 201, 220, 222, 233, 235, 236, 237, and 245.1); and sponsored a visitor use survey by consultants who interviewed more than one thousand visitors about their river running experience (see Admin. Rec. Docs. Nos. 223, 224). That review process continued until February 2000, when the GRCA Superintendent suspended it for the reasons articulated in his February 23, 2000, letter to GRCA constituents. Admin. Rec. Doc. No. 264.

In addition, the NPS has completed annual reviews of the management of the river,

has added experimental winter-season launch dates for noncommercial users, and has implemented numerous operational improvements (within the framework of the 1989 CRMP) designed to allow noncommercial users to more fully utilize their allocation, including allowing permit holders to defer trips in certain circumstances and allowing persons near the top of the waiting list an enhanced opportunity to utilize permits for canceled trips. See Admin. Rec. Docs. Nos. 222.1, 232, 255, and 272.

With respect to the NPS's management of the Colorado River within GRCA, it is important to emphasize two things: (1) The allocation of river-use permits is an integral component of the larger river management scheme documented and embodied in the 1989 CRMP. As such, the allocation issue is inextricably linked to other river management issues such as the environmental and social carrying capacity of the river, the timing of launch dates, the spectrum of use and trip types (e.g., oar boats vs. motor boats, rustic vs. civilized), the as-of-yet unquantified demand for additional user days for commercial passengers, internal NPS operational constraints, and the legal obligations imposed on the NPS by its existing contracts with the commercial operators (see further discussion below). The NPS cannot adjust the allocation without addressing at least some of those related issues, which would require the NPS to amend the 1989 CRMP and to comply with other applicable legal requirements (such as those imposed by NEPA and NHPA). (2) No statute, regulation, guideline, or policy requires the NPS to review and revise the 1989 CRMP or to adjust the river-use permit allocation. The only source of any arguable obligation is the above-quoted language in the plan itself, which merely provides that the NPS will conduct a comprehensive review (but not necessarily a revision) of the 1989

CRMP.¹⁰

In about 1972 the NPS, acting pursuant to its concession authority, began issuing concession permits (simplified concession contracts) to commercial operators to provide boat trips on the Colorado River within GRCA. See Admin. Rec. Doc. No. 22.1. Over time, those concession permits evolved into more detailed concession contracts. See, generally, Admin. Rec. Doc. No. 256. Currently there are sixteen such contracts, all of which will expire on December 31, 2002. Admin. Rec. Doc. Nos. 256-332, 246-101. To renew those contracts, the NPS first will prepare a prospectus. See National Park Service Concessions Management Improvement Act of 1998 (hereinafter "NPSCMIA"), tit. IV, National Parks Omnibus Management Act of 1998, codified at 16 U.S.C. § 5951, et seq., at § 5952 (2) and (3).¹¹ Prospective concessioners then will submit proposals. See 16 U.S.C. § 5952 (2) and (4). Finally, the NPS will evaluate the proposals and select the best ones. See 16 U.S.C. § 5952(5). The entire process of awarding the new contracts may require a year and a half or more. The NPS must prioritize its parkwide concession contract work load, however, and the process of renewing the boating concession contracts may not begin for

¹⁰Such monitoring provisions in plans generally do not create any obligations enforceable by third parties. Ecology Center v. U.S. Forest Service, 192 F.3d 922, 924-25 (9th Cir. 1999).

¹¹The NPSCMIA repealed the former NPS concession authorization law, which had been codified at 16 U.S.C. §§ 20-20g (1994). The NPSCMIA directs the Secretary of the Interior to enter into concession contracts with persons, corporations, or other entities to provide accommodations, facilities, and services to visitors to units of the national park system. Id. at § 403. Subsection 403(8) of the NPSCMIA authorizes the Secretary to grant to certain concessioners, including outfitters and guides, a preferential right to renew a concession contract. The final regulations for the NPSCMIA were published in the Federal Register on April 17, 2000, 65 Fed. Reg. 20,630 (2000), and are codified at 36 C.F.R. Part 51 (2000).

another year. If new contracts are not in place by January 1, 2003, then the NPS may execute extensions of the existing contracts. See 16 U.S.C. § 5952(11).

III. Applicable Law - General Legal Background

A. Standard of Review

This case arises under the Administrative Procedures Act (hereinafter "APA"). See Complaint, ¶¶ 1, 32-33, 42-43, 47, 49, and 52, and prayer for relief (pp. 12-13). The judicial review provisions of the APA are codified at 5 U.S.C. §§ 701-706 (2000). 5 U.S.C. § 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Furthermore, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Id. at § 704. The APA describes the scope of review as follows:

The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . .

Id. at § 706.

Under the APA the district court must base its decision on a review of the administrative record documenting the challenged action, with the appropriate deference shown to the agency in interpreting its own statutory authority. See, e.g., Chevron, U.S.A.,

Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984) (court must defer to agency's "reasonable interpretation" of statute); Udall v. Tallman, 380 U.S. 1, 16 (1965) (court must show "great deference" to agency's interpretation of statute); Western Radio Servs. Co., Inc. v. Espy, 79 F.3d 896, 900 (9th Cir.), cert. denied, 519 U.S. 822 (1996) (court may reverse agency's decision only if agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1069-70 (9th Cir. 1997) (court will defer to the agency's interpretation "if it is 'permissible' in light of the available evidence of congressional intent."); Daingerfield Island Protective Society v. Babbitt, 823 F. Supp. 950, 956 (D.D.C. 1993), aff'd, 40 F.3d 442 (D.C. Cir. 1994), reh'g and suggestion for reh'g en banc denied, 40 F.3d 442 (D.C. Cir. 1995) ("[w]here several administrative solutions exist for a problem, courts will uphold any one with a rational basis, so long as the balancing of competing solutions is not an arbitrary one"); Phillips Petroleum Co. v. Lujan, 951 F.2d 257, 259 (10th Cir. 1991) (scope of review is a "narrow one" (quoting Edwards v. Califano, 619 F.2d 865, 868 (10th Cir. 1980)); court must afford "substantial deference" to actions of agencies in compliance with their statutory enforcement obligations); Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1282 (10th Cir. 1991) (scope of review "is a narrow one" (quoting Edwards); court accepts agency's "reasonable interpretation" of its statutory authority); and Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir.); denial of reh'g and reh'g en banc, 608 F.2d 1250

(9th Cir. 1979); cert. denied sub nom. Eiseman v. Andrus, 446 U.S. 982, and Wilderness Public Rights Fund v. Andrus, 446 U.S. 982 (1980) (involving river rafting within GRCA and opining that NPS has "the wide ranging responsibility of managing the national parks").

Under the "arbitrary and capricious" standard, "administrative action is upheld if the agency has 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Friends of Endangered Species v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985)(quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105 (1983)); see also Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994). "[T]his standard is exceedingly deferential." Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996). The court's role is solely to determine whether "the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment" and therefore, was arbitrary and capricious. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416; see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency."); Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action."). Moreover, "an agency decision is entitled to some presumption of regularity," Preston v. Heckler, 734 F.2d 1359, 1372 (9th Cir. 1984), and the burden of proof is on the person challenging the decision. Park County Resource Council, Inc. v. U.S. Dep't of Agriculture, 817 F.2d 609, 621 (10th Cir. 1987). The arbitrary and capricious standard presumes the validity of the agency's action. Colorado Health Care Ass'n v.

Colorado Dept. of Social Services, 842 F.2d 1158, 1164 (10th Cir. 1988). The court should not substitute its judgment for that of the agency. City of Aurora v. Hunt, 749 F.2d 1457, 1464 (10th Cir. 1984); accord Sabin v. Berglund, 585 F.2d 955, 959 (10th Cir. 1978); Fund for Animals, Inc., 85 F.3d at 541 ("The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action.").

B. NPS's Discretionary Authority to Administer and Manage the Park

As stated previously, the NPS administers and manages GRCA as a unit of the national park system. What is commonly referred to as the NPS Organic Act is found at 16 U.S.C. §§ 1 and 2-4, and the park's authorizing legislation is found at 16 U.S.C. §§ 221-228j. The regulations applicable generally to units of the national park system are found at 36 C.F.R. ch. I (2000), and the regulations applicable specifically to GRCA are found at 36 C.F.R. § 7.4.

16 U.S.C. § 1 created the NPS and directs it to "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 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. § 1a-2(h) authorizes the Secretary of the Interior to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16

U.S.C. § 3 directs the Secretary of the Interior 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."

In a wide variety of contexts, reviewing courts have held that the NPS has broad discretionary authority to regulate access to and use of resources in units of the national park system. These challenges to the NPS's management of park areas have been brought under the APA, raising claims that the regulations are arbitrary and capricious or violate the Due Process Clause of the Fifth Amendment. See, e.g., Organized Fishermen of Florida v. Watt, 775 F.2d 1544, 1550 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986) (upholding NPS's regulation and restriction of fishing within Everglades National Park); Alaska Wildlife Alliance, 108 F.3d at 1069 (upholding NPS's interpretation of its statutory authority to allow commercial fishing in nonwilderness areas of Glacier Bay National Park); Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1465 (9th Cir. 1996)(upholding NPS's regulation and restriction of bicycle use within Golden Gate National Recreation Area); Lesoeur v. United States, 21 F.3d 965, 969 (9th Cir. 1994) (in context of tort action, upholding NPS's decision not to regulate Hualapai Tribe's Colorado River tours within GRCA); Free Enterprise Canoe Renters Ass'n of Missouri v. Watt, 711 F.2d 852, 856 (8th Cir. 1983) (upholding NPS's regulation prohibiting delivery or retrieval of canoes by nonconcessioners within Ozark National Scenic Riverways); Wilderness Public Rights Fund, 608 F.2d at 1254 (upholding NPS's unequal allocation of permits between commercial and noncommercial users of Colorado River within GRCA); and Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1, 3 (D.D.C. 1994) (upholding

NPS's allocation of permits for ships to enter Glacier Bay in Glacier Bay National Park).

IV. Legal Argument

A. The Applicable Statute of Limitations Bars Any Challenge to the Regulations Found at 36 C.F.R. § 7.4(b) and to Allocation Decisions Announced in the 1981 CRMP and the 1989 CRMP.

The complaint in this action was filed on March 9, 2000. Plaintiffs, proceeding under the APA, challenge the regulations found at 36 C.F.R. § 7.4(b), which became effective on January 8, 1972, and the allocation of permits between commercial and noncommercial river users announced in the 1981 CRMP and incorporated into the 1989 CRMP. See Complaint, ¶¶ 1, 32-33, 42-43, 47, 49, and 52, and prayer for relief (pp. 12-13). Notice of the 1989 CRMP was published in the Federal Register on January 19, 1990. Admin. Rec. Doc. No. 161.

28 U.S.C. § 2401(a) states, "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." Actions brought against federal officials or the United States under the APA are subject to the six-year limitations period. E.g., Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997); Daingerfield Island, 40 F.3d at 445; Wind River Mining Corp. v. United States, 946 F.2d 710, 712 (9th Cir. 1991); Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364 (9th Cir. 1990); Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988); Dunn McCampbell Royalty Interest, Inc. v. United States, 964 F. Supp. 1125, 1131 (S.D. Tex. 1995), aff'd, 112 F.3d 1283 (5th Cir.), rehearing and suggestion for rehearing en banc denied, 124 F.3d 195 (5th Cir. 1997); and Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir.

1985), reh'g denied, 782 F.2d 1351 (5th Cir. 1986).

Exactly when a cause of action accrues under the APA depends on the nature of the challenge to the governmental action. In Sierra Club the Ninth Circuit held that a challenge to regulations based on alleged procedural irregularities in the promulgation of the regulations must be brought within six years of the date of publication of the regulations. 857 F.2d at 1315-16. In Shiny Rock Mining Corp. the Ninth Circuit held that the limitations period began to run when a public land order was published in the Federal Register, providing interested or affected persons with constructive notice of the order. 906 F.2d at 1364-66. In Wind River Mining Corp. the Ninth Circuit summarized its holdings in those two cases as follows:

If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision. . . .

946 F.2d at 715; accord Dunn McCampbell Royalty Interest, Inc.

The complaint here raises policy-based challenges to the allocations in the 1981 CRMP and 1989 CRMP. Essentially Plaintiffs assert that the allocations are unfair and inequitable to non-commercial river rafters. This complaint was filed more than twenty-eight years after the NPS's regulations found at 36 C.F.R. § 7.4(b) went into effect, more than nineteen years after the 1981 CRMP went into effect, and more than ten years after the 1989 CRMP went into effect and notice was published in the Federal Register. It is far too late to raise policy challenges to those regulations or to the decisions announced in the 1981 and 1989 plans. The six-year statute of limitations bars all of Plaintiffs' claims

challenging the provisions of the regulations and plans, including the allocation between commercial and non-commercial river rafters. All of the claims raised by Plaintiffs in the complaint should be dismissed as untimely to the extent they directly or indirectly raise such challenges to the provisions of the 1972 regulations and the 1981 and 1989 plans.

B. The NPS's Regulations and Allocation Decisions Governing Use of the Colorado River Are Not Arbitrary and Capricious and Do Not Constitute an Abuse of Discretion.

Even if these policy based challenges were not barred by the statute of limitations they are without merit. Pursuant to its various statutory authorities the NPS regulates the use of the Colorado River within GRCA and has promulgated regulations specifically governing that use. 36 C.F.R. § 7.4(b). Those regulations, which now have been in effect for more than twenty-eight years, do not incorporate or dictate a specific allocation of user days. Rather, they recognize that the NPS has discretionary authority to determine the appropriate allocation:

The National Park Service reserves the right to limit the number of such permits issued, or the number persons traveling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area.

Id. at § 7.4(b)(3). The Ninth Circuit previously has upheld the NPS's authority to regulate allocation of use of the Colorado River within GRCA under these very same NPS regulations governing river use. Wilderness Public Rights Fund v. Kleppe, 608 F.2d at 1254. As the Ninth Circuit stated there:

The Secretary of the Interior, acting through the NPS, has the wide ranging responsibility of managing the national parks. Pursuant to this authority, the NPS regulates use of the Colorado River through the permit requirement

described in 36 C.F.R., § 7.4(h)(3), *Supra*. In issuing permits, the Service has recognized that those who make recreational use of the river fall into two classes: those who have the skills and equipment to run the river without professional guidance and those who do not. The Service recognizes its obligation to protect the interests of both classes of users. It can hardly be faulted for doing so. If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others. We must confine our review of the permit system to the question whether the NPS has acted within its authority and whether the action taken is arbitrary. Allocation of the limited use between the two groups is one method of assuring the rights of each are recognized and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary. It is well within the area of administrative discretion granted to the NPS.

Wilderness Public Rights Fund v. Kleppe, 608 F.2d at 1253 (Citations omitted). The existing allocation is clearly explained and supported by the administrative record. The current allocation was adopted in the record of decision for the 1981 CRMP, which stated in part:

When the ceiling was placed on annual use in 1973, the ratio of commercial to non-commercial user days was about 12:1. One of the goals of the planning process was to provide for a more reasonable allocation of commercial and non-commercial use. Accordingly, the final plan provides for a commercial to non-commercial ratio of about 2:1. The NPS feels that this ratio will more equitably accommodate the demand of river runners for non-commercial trips.

See Admin. Rec. Doc. No. 100. The 1981 CRMP was in turn based on analysis of river use allocation in the final environmental impact statement ("FEIS") for the 1979 CRMP. Admin. Rec. Doc. No. 69. The FEIS for the 1979 CRMP reflected that the limited demand data available indicated a demand ratio between commercial and non-commercial rafters of about 3:1. *Id.*, at 69-23. The 1981 CRMP indicated that the commercial and non-commercial use of the river would be monitored and the NPS reserved the right to modify

the allocations at a later date. Admin. Rec. Doc. Nos. 99 -21, 99-22. The issue of commercial and non-commercial river use was examined again in the 1989 CRMP but no changes were ultimately made in the allocation. Admin. Rec. Doc. No. 156-10. However, the tables in the 1989 CRMP reflecting that analysis indicate that, while the waiting list for non-commercial users was growing, approximately twenty percent (20%) of the user days allocated to non-commercial users were not being utilized due to the non-use of all available launch days. Admin. Rec. Doc. Nos. 156 -11, 156-159. The 1989 CRMP therefore imposed a small administrative fee that would encourage use of the available launch dates by non-commercial users. Id. A number of other administrative changes were made to add flexibility to non-commercial users. Admin. Rec. Doc. Nos. 160, 162. While the allocation was disputed by the competing interest groups, (see, e.g. Admin. Rec. Doc. No. 130), the past decisions on allocation have been explained by the NPS and supported in the record which is all that the APA requires. Jantzen, 760 F.2d at 982.

Finally, Plaintiffs argue that, since demand for non-commercial use may have risen over the years since then, the NPS is now required to reallocate more users days to them. However, nowhere in the NPS's statutes and regulations is "demand" made the "be all and end all" to public use of the national parks. If there were demand for houseboats, speedboats or jetskis on the river, would that require allocation of river use to such applicants for permits? Certainly not. The consideration of demand is merely one factor to be considered in the NPS' exercise of its discretion in determining what kinds of use and levels of use are consistent with its overall administration of the national park for the public at large. As the Ninth Circuit noted in Wilderness Public Rights Fund v. Kleppe, 608 F.2d

at 1253: “The Fund ignores the fact that the commercial operators, as concessionaires of the Service, undertake a public function to provide services that the NPS deems desirable for those visiting the area.”

Thus, even if the statute of limitations is not a bar as discussed above, Plaintiffs' claims that the NPS's regulations and past decisions on allocation are arbitrary and capricious, or an abuse of discretion are without merit.

C. Plaintiffs Do Not Have a Statutory Right of "Free Access" to the Colorado River.

Plaintiffs apparently believe that they have a statutory right to "free access to the natural curiosities and wonders of the Park"--i.e., a right to raft the Colorado River within GRCA--derived from 16 U.S.C. § 3. See Complaint, ¶¶ 34-35. Plaintiffs apparently read that statute to grant them a right of unfettered access to the river.¹² Plaintiffs, however, cite no cases recognizing any such right, see Plaintiffs' Brief at 38-42, and Defendants likewise have found none. A similar argument was raised and rejected the Ninth Circuit in Wilderness Public Rights Fund v. Kleppe, 608 F.2d at 1253, which recognized that any access right the statute may grant was “limited to the extent necessary to accommodate the access rights of others.”

The language of 16 U.S.C. § 3 from which Plaintiffs allegedly derive this right states as follows:

¹²Defendants note that the NPS has long been authorized to charge admission fees to national parks and to regulate uses and activities of the public within the parks, so the public does not have a right to free access to the parks to do whatever they want wherever and whenever they want. See, e.g., 16 U.S.C. § 3; 16 U.S.C. §460l-6a.

He [the Secretary of the Interior] may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for, but for periods not exceeding thirty years; and 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.

As an initial matter, the legislative history of the act suggests that Congress intended only to protect visitors to the national parks from access charges imposed by concessioners.

When this act was passed in 1916, Congress was aware of the large, untapped economic potential of national parks and of the need to contract with private concessioners to provide tourist services to the visiting public. The report of the Committee on Public Lands of the House of Representatives accompanying H.R. 15522, the bill that was enacted, with only minor amendment, as the NPS Organic Act, states:

The growing appreciation of the national assets found in the national parks and monuments is evidenced by the vast increase of visitors. The great trend toward the parks means retaining in this country the millions expended by our tourists in foreign travel previously spent abroad. This economic value of the parks is only recently coming to be realized. It is a factor of importance, in addition to the benefits to our people in their outdoor education and exercise. . . .

The segregation of national-park areas [from national forests] necessarily involves the question of the preservation of nature as it exists, and the enjoyment of park privileges requires the development of adequate and moderate-priced transportation and hotel facilities.

H.R. Rep. No. 700, 64th Cong., 1st Sess. 2-3 (1916). But Congress also clearly was concerned that concessioners not be allowed to charge visitors for access to the natural wonders in the national parks. The report continues:

The committee is of the opinion that plans now being carried out will tend more and more to make the parks self-sustaining, without extortion or unreasonable charge on the traveling public, merely by organization and control of the concessionaires. The subject of concessions is taken into

account in section 3, where it is provided that the Secretary of the Interior may "grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for, but for periods not exceeding 20 years."

Id. at 5 (emphasis added).¹³ In light of that legislative history it seems likely that by "free access" in the act Congress meant nothing more than access without extortionate or unreasonable charge from concessioners.

Even assuming *arguendo* that "free access" in 16 U.S.C. § 3 means "unfettered access," the statutory language, on its face, deals with the leasing, renting, or granting of natural curiosities, wonders, or objects of interest. The NPS has not leased, rented, or granted any such curiosities, wonders, or objects on or along the Colorado River within GRCA (including, for example, beaches, sand bars, bosques, and prehistoric ruins) to any entity, commercial or noncommercial. Rather, the NPS is merely regulating one means of access (river rafting¹⁴) pursuant to its primary duty under the NPS' Organic Act to preserve the national parks "unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. Acting pursuant to its concessions authority (formerly codified at 16 U.S.C. §§ 20-20g (1994)), the NPS has entered into concessions contracts with commercial operators to provide boat trips on the river, but has not denied or prohibited access to river by other means. Indeed, the regulations expressly provide for river rafting access with an appropriate permit from the NPS. 36 C.F.R. § 7.4(b).

The NPS, acting pursuant to its unquestioned authority under 16 U.S.C. §§ 1 and 3

¹³The floor debates on the bill did not address the concessioner or "free access" issues.

¹⁴One can hike to the river.

and 36 C.F.R. § 1.5, and through the promulgation of a special regulation (36 C.F.R. § 7.4(b)) and various river management plans over the course of almost thirty years, has regulated the recreational use of the Colorado River within GRCA by imposing public access and use limits. There is nothing novel or even unusual in the NPS's action in this regard. Steadily increasing visitation to the national parks has necessitated such regulation, and the vast majority of units of the national park system now have one or more areas in which public access or use is limited. Those public access and use limits are contained in special regulations (compiled in 36 C.F.R. Part 7) or in provisions in each park's "Superintendent's compendium" (as required by 36 C.F.R. § 1.7(b)). See, e.g., 36 C.F.R. § 7.13(e)(3) (closing certain waters of Yellowstone National Park to fishing) and 36 C.F.R. § 7.16(e) (limiting camping in Yosemite National Park to a certain number of days per year). It is worth noting that, if the NPS makes the necessary determination and otherwise complies with the requirements of 36 C.F.R. § 1.5, the NPS theoretically may close the Colorado River within GRCA to all public access and use. See Jones v. United States, 693 F.2d 1299, 1303 (9th Cir. 1982) (in context of tort action, holding that NPS may close a park or part thereof or may restrict its use); accord Klepper v. City of Milford, Kansas, 825 F.2d 1440, 1445 n.3 (10th Cir. 1987).¹⁵ Plaintiffs may not like the NPS's regulation of access to and use of the Colorado River within GRCA, but they have no statutory right of "free access" to that resource for river rafting purposes.

If Plaintiffs' argument is that the NPS's entering into concession contracts with

¹⁵Of course, if the NPS did so, it may be liable to the commercial operators for breach of their concession contracts.

commercial operators to provide boat trips on the Colorado River somehow has interfered with noncommercial users' access to the river, then the administrative record simply does not support that argument. The NPS began issuing concession permits (simplified concession contracts) for the provision of river trips within GRCA in about 1972. Admin. Rec. Doc. No. 22.1. In 1973 noncommercial users were allocated 7,600 user days, or 8% of the total number of user days allocated to commercial and noncommercial interests. Id. Since 1973, as concession permits have evolved into the current sixteen concession contracts, the number of user days allocated to noncommercial users has risen to its current level, 54,450, which represents 32% of the total user days allocated. Admin. Rec. Doc. Nos. 99, 156. Furthermore, the NPS has added experimental winter-season launch dates for noncommercial users and has implemented numerous operational improvements, some of which are described in section II above, designed to allow noncommercial users to more fully utilize their allocation. Admin. Rec. Doc. Nos. 222.1, 232, 255, and 272. Although Plaintiffs may not be satisfied with the current noncommercial allocation, it is clear that noncommercial users now have more access to the river (both absolutely and comparatively) than they did in 1973.

D. Plaintiffs Do Not Have a Constitutionally Protected Interest in Rafting the Colorado River.

Plaintiffs apparently also believe that they have an interest in rafting the Colorado River that is protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. See Complaint, ¶¶ 36-37, 42-43, and 49. The Fifth Amendment states in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without

due process of law." With respect to the liberty interest protected by the Due Process Clause, in Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court said:

Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Id. at 399 (as quoted in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972)).

Through a long line of cases the Supreme Court has held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education of one's children, Meyer; to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, id.; to bodily integrity, Rochin v. California, 342 U.S. 165 (1952); and to abortion, Planned Parenthood v. Casey, 505 U.S. 833 (1992). See generally Washington v. Glucksberg, 521 U.S. 702 (1997) (declining to find a liberty interest in assisted suicide). We have found no case, however, in which any court has held that the Due Process Clause protects a liberty interest in a purely recreational activity like river rafting.

Recreational river rafting also is not a property interest protected by the due process clause of the United States Constitution. It is well-settled that to claim a property interest in something, a person "must have more than an abstract need or desire for it. He

must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents of State Colleges, 408 U.S. at 577; accord Double J. Land and Cattle Co. v. United States Dep't of the Interior, 91 F.3d 1378, 1380-81 (10th Cir. 1996) (in order to trigger protections of Due Process Clause, plaintiff must show that it has a "legitimate claim of entitlement" to alleged property interest). An entitlement generally is created by a statute or regulation that vests a right in an individual. E.g., Koerpel v. Heckler, 797 F.2d 858, 863 (10th Cir. 1986) ("In summary, the rule derived from Supreme Court cases and from this circuit is that a property right must be based on an independent source such as a law, rule, or mutually explicit understanding"), and Lake Mohave Boat Owners Ass'n v. National Park Service, 78 F.3d 1360, 1366-67 (9th Cir. 1996), appeal after remand, 138 F.3d 759 (9th Cir. 1998). There is no statute, regulation, or mutually explicit understanding that creates in Plaintiffs any property interest in rafting the Colorado River within GRCA.

The law also is well-settled that revocable permits issued by the government create no vested property rights. See, e.g., United States v. Fuller, 409 U.S. 488, 493 (1973) (on governmental taking of private grazing land, Fifth Amendment required no compensation for any value added to land by revocable permits to graze adjacent federal lands); Federal Lands Legal Consortium v. United States, 195 F.3d 1190, 1200-01 (10th Cir. 1999) (Forest Service may reduce grazing permits without violating due process). Reviewing courts have specifically held that there is no constitutionally protected property interest in special use permits issued by the NPS or other federal agencies. E.g., Pai 'Ohana v. United States, 875 F. Supp. 680 (D. Hawai'i 1995), aff'd, 76 F.3d 280 (9th Cir. 1996) (NPS

permit); United States v. 5.96 Acres of Land, 593 F.2d 884 (9th Cir. 1979) (Corps of Engineers permit); Tucson Rod and Gun Club v. McGee, 25 F. Supp. 2d 1025 (D. Ariz. 1998) (Forest Service permit); cf. Lake Mohave Boat Owners Ass'n v. National Park Service (association members have no constitutionally protected interest in low marina rates); Washington Tour Guides v. National Park Service, 808 F. Supp. 877 (D.D.C. 1992) (despite long practice, tour guides acquired no constitutionally protected interest in privilege of conducting business on NPS-administered lands in contravention of regulation). Thus the fact that the NPS issues river-use permits or that Plaintiffs previously have obtained river-use permits does not confer on them any constitutionally protected interest in obtaining such permits in the future.

E. The NPS Has Not Unreasonably Delayed Action.

Plaintiffs then assert that the NPS has unreasonably delayed action by failing to make a new decision reallocating commercial and non-commercial use on the river. In their brief Plaintiffs state that "[a]dministrative agencies do not have the discretion to avoid discharging the duties that Congress intended them to perform." Plaintiffs' Brief at 31. They then cite extensively to the Tenth Circuit's decision in Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999), to support their argument that the NPS has unreasonably delayed adjusting the allocation of river-use permits.

First, it is worth emphasizing that the NPS has no statutory or regulatory duty to prepare a river management plan, to issue river-use permits, or to allocate those permits

in a particular way¹⁶. The NPS has a general duty, imposed by 16 U.S.C. § 1, to manage GRCA "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." How the NPS accomplishes its mission, however, is left to the discretion of the agency. As discussed in section IV.B above, the NPS theoretically could decide, in the exercise of its discretion, to close the Colorado River within GRCA to all public access and use.

Second, even assuming arguendo that the NPS has some duty to prepare or amend a river management plan, there is no statutory or regulatory deadline by which to do so. In Forest Guardians the Tenth Circuit contrasted action "unlawfully withheld" from action "unreasonably delayed" as follows:

In the absence of any clear statutory guidance we will simply apply the most straight forward common sense reading of these two phrases [in 5 U.S.C. subsection 706(1)]. Thus, if 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," see 5 U.S.C. § 555(b)--a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act.

¹⁶This Court noted in Yu v. Brown, 36 F.Supp. 2d 922, 930 (D. N.M. 1999) that such a duty is a general prerequisite to an action for unreasonably delayed agency action under the APA. The NPS has no duty to permit river rafting at all.

Thus, the distinction between agency action "unlawfully withheld" and "unreasonably delayed" turns on whether Congress imposed a date-certain deadline on agency action. See *Sierra Club v. Thomas*, 828 F.2d 783, 794-95 & nn.77-80 (D.C. Cir.1987) (citing cases and drawing a distinction between an agency's refusal to comply with an absolute time requirement for action and an agency's more generalized unreasonable delay in acting). In our opinion, when an agency is required to act--either by organic statute or by the APA-- within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable. However, when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers.

Id. at 1190. No statute here imposes any deadline, so the NPS has broad discretion in deciding when to act.

Nevertheless, it is important to remember that the NPS already has acted: first to prepare the 1989 CRMP and then, during the period from August 1997 to February 2000, to comprehensively review that plan before deciding that the agency was not going to pursue the expensive and time-consuming task of amending the plan (and, perhaps, in the process, adjusting the allocation). Admin. Rec. Doc. Nos. 156, 183-254. The reasons for the agency's decision to not take any action at this time to amend the plan, and perhaps adjust the allocation, are set forth in detail in the GRCA Superintendent's February 23, 2000, letter to GRCA constituents. Admin. Rec. Doc. No. 264; see also Admin. Rec. Doc. No. 260. The decision to defer the planning processes was summarized by the GRCA's Superintendent as follows:

Until such time as Congress formally acts upon wilderness designation and/or until this organization has both the financial and human resources fully available to do proper and unconstrained planning with NEPA compliance,

further efforts to continue with a merged planning document for WMP and CRMP, along with a required EIS, are halted. Work on a revision of the CRMP is similarly halted, as well as work on the draft WMP, pending a thorough analysis to determine the feasibility of its completion. Major river decisions that lie outside the park's discretion will be deferred until we have the capacity to properly engage necessary planning requirements. Major changes in the river-use allocation system will be deferred until such time as park resources are available to design and implement a revision of the CRMP. The park will continue to seek solutions to issues identified in the public scoping process. This alteration in the course of park planning will not affect current management of the backcountry and river corridor as wilderness.

Admin. Rec. Doc. No. 264-5. The reasons for the decision included limitations of funding and personnel, consideration of the park's other strategic priorities, and the lack of congressional action on a wilderness designation for the park. Admin. Rec. Doc. No. 264-1. The obdurate refusal of the park's various constituent groups to compromise on certain issues related to river management also foreclosed the possibility that the NPS would be able to build any consensus among those groups. Id., p. 2. (Plaintiffs' adamant position in this litigation is one example of the last.) To be blunt, the GRCA Superintendent, believing the 1989 CRMP still to be a useful and workable (although admittedly imperfect) management tool, decided to cut the park's losses, to suspend the effort to amend the plan, and to direct the park's limited resources to other projects--some related to the river, some not--more likely to produce tangible results.¹⁷ Id. His decision was based in large

¹⁷The other park projects related to river management are described in detail on pp. 5-6 of the Superintendent's February 23, 2000, letter. Admin. Rec. Doc. No. 264. They include development of a computer program that simulates river traffic and that can be used to test alternative scheduling of launches to improve resource protection and visitor experience; continued streamlining of the permitting systems and launch schedules; ongoing negotiations with the Hualapai Indian Tribe on management issues along the lower part of the Colorado River within GRCA; and development and increased use of quiet and clean motor technology in collaboration with the commercial river operators. In his letter the

part on his intimate knowledge of the park's natural and cultural resources (including, of course, the Colorado River itself), of the strengths and weaknesses of the 1989 CRMP as implemented, and of the costs and benefits of undertaking to amend that plan. Id. His decision was a reasoned and reasonable one in an area where he has considerable discretion, and the district court should not now substitute its judgment for his.

F. An Injunction of Further Concession Contracts and the Other Relief Requested by Plaintiffs Is Not Appropriate.

While the NPS does not believe that Plaintiffs have established any entitlement to relief under any of the claims they have advanced, we wish to comment on the relief requested by plaintiffs. First, without citing any authority, Plaintiffs request that the Court enjoin the awarding of further concession contracts pending any reallocation of use between commercial and non-commercial operators. Plaintiffs ignore that concessionaires have been accorded recognition by Congress and the NPS' regulations. See 16 U.S.C. § 5951, et seq.; 16 C.F.R. Part 51. While Defendants leave the argument as to what rights the concessioners have under NPSCMIA to the Intervenors to argue in this case, the express relief provided by the APA is limited to relief against the agency

Superintendent also mentions "[p]ossible adjustment of river-use allocation through ongoing discussions and possible contractual arrangements." Id. at 5. Given that the NPS believes that any increase in the total number of user days may result in degradation of the riverine ecosystem, any adjustment of allocation must entail an agreement by one user group to relinquish the number of user days given to another user group.

The projects not related to river management to which the Superintendent decided to direct the park's limited resources include the implementation of the park's general management plan, which, among other things, calls for constructing a new orientation/transit center on the South Rim, phasing in a new public transit system, and eventually removing most private vehicles from the South Rim. Needless to say, that is a project that will require a substantial commitment of resources over a period of several years.

whose action or inaction is being challenged (to set aside improper agency action and to compel agency action improperly withheld). 5 U.S.C. § 706. Plaintiffs have stated no basis for the extraordinary relief requested as to the concession contracts and the request should be denied.

Plaintiffs further request that the NPS be compelled to reallocate use between commercial and non-commercial users within sixty days, again without any stated legal basis for this request. As noted by the GRCA Superintendent in his decision deferring further action, Admin Rec. Doc. No. 264, substantial resources will be required to complete any reallocation, including amending the CRMP on which it would be based and complying with NEPA and NHPA. Any proposed change in allocation would be controversial and would require careful and thorough analysis, since it would likely be contested by either the commercial or non-commercial users depending on what decision was ultimately made by the NPS. Thus, if the Court determines that Plaintiffs is entitled to relief, it should hold a hearing on what time frames would be appropriate to complete any analysis and new decision on allocation.

CONCLUSION

Plaintiffs have not shown that the NPS' existing allocation decisions are arbitrary or capricious or even subject to challenge at this late date under the applicable statute of limitations. Plaintiffs have also not shown that they have any statutory and constitutional right to raft the river. Plaintiffs further have not shown that the NPS has unreasonably delayed action on any decision to reallocate use between commercial and non-commercial users in light of the controversy and expense in taking any present action.

Finally, Plaintiff have not shown that they are entitled to any of the relief they have requested. Judgment should be entered in favor of the NPS.

Respectfully,

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I hereby certify that a copy
of the foregoing pleading was
served by mail on opposing
counsel of record on December 15, 2000.

John W. Zavitz