

MICHAEL J. MALMQUIST (5310)
ROBERT H. HUGHES (9787)
Parsons Behle & Latimer
Attorneys for Wasatch Powderbird Guides
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

CITIZENS' COMMITTEE TO SAVE
OUR CANYONS, and UTAH
ENVIRONMENTAL CONGRESS,

Plaintiffs,

vs.

THOMAS L. TIDWELL, et al.,

Defendants,

and

WASATCH POWDERBIRD GUIDES,

Intervenor Defendant.

Case No. 2:05CV00548

**INTERVENOR DEFENDANT WASATCH
POWDERBIRD GUIDES' BRIEF IN
OPPOSITION**

Judge Ted Stewart

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	4
I. THE CHARACTERIZATION OF NON-MOTORIZED BACKCOUNTRY USE SATISFIED NEPA AND ALLOWED AN INFORMED CHOICE AMONG ALTERNATIVES.....	4
A. The 1999 and 2004 EIS Approach to Assessment of User Conflict was Reasonable, and Actual Head Counts of Backcountry Users Were Not and Are Not Required	5
1. 1999 EIS	5
2. 2004 EIS	9
II. THE EIS ASSESSMENT OF NOISE IMPACTS SATISFIED NEPA.....	15
III. THE EIS ADEQUATELY ASSESSED EXPLOSIVES SAFETY	18
IV. THE FOREST SERVICE DID NOT MISINTERPRET OR MISAPPLY ITS FOREST PLAN WITH RESPECT TO WPG’S ECONOMIC VIABILITY	20
CONCLUSION	23

INTRODUCTION

For 34 years, Wasatch Powderbird Guides (“WPG”) has run a heli-ski operation in the mountains east of Salt Lake City, under permit from the Wasatch Cache and Uinta National Forests. 2004 EIS at 1-1 [AR at 13821 at 12].¹ During that time, WPG has provided a safe and enjoyable backcountry experience to nearly 30,000 forest visitors, and has agreeably shared its core terrain, the Tri-Canyon Area (the drainages in Big Cottonwood, Little Cottonwood, and Mill Creek Canyons), with ski mountaineers and other winter backcountry users.

WPG’s operation, including its occasional and selective use of a limited number of explosive charges to test slope stability, has not caused a single injury to other backcountry users. Id. at 2-28 [AR at 13821 at 51]. WPG’s contribution to public safety, which includes the sharing of important slope stability information with the Utah Avalanche Center and the Utah Department of Transportation (“UDOT”), providing free helicopter rescue services to backcountry skiers, and performing avalanche control work for UDOT and other agencies, is widely recognized. Id.

During the 34 years of WPG operation, there have been several changes in management of National Forest lands in the Tri-Canyon Area. These include the creation by Congress of three wilderness areas (Lone Peak, Twin Peaks, Mt. Olympus), and creation by the United States Forest Service (“USFS”) of a large “heli-free zone” at the head of Big Cottonwood Canyon, where heli-skiing is now prohibited and other backcountry users can ski and recreate in relative solitude. Id. at Figure 2-2 [AR at 13821 at 28].

¹ Citations to the record will include both a reference to the actual document and its page number, as well as a bracketed citation that corresponds to the Federal Defendants’ citation format to the Administrative Record.

In the remainder of the Tri-Canyon Area, WPG shares terrain with other backcountry users, primarily ski-mountaineers, whose numbers have grown over the years. This has led to a degree of conflict and complaint, particularly from a small but vocal group of users who object to having to compete with WPG for untracked snow, and to hearing the noise of the helicopter when their areas of use overlap.²

The USFS recognizes and has responded to this conflict, primarily by including conditions in WPG's permit that prohibit operations, or limit the number of helicopters that can be used, on certain days in specified high use areas. See 1999 ROD at 8-9 [AR at 560-61]. The USFS also requires WPG to provide advance public notice of where it plans to ski so other users can avoid WPG operations if they so choose. Id. WPG also takes affirmative, voluntary steps to avoid conflict, and indeed, contrary to Plaintiffs' unsupported allegations, these various measures have worked: the USFS has determined that despite a growing number of backcountry users, there has been a reduction in the number of complaints and the level of conflict over the past five years. See, e.g., 2004 EIS at 2-25, 2-28 [AR at 13821 at 48, 51].³

The lead plaintiff in this case, Save Our Canyons ("SOC"), is a committed opponent of WPG's use of the Wasatch Mountains and Tri-Canyon Area, as indicated by its "Heli-free Wasatch" slogan.⁴ Clearly, the underlying object of SOC's appeal is to cause the USFS, or this

² Due largely to the insistence of this small group, the USFS has prepared two environmental impact statements in a period of only five years, in connection with renewal of WPG's permit in 1999 and 2004, even though WPG's operation has essentially no environmental impact other than temporary ski tracks and noise.

³ "WPG's new management has been more successful in managing the operation to reduce conflicts, and patterns of backcountry use have changed. These two factors have reduced reported recreational conflicts;" "WPG is under new management and has emphasized avoiding operating near other recreationists, reducing both conflicts and perceptions of risk."

⁴ See <http://www.saveourcanyons.org/store/splash.html>.

Court, to put an end to WPG's operations, through either the imposition of permit limitations so stringent they will drive WPG out of business, or flat out closure of the Tri-Canyon Area.

That goal, however, is inconsistent with the applicable Forest Plan, which as revised in 2003 continues to recognize that heli-skiing is a desired backcountry activity in the Tri-Canyon Area. As stated by the Regional Forester in the plan approval document:

Heli-skiing will continue to be allowed in areas where currently permitted. Many of the comments received on the Forest Plan revision dealt with continuing heliskiing in the Wasatch Mountains. My decision does not specifically approve or deny a helicopter skiing permit. That decision will be made through site-specific analysis. However, it is my belief that helicopter skiing is an appropriate use and should be part of the recreational opportunities provided on the Forest. I am well aware of the growing recreational pressures on the [WCNF]. I also recognize that it has become increasingly difficult for Forest users to find solitude and escape from the sights and sounds of civilization. In future years I anticipate this will become increasingly more difficult. In a location like the Wasatch Front, backcountry recreationists, whether backcountry skiers, snowmobilers, or heli-skiers, must find ways to coexist and reach a level of acceptance for other users. Separation of uses will only take us so far.

2004 EIS at 1-6 [AR at 13821 at 17] (quoting Wasatch Cache Forest Plan ROD at 26). See also 2004 ROD at 8 [AR at 13829].⁵

Consistent with the Regional Forester's direction, WPG continually strives to coexist with and reduce conflicts with other backcountry users in its permit area, while still maintaining a healthy, viable business. WPG only wishes that SOC would proceed in that same spirit.

⁵ "Heli-skiing has been a part of the recreation environment in the Wasatch Mountains for over 30 years and its place is established to the extent that Congressionally designated wilderness boundaries have been drawn to help provide for its continuation. Likewise, Forest Plans for the two National Forests allow for continued heli-skiing. The Forest Plan for the Uinta National Forest notes that heli-skiing opportunities will be available, within the resource capabilities of the land and in consideration of other land uses and resource management goals. Though not making a site-specific decision relative to this permit proposal, the Forest Plan and supporting documents for the Wasatch-Cache National Forest more explicitly address heli-skiing (Final EIS, section 1.5.1.1). The WCNF Forest Plan clearly notes that heli-skiing within its current boundaries is an appropriate use and that one of the Plan's many goals is that heli-skiing be a part of the array of recreation opportunities over the long term."

ARGUMENT

WPG joins in the Federal Defendants' Opposition Brief, which was filed with the Court on March 10, 2006. In that brief, the Federal Defendants demonstrate that each of Plaintiffs' claims are invalid, and that the actions taken by the USFS in approving WPG's 2004 operating permit complied fully with all applicable laws, including the National Environmental Policy Act ("NEPA"), the National Forest Management Act, the Administrative Procedure Act, the Wasatch Cache and Uinta Forest Plans, and all related regulations and policies.

In this brief, WPG provides additional factual and legal argument with regard to Plaintiffs' claims regarding the alleged inadequacy of analysis in the environmental impact statements ("EISs") prepared by the USFS in connection with WPG's permit renewal in 2004 and 1999, specifically with regard to (1) the quantification and characterization of use by other backcountry recreationists, and related conflicts with heli-skiing operations; (2) the analysis of noise impacts on other backcountry users; and (3) the consideration of safety risks from the use of explosives. In addition, WPG addresses the alleged inconsistency of the approved 2004 WPG permit with the applicable Forest Plan, particularly with regard to consideration of WPG's "economic viability."

I. THE CHARACTERIZATION OF NON-MOTORIZED BACKCOUNTRY USE SATISFIED NEPA AND ALLOWED AN INFORMED CHOICE AMONG ALTERNATIVES.

As demonstrated by Federal Defendants, the 1999 and 2004 EISs provided the USFS with adequate information regarding backcountry use to formulate meaningful alternatives and to make an informed permit renewal decision, in light of the stated purposes of "seeking to minimize conflicts between heli-skiing and other winter recreational uses" while also attempting

to “provide improved operating efficiencies for WPG relative to the current permit.” Federal Defendants’ Opposition Brief (“Fed. Opp.”) at 20-24. The USFS clearly took the required “hard look,” *id.*, and was able to do so without the detailed “headcounts” of backcountry users that Plaintiffs’ claim are required. *Id.* at 21.

WPG joins the Federal Defendants’ position with the following added support.

A. The 1999 and 2004 EIS Approach to Assessment of User Conflict was Reasonable, and Actual Head Counts of Backcountry Users Were Not and Are Not Required.

In the 1999 EIS, the USFS took a rational and reasonable approach to assessment of potential conflicts between helicopter skiers and other backcountry users, which was carried forward to the 2004 EIS, reassessed, updated, and found to have continuing validity and utility. That approach was tailored to the nature of the decision the USFS had before it, that is, what type of permit conditions might serve to minimize such conflicts, which consist primarily of “interaction between helicopter skiing and backcountry users, including the availability of untracked powder” and effects on “the peace and solitude that many backcountry users seek.” 1999 EIS at 3-1 [AR at 568 at 104].

1. 1999 EIS

The 1999 EIS first recognizes that the Tri-Canyon Area forms the “core” area of use for both heli-skiers and other backcountry users (which Plaintiffs do not dispute), and thus would be the focus of the assessment. 1999 EIS at 3-1 to 3-2 [AR at 568 at 104-05]. The EIS then notes that the primary information for characterizing backcountry use in this area included three reports: one prepared by the USFS and University of Utah based on interviews of backcountry recreationists at trail heads during a 2-winter period (1993-94); one a compilation of the

“detailed, daily records of the number and location of other backcountry users” observed by WPG in areas they were skiing during the winters of 1992-1998 (as required by the USFS); and one a 1994 report of the findings of an independent survey gauging the level of conflict perceived by helicopter skiers and other backcountry users. Id. at 3-2 to 3-3 [AR at 568 at 105-106].

These reports, which are summarized in the EIS, were further supplemented by monitoring reports prepared by Forest Service snow rangers (1998) and the report of a focus group convened by the USFS to assess attitudes of other backcountry users to WPG. Id. at 3-3 [AR at 568 at 106].

Based largely on these reports, the EIS methodically assesses potential conflicts. First, it categorizes the different types of winter backcountry users (ski mountaineers, cross country skiers, snowboarders and snowshoers), and assesses the potential for helicopter conflicts based on the various reports, and based on the equipment-based limitations of some types of users to access heli-ski terrain. Id. at 3-3 to 3-5 [AR at 568 at 106-108]. Next, it breaks the Tri-Canyon Area into seven sub-areas, which generally correspond to different “circuits” skied by the heli-skiers (as well as one sub-area where heli-skiing is prohibited), and assesses the use of each sub-area by category of backcountry user. Id. 3-5 to 3-8 [AR at 568 at 108-111]. The EIS then evaluates the level and pattern of use of the same sub-areas by heli-skiers, based on WPG records, operational limitations in the WPG permit, and other relevant factors. Id. at 3-8 to 3-14 [AR at 568 at 111-117]. This evaluation includes the results of the seven years of detailed WPG records (1992 to 1998), referred to as the Simultaneous Use Study, that detail not only WPG’s skiing activity, but also the date and location of all interactions with other backcountry users. Id.

at 3-15 to 3-17 [AR at 568 at 118-120].

Finally, the EIS synthesizes the above-described information and evaluation of backcountry and heli-ski use to determine “where and when members of each group encountered the other most frequently.” Id. at 3-17 to 3-19 [AR at 568 at 120-122]. The EIS concludes that the Northern Powder Circuit, or “NPC”, receives the heaviest use by both groups, and that use by both groups peaks on the weekends. Id. This conclusion is amply supported by the data and reports, including particularly the Simultaneous Use Analysis (actual interactions) and a probability analysis based on WPG’s reported use patterns. Id. As succinctly summarized in the body of the EIS:

In short, the data indicates that the greatest interaction, and thus the greatest potential for conflict, between helicopter skiers and other backcountry recreationists occurs in the NPC on weekends. Therefore, this analysis should focus on this area and this time period to meaningfully address the identified recreational issues.

Id. at 3-18 [AR at 568 at 121]; see also id. at S-9 [AR at 568 at 13] (“The vast majority of interactions between helicopter skiers and other backcountry recreationists occur in the Tri-Canyon Area, and most of these are in the NPC. This reflects the popularity of these areas with both groups. Records on WPG operations indicate that 98 percent of the ski mountaineers and other users encountered by helicopter skiers in the past 7 years were in the Tri-Canyon Area, 88 percent in the NPC. . . Most encounters between helicopter skiers and other recreationists occur on weekends.”).

The 1999 EIS expressly recognized that the USFS did not have “[a]ccurate figures on the current number of backcountry recreationists,” and that visitor days by such users had “undoubtedly increased” since studies were done in 1993 and 1994. Id. at S-9 [AR at 568 at 13].

This recognition was partly in response to comments on the draft EIS, asserting that updated, precise headcounts of backcountry users were necessary to assess user conflicts. See id. at A-23 to A-25, A-48 [AR at 568 at 225-227, 250]. But as the USFS concluded:

We recognize that the precision of our backcountry use data can be challenged. The broader art and science of estimating any dispersed recreation use is likewise imprecise. *We have not, however, assumed nor heavily relied on the precision of those numbers in the analysis and evaluation of alternatives nor will they factor heavily into the decision. . . .* The evolution of the conflict between helicopter skiing and ski mountaineers is documented (Section 1.3). *Patterns and characteristics of helicopter skiing and other backcountry uses are identified (Sections 3.2.2 and 3.2.3). The reasons for, and nature of, the conflict is described Sections 3.2.4, 3.2.5, and 3.2.6). The anticipated impacts of growth in other forms of winter recreation are analyzed and disclosed (Section 4.2.3). We consider the user data cited in the analysis adequate to these uses.*

Id. at A-24 to A-25 [AR at 568 at 225] (response to comment 32) (italics added).⁶

In essence, as indicated by response to comments on the 1999 draft EIS and the nature of the analysis contained in the final EIS (summarized above), the USFS chose to evaluate potential recreational conflicts based on the most prevalent locations and timing (day of week) of interactions between heli-skiers and other backcountry users. This involved assessment and identification of “patterns and characteristics of helicopter skiing and other backcountry uses,” but not knowledge of the precise or current number of backcountry users. As previously described, the EIS contains a methodical analysis of this issue, which resulted in a conclusion that was both reasonable and useful for purposes of considering permit terms that might avoid conflicts – helicopter skiers and backcountry user conflicts occur predominantly in the Tri-Canyon Area, in the Northern Powder Circuit, on weekends.

⁶ See also 1999 EIS at A-48 [AR at 568 at 250] (some user data was dated, “but it provided the information necessary to characterize backcountry recreation in the EIS” and “for purposes of the current decision, we believe the various indicators of interaction, competition, and conflict among motorized and non-motorized backcountry access are adequate for the evaluation of alternatives that attempt to integrate the two”).

Based on this conclusion, the EIS alternatives analysis considered various restrictions on WPG's use of the Tri-Canyon Area and NPC, including on weekend days, see id. at S-6 to S-7 [AR at 568 at 10-11] (Table S-1); see also id. at 2-6 to 2-17 [AR at 568 at 67-74], and the USFS imposed two permit conditions specifically designed to reduce interaction and conflict in that area: a Sunday/Monday closure of the Tri-Canyon Area to heli-skiing, and a 5-day limit on the simultaneous use of two helicopters in that Area. 1999 ROD at 2, 8-10 [AR at 553, 559-561].

Notably, while one of the Plaintiffs in this action did file an administrative appeal of the 1999 EIS and ROD, that appeal did not include a claim that the EIS characterization of backcountry use was inadequate or that a current numerical count was necessary to a reasoned choice among alternatives. See AR at 14038-14066.

2. 2004 EIS

In the 2004 EIS, the USFS carefully revisited and updated the issue of interaction and conflict between heli-skiing and other forms of backcountry recreation, and again expressly recognized the growth in numbers of backcountry users. See generally 2004 EIS at 3-8 to 3-12 [AR at 13821 at 75-79] ("Interaction Between Heli-skiing and Other Recreation"); id. at 3-2 to 3-4 [AR at 13821 at 69-71] ("Trends in Other Winter Backcountry Recreation in the Permit Area"); id. at 3-4 to 3-8 [AR at 13821 at 71-75] ("WPG Operations").

The EIS first noted that the 1999 EIS had concluded that "accurate estimation of the number of winter backcountry recreationists in the central Wasatch was not feasible," although "a number of factors suggested that use was increasing." Id. at 3-21 [AR at 13821 at 69]. It then examined national trends in winter backcountry use, and also local trends using information derived from several sources, including the Utah Avalanche Center, qualitative observations by

Forest Service personnel and backcountry enthusiasts, and WPG's Simultaneous Use Analysis, which had been continuously maintained since 1992, resulting in a total of twelve years of detailed information (1992 to 2004), based on direct observation of backcountry users sharing slopes in the same drainage. Id. at 3-2 to 3-4 [AR at 13821 at 69-71].⁷ Based on these sources, the EIS concluded that "while an accurate estimate of the number of people participating in the winter backcountry use in the Central Wasatch is not available," most information reviewed indicated that "winter backcountry use is high and growing, and that this trend is likely to persist." Id. at 3-4 [AR at 13821 at 71]. Finding this trend to be consistent with the information presented in the 1999 EIS, the USFS concluded that an adequate profile for characterizing increasing levels of backcountry use had been presented. Id.

The EIS then summarizes and incorporates the analysis of WPG's operations as presented in the 1999 EIS, and then updates that analysis by reviewing how the various operational limitations imposed by the USFS in the 1999 permit had changed WPG's patterns of use and the number of heli-skiers it was able to serve. Id. at 3-4 to 3-8 [AR at 13821 at 71-75]; see also id. at 2-25 to 2-26 [AR at 13821 at 48-49].

Next, the EIS presents a detailed update and analysis of the interaction between heli-skiing and other backcountry users, focusing on how the permit limitations imposed in 1999 had affected such interaction and resulting potential for conflict. The EIS first summarizes the approach taken in the 1999 EIS and how it was reflected in the permit decision:

⁷ Plaintiffs' repeated assertion that the EIS and USFS have no actual or current data is directly contradicted by WPG's simultaneous use reports, which are the most accurate and meaningful gauge of backcountry use, which are up to date, and which indicate a modest annual increase of about 4.5 percent over the last five years (total increase of 19 percent) in the area that really matters – the slopes shared by heli-skiers and backcountry users. 2004 EIS at 3-3 [AR at 13281 at 70]. This estimate is surely more credible than the eye-popping figure of a 249 percent increase that Plaintiffs continually cite in their brief.

The 1999 EIS provided useful background information on this issue (sections 3.2.5 and 3.2.6) which discuss patterns of heli-ski use coupled with observations of other recreationists to identify the key locations and times for potential conflicts. The conclusion was that the highest probability for interaction between heli-skiers and other recreationists, and thus the highest potential for conflicts, was in the Northern Powder Circuit on weekends. The probability of the two groups being in close proximity falls off considerably in other parts of the permit area and on weekdays. As a result, the Northern Powder Circuit on Saturdays and Sundays was the focus of the 1999 EIS's analysis of recreational conflicts and of the current permit's terms intended to manage such conflicts.

Reduction of potential recreational conflicts on weekends in the Tri-Canyon Area and particularly the Northern Powder Circuit was the main factor driving the 1999 decision, resulting in the current permits Sunday/Monday closure of the Tri-Canyon Area and the 5-day limit on simultaneous use by two helicopters in that area. Those measures did have an evident impact on interactions between heli-skiing and other forms of recreation.

Id. at 3-8 [AR at 13821 at 75]. The EIS proceeds to a detailed review of heli-skiing and backcountry user interaction during the 1999 to 2004 period, relying on "WPG activity reports, Forest Service observations, and simultaneous use observations, against the background of recent developments in other backcountry recreational use." Id.

The conclusions of this analysis include: (1) there was a significant reduction in WPG use of the Tri-Canyon Area, primarily due to the Sunday closure when other recreationists in the Area experienced no heli-ski effects; (2) WPG's pattern of spatial use had changed in the desired direction, in terms of reducing potential conflict (NPC use has fallen 13 percent, and total Tri-Canyon use decreased by 10 percent, offset by a 10 percent increase in peripheral terrain); and (3) the timing of WPG's use of the Tri-Canyon Area and NPC had changed, with an overall reduction in percentage of use on Saturdays, Sundays and Mondays and an increase on Tuesdays. Id. at 3-9 to 3-10 [AR at 13821 at 76-77].

The EIS also reviewed WPG's simultaneous use observations, and the number of WPG-related complaints received by the USFS. In general, WPG's observations indicated reduced interaction on Sundays, Mondays and Tuesdays, but increased interaction on other days, including a significant increase on Saturday. *Id.* at 3-10 to 3-11 [AR at 13821 at 77-78]. The EIS notes that this pattern "is generally consistent with the growth in numbers of other backcountry recreationists" and the changed patterns of use by WPG and other recreationists. *Id.* at 3-11 [AR at 13821 at 78].

The USFS found the Saturday increase notable, particularly since WPG provides public notice when it plans to ski in the NPC on a Saturday. In addition to the growth in numbers of backcountry users, the EIS notes that "tolerance of heli-skiing among other recreationists" and "limited ability to recreate on other days of the week" are likely involved in this pattern. It goes on to provide:

Regarding the Northern Powder Circuit, the more structured approach to heli-ski management embodied in this permit has, in general, provided a predictable weekend day when heli-ski impacts do not occur, on Sundays, and day when heli-ski impacts are expected and may occur, on Saturdays. Substantial numbers of other recreationists are apparently choosing to venture into the Northern Powder Circuit on Saturdays in spite of the likelihood of encountering the heli-ski operation there. *However, the number of WPG-related complaints from other recreationists received by the Forest Service has generally been decreasing during the last five seasons.*⁸

⁸ The reduction in conflict is further addressed in the EIS "response to comments" section:

As reported in Sections 3.2.4 and 4.2.3.1.1, the Forest Service has received fewer complaints from other backcountry recreationists regarding WPG's operations than under past permits. We see no reason why people would stop reporting complaints, and any attempt to attribute the reduction to one of the cited reasons would be overly speculative. The EIS discloses that both the terms of the current permit and WPG's efforts to reduce conflict have played a role. Finally, its important to note that a number [sic] people formally commenting on this EIS and in various other communications have indicated a reduction in the level of conflict, even though they remain opposed to heli-skiing in general.

2004 EIS at B-41 [AR at 13821 at 208]; *see also id.* at 2-25 to 2-26 [AR at 13821 at 48-49] ("Industry-wide growth

Id. (italics added). The EIS conclusion that complaints and perceived conflicts have actually decreased during the last five years, even though there has been an increase in backcountry use,⁹ stands in stark contrast to Plaintiffs' unsupported claim that conflicts have been rapidly increasing. See Plaintiffs' Opening Brief ("Pl. Brief") at 5.

In sum, the analysis of potential user conflicts in the 2004 EIS, which adopts and builds on the analysis set forth in the 1999 EIS, was reasonable and, in combination with the impacts assessment provided in Chapter 4 of the EIS, provided the USFS with an adequate characterization for making informed decisions regarding potential modifications to the permit terms, with respect both to the potential for heli-ski and backcountry use interaction and conflict and to impacts on WPG's operations. This analysis expressly recognized the trend of growth in backcountry use, and took that growth into account, in a rational and reasonable manner.

Plaintiffs are simply wrong when they claim that this analysis violates NEPA because it did not include a "head count" of backcountry users or determine with precision the actual growth in numbers or use. The USFS expressly addressed that issue, in its response to comments on the draft EIS, the ROD, and in its decision on Plaintiffs' administrative appeal of the 2004 ROD. In the comment response, the USFS explained:

Pertinent new information from other sources was also reviewed in the course of this EIS process (section 2.5.2) and increased backcountry use was identified as a reason for carrying the issue of impacts on other recreationists into detailed

in winter backcountry recreation, tempered by 5 years of drought and the recent economic downturn, has altered winter recreational participation and use patterns. WPG's new management has been more successful in managing the operation to reduce conflicts, and patterns of backcountry use have changed. These two factors have reduced reported recreational conflicts.").

⁹ The EIS goes on to briefly address how other permit terms have affected interaction between the two groups, concluding that there are no new notable issues with the exception of WPG's request that it be allowed a limited number of "home runs" (where heli-skiers return to WPG's base on skis, rather than in the helicopter) during the Sunday/Monday Tri-Canyon closure, to be examined in the "impacts" section of the EIS. 2004 EIS at 3-12 [AR at 13821 at 79].

analysis. Analysis of the current setting is documented in section 3.2.2 of this EIS, which describes recent increases in backcountry use and changed patterns of use in qualitative terms. This sets the stage for the impact analysis documented in section 4.2.3.

Based on pertinent outcomes of the Forest Plan revisions and on review of changes in backcountry use since the last renewal process, the 1999 response to this comment still holds. The updated but still largely qualitative information on other backcountry use in the permit area considered in this analysis is sufficient for public disclosure and informed decision making.

2004 EIS at B-36 to B-38 [AR at 13821 at 203-205]. In the ROD and in its appeal decision, the USFS similarly stated:

A point that was made in public comments on the 1999 EIS and that we heard again in public input received for this EIS was that the Forest Service needs to have detailed data available about the numbers of people participating in various backcountry recreation activities in order to make its decision. We believe that the EIS appropriately considered data, reports, and estimates from a variety of sources, even though no comprehensive or statistically reliable study of backcountry use levels has been done. *Such a study might be appropriate if the Forest Plan directs that recreation use be capped at certain levels, or if agency direction requires some uses to be given preference over others. Neither of these are the case. In fact, the Forest Plan clearly recognizes the competing recreation forces associated with heli-skiing and predicts competition, and to some degree conflict, will continue to grow. We believe that the qualitative approach used in the recreation analysis was consistent with the intent of NEPA and sufficient to make this decision.* In short, we believe that it is appropriate in this case for the Forest Service to encourage and facilitate cooperation among the user groups, rather than dictate one user group be excluded in favor of another. We sincerely hope this decision will further that goal and a level of acceptance and respect for other users can result.

ROD at 13-14 [AR at 13834-13835] (italics added).

In conclusion, it is clear that the USFS did not “ignore” or “sweep under the rug” the issue of increasing backcountry use, or the requests of some EIS commentors that more detailed backcountry user numbers and data be obtained. *See Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973).* Rather, the USFS gave direct and deliberate consideration to both issues. Further, it

responded by including information on increasing levels of backcountry use in both EISs, and providing a reasonable, rational explanation of why that information, along with the other information presented on backcountry and helicopter use, was adequate for the purpose it was intended to serve. For purposes of NEPA review, courts will defer to an agency's choice of methodology and data sources unless the method or data is clearly "irrational" or "unsound." Utah Shared Access Alliance v. U.S. Forest Service, 288 F.3d 1205, 1212 (10th Cir. 2002); see also Comm. to Preserve Boomer Lake Park v. Dept. of Transportation, 4 F.3d 1543, 1553 (10th Cir. 1993) ("Courts are not in a position to decide the propriety of competing methodologies ... but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.").

The methodology and data used by the USFS to characterize and assess potential user conflicts more than pass that test.

II. THE EIS ASSESSMENT OF NOISE IMPACTS SATISFIED NEPA.

The Federal Defendants concisely demonstrate how the 1999 and 2004 EISs address noise impacts and satisfy NEPA's "hard look" requirement. Fed Opp. at 28-29. WPG joins and adds the following support.

Plaintiffs argue that the USFS should have gone farther, and developed a detailed modeling analysis like the one being prepared by the National Park Service ("NPS") to provide an assessment of aircraft noise impacts at various locations within the Grand Canyon. See Pl. Brief at 25-27. That argument is fundamentally flawed.

By Federal statute specifically applicable to aircraft overflights of Grand Canyon National Park, the NPS and the Federal Aviation Administration ("FAA") have been directed to

“provide for substantial restoration of the natural quiet and experience of the park” and for the creation of related “flight free” zones. See Grand Canyon Air Tour Coalition v. F.A.A., 154 F.3d 455, 460 (D.C. Cir. 1998) (describing mandate of the National Parks Overflights Act of 1987, 16 U.S.C. 1a-1); United States Air Tour Assn. v. F.A.A., 298 F.3d 997, 1001 (D.C. Cir. 2002) (same). In response, the NPS has defined “substantial restoration of natural quiet” as when “50% or more of the park achieve[s] natural quiet (i.e., no aircraft audible) for 75-100 percent of the day,” and concluded that computer modeling is the only way to determine if that standard is met.¹⁰ Notably, it has been two decades since enactment of the National Parks Overflights Act, and the NPS and FAA have still not successfully modeled noise impacts at the Park.¹¹

Of course, WPG’s permit area in the Tri-Canyon Area of the Wasatch Forest is subject to a vastly different management context, where there is no mandate to “restore natural quiet” over 50% of the area, and where numerous noise sources (including the helicopter) are established

¹⁰ As described in a 2003 report commissioned by the NPS and FAA:

The National Parks Overflights Act of 1987 tasked the National Park Service (NPS), and the Federal Aviation Administration (FAA), with developing a plan for tour aircraft use of Grand Canyon airspace that will succeed in ‘substantially restoring the natural quiet in the park.’ NPS defined substantial restoration of natural quiet as occurring when ‘50% or more of the park achieve[s] natural quiet (i.e., no aircraft audible) for 75-100 percent of the day.’ Hence, a method was required to determine when substantial restoration of natural quiet is achieved. Because only through computer modeling is it practical to assess whether or not natural quiet has been substantially restored, this report presents the methods and results of a study that examines which of the four computer models best calculates tour aircraft audibility in the Grand Canyon.

See Aircraft Noise Validation Study (Jan. 2003) (<http://www.nps.gov/grca/overflights/documents/anmvs/summary.pdf>). Notably, while this report recommended use of one model, that model was rejected two years later and a different model was selected, and a successful model run has yet to be achieved. See Chronology of Events, *infra* note 7; see also Assessment of Tools for Modeling Aircraft Noise in the National Parks (March 2005) (<http://www.nps.gov/grca/overflights/documents/pdf/fican.pdf>).

¹¹ See Grand Canyon National Park Aircraft Overflights, Chronology of Events (<http://www.nps.gov/grca/overflights/documents/chronology.htm>); Status of Program (<http://www.nps.gov/grca/overflights/index.htm>). The complexity and controversy inherent in such a process, which has involved two lawsuits, multiple working groups, and an ongoing “alternative dispute resolution” process, is evident.

and accepted parts of the environment and management context,¹² and where the Forest Plan recognizes there will be helicopter noise impacts but calls for heli-skiers and backcountry skiers to coexist.¹³ Thus, there was no need to spend huge sums of time and money on a complex, detailed modeling exercise in an attempt to assess site-specific helicopter noise impacts at different locations in the permit area.

Rather, the 1999 WPG EIS tailored its noise analysis to the task at hand – providing a means for the USFS to compare between several alternative approaches to regulating WPG’s operations, in terms of resulting noise impacts to the backcountry community. In so doing, the EIS first documented that the primary determinant of the level of noise impacts is the degree to which the helicopter and other backcountry users interact in time and space, 1999 EIS at 2-21 [AR at 568 at 80],¹⁴ and then assessed noise impacts qualitatively in the context of its consideration of various methods to reduce such interaction and resulting conflict:

The alternatives analyzed in this EIS explore several methods to regulate helicopter skiing and thereby affect the interaction among the backcountry recreational user groups and the potential for conflict. These include limiting the

¹² 2004 EIS at 2-38 [AR at 13821 at 61] (“Other noise sources affect the permit area, including ski resort operations, highway and other vehicular traffic, other aircraft operations, and background sound from the Salt Lake metropolitan area.”).

¹³ See 2003 Wasatch Cache Forest Plan at Ch. 4 [AR at 7259 at 45] (“Central Wasatch Management Area”) (“Helicopter skiing will continue to operate as a component of the recreation picture in the Central Wasatch. Helicopter skiing and ski mountaineering will continue to compete for untracked conditions, and those users seeking quiet in the winter backcountry may continue to object to helicopter skiing.”) The Forest Service and Congress have established areas in the Tri-Canyon Area where helicopter flights and related noise are prohibited in order to provide a degree of natural quiet, which are available to and regularly utilized by backcountry skiers – the three wilderness areas to the east of the Northern Powder Circuit, and the “Heli-free Zone” at the head of Big Cottonwood Canyon. See 2004 EIS at Figure 2-2 [AR at 13821 at 28]. The remaining terrain, however, is essentially “zoned” by the Forest Plans for combined heli-ski use and non-motorized backcountry use.

¹⁴ The EIS also documented some of the key components of helicopter noise as relevant to other backcountry users – the absolute noise level in decibels, the pertinent characteristics of that noise (e.g., loudest during landing and ascending, quiet when screened by ridgelines, proximity-dependent), and potential measures by pilots to reduce noise, 1999 EIS at 3-19 to 3-22 [AR at 568 at 122-125], as well as the subjective nature of noise perception depending on the affected individual. Id. at 2-21 [AR at 568 at 124].

number and location of helicopters that WPG would be allowed to use, placing caps on seasonal use of permitted terrain, and establishing scheduled terrain closures.

1999 EIS at 4-2 [AR at 568 at 148].¹⁵

For each alternative, the EIS provides a detailed description of that alternative's likely effect on temporal and spatial interaction among the user groups, and then provides a qualitative description of resulting noise impacts through comparison of each alternative to the existing permit.¹⁶ The USFS revisited this approach in the 2004 EIS and found that it remained valid and provided an adequate framework to examine proposed changes to the permit with potential noise impacts. 2004 EIS at 2-25 to 2-26 [AR at 13821 at 48-49].

This qualitative approach allowed the USFS to make an informed decision, and fully complied with NEPA.

III. THE EIS ADEQUATELY ASSESSED EXPLOSIVES SAFETY.

The Federal Defendants conclusively demonstrate that the EIS adequately assessed the

¹⁵ Another fundamental component of this qualitative analysis, that was applied to assess conflict under each alternative, was the following: "Four important variables describe use by helicopter skiers and determine the level of interaction and potential for conflict between helicopter skiers and other backcountry users. These include the overall level of use, dispersion vs. concentration of use, predictability vs. randomness of use, and the incentive to use the periphery terrain." 1999 EIS at 4-4 [AR at 568 at 150].

¹⁶ Id. at 4-5 to 4-17 [AR at 568 at 150-163] (Alt. A: "decrease [in] the noise level in the backcountry and adjacent areas"; Alt. B: "noise levels in the backcountry and adjacent areas could also be expected to increase . . . With up to two helicopters flying, noise from their operation could affect more people for a longer period of time . . . and decrease the level of peace and solitude"; Alt C: "number, frequency, and intensity of interactions would increase . . . increased noise associated with the extra helicopter flights, combined with the additional activity in the backcountry, would decrease the level of peace and solitude"; Alt D: "duration of contact between helicopter skiers and other backcountry recreationists would tend to be shorter [and] WPG's potential use of the Tri-Canyon Area would decrease. Decreased numbers of helicopter skiers and the corresponding reductions in helicopter noise levels would promote an increase of peace and solitude in the backcountry"; Alt. E: "range of effects on the overall peace and solitude in the backcountry corresponding to the three levels of skier day caps . . . [ranging from] "adverse" to "no improvement" to a "decrease [in] the level of peace and solitude in those surrounding areas, but fewer people should be affected"; Alt F: "closure of two zones . . . should tend to decrease concentration . . . and preserve the peace and solitude . . . zones that remain open to WPG would tend to experience . . . higher noise levels for longer periods of time"; Alt. G: combination of other alternatives, noise impacts incorporated by reference).

potential risks to backcountry users of WPG's explosives use, which risk is minimal due to the safety measures that have been developed over the years by WPG and that are included as conditions in WPG's permit. Fed Opp. at 24-27. WPG will make only a few additional points with regard to this claim.

First, Plaintiffs note that much of the explosives safety analysis is contained in the 1999 EIS and therefore must be inadequate due to the increase in backcountry use since that time. Pl. Brief at 21. The conclusion in the 1999 EIS that explosives presented minimal risks was not, however, based on the number of backcountry users, but rather on the highly effective pre-bombing aerial flyovers performed by WPG of avalanche runout zones, done early in the morning and typically just after storms when ski tracks are easily visible, together with the minimal number of slides triggered (average of six per year), a relatively small number of explosives used each year (less than 300)¹⁷ and WPG's unblemished safety record. See 1999 EIS at 3-27 [AR at 568 at 130]. Plaintiffs' claim is baseless.

Plaintiffs also argue that effectiveness of WPG's aerial flyovers is exaggerated, as purportedly demonstrated by a statement by WPG in the 1999 Simultaneous Use Report that it "does not miss more than 10%" of the skiers. Pl. Brief at 21. Of course, that is a comparison of apples and oranges. WPG's simultaneous use observations, which have the purpose of gauging shared use, are often made days after a storm, when drainages are filled with many ski tracks, and when the need to identify every possible individual is not a paramount safety issue. As the EISs correctly concluded, WPG's pre-explosive flyovers have been and remain highly effective.

¹⁷ This can be compared to the annual use of between 7,680 and 11,200 explosive charges by the three nearby ski resorts and the Utah Department of Transportation in Little and Big Cottonwood Canyons. 1999 EIS at 3-28 [AR at 568 at 131].

2004 EIS at 2-28, B-46 [AR at 13821 at 51, 213].

The 2004 EIS concluded that there were no new circumstances that were significant enough to warrant a change in or reassessment of explosives use and safety, *id.*, and Plaintiffs have not met their burden of demonstrating otherwise.

IV. THE FOREST SERVICE DID NOT MISINTERPRET OR MISAPPLY ITS FOREST PLAN WITH RESPECT TO WPG'S ECONOMIC VIABILITY.

At pages 34 to 38 of their brief, the Federal Defendants conclusively refute Plaintiffs' claim that the USFS misinterpreted and misapplied its own Forest Plan with respect to consideration of WPG's economic viability. WPG joins and further supports that conclusion, as follows.

First, the USFS' interpretation of its own Forest Plan is to be given "controlling weight unless [it is] plainly erroneous or inconsistent with the regulation[s]." Lamb v. Thompson, 265 F.3d 1038, 1047 (10th Cir. 2001) (quoting Stinson v. United States, 508 U.S. 36, 45 (1993)); see also Sierra Club v. Martin, 168 F.3d 1, 4 (11th Cir. 1999) ("the Forest Service's interpretation of its Forest Plan should receive great deference from reviewing courts"). Plaintiffs' economic viability argument is a direct challenge to the USFS's reasonable interpretation of its own plan, as that interpretation is reflected in the analysis in the 2004 EIS, and must therefore be rejected.

Second, it bears emphasis that where, as here, "operational efficiency" has been reasonably defined as the permittee's "ability to provide the type and level of recreational opportunity desired by the Forest Service," consideration of that issue will inevitably and legitimately overlap with the operator's economics. For example, the EIS explains that conditions imposed in WPG's 1999 permit were partially responsible for the inability of several thousand aspiring helicopter skiers (e.g., those with reservations) to partake of that activity on

the National Forest, and annual use during the five year permit term was well below the 1,600 skier-days allowed by the permit. See 2004 EIS at 3-5 [AR at 13821 at 72].¹⁸ That reflects an obvious inability by WPG to provide the level of desired service, and thus clearly was a legitimate consideration by the USFS in the EIS and permit decision. Of course, WPG's economics also suffered as a result of the lost business opportunity.

Under Plaintiffs' theory, the USFS would be prohibited from considering and responding to this under-provision of recreational opportunity because to do so would positively affect WPG's economics. Surely, such an absurd result is not compelled by the USFS conclusion that under the new Forest Plan it need not "ensure the economic viability" of WPG. In short, it would be wholly unreasonable to interpret the new plan as barring the USFS from considering the adjustment of permit conditions on grounds that they will, in addition to improving operating efficiency, inure to WPG's bottom line. Yet that is effectively what Plaintiffs argue.

Third, the USFS did not, as Plaintiffs allege, ever interpret the new Forest Plan as ruling out any and all consideration of potential effects on WPG's economics. The statement in the EIS upon which Plaintiffs rely, which they have selectively quoted, is as follows:

The agency's concern is provision of a range of recreational opportunities on the lands under their administration. While it is recognized that a permittee cannot continue to provide a recreational opportunity if the permitted operation is not economically viable, viability itself is not an agency concern. Therefore, the focus of this analysis is on whether or not the terms of a given permit would provide WPG with adequate operational flexibility to continue to provide a quality heli-skiing experience, as addressed under Recreation above and in

¹⁸ "[B]ased on WPG's reservation records, demand for heli-skiing far exceeded the actual amount provided through this period. For example, in 2002/03, 1,977 people made guaranteed reservations or waited on standby, while only 683 (35 percent) were able to heli-ski. . . . Because it was a typical year, it is assumed to be representative of other years under the current permit. . . . the terms of the current permit appear to be one factor in the decline in heli-skiing activity." 2004 EIS at 3-5 [AR at 13821 at 72].

Chapters 3 and 4. Economic viability, *per se*, was determined to be outside the scope of this analysis on the basis of current Forest Plan direction.

2004 EIS at 2-38 [AR at 13821 at 61]. When read in context, it is clear that by stating that “economic viability, *per se*” was outside of the scope of analysis, the USFS had determined that it would not, as was done in connection with the 1999 EIS, participate in or consider a detailed profit-loss analysis to determine whether certain permit terms might put WPG out of business. Nothing in that statement, however, prohibited the USFS from considering permit conditions proposed by WPG that would increase its operating efficiency and in the process benefit its bottom line. Nor did the exclusion of solely economic considerations preclude the USFS from dismissing alternatives that would have obvious and significant negative impacts on operational efficiency and flexibility (e.g., prohibiting heli-skiing altogether in the Tri-Canyon Area), simply because those alternatives also would destroy WPG’s economic viability.¹⁹

The USFS said that its 2004 EIS would not engage in an analysis of WPG’s economic viability *per se*, and it clearly did not do so. There is no inconsistency between what the USFS said it would do, and what it did. Plaintiffs’ claim must fail.

Finally, Plaintiffs’ claim that “operational efficiency” is synonymous with “economic viability” because the EIS only considered the former in connection with two permit terms – the Sunday/Monday closure, and the cap on use of two helicopters in the Tri-Canyon Area – is simply wrong. Effects on operational efficiency (or operational flexibility, as it is sometimes

¹⁹ At page 37, Federal Defendants’ brief includes the following: “Thus, under the terms of the WCNF Plan, WPG’s economic viability was immaterial.” WPG believes that this statement, if read in isolation, is technically incorrect, and that a more accurate characterization of this issue is contained at page 38 of the brief, where it states that the USFS “was committed to providing the desired range of recreational opportunities, including heli-skiing, to the public, and whether a permittee was able to survive affected the USFS’s ability to do so.” That statement better characterizes the language in the ROD, and recognizes that the USFS could, in the future, give some consideration to economics in connection with efforts to continue to provide an opportunity for heli-skiing in the National Forest.

called in the EIS) were also analyzed in connection with many other potential permit modifications, including: modified eagle protection buffers, 2004 EIS at 3-12, 4-17 [AR at 13821 at 79, 114]; five use days outside of normal operating season, id. at 4-16, 4-24, 4-27 [AR at 13821 at 113, 121, 124]; caps on use of the NPC, id. at 4-16, 4-27 [AR at 13821 at 113, 119]; changes in total number of annual skier-days, id. at 4-16, 4-27 [AR at 13821 at 113, 121]; substituting home runs for fly-ins for return to base on weekends, id. at 4-16, 4-27 [AR at 13821 at 113, 127]; modifying or prohibiting alpine tours and home runs in wilderness areas, id. at 4-17, 4-19, 4-27 [AR at 13821 at 116, 119, 124]; change from an annual average to a seasonal cap on total skier-days, id. at 4-17, 4-22 [AR at 13821 at 114, 119]; and closures of the Mill Creek drainage, id. at 4-22, 4-25 [AR at 13821 at 119, 122].

In sum, Plaintiffs' economic viability argument is both factually and legally wrong.

CONCLUSION

For the reasons stated in the Federal Defendants' Opposition Brief, as well as the reasons discussed herein, the USFS' decision authorizing the issuance of WPG's operating permit should be upheld, and Plaintiffs' request that the decision be remanded should be denied.

DATED this 24th day of March, 2006.

/s/ Michael J. Malmquist

MICHAEL J. MALMQUIST
ROBERT H. HUGHES
PARSONS BEHLE & LATIMER
Attorneys for Wasatch Powderbird Guides

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2006, I electronically filed the foregoing **INTERVENOR DEFENDANT WASATCH POWDERBIRD GUIDES' BRIEF IN OPPOSITION** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Jared C. Bennett (E-Filer)

jared.bennett@usdoj.gov

laurie.coles@usdoj.gov

William B. Lockhart (E-Filer)

wblockhart@comcast.net

Joel M. Ban (E-Filer)

wildlawsw@uec.aros.net

joelban@hotmail.com

/s/ Michael J. Malmquist

MICHAEL J. MALMQUIST