No. 19-1044

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In Re PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY and HAWAII COALITION MALAMA PONO,

PETITIONERS

On Petition for Writ of Mandamus

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS (AGENCY ACTION UNREASONABLY DELAYED)

Paula Dinerstein, DC Bar # 333971
Public Employees for Environmental Responsibility
962 Wayne Avenue, Suite 610
Silver Spring, MD 20910
(202) 265-7337 (tel)
(202) 265-4192 (fax)
pdinerstein@peer.org

Attorneys for Petitioners Public Employees for Environmental Responsibility and Hawaii Island Coalition Malama Pono

July 15, 2019

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

GLOSSARY

ATMP	Air Tour Management Plan
FAA	Federal Aviation Administration
Agencies	Federal Aviation Administration and National Park Service
Covered Parks	Hawaii Volcanoes National Park, Haleakalā National Park, Lake Mead National Recreation Area, Muir Woods National Monument, Glacier National Park, Great Smoky Mountains National Park, and Bryce Canyon National Park
HICoP	Hawaii Island Coalition Malama Pono
IOA	Interim Operating Authority
NPS	National Park Service
NPATMA	National Parks Air Tour Management Act
PEER	Public Employees for Environmental Responsibility

INTRODUCTION

The Response of the Federal Aviation Administration (FAA) and the National Park Service (NPS) (collectively the "Agencies") describes their unsuccessful attempts to comply with the requirements of the National Parks Air Tour Management Act (NPATMA) to produce either Air Tour Management Plans (ATMPs) or voluntary agreements for every non-exempt unit of the National Park System. After 19 years of purportedly devoting "considerable effort and resources" to the task, Response at 28, the Agencies have not produced a single ATMP and only two parks are covered by voluntary agreements. The Agencies nevertheless claim that since the filing of the Petition, a new day has dawned, and they are prepared to move forward with compliance, obviating the need for court action.

However, their new plan contains no commitment to any dates for action, but only to a date to produce a schedule. That schedule would apply to only seven parks out of the 23 or 24 now in violation of NPATMA.[1] The remainder are relegated to "the longer term." Response at 15.

---

[1] According to the Agencies, there are now 25 park units where ATMPs or agreements are required. Trevino Decl., Att. 2, p.13, ¶ 42 (78 parks with IOA minus 53 that are exempt). The latest data submitted by the Agencies shows 26 such parks. Trevino Decl., Ex. F, p. 27, Table 7. The discrepancy apparently derives from the Agencies' claim that Muir Woods now "qualifies for the exempt park list," Trevino Decl., Att. 2, p. 13 at ¶ 41; *see* Response at 12, 25, although it has not yet been placed on that list. As there are two parks with voluntary

The Agencies' submissions provide no grounds for confidence that the future will differ from the past. Their own narrative plainly illustrates the need for court intervention to ensure compliance with the statute within a reasonable time.

ARGUMENT

I. The Agencies' Past and Current Activities Do Not Excuse its Delay or Ensure Future Timely Compliance

The Response describes three phases of the Agencies' efforts. In the first phase, the twelve years from the Act's passage in 2000 to its amendment in 2012, the Agencies issued regulations to implement NPATMA, established an advisory group, and executed a Memorandum of Understanding for cooperation between the NPS and the FAA. *Id.* at 8-9. They produced two drafts of a comprehensive implementation plan, each hundreds of pages in length, Response Att. 1, Exs. B and C, that were never finalized. Response at 9. They spent over $ 25 million on contracts for noise modeling and other tasks. *Id.* at 10; Lusk Decl., Att. 1 at ¶29. They worked on developing 16 ATMPs over a period of seven years. *Id.* at ¶¶ 30-41. However, all these efforts and expenditures ultimately came to naught. The Agencies "did not get beyond the initial stages of environmental review for the specific parks" and abandoned all of the ATMPs in favor of developing voluntary

---

agreements, that leaves 23 or 24 out of compliance. Only one of the parks subject to this Petition, Great Smoky Mountains National Park, is on the Agencies' priority list.

agreements when the law was amended to provide for them in 2012. Response at 11.

In the second phase, from 2012 to 2019, the Agencies focused on developing voluntary agreements. During that seven-year period, two were completed, for Big Cypress National Preserve in 2015 and Biscayne National Park in 2016. Response at 12.[2] Voluntary agreements were entered with some of the operators over Glen Canyon National Recreation Area and Rainbow Bridge National Monument, but because not all operators over those parks participated, the Agencies admit that they have to go back to the drawing board and produce an ATMP. *Id.* at 15; Sauvajot Decl., Att. 3, p.3, ¶ 7.a.i (noting that the operators who entered the voluntary agreements are concerned that they will be at a disadvantage in relation to operators who did not participate, and an ATMP is needed). There are two other voluntary agreements, for Badlands National Park and Mount Rushmore National Memorial (which are served by the same operator), said to be in the works. Response at 13.

The Agencies admit that reliance solely on voluntary agreements cannot achieve statutory compliance on a significant scale, as there is little incentive to enter agreements as long as operators can simply continue to operate under the far

[2] These parks have a low volume of air tours, averaging well below one a day. Based on the latest data submitted by the Agencies for 2017, Biscayne had 138 and Big Cypress had 81 overflights for the year. Trevino Decl., Att. 2, Ex. F, p. 15.

less restrictive Interim Operating Authority (IOA). *See* Petition at 14. The Response admits the need to "increase[] incentives for operators with interim operating authority to participate in the voluntary agreements," and that ATMPs must be held in reserve if operators do not join voluntary agreements. *Id.* at 33; Sauvajot Decl., Att. 3 at p. 6, ¶ 7.b (because of the advantages of IOA over voluntary agreements, NPS and FAA must "make[] it clear to operators that ATMPs will be pursued if voluntary agreements cannot be achieved").

The disincentive to enter voluntary agreements is magnified by the fact that the IOA granted to existing operators far exceeds the number of flights they are actually conducting, allowing for not only continuation but major expansion of their businesses without the further restrictions that would be part of voluntary agreements. Current IOA amounts to 187,420 flights per year, nearly four times the actual number of flights, which is 47,143. Trevino Decl., Att. 2, p. 15, ¶ 45 f. As Ms. Trevino states,

> when operators have more IOA than they use, they generally do not have an incentive to work with the agencies to enter voluntary agreements to manage air tours …. [that could involve] route modifications, limits on the number of flights, limits on altitude, time of day limitations, quiet technology incentives, agreeing not to conduct flights during certain time periods, etc.

Id. at ¶ 48. *See also* Sauvajot Decl., Att. 3 at p. 6, ¶ 7.b:

> Operators who do not participate in the voluntary agreement process retain their full IOA without significant limitation to routes, altitudes, time of day or other flight restrictions, and may therefore have a

> competitive advantage over operators who voluntarily accepted restrictions on their activities to protect park resources.[3]

Thus, the original twelve-year effort to produce ATMPs and the subsequent seven-year effort to rely solely on voluntary agreements have netted next to nothing. The Agencies have admitted that their original effort to develop ATMPs had to be abandoned because of the failure of the two agencies to reach agreements, Response at 10-11, and that their subsequent effort to rely solely on voluntary agreements had no possibility of success because of the disincentives to enter such agreements. Without apparent irony, the Agencies seek to avoid a finding of unreasonable delay by touting the monumental waste of agency resources and taxpayer dollars consumed by these efforts.

The third phase of agency NPATMA compliance provides no assurance that the lengthy past record of ineffective efforts has been left behind or that future compliance will occur in a reasonable timeframe. It appears to be primarily an

[3] However, FAA is apparently unwilling to use its authority under NPATMA to revoke IOA for cause, 49 U.S.C. § 40128 (c)(2)(D); 14 C.F.R. § 136.41(a)(4), when operators have large amounts of unused IOA. Mr. Lusk relates that in late 2018 and early 2019, the FAA sent letters to 20 air tour operators who had not reported any tours at specific parks where they had IOA in the five years since reporting began, asking them to voluntarily surrender IOA for those parks. None of them were willing to do so and the FAA took no further action. Lusk Decl., Att. 1, ¶ 60. Although the Response (at 14) makes a vague statement that the Agencies have been working on a process to modify IOA based on inactivity and underutilization, there is no explanation of what that process may be or when it would be implemented.

effort to forestall a court-ordered schedule by creating an appearance of new activity or at least good intentions. One month after the Petition was filed, the Agencies began in March 2019 to meet to discuss a new course to implement NPATMA. However, these meetings have so far resulted in nothing more than vague statements of intent and a limited and ill-defined plan of action, with even a preliminary timeline yet to come.

The claimed "important shift" in priorities is that ATMPs and voluntary agreements will be pursued "in tandem," meaning that the Agencies will continue to pursue voluntary agreements but if they are unsuccessful, they will "promptly initiate" ATMP processes. Response at 15. The initial plan of action is to continue to pursue voluntary agreements at Badlands and Mount Rushmore, and initiate voluntary agreement processes at Death Valley, Mount Rainier and Great Smoky Mountains. An ATMP process would begin for Glen Canyon and Rainbow Bridge, where the voluntary agreement process was already tried but failed to include all operators. There is no commitment to any dates certain even regarding these seven parks, but a schedule of unspecified length will be submitted to the court by September 30, 2019. Response at 15.

While it is certainly a step forward to belatedly acknowledge that the voluntary agreement only strategy will not work, and that ATMPs must at the least be kept in reserve, the plan falls far short of an assurance of statutory compliance

in a reasonable time. First, only seven of 23 or 24 parks are prioritized, and only one of the Covered Parks. Second, five of the seven priority parks will first attempt voluntary agreements, despite all of the admitted obstacles to them discussed above. There is no clarity as to how long voluntary plans will be attempted before switching to ATMPs. Third, there is no plan at all for the remaining parks. The only hint at how long full compliance would take is the meaningless claim it will be achieved in a "realistic timeframe." Sauvajot Decl., Att. 3, p. 8, ¶ 7.e. The Agencies' defense of their paltry progress over the last 19 years counsels against leaving it to them to proceed in what they consider a "realistic timeframe."

The Agencies claim that the prioritized parks were selected based on work already done and their potential to serve as models for other agreements or plans "over the longer term." Response at 15. However, the priorities inexplicably include two parks, Death Valley and Mount Rainier, where the most recent data shows no overflights at all, making their inclusion, and their potential for use as models, highly questionable. Trevino Decl., Att. 2, Ex. F, p. 27, Table 7. The priorities do not include parks included in the Petition which are both in the top four "High-Activity" category as shown in Table 4 and Figure 2 of Trevino Ex. F, pp. 22-23, and the subject of years of prior efforts including public hearings and public comments on ATMPs - Hawaii Volcanoes (16,520 annual tours), Lake

Mead (8,735 annual tours) and Haleakala (4,839 annual tours). Lusk Decl. Att.1 at 30-32, 36.[4]

Rather than providing any concrete plans for full statutory compliance, the Agencies are basically asking the court to "trust us." That request is jarringly inapt coming from agencies that have spun their wheels with little to show for 19 years, and even under the pressure of a mandamus petition offer no more than a vague promise to take action on a fraction of the non-exempt parks on a timetable to be submitted in the future. Also, the Agencies have not convincingly shown that their future efforts will be any more successful than past efforts. The main new element is to turn to ATMPs if voluntary agreements are not successful. However, ATMP efforts were previously fruitless, purportedly due to differences in approach between FAA and NPS. The extent and seriousness of these differences are described in detail, Response at 10-11, Lusk Decl., Att. 1, at ¶ 45; Trevino Decl.,

[4] Ambient sound level studies were also conducted at Glacier and Muir Woods. *Id.*. at ¶¶ 27-28. Previous work on ATMPs included Muir Woods as part of the Golden Gate National Recreation Area. *Id.* at ¶ 41. Though the Response treats Muir Woods as an exempt park, it has not yet been added to the exempt parks list. The latest data shows 1,173 overflights for 2017, though Mr. Lusk claims that recent discussions with the operators determined that the tours were not in fact over the park. Trevino Decl., Ex. F, p. 17, Table 7; Lusk Decl. ¶ 56. There is no explanation of how such a mistake could have been made, or where the reported overflights actually were. At least one operator continues to advertise flights over Muir Woods. *See* https://www.seaplane.com/air-tours/greater-bay-area-tour/ (last visited July 15, 2019). Petitioners request that absent further official confirmation, Muir Woods be included in the relief granted here.

Att. 2, p. 8, ¶ 24, but surmounting them is theorized based only on "prioritiz[ing] resolving past differences," without any hint as to how that might be accomplished. Response at 15.

II. Preparation of ATMPs or Voluntary Agreements is a Clear-Cut Mandatory Duty Subject to Mandamus

There can be no doubt that NPATMA commands in a clear and indisputable fashion that the Agencies have a non-discretionary duty to develop ATMPs or voluntary agreements. 49 U.S.C. § 40128(b)(1)(A) ("The Administrator, in cooperation with the Director, *shall* establish an air tour management plan" whenever a person applies for operating authority) (emphasis added); and as an alternative to ATMPs, "may enter into a voluntary agreement." 49 U.S.C. § 40128(b)(7)(A).[5] The Agencies attempt to transform this clear command into something discretionary because each agency retains some discretion regarding the environmental analyses and the actions they will approve. Response at 20. However, Petitioners do not seek to control agency discretion as to the content of environmental documents, plans, or agreements, but only to enforce the clear duty to create them at all. *See American Hospital Ass'n v. Burwell*, 812 F.3d 183, 191

[5] The Agencies argue that Petitioners may not compel the establishment of voluntary agreements because they require the cooperation and agreement of third-party operators. Response at 20, n. 4. Petitioners to not seek to compel the establishment of voluntary agreements, but merely recognize that the Agencies can fulfill their statutory duties without ATMPs if all of the operators in a park enter voluntary agreements.

(D.C. Cir. 2016) (plaintiff does not seek to compel the content of decisions or the manner in which they are made, but only to compel making decisions within the statutory time frames).

III. The Absence of an Absolute Statutory Deadline Does Not Counsel Against Mandamus

The second *TRAC* factor concerns a congressional timetable *"or other indication of the speed with which it expects the agency to proceed."* *Telecomms. Research and Action Ctr. v. Federal Comms. Com'n*, 750 F.2d 70, 80 (D.C. 1984) (emphasis added). The Agencies are correct that there is not a hard deadline to complete ATMPs or voluntary agreements. However, there is a clear indication that Congress expected the Agencies to issue ATMPs ("make every effort") within 24 months of any operator applying for authority to fly over a park.[6] FAA itself has stated that an application for operating authority is the trigger for development of an ATMP, and that IOA was intended to be only a temporary solution while ATMPs were developed. *See* Petition for Mandamus at 6, 9-10 and citations therein. The Agencies cannot now credibly claim that that Congress imposed only an "aspirational goal" of ATMPs within 24 months, Response at 24, that allows for 19 years and counting of continued IOA without a single ATMP.

[6] In order to be relieved of that responsibility, voluntary agreements with all operators over the park would have to be entered within that time period.

Even if there had not been a congressional expectation that ATMPs would be completed in 24 months, 19 years could not be considered a reasonable time. Many cases have found lesser periods to be unreasonable even without any statutory deadline or indication of congressional intent regarding timing. *E.g. In re Core Commc'ns., Inc.* 531 F.3d 849 (D.C. Cir. 2008) (seven-year delay); *In re Int'l Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) (six-year delay). *See also Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) ("the lack of a timetable does not give government officials carte blanche to ignore their legal obligations").

IV. Difficulties in Inter-Agency Cooperation Do Not Justify Extended Delay

The Agencies claim that their 17-year delay beyond Congressional direction to complete ATMPs within 24 months of an application for operating authority is justified by difficulties in inter-agency cooperation. At the same time, they claim that the court should stay its hand because those difficulties can now be overcome merely by "prioritiz[ing] resolving past differences." Response at 15. Either those differences could have been overcome a long time ago, or they are not likely to be resolved now absent court intervention.

In fact, it was never true that the different missions of the Agencies precluded cooperation to complete ATMPs. FAA's mission is "to provide the safest, most efficient use of aerospace," Response at 5, citing 49 U.S.C. §§ 40101-

40104, while the mission of the NPS is "to conserve and provide for the enjoyment of scenery, natural and historic objects, and wildlife in parks and to leave them unimpaired for the enjoyment of future generations." Response at 6, citing 54 U.S.C. § 10010(a). FAA can protect aviation efficiency and safety and NPS can protect park resources without conflict. A reduction in the number of flights or restrictions on their timing or routes to protect park resources would not likely pose any concerns for air safety or efficiency. And NPATMA applies only to sightseeing tours over national parks, and has no potential to interfere with FAA's general authority over aviation. *See* 14 C.F.R. § 136.33(d)(1).

The Response claims that the obstacles stemming from the need for joint agency approval "are for the political branches to resolve." Response at 21. But in fact, Congress has already spoken on this issue. Congress's expectation was that the two agencies would work together despite any difficulties. The Response points to the House Report on the original NPATMA, stating that Congress realized that cooperation between the two agencies "may be a difficult venture." Response at 5, citing H.R. Rep. No. 106-167 at 93. The Response fails to note that the next sentence in that Report states, "However, the two agencies must work together" to develop viable air tour management plans. *Id.* This expectation had not changed when the Act was amended in 2012. Congress retained the portions of the Act requiring cooperation and joint approval of environmental documents for

ATMPs, and the new option of voluntary agreements requires NPS and FAA to act together to enter into voluntary agreements and to conduct public review and consultation with Indian Tribes. 49 U.S.C. § 40128 (b)(7). Congress did not act to excuse the Agencies' delay or recognize any major obstacle inherent in achieving interagency cooperation.

Finally, administrative complexities, in and of themselves, cannot justify extensive delay. *Cobell,* 240 F.3d at 1097.

V. The TRAC Factors Favor Mandamus

The Agencies claim that competing priorities counsel against mandamus, but do no more than recite their general duties, without explaining how they prevent compliance with NPATMA. The Agencies' NPATMA history reveals not so much competing priorities or lack of resources as a misguided use of resources in efforts that were later abandoned or in pursuit of unworkable strategies like seeking voluntary agreements only.

The Agencies claim that mandamus relief would upset their newly-set priority list of seven parks, which includes only one park subject to the Petition, by giving precedence instead to the other parks named in the Petition, contravening the decision in *In re Barr Laboratories*, 930 F.2d 72, 75 (D.C. Cir. 1991). Response at 30. However, this is not a case like *Barr*, in which the court found that the agency was diligently processing and acting upon applications, but was

simply behind the statutorily-allotted time frame due to limited resources. Judicial intervention would have served *only* to move Barr forward in the line at the expense of other applicants. 930 F.2d at 73-74. The *Barr* court noted that the situation would be different if an agency was "asserting utter indifference to a congressional deadline," in which case it would "have a hard time claiming legitimacy for its priorities." *Id.* at 76.

This is such a situation. Petitioners seek to require the Agencies to take up a long-neglected statutory mandate that Congress imposed for the benefit of all national park visitors and neighbors. The Agencies' neglect has affected Petitioners in the particular parks their members frequent and live near that are burdened by significant overflight activity. The fact that the Agencies have now chosen some different parks to prioritize does not disqualify the Petition, especially since the Agencies' new plan does not commit to the creation of ATMPs or voluntary agreements for the Covered Parks in *any* reasonable timeframe. In *Barr*, the failure of the court to intervene resulted only in Barr having a longer wait, commensurate with other applicants. Here, the failure of the court to act would result in perpetuation of the status quo where the statutory mandate is almost entirely unfulfilled; and only a weak, vague and incomplete plan for compliance has been advanced, which includes no concrete commitment to take action on most of the Covered Parks (and many others) at all.

VI. Petitioners Have Standing

Petitioners submitted 14 declarations detailing their members' reduced enjoyment of the parks, and in some cases, compromised utilization for business activities such as tour guiding and soundscape recording, due to the noise, visual impacts and disruption of air tours. The Agencies do not dispute these injuries, but rather question their redressability, because "there is no guarantee" that they would be reduced by the adoption of ATMPs or voluntary agreements. Response at 18. The Agencies also argue that Petitioners' injuries are not redressable because they are not entitled to mandamus, *id.* at 18-22, an argument that confuses the merits with standing and is addressed above in connection with the merits.

It is obvious that ATMPs or voluntary agreements would likely redress the Petitioners' members' injuries, as ATMPs are specifically designed to reduce or prohibit overflights; regulate routes, altitudes, and timing; mitigate noise, visual and other impacts; and incentivize the adoption of quiet aircraft technology. 49 U.S.C. § 40128 (b)(3)(A), (B) and (D). Voluntary agreements contain similar provisions. 49 U.S.C. § 40128 (b)(7)(B); Trevino Decl., Att. 2, p. 16, ¶ 48 (voluntary agreements "protect park resources and visitor experience" by "route modifications, limits on the numbers of flights, limits on altitude, time of day limitations, quiet technology incentives, agreeing not to conduct flights during certain time periods, etc.").

Petitioners have standing.

CONCLUSION

For the foregoing reasons, Petitioners ask that their Petition for Mandamus be granted.

Respectfully submitted,

/s/ Paula Dinerstein
Paula Dinerstein
D.C. Bar No. 333971
Public Employees for Environmental Responsibility
962 Wayne Ave., Suite 610
Silver Spring, MD 20910
202-265-7337 (tel)
202-265-4192 (fax)
pdinerstein@peer.org

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

With Type-Volume Limit, Typeface Requirements and Type-Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 21 (d)(1) and the Court's order of May 1, 2019 (Document #1785524) allowing Petitioners to file a reply not exceeding 3,900 words.

This document contains 3,837 words, not including the items exempted by Federal Rule of Appellate Procedure 32(f).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because This document has been prepared in a proportionally spaced typeface using Times New Roman, 14 point.

___/s/ Paula Dinerstein_____

Paula Dinerstein
Attorney for Petitioners PEER and HICoP

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 15th day of July 2019, she electronically filed the foregoing Reply in Support of Petition for Mandamus with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Paula Dinerstein
Paula Dinerstein