

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

**PROGRESS UPDATE OF
THE FEDERAL AVIATION ADMINISTRATION
AND THE NATIONAL PARK SERVICE**

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**PROGRESS UPDATE OF
THE FEDERAL AVIATION ADMINISTRATION
AND THE NATIONAL PARK SERVICE**

The Court's order of November 20, 2020 approved a plan (Plan) submitted by the Federal Aviation Administration (FAA) and National Park Service (NPS) (collectively the agencies) for bringing twenty-three specific parks into compliance with the National Parks Air Tour Management Act of 2000 (NPATMA).¹ The order further directed the agencies to file a progress update on November 30, 2020 and to file subsequent updates at 90-day intervals thereafter.² Pursuant to that order, as modified by a February 10, 2022 order, the agencies submit the following:

The Plan details the agencies' intended approach to completing air tour management plans (ATMPs) for all covered parks within two years, and it describes on a quarterly basis the actions that the agencies anticipate undertaking in furtherance of that approach. The table below identifies the actions included in the Plan for Year 2, Quarter 2 (December 1, 2021 to February 28, 2022) and provides a concise summary of the work activities accomplished during this quarter.

¹ As explained in a previous progress update, the NPS withdrew the exemption applicable to Muir Woods National Monument and the agencies are now proceeding with ATMPs for 24 parks.

² On February 20, 2022, the Court granted the agencies' unopposed motion to adjust the progress reporting schedule and authorized filing on fixed dates of February 28, May 31, August 31, and November 30, rather than at 90-day intervals.

Actions in Proposed Plan for Second Year, Quarter 2	Work Activities Completed in Second Year, Quarter 2
<p>Incorporate comments from public meetings and prepare responses, as appropriate.</p>	<ul style="list-style-type: none"> • The agencies reviewed the comments submitted through the NPS Planning, Environment, and Public Comment (PEPC) site for the 12 draft ATMPs, covering 15 National Park System units, released thus far. In addition, the agencies considered the questions raised during the public meetings held for those ATMPs. • The agencies developed concern statements from public comments, drafted public comment decision matrices, and determined whether and how to address public comments. • The agencies identified and agreed to necessary and appropriate changes to the draft ATMPs based upon the public comments received.
<p>Begin drafting Records of Decision and finalizing ATMP/NEPA documents.</p>	<ul style="list-style-type: none"> • The agencies considered public comments received on the draft ATMPs in further development of the Categorical Exclusions/Environmental Screening Forms, as appropriate. • The agencies developed and outlined the content for records of decision for the ATMPs and began drafting portions of records of decision for the ATMPs that were released for public comment.

Actions in Proposed Plan for Second Year, Quarter 2 (continued)	Work Activities Completed in Second Year, Quarter 2 (continued)
Complete resolution of Tribal and other agency consultations, as necessary.	<ul style="list-style-type: none">• The agencies sent Section 106 consultation letters to State Historic Preservation Officers/Tribal Historic Preservation Officers, tribes, operators, and other consulting parties regarding identification of historic properties in the Areas of Potential Effects for Olympic National Park, Everglades National Park, Mount Rainier National Park, Arches National Park, Canyonlands National Park, Natural Bridges National Monument, Bryce Canyon National Park, and Great Smoky Mountains National Park.• The agencies developed a plan for conducting consultation for Hawai'i Volcanoes National Park and Haleakalā National Park.• The agencies held consultation meetings with consulting parties at Haleakalā National Park and Hawai'i Volcanoes National Park on December 9 and 10, 2021, respectively.• The agencies continued outreach to the Oglala Sioux Tribe to initiate formal consultation with the tribe for the ATMP at Badlands National Park.• The agencies held a tribal consultation meeting for Badlands National Park and Mount Rushmore National Memorial on January 28, 2022, and continued preparations for future meetings.

<p>Actions in Proposed Plan for Second Year, Quarter 2 (continued)</p>	<ul style="list-style-type: none"> • Work Activities Completed in Second Year, Quarter 2 (continued)
<p>Complete resolution of Tribal and other agency consultations, as necessary. <i>(continued)</i></p>	<ul style="list-style-type: none"> • The agencies held a tribal consultation meeting for Death Valley National Park with the Timbisha Shoshone on December 16, 2021. • The agencies continued to reach out to tribes associated with Bandelier National Monument regarding scheduling consultation meetings. • The agencies conducted additional outreach to tribes from which responses have not been received to date. • The agencies identified additional consulting parties for Section 106 consultations for the Utah parks. • The agencies continued to draft Section 7 of the Endangered Species Act compliance documentation.
<p>Continue work on any appropriate park-specific incentives for quiet technology.</p>	<ul style="list-style-type: none"> • The agencies agreed to revised quiet technology language in the draft ATMPs already released.
<p>Additional work done to facilitate implementation of ATMPs</p>	<ul style="list-style-type: none"> • The agencies initiated public scoping in connection with the development of ATMPs for Haleakalā National Park and Hawai'i Volcanoes National Park. • The agencies responded to congressional and stakeholder inquiries.

At this point, the agencies are on schedule to bring all 15 of the parks covered by the 12 ATMPs that were released for public review in August, September, and October of 2021 into compliance with NPATMA by August 31, 2022. The agencies have received thousands of public comments on these draft ATMPs and are considering those comments in drafting final ATMPs and compliance documentation for those parks. While many of these comments were form letters, there have been many unique comments, many of which apply to multiple parks, that the agencies have needed to consider. Those 15 parks are covered by 12 ATMPs, as follows:

- Arches National Park (450 comment letters received)
- Bandelier National Monument (1,102 comment letters received)
- Bryce Canyon National Park (448 comment letters received)
- Canyonlands National Park (429 comment letters received)
- Death Valley National Park (1,259 comment letters received)
- Everglades National Park (5,496 comment letters received)
- Glacier National Park (2,668 comment letters received)
- Golden Gate National Recreation Area, Point Reyes National Seashore, Muir Woods National Monument and San Francisco

Maritime National Historical Park (149 comment letters received)

- Great Smoky Mountains National Park (448 comment letters received)
- Mount Rainier National Park (3,990 comment letters received)
- Natural Bridges National Monument (395 comment letters received)
- Olympic National Park (4,142 comment letters received)

The agencies still need to complete consultations pursuant to Section 106 of the National Historic Preservation Act (Section 106) and Section 7 of the Endangered Species Act (Section 7) as well as compliance with the National Environmental Policy Act (NEPA), in addition to revising and finalizing the ATMPs for these parks.

While the schedule is currently holding for these ATMPs, the agencies are working through particular complications for two of these ATMPs (the ATMPs for Bandelier National Monument and the Northern California parks) that may push completion past August 31, 2022. These complications include ongoing tribal consultations as well as discrete challenges related to consultations under Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act as well as, for Bandelier National Monument, ongoing reviews by the local Flight Standards District Office to address unique safety concerns. The agencies will be able to better address the schedule for these ATMPs in their next quarterly progress update.

In addition to the parks identified above, the agencies currently anticipate bringing the National Parks of New York Harbor (NPNH) into compliance with NPATMA by August 31, 2022. NPNH is an NPS administrative grouping of several parks, only two of which require an ATMP or voluntary agreement: the Statue of Liberty National Monument (which includes Ellis Island and Liberty Island) and Governors Island National Monument. Addressing commercial air tours over these parks has been challenging for a number of reasons including the existence of particularly complex airspace and efforts to accommodate an existing city concessions agreement for helicopter tour operations over NPNH.

Despite the extensive resources the agencies have devoted to this process, as outlined in the declarations of Kevin Welsh and Raymond Sauvajot filed on November 5, 2021 in support of the agencies' Response in Opposition to Petitioner's Motion to Enforce Order Granting Petition for Mandamus, it has become clear that the agencies will not be able to bring 8 of the 23 covered parks into compliance with NPATMA by August 31, 2022. The eight parks are identified below along with specific, concrete reasons for the delay and estimated timelines for completion of the agencies efforts to bring them into compliance with NPATMA.

a. **Canyon de Chelly National Monument.** This park is located entirely on Navajo Nation Reservation lands and is co-managed by the Navajo Nation and the NPS. In initial consultation with the Navajo Nation, the Nation identified several concerns and expressed a desire to be included in the planning process. Consistent with NPATMA, the agencies invited the Navajo Nation to be a cooperating agency under NEPA for this ATMP. Due to the unique status of this park, the agencies also requested that a representative of the Nation be included in the planning team for the development of the ATMP. The Nation has recently responded to this request and identified a team member. The agencies will work cooperatively with the Nation's representative to identify a proposed action and potential NEPA pathway. The agencies will also need to, among other things, conduct tribal consultation with other tribes that have an interest in or connection to the park, prepare a draft ATMP to be released for public comment, review and address comments, complete the appropriate level of NEPA review, complete Section 106 and Section 7 consultation, and finalize an ATMP and record of decision (ROD). The agencies currently anticipate that completion of these steps will take up to an additional year beyond the current 2-year schedule, until August 2023.

b. **Lake Mead National Recreation Area.** The airspace over this park is complicated because it is overflown by commercial jets en route to Las Vegas and air tour transportation routes to Grand Canyon National Park that are specifically exempted from compliance with NPATMA. The agencies are working to define these transportation routes in order to determine the existing condition of commercial air tours over the park and how these routes should be regulated under an ATMP. This requires additional outreach and consultation with air tour operators to ensure that commercial air tours, as opposed to transportation routes, have been consistently and correctly reported. After the existing condition is identified, the agencies will need to identify the appropriate NEPA pathway, and complete NEPA compliance, draft an ATMP, and complete the consultations outlined above. The agencies currently anticipate that completion of these steps will take up to an additional year beyond the current 2-year schedule, until August 2023.

c. **Glen Canyon National Recreation Area/Rainbow Bridge National Monument.** Seven of the nine air tour operators that overfly these parks have signed voluntary agreements, which regulate approximately 90% of the commercial air tours over these parks. The agencies have spent substantial efforts to identify the best path forward for

these parks, consistent with NPATMA, given the existing voluntary agreements for most but not all operators, and continue to evaluate the most appropriate and effective options. This overall process will also include extensive tribal consultation, given the substantial tribal interest in consultation on the voluntary agreements currently in place between the agencies and the majority of operators that operate over these parks and the agencies' past experience with such consultation. The agencies currently anticipate that completion of these steps will take up to an additional eighteen months beyond the current 2-year schedule, until February 2024.

d. **Mount Rushmore National Monument/Badlands National Park.** Development of ATMPs for these parks has been complicated by the extensive tribal consultation that has been required for both parks, which are viewed by many tribes as part of a single cultural landscape. The interconnectedness of the landscape encompassing these two park units, concerns about indirect effects of the ATMP on areas outside park boundaries, and the need to overcome recent experiences that the tribes in the area have had with other Federal agencies and rebuild trust have complicated the tribal consultation process, which is ongoing. The agencies have held several meetings with the tribes and plan to hold more meetings before the consultation is complete. Furthermore, the agencies

have invested specifically with outreach to the Oglala Sioux Tribe but have not yet succeeded in initiating formal consultation. Consultation with the Oglala Sioux Tribe is important because the Pine Ridge Reservation is adjacent to Badlands National Park and will be included in the ATMP for the park. The Oglala Sioux Tribe also co-manages the South unit of Badlands National Park. The agencies have already decided to prepare environmental assessments for these parks but still need to develop a preliminary range of alternatives for public scoping, analyze comments received and potentially refine the alternatives, and also complete the other steps described above prior to completing final ATMPs for the parks. Though the general work completed by the agencies regarding environmental assessments described in previous progress updates will be useful in this effort, the agencies currently anticipate that completion of these steps will take up to an additional year beyond the current 2-year schedule, until August 2023. While the agencies currently anticipate completing, and will make every effort to complete, ATMPs for these parks by August 2023, challenges beyond their control arising from consultation under Section 106 could have the potential to delay the completion date beyond August 2023.

e. **Hawai'i Volcanoes National Park/Haleakalā National Park.**

The planning efforts for these parks have been complex due to the high number of air tours over both parks, the high number of stakeholders, differing stakeholder views, and substantial concerns about effects of air tours outside the parks' boundaries. The agencies decided to prepare environmental assessments for both parks, have begun consultations with Native Hawaiian Organizations, and have had initial Section 7 meetings with the U.S. Fish and Wildlife Service. The agencies developed potential alternatives for both parks and plan to send out a scoping newsletter by the end of February to get public feedback on those potential alternatives.

Because of uncertainty about impacts to park resources and visitor experiences from existing levels of air tours over both parks, the agencies are not able to use the current condition as a basis for development of a proposed action as they have done with other parks. Prior to initiating the NEPA process, the agencies have also had to get more information regarding existing park conditions, work to reconcile flight tracking data with operator reported information, complete preliminary noise modeling, and obtain information from the parks regarding park-specific natural and cultural resources. After the scoping is completed and any refinements to alternatives are made, the agencies will need to complete the steps outlined

above prior to establishing ATMPs for these parks. The agencies currently anticipate that these steps will take up to an additional year beyond the current 2-year schedule, until August 2023. While the agencies currently anticipate completing, and will make every effort to complete, ATMPs for these parks by August 2023, challenges beyond their control arising from consultation under Section 106 and Section 7 could have the potential to delay the completion date beyond August 2023.

The agencies will provide a more concrete timeline for completing ATMPs at the parks identified in subsections (a)-(e), above, and will provide any additional schedule updates for all parks, in future progress updates as such information becomes available.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document is not a brief or motion and therefore is not subject to the type-volume limits of Federal Rules of Appellate Procedure 27(d)(1)(E)(2) and 32(a)(7)(B). Excluding the cover, signature block, and certificate this document contains 2,510 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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