

CASE ARGUED DECEMBER 9, 2019**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 19-1044

IN RE: PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY
AND HAWAII ISLAND COALITION MALAMA PONO,
Petitioners

ON PETITION FOR A WRIT OF MANDAMUS

**SECOND MOTION TO ENFORCE ORDER
GRANTING PETITION FOR MANDAMUS**

On May 1, 2020, this Court granted the Petition for Writ of Mandamus in this case, and ordered the following:

that the agencies [the Federal Aviation Administration (FAA) and National Park Service (NPS)] file with the court a proposed schedule, within 120 days of the issuance of this court's opinion, for bringing all twenty-three parks into compliance within two years. Should the agencies anticipate it will take them longer than two years, they must offer specific concrete reasons in the proposed schedule for why that is so. The court will retain jurisdiction to approve the plan and monitor the agencies' progress. After the plan is approved, the agencies are directed to submit updates on their progress every 90 days until their statutory obligations are fulfilled.

Per Curiam Order, Document #1840824; Opinion, Document #1840825 at 14-15.

The agencies filed progress reports on November 30, 2020, Doc. #1873667; March 1, 2021, Doc. 1887739; May 28, 2021, Doc. 1900668; August 26, 2021,

Doc. 1911724; November 24, 2021, Doc. #1923888; and February 28, 2022, Doc. # 1925907. In every one of these reports over a year's time between November 30, 2020 and November 24, 2021, the agencies reported that they were on track to complete all the Air Tour Management Plans (ATMPs) in two years, in compliance with this Court's Order.¹

Then suddenly in the February 28, 2022 report, the agencies revealed that they are actually seriously off track. They now admit that they will not meet the deadline for 13 of the 24 parks covered by the Court's order.² Of the 12 ATMPs that were already released in draft form (covering 15 parks) the agencies expect to meet the deadline for 10 parks. The Agencies also "currently anticipate" meeting the deadline for the National Parks of New York Harbor. *Id.* at 7. This is a total of

¹ Progress Update, Nov. 30, 2020, at 2: "At this time, the agencies do not anticipate delays at any individual park;" Progress Update, March 1, 2021, at 1: "At this time, the agencies do not anticipate delays at any individual park;" Progress Update May 28, 2021, at 3: "At this time, the agencies do not anticipate delays at any individual park;" Progress Update, August 26, 2021 at 2: "At this time, the agencies do not anticipate delays at any individual park." The most recent of these reports, the Progress Update of Nov. 24, 2021, states at 6: "At this time, the agencies' goal remains to complete all air tour management plans, or voluntary agreements, consistent with the Court approved plan and schedule, by August 31, 2022."

² These are Arches National Park, Bryce Canyon National Park, Canyonlands National Park, Death Valley National Park, Everglades National Park, Glacier National Park, Great Smoky Mountains National Park, Mount Rainier National Park, Natural Bridges National Monument and Olympic National Park. Feb. 28, 2022 Progress Update at 5-6.

11 parks out of the 24 now covered by the Court's Order, leaving 13 parks where the deadline is now projected to be violated.³

With regard to the remaining parks with draft ATMPs, the agencies expect indeterminate delays for Bandelier National Monument and the four Northern California parks.⁴ *Id.* at 6. For eight additional parks, the agencies now anticipate lengthy delays beyond the Court-ordered deadline of a year to 18 months. The description of the status of the work on these parks reveals that the agencies have barely begun the process of producing ATMPs for these parks. It is thus not credible that the agencies reasonably believed that they would meet the deadline when they filed their previous Progress Updates, and it is also doubtful that even the current extended projections will be met. There is no credible explanation for why so little has been done.

This case was occasioned by delays in complying with the National Parks Air Tour Management Act over nearly two decades. Especially given the agencies' belated acknowledgement that the deadlines will not be met and the little progress that has been made on several parks, it seems that what we are now facing

³ While the court order covered 23 parks, the agencies are including Muir Woods, for which they withdrew the prior exemption, and therefore are proceeding with 24 parks.

⁴ The Northern California parks are Golden Gate National Recreation Area, Point Reyes National Seashore, Muir Woods National Monument and San Francisco Maritime National Historical Park.

is more of the same recalcitrance and lack of serious intent to comply with the law that occurred over the 20 years before this Court's order. The agencies have known what they needed to do to meet the court's deadline since May 2020, nearly two years ago, but have done little or nothing with respect to the eight parks they now admit will need at least another year. These parks are some of those with the greatest numbers of overflights, that will be the most controversial and difficult to address, such as Hawaii Volcanoes National Park, Haleakala National Park, and Lake Mead National Recreation Area.⁵ If the current projected delays are accepted, it is likely that the agencies will be coming back to the Court for even further delays. The lack of credibility of the agency's reports and projections could also mean that even the parks now claimed to be on track to meet the deadline could also fall behind.

It should also be noted that the only parks that are even claimed to be on track to meet the Court's deadline are those that will get no National Environmental Policy Act (NEPA) review, but instead will claim to be categorically-excluded from NEPA. *See* February 28, 2022 Progress Update at 2, noting that the agencies are working on categorical exclusions for the parks covered by the 12 draft ATMPs. As Petitioners laid out in their first Motion to

⁵ Agencies' Opposition to Petition, Attachments Vol. 3, Doc. #1795359, Ex. F to Trevino declaration, p. 27.

Enforce, even beyond the usual requirements of NEPA for analysis of actions that may affect the quality of the human environment, the National Parks Air Tour Management Act specifically provides that either an Environmental Impact Statement (EIS) or Environmental Assessment (EA) must be prepared for each ATMP.

Environmental determination. In establishing an air tour management plan under this subsection, the Administrator and the Director shall each sign the environmental decision document required by section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) which may include a finding of no significant impact, an environmental assessment, or an environmental impact statement and the record of decision for the air tour management plan.

49 USC § 40128(b)(2). Thus, the statute requires an EIS or EA (possibly with a finding of no significant impact), signed by both the FAA and the NPS. It does not permit a categorical exclusion from NEPA for ATMPs.⁶

The Court denied the first Motion to Enforce without explanation, likely because there had been no final agency action regarding NEPA review on the draft ATMPs. Petitioners continue to assert that an ATMP based on a categorical exclusion would not meet the requirements of the statute. Therefore, even those ATMPs for parks now claimed to be on track to meet the Court's deadline would

⁶ The agencies have not yet invoked CEs for the ATMPs they have drafted, but in any event a CE could not amount to compliance with the Act given the quoted language.

not in fact meet the deadline for a statutorily-compliant ATMP even if they are not further delayed.

Thus, accepting these additional delays beyond the Court-ordered deadlines would likely lead to even more delays and non-compliant ATMPs, with no real completion date in sight. All of these factors support the Petitioners' request for immediate relief requiring compliance by the deadline for all parks. Petitioners seek an order requiring that for those parks that do not have ATMPs meeting the statutory requirements in place by August 31, 2022, no air tours will be permitted until such plans are in place.

The details provided by the agencies concerning the delayed parks illustrate how little has been done and the low probability that even the current delayed projections will be met.

For Canyon de Chelly National Monument, the agencies report that because the park is located on Navajo Reservation lands and is co-managed by the Navajo Nation, they intend to make the Nation a cooperating agency under the National Environmental Policy Act (NEPA) and include a representative of the Nation on the planning team for the ATMP. They have only now begun the working with a Navajo Nation team member, have not yet consulted with other tribes that have an interest in or connection to the park, have not prepared a draft ATMP for public comment, have not completed NEPA review (there is no indication they have even

begun NEPA review), and have not completed Section 106 (historic preservation) review, or Section 7 (endangered species) consultation. *Id.* at 8. The agencies predict that this ATMP could take up to an additional year beyond the current deadline, until August 2023. With all that remains to be done, it is questionable whether the projection can be met, or whether the agencies will return to the Court with yet another projected delay. No viable explanations are provided for why so little has been done.

For Lake Mead National Recreation Area, the agencies report that they are still trying to define the “existing condition of commercial air tours over the park,” have not yet selected “the appropriate NEPA pathway,” much less begun to implement it, have not yet drafted an ATMP, or completed historic preservation and endangered species consultations. *Id.* at 9. In other words, it is not clear that they have done much of anything at all. They estimate that this park will also take another year beyond the deadline, again a questionable projection under the circumstances.

For Glen Canyon National Recreation Area/Rainbow Bridge National Monument, the agencies report that they have not even yet decided whether to produce an ATMP or to somehow use the existing voluntary agreements for some of the operators. They still need to engage in extensive tribal consultations. They estimate the need for an additional 18 months past the August 2022 deadline. *Id.* at

9-10. No legitimate excuse for having done so little to meet the deadline is offered.

For Mount Rushmore National Monument/Badlands National Park, the agencies are still in the process of consulting with affected tribes, citing the need to “rebuild trust,” and have not yet initiated formal consultation with the Ogalala Sioux Tribe, and essential partner because it co-manages part of the Badlands National Park. *Id.* at 10-11. The agencies have decided to conduct environmental assessments for these parks but have not even begun to develop a preliminary range of alternatives for public scoping. *Id.* at 11. Nor have they taken the other needed steps such as historic preservation and endangered species consultations. The agencies project an additional year beyond August 2022 will be needed. They admit that even longer could be required. *Id.*

For Hawaii Volcanoes and Halekakala National Parks, which have, as noted, some of the most air tours in the nation, the agencies note that they have not yet sent out a scoping newsletter to get public feedback on potential alternatives for an environmental assessment, and have just begun consultations with Native Hawaiian Organizations and endangered species consultations with the U.S. Fish and Wildlife Service. *Id.* at 12. The agencies note that they still do not have a handle on impacts to park resources and visitor experiences from current levels of air tours. *Id.* The agencies anticipate the need for another year beyond the current

deadline, but admit that the process could extend even further. *Id.* It is apparent by how early in the process the agencies are that they are likely to seek an even further extension.

REQUEST FOR RELIEF

Accordingly, Petitioners request the Court to enter an order requiring that the agencies permit no air tours over parks that do not have statutorily-compliant ATMPs by the Court's deadline of August 31, 2022. Such an order should be issued promptly to make clear to the agencies that their self-conferred extensions of the Court's deadline are not acceptable, and to provide time for the agencies and air tour operators to prepare for the cessation of air tours by August 31, 2022 if statutorily-compliant ATMPs are not in place.

Respectfully submitted,

/s/ Paula Dinerstein

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Dated: March 9, 2022

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioners certifies as follows:

A. Parties and Amici

The Petitioners are Public Employees for Environmental Responsibility (PEER) and Hawaii Island Coalition Malama Pono (HICoP). The Respondants are the Federal Aviation Administration (FAA) and its Acting Administrator, Dan Elwell, and the National Park Service (NPS) and its Deputy Director, P. Daniel Smith (exercising the authority of the Director). No Amici are currently anticipated in this court.

B. Rulings Under Review

There are no rulings under review. Petitioners seek a writ of mandamus to order the Federal Aviation Administrator and National Park Service Director to develop Air Tour Management Plans (ATMPs) or voluntary agreements for 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.

C. Related Cases

The petitioners previously filed a complaint in the United States District Court for the District of Columbia seeking similar relief to that sought here. *Public*

Employees for Environmental Responsibility and Hawaii Island Coalition Malama Pono v. Federal Aviation Administration, No. 17-cv-2045 (D.D.C.) The action was voluntarily dismissed by the petitioners on January 19, 2018.

The Petitioners also filed a writ of mandamus in this Court, No. 18-044. That petition was dismissed on November 13, 2018 on standing grounds because the court found that Petitioners' injury was not redressable without the participation of the National Park Service as a party. Doc. 1759626.

/s/

Paula Dinerstein
Attorney for Petitioners PEER and HiCoP

DISCLOSURE STATEMENT (PEER)

As required by Circuit Rule 26.1 Petitioner, Public Employees for Environmental Responsibility (PEER), files this Disclosure Statement.

PEER is a non-profit, tax-exempt corporation incorporated in the District of Columbia. Its purposes include educating employees of resource management and environmental protection agencies nationwide, and the public, about environmental ethics and to assist those who speak out on behalf of environmental ethics. PEER has no parent companies and no publicly-owned company has a 10% or greater ownership interest in PEER.

_____/s/_____
Paula Dinerstein

Attorney for PEER

CERTIFICATE OF COMPLIANCE

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

This document complies with the type-volume limit of Fed. R. App. P. 21(d)(1), and Rules 32(a)(5) and (a)(6). It is prepared in proportionally spaced typeface using Times New Roman, 14 point. This document contains 2,096 words, not including the items exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Paula Dinerstein

Paula Dinerstein
Attorney for Petitioners PEER and HICoP

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 9th day of March 2021, she electronically filed the foregoing Second Motion to Enforce Order Granting 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