

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

GOVERNOR KRISTI NOEM, in her
official capacity as the Governor of
South Dakota; SOUTH DAKOTA,

3:21-CV-03009

Plaintiffs,

DEFENDANTS' ANSWER

vs.

DEB HAALAND, in her official
capacity as United States
Secretary of the Interior, et al.,

Defendants

The U.S. Secretary of the Interior Deb Haaland; Principal Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks, Shannon A. Estenoz; Deputy Director, Operations, Exercising the delegated Authority of the Director, National Park Service, Shawn Bengé; and National Park Service Regional Director Herbert Frost, (collectively, the “United States”) answer Plaintiffs’ Complaint as follows. All allegations not specifically admitted herein are denied. The numbered paragraphs in this Answer correspond to the numbered paragraphs in Plaintiffs’ Complaint.

INTRODUCTION

1. The allegations in paragraph 1 of the complaint purport to characterize a document, John Adams, Letter from John Adams to Abigail Adams, (July 3, 1776) archived at Massachusetts Historical Society,

http://www.masshist.org/digitaladams/archive/doc?id=L17760703jasecond&bc=%2Fdigitaladams%2Farchive%2Fbrowse%2Fletters_1774_1777.php which speaks for itself and is the best evidence of its contents.

2. The allegations in the first sentence of paragraph 2 of the complaint purport to characterize a document, Calvin Coolidge, Address at Opening of Work on Mount Rushmore in Black Hills, SD (Aug. 19, 1927), archived at <https://millercenter.org/the-presidency/presidential-speeches/august-10-1927-address-opening-work-mount-rushmore-black-hills>, which speaks for itself and is the best evidence of its contents. The allegations in the second sentence of paragraph 2 purport to characterize a document, the National Park Service's July 4th Holiday Fireworks Program Environmental Assessment (April 2003) (2003 EA), which speaks for itself and is the best evidence of its contents.
3. The allegations in paragraph 3 purport to characterize a document, the 2003 EA, which speaks for itself and is the best evidence of its contents.
4. The United States denies the allegations in the first sentence of paragraph 4. The allegations in the second sentence of paragraph 4 purport to characterize a document, Justin Gurley, *Booms, Blasts and Cracks Heard Round the World*, Pennsylvania State University Library Center for the Book Spring 2010, which speaks

for itself and is the best evidence of its contents.

5. The United States denies the first and second sentences of paragraph 5. The United States denies the allegations in the third sentence of paragraph 5 but notes that the Department of the Interior (DOI) and South Dakota signed a Memorandum of Agreement on May 6, 2019 addressing fireworks (2019 MOA).
6. The United States admits the first sentence of paragraph 6. The United States lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the second sentence and therefore denies it.
7. The United States denies the allegations in the first sentence of paragraph 7. The remaining allegations in paragraph 7 purport to characterize a document, the March 11, 2021 letter from Herbert C. Frost of the National Park Service to Jim Hagen, denying a permit for fireworks over the July 4 holiday (Permit Denial Letter), which speaks for itself and is the best evidence of its contents.
8. The allegations in paragraph 8 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.
9. The allegations in paragraph 9 are legal conclusions and characterize Plaintiffs' case to which no response is required. To the extent the Court deems a response required, it is denied.

JURISDICTION AND VENUE

10. The United States admits the allegations in paragraph 10.

11. The allegations in paragraph 11 characterize Plaintiffs' case to which no response is required.

12. The United States admits the allegations in paragraph 12.

PARTIES

13. The United States admits the allegations in paragraph 13.

14. The United States admits the allegations in the first sentence of paragraph 14. The United States is without knowledge or information sufficient to ascertain the truth or falsity of the remaining allegations in paragraph 14, and on that basis denies them.

15. The United States admits that Deb Haaland is the U.S. Secretary of the Interior and the head of DOI. All other allegations in paragraph 15 are legal conclusions, to which no response is required. To the extent the court requires a response, the allegations are denied.

16. The United States admits the allegations in the first and second sentences of paragraph 16. The allegations in the third sentence of paragraph 16 constitute legal conclusions and characterize Plaintiffs' case, to which no response is required.

17. The United States admits that Shawn Benghe is the Deputy Director for Operations and, when acting in the Director's role, uses

the title: Deputy Director, Operations, Exercising the delegated Authority of the Director, National Park Service. The United States admits the allegations in the second sentence of paragraph 17. As to the allegations in the third sentence of paragraph 17, the United States admits only that Shawn Benge is responsible for overseeing day-to-day operations of the NPS and is responsible for the policies, procedures, and decisions of NPS. The decisions on the Permit Denial Letter were made by Regional Director Frost. Any remaining allegations in third sentence of paragraph 17 are denied. The allegations in the fourth sentence of paragraph 17 constitute legal conclusions and characterize Plaintiffs' case, to which no response is required.

18. The United States admits the allegations in the first sentence of paragraph 18. The United States denies the allegations in the second sentence of paragraph 18, but notes that Regional Director Frost is responsible for oversight of 58 National Park System units, including the Memorial, and three national trails within the Midwestern states. The allegations in the third sentence of paragraph 18 constitute legal conclusions and characterize Plaintiffs' case, to which no response is required.

BACKGROUND

19. The allegations in paragraph 19 purport to characterize a document, George H.W. Bush, *Remarks at the Dedication Ceremony of the Mount Rushmore National Memorial in South Dakota* (July 3, 1991), which speaks for itself and is the best evidence of its contents.

20. The United States denies the allegations in the first sentence of paragraph 20 on the grounds they are vague and ambiguous. The United States admits the allegations in the second sentence of paragraph 20. The allegations in the third sentence of paragraph 20 purport to characterize a document, the 2019 MOA, which speaks for itself and is the best evidence of its contents.

21. The allegations in paragraph 21 purport to characterize a document, the 2003 EA, which speaks for itself and is the best evidence of its contents.

22. The United States is without knowledge or information to ascertain the truth or falsity of the allegations in the first sentence of paragraph 22, and on that basis denies them. The allegations in the second sentence of paragraph 22 purport to characterize the 2003 EA, which speaks for itself and is the best evidence of its contents.

23. The United States is without knowledge or information to ascertain the truth or falsity of the allegations in paragraph 23, and on that basis denies them.

24. The United States is without knowledge or information sufficient to ascertain the truth or falsity of the allegations in paragraph 24, and on that basis denies them.

25. The United States is without knowledge or information sufficient to ascertain the truth or falsity of the allegations in paragraph 25, and on that basis denies them.

26. The allegations in paragraph 26 purport to characterize a newspaper article, Rapid City Journal, *Mount Rushmore fireworks canceled* (Jan. 14, 2010), https://rapidcityjournal.com/news/mount-rushmore-fireworks-canceled/article_ecc66d4c-0093-11df-92b0-001cc4c03286.html, which speaks for itself and is the best evidence of its contents.

27. The allegations in the first sentence of paragraph 27 are vague and ambiguous, and on that basis the United States denies them. The United States denies the allegations in the second sentence of paragraph 27.

28. The United States admits the allegations in the first sentence of paragraph 28. The allegations in the second sentence of paragraph

28 purport to characterize the 2019 MOA, which speaks for itself and is the best evidence of its contents.

29. The allegations in paragraph 29 purport to characterize a document, an October 3, 2019 letter from Ryan Hambleton, the Deputy Assistant Secretary for Fish and Wildlife and Parks for DOI, to Governor Noem (October 3, 2019 Letter), which speaks for itself and is the best evidence of its contents.

30. The allegations in paragraph 30 purport to characterize the October 3, 2019 Letter, which speaks for itself and is the best evidence of its contents. However, the United States notes that the quoted language in paragraph 30 is incorrectly attributed to the “MOA at 4.”

31. The United States admits there was a GO/NO GO Checklist (Checklist), but with only nine, not eleven separate safety conditions. The Checklist is Appendix A of Exhibit C (see docket entry at 3-2, 88-89). The remaining allegations purport to characterize the Project Agreement, which speaks for itself and is the best evidence of its contents.

32. The allegations in paragraph 32 purport to characterize the Project Agreement, which speaks for itself and is the best evidence of its contents.

33. The United States admits the allegations in the first sentence of paragraph 33. The United States denies the allegations in the second sentence of paragraph 33.

34. The United States denies the allegations in paragraph 34.

35. The United States denies the allegations in the first sentence of paragraph 35. The United States admits the allegations in the second sentence of paragraph 35.

36. The United States is without knowledge or information sufficient to ascertain the truth or falsity of the allegations in paragraph 36, and on that basis denies them.

37. The United States admits that it sent a letter on March 11, 2021 from NPS Regional Director Frost which fully and adequately explains the reasons for the permit denial. Plaintiffs' characterizations of the Permit Denial Letter are denied.

38. The allegations in paragraph 38 purport to characterize the Permit Denial letter, which speaks for itself and is the best evidence of its contents.

39. The United States admits that the quoted language from the Permit Denial Letter is accurate. The quoted language constitutes an introduction to the explanation that follows discussing reasons why the NPS denied the permit.

40. The allegations in paragraph 40 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.

41. The allegations in paragraph 41 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents. The United States admits that face coverings were not required in National Park Service units in July 2020. Any remaining allegations in paragraph 41 are denied.

42. The allegations in paragraph 42 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents. Furthermore, as to the allegations in the second sentence of paragraph 42, the United States notes that the Permit Denial Letter was issued in March 2021 when future vaccination rates were unknown.

43. The allegations in paragraph 43 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.

44. The allegations in paragraph 44 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.

45. The allegations in paragraph 45 purport to characterize the Permit Denial Letter and the 2020 Finding of No Significant Impact

(FONSI), which speak for themselves and are the best evidence of their contents.

46. The allegations in paragraph 46 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.

47. The United States denies the allegations in the first sentence of paragraph 47. The allegations in the second and third sentences of paragraph 47 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents. The allegations in the fourth sentence are legal conclusions, to which no response is required. To the extent the court requires a response, the allegations are denied.

48. The allegations in paragraph 48 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.

49. The allegations in paragraph 49 purport to characterize a document, a letter from Governor Noem to President Biden (April 13, 2021) (“Noem Letter”), which speaks for itself and is the best evidence of its contents. Any remaining allegations in paragraph 49 are denied.

50. The allegations in the first sentence of paragraph 50 purport to characterize the Noem Letter, which speaks for itself and is the best

evidence of its contents. The United States lacks knowledge or information to ascertain the truth or falsity of the allegations in the second sentence of paragraph 50, and on that basis denies them.

51. The allegations in the first, third, fourth and fifth sentences of paragraph 51 purport to characterize the Noem Letter, which speaks for itself and is the best evidence of its contents. The allegations in the second sentence of paragraph 51 purport to characterize the Permit Denial Letter, which speaks for itself and is the best evidence of its contents.

52. The allegations in paragraph 52 purport to characterize the Noem Letter, which speaks for itself and is the best evidence of its contents.

53. The allegations in paragraph 53 purport to characterize the Noem Letter, which speaks for itself and is the best evidence of its contents.

54. The allegations in paragraph 54 purport to characterize the Noem Letter, which speaks for itself and is the best evidence of its contents.

55. The United States denies the allegations in the first sentence of paragraph 55. As to the allegations in the second sentence of paragraph 55, DOI did not provide a response as it did not receive a copy of the Noem Letter, which was addressed to the President of the United States.

COUNT I

56. The United States incorporates by reference its responses to the preceding paragraphs.

57. The allegations in the first sentence of paragraph 57 purport to characterize a federal statute, 5 U.S.C. § 706(2)(A), which speaks for itself and is the best evidence of its contents. The allegations in the second sentence of paragraph 57 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents.

58. The allegations in paragraph 58 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

59. The allegations in paragraph 59 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

60. The allegations in paragraph 60 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

61. The United States denies the allegations in paragraph 61.

COUNT II

62. The United States incorporates by reference its responses to the preceding paragraphs.

63. The allegations in paragraph 63 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

64. The allegations in paragraph 64 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

65. The allegations in paragraph 65 purport to characterize judicial opinions, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

66. The United States denies the allegations in the first sentence of paragraph 66 on the grounds they are vague and ambiguous. The allegations in the second sentence of paragraph 66 purport to characterize federal regulations, which speak for themselves and are the best evidence of their contents. The allegations in the third

sentence of paragraph 66 purport to characterize a Federal Register notice, which speaks for itself and is the best evidence of its contents. The allegations in the fourth sentence of paragraph 66 are legal conclusions, to which no response is required.

67. The allegations in paragraph 67 purport to characterize federal statutes, which speak for themselves and are the best evidence of their contents.

68. The allegations in paragraph 68 purport to characterize judicial opinions and Federal Register notices, which speak for themselves and are the best evidence of their contents. Furthermore, to the extent the allegations constitute legal conclusions, no response is required.

69. The allegations in paragraph 69 purport to characterize a federal statute, which speaks for itself and is the best evidence of its contents. To the extent the remaining allegations constitute legal conclusions, no response is required.

70. The allegations in paragraph 70 purport to characterize federal statutes, which speak for themselves and are the best evidence of their contents. To the extent the remaining allegations constitute legal conclusions, no response is required.

71. The allegations in the first sentence of paragraph 71 purport to characterize a judicial opinion, which speaks for itself and is the best evidence of its contents. Furthermore, to the extent the allegations in

the first sentence of paragraph 71 constitute legal conclusions, no response is required, The allegations in the second sentence of paragraph 71 characterize a judicial opinion and a federal statute, which speak for themselves and are the best evidence of their contents. Furthermore, the second sentence of paragraph 71 constitutes a legal conclusion, to which no response is required.

72. The allegations in the first sentence of paragraph 72 characterize a judicial opinion, to which no response is required. The allegations in the second sentence of paragraph 72 are legal conclusions, to which no response is required.

REQUEST FOR RELIEF

The remainder of Plaintiffs' complaint constitutes their requests for relief, to which no response is required. To the extent a further response is required, the United States denies the Plaintiffs are entitled to the relief requested or any relief whatsoever.

GENERAL DENIAL

The United States denies any allegations in Plaintiffs' complaint, whether express or implied, that are not specifically admitted, denied or qualified herein.

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a claim upon which relief can be granted.

2. The United States, through its employees and agents, acted with due care and diligence at all relevant times.
3. Plaintiff cannot recover attorney's fees. 28 U.S.C. § 2412(d)(1)(A).
4. Some or all of Plaintiffs' claims are barred by laches because Plaintiffs waited too long before challenging the Permit Denial Letter from March 2021.
5. The permit was properly denied and there is no further action to be taken by NPS which can be enjoined.
6. Plaintiffs lack standing because they are asking the court to enjoin NPS from taking an action that it has already taken, thus the court cannot order relief through an injunction that would redress the injury. Plaintiffs' request is in the nature of asking the court to compel agency action under 5 U.S.C. 706(1), which is akin to a writ of mandamus. *Norton v. SUWA*, 542 U.S. 55, 63 (2004).

WHEREFORE, the United States respectfully requests that the Court enter judgment as follows:

- (1) Deny Plaintiffs' request for a declaratory judgment that DOI's permit denial was arbitrary and capricious;
- (2) Deny Plaintiffs' request for a declaratory judgment that the statutes granting DOI permitting authority are unconstitutional for want of an intelligible principle to guide DOI's issuance of regulations that govern that authority;

- (3) Deny Plaintiffs' motion for preliminary injunction;
- (4) Dismiss Plaintiffs' complaint with prejudice; and
- (5) Grant other and further relief as deemed just and appropriate.

Dated this 13th day of May 2021.

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Acting U.S. Attorney
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