

PROGRAMMATIC AGREEMENT

Among the FEDERAL AVIATION ADMINISTRATION, the HUALAPAI TRIBE, the HUALAPAI TRIBE HISTORIC PRESERVATION OFFICER, the NATIONAL PARK SERVICE and the ADVISORY COUNCIL on HISTORIC PRESERVATION regarding

the

“SPECIAL FLIGHT RULES AREA in the
VICINITY of the GRAND CANYON NATIONAL PARK”

Whereas, the final Federal Aviation Administration (FAA) regulations for which implementation has been delayed and the proposed FAA actions modifying the Special Federal Aviation Regulation Number 50-2 (SFAR 50-2), modifying the commercial air tour routes within the Special Flight Rules Area (SFRA) in the vicinity of Grand Canyon National Park and the Operational Limitations described in the following Federal Register Notices constitute an Undertaking within the meaning of Section 106 of the National Historic Preservation Act (NHPA): (1) Final Rule, Revisions to the Special Flight Rules in the Vicinity of the Grand Canyon National Park, 61 FR 69302; (2) Notice of Proposed Rulemaking for Noise Limitations (Quiet Technology NPRM), 61 FR 69334; (3) Notice of Availability of Proposed Commercial Air Tour Routes, 61 FR 69356; as revised by the Notice of Availability of Commercial Air Tour Routes for the GCNP, 62 FR 26909; (4) the Notice of Proposed Rulemaking for the Establishment of Corridors in the GCNP SFRA, 62 FR 26902, (5) Notice of Proposed Rulemaking, Commercial Air Tour Limitation in the GCNP SFRA, 64 FR 37304; (6) Notice of Availability on Routes in GCNP, 64 FR 37191; and, (7) Notice of Proposed Rulemaking, Modification of the Dimensions of the GCNP SFRA and Flight Free Zones, 64 FR 37296 (collectively “Undertaking”); and,

Whereas, the National Park Service (NPS) is cooperating with FAA in the Undertaking;
and

Whereas, the FAA will cooperate with NPS in the Comprehensive Noise Management Plan (CNMP), which “is the overall process that the government [will] use to control and monitor noise conditions in the GCNP to achieve the statutory goal of substantial restoration of natural quiet” 64 FR 37304, 37306 (July 6, 1999) and which will be the subject of subsequent consultation under Section 106 of the NHPA; and

Whereas, the FAA has determined in cooperation with NPS and in consultation with the Hualapai Tribe and Tribal Historic Preservation Officer (THPO), that at least forty (40) Traditional Cultural Properties (TCPs) enumerated in the “December 15, 1999 TCP List” provided by the Hualapai Tribe to the FAA meet the criteria for inclusion in the National Register of Historic Places (36 CFR § 60.4), and will therefore be considered eligible for the National Register of Historic Places for purposes of Section 106 review of the Undertaking; and

Whereas, the FAA has determined in cooperation with NPS and in consultation with the Hualapai Tribe and THPO, that the Undertaking, as currently proposed, will have no adverse effect on historic properties, with the exception of at least some of the above-referenced TCPs, at least all of which comprise a landscape of traditional cultural importance to the Hualapai Tribe. The FAA has determined that the Undertaking may alter, directly or indirectly, the characteristics of at least some of the TCPs that qualify them for inclusion in the National Register of Historic Places in a manner that would diminish their integrity; and

Whereas, the Hualapai Tribe is a sovereign, Federally recognized Indian tribe and enjoys a government-to-government relationship with the United States; and

Whereas, the FAA and NPS have a trust responsibility to the Hualapai Tribe; and

Whereas, the THPO has assumed the functions of the State Historic Preservation Officer for purposes of compliance with Section 106 of NHPA by an agreement between the Hualapai Tribe and the Department of Interior-NPS dated August 20, 1996; and

Whereas, the FAA and NPS consulted with the Hualapai Tribe and the THPO in an effort to redesign the proposed commercial air tour routes to address certain areas identified by the Hualapai Tribe and THPO as being of traditional religious and cultural significance; and

Whereas, the Hualapai Tribe has prepared two reports presenting the results of two phases of an ethnographic study that identified TCPs in an expansive area; and

Whereas, the FAA and NPS have consulted with the Hualapai Tribe, the THPO and the Advisory Council on Historic Preservation (Advisory Council) in accordance with 36 CFR § 800.14(b)(3) to resolve the adverse effects of the Undertaking on affected TCPs, such as possible impacts to the traditional Hualapai cultural use of the landscape; and

Whereas, the FAA has determined in cooperation with the NPS and in consultation with the Hualapai Tribe, THPO and the Advisory Council that a Programmatic Agreement (PA) is appropriate because the effects on historic properties cannot be fully determined prior to approval of the Undertaking and because other circumstances, including the large geographic area involved and the complexity of the Undertaking, warrant a departure from the normal Section 106 process;

Now, therefore the FAA, NPS, Advisory Council, Hualapai Tribe and THPO agree that the Undertaking shall be implemented in accordance with the following Stipulations to satisfy FAA's and NPS' Section 106 responsibilities for the Undertaking, and these Stipulations shall govern the Undertaking and all of its parts until this PA expires or is terminated.

Stipulations

The FAA, in cooperation with NPS, shall ensure that the following stipulations are carried out:

I. Area of Potential Effect (APE)

A. The term APE in this PA refers to the portion of the APE for the Undertaking that lies within the Hualapai Reservation as identified in the "Amended Statement of Work To Identify Traditional Cultural Properties (TCPs) within the Area of Potential Effect Related to Proposed FAA Actions Over the Hualapai Indian Reservation to be performed by the Hualapai Tribal Office of Cultural Resources" (Amended SOW). In accordance with 36 CFR § 800.16(d), the APE is defined as the geographic areas of the Hualapai Reservation within either or both of the following noise contours or higher decibel (dB) noise contours: (1) the 20 dB L_{eq} 12 Hour (long-term A-weighted equivalent) noise contour depicted in the December 1996 Environmental Assessment, as amended by the noise analysis summarized in the October 1997 Written Reevaluation; or (2) the 20 dB L_{eq} 12 Hour (long-term A-weighted equivalent) noise contour as depicted on Figure A-1 in the June 1999 Draft Supplemental Environmental Assessment. The FAA and NPS agree, for the purposes of Section 106, to also evaluate in accordance with 36 CFR Part 800 those areas identified as especially critical and sensitive that lie partly under or abut one or both of the above-described noise contours and where either the Hualapai Tribe or THPO establishes to the satisfaction of the FAA and the NPS that the integrity of the entire canyon or area is essential for religious or cultural reasons, including but not limited to Madwida Canyon.

B. If the proposed route structure changes while this PA is in effect, then the FAA in cooperation with NPS and in consultation with the Hualapai Tribe and the THPO, shall modify the APE as needed to reflect the change to remain consistent with the definition of the APE in Stipulation I.A. The Advisory Council shall participate in the consultation on the modification of the APE if the FAA, the Hualapai Tribe or the THPO requests.

II. Identification of TCPs

Promptly after the FAA receives its fiscal year 2000 budget, the FAA and the Hualapai Tribe will negotiate a schedule and funding for the Hualapai Tribe to conduct a "Phase II (B)" study. This study shall identify, document, evaluate and make recommendations regarding any TCPs and associated archaeological sites within the APE that were not previously identified in Phases I and IIA under the Amended SOW. The FAA and the Hualapai Tribe entered into the Amended SOW on November 19, 1999. Such schedule shall provide for the prompt commencement of the Phase II (B) study.

III. Noise Modeling

Concurrently with or prior to the THPO's provision of the Phase II(B) final report pursuant to Stipulation II of this Programmatic Agreement, the THPO shall provide the FAA with a list of additional representative locations for the Phase II(B) TCPs. Such list shall include the latitude and longitude or U.T.M. coordinates of each location and the elevation of each location. Within a reasonable amount of time after receipt of those additional representative locations, the FAA shall provide the THPO with line of sight analysis and modeled L_{eq} 12 Hour (long-term A-weighted equivalent) decibel level for the summer season, peak day and peak hour of peak day, and the modeled L_{max} (maximum sound level) for each representative location provided by the THPO. Said noise data shall include the modeled results for the current calendar year, five years later and ten years later.

IV. National Register Eligibility Evaluation and Assessment of Adverse Effects on TCPs

A. The FAA, in consultation with the Hualapai Tribe and the THPO, shall evaluate the eligibility of all historic properties in the remainder of the APE identified under Stipulation II. FAA shall commence consultation within sixty (60) days of receipt of the Phase II(B) final report from the THPO. Such evaluation shall be made in accordance with 36 CFR § 800.4(c), 36 CFR § 60.4 (National Register Criteria), and "National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties."

B. Subsequent to the determination of eligibility under Stipulation IV.A the FAA, in consultation with the Hualapai Tribe and THPO, shall determine whether the Undertaking may have an effect, as defined in 36 CFR § 800.16(i), on any properties determined to be eligible. The results of the monitoring conducted pursuant to Stipulation V. B shall be considered in assessing whether the Undertaking may affect eligible properties in the remainder of the APE, to the extent that such data is available at the time of determination of effect. If FAA determines that historic properties will be affected, FAA will proceed to apply the criteria of adverse effect at 36 CFR § 800.5(a) in consultation with the Hualapai Tribe and THPO. If FAA determines that no historic properties will be affected, it need not take further steps regarding historic properties in the remainder of the APE unless the Hualapai Tribe or THPO objects to that determination within 60 days of receipt, in which case FAA will proceed to apply the criteria of adverse effect.

C. The results of the monitoring conducted pursuant to Stipulation V. B shall be considered in applying the criteria of adverse effect to historic properties in the remainder of the APE to the extent that such data is available at the time of assessment of adverse effects. If after applying the criteria, FAA makes a finding of adverse effect, mitigation and monitoring for those properties will take place in accordance with

Stipulation V. If after applying the criteria of adverse effect, FAA determines that historic properties will not be adversely affected, it need not take further steps regarding those historic properties unless the Hualapai Tribe or THPO objects to the determination within 60 days of receipt, in which case FAA will refer the finding to the Advisory Council for review. FAA will proceed in accordance with the Advisory Council's determination. If the Advisory Council does not respond within 30 days of receipt of FAA's determination, FAA may assume Advisory Council concurrence with the determination and proceed in accordance with its determination.

V. Mitigation and Monitoring

FAA in cooperation with NPS shall: (1) implement the initial mitigation measures listed in Stipulation V.A; (2) provide assistance for the monitoring program described in Stipulation V.B, and (3) take further mitigation steps pursuant to Stipulation V.C.

A. Initial Mitigation Measures

1. The FAA shall eliminate portions of the commercial air tour routes known as Blue-2 and Green-4 east and south of Surprise Canyon, instead of shifting the southernmost portions of these routes from the GCNP onto the Hualapai Reservation. (See 61 FR 69356 and 62 FR 26909.) The FAA shall also eliminate the previous commercial air tour routes known as Blue-1 and Blue-1A and the associated corridor through the Toroweap/Shinumo Flight Free Zone (FFZ). (See 61 FR 69302, 61 FR 69334; 62 FR 26902, 26904, 26907; 62 FR 26906; 62 FR 66248; and, 63 FR 38233.) To mitigate the impacts of projected increases in air tour flights when Blue-1 closes, the FAA shall also modify the remaining routes over the Colorado River in the Sanup Area. These routes shall be modified so that they do not fly directly over TCPs and associated archeological sites listed on or determined to be eligible for the National Register of Historic Places identified in the Phase I and II(A) Final Reports for the SOW. The FAA shall also raise the altitude and adjust the location of the route known as Blue Direct South to reduce impacts on TCPs and associated archeological sites contained in the December 1999 list.

~~2. The FAA will amend the "Las Vegas Flight Standards District Office (FSDO) Grand Canyon National Park Special Flight Rules Area Procedures Manual" to state that operators using the visual flight rules (VFR) routes are encouraged to use the highest altitude practicable on Blue Direct North and Blue Direct South consistent with the highest standards of safety and aircraft performance.~~

3. Subject to appropriate notification by the Hualapai Tribe (minimum thirty (30) day advance notification), the FAA will issue a Notice to Airmen (NOTAM) to mitigate potential effects on traditional cultural ceremonies and other cultural activities of short duration.

4. To the extent that the Hualapai Tribe and THPO determine that providing information on Hualapai traditional cultural concerns to operators is appropriate, the FAA will incorporate such information as may be designated by the Tribe and THPO into recurrent Las Vegas FSDO operator safety and informational meetings. The FAA shall ensure that the presentations and materials regarding Hualapai traditional concerns to be used at such meetings are reviewed in advance by the Tribe and THPO, and the cultural information deemed sensitive by the Tribe or THPO shall be excluded.

5. The FAA Las Vegas FSDO will meet with Hualapai Tribe representatives prior to implementation of the April 1, 2000 "Grand Canyon Special Flight Rules Area" map for commercial air tour operators to discuss opportunities to reduce impacts on TCPs through appropriate route descriptions and visual reference points, such as avoiding the use of TCPs as visual reference points. Such route descriptions and visual reference points will be consistent with the highest standards of flight and navigation safety.

6. The FAA shall provide training in cooperation with the Hualapai Tribe and THPO for members of the Hualapai Tribe to facilitate identification and reporting of violations, including minimum altitude rules and other Special Flight Area rules and regulations.

7. The FAA shall respond to reports of violations submitted by Hualapai Tribal members in accordance with FAA Order 2150.3A, "Compliance and Enforcement Program" (a copy of Order 2150.3A will be provided to the Hualapai Tribe with this PA).

B. Monitoring

Within six (6) months after execution of this PA in cooperation with NPS and in consultation with the Hualapai Tribe and THPO, FAA shall initiate a program of financial and technical assistance to the Hualapai Tribe in monitoring the auditory, visual and other effects of the Undertaking on TCPs within the APE, including the 40 previously identified TCPs. Those areas of concern identified by the Hualapai Tribe and THPO during the Phase II(B) study will be added to the monitoring program as they become available, pending completion of the Phase II(B) study and National Register evaluation under Stipulation IV.A. This program shall:

- Employ interdisciplinary methods, drawing on but not limited to the disciplines of socio-cultural anthropology, social psychology, auditory and visual impact analysis;
- Consider effects described by Hualapai traditional cultural practitioners of aircraft on the TCPs within the APE;
- Consider data collected during monitoring, including but not limited to, single event, seasonal variations, peak conditions (event, day, and hour), noise frequency distribution (one-third octave band), cumulative exposure, etc;

- Consider the visual and aesthetic effects of aircraft, including but not limited to the visibility of aircraft from TCPs forming part of the cultural landscape; and,
- Consider the effects of viewers in the air on use of the TCPs within the APE by Hualapai traditional cultural practitioners.

C. Long-Term Mitigation

1. In preparing the CNMP, and in review of the proposed CNMP under Section 106 and other applicable laws, FAA and NPS, in consultation with the Hualapai Tribe and THPO will:

- a. Consider the results of the monitoring program conducted pursuant to Stipulation V.B; and,
- b. In accordance with 36 CFR § 800.6(a) develop and evaluate alternative measures to avoid or otherwise mitigate the impacts of flight operations on the character and use of the TCPs within the APE consistent with Public Law 100-91, FAA statutory mandates, and Trust responsibilities to Native American Tribes. The measures considered shall include, but shall not be limited to, the rerouting of commercial SFRA operations and revision of the SFRA airspace to minimize overflights of the Hualapai Reservation, and time of day restrictions on SFRA aircraft operations.

2. If by December 2002, the CNMP has not resulted in the initiation of Rulemaking by issuance of a Notice of Proposed Rulemaking or the initiation of other actions concerning noise management in the SFRA that implement Stipulation V C.1 above, then the signatories will meet to set a schedule for the consideration of the results of the monitoring program and consideration of further mitigation measures to implement Stipulation V C.1 (a) and (b).

VI. Review of the Implementation of the Programmatic Agreement (PA)

A. FAA shall provide biannual summary reports of its progress toward completing the terms of this PA to each of the signatories. The biannual reports shall identify the tasks completed and provide schedules for completion of all remaining tasks, consistent with the time allotted for such tasks under this PA or any amendments. The first biannual report shall be submitted to the signatories six (6) months after the date of the last signature on the PA, and reports will be submitted every six- (6) months thereafter until this PA has been fully implemented. The FAA shall provide a final report documenting that all of the tasks required by this PA have been completed to each of the signatories to this PA promptly upon such completion.

B. A yearly meeting shall be held among the signatories to review the effectiveness of this PA and the results of the mitigation strategies.

VII. Confidentiality

A. The THPO will retain all material deemed confidential by Hualapai traditional cultural practitioners or the THPO at the THPO offices in Peach Springs, Arizona. This may include, but is not limited to, interview notes and recordings, maps identifying TCPs and associated archaeological sites and reports of TCPs and associated archaeological sites. TCP and associated archaeological site maps, inventories and reports submitted by the THPO to FAA or NPS pursuant to this PA will provide site boundaries, to the extent ascertainable, but will exclude confidential information at the discretion of the THPO. Copies of all materials relied upon in producing such site maps, inventories and reports, including letters, memoranda, records of visits, research material, statistical and other data, will be available to the FAA and NPS for review at the THPO offices in Peach Springs, Arizona.

B. All confidential information submitted by the Hualapai Tribe or THPO to FAA or NPS shall be governed by the following conditions:

The contents of this document are confidential and not for further distribution without express authorization by the Hualapai Tribal Government through the Hualapai Tribal Historic Preservation Officer with the approval of Hualapai traditional cultural practitioners. The contents are further protected from disclosure under applicable tribal and federal law, including but not limited to 16 U.S.C. §§ 470w-3, 470hh and 470ee. All parties to whom this document is released agree to maintain the confidentiality of the document or be subject to applicable federal and tribal sanctions for breaching this confidentiality provision. This document is for federal agency use and any request for duplication shall be directed to the Hualapai Tribal Historic Preservation Officer, in writing.
Copyright [year], Hualapai Tribe, all rights reserved.

C. The FAA, NPS and the Advisory Council, respectively, shall maintain the confidentiality of Hualapai TCPs and associated archaeological sites and related sensitive cultural information identified or discussed in reports, maps, inventories or other documents in the respective agency's possession or control.

VIII. Sovereign Immunity

Nothing in this PA shall be interpreted as a waiver of sovereign immunity by the Hualapai Tribe or the THPO.

IX. Reservation of Rights

The THPOs participation in this PA is not an endorsement by the THPO or the Hualapai Tribe of the Undertaking covered by this PA. The Hualapai Tribe including the THPO reserves all of its rights to pursue any remedies whatsoever for FAA's or NPS' failure to comply with any applicable laws with respect to the Undertaking, including but not limited to the NHPA, in any administrative, judicial, or legislative forum.

X. Amendment

Any signatory to this PA may request that it be amended, whereupon the signatories shall consult to seek amendment of the PA. No amendment shall be effective unless in writing and signed by all of the signatories to this PA.

XI. Dispute Resolution

A. Should any signatory to this PA object in writing to the FAA regarding that agency's implementation of its obligation under this PA, the agency shall consult with the signatories to this PA to resolve the objection. If after initiating such consultation any signatory determines that the objection cannot be resolved through consultation, the agency shall notify all signatories of such determination and forward all documentation relevant to the objection to the Advisory Council, including the agency's proposed response to the objection. The Advisory Council shall provide all signatories with an opportunity to submit to the Advisory Council additional relevant documentation and recommendations for resolution of the objection. Within forty-five (45) days after receipt of all pertinent documentation, the Advisory Council shall exercise one of the following options:

1. Advise all signatories that the Advisory Council concurs in the agency's proposed response to the objection, whereupon the agency will respond to the objection accordingly;
2. Provide the agency with recommendations, which the agency shall take into account in reaching a final decision regarding its response to the objection and will provide all signatories with a copy of its recommendations; or
3. Notify all signatories that the objection will be referred for comment pursuant to 36 CFR § 800.7(c) and proceed to refer the objection and comment. The resulting comment shall be taken into account by the agency in accordance with 36 CFR § 800.7 (c)(4) and Section 110(1) of NHPA.

B. Should the Advisory Council not exercise option A.1 or A.2 or notify the agency under option A.3 above within forty-five (45) days after receipt of all pertinent documentation, the agency may proceed in accordance with its proposed response to the objection.

C. The agency shall take into account any Advisory Council recommendation or comment provided in accordance with this Stipulation with reference only to the subject of the objection; the responsibility of FAA and NPS to carry out all actions under this PA that are not the subjects of the objection shall remain unchanged.

D. The availability or use of the dispute resolution mechanism under this Stipulation shall not alter the right of any signatory to seek amendment or terminate this PA under Stipulations X or XII.A and shall not affect the rights reserved under Stipulation IX with regard to the subject of the objection. A signatory need not seek dispute resolution under this Stipulation prior to seeking amendment or termination under Stipulations X or XII.A.

XII. Termination

A. If any signatory determines that the terms of this PA cannot be carried out, the signatories shall consult to seek amendment of the PA. If the PA is not amended, any signatory may terminate the PA by providing thirty (30) days written notice to the other signatories, provided that the signatories shall consult further during this thirty (30) day waiting period to seek agreement on amendments or other actions that would avoid termination. In the event that agreement is not reached within this thirty- (30) day period or the signatory seeking termination does not extend the waiting period by written notice to the other signatories, this PA shall terminate. In the event of such termination, the FAA, in cooperation with NPS, shall request the comments of the Advisory Council in accordance with 36 CFR § 800.7(c). FAA shall take the resulting comments into account in cooperation with NPS, in accordance with 36 CFR § 800.7(c)(4) and Section 110(1) of the NHPA.

B. If the FAA has not issued the final rules and taken final agency actions comprising the Undertaking by April 30, 2000, this PA shall terminate. FAA, if it chooses to continue with the Undertaking, shall re-initiate consultation with the signatories in accordance with 36 CFR § 800.6 to reconsider the terms of this PA.

C. If all of the signatories agree in writing that all of the terms of this PA and any amendments to this PA then in effect have been implemented, this PA shall terminate.

XIII. Objection by Member of the Public

If a member of the public raises an objection in writing to this PA while this PA is

in effect, FAA shall review and respond as needed to the objection in consultation with the signatories to this PA.

XIV. Anti-Deficiency Act

All requirements set forth in this PA requiring the expenditure of FAA funds are expressly subject to the availability of appropriations and the requirements of the ~~Anti-Deficiency Act (31 U.S.C. Section 1341). No obligation undertaken by the FAA~~ under the terms of this PA shall require or be interpreted to require a commitment to expend funds not appropriated for a particular purpose.

Execution of this PA and implementation of its terms evidences the compliance of FAA and NPS with Section 106 of NHPA and 36 CFR Part 800. In the event that this PA is terminated pursuant to Stipulation XII.A, compliance with Section 106 of the NHPA and 36 CFR Part 800 shall be evidenced by compliance with 36 CFR § 800.7(c) and Section 110(1) of the NHPA.

SIGNATORIES:

Federal Aviation Administration

By: David Trayham Date: 1/10/99

Title: Assistant Administrator for Policy, Planning, and International Aviation

Advisory Council on Historic Preservation

By: John M. Jordan Date: 1/10/2000

Title: Executive Director

Hualapai Tribe

By: Louise Benson Date: 01/24/00

Title: Chairwoman

Hualapai Tribal Historic Preservation Officer

By: L. Monya Hodge Date: 01/24/00

Title: Director, Office of Cultural Resources

National Park Service

By: Janet Z Date: 1/7/00

Title: Deputy Director