



Ms. Raquel Girvin  
Regional Administrator  
Western-Pacific Region  
Federal Aviation Administration  
777 S Aviation Avenue, Suite 150  
El Segundo, CA 90245

Ref: *Proposed Air Tour Management Plan (ATMP) at Hawai'i Volcanoes National Park*  
*Hawai'i County, Hawai'i*  
*ACHP Project Number: 019858*

Dear Ms. Girvin:

On July 24, 2023, the Federal Aviation Administration (FAA) requested that the Advisory Council on Historic Preservation (ACHP) review its finding of “no adverse effect” for the referenced undertaking. The ACHP’s opinion was requested pursuant to 36 CFR §§800.5(c)(2) and (3) of the regulations implementing Section 106 of the National Historic Preservation Act (NHPA), “Protection of Historic Properties” (36 CFR Part 800). Four consulting parties objected to the FAA’s finding within the 30-day review period; two additional objections were received later from another consulting party and the Hawai’i State Historic Preservation Officer (SHPO). FAA resolved the objection of one of the parties, the Office of Hawai’ian Affairs (OHA), through additional consultation.

Based on the documentation submitted, it appears FAA has not appropriately applied the criteria of adverse effect [36 CFR § 800.5(a)(1)] for this undertaking and that a finding of adverse effect, based on the potential for adverse effects to occur, is appropriate. While we acknowledge the FAA has attempted to reduce the potential for adverse effects through imposition of several conditions, these conditions do not avoid the possibility for adverse effects to result. The rationale for this advisory opinion follows.

### ***Background***

FAA’s undertaking consists of the development and implementation of an Air Tour Management Plan (ATMP) for the Hawai’i Volcanoes National Park (Park) to regulate commercial air tours within the ATMP planning area. The undertaking does not include the operation of air tours themselves but “implementing a plan that applies to all commercial air routes over the Park and within ½ mile outside the boundary of the Park.” Commercial air tours subject to the ATMP are those conducted for compensation or hire in a powered aircraft for the purposes of sightseeing during which the aircraft flies below 5,000 feet (ft.) above ground level (with minor safety exceptions) and less than one mile laterally from any geographic feature within the Park.

Development of this ATMP or a voluntary agreement is required to comply with the National Parks Air Tour Management Act (NPATMA) enacted in 2000. While commercial air tours have been operating over the Park for more than 20 years, prior to NPATMA, air tour operators were subject only to FAA’s general safety regulations. After 2005, air tours operated in accordance with an interim operating authority, also required by NPATMA, for which compliance with Section 106 was not required because it

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did not impose any conditions other than an annual limit on the number of flights. In initiating consultation under Section 106, FAA has asserted that the baseline or existing condition against which it is assessing the potential effects of the undertaking is air tour operation prior to the implementation of the ATMP (i.e., following the interim operating authority), not a condition in which no air tours operate.

FAA, in consultation with the National Park Service (NPS) and consulting parties, including the Hawai'i State Historic Preservation Office (SHPO), Native Hawai'ian Organizations (NHO), members of the Park's Kūpuna consultation group, and operators, delineated the Area of Potential Effects (APE) and conducted its identification effort, which identified 43 historic properties where setting and feeling are primary elements of integrity to the property's National Register of Historic Places (NRHP) eligibility, assuming these historic properties are most sensitive to the effects of aircraft overflights. These include cultural landscapes, rural historic districts, outdoor spaces designed for meditation or contemplation, and certain Traditional Cultural Properties (TCPs) associated with cultural practices, customs, or beliefs that continue to be held or practiced today.

FAA, in consultation with the NPS, determined that the entirety of Hawai'i Volcanoes National Park is a TCP significant for its association with Native Hawai'ian culture, traditions, and sacred uses. A TCP Study to detail all the contributing elements is in progress but is not yet complete.

In considering effects from the implementation of the ATMP, the FAA considered that the number of air tours per year would decrease by 86 percent from the total average number of tours that operated annually from 2017 to 2019, reducing annual number from 11,376 to 1,565. Further, operators would be required to fly on three consolidated routes within the ATMP planning area that avoid noise sensitive resources, including historic properties by increasing the minimum altitude, including time-of-day restrictions, incentivizing the use of quiet technology aircraft, and setting regular no-fly days and the option for additional days for Native Hawai'ian events or other programs. The FAA, in the draft ATMP, included a requirement for semi-annual reporting with flight monitoring data by operators as well as an annual training course and an annual meeting with Park Staff, local FAA Flight Standards District (FSDO), and all operators.

The FAA determined that the undertaking would have “no adverse effect” on historic properties, basing its finding on the aforementioned reduction in tours, and because aircraft are transitory elements in a site or viewshed, meaning that the visual effects would be relatively short in duration.

The FAA recognized that noise from air tours can be disruptive to traditional practices, and reiterated its assertion that these effects are temporary and transitory in nature, and would not result in a diminishment of the characteristics of the properties that qualify them for inclusion in the NRHP.

### ***ACHP's Review of Finding***

In making its finding of “no adverse effect,” the FAA has relied on its interpretation of 36 CFR §800.5(a)(2)(v), stating its belief that it is only required to consider potential adverse effects caused by the introduction of audible or visual elements. Because the air tours are a continuation of activities that have occurred for over 20 years, FAA asserts that these are not an introduction of new elements and therefore should not be considered an adverse effect. However, as the ACHP has previously opined to FAA, this section of the regulations includes examples of adverse effects, but does not constitute an exhaustive list, as other changes may also result in an adverse effect.

The FAA's correspondence is clear that the intent is to move air tours away from the most sensitive and avoid direct overflights of *most* historic properties, but it is not clear how FAA determined which historic properties were most sensitive to noise or visual intrusions. From FAA's analysis, flights would increase along the Coastal Route and the Kahuku Route, and noise modeling demonstrated an increase in noise associated with the flights in the vicinity of historic properties near the Coastal Route compared to existing conditions. Any increase in effects from existing conditions, where these effects are also already temporary, represents the potential for adverse effect to historic properties which the FAA has not acknowledged in its finding. As a result, the FAA appears to be prioritizing the reduction of flights over certain historic properties in the Park, such as Kīlauea Crater, at the potential expense of increasing adverse effects to others on these three routes.

While the ACHP agrees it is not within FAA's purview to assess effects that occurred prior to its involvement in the ATMP, it cannot reasonably deny that effects from air tours have been occurring to historic properties in the Park. Further, the measures proposed would reduce or minimize the likelihood that noise from an air tour would interrupt Native Hawai'ian traditional practices and diminish the integrity of setting and feeling for these historic properties, but the conditions set by the ATMP do not completely avoid these effects. Absent ending air tours altogether, there does not appear to be a way to eliminate the potential for adverse effects.

Accordingly, the ACHP recommends that the FAA reconsider its "no adverse effect" finding to be consistent with the threshold in 36 CFR §800.5(a)(1), which recognizes that an adverse effect finding is appropriate when such diminishment of integrity may result from the undertaking, but that diminishment does not have to be a certainty. The FAA should then document the proposed minimization measures and training and reporting requirements as commitments in a Memorandum of Agreement (MOA) and consult further on the development of other measures to resolve adverse effects on historic properties. An MOA would allow FAA to specify contingencies and Section 106 consultation procedures should the measures in the ATMP need to be changed, or adverse effects to historic properties are identified in the future. Should FAA revise its finding to adverse effect, the ACHP would accept the invitation to participate in the continuing consultation to resolve adverse effects.

In accordance with 36 CFR § 800.5(c)(3)(ii)(B), the FAA is required to take into account this advisory opinion in reaching a final decision on its finding of no adverse effect and provide to the ACHP, SHPO, NHOs, and other consulting parties its rationale and a summary of how this opinion was considered. If the FAA affirms its initial finding, once the summary of the decision has been sent to the ACHP and other parties, the agency official's Section 106 responsibilities are fulfilled for review of this undertaking.

Thank you for the opportunity to comment on this dispute regarding effects to historic properties. If we may be of further assistance, or you would like to discuss this matter, please contact Ms. Rachael Mangum, at (202) 517-0214, or via e-mail at [rmangum@achp.gov](mailto:rmangum@achp.gov).

Sincerely,



Jaime Loichinger  
Acting Director  
Office of Federal Agency Programs