



U.S. Department
of Transportation
**Federal Aviation
Administration**

United States Department of Transportation
FEDERAL AVIATION ADMINISTRATION
Office of Policy, International Affairs & Environment
Office of Environment and Energy

NATIONAL PARKS AIR TOUR MANAGEMENT PROGRAM

November 21, 2023

Re: Request for Review from the Advisory Council on Historic Preservation Pursuant to 36 CFR §800.5(c)(2) of the Federal Aviation Administration's Proposed Finding of No Adverse Effect on Historic Properties from the Implementation of an Air Tour Management Plan for Bandelier National Monument

Ms. Jaime Loichinger
Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street, Ste. 308
Washington, DC 20001

Dear Ms. Loichinger:

The Federal Aviation Administration (FAA), as the lead Federal agency and in coordination with the National Park Service (NPS), respectfully requests that the Advisory Council on Historic Preservation (ACHP or the Council) review the FAA's proposed finding of no adverse effect on historic properties from the implementation of an Air Tour Management Plan (ATMP) for Bandelier National Monument (Park) made under Section 106 of the National Historic Preservation Act (NHPA). The FAA submits this request in accordance with 36 CFR §800.5(c)(2)(i) in response to Southwest Safaris' objection to the proposed finding. The FAA is concurrently notifying all consulting parties about this request and will make the request documentation available to the public at:

https://www.faa.gov/about/office_org/headquarters_offices/apl/aee/air_tour_management_plan

Enclosed is the correspondence sent to, and received from, consulting parties throughout the consultation process (see Exhibits 1 through 5). In particular, Exhibit 4 contains the agency's April 20, 2023, finding of effect letter to the New Mexico State Historic Preservation Office (SHPO), which meets the requirements of 36 CFR §800.11(e). The finding of effect letter describes the undertaking, the Area of Potential Effects (APE), a description of steps taken to identify historic properties, a description of affected historic properties in the APE and the characteristics that qualify them for listing in the National Register of Historic Places (National Register), and an explanation of why the criteria of adverse effect do not apply to this undertaking. It also describes the Section 106 consultation process and public involvement completed for this undertaking.

Included in Exhibits 4 and 5 are the responses to FAA's April 20, 2023, letter received from consulting parties. The FAA received concurrence with the proposed finding of no adverse effect from the New Mexico SHPO, the Pueblo of San Felipe, and the Comanche Nation. Southwest Safaris, an operator conducting air tours at the Park, objected to the FAA's determination in letters dated May 19, 2023 (two letters, one of which was received May 25, 2023); May 31, 2023; June 6, 2023; June 9, 2023; August 11, 2023; August 14, 2023; September 25, 2023; October 1, 2023; and October 10, 2023.¹ Through Southwest Safaris correspondence and consultation, it is clear that Southwest Safaris objects to the undertaking, prohibiting air tours within the ATMP planning area, rather than the FAA's no adverse effect finding. However, since Southwest Safaris has raised concerns regarding the applicability of the Section 106 regulations to the ATMP process, the FAA has addressed those concerns in this request.

This letter includes background about the National Parks Air Tour Management Act (NPATMA), describes the undertaking and the history of air tours over the Park, and addresses the elements of Southwest Safaris' objection and the FAA's response.

The National Parks Air Tour Management Act

NPATMA requires that all commercial air tour operators conducting or intending to conduct a commercial air tour operation over a unit of the National Park System apply to the FAA for authority to undertake such activity. 49 U.S.C. §40128(a)(2)(A). As amended by the FAA Modernization and Reform Act of 2012, NPATMA further requires the FAA, in cooperation with the NPS, to establish an ATMP or voluntary agreement for each park for which applications were made, unless a park has been exempted from this requirement. *Id.* §40128(b)(1)(A), (b)(7). The objective of an ATMP is to "develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands." *Id.* §40128(b)(1)(B).

FAA regulations define a commercial air tour as:

[A]ny flight, conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing over a national park, within ½ mile outside the boundary of any national park, or over tribal lands during which the aircraft flies:

- (i) Below 5,000 feet above ground level (except for the purpose of takeoff or landing, or as necessary for the safe operation of an aircraft as determined under the rules and regulations of the Federal Aviation Administration requiring the pilot-in-command to take action to ensure the safe operation of the aircraft); [or]
- (ii) Less than 1 mile laterally from any geographic feature within the park (unless more than ½ mile outside the boundary). . . .

14 CFR §136.33(d).

Because Congress anticipated that the development of ATMPs would take time, it provided in NPATMA that prior to the establishment of an ATMP, the FAA "shall grant interim operating authority" to existing air tour operators that apply for prospective operating authority. 49 U.S.C. §40128(c)(1) (emphasis

¹ The additional letters received after the close of the comment period were clarifications of issues previously raised in earlier correspondence or clarifications based on the consultations conducted to resolve objections.

added). NPATMA required that interim operating authority was the greater of the number of commercial air tour flights over the park during the 12-month period, or the average number of commercial air tour flights within the 36-month period, prior to the enactment of NPATMA. *Id.* §40128(c)(2).

The History of Air Tours at the Park

Commercial air tours have been operating over the Park well before NPATMA was enacted in 2000. Prior to NPATMA, the FAA did not regulate air tours over national parks, and the NPS did not have authority to regulate commercial air tours. Air tour operators were subject only to FAA's general safety regulations, which applied to the operators of various types of aircraft, including those used to conduct commercial air tour operations, whether inside or outside of national parks. At that time there were no limits on the number of air tours that could be conducted per year and no designated routes or altitudes for flights.

Since 2005, most commercial air tours over national parks, including Bandelier National Monument, have been conducted pursuant to interim operating authority issued by the FAA in accordance with NPATMA. See 70 Fed. Reg. 36,456 (June 23, 2005). Because the FAA's grant of interim operating authority was a non-discretionary agency act mandated by Congress, compliance with the National Environmental Policy Act (NEPA) and Section 106 of the NHPA was not required. See *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992) (holding that where an agency did not have the discretion to deny certification to a facility that met certain criteria, compliance with NEPA and Section 106 was not required); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001) (compliance with Section 106 and NEPA is not required for nondiscretionary actions).

Currently, one operator, Southwest Safaris, holds interim operating authority to conduct a total of 126 air tours each year over the Park and over Pueblo de Cochiti tribal lands within ½ mile of the Park's boundary. However, the agencies consider the existing operations for commercial air tours to be an average of 2017-2019 annual air tours flown, which is 101 air tours that occurred, on average, 99 days per year (thus, a single tour occurred on most days). Northeast of the Park and within the ATMP planning area there is restricted airspace over Los Alamos National Laboratory. No commercial air tour operators have the authority to fly within restricted airspace. Air tour operators currently fly under visual flight rules (VFR). VFR is based on the principle of "see and avoid" and does not require specific routes or altitudes. 14 CFR § 91.155. Interim operating authority does not itself include any operating parameters (e.g., routes, altitudes, time of day, etc.) for air tours other than an upper limit of the total number of air tours operators may conduct each year. Attachment A to the FAA's finding of effect letter (Exhibit 4 to this letter) depicts the routes currently flown by the operator, however, under interim operating authority they are not restricted to any route when they conduct commercial air tours, and their routes could change without notice to the FAA or the NPS. The operator currently flies between 800 feet (ft.) to 1,000 ft. above ground level (AGL), on all routes while over the Park or outside the Park but within ½ mile of its boundary although they are currently not required to fly at any minimum altitude.

In accordance with NPATMA and a plan approved by the U.S. Court of Appeals for the District of Columbia Circuit (Court), the FAA and the NPS are developing an ATMP for the Park. The Court retained jurisdiction to monitor the agencies' progress consistent with the approved plan. Thus, the planning process to implement an ATMP for the Park has proceeded, and remains, under Court supervision.

The Undertaking

The FAA has determined that the development and implementation of an ATMP for the Park is an undertaking under the NHPA. Since the first publication of the draft ATMP, which proposed continuing the existing conditions at the Park, and in response to objections from the public and tribes to continuing air tours at existing conditions, the agencies began considering alternatives for the ATMP. The proposed undertaking would prohibit commercial air tour operations within the ATMP planning area. The ATMP for the Park includes the following:

SUMMARY OF ATMP ELEMENTS

General Description and Objectives	Prohibits air tours within the ATMP planning area to maximize achievement of Park management objectives. Air tours could continue to fly outside the ATMP planning area (i.e., at or above 5,000 ft. AGL or more than ½-mile outside of the Park's boundary).
Annual/Daily Number of Flights	None in ATMP planning area.
Routes	None in ATMP planning area.
Minimum Altitudes	Flights over the Park at or above 5,000 ft. AGL could occur as they are outside the ATMP planning area. Flights more than ½-mile outside the Park boundary could similarly still occur as they are also outside the ATMP planning area.
Time of Day	N/A
Day of Week	N/A
Seasonal	N/A
Quiet Technology (QT) Incentives	N/A
Annual Meeting, Operator Training and Education	N/A
Restrictions for Particular Events	N/A
Adaptive Management	N/A
Initial Allocation, Aircraft Type, Competitive Bidding, and New Entrants	N/A
Monitoring and Enforcement	Monitoring would occur to ensure operators are complying with the terms and conditions of the ATMP.
Interim Operating Authority	Terminates 180 days from the effective date of the ATMP.

For further details related to the various elements of the ATMP for the Park, refer to the summary in the FAA's April 20, 2023, finding of effect letter (Exhibit 4).

Under NPATMA, all IOA for the Park terminates by operation of law 180 days after the establishment (effective date) of the ATMP, 49 U.S.C. § 40128(c)(2)(E), after which time no operator may continue to

rely on any operating specifications issued under IOA as authority to conduct commercial air tours within the ATMP planning area.

Southwest Safaris' Objection and the FAA's Response

The FAA thoroughly analyzed the effects of the undertaking and supported its determination of no adverse effect in its April 20, 2023, letter. See Exhibit 4. The FAA sent the correspondence to all 31 consulting parties—including the New Mexico SHPO—requesting that they concur with the agency's finding. The New Mexico SHPO, the Pueblo of San Felipe, and Comanche Nation, concurred with the FAA's proposed finding of no adverse effects for the undertaking, Southwest Safaris objected to the finding by letters dated May 19, 2023; May 19, 2023 (received May 25, 2023); May 31, 2023; June 6, 2023; June 9, 2023; August 11, 2023; August 14, 2023; September 25, 2023; October 1, 2023; and October 10, 2023.

In some of the letters mentioned above, Southwest Safaris submitted various comments that were directly related to the ATMP for this Park and related to ATMPs for other Parks as well as the NEPA process. The FAA held two virtual objecting party meetings, in accordance with 36 CFR §800.5(c)(2), with Mr. Bruce Adams, who represented Southwest Safaris, to discuss the Section 106 comments in an effort to resolve the objection to the proposed finding. The objecting party meetings were held on August 10, 2023, and September 26, 2023. After these meetings, Southwest Safaris still maintained its opposition to the FAA's proposed finding. Southwest Safaris then submitted comments specifically pertaining to the Section 106 process in letters dated August 11, 2023; August 14, 2023; September 25, 2023; October 1, 2023; and October 10, 2023. Those comments related to the Section 106 process or the assessment of effects of the undertaking are summarized below:

- Southwest Safaris argues that the NPATMA is the controlling law and therefore should direct how the FAA complies with the NHPA and the Section 106 regulations.
- Southwest Safaris challenged how the FAA identified historic properties under Section 106.
- Southwest Safaris challenged whether the identified properties in the APE were appropriately listed on the National Register.
- Southwest Safaris argued that aircraft noise and visual impacts do not have an adverse effect on persons and historic properties on the ground.
- Southwest Safaris challenged whether the noise modelling used to assess the effects of the undertaking in the Section 106 process was based on science.

See Exhibit 5, Letters from Southwest Safaris.

Southwest Safaris' objection is misplaced for the following reasons:

The Applicable Law

Southwest Safaris argues that the NPATMA is the controlling statute when developing and implementing an ATMP. Specifically Southwest Safaris states that "NPATMA is the controlling legal authority for ATMPs, not NEPA and not the NHPA." (Southwest Safari letter dated August 14, 2023). The FAA agrees. However, Southwest Safaris erroneously believes that if NPATMA is the controlling statute then no other statute or regulation can apply to the development and implementation of an ATMP or that the agency must apply NPATMA's provisions to the other statutes. With respect to the NHPA, any federal action that meets the definition of an undertaking under the NHPA and Section 106 regulations trigger

compliance with Section 106 of the NHPA. The development and implementation of an ATMP meets the definition of an undertaking triggering the Section 106 process. Thus, under Section 106 of the NHPA, the agencies must consider the impact of their actions (the ATMP) on historic properties. So, while NPATMA governs how the FAA and NPS develop and implement ATMPs, if the development and implementation of an ATMP meets the definition of an undertaking, the agencies must comply with Section 106 of the NHPA, and the Council's implementing regulations, and consider the effects of the undertaking (ATMP) on historic properties. Compliance with NPATMA does not preclude compliance with other federal statutes and regulations. Put differently, the agencies must comply with both NPATMA and Section 106 of the NHPA. Compliance with other applicable statutes and regulations does not mean that the agencies are not fully complying with NPATMA.

Historic Property Identification

Southwest Safaris alleges that the FAA relied on hearsay not backed by data to identify properties within the APE. The FAA complied with 36 CFR § 800.4(a) in identifying historic properties within the APE. The provision states in part that "in consultation with the SHPO/THPO the agency official shall... [r]eview existing information on historic properties within the [APE], including any data concerning historic properties not yet identified." The agency is also directed to "[g]ather information from any Indian tribe...pursuant to 36 CFR § 800.3(f) to assist in identifying properties including those located off tribal lands, which may be of religious and cultural significance to them..." 36 CFR 800.4(a)(4). In its efforts to identify historic properties, the FAA gathered information on historic properties within the APE using information provided by the New Mexico Preservation Division (SHPO), information gathered from the National Register, and verbal and written information received from tribes and other consulting parties through the Section 106 consultation process. Additionally, data was gathered from the NPS, including the NPS foundation document (2015), the National Register Nomination Forms (1966, 1971-updated 2014) and the 2015 study titled "Bandelier National Monument Cultural Landscape Report for CCC National Historic Landmark Historic District," which lists cultural surveys and excavations performed within the National Historic Landmark from 1933 through the present. The FAA's consideration of written or orally provided tribal information is appropriate. Furthermore, the standard for determining the sufficiency of the agency's efforts to identify historic properties is not hearsay, but whether the agency made "a reasonable and good faith effort" to conduct appropriate identification efforts, "which may include... consultation and oral history interviews." The FAA, in accordance with Section 106, considered input from tribes and made a good faith effort to identify historic properties within the APE for this Park.

Southwest Safaris also challenges whether some of the properties considered eligible for or listed on the National Register are appropriately considered, expressing specific concern regarding the historic properties that were identified as eligible for listing through consultation under the Section 106 process for this Park. The FAA did identify properties within the APE that were eligible for listing or listed on the National Register in accordance with the Section 106 regulations. Furthermore, the NHPA allows historic properties with cultural and religious significance to tribes to be listed or to be deemed eligible for listing in the National Register, even if their locations are restricted to the public. The FAA's identification efforts and consideration of the historic properties identified in the APE is appropriate.

Assessment of Effects

Southwest Safaris raises three main issues that relate to how the FAA assessed the effects of the undertaking. First, it appears that Southwest Safaris misunderstands that the proposed finding of no

adverse effect applies to the undertaking and not air tour operations in general. Second, Southwest Safaris alleges that aircraft noise and visual impacts from aircraft do not have an adverse effect on people or historic properties on the ground. Third, Southwest Safaris alleges that the noise modelling was not based on science.

The undertaking for this Park is the implementation of the prohibition of air tours within the ATMP planning area which includes the Park boundary and areas outside the Park but within ½ mile of its boundary and below 5,000 ft. AGL (referred to as the ATMP planning area). The FAA assessed the effects of the prohibition of air tours on historic properties identified within the APE and found that the undertaking would not have an adverse effect on those properties. The FAA did not assess the effects of air tour operations generally. In assessing the effects of the undertaking, the FAA compared implementing the undertaking with existing conditions. The FAA focused on whether the undertaking would “alter any characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials workmanship, feeling or association.” 36 CFR § 800.5(a)(1). The FAA found that the undertaking (prohibiting air tours) would not have an adverse effect on historic properties within the APE. Contrary to Southwest Safaris’ allegation, in assessing the effect of the undertaking on historic properties, the FAA did not determine that aircraft noise and visual impacts from aircraft have an adverse effect on people or historic properties.

Finally, Southwest Safaris challenges whether the noise analysis used to assess the effects of the undertaking was based on science. The agencies’ assessment of air tour noise within the ATMP planning area was based on reasonable scientific methods. The FAA’s Aviation Environmental Design Tool (AEDT), Version 3e (Lee et al., 2022), which was relied on by the agencies to model the noise impacts of air tours within the ATMP planning area, is the FAA-approved computer program for modeling noise, as listed under Appendix A of FAA’s Part 150 Airport Noise Compatibility Planning (14 CFR sec. A150.103(a)). The FAA’s requirements for aircraft noise modeling are defined in FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, and in FAR 14 CFR Part 150, Airport Noise Compatibility Planning. Noise modeling conducted for the draft ATMP and draft Environmental Assessment (EA) was consistent with these FAA requirements. Additional information about noise modeling can be found in Appendix F, of the EA, Noise Technical Analysis. AEDT dynamically models aircraft performance in space and time.

Request for Review and Concurrence

For the reasons stated in the finding of effect letter and as stated above, the FAA has proposed a finding of no adverse effect on historic properties. The FAA respectfully requests the ACHP’s review of its proposed finding in accordance with 36 CFR § 800.5(c)(3).

Should you have any questions regarding any of the above, please contact me at 202-267-4185 or Judith.Walker@faa.gov and copy the ATMP team at ATMPTeam@dot.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Judith Walker', with a long horizontal flourish extending to the right.

Judith Walker
Federal Preservation Officer
Senior Environmental Policy Analyst
Environmental Policy Division (AEE-400)
Federal Aviation Administration

CCs: Rachael Mangum, Advisory Council on Historic Preservation
Bruce Adams, Southwest Safaris

Enclosures

- Exhibit 1 – Consultation Initiation Letter and Responses
- Exhibit 2 – Undertaking APE Letter and Responses
- Exhibit 3 – Historic Property Identification Letter and Responses
- Exhibit 4 – Finding of Effect letter and Concurrences
- Exhibit 5 – Objections to Finding of Effect letter and Responses