



December 21, 2023

Ms. Julie Marks
Executive Director (A), AEE-1
Office of Environment and Energy
Federal Aviation Administration
800 Independence Avenue, SW
Suite 900W
Washington, DC 20591

Ref: *Proposed Air Tour Management Plan (ATMP) at Bandelier National Monument
Sandoval and Los Alamos counties, New Mexico
ACHP Project Number: 020374*

Dear Ms. Marks:

On November 21, 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). On November 21, 2023, the ACHP notified the FAA that it was extending its review period for an additional 15 days pursuant to 36 CFR § 800.5(c)(3)(i). One consulting party, Southwest Safaris, an air tour operator operating under an Interim Operating Authority (IOA) to provide air tours over Bandelier National Monument has objected to the FAA’s finding. The FAA continued consultation with Southwest Safaris in an effort to resolve their objection in meetings and correspondence from May to November 2023. In addition to the documentation provided by the FAA, the ACHP has also reviewed letters sent by Southwest Safaris directly to the ACHP (2 on November 27, 2023 to ACHP and FAA; and one on December 4, 2023, December 14, 2023, and December 20, 2023).

Based on the documentation submitted, it appears FAA conducted a Section 106 review to consider the effects of its undertaking on historic properties and to allow the ACHP a reasonable opportunity to comment. As further articulated below, the FAA has appropriately applied the criteria of adverse effect for this undertaking and a finding of “no adverse effect” to historic properties is reasonable.

It also appears the FAA has made a reasonable effort to address the concerns of the objecting party, Southwest Safaris, many of which do not relate to determinations or findings in the Section 106 process and instead relate to misunderstanding the scope of the Section 106 review. Section 106 does not require an agency to consider alternatives to its proposed undertaking that may or would result in adverse effects to historic properties. The alternatives that the Section 106 process focuses on are those that may avoid, minimize, or mitigate adverse effects. That is why the Section 106 regulations allow agencies to conduct nondestructive planning activities before wrapping up their Section 106 compliance “provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 ☐ Washington, DC 20001-2637
Phone: 202-517-0200 ☐ Fax: 202-517-6381 ☐ achp@achp.gov ☐ www.achp.gov

undertaking's adverse effects on historic properties.” 36 CFR § 800.1(c). By copy of this letter, the ACHP is also responding to the letters Southwest Safaris sent to us directly in the course of our review of the FAA’s request. 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 Bandelier National Monument (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 prior to NPATMA and the undertaking, air tour operators were subject only to FAA’s general safety regulations. After 2005, air tours operated in accordance with an interim operating authority (IOA), also required by NPATMA, for which FAA stated that compliance with Section 106 was not required because it did not impose any conditions other than an annual limit on the number of flights.

FAA initiated consultation under Section 106 for the development of the ATMP in March 2021, and established the existing condition against which they would base their analysis as air tour operation prior to the implementation of the ATMP. Southwest Safaris is the one operator that holds IOA at the Park to conduct up to 126 air tours per year; however, the FAA based its analysis on a three-year average (2017-2019) of commercial air tours, which is 101 air tours per year by the one operator who holds IOA. Southwest Safaris clarifies that they operate about two (2) flights per week, once every three (3) days. Currently, the IOA has no other restrictions that operators must adhere to such as designated flight routes or no no-fly zones.

FAA, in coordination with the National Park Service (NPS), consulted with numerous consulting parties, including the New Mexico State Historic Preservation Office (SHPO), 27 Indian Tribes, and the air tour operator, Southwest Safaris, to delineate the Area of Potential Effects (APE). The FAA focused identification efforts on historic properties for which setting and feeling are characteristics contributing to a property’s National Register of Historic Places (NRHP) eligibility, as they are the type of historic properties with characteristics most sensitive to the effects of aircraft overflights from both visual and audible intrusions.

In the course of consultation FAA identified four (4) historic properties including historic and archaeological districts, one of which encompasses the entire Park boundary, and the Bandelier National Monument Traditional Cultural Properties (TCP), a collection which includes many Ancestral Pueblo sites and sacred landscapes considered TCPs by several Tribes. Tribes informed the FAA that TCPs including sacred landscapes within the Park boundary also extend beyond to the larger landscape of the area. Tribes identified that these properties of religious and cultural significance are important for cultural, traditional, and religious use and practices deemed by one Tribe as integral to the identity of their people and critical in the retention and transmission of their culture and history.

The objective of the 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” (49 U.S.C. § 40128(b)(1)(B)). In the draft ATMP, the NPS determined that air tour routes continuing at even their current levels on current routes in the Park presented unacceptable impacts to the Park’s cultural resources, including the potential for adverse effects on historic properties, which does not meet the purpose and need for the ATMP. FAA and NPS selected the preferred alternative, which prohibits all air tours, as the undertaking to be assessed for effects to historic properties in the Section 106 review.

The FAA determined that an ATMP that prohibited air tours would have “no adverse effect” on historic properties because eliminating air tours would eliminate noise or visual elements from air tours on historic properties in the Park. FAA acknowledges that aircraft conducting tours in airspace over the Park create noise and are visible from historic properties in the Park, facts which FAA evaluates through noise-modeling, and importantly in the Section 106 review, are attested to by Tribal cultural practitioners on the ground. This consultation with Tribes provided FAA with evidence that air tours intrude on and can disrupt traditional practices involving historic properties, a point which the ACHP has repeatedly encouraged the FAA to consider in its Section 106 reviews for ATMPs at other national parks. FAA found no indirect effects from the undertaking because it believes it would be unlikely for the air tour operator to continue to conduct commercial air tours of the Park by flying along the perimeter of the ATMP planning area. However, the ACHP acknowledges such flights as being reasonably foreseeable and the FAA or NPS may need to reassess indirect effects if conditions considered in the analysis change.

Earlier in the consultation process, the FAA considered an alternative that would have allowed some air tour operations to continue, with specific conditions imposed to reduce potential adverse effects on historic properties in the Park. However, through further consultation with the SHPO and Tribes, the NPS and FAA found that implementation of an ATMP that allowed any air tours over the Park would result in unacceptable impacts to cultural resources, including potential adverse effects to historic properties, that could not be avoided through any conditions. As such, FAA modified the preferred alternative to eliminate air tours over the Park, and on April 20, 2023, conveyed its finding of no adverse effects to historic properties.

The FAA states that the objections of the air tour operator include the following concerns 1) NPATMA is the controlling law and therefore should direct how the FAA complies with the NHPA and the Section 106 regulations; 2) the FAA’s identification efforts under Section 106 were flawed; 3) historic properties in the APE are not listed on the National Register of Historic Places (NRHP); 4) the aircraft noise and visual impacts do not have an adverse effect on persons and historic properties on the ground; and 5) the noise modelling used by FAA to assess the effects of the undertaking in the Section 106 process was not based on science.

ACHP’s Review of Finding

The objecting consulting party questions the federal agency’s requirement to comply with both the NPATMA and Section 106 of the NHPA. As the agency responsible for overseeing the requirements of Section 106 of the NHPA, the ACHP clarifies that federal agencies are required to comply with Section 106 of the NHPA when undertakings they propose to carry out, license, permit, or fund may have effects on historic properties. Per the Section 106 regulations, it is the federal agency’s unilateral responsibility to establish the undertaking, and to initiate the Section 106 process early in the undertaking’s planning so that a broad range of alternatives to avoid, minimize, or mitigate adverse effects to historic properties may be considered (see 36 CFR §§ 800.1(c), 800.3(a)). The term “undertaking” is defined in the Section 106 regulations at 36 CFR § 800.16(y) and it applies to actions carried out, licensed, or funded by federal agencies, whether directed by Congress in laws like NPATMA or through agency decisions, that may

have effects on historic properties. In this case, NPATMA does not exempt or waive responsibility for compliance with Section 106 of the NHPA; therefore, the FAA must also comply with Section 106's requirements prior to making a final decision under NPATMA. This includes the timing mandate in Section 106 to complete the review process prior to the approval or issuance of any license for the undertaking. The FAA has conducted Section 106 reviews for implementing ATMPs at other national park units across the country and is carrying out the same type of review for this Park. As in the development and Section 106 review of ATMPs in other parks, the Section 106 process must be completed before FAA makes a final decision on the undertaking, which in this case would be approving the ATMP, which has not occurred yet as air tour operations are subject only to the IOA.

The purpose of the Section 106 process is for federal agencies to consider the effects of their undertakings on historic properties, separate and distinct from other laws requiring review of federal actions. The Section 106 process "seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the *effects of the undertaking on historic properties*...The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and *seek ways to avoid, minimize or mitigate any adverse effects on historic properties*" (36 CFR §800.1(a)) (*emphasis added*). Accordingly, the FAA carried out an effort to identify historic properties consistent with the purpose and process of Section 106, including a records review and consultation with numerous parties, including NPS, Tribes, and the SHPO. All of these parties provided information about historic properties within the APE, which FAA considered in its assessment of effects. Historic properties are those considered eligible for or listed on the NRHP, and can include properties of religious and cultural significance to Indian Tribes. Under the NHPA, there is no requirement for properties to be listed on the NRHP to be considered historic properties.

The objecting party presented concerns that noise modeling conducted by the FAA and comments from Tribes pertained to the *potential* for adverse effects, not the actuality of those effects. The ACHP has previously advised FAA and other federal agencies that adverse effects do not need to be a certainty. Rather, adverse effects are found for Section 106 purposes when an undertaking *may* alter, directly or indirectly any of the characteristics that qualify it for inclusion in the NRHP, in a manner that would diminish the property's aspects of integrity (see 36 CFR § 800.5(a)(1)). Based on the information provided by Tribes, noise and visual elements from air tours have the potential to alter characteristics of historic properties significant to them by diminishing integrity of setting and feeling, among other aspects of integrity. The ACHP has developed policy statements and other guidance that affirm the validity of Indigenous Knowledge in identifying historic properties of religious and cultural significance. Therefore, the information provided by Tribes is sufficient for the FAA to determine that properties of significance to Tribes are historic properties without further archaeological evaluation, and the characteristics that make the properties significant could be adversely affected by continued air tours above and around them.

Though the Section 106 process only assesses effects to historic properties, the process does seek to include the views of consulting parties with a "demonstrated interest in the undertaking...due to the nature of their legal or economic relation to the undertaking or affected properties." However, the Section 106 process is only focused on the potential effects on historic properties, not on effects to other types of resources or concerns, such as economic interests. The impacts of the undertaking on other resource types are considered by the agency through compliance with other laws, such as the National Environmental Policy Act.

Further, while the Section 106 process does not mandate a specific outcome, the regulations implementing Section 106 present an order to the consideration of alternatives with regard to adverse

effects, if any. The agency should first consider ways to avoid adverse effects to historic properties; if such options are not available, then the agency would consider ways to minimize or mitigate adverse effects (see 36 CFR §800.6(a)). An agency is not required by Section 106 to avoid adverse effects to historic properties; however, if an agency determines that the undertaking as proposed would avoid all such adverse effects, then the agency may conclude its review with a finding of “no historic properties affected,” or “no adverse effect.” There are opportunities in the regulations for consulting parties to object or disagree with the agency’s effect finding. But there is no process or requirement in the Section 106 regulations for the agency to consider alternatives that would allow adverse effects. The ACHP agrees that the FAA’s finding of no adverse effect for this undertaking is supported by its Section 106 review and record of consultation, and that the implementation of an ATMP that eliminates air tours at the Park and the ATMP planning area reasonably avoids adverse effects to historic properties.

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, the SHPO, Tribes, 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.

Sincerely,



Jaime Loichinger
Director
Office of Federal Agency Programs