Exhibit 6 – Objection to Finding of Effects Letter and Response

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Washington, DC

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CACH Section 106 – FAA 's Request for Concurrence
Southwest Safaris' Statement of Disagreement

Dear Ms. Walker:

This is Southwest Safaris (SWS) fifth response to the FAA's request for concurrence with the agency's proposed finding of "no adverse effects" from the Canyon de Chelly National Monument (CACH, or "the Park") draft Air Tour Management Plan (ATMP) in compliance with the National Parks Air Tour Management Plan of 2000 (NPATMA, or "the Act").

Other letters were dated June 9, June 12, June 30, and November 14, 2023. All of these letters should be included in SWS' record of response to the FAA's *Request for Concurrence* to the agency's Finding of "no adverse effects."

Southwest Safaris does not concur with the FAA's proposed finding (the Finding) that there will be "no adverse effects" from denying SWS continued air tour overflight rights at Canyon de Chelly National Monument. SWS argues that reason based on facts is sufficient to discredit the FAA's Finding. Moreover, SWS argues that the FAA's methods of assessment for arriving at the finding of "no adverse effects" lacks procedural and substantive legality.

I The FAA's Finding of "no adverse effects" is incorrect; banning air tours increases noise.

a. The FAA's finding is wrong based on physics.

In the FAA's Request for Concurrence of "no adverse effects" from banning air tours over CACH, the FAA makes the following remark at the bottom of page 7:

> The elimination of air tours within the ATMP planning area will reduce maximum noise levels at sites directly below commercial air tour routes compared to existing conditions. All historic properties within the APE would experience a reduction in noise from air tours.

Southwest Safaris takes particular exception to the FAA's conclusion.[1] It is not true that elimination of air tours within the ATMP planning area will reduce noise effects to historic properties either directly below the current route of flight or for the Park in general. Eliminating all air tours over the Park will actually increase the number of air tours flying immediately around the Park and will, therefore, increase the associated noise bleeding over into the Park.

Southwest Safaris does not fly helicopters. Helicopters would fly directly over the canyons of the Park. Fixed-wing airplanes fly at an offset distance from the objects of view, the perspective from an airplane being oblique, not vertical. Therefore, the above remarks of the FAA are irrelevant to Canyon de Chelly. Southwest Safaris routes are already offset from the canyons and away from parking/view areas. Flying outside the Park will mean flying at lower altitudes, so the ever-so-slight reduction in noise from relatively minor increases in horizontal displacement will be more than offset by major increases in noise generated from significantly lower vertical heights. The air tour operator (ATO) already flies near the southern border of the Park (new routes) where there are no historic properties or tourists and flies at relatively high altitudes and low power settings, the ideal solution to reducing noise and visual presence. On the west side of the Park, the ATO has also modified its routes so as to fly on the east side of the upper (northern) end of Canyon del Muerto and then west of that canyon on the lower (southern) end before exiting the Park west of the Visitors Center. So, the noise directly beneath the new routes of SWS' planes is currently of no consequence for fixed-wing aircraft, the routes having already been modified to achieve measurable reduction in noise and visual presence compared to past existing conditions. Offsetting SWS' tracks eliminates one of the FAA's main objections to flying current routes.

Moreover, eliminating direct flights across the major diameter of the Park (i.e., eliminating the route parallelling Canyon de Chelly) would actually increase the noise impact on all historic properties within the APE by a factor of 260%. The issue is a question of math and geometry. The physics of the problem demonstrates that there will be a marked increase in noise created by circling CACH as opposed to flying along the length of the longest canyon in a straight line.

[1] See my letters of August 11, 2023, "4th Response to Request for Concurrence on Sec 106," page 5, and of August 14, "5th Response to Request for Concurrence on Sec 106, page 2.

The formula for the circumference of a circle is C= πD, where D is the diameter, represented in the present instance by Canyon de Chelly, itself. SWS calculates that the distance for flying half way around the circle to circumnavigate the Park, would be πD/2. By this computation, it will require almost 60% more flying time to circumnavigate the Park instead of flying across the Park on a straight line. Moreover, instead of gradually descending, using minimal power to fly the shortest distance across the Park, tour aircraft will use full power, generating twice as much noise at much lower altitudes to circle the park as fast as possible to make up for the greater distance. That means at least twice the noise for 60% longer, or 260% more noise and visual presence in total. That figure is significant and directly confirms the FAA's statement in the middle of page 7, that "aircraft are transitory elements in a scene and visual impacts tend to be relatively short" … as long as aircraft are allowed to fly in a straight line. The least impactful route in and around the Park is straight across it, in a glide, which is the manner in which SWS already flies outside "the cone of annoyance." Flying the shortest route with the least amount of power eliminates the second reason the FAA might have for objecting to Southwest Safaris continuing to fly its current routes.

Finally, eliminating straight flights across the southern end of Canyon de Chelly will force SWS' flights to be conducted around the north end of the Park on the way out to Chinle and around the southern flank of Canyon de Chelly on the return route, increasing by a factor of 2 the impactful noise from all directions instead of just one. That will increase the total new noise by a factor of approximately 5.0. Two low flights per tour will be required around the Park instead of just one over it. More people and historic sites will be adversely affected from more directions more often than before, which eliminates the FAA's third and final objection to flying existing routes.

The most logical overall pronouncement, therefore, should be a Finding of "significant adverse impact" from eliminating air tours over the Park. This would support a decision, under NEPA, for "Alterative 1" of the draft ATMP, meaning a ruling in favor of "no change" in the way air tours at CACH are conducted in the future.

b. The FAA's Finding is wrong based on operations.

On the bottom of page 7 (*Indirect Effects*) of the FAA's Request for Concurrence, the FAA makes the statement that:

> It is unlikely that the operator would continue to conduct commercial air tours of the Park by flying along the perimeter of the ATMP planning area because it is difficult to see the predominant features of the Park from outside the ATMP planning area. Flights at or above 5,000 ft. AGL are unlikely due to the Park's elevation and safety requirements for unpressurized aircraft flying over 10,000 ft. MSL for more than 30 minutes. If air tours are conducted at or above 5,000 ft. AGL over the ATMP planning area, the increase in altitude would likely decrease impacts on ground level resources as compared to current conditions because the noise would be dispersed over a larger geographical area. Noise from air tours conducted at or above 5,000 ft. AGL would be audible for a longer period, but at lower intensity. Similarly, aircraft are transitory elements in a scene and visual impacts tend to be relatively short, especially at higher altitudes.

In rejoinder, Southwest Safaris claims that every Section 106-related assumption the FAA makes here is wrong. In interest of brevity, SWS will only briefly comment on each of the errors.

First, if denied access to the Park, Southwest Safaris will definitely fly the circumference of the circle defined by the ends of the canyons. SWS needs to cross the Park from east to west to get to the Chinle, AZ airstrip, where ground tours commence. Flying around the Park means that the minimal aircraft noise that otherwise would have been generated over the southern and least sensitive areas of the Park (flying on the south side of Canyon de Chelly just inside the Park boundary), will be intensified (see math computations above) and transferred to the Navajo communities on the northeast and north ends of the canyons, instead, which will inflict adverse impacts on Tribal lands SWS has ardently tried to avoid. Second, flying the circumference will highlight the views of the Park from the north and west, including all of Canyon del Muerto (on the outbound leg) as well as Canyon de Chelly (viewed on the return flight), so the new routes will have great advantages (marketing value) leading to selling more air tours than before, producing ever more alleged "adverse impacts" on the Park. Third, there is no need to fly 5,000 feet above the Park if flying outside the Park; flying 500-feet AGL around the Park will yield even better views of the canyons, be just as legal as flying 5,000-feet over the Park, and require no use of oxygen. Fourth, flying around the Park to the west will increase the noise blown over the Park by the prevailing westerly winds, not decrease the noise. Fifth, noise generated from low-flying air tours circling the Park at full power will be audible for a longer period and at a higher intensity than higher flights traversing the Park at 4,000 AGL initial altitude using minimum power while descending for landing at Chinle. Sixth, the walls of the canyons, themselves, tend to block aircraft noise projected at a slant angle. The FAA calls this "terrain shielding." Fixed-wing airplanes fly obliquely to canyons, not over them (as opposed to helicopters), so Southwest Safaris' air tours generate almost no measurable noise at the bottom of the Park as it is. By flying just outside the boundaries of the Park (1/2 mile) to the north and west, SWS will adjust its "magic altitude" to about 800 feet AGL to allow views of the bottom of the canyons for a longer time at high power settings, so noise exposure directed at the bottom of the canyons will be unavoidably maximized by flying at the lower elevations AGL. The FAA's proposals will be counterproductive.

The FAA has performed no sound studies in Canyon de Chelly. The agency has no actual figures with which to document its allegations of adverse sound and visual impacts. So, the FAA has no proof, upon which it can reasonably rely, to back up its theorem that eliminating all air tours over the Park will actually have "no adverse effects" on CACH. The FAA Finding, based on NHPA contrivances, is just an untested hypothesis that does not stand the test of real-world analysis. Multiple factual analyses of Southwest Safaris' actual air tours serve to eliminate any remaining FAA objections to Southwest Safaris continued flights along existing routes.

Southwest Safaris has been conducting air tours across CACH for 49 years. During that time, the ATO has received no complaints of noise or aircraft presence from the FAA, the NPS, or from the Navajo Nation, even along its old routes. Neither the FAA, the NPS, nor the Tribe has any record of complaints against Southwest Safaris for any reason.

This observation leads to two general conclusions. First, the lack of complaints alone testifies that the FAA's grounds for pursuing Section 106 (also "S106" or "106") process are without merit. The FAA is trying to provide a fix for a problem that does not exist.

According to FAA figures, operationally speaking, SWS flies less than 50 air tours over the Park per year. So, there is no regulatory requirement for an ATMP for the Park at all, 49 USC §40128(a)(5)(A), unless an extraordinary circumstance exists … "making it necessary to protect park resources and values or park visitor use and enjoyment" … that requires the NPS to withdraw the exception for Parks with 50 or less air tours. The FAA has never said that the NPS has declared the existence of an exceptional circumstances at CACH, has never justified a decision to withdraw the "exception" for parks with 50 or less air tours per year, and has never conducted any science-based sound studies under Section 808 of the Act that are required to validate any such "justification" of withdrawal of exception. See Attachment 2. See also 49 USC §40128(b)(3)(F).

Air tours over CACH do not have a significant effect on the human environment any more than they do at ARCH, CANY, RABR, NABR, or BRCA. All these parks were "categorically excluded" from the requirement for an environmental assessment. All of them were determined worthy of having air tour operations. The FAA and NPS (the agencies) must provide substantial documentation to justify their decision to make a regulatory distinction for CACH, which they have failed to do anywhere in the Section 106 process.

The FAA has created a "catch 22." It claims that the "justification" the ATO seeks properly belongs under the NEPA process, and that process can not commence till after the S106 process has been completed. Therefore, the FAA will argue, the "justification" does not have to be provided in time for the ATO to argue against it to critique the agencies abuse of Section 106 procedures. The FAA's rejoinder is convenient, but illegal on grounds of denial of due process.

Second, Southwest Safaris has an amazing record for "doing no harm," probably unique in all of the National Park Service's history with air tours. SWS is mystified as to why the NPS would want to throw out the research and methodology developed by the company when the results of prohibiting air tours over the Park are going to produce no net gain for anyone. The FAA appears not to care, being more concerned with arriving at an extremist political solution for a non-existent problem than rational operational remedies that would avoid "potential" adverse impacts in the first place.

Therefore, Southwest Safaris alleges that the FAA has violated NHPA's 36 CFR §800.5, *Assessment of Adverse Effects*, by knowingly and deliberately arriving at an improper Section 106 finding of "no adverse effects" from eliminating all air tours over CACH contrary to fact, operational analysis, and law. A more thorough analysis of violation of regulation and law follows.

II <u>The FAA's finding is wrong, based on reason and law.</u>

a. The FAA's Finding is wrong based on logic.

The FAA's Statement of Effects Letter is logically incoherent. The FAA asks Southwest Safaris to disprove a double negative and concur that "no flights over the Park cause no adverse effects thereon." It is impossible to argue against a double-negative syllogism with formal logic. The proof of FAA error can only be demonstrated with real-world illustrations to the contrary of allegation. Southwest Safaris has already performed this duty.

SWS has demonstrated above, with reference to physics and real-world operations, that existing air tours over the Park cause no adverse impact on persons and cultural properties in the Area of Potential Effect (APE). There have been no complaints to the FAA or NPS against SWS' air tours in 49 years. SWS also demonstrated mathematically and operationally how being forced to fly around the Park would actually increase the noise impact on the overall Park. Moreover, SWS argued that the FAA has no legal basis for taking away the exception for CACH and creating an ATMP.

In further rejoinder to the FAA's Finding, Southwest Safaris alleges that the Section 106 process has been deliberately abused by the FAA so as to make constructive comment and consultation under NHPA impossible. The FAA's construction of its double-negative Finding is designed to block any attempt to arrive at any alternative method … other than banning all air tours … for reducing alleged adverse impacts on historic properties in the APE. The FAA's methods defeat the whole purpose of trying to arrive at reasonable compromise under Section 106's consulting process. Therefore, the FAA's Finding must be withdrawn, because it violates both Section 106 and NPATMA and serves no constructive purpose of remediation.

b. The FAA's finding is wrong, based on reasonable interpretation of regulation.

The FAA says on page 8 under *Finding of No Adverse Effect Criteria*:

> To support a Finding of No Adverse Effect, an undertaking must not meet any of the criteria set forth in the Advisory Council on Historic Preservation's Section 106 regulations at 36 CFR 800.5(a). This section demonstrates [that] the undertaking does not meet those criteria [and therefore is valid].

The truth is just the opposite. As Southwest Safaris has demonstrated above, the FAA's finding of "no adverse effects" from eliminating all air tours over the Park is contrary both to physics and operational reality. The FAA's undertaking does meet the criteria set forth in 36 CFR 800.5(a)(2)(v), because of "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." In regulatory language, the FAA's undertaking would definitely introduce both auditory and visual elements that would "diminish the integrity of the significant historical features of any historic properties in the APE." So, the FAA's finding under Section 106 "flies" against its own regulations upon which the agency relies. The FAA cannot justify a Finding of "no adverse effect" as a matter of both fact and regulation.

If the FAA wishes to contest the assertions of Southwest Safaris, the FAA has the responsibility to produce reasonable evidence to the contrary. This can only be done by generating real evidence from real sound studies, not imaginary noise modeling estimates based on hypothetical conditions where the variables are controlled by parties who have a vested interest in the outcome. The FAA's noise modeling results have no credibility in this situation. Besides, the above arguments notwithstanding, the FAA's Section 106 process at CACH is without legal authority, because the findings are contrary to the purpose and methods of NPATMA. The Act is the controlling legal authority for ATMPs, not NHPA. More on this later.

The FAA's finding of "no adverse effects" is predicated on the "potential" elimination of all air tours over the Park. The actuality of the removal has never been tested. So, strictly considered, there is no proof of the accuracy of the FAA's finding that prohibiting all air tours over the Park will have no adverse effects. Deductive reasoning is not enough, according to NPATMA. Therefore, the agency's finding of "no adverse effects" is pure speculation, not being based on science, which requires testing (see Section 808 of NPATMA) and which is the basis for decision. A definite finding cannot be based on "potential" assumptions.

Thus, the FAA's finding under Section 106 is incompatible, on the basis of regulatory analysis, not only with NHPA, but with NPATMA, as well, and must be rejected. This because NPATMA demands science-based determinations and because the Act is the controlling legal authority.

The FAA's artful demand that Southwest Safaris concur with a double-negative syllogism contained in the FAA's *Request for Concurrence* (*Letter of Effect*) is not enough to get to a logically infallible conclusion. The FAA's errant finding is based on the premise that the only way to absolutely eliminate all potential adverse effects from air tours is to eliminate all air tours. The test must be based on science, <u>not</u> untested deductive reasoning. Deductive reasoning … based in this case on the NEPA Theory of Mere Presence and the NHPA Theory of Mere Allegations,[2] whereby noise studies are not required at all …has its own set of errors, as already demonstrated.

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[2] The Theory of Mere Allegation is a uniquely NHPA concept. It holds that real adverse effects do not have to exist to be objectionable. They only have to be "potential." This means that hard evidence (based on "reasonable scientific methods") required by NPATMA to support allegations of "significant adverse impacts," are not required under terms of NHPA. The Council considers allegations by themselves to be credible evidence.

The FAA tries to use Section 106 to end run NPATMA, there being no requirement under NHPA to conduct sound studies to prove the validity of claims for adverse impacts of air tours on historic properties which are defined by the National Register. Under Section 106, a mere claim of the potential for adverse effect is considered evidentiary proof of legitimacy of allegation. Therefore, NHPA, considering the "if any" phrase in NPATMA and Section 808 methodology of compliance, is inconsistent with NPATMA. The Act requires, through sound studies, performance of the "if any" conditional test. The FAA failed to conduct the test. Thus, the FAA's Finding must be set aside under the twin Theories of Primacy of Law and Consistency of Law until NPATMA conditionally allows NHPA to come into effect. Sound studies are mandatory under NPATMA, the Act being the controlling legal authority for ATMPs. At CACH, Section 106 only comes into partial force and effect if and when NPATMA passes qualified authority to it … by controlling NHPA's timing, language, and methods … which happens only when a ***<u>legal</u>*** undertaking is commenced, not before.

Southwest alleges that the FAA's S106 finding of "no adverse effects" has additionally, and most significantly, violated NPATMA, the controlling legal authority for NHPA, by not complying with NPATMA's Section 808 (49 USC §40128.808). Southwest Safaris argues that the FAA has no latitude of discretion re. sound studies required by NPATMA. In the present instance, the Act controls implementation of Section 106. The Act is explicitly clear with respect to mandatory application of Section 808. The FAA tries to use NHPA to undermine NPATMA's authority, claiming that NPATMA language does not apply to NHPA procedure. On the other hand, the FAA appears to believe that NHPA language does control NEPA's and NPATMA's methods. Violation of regulatory language and process is immediately obvious. FAA interpretation of the three sets of regulations results in legal chaos.

By way of sidebar, Southwest Safaris alleges that the reason for the FAA's intractable argument against complying with Section 808 is that the FAA is afraid that sound studies would reveal the agency has no case against SWS that the FAA can justify and document (see 49 USC §40128(b)(3)(F)). The FAA's alleged intent is to deprive the ATO at CACH of due process, preventing SWS from bringing "sound" evidence to the attention of a court that would discredit the agency's Finding and undermine the agency's justification for action. The wrongfulness of the FAA's methods is transparent.

c. The FAA's Finding is wrong, based on misinterpretation of law.

The FAA says on page 6 under *Statement of Effects*:

> The FAA, in coordination with the NPS, focused the assessment of effects on the **potential** for adverse effects from the introduction of audible or visual elements that **could** diminish the integrity of the property's significant historic features. (Emphasis added.)

This statement is antithetical to the purpose and methods of the entire ATMP undertaking. It demonstrates, by use of the words, "potential" and "could," the FAA's fundamental misunderstanding of applicable law in relation to complying with the provisions of NPATMA, NHPA (Section 106), and NEPA, combined.

Southwest Safaris has repeatedly argued, in relation to the creation of Air Tour Management Plans (ATMPs), that (1) NPATMA is the controlling legal authority; that (2) the Act, itself, triggers the activation of NHPA and NEPA at the appropriate time; and that (3) the Act controls, with respect to sound studies, the way those other statutes are to be implemented. The application of NHPA and NEPA is "directed and controlled" by NPATM to the degree that these other laws must found their decisions on science-based sound studies incorporating "pertinent data," [3] because of the presence of the "shall clause" imbedded in Section 808 of the Act mandating same. The FAA's confusion as to the proper role and timing of each of the three

[3] In Southwest Safaris' letter to Volpe of August 7, 2023, on page 17, SWS defined "pertinent" sound-study data to mean "current, comprehensive, relevant, accurate, and science-based."

statutes has led the agency to make major errors in the process of creating ATMPs. In the present instance, the agency's errors and omissions began with the errant creation of the CACH undertaking, progressed to wrongful application of Section 106 initiatives, and then ultimately undermined the CACH ATMP project by now arriving at a flawed Finding of "no adverse effects"… this conclusion permitting a determination of "no air tours." The FAA's multiple errors stem from basing its findings of "no adverse effects" and decision for "no air tours" on use of NHPA terms such as "potential" and "could" instead of on NPTMA precepts of "actual" and "measurable," which allows the vague and uncertain to control the defined and definite, contrary to Congressional intent for ATMPs.

d. The FAA's Finding is wrong, based on misapplication of law.

On November 7, 2023, the FAA wrote Southwest Safaris and discussed the definition of an "undertaking" and the interaction between NAPA and NPATMA. On page 3, under *The Applicable Law*, the FAA said:

> 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 [necessarily] meets the definition of an undertaking triggering the Section 106 process**. Thus, under Section 106 of the NHPA, federal agencies must consider the impact of their actions 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 FAA and the NPS must also comply with the Section 106 process under the NHPA and consider the effect of the undertaking 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.** (Emphasis added.)

The first sentence of the FAA's statement[4] of position is only half-true. It is true that federal actions which meet the definition of a legal undertaking require compliance with Section 106 of NHPA. However, the agency incorrectly adds the use of the word, "any."

It is not true that "*any* federal action" that might appear on the basis of agency initiatives to be an "undertaking" is, in fact, an "undertaking" in the eyes of the Law. A Federal action can appear to be an "undertaking," but not meet the requirements thereof. A Federal action that does not meet both the definition of and the requirements for an "undertaking," is not a *legitimate* "undertaking." This is the case with the FAA's application of NHPA with respect to the CACH ATMP. SWS argues that the CACH "undertaking" the FAA supposedly relies upon to justify the creation of an ATMP has not yet been *legally* triggered by meeting the requirements of NPATMA, which authority of Act is required by Congress.

Southwest Safaris offers three different amplified explanations for the illegality of the FAA's BAND ATMP "undertaking."

[4] The FAA's remark comes from its November 7, 2023 letter to Southwest Safaris, page 3, *The Applicable Law*.

Explanation1: At CACH, the FAA has never performed the "if any" test[5] required by NPATMA to check for significant, actual, present, adverse impacts on historic properties in the APE using science-based sound studies employing pertinent data. Therefore, a legal "undertaking" at CACH has never existed. Consequently, actions under NHPA and NEPA cannot *legally* proceed at CACH until the noise tests required by Section 808 of NPATMA are conducted to satisfy the "if any" condition in compliance with Section 808 of the Act. This is the short version of SWS' allegation.

The long version of the allegation requires some flushing out.

The principle of Primacy of Law[6] makes the National Parks Air Tour Management Act of 2000 the controlling legal authority in the creation of ATMPs. The FAA errs by acting preemptively to initiate the Section 106 investigation of CACH without having first acted on Section 808 of NPATMA in order to test the "if any" condition contained in the "Objective" paragraph of the Act, 49 USC §(b)(1)(B). Moreover, the Principle of Continuity of Law[7] means that Section 106 cannot be called upon by the FAA to negate the effect of NPATMA. Otherwise, the agency would be able to declare, by means of Section 106, that sound studies at selected Parks are irrelevant to determination of adverse impact of air tours on TCPs. Without the Principle of Continuity of Law, the FAA could base its objections to air tours at CACH on the Theory of Mere Presence[8] and simple allegations of noise intrusion, ignoring the requirement for noise

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[5] See Attachment 2: NPATMA's Primary & Secondary Objectives: The "if any" test and Section 808 compliance; how NPATMA, NHPA, and NEPA interact.

[6] The Principle of Primacy of Law directs the order of application of laws in a vertical manner. Where multiple laws affect a result, course of action, or determination, the laws must be satisfied in accordance with the most controlling to the least. See my letters to the FAA dated September 25 and October 1, 2023, wherein SWS gives a detailed discussion on the Principle of Primacy of Law as it applies to NPATMA, NEPA, and NHPA working together.

[7] The Principle of Continuity of Law means that one law cannot horizontally contradict another where they overlap.

[8] The Theory of Mere Presence is brought forward by parties opposed to the conduct of air tours in any form or manner over units of the National Park Service. The Theory of Mere Presence states that air tours, by definition, impose adverse impacts on persons and property on the ground, including religious and cultural sites and events, and that there is no way to lessen the impact of same, invasion of privacy in particular. According to this theory, all Air Tour Management Plans must completely ban all air tours of all types to eliminate any possibility for adverse effects in the future. This extremist theory asserts that any Plan that does not ban all air tours does not address "the problem" of air tours at all. In the case of Hawaii Volcano National Park (HAVO), the FAA flatly states that it will not consider the theory. For unstated reasons, the FAA appears to have reversed its opinion at BAND. The suddenly but conveniently "revised" opinion held by the FAA … that the mere presence of air tours in the Park is objectionable, in contrast to HAVO … lacks explanation and, therefore, credibility. The FAA everywhere else claims that the standard for determination of adverse impact of air tours under NPATMA is "existing conditions," not "no air tours."

studies altogether.[9] However, the power of the two principles working together means that Section 106 cannot be used to bypass Section 808. Furthermore, it means that Section 106 is only then called into conditional effect … meaning that NHPA decisions must be based on comprehensive, relevant, and current sound studies … after NPATMA passes authority to it by means of satisfying the all determining "if any" phraseology of the Act. Therefore, the FAA is currently exceeding its authority by prematurely asking for comment on historic properties within the APE before the subject of air tour noise has even been addressed by NPATMA. The FAA has failed to comply with Section 808 and standards of due diligence contained therrein.

For these reasons, the FAA's comment, "The development and implementation of an ATMP [necessarily] meets the definition of an undertaking triggering the Section 106 process," is entirely untrue. That being the case, everything that follows is also mostly untrue. For instance, the FAA says, "If the development and implementation of an ATMP meets the definition of an undertaking, the FAA and the NPS must also comply with the Section 106 process under the NHPA and consider the effect of the undertaking on historic properties." This statement is only true providing that the "if" conditional is true. In the case of CACH, the "if" conditional is not true. The CACH ATMP only has the appearance of legality, not the actuality of it. So, it is not true in the case of CACH that "the FAA and the NPS must also comply with the Section 106 process under the NHPA and consider the effect of the undertaking on historic properties." In fact, the agencies have no authority to do so at all, without first complying with NPATMA. For this very reason, the FAA's conclusion is not true in the case of BAND, either. AT BAND, the FAA also never complied with the "if any" condition and Section 808 process. The FAA erroneously says in grand summary, "Compliance with other applicable statutes and regulations does not mean that the agencies are not fully complying with NPATMA." As a point of law, to date the agencies have not complied with NPATMA at all. Therefore, the FAA's Section 106 initiatives at CACH and BAND are not in compliance with law and must be withdrawn, the Act being the controlling legal authority.

Explanation #2**:** The FAA has not determined by means of NPATMA's Section 808 that there is any need to proceed with changes to existing conditions based on the alleged impact of aircraft noise on Traditional Cultural Properties. All parks do not require ATMPs. ATMPs only apply to certain units of the NPS. Until certain conditions and exceptions are met for individual parks, the requirement for an ATMP does not exist. That is, the triggering requirement for an ATMP (and, therefore, for an "undertaking") does not exist just because the Act exists. In the case of CACH, if all legal procedures had been followed, the initiation of the ATMP process would indeed be an "undertaking," 36 CFR §800.16(y). Southwest Safaris agrees with the FAA,

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[9] The FAA tries to use Section 106 to end run NPATMA, there being no requirement under NHPA to conduct sound studies to prove the validity of claims for adverse effect of air tours on historic properties as defined by the NR. Under Section 106, a mere claim of the potential for adverse effect is considered evidentiary proof of legitimacy of allegation. Therefore, NHPA, considering the "if any" phrase in NPATMA and Section 808 methodology of compliance, is inconsistent with NPATMA … that Act requiring, thorough sound studies, the satisfying of the "if any" conditional test … and must, at least at first, be set aside under the twin Theories of Primacy of Law and Consistency of Law, until NPATMA conditionally allows it by making sound studies mandator as a condition for NHPA review, the Act being the controlling legal authority for ATMPs. Regardless, at CACH, Section 106 only comes into qualified force and effect if and when NPATMA passes authority to it … which happens only when a ***legal*** undertaking is commenced, not before.

arguing, as does the NPS, that by law Section 106 cannot be activated without the existence of an "undertaking," 36 CFR §800.3(a) … but the undertaking has to be legal. To date, the supposed undertaking at CACH is not legal for lack of compliance with NPATMA's "if any" test and Section 808's mandatory sound studies.

Explanation #3: In the case of the ATMP initiative at Canyon de Chelly, Southwest Safaris argues that legal process has not been followed. An "undertaking" in the case of an ATMP cannot commence without the 'if any" phrase of NPATMA being satisfied by science-based sound studies using "pertinent data"; or, it cannot begin unless the NPS determines that creating an ATMP is necessary to "protect park resources and values or park visitor use and enjoyment," 49 USC §40128(a)(5)(B). The NPS, nonetheless, has to prove the necessity for bypassing normal categorical exclusion rulemaking in *extraordinary* circumstances, 40 CFR §1501.4. Either way, the "if any" test and Section 808 sound-study requirements of NPATMA must be fully satisfied by law to comply with the Act's requirement for justification and documentation per 49 USC §40128(b)(3)(F). Section 808 cannot be bypassed, because inclusion of its "shall clause" makes it mandatory in all circumstances. In any case, the FAA has not performed the "if any" test, so the FAA's actions to proceed with its *Request for Concurrence* (i.e., Finding of "no adverse effects") as well as the whole CACH ATMP are illegal, at this time.

The FAA will certainly argue that Southwest Safaris' legal theories, though interesting, are irrelevant with respect to ATMPs. According to the Principle of Parallel Laws,[10] the FAA will assert, NHPA can act independently of NPATMA. Southwest disagrees, reaffirming that NPATMA creates a vertical stacking of statutes, in so far as the creation of ATMPs is concerned. SWS argues it is the FAA's position that is actually irrelevant in the current instance. Even if a court were to decide against SWS' theory of jurisprudence based on the Principle of Primacy of Law, affirming the FAA's Principle of Parallel Laws, the FAA's "undertaking" would still be illegal. The FAA's "undertaking" lacks initiation of a legal process (the "if any" test) and Section 808 sound studies under NPATMA before it can arrive at a final determination for "no air tours." Under the FAA's errant theory of jurisprudence, NPATMA may be postponed. Southwest Safaris rejoins that NPATMA acts first, then NHPA, thereby controlling NYPA at all times.

NPATMA cannot be avoided. In the case of CACH, "pertinent" sound studies have not been conducted at all. Without sound studies, the NPS cannot demonstrate, outside of claiming Theory of Mere Presence … which argument is not allowed by the FAA elsewhere … that critical "park resources and values" or "visitor use and enjoyment" have been adversely affected by air tours under existing conditions. The FAA has no other mechanisms of avoidance at its disposal. The FAA cannot rely on 49 USC 40128(a)(5)(B) to withdraw an exception, nor can the FAA justify using extreme corrective measures outside of an exception. No "extraordinary

[10] The Principle of Parallel Laws states that all laws run equal and parallel to one another. No one law is superior to another. All laws run concurrently, each triggered by its own enabling language. Under this theory, the FAA claims that NHPA has equal authority with that of NPATMA and is in no manner controlled by that Act. SWS argues to the contrary, that NPATMA creates a vertical column of laws, each triggered in sequence and controlled, in some degree, by higher law. This is a point of jurisprudence that the FAA, being a party to the dispute, cannot resolve administratively, without the help of the courts. Resolution of the disputed interpretation of law will have a major effect on the implementation of both Section 106 process and of the ATMP "undertaking."

circumstances" per 40 CFR §1501.4(b)(1) exist at CACH, the FAA's arguable Theory of Mere Presence notwithstanding.

The relevant undisputed fact is that Southwest Safaris has been conducting air tours over CACH for 49 years, without a single documentable complaint. Until the present ATMP process was initiated, the Navajo chapter houses surrounding CACH were unaware that fixed-wing air tours were even being conducted over the Park. Any alleged "potential" impacts of air tours on the few TCPs within the park that are protected by Section 106 are purely theoretical, imaginary, and conjectural, based on deductive assertions (NHPA), not inductive research (NPATMA).[11] Existing conditions at Canyon de Chelly, regarding sound levels of air tours, are well below noise levels that are objectionable to persons in the Park. This reality makes the de minimis presence of infrequent air tours (currently averaging 1.4 tours per week, but frequently averaging less than 50 flights per year) under Section 106 immaterial for argument. CACH should never have been selected for ATMP status in the first place; the decision is obviously being driven by politics, not operations. This explains why the Section 106 process has been so corrupted and why the FAA is loathed to comply with NPATMA, the Act standing in the way of unrestrained application of NHPA.

The FAA's Section 106 request for concurrence on a finding of "no adverse effects" at CACH at this time, lacks justification and authority, both under NPATMA and NHPA, for lack of initiation of a *legitimate* CACH "undertaking." The safeguards of NPATMA for air tour operators have been purposefully ignored by agency [12] to achieve a political objective beyond the reach of due process.

To return to an earlier point, the FAA errs in assuming that Section 106 process can begin just because the agency has declared that an ATMP "undertaking" has commenced, even if the "undertaking" is being federally financed. In the first place, under NPATMA the FAA has wrongly begun the ATMP process at CACH without going through Congressionally-directed process necessary to activate the "undertaking." In other words, the FAA, SWS alleges, is

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[11] The conflict between NHPA and NPATMA over deductive versus inductive determination can only be resolved by acknowledging that NPATMA is the controlling legal authority, the Principle of Continuity of Law being, once again, of critical effect. Guided additionally by the Principle of Primacy of Law and Intent of Congress, all assessments of air tour noise under Section 106 re. ATMPs must be based on "reasonable scientific methods" and "pertinent data," per Section 808 of the Act. By refusing to comply, under Section 106 the FAA fails to act/decide according to law.

[12] Congress never intended that NPATMA would be used to destroy the air tour industry. In order to ensure the rights of air tour operators (ATOs), including due process of hearing, Congress insisted that all ATMP initiatives under NPATMA would have to pass the test of reasonableness, the standard of determination being that of "existing conditions," not "no air tours." To safeguard these rights, Section 808 was added to the Act, the purpose of which was to create measures of decision that could be tested against science-based observations and allow for judicial review. By failing to conduct timely science-based noise studies using "pertinent data" (Footnote #3), the FAA has knowingly deprived ATOs of the ability to defend their right of operation by means of hard sound data and, thus, deprived them of constructive administrative and judicial hearing. Had timely, science-based, sound studies been conducted early in the ATMP process, most of the ATMPs the FAA has since created would have been proven to be without cause. Air tour operators cry "foul!" The FAA's lack of regard for Section 808 serves to negate operators' right of judicial review under 49 US §40128(b)(5), it being impossible under both NPTMA and Section 106 to provide credible evidence without authoritative sound studies.

illegally funding an "undertaking" which has no authorization. The FAA's action leads to accusation of abuse of process and misappropriation of Federal funds.[13]

In the second place, there is a question regarding the financial legality under Section 106 of the FAA's timing for the CACH ATMP relevant to NHPA. In 36 CFR 800.1(c) the ACHP (the Council) says:

> The agency official must complete the section 106 process ***prior to*** the approval of the expenditure of ***any*** Federal funds on the undertaking or prior to the issuance of any license. (Emphasis added.)

It appears that the FAA is in violation of NHPA's regulation. The FAA currently is well on its way to completing the CACH ATMP before consultation under Section 106 has been finished, and before fundamental legal questions … which have been outlined in this letter … have been resolved.[14] SWS submits that significant Federal funds (e.g., salaries and other administrative costs) have already been expended on the CACH ATMP without the FAA having even *legally* commenced an "undertaking" for same, let alone having completed the Section 106 process. For this reason alone, the FAA's Finding is in violation of NHPA regulation. The FAA's misinterpretation of law pervades the entire ATMP "undertaking."

In summation of argument, returning to the greater issue, the point in the case of CACH is that a legal Federal "undertaking" does not exist just because the FAA and NPS have inappropriately expended Federal funds to initiate a "process." Southwest Safaris' allegation keeps coming back to the same declaration of principle; implementation of an "undertaking" does not cleanse the method of bringing the action into being. An "undertaking" must first be *legally* triggered and legally financed. SWS alleges that the FAA errs by having commenced the ATMP-related Section 106 process at CACH without first initiating a *legal* "undertaking," as defined by the language of Congressional statute, NPATMA. By so doing, the FAA is in violation of NPATMA,

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[13] After NPATMA was passed by Congress, it would have been appropriate for the FAA to expend funds to test for conditions that would trigger the creation of ATMPs. Prior to that determination, predicated on Section 808 science-based studies, no further federal money was authorized by Congress to be spent. In no case was an "undertaking" meant to arbitrarily and capriciously put air tour operators out of business. The FAA and NPS (the agencies), SWS alleges, have together conspired to misuse Federal funds to achieve a political agenda, involving the radical curtailment of the air tour industry, never contemplated by Congress. In the process, SWS contends, the agencies have defrauded the U.S. Court of Appeals for the District of Columbia Circuit by deliberately withholding relevant information so as to deceive the court to "compel" the agencies to prematurely initiate "undertakings" that had, as of then and now, no legal basis for coming into existence, the requirements for same not being satisfied. The results are all too obvious for all to see: abuse of law and tragic/unnecessary destruction of the air tour industry.

[14] As of this date, the FAA has all but completed the ATMP for Canyon de Chelly. The FAA long ago gave copies of the draft CACH ATMP and EA to "cooperating agencies" but not to SWS.

NEPA[15], and NHPA, all three, the Court order[16] for the FAA to expedite ATMP process notwithstanding.

A court cannot compel an unlawful act. An order to expedite process is not an order to break Congressional law. Under NHPA, the FAA may begin investigative initiatives prior to activation of an "undertaking" under certain conditions, but the Agency cannot implement decision-making actions (e.g., requests for input and/or concurrence) prior to actual existence of a legal "undertaking," 36 CFR §800.1(c). Under NEPA, the FAA also has no latitude to commence work on a draft EA without "authorization" from the NPATMA process, meaning conduct of the "if any" test. The FAA's alleged disregard for NPATMA's controlling legal authority, using Court order as cover for action, has already led to grave injury of the general air tour industry, to the detriment of the economy of rural America.[17]

Moreover, SWS argues that the FAA's failure to establish a legal undertaking before beginning an ATMP initiative has precipitated violation of fundamental clauses of the Constitution. SWS refers to the Fifth and Fourteenth Amendments, both guaranteeing due process.

The Fifth Amendment protects persons from being forced to testify against themselves. The FAA's Request for Concurrence under Section 106, "allowed" by the illegal undertaking, requires the ATO to admit that depriving him of his right to fly over the Park will have "no adverse effects" on the Park, itself. The FAA thereby compels the ATO to agree that any counter-arguments submitted by the operator, though meritorious by themselves, have neither validity with respect to the purpose of the ATMP nor relevance to the process of Section 106 objection. Thus, the agency deprives him of his right to both argument and hearing.

By means of the Section 106 Request for Concurrence, the FAA has artfully contrived a means by which the ATO is forced to testify against himself, no matter how he frames his objections, grossly prejudicing a decision of the agencies (FAA and NPS) against his right of operation.

If the ATO agrees that imposition of Alternative d2 (no air tours allowed over the Park) of the pending draft CACH ATMP would have "no adverse effect," he loses his defense claiming right of operation. If the ATO declines to engage in pointless argument against a flawed and self-fulfilling double-negative syllogism leading to a conclusion favoring a decision of "no adverse effect," the FAA will decide against him, the ATO having made no argument to the contrary. If the ATO argues against the finding of "no adverse effects," his arguments are thrown out for not

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[15] NEPA is equally impacted by the Controlling legal authority of NPATMA. The requirement for satisfying the "if any" phrase and Section 808 sound studies under NPATMA are mandatory prior to the justification for, and commencement of, a NEPA Environmental Assessment. After the former is accomplished, NPATMA permits the latter to commence, in that order, if the creation of an ATMP is justified by the Objectives of the Act.

[16] *Order of U.S. Court of Appeals, District of Columbia Circuit, supra* Footnote #35

[17] For these reasons, SWS submits that it would be much better to stop the ATMP process at CACH now, correct the situation (there and at other units of the NPS, Bandelier National Monument, Badlands, and Mount Rushmore in particular), and then proceed, rather than force the issue of ATMP management back before the U.S. Court of Appeals, the outcome of which would be far from certain for all parties.

being relevant to Section 106 objection, but to NEPA concerns. That is, if the ATO engages in argument, he is told that his arguments are irrelevant under S106 and too late for NEPA objection. The comment period for the ATMP (as in the case of BAND) will have already closed before the S106 process was completed. That was the actual case at BAND. The same forces are aligning themselves at CACH, the FAA having initiated the ATMP process long before the S106 process can be finalized.

Under both the 5th and the 14th Amendments, ATOs are guaranteed the right to fair trial and/or administrative hearing. By failing to honor the language of the 5th and 14th Amendments pertaining to self-incrimination, and the requirement of Section 808 of NPATMA at CACH for sciences-based sound studies, the FAA makes it impossible for the ATO to bring his grievances under NHPA and NPATMA before a body of hearing. The ATO has been denied not only the right to constructive argument under NHPA … the ATO having to contend with double-negative syllogisms… but also the ability to present current objective evidence under NPATMA … the ATO being deprived of access to sound studies that SWS could otherwise offer in its own defense. Therefore, the FAA violates, under Section 106, both the Constitution and the judicial review clause of NPATMA, 49 US §40128(b)(5).

The 5th and 14th Amendments were both drafted to ensure a review process of executive actions that would guarantee fundamental fairness, both procedurally and substantively considered. The FAA's application of NHPA and lack of application of NPTMA to the CACH ATMP defies both. The FAA disallows substantive argument under rules of logic (violating the intent of Section 106) and makes presentation of credible facts (i.e., sound studies) under rules of evidence impossible, in the meanwhile forcing ATOs, by means of the FAA's *Request for Concurrence*, to testify against themselves and their own interests. The entire Section 106 process is so flawed and so aligned against fair and impartial hearing of ATOs' grievances that it must be halted pending judicial review of the ATMP process.

e. The FAA's Finding is wrong, because it attempts to override controlling law.

NHPA and NPATMA war against one another.

Under NHPA there is no requirement for sound studies. Under NPATMA, sound studies must be performed. Under NHPA, mere allegations suffice as convicting evidence; under NPATMA there has to be hard evidence based on reasonable scientific methods. Under NHPA, the standard for decision is "potential" adverse effects; under NPATMA, the adverse impacts have to be "existing." Under NHPA, "feelings" and "cultural setting" can be the basis of complaint; under NPATMA, complaints have to be moored to measurable effects. NHPA is predicated on deductive speculation; NPATMA, on inductive methodology. NHPA means are the extremes; NPATMA seeks reasonable compromise based on common-sense solutions. The two statutes are completely incompatible. Without there being a priority of authority, the war between the two will destroy the principle of controlling jurisprudence.

Clearly, one of these laws has to control the other in the matter of ATMP creation. Congress wrote NHPA back in 1966. It was drafted as a general law to preserve historic properties. NPATMA was meant to be an aviation law. It was passed in 2000. Under the Principle of Primacy of Law, the specific law controls the general; the later law controls the earlier; the law that activates the other, is the controlling law; the law that contains the purpose and intent of Congress for a specific "undertaking" is the controlling law. In the case of ATMPs, where NPATMA, NEPA, and NHPA all must work together, NPAMA is the managing regulating statute, residing in a vertical manner on top of the other two.

Contrary to FAA theory, NHPA does not stand on its own with respect to the creation of ATMPs. In the present instance, NHPA only has power to the extent that it is called into effect by NPATMA. It is NPATMA which creates the existence of a NHPA undertaking, so NPATMA determines the timing of NHPA's calling and the methods and vocabulary that NHPA can employ. In short, NPATMA contains the "genetic code" written by Congress for the creation of ATMPs. NPATMA, therefore, is the controlling legal authority for managing the ATMP process.

The FAA's *Letter of Effects* endeavors to use NHPA methodology to override NPATMA law … but to no avail.

NPATMA specifically demands a three-step process for an ATMP undertaking to be called into being. First, at any given park, possible adverse effects from air tour operations must be tested for an "if any" condition (49 CFR §40128(b)(1)(B)). Second, the test for the "if any" condition must be performed in compliance with Section 808 of the Act, which requires sound studies using "reasonable scientific methods" based on pertinent data. Third, a reasonable solution for remedying adverse solutions must be chosen that is both "acceptable and effective." "Acceptable" means agreeable to all parties. "Effective" includes the application of reasonable compromise by all parties to achieve a common goal. Without compromise, no solution will hold together, destroying its "effectiveness."

The FAA's *Letter of Effect*/*Request for Concurrence* (the Letter) attempts to use Section 106 language and methods to undermine NPATMA's authority. The Letter makes not a single mention of NPATMA, fails to perform the "if any" test mandated by NPATMA (see Attachment 2), completely ignores the Section 808 requirement to perform sound studies (see Attachment 2), imposes unreasonable assumptions meant to predetermine the outcome of the Finding (see Section 2a), is based on hearsay evidence (see section 4), and offers not even the pretense of compromise. In fact, its Finding of "no adverse effects" is, indeed, extremist (see Section 4).

Contrary to FAA and ACHP opinion, there is nothing in NHPA that requires the FAA to take the most radical approach to quelling alleged adverse impacts from air tours (see Section 4). The FAA resorts to extremist measures by eliminating air tours altogether. The agency falsely claims that doing so will have no consequential effect (see Section 1b).

The FAA's Finding is based on deductive noise assessments derived from noise modeling. The FAA AEDT methodology consists of sophisticated technology, not science. In fact, it is based on very elaborate spreadsheet algorithms. It is not suitable for weighty environmental analysis, according to Congress (Section 808 of the Act) (see Section 6).

Moreover, the methods and goals of Section 106, as used by the FAA, are diametrically opposed to the Will of Congress, as documented many times by SWS (see Attachment 1).

Therefore, the FAA's Finding of "no adverse effects" must be rejected because its illogic rips at the fabric of American law. The FAA's theory of jurisprudence is predicated on the assumption of guilt until proven innocent. Innocence is impossible to prove under the tenants of S106 double-negative syllogisms.

The FAA's Finding, in fact, violates NPATMA entirely. It is a mere untested hypothesis masquerading as a proof, presented as an axiom, that makes constructive "consultation" impossible, because the axiom arrives at a predetermined decision of "no air tours." Without conducting sound studies, the agencies have made it impossible to break the axiom. This makes a mockery of due process. The agencies need to go back to the Court and get an interpretation of the order of law. Administrative discretion cannot be substituted for Constitutional interpretation. The power of legal interpretation properly resides with the courts.

At the top of page 4 of the ACHP's December 21, 2023 Opinion re. the FAA's Finding of "no adverse effects," at BAND, the ACHP says:

> 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.

The ACHP's statement of Dec. 21 agrees with the FAA's statement of November 7:

> 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 FAA and the NPS must also comply with the Section 106 process under the NHPA and consider the effect of the undertaking on historic properties. Compliance with NPATMA does not preclude compliance with other federal statutes and regulations.

Both the ACHP and the FAA err by hitting a bullseye on the wrong target. The point is not that the FAA has to comply with Section 106, SWS acknowledges that. The issue is that NPATMA controls the target that Section 106 must hit, both the when and the how, i.e., the timing, vocabulary, and method of NHPA analysis.

The ACHP's statement of December 21, however, is incorrect. To paraphrase, the ACHP says that because NPATMA does not expressly exempt the FAA from responsibility for compliance with Section 106 of NHPA, the FAA must fully comply with Section 106 without regard for the purpose and methods dictated by NPATMA. This could not be further from the truth, but explains the refrain that the ATO keeps saying. The statutes naturally war against one another, so Congress gave control to NPATMA.

In the present instance of the ACHP's misstatement, SWS rejoins by clarifying that NPATMA does not have to incorporate specific language that would "exempt or waive … compliance with Section 106 of the NHPA." The very Act, itself, controls the overall process and keeps NHPA from warring with NPATMA in such a manner as would destroy the purpose of the entire ATMP process. NPATMA requires that certain parts of NHPA be implemented to assess significant adverse effects on historic properties, but also requires NHPA to make the assessments utilizing science-based sound studies and verifiable evidence grounded on existing, not hypothetical or "potential," conditions. In the case of the FAA, its Finding is flawed at Canyon de Chelly, because the "if any" conditional is not tested for positive results. The FAA has not verified that adverse conditions even exist, as previously discussed.

The ACHP and FAA abuse Section 106 process by ignoring the overriding goal of the ATMP initiative. This was to implement a reasonable and common-sense approach to mitigating provable existing significant adverse impacts on historic properties. Only NPATMA can accomplish this. Both NHPA and NEPA innately have propensity to work towards the extremes, not the means. In defiance of Will of Congress, the ACHP boldly states, and the FAA agrees, that the FAA is not compelled by that governing body to consider NPATMA at all for purpose of Section 106 implementation, that NHPA regulations stand on their own. Southwest Safaris rejoins that this is why the ATMP process has gotten out of control, doing untold damage to ATOs, rural communities, and regional economies and that this approach, as demonstrated, represents an unreasonable analysis of the proper interaction of the laws at hand, sending a wrecking ball through the rural air transportation system.

III The FAA's Finding is wrong, because the agency's list of historic properties in the APE is based on hearsay.

SWS alleges that the FAA's list of 37 cultural resources in the APE of the BAND ATMP is based on hearsay. None of the corroborating testimony in support of the list has been gathered or verified by the FAA, itself.

To verify the authenticity of the historic properties at CACH, the FAA had a legal responsibility to "walk the park" to validate the NPS' claims for legitimacy of National Registry (NR) eligibility. The FAA failed to perform this duty. The FAA would have realized the legitimacy of SWS' objections to the agency's selection of historic properties if the agency had complied with 36 CFR §800.4(b)(2). This regulation requires, under heading of "Identification of Historic Properties," the FAA to "conduct an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects . . .." Under regulation, this obligation cannot be delegated to another agency, particularly the NPS, which has an obvious self-interest in the outcome of the ATMP process. The FAA has no authority, SWS claims, to ask for comments from the public/ATO relating to itemized historic properties till the agency has personally conducted field investigation to verify the accuracy of the list of properties. Without the verification, the public comments would be irrelevant. As it is, the FAA relies 100% on other people's/agencies' untested memories and unchallenged records.

Until the FAA reveals the location of each of the FAA's claimed "cultural resources," the FAA list of historic properties has no credibility. Each site needs to be verified. Otherwise, the evidence the FAA relies on merely consists of a general aggregate of testimony involving unidentified third parties (tribes, consultants, and archaeologists) presented as unsubstantiated facts by second parties (the NPS and State Historic Offices) that have little firsthand expertise with the field research behind this specific data. Such testimony, both verbal and written, with a few exceptions, is inadmissible in either court or hearing body, without field confirmation by the FAA.

Incredibly, the FAA counterclaims that hearsay, under the rules of NHPA, is admissible for Sec.106 purposes. The FAA claims that it is not bound by rules of evidence applied by courts.

SWS rejoins that the FAA can cite no source that allows the agency to use hearsay.

The FAA counters by reliance on the fact that NHPA (under Section 106) generally considers all testimony, especially that of Indians, to be appropriate evidence, without any verification.

In turn, Southwest Safaris responds: (1) the FAA's opinion allows unsubstantiated evidence to "poison" objective analysis; and (2) the courts have long recognized that contamination of evidence with hearsay must be arduously avoided in order to ensure due process.

Because (1) the FAA failed to conduct and/or verify any kind of actual field investigation; and because (2) the agency relied in large part on testimony and records of unidentified "consulting parties," all of whom SWS assumes had a personal/agency interest in the outcome of the eventual S106 finding; and because (3) the NPS and the Navajo Nation (e.g., local Chapter Houses and the Navajo Heritage and Historic Preservation Department, plus members of the Tribal Council[18]) have an admitted vested interest in denying Southwest Safaris right to fly over the Park … which predilection makes objective analysis and presentation of data impossible. SWS asserts that the FAA and the NPA (the agencies) working jointly, in fact made neither "a reasonable and good faith effort to identify historic properties within the APE,"[19] nor did the agencies use reasonable and appropriate means of identifying historic properties consistent with the ACHP's regulations.

It remains, then, for Southwest Safaris to demonstrate that the 1,637 cultural resources that the FAA claims lie within the District of the APE, including 1,600 archaeological sites, are not properly included or eligible for inclusion on the National Register. The reasons have to do with current eligibility. The sites are only eligible for listing on the NR for reason of general historic accommodation. The claims for specific historic importance/and relevance are impossible for the FAA to verify.

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[18] See Footnote #38 in reference to testimony of Mr. Carl Slater, member of the Navajo Nation Council, delivered on December 5, 2023 to the House Natural Resources Subcommittee on Oversight and Investigations. See also Footnote #39 for quote from Navajo Council Speaker Crystalyne Curley in Gallup Sun newspaper.

[19] See FAA's *Finding of Effects* letter, December 28, 2023, page 5, *Identification of Historic Properties*.

As it turns out, the FAA, itself, admits that 1,600 of the claimed properties are irrelevant to the "undertaking." On page 6 of the FAA's *Letter of Effect*, the FAA says:

> 1,600 additional inventoried and recorded below-ground archaeological sites [lie] within the APE; however, these below-ground archaeological resources are not further described in this letter because feeling and setting are not characteristics that make these properties eligible for listing on the National Register and there is no potential for the undertaking to affect these resources.[20]

So, Southwest Safaris has only to refute the listing of the other 37 sites in the APE.

Title 36, Part 60 is concerned with the National Register of Historic Places (National Register, or "NR"). §60.4 lists the "Criteria for Evaluation" that must be used to determine the characteristics of a property that might make it eligible for listing on the National Register. All of the properties referenced by the FAA in the APE are technically considered "sites," because they have physical presence over and above cultural significance. So, they fall under the eligibility rules of §60.4.

According to 36 CFR §60.4, none of the individual properties included in the "districts" listed in Schedule C of the FAA's *Letter of Effects* would qualify on their own as Historic Properties (HPs). Sacred space and religious/cultural setting (e.g., "cultural landscapes" and "traditional cultural properties") are not enough to make a property (i.e., a "site") eligible for listing on the NR. Nor are properties qualified whose only distinctive characteristics are "setting and feeling."[21] The NR does not include "outdoor spaces designed for meditation or contemplation,"[22] either.

The NR regulation concerning qualification of properties reads as follows:

> §60.4 *National Register criteria for evaluation.* The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, *sites*, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, *feeling,* and association **and** (a) that are associated with events that have made a significant contribution to the broad patterns of our history; **or** (b) that are associated with the lives of persons significant in our past; **or** (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; **or** (d) that have yielded, or may be likely to yield, information important in prehistory or history. (Emphasis added.)

[20] Southwest Safaris points out that this line of reasoning is diametrically opposed to that used by the FAA for the BAND ATMP. At BAND, the FAA argues that all 3,000 some ancestral cultural sites of the local Tribes ae still sacred and have to be protected by the ATMP for reasons of "settings and feelings." The FAA argues inconsistently from park to park, undermining the agency's credibility.

[21] Non-listing of TCPs. See FAA's Finding of Effects Letter, December 28, 2012, page 5, Identification of Historic Properties.

[22] Ibid

There is an "and" coordinating conjunction involved in the regulation, followed by a long line of "or" conditionals. The regulation is a logic statement consisting of "and/or" construction. In order to be eligible for listing on the National Register for religious/spiritual/cultural reasons, property categories of the classes the FAA mentions would need to have "setting/feeling" qualities *plus* meet at least one of the "criteria considerations" listed in the above regulation stipulation.

All but one of the TCP properties listed in the FAA's Attachment C fail to meet the standards of the "or" clauses/ subparagraphs (a) through (d) above. With the exception of White House Ruin, none of the individual TCP properties are even generally associated with identifiable historic events of significant record, (a); none are associated with specific persons, (b); none but White House Ruin are associated with works of construction or creative design, (c); and none but White House Ruin "yield information important in prehistory or history," (d). In the case of Spider Rock, Spider Woman is a figure of current reality to the Navajo people; she is a living figure whose importance is primarily in the present. Attachment C lists no identifiable connection of Spider Woman with historic events, citing no specific commemorative aspects of Spider Woman's actuality, only general reference to her as a teacher of timeless spiritual values. A towering rock monolith is not an architectural achievement; it is a landmark, not a structure. No historic battles occurred at Spider Rock. Moreover, the NR makes no mention of anthropomorphic qualities passing from spiritual persons to physical properties (rocks) so that the identity of a natural object would become that of the spiritual, allowing the property to take on timeless historic significance. Spider Rock is a popular tourist attraction, lacking privacy and silence viewed from the overlooking parking lot.

Beyond two listed NPS buildings plus White House Ruin and Spider Rock, other possible historic properties in the Park are only identified in Attachment C by number. With the exception of White House Ruin, nothing substantive is said about the individual identities, histories, or integral importance of these numbered properties to the overall historic characteristics of the Park, only that several of the sites have "setting and feeling" attributes that are "significant," whatever that means. [23] By concealing the majority of the sites' identities, the FAA has deliberately made the sites impossible to critique for veil of secrecy. The FAA denies ATOs due process by withholding from ATOs constructive opportunity to comment on the numbered properties. SWS challenges the numbered properties authenticity. SWS further argues that the 33 numbered TCPs within and outside the Park boundary should be eliminated from eligibility on the National Register for lack of qualifying criteria (specificity and relevance)

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[23] The FAA makes reference to the National Register Bulletin 36, pointing out that "A contributing resource has the following characteristics: it was present during the period of time that the property achieved its significance; it relates to the documented significance of the property; and it possesses historical integrity or is capable of yielding important information relevant to the significance of the property." SWS counters by observing that this reference is far too general, too abstract, does not apply to specific physical sites, and is too vague with respect to application. Moreover, the information contained in the contested "contributing resources" is not of *significance* or *importance* with reference to each individual site.

and eliminated from consideration in the proposed CACH ATMP for lack of connection with any particular route (lack of definition and location). [24]

Attachment C lists only 37 individual historic sites. Only two "building properties" are included in the Park HQ inventory, and neither one of them counts[25]; none of the sites lie along or directly under the routes flown by SWS. Within the districts, the FAA claims that there exist 35 "cultural resources," but none of them are actually listed on the NR. For 33 of the sites, the FAA gives no proof of even their actual existence by any sort of geographic reference that either the agency or the ATO can verify. This is a point of important contention; the sites are "faceless," having no individual characteristics.

The FAA says that the "information provided by consulting parties, including tribes, is reasonable and an appropriate means of identifying historic properties and is also consistent with the ACHP's regulations." Southwest Safaris disagrees.

In the first place, the information garnered from consulting parties relating to historic properties dating back far beyond collective memory can only have been derived from historic hearsay passed down from one consulting "expert" to the next. Consulting with Indian tribes, as required by NHPA regulation per PL 102-575, does not change the type of reliance (hearsay) that the FAA is depending on.

PL 102-575 states:

> In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).

[24] It is interesting to note that none of the "cultural resources" claimed by the FAA for inclusion on the National Register have been listed in the registration for the historic property. The registration form has not been updated since 1970.

[25]One of the properties listed is the "Custodian's Residence." This property is ineligible for inclusion in the FAA list of historic properties in the APE because it properly belongs to the Thunderbird Lodge historic district. This district was not listed as one of the included "Districts" in the APE because the cluster of buildings has been specifically delisted from the National Register. Moreover, the Lodge is a working partner with Southwest Safaris, providing numerous ground services for the ATO. By standing agreement, SWS signals the Lodge of the ATO's arrival by flying over the Lodge at a low enough altitude to be heard in the office, to confirm need for pickup at the local airstrip. Noise and physical presence of air tours at CACH is obviously not an issue with Thunderbird Lodge, the FAA's obsession with "settings and feelings" notwithstanding. The Lodge is a major employer of Navajos in Chinle, who, upon inquiry, appear to share the opinions of management. The other building serves as the HQ for the Park. It, too, is not listed as a site on the NR, because its construction is neither unique nor commemorative. It sits immediately adjacent to the main visitor parking lot. It is one of the noisiest parking sites in the Park, so the applicability of "setting and feelings" as a characteristic of the property that would qualify it for inclusion in the APE is completely inappropriate.

Complying with this law does not mean that the FAA necessarily has to incorporate the statements and figures of the Tribes. To do so without verification of data would still imply reliance on hearsay. The FAA has provided no evidence of fact-checking, relying only of the highly biased testimony of the NPS and Tribal Historic Office for concurrence.
In the second place, listing on the NR is not determined by NHPA, but by a different set of regulations. In the present instance, eligibility of the properties is solely determined by the "Criteria for Evaluation" enumerated under 36 CFR §60.4. Very few of the tests of qualifying criteria would successfully apply to the individual "sites" in question. Southwest Safaris claims, therefore, that the supposed "cultural resources" listed by the FAA likely represent grossly exaggerated claims by the NPS and Tribes. These are highly prejudiced parties to the ATMP undertaking, whose word, therefore, cannot be taken at face value, 36 CFR §800.4(c)(1) notwithstanding. Of the 37 TCP properties listed in Attachment C, all but White House Ruin fail to meet the standards of the "or" clauses/subparagraphs (a) through (d) above.

All of the sites, including the buildings,[26] fail the eligibility test for reason of itemized "criteria considerations." These §60.4 stipulations follow in the regulation immediately after the "National Register Criteria for Evaluation" paragraph referenced above. Cemeteries and graves of historical figures and properties primarily commemorative in nature, characteristics obviously alluded to with reference to the 35 cultural and archaeological sites, are not considered eligible for the NR. §60.4 states that "Ordinarily properties . . . used for religious [including prayerful, meditative, and ceremonial] purposes . . . shall not be considered eligible for the National Register." None of the listed extenuating exceptions to this rule apply under §60.4, with the possible allowance for (f) White House Ruin.[27] However, none of the other properties in question are "primarily commemorative in intent," nor do they have "*exceptional* significance." None of the other properties listed were originally created by man for celebratory purposes, and natural properties do not "inherit" man-made "traditional significance" over time unless an extraordinary historic event is directly associated therewith. The FAA makes no claim that any of the listed TCPs have commemorative association attached to identifiable events. Therefore, all of the unnamed TCPs lack overall "integrity" of presentation with respect to the NR.

The criteria for eligibility of listing on the NR do not include landscape locations "that have been continuously used for contemplation and prayer." Nor do the criteria for eligibility allow listing "because of association with cultural practices or beliefs." The concept of "cultural landscape" including "outdoor spaces designed for meditation or contemplation" is completely foreign to the wording of the NR's Criteria for Evaluation and to the qualities of stipulated exception/eligibility that follow. The FAA has artfully crafted the misleading and prejudicial terminology. The NR considers such sweeping categories to be much too broad. On the other hand, individual TCPs are not automatically and separately included in the NR just because they have cultural importance for current time. Their eligibility for listing comes solely from being part of the Park.

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[26] *Ibid.*

[27] With regards to exceptions for governing listing on the NR, §60.4 says: "However, such properties will qualify if they are integral parts of districts that do meet the criteria of if they fall within the following categories: (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or . . ."

The main justification for all of the TCPs but White House Ruin being included in the APE as historic sites is that they fall within the boundaries of CACH. This is a "district" that does meet the criteria for listing on the NR. However, the majority of the properties, considered by themselves, would not meet the criteria.[28] Moreover, the exception for reason of district inclusion is nullified by the fact that the individual properties are not "integral parts of districts," meaning that they cannot be cognitively recognized as such by laymen and cannot readily be observed as historic sites by normal visual means. The sites lack unique physical characteristics (being "faceless"). Their presence is not essential to the identity of the Park. They are cultural locations of importance to local residents, not material or objective sites that contain specific historic importance/relevance to the Park. The sites have only general "setting and feeling" of note.

Southwest Safaris acknowledges the existence of special wording in PUBLIC LAW 102-575—OCT. 30, 1992 106 STAT. 4757 which says that "Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." SWS notes, however, that the wording does not include, "without further consideration" at the end of the statutory language. SWS alleges that the FAA errs in two ways. First, the agency misinterprets the "may be determined" clause to mean "shall be determined." This clause carries vastly different meaning than the alternative interpretation, which would mean, instead: "is allowed to be considered for …." Under the alternative interpretation, the properties would be given favorable consideration, but would still have to abide by 36 CFR §60.4. Southwest Safaris argues in favor of the alternative interpretation, contending that inclusion of the properties on the NR is not automatic.

Second, the FAA does not recognize the full meaning of 36 CFR §800.4(c)(1). With reference to the current instance, the relevant portion of the NCHP regulation states:

> The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible.

Certainly, the passage of time has affected the qualities of the 35 sites that the FAA is claiming as cultural properties for inclusion in the NR. Many of these sites are over 1,000 years old. They have been buried by sand at the rate of one shovel of time per year and deteriorated to the point where they are unrecognizable to the untrained eye. They have been ravaged by fire, wind, storm, flood, sun, and vandalism. Their relevance to the NR by current standards has become sadly irrelevant except in the most historic context. Most of the 1,600 "cultural resources" at CACH supposedly listed on the NR no longer constructively exist anymore and, for the sake of accuracy and credibility, should not be considered eligible for listing on the NR, their "potential presence" undermining the integrity of the Register. Currently, except for the well-meaning but unverified testimony of tribal members, there is no way to know which of the listed cultural properties are "real" for purposes of NR listing and which are not anymore.

[28] *Non-listing of TCPs, supra* Footnote #21.

SWS points out that creation of Prohibited Airspace in the CACH ATMP above TCPs cannot be based on undefinable "cultural landscapes" of vague social and religious significance from bygone times. Moreover, considerations of airspace surrounding historic properties is not relevant to the National Registry's *Criteria for Evaluation*. §60.4 makes no mention of "viewsheds" being a part of a historic property's intrinsic value. "Diminishment of viewshed" is a concept foreign to the *Criteria for Evaluation* and not a factor of relevance under NPATMA when determining adverse impact of aircraft presence. This discounts most of the FAA's criticism of air tours over the Park.

Additionally, the *Criteria for Evaluation* attaches no vertical column of airspace to any historic property. Therefore, cultural and ceremonial sites have no claim to trespass or intrusion of presence by persons or machines passing overhead either by foot or wing. This largely discounts the rest of the FAA's objections to air tours over the Park.

The FAA's attempt to rely on hearsay was erroneously reinforced by the ACHP when the ACHP responded to the FAA's request for opinion regarding a pending ATMP for Bandelier National Monument (BAND). In the ACHP's letter to the FAA of December 21, 2023, the ACHP said on page 4, *ACHP's Review of Finding*:

> Based on the information provided by Tribes, noise and visual elements from air tours [at Bandelier National Monument] 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.

Relying on the arguments and regulatory language cited earlier, Southwest Safaris strenuously refutes the ACHP's statement. The Council claims that information provided by Tribes is sufficient unto itself as qualifying evidence of historic properties without any archaeological evaluation. They further claim that allegations of "potential" adverse effects from air tours have to be accepted without cross-examination or any means of verification. The NHPA regulations, themselves, make it patently clear that this is not the case, which is probably why the ACHP cites no regulations upon which its flawed interpretation rests. Moreover, NPATMA also disagrees with ACHP opinion, the Act requiring performance of the "if any" test by means of Section 808 sound measurements in order to verify any alleged statements of adverse impacts from air tour overflights. SWS says yet gain, in refrain, that NPTMA, not NHPA and not NEPA acting by themselves, is the controlling legal authority re. all matters relating to the creation of ATMPs.

SWS concludes this section by stating, with reference to the APE for Canyon de Chelly, that the FAA is asking for the impossible. It is not fair under Section106 for the FAA to ask an ATO to comment on boundaries of the APE based on TCPs that the FAA will not identify as to location. All claimed historic properties at CACH should be identified on a map, the argument for privacy notwithstanding. The FAA is wrongly withholding the locations of historic sites that would be essential for planning air tour routes.

IV <u>The FAA's Finding is wrong, because it is based on extremist interpretation of law, ignoring NPATMA</u>.

There is nothing in the Federal Code that justifies the FAA's extremist interpretation of law and regulation. The FAA misuses the regulatory body to ban all air tours over Canyon de Chelly and Bandelier.

The ACHP, upon whose opinion the FAA relies, apparently agrees. In the ACHP's Opinion letter of December 21, 2023, in which the Council comments on the FAA's Finding of "no adverse effects" for the BAND ATMP, the ACHP says at the bottom of page 4:

> 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)). (Emphasis added.)

The FAA builds a huge untruth around a small truth. While it is true that "Section 106 process does not mandate a specific outcome" … meaning that NHPA does not require the FAA to choose the most radical remedy for addressing adverse impacts … the rest of the FAA's sentence is blatantly false. NHPA regulations do not require or even suggest an order of remediation for "potential" adverse effects.

The actual language of the regulation to which the ACHP refers is contained in 36 CFR §800.1(a) (not §800.6(a), which the ACHP erroneously cites). That wording says:

> §800.1 Purposes
>
> 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.

The ACHP and the FAA base their entire theory of extremist remedy on misinterpretation of this single, informative sentence. The rationale of the statement was simply to give the "purposes" behind the NHPA statute and the general methods of accomplishing them. It serves as introductory text for the NHPA statute. The text gives an explication of goals and the means of attaining them, not instructions for how to achieve them; that comes later in the law. The wording of the sentence does not include any mandatory terminology such as "must" or "shall."

The ACHP incorrectly declares that the first and major priority of Section 106 is to avoid adverse effects on historic properties altogether and, if that option is not available, only then would the FAA, empowered by the ACHP, elect alternative remedies that would either minimize or mitigate adverse effects. The regulation, as quoted, says no such thing.

Textual analysis of the regulation refutes the Council's interpretation. In the first place, Congress presents the words, "avoid, minimize or mitigate," merely in alphabetical order. In the second place, Congressional use of the coordinating conjunction, "or," creates equal standing

between the terms, not priority of order. Congress gave agencies three choices of remedy; they could choose any one of them, providing that the agencies could justify it (49 USC §40128(b)(3)(F)). In the third place, had Congress intended the interpretation adopted by the ACHP/FAA, Congress would have expressly used wording calling attention to that effect, such as adding "in that order" to the end of the sentence. In the fourth place, Congress uses words that do not express a clear difference of degree. By using the words, "minimize or mitigate," Congress attempts to draw a distinction that does not make a clear difference, the degree of difference being just too subtle for regulatory purposes. If Congress had meant the words to apply in descending order of degree for aviation purposes, where clarity is of utmost importance, it would have employed more useful vocabulary. It might have said, "… seek ways to prevent, accept, or modify any adverse effects on historic properties, in that order." Evidently, Congress had no obvious order of preference for implementing the three choices for correcting adverse impact. Congress simply directed that the decision would be "reasonable" … meaning made with the aid of the intentional "if any" test required by NPATMA … and "justifiable … meaning consistent with the findings from performing the science-based sound studies required under Section 808 of the Act.

NHPA was never written to be an aviation regulation. NPATMA was. The FAA is relying on language that is not applicable to its endeavor. This is yet another example of why Congress intended NPATMA to be the controlling legal authority re. ATMPs, where the language is specific to the "undertaking."

The ACHP's/FAA's gross misunderstanding of Federal code as it applies to the ATMP process goes to the heart of the FAA's justification for using extremist remedies for eliminating all "potential" (i.e., currently nonexistent) adverse impacts on historic properties. This policy drives the FAA's interpretation of NHPA regulations to allow the agency to arrive at an erroneous Finding of "no adverse effects" from banning all air tours over the Park. In this manner, the agency can conclude the ATMP process with a decision of "no air tours" allowed, which contradicts the Will of Congress (see Appendix 1).

It appears that the ACHP has been caught in a misstatement of huge proportions, The Council attempts to grab powers under Section 106 that Congress never granted. Then the Council gives them to the FAA. Of course, one would expect NPATMA to come to the opposite conclusion … and it does. Ergo, the FAA's reason for hating NPATMA and trying to skirt, or negate, or violate it.

NPATMA, 49 USC 40128(b)(1)(B), voices just the opposite of the Council's Opinion, that:

> The objective of any air tour management plan shall be 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.

The language of the Act is very clear. There is an "or" between "mitigate" and "prevent." Under NPATMA, there is no imperative to "avoid" all "potential" adverse impacts, the concept of "avoidance" being foreign to the Act. By incorporation of the word, "or," NPATMA expressly allows latitude of mitigation methods. The *Objections* section of the Act gives the FAA power only to prevent the *defined* "*significant*" *existing* adverse impacts of air tours over

parks, not eliminate *all* "*potential,*" *unmaterialized*, *future* consequences of same. The ACHP methodology, in contrast, favors avoidance schemes based on the theory of "potential" adverse effects. This is a speculative concept which is unsupported by regulation of either NHPA or NPATMA origin. The policy would deny the ATO at BAND the right to fly over the Park regardless of the results of the "if any" test, even if the test proves "no adverse impacts." The ACHP attempts to use NHPA as a weapon with which to war against NPATMA, in violation of basic principles of jurisprudence (Primacy of Law and Continuity of Law). However, the Council's aim falls short of its mark, failing the test of strict scrutiny.

To elaborate in greater textual detail, the word "potential" does not even appear in NPATMA, nor does the Act include the word, "avoid." "Avoid" carries the inference of "potential," as in the FAA's favorite NHPA phrase, "avoid potential effects." The word, "prevent," however, used in the *Objective* section of NPATMA, points to "existing conditions," as in "mitigate or prevent significant [existing] adverse impacts." So, the Act being the controlling legal authority for ATMP implementation, and the textual meaning of the Act being clear, the ACHP's "do no possible harm" theory imported from NHPA … incorrectly interpreted to mean the application of the most restrictive measures for reducing adverse impacts … is inappropriate and inapplicable in the case of all ATMPs. This is especially true for CACH and BAND, where noise and physical presence of aircraft are not problems in the first place.

A decision in favor of Southwest Safaris' interpretation of statutory language is logical even if one were to decide that the mitigation language of NHPA and NPATMA is not clear. According to the canon of Chevron deference, in cases where Congress does not specify agency actions, and the law is either ambiguous or silent, a specific textual test of reasonableness is required. Under NPATMA … the Act being the controlling legal authority re. ATMPs … the measure of reasonableness is expressly determined by application of the "if any" test for adverse impact, which in turn must be performed against existing conditions by means of science-based sound studies under Section 808. The standard of reasonableness cannot be construed under latitude of statutory interpretation to mean the elimination of all "potential adverse effects." The Act provides specific language and methods to the contrary.

In the case of NHPA and NPATMA, the general contextual test of reasonableness is whether the agency's interpretation of the law is consistent with legislative intent. In the present instance, the intent of NPATMA is clearly identified in its *Objectives* section, 49 USC 40128(b)(1)(B). The intent of NHPA is spelled out in 36 CFR 800.1(a). Both sets of regulations make significant use of "or" between the words "mitigant or prevent" in the former case and "avoid, minimize, or mitigate" in the latter. The intent of Congress in both statutes was to allow considerable latitude as to methodology for lessening alleged adverse impacts, if any. Southwest Safaris clarifies that the Opinion of the ACHP fails legal scrutiny thrice over. There is neither specific nor general interpretation of NPATMA and NHPA that would allow extremist interpretation for excessive remedies. Moreover, the "if any" test required by NPATMA was never performed, so the FAA's methods fail the test of reasonableness, yet again.

The FAA has no problem recognizing the validity of Southwest Safaris' arguments when it comes to major parks throughout the USA. Take Hawaii, for example. At HAVO, the FAA argues against the ACHP, saying the standard of decision is not "no air tours" based on the

Theory of Mere Presence,[29] but rather that of "existing conditions" and historical precedent. At HAVO, the FAA claims that air tours existed *at the time* NPATMA was created, so the noise levels at that time should be the standard of acceptance, and any measures taken to mitigate such noise will be sufficient to accomplish the objective of the Act.[30] Moreover, the FAA also argues that air tours over the park existed long *before* HAVO was created as a national park, asserting that air tour noise was, therefore, part of acceptable "existing conditions" even before the park was created[31].

The FAA's arguments at HAVO, HALE, ARCH, CANY, BRCA, and NABR are completely contrary to those at CACH and BAND, the difference in reasoning going unexplained. At CACH and BAND, the FAA argues that the basis for decision is "no air tours" predicated on the Theory of Mere Presence, no deference being given to the fact that air tours existed when the Park was created and long before.

The ACHP had a duty to address this glaring inconsistency and to ask the FAA to clarify the FAA's reasoning. The failure to confront the FAA speaks to the Councils predilection to opine against SWS from the very outset and disqualifies the Council's Opinion for lack of

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[29] *Theory of Mere Presence, supra* Footnote #1.

[30] See FAA's letter to ACHP of July 24, 2023, top of Page 3. There, the FAA states:

> The standard set out in the ACHP's regulations for assessing visual and audible effects is whether there is an introduction of visual or audible elements that diminish the integrity of the property's significant historic features. *See* 36 CFR § 800.5(a)(2)(v). The FAA's assessment of the effects of the undertaking is consistent with this standard …. For these reasons, **the FAA's use of existing conditions as the baseline against which to measure the impacts of its undertaking is appropriate**. The FAA's finding that the undertaking would not diminish the characteristics of any historic properties located within the APE but instead would represent a reduction in audible and visual effects on historic properties when compared to existing conditions is supported and consistent with the ACHP's regulations implementing Section 106 of the NHPA. (Emphasis added.)

See also FAA's letter to ACHP of September 12, 2023. In the middle of Page 4, the FAA states:

> Impacts from the **existing condition** of air tours over the Park **is the appropriate baseline** for determining whether the undertaking (ATMP) will adversely affect historic properties. . . .

And, at the bottom of Page 4, the FAA states:

> As the FAA explained in its request to the ACHP for an opinion on this finding, neither the National Parks Air Tour Management Act (NPATMA) nor the National Historic Preservation Act (NHPA) require the effects of the undertaking to be measured against a condition under which no air tours are occurring. (Emphasis added.)

[31] Ibid, Page 9. The FAA states therein:

> Furthermore, neither NPATMA nor NHPA require the agency to assess the effects of the undertaking assuming that the existing conditions already have an adverse effect.

objectivity, let alone misinterpretation and misapplication of law and regulation.[32] Disqualification of ACHP opinion serves to disqualify the FAA's extremist methodology.

The ACHP's tacit S106 support for the FAA's double-standards for different parks notwithstanding, NPATMA will not tolerate the FAA's order of amelioration of adverse effects. NPATMA disagrees that the agency must first avoid, then minimize, and lastly mitigate "potential" adverse impacts. The basis of decision under the Act is *reasonable* reduction of adverse effects based first on implementing NPATMA's "if any" test by means of Section 808 sound studies and then by using a common-sense approach rather than resort to an extreme remedy that would bar all air tours entirely. Evidence to this effect is presented in Appendix 1, "NPATMA and the Will of Congress," where reasonable compromise and common-sense is touted. Based on these measures, the ACHP's Opinion at BAND and the FAA's application of it at CACH is unreasonable by any measure. Moreover, the Council's Opinion attempts to support the FAA's efforts to interpret existing regulation on an inconsistent park by park basis, as already demonstrated. By denying the Theory of Constructive Remedy[33] and its associated methodologies, the ACHP attempts to fabricate new regulatory interpretation to the effect of "new law," which, according to NPATMA, "will not fly."

Because the ACHP (and thereby the FAA) has no intention of ever concurring with a decision to allow air tours at CACH and BAND, the ACHP does not support any sound studies at the Parks and neither does the Council care how draconian are the measures the FAA uses to destroy all air tours thereover. By eliminating all "potential" adverse consequences of flying over Canyon de Chelly and Bandelier, the ACHP justifies eliminating all air tours over all parks, which is contrary to the intent of NPATMA. Southwest Safaris alleges that this is the real reason the

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[32] The FAA loves to point out that Southwest Safaris' arguments have little to do with Section 106, saying that S106 is only a "process regulations" that does not arrive at a decision, only an opinion. The fact that the FAA is trying to make a distinction without a difference notwithstanding, SWS' rebuttal has everything to do with Section 106. Moreover, the FAA uses broad NPATMA language under the Objectives section to justify a finding of "no adverse effects," narrowly focusing on the use of the words, "prevent," "cultural resources," and "tribal lands." The FAA claims that it does not have to "justify and document" its finding by NPATMA standards, which sets forth the basis for decisions under ATMP process. The FAA broke with regulations when it prematurely gave draft copies of the CACH ATMP to Navajo "consulting parties" which were not "consulting agencies," but continues to withhold the document from SWS, just as the FAA did when the agency prematurely published the BAND ATMP before completing the S106 process. So, the decision to find for "no air tours" is incorporated into the Section 106 process by direct association therewith. The finding of "no adverse effects" from disallowing air tours over the Park is used as the direct link to arrive at the decision in favor of "no air tours," so the logic and methods used to arrive at a Section 106 finding are very much on the table. SWS has many times pointed out the FAA's techniques for obstruction of argument and the agency's failure to properly order the presentation of documents and the problems it raises in written and oral argument, both to the ACHP and to the FAA, but gets stonewalled every time.

[33] The Theory of Constructive Remedy states that general remedies for adverse effects must be applied starting with the least harmful remedies for all parties impacted and ending with the most harmful remedies for those who most will suffer the pain of corrective action. In other words, apply the least impactful remedies first; the most impactful remedies last. This theory of social justice, promoting "reasonable and common-sense compromise," see Attachment 1, directly contradicts the FAA's methods and remedies for "potential" adverse effects addressed by ATMPs. The FAA's means and methods for ATMPs are unacceptable, according to NPATMA, because they only consider the interests of one end of a fix, not both ends, favoring one party to a dispute and ignoring the other, thereby tending to be "extremist."

Council incorrectly claims that "the agency should first and primarily consider ways to ***avoid*** adverse effects to historic properties." The obvious goal of the FAA is to dismantle the air tour industry. NHPA is the primary tool in the FAA's arsenal for doing so. The FAA's actions to improperly use the Section 106 tool, encouraged and endorsed by the Council, speak to the effective failings of the majority of the ATMP undertakings.

V <u>The FAA's Finding is wrong, because it is based on false environmental analysis</u>.

Had the FAA "walked the Park" according to regulation, the agency would have realized how incorrect and pointless the agency's assessment of Canyon de Chelly's environment really is. The Navajo Tribe has done everything they can to popularize the Park and encourage motorized access to it, both along the rims and in the bottom of the canyons. There is virtually no privacy in the Park due to commercial vehicles roaring up and down the sandy canyon floors and along the rims. CACH is probably one of the noisiest of all the units of the NPS.

Even the FAA artfully acknowledges this "inconvenient truth." At the bottom of the FAA's January 11, 2023 response to the ACHP's December 21 Opinion regarding the BAND ATMP, the FAA says:

> However, the elimination of air tours within the [BAND} ATMP planning area will [only] slightly reduce noise and visual intrusions within the APE and adverse effects are not anticipated as a direct or indirect result of the ATMP. (Emphasis added.)

The only "slight" reduction the FAA is talking about in the case of Bandelier applies equally to Canyon de Chelly. The arguable reduction in aircraft noise and visual intrusions achieved by the proposed CACH ATMP, allowing "no air tours," assuming that they might prove to be the case, will be immeasurable and statistically insignificant compared with the prevailing noise in the Park all day long. One air tour a week gliding over CACH from 4,000 AGL in preparation for landing at Chinle is hardly a significant impact, no matter how measured. NPATMA is only concerned with the reduction of *significant* adverse impacts. No significant noise impact from air tours exists at Canyon de Chelly.

The agencies really do not seem to care very much; remedy of significant adverse conditions is not the point. The corrupted objective of the CACH ATMP is now the elimination of air tours over the Park altogether, by any means and justification necessary. This is why the FAA seeks a draconian remedy for a non-existent problem. The agency argues that all it has to do is come up with a proposal that will reduce noise by even the slightest degree and then use that method to justify a decision for "no air tours." The goal is to win a political victory, not seek an operational solution. Southwest Safaris alleges that the FAA misuses authority of Congress by not considering minimizing or mitigating air tour noise before attempting to avoid it altogether. The FAA's methods are inconsistent with the Theory of Constructive Remedy,[34] contrary to the purpose and methods of NPATMA, and work in violation to Will of Congress (see Appendix 1).

[34] *Theory of Constructive Remedy, supra* Footnote #33

VI <u>The FAA's Finding is wrong, based on inaccurate data and sloppy noise modeling.</u>

The FAA bases its Finding of "no adverse effects" from banning air tours over CACH on false data and flawed noise analysis.

Figures 2, 3, and 4 of the FAA's *Finding of Effects Letter* depict sound contour maps. Attachment D gives a *Summary of Noise Technical Analysis from NEPA Review*. The summary of noise produced by Southwest Safaris' air tours is misleading and wrong.

In the first place, SWS' current routes have changed since the charts were produced. The FAA never asked the ATO whether its routes have changed from those submitted several years ago, but acknowledges that changes might have occurred. They have, significantly. SWS now flies further away from Canyon de Chelly, staying south of the main road paralleling the canyon as its planes fly west, and north of the canyon as the planes fly east. The current air tour route flies east of Canyon del Muerto as the plane flies south, crosses the canyon between overlook sites, and then flies west of that canyon till exiting the Park. Southwest Safaris has already offset its current routes so that noise and visual presence are almost impossible to detect. Total avoidance of the Park is entirely unnecessary to achieve the purposes of NPATMA.

In any case, the figures 2, 3, and 4 give a false picture of what is actually going on, past and present. The figures are designed to give a worst-case graphical picture, which is entirely misleading. The charts make it appear that the noise and physical presence of air tour planes entirely "soaks" the canyon, the whole canyon being painted black in the case of figure 1. In point of fact, the "noise shadow" follows the aircraft, immediately disappearing after the plane passes out of the local area because of "terrain shielding" due to the plane's offset angle to the canyons … which tends to block <u>vertical</u> entrance of sound … and because of the bends in the canyons … which tend to block <u>horizontal</u> movement of sound. Southwest Safaris has many times asked Navajo ground tour guides if they are aware of Southwest Safaris aircraft in the vicinity of the Canyon. The answer is always the same: "No, we never see you, but wonder if you are going to land to meet us at the airport; we worry that you will cancel … maybe weather when birds don't fly. Actually, we would like to see you fly overhead; it would be a beautiful sight against a turquoise sky." This is a uniquely Navajo reply: short, to the point, and creative.

In the second place, the FAA's noise modeling assumptions are total fiction. The FAA has never measured Southwest Safaris actual sounds in the vicinity of the canyon, so its base assumptions are completely incorrect. For instance, the FAA's AEDT assumptions are based on standard noise patters of a Cessna 182 in cruise configuration. That is not how Southwest Safaris flies CACH. After crossing the Chuska mountains, heading west, SWS' plane is almost 10,500 feet MSL. The plane has to lose almost 5,000 feet of altitude over 30 miles to land at Chinle, just to the west of the Park. As the tour plane flies west along (not over) Canyon de Chelly, the tour aircraft is descending, using minimum power. No one on the ground can hear SWS coming in to land. The actual sound footprint of the plane would be much lower than 32 dB the entire route. The dBs are too low and the "noise shadow" is but a few seconds at any given spot in the Canyon. The FAA's *theoretical* sound *projections* are completely untested and unrealistic.

In the third place, figures 2 & 3 are wrong. There is no reason for the noise at any spot in the canyon to be above 32 dB, let alone above 52 dB, given the facts specified above. However, even if it were true that the plane generated brief exposure to noise above 52 dB, it would not matter. The three locations the FAA picked correspond to Spider Rock, White House Ruin, and the visitor parking area, where noise from ground vehicles and tourist voices are already maximized. No one would hear the plane over existing noise, and no one would see the plane, either, because the plane is on the south side of the canyon, benefiting from "terrain shielding," and tourists are looking north to view the scenery, where the cliff dwellings are.

In the fourth place, the FAA makes no mention of the fact that Southwest Safaris is not really giving an air tour in the manner the agency is trying to portray. The routes in and out of Chinle are as much for transportation as for scenic viewing. Southwest Safaris is not circling Canyon de Chelly, unless forced to do so by the FAA's newly proposed Alternative 2, "no air tours." The FAA's charts do not convey to the public that the maximum time over the Canyon, flown in either direction, is ten minutes total, flown less than once per week, according to the FAA's figures. Viewed from the bottom of the canyons, the aircraft's presence is but a few seconds. The FAA says in the margins of the maps that "the noise contour map legends indicate the cumulative percentage of the total ATMP planning area covered by each contour level." The map conspicuously does not present the percentage of daily time that the noise levels are audible, which would give an entirely different picture of the alleged "potential" adverse effects of SWS' air tours over CACH. The actual on-site percent-audible (PA) noise presence from Southwest Safaris' air tours is so low as to be undetectable.

In the fifth place, the charts fail to disclose the alternative scenarios, so the basis for comparison is totally misleading. If forced to circle the park, Southwest Safaris will fly barely to the west of Canyon del Muerto on the flight out to Chinle, and then fly scarlessly to the south of Canyon de Chelly on the return flight. This will expose the canon to at least 2.6 times the noise as just flying over the canyon once on the inbound flight, as argued earlier. Moreover, the return flight will be conducted at full power in the immediate vicinity of the Park as the plane climbs to get over the Chuska Mountains, so that noise saturation will be at a maximum. The FAA needs to add charts to its presentation to reflect this certainty, along with text to explain the negative consequences of the alternative. The FAA has not revealed the big picture.

The reality, that the FAA tries to conceal, is that air tours over Canyon de Chelly, as actually being conducted today, have virtually no sound or visual impact on the Park.

However, all of this is irrelevant. There is no point in going into any more detail to perform a technical analysis on the flaws of the numbers the FAA presents. None of the FAA's data is admissible evidence, another "inconvenient truth" that the FAA tries to conceal.

NPATMA is the controlling legal authority for the creation of ATMPs. As stated, many times already, NPATMA controls the timing of NHPA and NEPA and also controls the language and methods that NHPA and NEPA can employ to carry out their tasks.

NPATMA dictates that NHPA is not called into effect until: (1) the "if any" test under NPATMA is conducted; (2) the "if any" test indicates that there exist "significant" adverse effects from air

tours, and (3) all measurements of sounds are science-based using pertinent data. Until all of this is accomplished, there is no legal undertaking at CACH. Without a legal undertaking, no Findings can be launched and no NEPA EAs can be funded. To date, the FAA has ignored all of the above.

The FAA has clearly fully funded two different agency decisions, one each for CACH and BAND ATMPs. The initiatives are already almost completed before the projects have even been "approved" by Congress (by means of the "if any" test). Furthermore, the "undertakings" have already been largely completed well before Section 106 will be finished, two more violations of NHPA on top of the first set. At BAND, the FAA has already held a public meeting and closed a public comment period for the "proposed" ATMP before completing S106 process. At both CACH and BAND, the FAA has compiled the final version of the proposed ATMP, told all the consulting agencies/parties that the agency intends to adopt alternative 2, performed an Environmental Analysis, and distributed the "draft ATMP" to all parties except, in the case of CACH, Southwest Safaris. All of this has been done without the knowledge or consent of SWS, without a public hearing at CACH, and without a public comment period for CACH in violation of NHPA regulation, 36 CFR §800.1(c). The FAA's juggernaut just keeps on rolling.

Moreover, the FAA bases its sound studies on noise modeling, not "reasonable scientific methods," as required by Section 808 of NPATMA. There is no allowance for AEDT-based sound studies in the Act, but this does not slow the FAA's progress to "satisfy the court." [35]

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[35] See USCA Case #19-1044, Document #2001434, Filed 5/31/2023. The U.S. Court of Appeals, District of Columbia Circuit, said, "We fully expect that the agencies will make every effort to produce a plan that will enable them to complete the task [of creating ATMPs for 23 parks] within two years, as Congress directed. If the agencies anticipate that it will take them more than two years, they must offer specific, concrete reasons for why that is so in their proposal."

Southwest Safaris alleges that the agencies (FAA and NPS, acting jointly) defrauded the court by withholding information that would have revealed that the agencies were required to meet the "if any" test in NPATMA by conducting science-based sound studies using pertinent data under Section 808 of the Act, which they would not be able to accomplish under the timeline of the Court. By knowingly withholding critical information, the agencies deceived the Court to: (1) justify violating NPATMA in order to misuse NHPA; and (2) expedite creation of ATMPs without having to worry about any civil rights violations that ATOs might claim. There would be no checks and balances to "agency discretion," which would give the FAA a free hand to do as it pleased regardless of the ever-nagging Will of Congress. See Attachment 1.

The agencies argue that the court order prevents the agencies from complying with otherwise required administrative process. This allows the agencies to use one law (NHPA) to break another (NPATMA), circumventing Congressional mandate to perform sound studies required by the Act.

Southwest Safaris alleges that the agencies want to avoid sound studies because the field tests would provide data that ATOs could take to court to argue against the agencies' decisions. Thus, the agencies have additionally conspired to deprive ATOs, Southwest Safaris in specific, of due process in the cases of CACH and BAND and obstruction of evidence (sound-study data) that could otherwise have been used in court against the agencies.

These reasons alone document incredible agency abuse of due process and complete disregard for regulation and law, requiring cessation of ATMP process until the agencies get clarification from the Court as to how to proceed.

The FAA incorrectly relies on noise modeling technology to make its determinations as to the level of air tour noise at CACH and BAND. This reliance, SWS maintains, adversely impacts the correct assessment of harmful impact of said noise on TCPs and, therefore, incorrectly influences FAA opinion and determinations under Section 106.

Actually, at Canyon de Chelly and Bandelier National Monuments, the FAA is in violation of NPATMA, NEPA, and NHPA, all three, because the use of noise models does not satisfy Section 808, in any case.

NPATMA says that "*any methodology*" used by the FAA to assess air tour noise shall be based on "reasonable scientific methods." Noise models do not constitute scientific methodology, especially if the studies do not incorporate timely, accurate, thorough, and objective data obtained from vigorous field research … none of which was provided at CACH. A noise model is just another term for an "Aviation Environmental Design Tool" (AEDT), to use an FAA term. The output from an AEDT is totally dependent on whatever numbers (including formulas) are input. The field-gathered input data the FAA is using at CACH, if it ever even existed, is too old, too few, too isolated, and too infrequently gathered, representing unreliable assumptions of present conditions, this on top of biased formulas. In fact, the FAA's *Assessment of Effects* letter makes no claim to the FAA's having ever conducted a sound study at CACH to which the agency is willing to admit … for reason of withholding evidence that could be used against the agency to disprove its theories. Southwest Safaris alleges that the FAA, under Section 106, is relying on noise modeling at CACH to control the input so as to get a predetermined output that is contrary to the interests of the ATO. Regardless, the FAA appears to have no science-based sound study data with which to refute SWS' claims of no adverse impact.

Spreadsheets, themselves, are not science. Science is based on acquiring original data gathered by observation in the field. Noise models, in contrast, are based on deductive armchair reasoning. Therefore, SWS argues, principal reliance on AEDT technology is not allowable under NPATMA (and, therefore, NHPA) as the primary or conclusive means of determining "adverse impact" where significant decisions are involved. This is one of the reasons SWS has argued in the body of this letter that NPATMA is the controlling legal authority for ATMPs, not NHPA or NEPA. Under the Principle of Primacy of Law and the Principle of Continuity of Law, NPATMA keeps NHPA and NEPA from warring with the Act. For example, under NPATMA, Section 808, the NEPA §1502.23 arguable allowance for using AEDT technology does not exist, because NEPA regulations are incompatible with NPATMA law, per 40 CFR §1500.3.

Even if NEPA's §1502.23 did apply, the FAA would still be required to use scientific methodology to control the input with current, comprehensive, relevant, accurate, and science-based (i.e., pertinent) data. SWS argues that the FAA's input data for CACH, even if one allows use of AEDT noise modeling, falls short of meeting these requirements for any given "test."

The "warring" problem over noise modeling (NHPA v. NPATMA) is particularly problematic at CACH, where the FAA conducts no actual current noise studies in the field. The FAA instead relies entirely on its Aviation Environmental Design Tool (AEDT), i.e., noise modeling technology, and outdated data upon which to base its calculations of "adverse impact." This is allowable under NEPA. 40 CFR §1502.23 of NEPA says, "Agencies are not required to

undertake new scientific and technical research to inform their analyses." However, this statement is directly contrary to NPATMA, which is the controlling legal authority in the present instance.

SWS clarifies that §1502.23 does not apply to NPATMA because of the "shall clause" (Section 808). Moreover, Congress does not refer to §1502.23 in NPATMA's §40128(b)(4)(C), in order to grant special exception. So, the requirement for noise studies based on "reasonable scientific method" still applies, NHPA and NEPA notwithstanding.

To avoid the "warring personalities" of NHPA and NEPA, NPATMA imposes a clear and unequivocable requirement to conduct pertinent sound studies, using "reasonable scientific methods," before and during implementation of ATMPs for respective Parks. The FAA has a duty to perform sound studies which cannot be excused. This is a due diligence mandate.

As said many times, the use of noise modeling technology does not satisfy the requirements of Sec. 808 for use of "reasonable scientific methods." Noise modeling may incorporate sophisticated computer technology, but it is not science, and it is prone to error. In support of this theory, SWS directs the reader's attention to a FAA Memorandum, dated June 13, 2018, titled "Noise Screening Assessments,"[36]

In general, the Memorandum is intended to "clarify existing FAA policy and guidance on noise screening assessments and the appropriate use of noise screening tools and methodologies." The Memorandum makes it abundantly clear that noise screening tools and methodologies afford only approximate analysis of air tour noise impacts, and are not appropriate for detailed EA or EIS analysis presented to the public, nor for Section 106 analysis. Therefore, the FAA has chosen to use AEDT (Version 3e), instead, as that constitutes "approved" analysis technology. The FAA does not say who approved it; apparently, the FAA "approves" its own technologies.

Regardless, the Memorandum also makes it abundantly clear that noise modeling … irrespective of the technology incorporated, whether noise screening or technical noise analysis (AEDT) … is not science. The inadequacies of AEDT technology (noise modeling) logically follow the shortcomings of sound-level estimation (noise screening). Had Congress wanted to allow reliance on AEDT analysis of air tour noise, it could have easily specified to that effect in the Act (i.e., done so expressly). This is a noticeable omission, but *not* by oversight. Reliance on AEDT technology is *not* allowed under NPATMA any more than reliance on noise screening. In any case, the data fed into either modeling tool would have to be "pertinent," defined by reason to mean "current, comprehensive, relevant, accurate, and science-based." Both noise modeling methodologies used by the FAA (noise screening and AEDT) fail to make use of "pertinent" data at CACH, so the outcome from noise modeling at CACH in any case is flawed from the outset, irrespective of the computer programs used for analysis.

For all of the above reasons, SWS argues that the FAA's efforts to gather input on TCPs for CACH are misplaced for lack of appropriate sound data upon which to base decision.

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[36] See http://www.faa.gov/sites/faa.gov/files/air_traffic/environmental_issues/environmental_tetam/screening-memo.pdf.

VII <u>The FAA's Finding is wrong, because it misrepresents the Navajo Nation's attitude towards air tours</u>.

The FAA knowingly misrepresents the attitude of the Navajo Nation towards air tours. At the top of page 2 of the FAA's Letter of Effects, the agency says:

> The agencies invited public involvement for this undertaking through a Federal Register Notice and NPS's Planning, Environment and Public Comment System (PEPC) website. Through these platforms, the public was invited to participate in Section 106 activities, specifically reviewing and providing comments on the Section106 process and the FAA's efforts to identify consulting parties, determine the APE, identify historic properties, and assess the effects of the undertaking on historic properties within the APE. In total, five comments were received during the thirty-day comment period. Of the five, two of the comments opposed air tours over the Park generally. One commenter stated, "I feel that our canyon is [sacred] to us and should be preserved as long as we can plus the noise from the aircrafts will disturb historic ruins and animal life not to mention the pollution it will cause in the air from the aircrafts." Another commenter mentioned that "ancestors' ancient homes, rock art panels, burial sites, historic fortresses, peach orchards, trails, pole ladders, ceremonial chambers still stand and are intact to this day... As Dine' children we were taught to never enter or bother archaeological sites." A fifth commentor expressed that air tours over ancestral land block spiritual connections during sacred ways of ceremonies, which require quietness and privacy.

Southwest Safaris takes great exception to the FAA's negative characterization of Navajo sentiment towards air tours. At best, the FAA's representation is a half-truth. At worst, it constitutes fraudulent misrepresentation and withholding of evidence.

In the first place, only five written comments were received. Of these, only three were opposed to air tours over Canyon de Chelly. There are approximately 400,000 Navajos, half of whom live on the Navajo reservation. The percentage of negative letters compared with the total population is a mere 0.0000075. Compared to the Navajo population living on the reservation, the number is still only 0.000015. The FAA's claim of negative Navajo reaction to air tours at CACH has no statistical value. The FAA has no grounds to make a significant Finding in support of a decision for "no air tours" based on such de minimis feedback. One is led to believe that the other two comments were either strongly in favor of air tours or were neutral, which information the FAA fails to disclose.

Moreover, the statement of the FAA is mostly false. The official position of the Navajo Tribe is just the opposite of that represented by the FAA. The Tribal leadership actually favors air tours over the reservation; the tribe just wants to appropriate the air tour industry for itself. If the Tribe cannot get a significant portion of the revenues from air tours, only then does it have qualified reservations about air tours in general. The local business at Chinle, AZ that are making money off Southwest Safaris love the fact that SWS is bringing business to the local community while flying respectfully over the Park. Competitive ground services that are not doing business with the sole ATO serving the Park, of course, will have a different point of view … until air tour business starts to flow their way.

On December 5, 2023, the House Natural Resources Subcommittee on Oversight and Investigations held a special hearing on the subject of "Limiting Access and Damaging Gateway Economies: Examining the National Parks Air tour Management Program." A representative from the Navajo Nation testified at length. Mr. Carl Slater is a member of the 25th Navajo Nation Council, representing the communities of Tsaile/Wheatfields, Lukachukai, Round Rock, Tséch'izhí, and Rock Point. He is also is the Vice Chair of the Navajo Budget and Finance Committee. Mr. Slater presented oral[37] and written[38] testimony.

On page 5 of his written testimony, Mr. Slater states:

> Management Plan with Tribal Consent
> Despite all of the risks associated with expanding air tourism in and around the Navajo Nation, I want to be clear that we [the Navajo tribal Council] do not oppose air tourism across the board. This is why tribal consultation is so important. **The Navajo Nation would happily endorse additional air tours in the surrounding national parks** under the condition that a comprehensive management plan is developed in collaboration and with the consent of the affected tribal communities, ensuring that their perspectives, concerns, and cultural considerations are incorporated into those plans. (Emphasis added.)

SWS notes that this is the official statement from a representative of the Navajo Nation delivered to an official investigative body of U.S. Congress. These words carry enormous weight.

Mr. Slater verbally stated that the Tribe is not against air tours. In fact, the Tribes welcomes the contribution of air tours to the Tribe's regional and local economies; the tribe just wants to see that a portion of the revenues therefrom goes to local Navajos. Mr. Slater orally testified that the Tribe, itself, wants to get into the business of conducting air tours, and stated that he would like to see existing air tour operators provide the training!

On page 6 of his written testimony, Mr. Slater said:

> Even assuming consultation is adequate, an essential aspect of securing the Navajo Nation's support for air tours is the firm belief that tribal members should have the opportunity to benefit economically from such activities.

On page 7, Slater went on to say:

> Engaging local Navajo residents in the economic aspects of air tours could also remedy some of the potential risks of air tours as well as enhance the experience for the tourist.

[37] The link to the Hearing is: https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=415213

[38] The link to printed testimony of Carl Slater is:
https://www.congress.gov/118/meeting/house/116617/witnesses/HHRG-118-II15-Wstate-SlaterC-20231205.pdf

Then he added:

> But to enjoy the greatest economic benefit, it would be ideal if more tour companies were established on the Navajo Nation and owned by local Navajo entrepreneurs. For this reason, air tour management plans should include incentives for existing tour operators to mentor Navajo entrepreneurs, and a certain percentage of available flights should be reserved for Navajo-owned businesses to ensure local residents benefit from the existence of tours.

Slader concluded his remarks on *Economic Opportunities for Tribal Members* by testifying that:

> If done right, the air tourism industry has the potential to spur economic development across the Navajo Nation. Economic opportunities generated by air tours can act as catalysts for community development within the Navajo Nation by improving our airports and related infrastructure. This will not only support the tours directly, but increase transportation options for all tribal members, making it easier for tribal members to access essential services and connect with other communities.

Other Navajo leaders have come forward with much the same testimony. Navajo Council Speaker Crystalyne Curley agreed that the federal government needs to consult with the tribes when it comes to air tours. Southwest Safaris found her testimony in the Gallup Sun newspaper, dated Friday, January 19, 2023: [39]

> Air Tour Management Plans can be devised responsibly through tribal consultation. The federal government has the responsibility for consultation at every step," Curley said. "The federal government needs to meet tribes at their level of capacity and let tribes set the pace of consultation. We need to ensure that tribes benefit from economic development and revenue generation related to air tourism.

It is perfectly clear that the leadership of the Navajo Nation want to keep the window open to air tours, hoping to capture some of the economic benefits for the Tribe. The two testimonies offered here are in direct opposition to those presented by the agencies. In fairness, that might be because one set of testimonies represents the long-term vision of the Tribal Council, whereas the FAA is only measuring the short-term interests of local chapter houses. However, it really does not matter.

The FAA and NPS, acting jointly, have presented a knowingly false and misleading *Request for Concurrence*. The FAA's Finding serves as a prototype of administrative weaponry intended to destroy the air tour industry at large, Southwest Safaris in specific. At the same time, the Finding undermines the interests and aspirations of the very People, the Dine, that the agencies purport to represent in consultation, i.e., the Navajos. The Finding represents abuse of public trust. The agencies had a due-diligence obligation to get input from all levels of Navajo government and grassroots groups, which clearly the agency did not seek. Both comments by members of the Council reflect the validity of SWS allegations.

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[39] The link to the testimony of Crystalyne Curley is:
ttps://gallupsun.com/index.php?option=com_content&view=article&id=18024:staff-reports-&catid=186:politics&Itemid=616

It also appears that the FAA has not made it clear to the Navajo Nation that the proposed ATMP for CACH will not make any meaningful decrease in overall noise but will actually increase it in and around the Park; will not meaningfully increase privacy for residents in the canyons; and will actually hurt the community of Chinle economically by cutting off significant tourist revenues. It appears that the agencies have misrepresented the CACH ATMP "undertaking" to the Navajo People.

It is evident that the Navajos are looking for "reasonable" mitigation of "potential adverse effects" on historic properties, not radical elimination of all air tours at CACH, from which the Navajos greatly benefit already. The Navajos seem to want the same as Southwest Safaris, the lone air tour operator at the Park. The FAA would pit the parties against each other, when they actually appear to see things eye to eye.[40] Therefore, the disparity in public perception over the intent of the ATMP calls for immediate withdrawal of the *Request for Concurrence* and suspension of the ATMP process. The "undertakings," at CACH, BAND, and many other parks, have been misrepresented on many different levels. As demonstrated, the ATMPs at CACH and BAND, for example, will actually increase the "significant" adverse impacts on persons and historic properties in the APEs and the local communities will suffer "significant" adverse economic effects, which the FAA refuses to measure. The agencies have managed to turn the hopes of Congress into a nightmare of administrative mismanagement. The real "undertaking" of the agencies at CACH is administrative fraud and public deception.

VII Conclusion

Southwest Safaris respectfully petitions the FAA to reconsider its proposed Finding of "no adverse effects" from banning all air tours over the Park. There are no mathematical, operational, regulatory, or lawful arguments to support the FAA's ultimate proposal for "no air tours." The FAA's untimely requests for opinion and consent for a Finding of "no adverse effects" are out of order and greatly, unfairly, and intentionally prejudice the outcome of the agency's eventual ATMP determination. The FAA's *Letter of Effect* is being implemented under theories contrary to Federal regulation, law, and public interest. The FAA and NPS, acting jointly, wrongly attempt to employ NHPA to negate NPATMA, thus using one law, NHPA (Section 106), to break another, NPATMA, in order to defy the Will of Congress, with which the agencies do not agree. The agencies forever strive to overreach their authority by not recognizing basic principles of jurisprudence, attempting to use an assortment of laws as tools to accomplish the undoing of orderly regulation by devious schemes and conflation of regulations never anticipated by Congress. The consequences will be legal, administrative, and operational chaos for the Navajo People, struggling small communities across the USA, and a rural air

[40] Southwest Safaris has been conducting air tours over CACH for 49 years. In the nearly five-decade history of the company, SWS has never received a single complaint relating to its flights, either pertaining to noise or physical presence. Few locals even realize that the company flies over CACH. The ATO typically lands at Chinle, contracts with Navajo drivers to be transported into a local Navajo lodge, contracts for Navajo ground tours, procures lunch at a Navajo restaurant, and purchases arts & crafts from a Navajo gift shop. Then, SWS flies back to Santa Fe, NM, the point of origin for the tours, after leaving a lot of money on the table at Chinle, AZ. At least, that is what SWS has been doing for 49 years. That is all about to change, at great potential loss for the Navajo community at Chinle.

transportation system that has taken 100 years and untold investment to develop. By failing to recognize the Principles of Priority of Law and Continuity of Law, and failing to heed the content of law, the FAA has challenged the cannons of Separation of Powers, Due Process, and limitations on Federal administrative authority. The FAA attempts to selectively use old laws to make "new law" constituting a national transportation policy outside the intent and reach of Congress and out of effective remedy by the judiciary. The result will be crisis in the courts, in this Great Land, and in the air.

Because the "undertaking" for CACH has not been *legally* triggered, SWS argues, the "undertaking" for CACH to this day does not legitimately exist. Therefore, the development, implementation, and funding of the CACH and BAND ATMPs are out of order. So also are Section 106 processes as well as the Environmental Assessments. Both EAs for the parks were compiled under cloak of the FAAs's Theory of Parallel Laws. SWS' objections to the FAA's reliance on its Theory of Parallel Laws have significant implications for NPATMA, NHPA and NEPA, indeed for much of American administrative law. Legal order must precede political expediency

The FAA asserts that it has no duty to consider the adverse economic effects of its actions on the Navajo Nation. Southwest Safaris strongly disagrees, arguing in favor of Navajo interests to agencies who have apparently turned a deaf ear to the long-term needs of the Tribe as well as to the present benefits Southwest Safaris provides for the communities at Canyon de Chelly while "doing no harm."

The FAA's efforts fail because the agency has weaponized NHPA, using it as a wrecking ball instead of a constructive tool to rebuild the air tour industry and the economies of small rural communities desperately in need of help after the ravaging impact of the Pandemic.

The FAA's methods and procedures have been shown to violate the provisions of NHPA, NEPA, and NPATMA, all three. That is because, under FAA theory of jurisprudence, there is no priority of authority, there being no recognition of the Principle of Primacy of Law and Principle of Continuity of Law. The FAA has come up with no method of bringing harmony to the laws so that they work together instead of tearing each other apart, allowing the parts to destroy the whole. The concept of "reasonableness" is everywhere written into the wording of NPATMA, which Act the FAA, through Section 106 process, knowingly attempts to override and/or ignore. In contrast, Southwest Safaris' arguments bring unity and rationality to the table, achieving the Will of Congress.

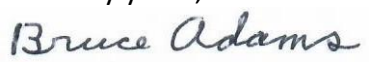
The FAA's theories and methods do not satisfy NPATMA. Harmony between laws and operations is the ultimate test of conformity with legislative intent for ATMPs. The agency's tactical approach has produced neither "acceptable" nor "effective" strategic results, no predictability or continuity of decision, and failure to logically and legally identify, "mitigate" or "prevent" significant and existing adverse impacts. The FAA's and NPS' misguided coordination of NPATMA, NHPA, and NEPA will throw the implementation of ATMPs back on the courts with an admission that politics has destroyed the ability of the agencies to work together. It is the hope of Southwest Safaris that reason can prevail between the parties of contention, allowing

the ATO to openly negotiate at the ATMP table after the CACH and BAND ATMP "undertakings" have begun anew.

Southwest Safaris, one more time, respectfully petitions the FAA that the agency withdraw its notice for comment on Section 106 historic properties at CACH and BAND and withdraw the FAA's *Requests for Concurrence* thereof.

Thank you for your consideration.

Sincerely yours,



Bruce Adams

Appendix 1

NPATMA and the Will of Congress

In 1997, the issue of the presence of aircraft over lands managed by the NPS became so contentious that Congress became involved. The House and the Senate both held hearings, during which the pros and cons of air tours over National Parks and Monuments were aired.

When Congress finally drafted the National Parks Air Tour Management Act of 2000 (hereafter, NPATMA, or "the Act), the Intent of Congress was clearly spelled out.

On November 17, 1997, in Dixie College, St. George, Utah, the House of Representatives' Subcommittee on National Parks and Public Lands (Committee on Natural Resources) joint with the Subcommittee on Aviation (Committee on Transportation and Infrastructure) held a public meeting to discuss the pending regulation of air tours over units of the National Park Service. Congressman John Duncan went on record with a prepared statement, which summed up most of the Congressional testimonies that day. His prepared statement is particularly relevant because, at the time, Rep. Duncan headed the House Transportation and Infrastructure Committee. On 2/11/1999, Rep. Duncan introduced *H.R. 717 - National Parks Air Tour Management Act of 1999* to the 106th Congress (1999-2000). That bill eventually became the final *National Parks Air Tour Management Act of 2000*.

STATEMENT OF HON. JOHN J. DUNCAN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Chairman Hansen, Congressman Ensign, it is a pleasure to be here today in this wonderful community and in the Stale of Utah.

I am fortunate to have the opportunity to serve both on the Parks Subcommittee and as Chair of the Aviation Subcommittee in the Congress, which enables me to have a unique perspective on all sides of this issue.

Let me make clear at the outset that I strongly support the goal of protecting our National Parks from unnecessary aircraft noise.

There are many legitimate methods for management of aircraft over Parks which will achieve the appropriate balance between aircraft use and protection of the visitor experience, including but not limited to: limitation on time, place and number of aircraft, quiet aircraft technology and management of visitor use patterns.

These management actions are not dissimilar to actions taken to address other resource use allocation issues or management of other uses of park areas.

I also believe that sightseeing by aircraft is a legitimate manner in which to experience the Grand Canyon National Park and other Park areas.

> With the efforts put forth by the Aviation Working Group, which consists of Federal, private, environmental, and other organizations, ***I believe that we can develop a*** [***viable***] ***solution which will permit continuation of aircraft overflights*** while enhancing opportunities for Park visitors to experience natural quiet.
>
> If we ***work together to develop consensus on a reasonable and common-sense approach***, then I think we will be very successful on this and many other issues.
>
> Mr. Chairman, I look forward to hearing from the expert witnesses we have before us today. [Emphasis added]

Congressman Duncan used the phrase, "reasonable and common-sense approach," as synonym language for that of "acceptable and effective" which appears in 49 USC §40128(b)(1)(B) of the Act. Reason and common sense were meant to rule the application of NPATMA, not extremism.

Congress had two purposes in mind when it drafted NPATMA. The first, as stated by the Chairman, was to "support the goal of protecting our National Parks from unnecessary aircraft noise."

The second unambiguous purpose of the Act was to protect and preserve the right of air tour operators to provide air tours over the National Park System. That is why the Honorable Chairman John Duncan said for the record in writing, speaking for Congress and for future generations: "*I also believe that sightseeing by aircraft is a legitimate manner in which to experience the Grand Canyon National Park and other Park areas.*" This is a statement by a congressman who sat on both the House Subcommittee on National Parks & Public Lands and chaired the House Subcommittee on Aviation. There can be no clearer enunciation of the Will

Attachment 2

NPATMA's Primary & Secondary Objectives: the "if any" test and Section 808 compliance. How NPATMA, NHPA, and NEPA interact.

NPATMA has a prime directive and a secondary directive, both derived from the stated *Objective* section of the Act. The relevant language, 49 USC §40128(b)(1)(B), stipulates:

> Objective. The objective of any air tour management plan shall be 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. (Emphasis added.)

The first objective of NPATMA, one that *must* be fulfilled, is to determine if any impacts from air tours at a particular park significantly adversely affect persons and property on the ground. The interjection of the "if any" wording into the Act is not a casual remark by Congress. The "if any" question must be satisfied before the Act can be employed to affect a determination as to the type of ATMP that will be employed for any particular park, if any. Only after the "if any" question is resolved can NPATMA make such a determination and empower NEPA and NHPA to act accordingly. If there are no significant adverse impacts from air tours at a given park, then NPATMA (and, therefore, NEPA and NHPA) has no power to direct an ATMP to curtail or eliminate air tours over that park, there being no reason to do so. In this case, the ATMP for the respective park must make a determination of "No Change" in the way current air tours are being conducted. Unless "extraordinary circumstances" exist, if the park has 50 or less flights per year, the ATO would be allowed by NPATMA to continue operations under existing IOA.

The secondary objective of NPATMA (there being more) is to stipulate the type and manner of methodology that *must* be used to assess the "if any" question. To this end, NPATMA calls into effect Section 808 of the Act.

Section 808 of the Act stipulates that:

> *Any methodology* adopted by a Federal agency to assess air tour noise in any unit of the national park system (including the Grand Canyon and Alaska) *shall* be based on *reasonable scientific methods*. [Emphasis added.]

Section 808 of the Act *must* be employed in order to satisfy the "if any" question. Without answering the "if any" question, the Act cannot go forward… meaning that an ATMP cannot be introduced for lack of cause (program decision). In this case, the "if" component of the "if … then … else" syllogism would not have been positively satisfied, causing the Act to freeze like a computer program. Without first applying the "if any" test by means of science-based noise studies using pertinent data, the Act prohibits fights over a given park if more than 50 air tours are conducted per year but allows continued flights under IAO if the authorized flights are 50 or less (unless extraordinary circumstances exist). In either case, without performing the "if any" test, NEPA and NHPA would not yet be activated.

If the "if any" test is performed for a park that has more than 50 air tours per year, then NPATMA would authorize the creation of an ATMP "undertaking," requiring "reasonable and common-sense" methods of avoiding (which does not necessarily mean preventing), accepting, or lessening *significant* adverse effects from air tours. The degree of "significance" present, if any, is to be determined solely by the "if any" test. Unless extraordinary circumstances exist, the "if any" test would not normally be performed for parks that have less than 50 air tours per year. If extraordinary circumstances to exist, then the "if any" test would be required to prove the circumstances.

NPATMA makes it mandatory to use "reasonable scientific methods" for investigation of noise impacts on units of the National Park Service (NPS). No other methodology will suffice. The "*shall*" clause of Section 808 controls both NHPA and NEPA, because NHPA is concerned with the operational conduct and NEPA is focused on the environmental analysis of any "undertaking." Section 808 negates the power of NEPA's §§1502.21, .23, which would otherwise exonerate the FAA from performing any disciplined current sound studies at all.[41] Under NPATMA, science-based sound studies must provide the measure of need for corrective action to mitigate or prevent alleged adverse impacts of air tours. Because NPATMA controls the timing, vocabulary, and methodology of NHPA and NEPA, and because NHPA is silent on the subject of sound studies and NEPA is not exempted from the requirement for sound studies, the "*shall*" demand of Section 808 is the controlling legal authority for noise studies for all three statutes (NPATMA, NHPA, and NEPA).

[41] See my letter dated September 25, 2023, page 3, top, *6th Response to Request for Concurrence on Sec.106.* In that letter, I argue that "Section 808 negates any authority of NEPA's 43 CFR §1502.21 … wherein NEPA excuses incomplete or unavailable information and allows theoretical approaches or research methods instead of science-based studies; and §1502.23, wherein NEPA allows agencies to make use of existing data and resources instead of pertinent, scientifically-researched data. NPATMA makes it mandatory to conduct sound studies, based on 'reasonable scientific methods.' This agency-specific power of Act by itself asserts the authority of NPATMA over NEPA.

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

April 10, 2024

Re: Continuing Consultation under Section 106 of the National Historic Preservation Act for the development of an Air Tour Management Plan for Canyon de Chelly National Monument

Bruce M. Adams
Southwest Safaris
712 Felipe Place
Santa Fe, NM 87505

Dear Bruce M. Adams:

The Federal Aviation Administration (FAA) and National Park Service (NPS) (together the agencies) are in receipt of Southwest Safaris' (the operator) five letters in response to the Section 106 process for the undertaking at Canyon de Chelly National Monument (the Park). Southwest Safaris' June 9, June 12, and June 30, 2023, letters were in response to the Area of Potential Effects (APE) letter at Canyon de Chelly National Monument that the FAA provided on June 2, 2023. A letter dated November 14, 2023, was provided in response to the agencies' request for comments on the historic properties the agencies identified within the APE. Lastly, the agencies have received your January 29, 2024, letter in response to the Finding of No Adverse Effect under Section 106 of the National Historic Preservation Act (NHPA). In all the letters, Southwest Safaris expressed concerns with the Section 106 process as well as concerns regarding compliance with the National Parks Air Tour Management Act (NPATMA) and the National Environmental Policy Act (NEPA). This letter is in response to Southwest Safari's letters and focuses solely on addressing the issues raised that pertain to the Section 106 process. Southwest Safaris raises the following issues:

- 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 challenges how the FAA identified historic properties under Section 106.
- 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.

Overview of Section 106 Process

Section 106 of the NHPA, 54 U.S.C. § 306108, requires federal agencies to consider the effects of the projects they carry out, approve, or fund on historic properties (undertakings). Section 106 review ensures that preservation values are taken into account in federal agency planning and decisions. Federal agencies

are responsible for initiating Section 106 review of their undertakings, most of which takes place between the agency, state, and consulting parties, including tribal nations. For more information see https://www.achp.gov/sites/default/files/documents/2017-01/CitizenGuide.pdf.

To successfully comply with Section 106 of the NHPA and its implementing regulations, 36 CFR Part 800, federal agencies must generally follow a four-step process:

1. **Initiate the Section106 process**. This includes determining the undertaking; identifying the appropriate State or Tribal Historic Preservation Officer (SHPO or THPO), consulting parties including tribal nations, and developing plans to involve the public in the process.
2. **Identify historic properties**. This step requires consultation with the SHPO/THPO and consulting parties to determine the geographic area(s) within which an undertaking may directly or indirectly cause changes in the character or use of historic properties or the area of potential effects (APE). This step also includes consultation with the SHPO/THPO and consulting parties to identify historic properties in the APE that may be affected by the project and determining whether they are listed, or are eligible for listing, in the National Register of Historic Places (National Register).
3. **Assess effects**. This step requires the federal agency to assess the effect of the undertaking on historic properties within the APE, applying the standards in the Section 106 regulations. If the agency finds that the undertaking would have no adverse effect on historic properties within the APE and the consulting parties do not object, the Section 106 process is concluded. If consulting parties object to the finding, the agency may continue consultation or request an opinion from the Advisory Council on Historic Preservation (ACHP). Once the ACHP provides an opinion the agency must consider it in determining whether to affirm the finding or change it. If the agency affirms the finding, then it must show the ACHP and the consulting parties how it considered the ACHP's opinion. Once this is done the Section 106 process is concluded. If the agency changes its finding to that of adverse effect, then it moves to resolving the adverse effect step.
4. **Resolve adverse effects**. If the agency finds that the undertaking would have an adverse effect on historic properties in the APE, then the agency is required to notify the ACHP and resolve the adverse effect through consultation. The Section 106 process concludes when the agency and the relevant SHPO/THPO (and the ACHP in some cases) reach agreement.

The Applicable Law

Southwest Safaris argues that NPATMA is the controlling statute when developing and implementing an ATMP. Specifically, Southwest Safaris argues that before Section 106 of the NHPA is triggered, the FAA must first act "on Section 808 of NPATMA in order to test the 'if any' condition contained in the 'Objective' paragraph of the Act, [49 U.S.C. § 40128(b)(1)(B)]." While NPATMA sets certain requirements for an ATMP, when establishing an ATMP for a park the agencies must comply with all applicable laws. Section 106 of the NHPA, 54 U.S.C. § 306108, applies to all federal actions that meet the definition of an undertaking, 54 U.S.C. § 300320. The development of an ATMP meets the definition of an undertaking triggering the agencies' responsibility to comply with Section 106 and its implementing regulations, 36 CFR Part 800. NPATMA, 49 U.S.C. § 40128(b)(1)(B) does not provide an exception to the agencies' responsibilities under Section 106 for ATMPs, nor does it otherwise alter the statutory and regulatory requirements for Section 106 consultation. Instead, the agencies are required to comply with both statutes when completing an ATMP, as they have done with respect to the ATMP for Canyon de Chelly National Monument. It is under the sole purview of Section 106 of the NHPA, not NPATMA, that federal agencies must consider the impact of their actions on historic properties. Put differently while NPATMA governs how the FAA and NPS develop and implement ATMPs, the agencies must also comply with Section 106 of the NHPA and consider

the effect of the undertaking on historic properties consistent with the process set forth in its implementing regulations, 36 CFR Part 800.

Historic Property Identification

Southwest Safaris disagrees with the "FAA's selection of historic sites for inclusion in the APE at [Canyon de Chelly National Monument]." Based on the analysis done by Southwest Safaris "all but one of the TCPs fail the eligibility test..." Southwest Safaris further alleges that the FAA has not complied with 36 CFR § 800.4(c) and contends that "there are no historic properties of any kind in the Park that need to be protected because air tours are conducted so infrequently as to be of de minimis quantifiable objection." Southwest Safaris states that the FAA is "wrongly withholding the locations of historic sites that would be essential for planning air tour routes."

The FAA has complied with the property identification provisions in Section 106 of the NHPA and has appropriately identified historic properties within the APE for this undertaking. The Section 106 regulations require federal agencies "in consultation with the State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO), and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects," to take the necessary steps to identify historic properties within the APE. 36 CFR § 800.4(1). The regulations describe the level of effort to identify historic properties which may include "background research, consultation, oral history interviews, sample field investigations, and field surveys." 36 CFR § 800.4(b)(1). For the undertaking at Canyon De Chelly National Monument the FAA's identification efforts focused on identifying properties where setting and feeling are the type of characteristics that contributed to a property's eligibility on the National Register. In its efforts to identify historic properties, the agencies engaged in consultation, conducted background research that included reviewing nomination documentation, and records searches. The FAA gathered information on historic properties within the APE 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 for Canyon de Chelly National Monument (NPS, 2016) and the National Register Nomination Form for Canyon de Chelly National Monument (1970). The FAA also coordinated with the Navajo Nation Heritage and Historic Preservation Department to collect data for previously identified properties that may be listed in or are eligible for listing in the National Register. The FAA and NPS performed an in-person records search at the Navajo Nation Heritage and Historic Preservation Department on September 13, 2023. In accordance with the Section 106 regulations, the FAA relied on background research, prior investigations and consultation to determine the historic properties within the APE.

Southwest Safaris claims that the FAA did not comply with 36 CFR § 800.4(c). The FAA did not make any determinations of eligibility because all of the properties identified in the APE were already listed on the National Register or previously determined eligible for listing on the National Register. Based on consultation with Tribal nations that attach religious and cultural significance to the properties, eligibility of previously listed or eligible properties was confirmed.

Southwest Safaris alleges that the FAA withheld the locations of historic sites that would be essential for planning air tour routes. Southwest Safaris misunderstands the goal of the Section 106 process. The goal of consultation under the Section 106 process 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 the historic properties," not to aid in planning air tour routes that are not included in the undertaking. 36 CFR

§ 800.1(a). The FAA disclosed that the Park was listed in the National Register in its entirety. The FAA did not disclose the locations of certain TCPs within the ATMP planning area, including the park, due to confidentiality concerns of the Tribal nations involved in the Section 106 consultations, in accordance with 54 USC 307103 and 36 CFR § 800.2(c)(2)(ii)(A).

Assessment of Effects

Southwest Safaris alleges that the FAA has not properly evaluated and tested the effects of air tours under NPATMA since the agency has not conducted "science-based sound studies." Southwest Safaris also alleges that the FAA has not taken into account the effect of pedestrian and vehicular traffic in the Park. The assessment of effects under the Section 106 process is concerned solely with the effects of the undertaking on the historic properties within the APE. 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 within ½ mile outside the Park's boundary and below 5,000 feet above ground level. So, the consideration of the effect of ground transportation and foot traffic on historic properties within the APE is not appropriate as those modes of transportation are not included in the undertaking.

Finally, Southwest Safaris challenges whether the noise analysis used to assess the effects of the undertaking is based on science. The agencies' assessment of air tour noise within the ATMP planning area is based on reasonable scientific methods. The FAA's 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 § 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.

Please be advised that this letter addresses the issues or concerns raised related to the Section 106 process. All other substantive concerns raised in the letters will be addressed through responses to the public comments on the NEPA and ATMP documents. If you have any questions or concerns regarding this correspondence, please do not hesitate to contact me at (202) 267–4185 or Judith.Walker@faa.gov, copying ATMPTeam@dot.gov.

Best regards,

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