



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

June 4, 2024

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

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

Dear Ms. Loichinger:

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

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

Enclosed is the correspondence sent to, and received from, consulting parties throughout the consultation process (see Exhibits 1 through 6). In particular, Exhibit 5 contains the agency's December 28, 2023, finding of effect letter to the Navajo Nation Tribal Historic Preservation Officer (THPO), which meets the requirements of 36 CFR §800.11(e). The finding of effect letter describes the undertaking, the Area of Potential Effects (APE), a description of steps taken to identify historic properties, a description of affected historic properties in the APE and the characteristics that qualify them for listing in the National Register of Historic Places (National Register), and an explanation of why the criteria of adverse effect do not apply to this undertaking. It also describes the Section 106 consultation process and public involvement completed for this undertaking.

Included in Exhibits 5 and 6 are the responses to FAA's December 28, 2023, letter received from consulting parties. The FAA received concurrence with the proposed finding of no adverse effect from the National Parks Conservation Association. Southwest Safaris, an operator who currently conducts air tours over the Park, objected to the FAA's determination in a letter dated January 29, 2024. Through Southwest Safaris correspondence, it is clear that Southwest Safaris objects to the undertaking, prohibiting air tours within the ATMP planning area, rather than the FAA's no adverse effect finding. However, since Southwest Safaris raised concerns regarding the applicability of the Section 106 regulations to the ATMP process, the FAA addressed those concerns in this request.

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

The National Parks Air Tour Management Act

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

FAA regulations define a commercial air tour as:

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

(i) Below 5,000 feet above ground level (except for the purpose of takeoff or landing, or as necessary for the safe operation of an aircraft as determined under the rules and regulations of the Federal Aviation Administration requiring the pilot-in-command to take action to ensure the safe operation of the aircraft); [or]

(ii) Less than 1 mile laterally from any geographic feature within the park (unless more than ½ mile outside the boundary). . . .

14 CFR §136.33(d).

Because Congress anticipated that the development of ATMPs would take time, it provided in NPATMA that prior to the establishment of an ATMP, the FAA "*shall* grant interim operating authority" to existing air tour operators that apply for prospective operating authority. 49 U.S.C. §40128(c)(1) (emphasis added). NPATMA required that interim operating authority was the greater of the number of commercial air tour flights over the park during the 12-month period, or the average number of commercial air tour flights within the 36-month period, prior to the enactment of NPATMA. *Id.* §40128(c)(2).

The History of Air Tours Over the Park

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

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

Currently, four commercial air tour operators are authorized to conduct air tours over the Park with Interim Operating Authority for 175 commercial air tours annually, but only one commercial air tour operator, Southwest Safaris, currently operates. The agencies consider the existing operations for commercial air tours to be an average of 2017-2019 annual air tours flown, averaging 43 tours per year conducted by Southwest Safaris. Air tour operators currently fly under visual flight rules (VFR). VFR is based on the principle of "see and avoid" and does not require specific routes or altitudes. 14 CFR § 91.155. Interim operating authority does not itself include any operating parameters (e.g., routes, altitudes, time of day, etc.) for air tours other than an upper limit of the total number of air tours operators may conduct each year. Attachment B to the FAA's finding of effect letter (Exhibit 5 to this letter) depicts the routes currently flown by the operator, however, under interim operating authority the operator is not restricted to any route when conducting commercial air tours, and the routes could change without notice to the FAA or the NPS. The operator currently flies between 800 feet (ft.) to 1,000 ft. above ground level (AGL), on all routes while over the Park or outside the Park but within ½ mile of its boundary although no minimum altitude is currently required.

In accordance with NPATMA and a plan approved by the U.S. Court of Appeals for the District of Columbia Circuit (Court), the FAA and the NPS are developing an ATMP for the Park. The Court retained jurisdiction to monitor the agencies' progress consistent with the approved plan. Thus, the planning process to implement an ATMP for the Park has proceeded, and remains, under Court supervision. The provisions and conditions in the draft ATMP are designed to protect the Park's cultural resources which necessarily include resources that are culturally and spiritually significant to the Navajo Nation because the Park is located entirely on Tribal trust lands and thus are consistent with the co-management relationship that NPS has with the Navajo Nation regarding specific decisions involving the monument.

The Undertaking

The FAA has determined that the development and implementation of an ATMP for the Park is an undertaking under the NHPA. The proposed undertaking would prohibit commercial air tour operations within the ATMP planning area. The ATMP for the Park includes the following:

SUMMARY OF ATMP ELEMENTS

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

Under NPATMA, all IOA for the Park terminates by operation of law 180 days after the establishment (effective date) of the ATMP, 49 U.S.C. § 40128(c)(2)(E), after which time no operator may continue to rely on any operating specifications issued under IOA as authority to conduct commercial air tours within the ATMP planning area.

Southwest Safaris' Objection and the FAA's Response

The FAA thoroughly analyzed the effects of the undertaking and supported its determination of no adverse effect in its December 28, 2023, letter. See Exhibit 5. The FAA sent the correspondence to all consulting parties, including the Navajo Nation THPO, requesting that all consulting parties concur with the agency's finding. The National Parks Conservation Association concurred with the FAA's proposed

finding of no adverse effects for the undertaking, Southwest Safaris objected to the finding in a letter dated January 29, 2024.

In its letter Southwest Safaris submitted various comments that were directly related to the ATMP for this Park and related to ATMPs for other Parks as well as the NEPA process. The comments related to the Section 106 process or the assessment of effects of the undertaking are summarized and addressed below:

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

See Exhibit 6, Letter from Southwest Safaris.

Southwest Safaris' objection is misplaced for the following reasons:

The Applicable Law

Southwest Safaris argues that the NPATMA is the controlling statute when developing and implementing an ATMP. Specifically, Southwest Safaris 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)]" (Southwest Safaris, January 29, 2024 pg. 10). While NPATMA sets certain requirements for an ATMP, when establishing an ATMP for a park the agencies must comply with all applicable laws. Southwest Safaris erroneously believes that if NPATMA is the controlling statute then no other statute or regulation can apply to the development and implementation of an ATMP or that the agency must apply NPATMA's provisions to the other statutes. With respect to the NHPA, any federal action that meets the definition of an undertaking under the NHPA and Section 106 regulations trigger compliance with Section 106 of the NHPA. The development and implementation of an ATMP meets the definition of an undertaking triggering the Section 106 process. Thus, under Section 106 of the NHPA, the agencies must consider the impact of their actions (development and implementation of the ATMP) on historic properties. So, while NPATMA governs how the FAA and NPS develop and implement ATMPs, if the development and implementation of an ATMP meets the definition of an undertaking, the agencies must comply with Section 106 of the NHPA, and the Council's implementing regulations, and consider the effects of the undertaking on historic properties. Compliance with NPATMA does not preclude compliance with other federal statutes and regulations. Put differently, the agencies must comply with both NPATMA and Section 106 of the NHPA. Compliance with other applicable statutes and regulations does not mean that the agencies are not fully complying with NPATMA.

Historic Property Identification

Southwest Safaris states that, "the FAA's Finding is wrong, because the agency's list of historic properties in the APE is based on hearsay" (Southwest Safaris, January 29, 2024 pg. 19). Based on the analysis done by Southwest Safaris "... '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)" (Southwest Safaris, January 29, 2024 pg. 13). Southwest Safaris states

that the FAA is “wrongly withholding the locations of historic sites that would be essential for planning air tour routes” (Southwest Safaris, January 29, 2024 pg. 26).

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, the FAA confirmed the eligibility of listed properties or properties previously determined eligible .

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).

The FAA’s identification efforts and consideration of the historic properties identified in the APE is appropriate.

Assessment of Effects

Southwest Safaris raises three main issues that relate to how the FAA assessed the effects of the undertaking. First, it appears that Southwest Safaris misunderstands that the proposed finding of no adverse effect applies to the undertaking and not air tour operations in general. Second, Southwest Safaris alleges that aircraft noise and visual impacts from aircraft do not have an adverse effect on people or historic properties on the ground. Third, Southwest Safaris alleges that the noise modelling was not based on science.

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

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

Request for Review and Concurrence

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

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

Sincerely,

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

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

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

Enclosures

- Exhibit 1 – Consultation Initiation Letter and Responses
- Exhibit 2 – Undertaking APE Letter and Responses
- Exhibit 3 – Historic Property Identification Letter and Responses
- Exhibit 4 – Section 106 Public Involvement
- Exhibit 5 – Finding of Effect letter, Additional Public Involvement Comments, and Concurrences
- Exhibit 6 - Objection to Finding of Effect letter and Responses