Scenic Air Tours over Our National Parks: Exploitation of Our National Resources or Environmental Solution

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SCENIC AIR TOURS OVER OUR NATIONAL PARKS:
EXPLOITATION OF OUR NATIONAL RESOURCES OR
ENVIRONMENTAL SOLUTION?

Ann E. Lane*

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  assistance in the preparation of this Comment.
I. INTRODUCTION

SCENIC FLIGHTS over our national parks are being threatened by conservation groups and outdoor enthusiasts who claim that aircraft noise is ruining the national park experience for many ground visitors. Hikers, campers, and rafters at national parks seeking the wilderness experience complain that their solitude is constantly shattered by the sound of aircraft.¹ "High decibel engine noise is disruptive, whether someone happens to be gazing out across the spectacularly sculpted rock formations from a perch on the rim [of the Grand Canyon] or hiking the backcountry in search of tranquility."² But at a time when our national park facilities are strained by overcrowding, overuse, and under funding,³ scenic air tours can provide a solution. Air tours relieve traffic congestion, do not contribute to erosion of the trails, and help elderly and handicapped people experience the beauty of our national parks.⁴

Although overflight restrictions are in place over several parks, opponents of the tours are pushing for stricter regulations and bans of overflights. The air tour industry has responded by arguing that further regulations are unnecessary and may force many companies out of business, thus eliminating an enjoyable and safe alternative to visiting the national parks on the ground. Both sides have strong support for their position. "[T]he battle is joined between those who believe that our natural parks should be exactly that—natural—and those

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¹ Dennis Brownridge, Covering the Land with Noise, 133 CONG. REC. 3475, 3476 (Feb. 18, 1987) (Rep. Coelho included this article in the record); see also Don Hopey, Helicopters Wreak Havoc, PIT. POST-GAZETTE, Jan. 30, 1995, at A7.
³ Dennis J. Herman, Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks, 11 STAN. ENVTL. L.J. 3, 10 (1992).
who believe that they are for the enjoyment of all, whether they are hikers on a trail or passengers in a plane.  

The difficulty in the two sides coexisting peacefully is demonstrated by the following story told in the National Parks magazine:

On a late Spring day, rock climber David Widden and his partner were repelling down a 400-foot tower near Canyonlands National Park in Utah when a helicopter appeared out of the blue. The chopper hovered within 100 feet of the climbers as passengers inside snapped photos. Air drafts from the chopper's main rotor buffeted the climbers against the rock wall, creating what Widden said was an unnerving incident that "could have been a really dangerous situation."

Due to the increasing number of tours and incidents like the one described above, and because scenic air tours are the only unregulated commercial activity taking place in national parks, steps are underway to further regulate the air tour industry. But there is no easy answer to the goal of restoring natural quiet and solitude to our national parks. With a $500 million industry nationwide and over 1,300,000 yearly visitors enjoying the air tours, scenic overflights are here to stay. Additionally, it is very difficult to determine the extent of the problem. "Measuring degrees of quiet and perception of quiet is very different from measuring amounts of noise."

The Grand Canyon National Park and Hawaiian Islands National Parks have by far received the most attention concerning these issues. Therefore, this Comment centers primarily on these two areas. However, the issues and recommendations discussed herein are applicable to all national parks with scenic overflights. Moreover, because proposed legislation primarily addresses the National Park Service's mandate to "restore natural quiet" to our national parks, other issues with respect to overflights, such as pollution, will not be addressed.

This Comment will begin by briefly discussing charters of the National Park Service (NPS) and the Federal Aviation Adminis-

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5 Toledo Blade, Buzzing the National Parks, S.F. EXAMINER, Oct. 21, 1994, at A22.
tration (FAA), followed by an overview of the historical background giving rise to the scenic overflight controversy. Part III will describe the air tours currently available at various national parks, the effect of overflights on wildlife and cultural resources, and quickly review safety issues. Next, the Comment will discuss proposed legislative and administrative actions. Finally, the Comment will analyze a few of the possible solutions designed to help restore quiet to our national parks, while also allowing the air tour operators to continue to provide their popular and profitable scenic overflights.

II. HISTORICAL BACKGROUND

A. National Park Service

The NPS administers many of our most important national historical sites, from Yellowstone and the Grand Canyon, to the Statue of Liberty and Independence Hall. The NPS is governed by the Act of August 15, 1916 (NPS Organic Act), which created the NPS within the Department of the Interior (DOI) to promote and regulate national parks. The fundamental purpose of the NPS Organic Act is “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

Franklin Lane, Secretary of the Interior in 1918, interpreted the purpose of the NPS as maintenance of the national parks in an “absolutely unimpaired form for the use of future generations” and at the same time “give the public every opportunity to enjoy the parks in the manner that best satisfied individual taste.” The competing goals of preservation and development have become part of the traditional operating philosophy of the NPS, and this conflict in legislative intent has never been clarified by Congress.

11 Id.
13 See generally id. at 56. Congress did, however, provide increased support for preservation. The 1978 Amendment to Section 1(a)-i of the Organic Act states
The dual purposes of use and preservation did not substantially impact the national parks during the first sixty years. "[M]ost parks were in remote areas and few people were able to use them." Today the NPS's biggest challenge is preserving the parks' natural beauty in the face of an increasing number of park visitors. But in addition to a park's natural beauty, the NPS must also preserve the natural quiet and solitude generally associated with the outdoor wilderness areas.

One consequence of the increasing number of park visitors is a substantial increase in aircraft overflights. The NPS contends that as many as 100 parks of the 367 units in the national park system are affected by aircraft noise, many of them because of air tours. However, despite its mandate to preserve the natural beauty of the parks and accommodate visitors, the NPS has no control over scenic air tours. Unlike other companies doing business at national parks, air tour companies are outside Park Service jurisdiction because they operate from sites outside park boundaries. Instead, the air tours are under the jurisdiction of the FAA.

B. Federal Aviation Administration

The FAA under the Department of Transportation (DOT) has the exclusive authority to regulate airspace, including jurisdiction over park overflights. The FAA's enabling legislation specifically provides that it has "control of the use of the navigable airspace . . . and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both." The FAA also has full authority to address noise along with safety, but until recently the FAA has not ex-

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14 Id. at 47.
15 See generally id. at 42. "From 1960 to 1979, total visits to parks increased from 135 million to 282 million, with little corresponding increase in the size and number of national park areas." Id. By 2010 the number of tourists visiting national parks is expected to jump to 500 million. Herman, supra note 3, at 9.
16 Lee, supra note 6, at 24.
17 See Smith, supra note 4, at A1; see also Lee, supra note 6, at 24.
18 See Lee, supra note 6; see also Hopey, supra note 1, at A7 ("Flightseeing" on helicopters and small planes creates noise that "is the number one problem in a majority of parks, according to a Park Service manager's study.").
20 The FAA Can and Should Control Helicopter Noise, L.A. TIMES, Dec. 11, 1994, at 14 (Letter to the Editor); see also Viewing National Parks by Planes and Helicopters:
ercised its power to address the noise problems caused by air traffic in national parks.\textsuperscript{21} Even though the FAA has issued Special Federal Aviation Regulations (SFAR) which cover air tours in the Grand Canyon and certain Hawaiian national parks and which have mitigated the noise problem in those areas, the SFAR's were put in place primarily for safety reasons.\textsuperscript{22} The FAA's first real attempt to regulate noise is set forth in its various Notices of Proposed Rulemaking (NPRM), discussed in Part IV, section C below.

C. The Air Tour Industry

The first flightseeing tours began over America's national parks in the 1920s.\textsuperscript{23} Since that time, scenic overflights have proven to be a popular tourist activity. The air tour industry has become a $500 million business nationwide with one-half of the revenues from the Grand Canyon and $75 million from Hawaii.\textsuperscript{24} Air tour companies, while sensitive to noise complaints, are understandably opposed to any further restrictions on their livelihood.

The air tour industry initially opposed the SFARs, claiming the regulations would adversely impact their business. The industry has been partially correct. Although there has been no decrease in air tours as a result of SFARs in place at the Grand Canyon, Hawaiian tour operators have experienced a major downturn in their industry.\textsuperscript{25} Bookings in Hawaii for the flights have dropped as much as 40 to 50\%.\textsuperscript{26}

\begin{flushleft}
\textit{Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 103rd Cong., 2d Sess.} (1994) [hereinafter Subcommittee Hearing] (Appendix I to Testimony of Terry Bracy, Board of Trustees, Grand Canyon Trust).
\end{flushleft}

\begin{itemize}
\item \textsuperscript{21} 133 \textsc{cong. rec.} 2603 (1987) (statement of Sen. McCain).
\item \textsuperscript{22} See infra notes 54 and 60 and accompanying text.
\item \textsuperscript{23} Lee, supra note 6, at 24.
\item \textsuperscript{24} 141 \textsc{cong. rec.} S8109 (June 5, 1995) (statement of Sen. Akaka).
\item \textsuperscript{25} Lucy Jokiel, \textit{Unfriendly Skies: Has a Recent FAA Safety Ruling—which Has Dealt a Stunning Blow to Hawaii's $75 Million Tour Helicopter Industry—Actually Created a More Dangerous Situation?}, \textsc{Haw. Investor}, Mar. 1, 1995, at 10; see also John H. Cushman, Jr., \textit{Tourist Helicopters in Hawaii Can Fly Lower}, \textsc{N.Y. Times}, May 19, 1996, at 3 (at least one tour operator has filed for bankruptcy).
\item \textsuperscript{26} Jokiel, supra note 25. Helicopter pilot Curt Lofstedt reports a 50\% reduction in bookings while HHOA, which represents 26 tour companies, reports a 40\% drop in bookings. The drop in bookings is a result of a TV report questioning the safety of tours. Bookings also drop because many of the flights have to cancel or turn back when the clouds descend and the helicopters are unable to
\end{itemize}
Furthermore, Grand Canyon sightseeing flight operators could still be crippled by future attempts to regulate the Grand Canyon flights, especially in light of a NPS Report that recommends a ban on all flights from the north-south Dragon flight corridor. The air tour companies maintain that since the current regulations have been implemented, natural quiet has been restored (at least at the Grand Canyon), and no further restrictions are necessary. Information obtained by scenic air tour organizations from National Park Service data reveals that at Grand Canyon National Park, only 8 in 1,000,000 visitors complained about aircraft noise in the park.

Overflights are also an environmental solution to the overcrowding and deterioration of our national parks. The opportunity to “look, but don’t touch” provided by the overflights should be the preferred environmentally sensitive method to see our national parks. Rafters in the Grand Canyon help erode the Colorado River’s beaches as a result of nearly 20,000 annual beach landings; and back country hikers infect the ground water system with their bodily wastes. In contrast, “sound is tempo-

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27 Rausch, supra note 4. With the increased number of air tours over the Grand Canyon, any sort of regulation eliminating even more flight corridors would increase the number of flights in the remaining available corridors to the point where safety concerns would limit the total number of flights. Id.


29 Id. at 40,121.

30 Subcommittee Hearing, supra note 20 (statement of Walter S. Coleman, President, Regional Airline Association). The operators have vigorously disputed an NPS survey which concluded that natural quiet had not been restored. Id. The operators hired an independent source to review the NPS's acoustic, visitor, and dose response surveys. Id. (statement of Daniel W. Anderson, President, Grand Canyon Air Tourism Association). The independent source concluded the NPS study had “serious flaws and biases in the sampling plans, sample implementations, and data presentations.” Id. The operators maintain the flawed NPS study should be disregarded; an accurate indication that natural quiet has been restored is the minuscule number of noise complaints from ground visitors. Id.

31 See generally Rausch, supra note 4, at E402.

32 Id. at E401. Conservative calculations show 40,000 lbs. of sand is kicked and shoved into the river each year as a result of the beach landings by rafters. It is estimated that 30 to 40% of the human bodily waste generated during river trips (which is required to be carried out) is deposited in the delicate side canyons as a result of these hikes. Id.
ry and leaves no damage or impact." An air tour pilot at the Grand Canyon has this point of view:

From an environmental standpoint, I can think of no other way that hundreds of thousands of visitors could view the magnificence of the Grand Canyon and have virtually no impact. . . . Many of these people are fulfilling a life-long dream and would never be able to see so much of the beauty in relative ease because of age, physical ability or time constraints. These people should not have this incredible way to view the wonders of the Grand Canyon taken away. Each way people choose to experience the Grand Canyon is unique and wonderful to them and should be preserved. With minor changes, each can be made so as to not overly interfere with the enjoyment of the other. At over 1,940 square miles, it seems there should be room enough for us all.

Air tours can help to limit the extent of overcrowding. At the Grand Canyon, overcrowding during the summer is legendary, with hour long waits at the entrance gate, two hour waits for tables at park restaurants, hour waits for shuttle buses to the scenic overlooks, and fistfights breaking out in the parking lots as thousands of motorists compete for 2000 parking spaces. However, there are 800,000 less people on the park grounds each year because the flight seers are visiting the park through the air, often flying out of Las Vegas.

"Air tour operators have charged that NPS policies and proposed recommendations disproportionately favor the experience of [a] few . . . and ignore the many who need and desire less physical options to experience the Grand Canyon." The Grand Canyon is not just the "private back yard of environmentalists." Instead, many of the visitors to our national parks sim-

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33 Air Tour Operators Stress to Peña Importance of FAA Jurisdiction Over Airspace, WKLY. OF BUS. AVIATION, Apr. 17, 1995, at 165.
37 Id.
38 Frances Fiorino, Back Yard Brawl, AVIATION WK. & SPACE TECH., Sept. 11, 1995, at 19 (quoting National Air Transportation Association President James Coyne); Different Views of the Canyon, TIME, July 31, 1995, at 4 (Letters section); see also Rausch, supra note 4 (environmentalists make up less than one-tenth of one
do not have the physical ability to climb down into a canyon, or hike to the top of a waterfall. “Often, the individuals taking advantage of sightseeing flights are senior citizens, handicapped individuals, families, or other persons who lack the physical stamina or time to walk through the park.”39 Because many of the most beautiful parks are difficult to get to, visitors often do not have the time to spend several days visiting all the different scenic wonders by car, or have the money necessary to spend a week or two rafting through a canyon.40 The imposition of stringent flight regulations will “limit access to hundreds of thousands of visitors that see the canyon by air tour.”41

Furthermore, air tours are simply a great way to see national parks. Visitors come to a national park to see it, not hear it.42 The scenic overflights provide access to areas of national parks completely unaccessible by land. “Whizzing 100 feet above the rim of the canyon in a single-engine plane, one begins to sense the vastness of the seemingly unending gorge and can get a feel of its geographical placement amid the surrounding Kaibab National Forest.”43 Hawaiian visitors can “feel the heat” by hovering over the center core of Kilauea Crater in Volcanoes National Park.44

D. NATIONAL OVERFLIGHTS ACT OF 1987

Due to the FAA’s initial failure to address the overflight issue, Congress became involved in 1987, enacting the National Over-
flights Act. The Act's goal was the "substantial restoration of natural quiet" by restricting flights in three national parks: the Grand Canyon National Park, Yosemite National Park, and Haleakala National Park. In the Grand Canyon National Park, the Overflights Act mandated the creation of specific air corridors for scenic air tours, as well as flight free zones. The Act also limits noise, which at the time of the enactment was audible 95% of the time to rafters and hikers in the Canyon. Furthermore, in Yosemite, California and Haleakala, Hawaii, the Overflights Act sets forth minimum altitude restrictions for the air tours.

The National Overflights Act also called for an assessment of the adverse impact of overflights on the National Forest Service wilderness areas, and further authorized a three-year study by the Secretary of the Interior on air traffic within the boundaries of ten national parks. The study's goals were to determine the proper minimum altitude which should be maintained by aircraft when flying over national parks and to identify any problems associated with scenic air tours. Originally scheduled to be completed by 1990, the study was finally submitted to Congress in September of 1994.

The Report on Effects of Aircraft Overflights on the National Park System (NPS Report) concluded that "because the details of na-
ational park overflights problems are so park-specific, no single altitude can be identified for the entire National Park System."

For the Grand Canyon, it recommended quieter planes and helicopters flying over the main gorge, and within five years, banning all flights from the north-south Dragon flight corridor, which crosses the main gorge.

E. Emergency Actions in the Grand Canyon

The first FAA overflight regulation for the Grand Canyon was issued in June of 1987 and provided rules to enhance the safety of overflight operations in the vicinity of the Grand Canyon National Park. SFAR No. 50-2 was issued the following year as a result of recommendations mandated under the Overflights Act. The new SFAR established a Special Flight Rules Area from the surface to 14,500 feet above mean sea level (msl) in the area of the Grand Canyon. It also established flight-free zones below 14,500 feet msl in certain park areas, including most of the visitor areas on the north and south rims, and ninety percent of the back country areas. Moreover, SFAR No. 50-2 limits air tour operators to specific routes covering only sixteen percent of the park. The SFAR is a temporary measure, however, and must be periodically extended by the FAA.

F. Emergency Actions in Hawaii

The FAA enacted SFAR 71 in the wake of several accidents, including two helicopter accidents on the same day, one of

53 Blade, supra note 5; David Fritze, Canyon Tours: Curbs Would Hurt Air Safety, ARIZ. REPUBLIC, Oct. 12, 1994, at B1.
55 Id.
56 Id. The existing altitude restriction over the Grand Canyon is a significant impediment for pilots flying through that area. General aviation pilots are usually required to use supplemental oxygen above 14,000 feet—but most aircraft are not equipped with supplemental oxygen. Furthermore, aircraft that do not have turbo charged engines may be prevented from flying higher than 12,000 feet. Subcommittee Hearing, supra note 20 (statement of Phil Boyer, President, Aircraft Owners and Pilots Association).
58 Collogan, supra note 34, at 142.
59 AIR SAFETY WK., Apr. 17, 1995 (announcing a proposed extension of SFAR 50-2 for an additional two years); Fatal Canyon Crashes Prompt Air Tour Safety Concerns, AVIATION WK. & SPACE TECH., Dec. 6, 1993, at 58 (the latest extension will extend the SFAR until June 15, 1995).
which resulted in fatalities.\textsuperscript{60} Under SFAR 71, helicopter pilots were initially required to maintain a minimum altitude of 1500 feet above the sightseeing attraction and 1500 feet from canyon walls;\textsuperscript{61} non-amphibious helicopters and planes were required to be equipped with flotation devices to keep the craft from sinking immediately into the sea, or to provide individual flotation devices for each passenger aboard.\textsuperscript{62} The pilots were also required to file pre-flight performance plans designed to maintain enough combined height and speed to permit a safe landing in the event of engine power loss, and to brief passengers before flights on flotation devices, emergency exits and water-ditching procedures.\textsuperscript{63}

Despite the air tour operators vigorous opposition to SFAR 71,\textsuperscript{64} the FAA claims that the SFAR was only put into place because the operators refused to voluntarily comply with measures designed to reduce accidents. Normally, the FAA tries not to invoke SFARs, because its philosophy is to allow free and unrestricted use of the nation’s airspace.\textsuperscript{65} Hank Verbais, public affairs spokesperson for the FFA’s Western Pacific Region, says that for a year or so before SFAR 71 was enacted, the FAA con-

\textsuperscript{60} Yenckel, \textit{supra} note 44. The two accidents occurred on July 14, 1994. “Both choppers made forced landings in the water close to shore, one off the rugged cliffs at Kauai’s Na Pali coast and the other off a remote area of Molokai.” \textit{Id.} The pilot and two passengers drowned in the Kauai accident after escaping from the helicopter. The helicopter was not equipped with flotation devices and sank after hitting the water. Survivors told investigators that they were not briefed on the location and use of life vests, which were located in the helicopter under the seats. \textit{Id.} See also Paul Takemoto, \textit{FAA Sets New Safety Rules for Hawaii Air Tours; Prompted by Accidents in the Islands, Including 24 Fatalities in Three Years; Federal Aviation Administration Implements Stricter Regulations on Hawaiian Air Tour Operators, TRAVEL WKLY.,} Oct. 3, 1994, at 16 (There have been 24 fatalities over the past three years in the Hawaiian air tour industry.).

\textsuperscript{61} Jokiel, \textit{supra} note 25.

\textsuperscript{62} Takemoto, \textit{supra} note 60.

\textsuperscript{63} \textit{Id.} at 16. Prior to implementing SFAR 71, the FAA requested all Hawaiian air tour operators submit to the FAA for evaluation audit reports of their operations, including maintenance practices. \textit{Id.} See also Yenckel, \textit{supra} note 44 (the FAA issued the 1500 feet ruling immediately after the two crashes in order to give pilots more altitude in order to glide to a suitable landing spot in case of mechanical difficulties); Christopher Reynolds, \textit{New High-Flying Rules Have Air Tour Pilots Feeling Low Aviation: Hawaii Operators Say the FAA’s Minimum Altitude Regulation, and Others, Could Put Them Out of Business, L.A. TIMES,} Nov. 6, 1994, at 2 (in issuing the SFAR, the FAA administrator declared an “urgent safety problem,” referencing the 13 fatal accidents (48 deaths) between 1982 and July of 1994).

\textsuperscript{64} See Reynolds, \textit{supra} note 63 (HHOA claims new regulations have to do with noise, not safety).

\textsuperscript{65} Jokiel, \textit{supra} note 25.
sulted with Hawaii helicopter operators and suggested that they help by adopting voluntary measures to reduce the risk of accidents. However, the FAA felt that not all of the operators were complying with the voluntary restrictions necessary to ensure safety, and therefore had no choice but to invoke the special regulations.

III. CURRENT STATUS

A. GRAND CANYON

By far, the Grand Canyon overflights have generated the most discussion in the scenic air tour noise debate. In contrast to the limited number of permits and long waiting lists for raft trips, back country hiking, and mule trips, air tours are soaring because no permits are required to travel by aircraft above the Canyon. Air tour traffic at the Grand Canyon has doubled since 1987 to 800,000 people annually. During summer months the number of air tours exceeds 10,000 per month and accounts for approximately 300 pilot jobs, generating $250 million annually to the economy in and around the Grand Canyon.

Although SFAR No. 50-2 has helped in reducing the noise in certain areas of the Canyon, due to the exponential increase in air tours, opponents are still demanding more stringent regulations. Therefore, although air tours are already prohibited in over eighty-six percent of the Grand Canyon National Park, the NPS has recommended curtailing the sightseeing flights even further. NPS proposals include limiting times of operations, establishing a new flight-free zone in the western Grand Canyon, expanding the existing flight-free zones, and treating the aircraft operators as concessions, with a portion of the revenue returned to Uncle Sam. Additionally, the NPS would like

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66 Id.
67 Id.
69 Steve Yozwiak, Counting Raptors is Canyon Rapture, NEW ORLEANS TIMES-PICAYUNE, Nov. 6, 1994, at A2.
70 J. Scott Hamilton, Allocation of Airspace as a Scarce National Resource, 22 TRANSP. L.J. 251, 289 (1994); see also Jaroff, supra note 35 (“[forty-three] different services provide . . . plane and helicopter flight[s] over the Canyon during the peak summer months”).
71 141 CONG. REC. S8109 (June 5, 1995) (statement of Sen. Akaka); see also Rausch, supra note 4, at E402 (in contrast to the air tour industry, the river running-trail guiding industry is a $35 million a year business).
72 Fiorino, supra note 38.
73 Smith, supra note 4.
all the Grand Canyon operators to use the "new quiet technology" aircraft.\textsuperscript{74}

B. **Hawaii**

Visitors to Hawaii return to their homes with memories of Hawaii's most spectacular tourism feature—the scenery. Hovering above a spectacular waterfall, or swooping into an active volcano are both offered by Hawaii's helicopter tours, which allow visitors to see parts of Hawaii not accessible from the ground.

The Hawaiian scenic air tour industry consists of twenty-six commercial helicopter firms, making up more than ninety percent of the non-governmental flights in the islands.\textsuperscript{75} In addition to contributing revenues of $75 million to the economy, the tours also save the state of Hawaii money. "Tour helicopters also assist county officials with fire fighting, emergency search and rescue, and medical evacuations, saving the state hundreds of thousands of dollars for these services."\textsuperscript{76}

The FAA's SFAR 71 has had drastic effects on Hawaii's air tour operators. With a forty percent drop in its bookings attributed to the new regulations, the Hawaii Helicopter Operators Association (HHOA) initially fought back with a lawsuit against the FAA challenging the rules.\textsuperscript{77} The HHOA objected to the prohibition against flying below a minimum altitude of 1500 feet, and requirements that helicopters be amphibious and equipped with emergency flotation gear.\textsuperscript{78} The HHOA claimed the FAA waived the notice and comment requirements without good cause, that SFAR 71 is arbitrary and capricious, and that there was no rational basis for the flotation requirements.\textsuperscript{79} Although SFAR 71 was upheld by the Ninth Circuit, the FAA has

\textsuperscript{74} Id.; see infra notes 188-195 and accompanying text.

\textsuperscript{75} Jokiel, supra note 25; see also Bill Poling, FAA, Park Service Work to Clean up Aircraft Noise Pollution; Federal Aviation Administration, National Park Service; Reduction of Noise Above National Parks, TRAVEL WKLY., Mar. 24, 1994, at 8 (reporting that there are 60 commercial air tours a day over Hawaii Volcanos National Park, and seven firms on Maui offering helicopter tours to Haleakala).

\textsuperscript{76} Jokiel, supra note 25.

\textsuperscript{77} Hawaii Helicopter Operators Ass'n v. Federal Aviation Admin., 51 F.3d 212 (9th Cir. 1995); see also Jokiel, supra note 25 (the Helicopter Association theorizes that the real reason behind the regulations is not entirely safety as the FAA claims, but instead the regulations were put into place to help stem noise complaints).

\textsuperscript{78} Hawaii Helicopter Operators Ass'n, 51 F.3d at 214.

\textsuperscript{79} Id.
subsequently lowered the minimum 1500 feet minimum altitude requirement.\textsuperscript{80}

C. OTHER NATIONAL PARKS

Grand Canyon National Park and the Hawaiian Islands National Parks are not the only parks affected by scenic overflights. The controversy over air tours even extends to the hustle and bustle of New York City. Although New York is not known for its peace and quiet, aircraft noise has affected some tourist attractions. Commercial air tour companies provide approximately 115 helicopter trips daily to tourists desiring to see the Statue of Liberty.\textsuperscript{81} New York resolved the issue through a compromise between the New York air tour operations and the Department of Transportation (DOT).\textsuperscript{82} Two helicopter companies voluntarily agreed to keep their air tours at least 500 feet from Ellis Island and the Statue of Liberty, for safety and noise reasons.\textsuperscript{83} This agreement has a direct correlation to the problems at the Grand Canyon. Because of the large controversy over air tours in the Grand Canyon, the DOT and NPS began looking into ways, such as the New York City private agreement, to limit noise at other national parks.\textsuperscript{84}

Out west, Colorado's Rocky Mountain National Park and the town of Estes Park are trying to stop scenic air tours from even getting off the ground. Concerned by inquiries from two established tour operators and helicopter tours flying at the Black Canyon of the Gunnison National Monument on Colorado's western slope, officials from the park, Estes Park, and Larimer County met with the FAA to ask for help in preventing problems before they started.\textsuperscript{85} The state and local opposition's lobbying efforts have been successful; on Earth Day 1996, President Clin-

\textsuperscript{80} FAA Allows Lower-Altitude Copter 'Flightseeing' Tours in Hawaii, ARIZ. REPUBLIC, May 26, 1996, at T5.
\textsuperscript{81} ANPRM, 59 Fed. Reg. at 12,743.
\textsuperscript{82} New York City Air Tour Companies, DOT Make Standoff Distance Agreement, AIR SAFETY WK., July 17, 1995; see also Mike Shoup, Helicopter Tours Can Be Dangerous, SEATTLE TIMES, Jan. 8, 1995, at K9 (New York City is a distant third behind the Grand Canyon and Hawaii for helicopter tours).
\textsuperscript{83} Lady Liberty Aloof to Noisy Copters, TULSA WORLD, July 6, 1995, at N10.
\textsuperscript{84} New York City Air Tour Companies, DOT Make Standoff Distance Agreement, supra note 82.
\textsuperscript{85} Deborah Frazier, Park Officials Want Choppers Grounded, ROCKY MTN. NEWS, April 14, 1995, at 8A.
ton ordered the FAA to address the problems at Rocky Mountain National Park.\textsuperscript{86}

Even though the FAA has sole control over aircraft in the air, Rocky Mountain National Park is not relying solely on federal intervention.\textsuperscript{87} Opponents of the air tours are attempting to limit where helicopters take off and land,\textsuperscript{88} and have suggested implementing noise ordinances prohibiting non-emergency helicopter take-offs and landings.\textsuperscript{89} So far, Rocky Mountain National Park has been successful; both Larimer County and the town of Estes Park have turned down requests for a helicopter base near the park.\textsuperscript{90}

Great Smokey Mountain National Park is another national park trying to use local legislation in addition to FAA regulations to restrict air tours. Although there have been scenic air tours over the park for more than two decades,\textsuperscript{91} Tennessee is now attempting to limit the air tours through both state legislation and negotiations with air tour operators. After a meeting in 1995 between the helicopter operators, the FAA, and national park officials, the air tour operators made voluntary concessions to stop Sunday flights and to cut back on the areas that the tours fly over.\textsuperscript{92} In addition to these voluntary measures, the Great Smokey Mountain helicopter operators flying out of a “tourist

\textsuperscript{86} Presidential Memorandum, 61 Fed. Reg. 18,229 (Apr. 22, 1996); see infra notes 160-61 and accompanying text; Notice of Proposed Rulemaking (NPRM), 61 Fed. Reg. 24,582 (proposed May 15, 1996). The NPRM provides three alternatives for Rocky Mountain National Park: (a) a complete ban on scenic tours; (b) certain altitude and/or time restrictions on scenic tours; or (c) a voluntary agreement between the air tour operators and the federal government (similar to the New York Agreement). Id.

\textsuperscript{87} Mary George, Park’s Cry: No Copter Tours!, DENVER POST, June 11, 1995, at C1.

\textsuperscript{88} Id.

\textsuperscript{89} Editorials, DENVER POST, June 14, 1995, at B6; but see infra notes 91-104 and accompanying text regarding similar legislation in Tennessee.

\textsuperscript{90} Gary Gerhardt, Copter Flights Over Park?, ROCKY MTN. NEWS, July 1, 1995, at 8A; see also George, supra note 87 (a Larimer County Commissioner is proposing legislation that limits helicopter take-offs and landings in the county only at U.S.-approved airports. Other nearby counties have apparently bought into this agreement, thereby protecting Rocky Mountain National Park’s busiest side).


resort county” in Tennessee may have to comply with additional restrictions under state law.

The state has enacted two separate statutes attempting to ground air tours, although it is unclear at this time whether the state will be successful. Tennessee originally enacted Chapter 212 of the 1991 Tennessee Public Acts regulating “commercial helicopter touring.” The Tennessee Attorney General’s office took the position that “the statute restricted, upon the basis of concerns over aircraft noise and air flight safety, the type of helicopter operations that could be conducted from licensed, private commercial heliports.” The Attorney General’s office, however, declined to defend this regulation due to federal preemption by the Federal Aviation Act.

In 1992, the Tennessee legislature tried a different tack, enacting a new statute regulating land use. The new statute prohibits land in a “tourist resort county” located within nine miles of the boundary of the Great Smokey Mountains National Park from being used as a heliport. The statute is aimed directly at restricting or stopping the helicopter tours operating out of Pigeon Forge, Tennessee. The Tennessee Attorney General’s office has held in an advisory opinion that the land use restriction is valid because it is rationally related to protecting “public health, safety, comfort, or welfare.”

In 1993, the Pigeon Forge operators filed suit, claiming the law is illegally attempting to preempt federal law regulating aircraft flight and noise. Although the trial court dismissed the tour operators’ challenge in 1994, a state court of appeals judge has since overturned the trial court. Specifically, the court of appeals held that granting the motion to dismiss was in error. Moreover, in dismissal, the trial judge said the new law is a land use statute and not preempted by federal law. The trial judge erred in not considering whether the operators’ allegations

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95 Id.
97 Id. § 42-8-102(a). A tourist resort county is defined as a county having more than five percent of its territory located within the boundaries of a national park. Id. § 42-8-101 (2).
99 Id.
100 Kenner, supra note 91.
101 Id.
102 Id.
were true and if the issues should be tried. This lawsuit is now awaiting a decision by the Tennessee Supreme Court.

Glacier National Park, Montana is also concerned about air tours. While Glacier is not experiencing overflight problems yet, the number of tours has increased from almost none in 1981 to fifteen a day during the summer of 1993. Air tours are also available at Niagara Falls, Mount Rushmore, and several of the National Parks in Utah. In some of these areas, complaints of noise pollution from overflights is not limited to park visitors. For example, "the residents of Moab, Utah are also organizing to limit air traffic around Canyonlands [National Park further, and] the government of Springdale, Utah refused to allow a scenic tour operator to build a heliport outside of Zion National Park." These are only a few of the parks affected by overflights. With estimates that overflights exist at over 100 parks in the National Park System, similar disputes are occurring elsewhere.

Although the scenic air tour operators are seen as the problem in many of these parks, other aircraft contribute to the noise controversy. Transcontinental flights and the U.S. government are responsible for a great deal of the noise in national parks. "Low-flying military jets disturb visitors and wildlife when they blast over park units such as Joshua Tree National Monument in California and Great Sand Dunes National Monument in Colorado, where the Air Force is increasing flights despite residents' complaints." In addition, non-tour flights

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103 Id.
105 Id. supra note 6 (quoting Glacier's chief ranger Steve Frye); cf. NPS Study Recommends Curbs on Overflights; National Park Service Report on Air Traffic Over National Parks, NAT'L PARKS, Jan. 1995, at 15 (Glacier, along with the Grand Canyon, Hawaiian parks, and Great Smokey Mountains, were "identified as having the most widespread overflight problems and the most obvious impact"); Shoup, supra note 82 (Residents in the Flathead Valley near Glacier have organized to fight the air traffic generated by the tours.).
107 Id. supra note 6.
108 Id.
109 Id.
110 Id.
such as the aircraft used by NPS, police, medevac, states, and counties are often mistaken for tour flights. Tourists complaining about noise often do not differentiate between air tour and non-tour flights. "Too often the air tour industry has been blamed for unfriendly flying because the ground-based visitors assumed an offending flight was a tour aircraft, when in actuality it was a flight conducted for Park Service, or other governmental purposes such as research, military missions or drug interdiction."112

D. Effect on Wildlife

Presently, there are no definitive studies on the effects of air tour generated noise on wildlife.113 Still, environmentalists claim that aircraft noise adversely effects wildlife, and it has been reported that grizzly bears, bighorn sheep, and migratory birds can be harassed and stressed by low-flying aircraft.114

Of particular concern are scenic overflights in areas with endangered species. An example of such an area is Pusch Ridge Wilderness in the Catalina Mountains near Tucson, home to a herd of bighorn sheep. Air tours could cause a "significant stress on the bighorns, which are close to extinction."115 The Pusch Ridge bighorn sheep have declined from a herd of 150 animals in 1979 to ten or twenty sheep today, with the decline attributed in part to the encroachment of civilization.116

Birds may also be among the animals most affected by air tours. The sight of a red tailed hawk or other bird of prey soaring above the Grand Canyon is one of those spectacular remind-

111 Subcommittee Hearing, supra note 20 (testimony of the Hawaii Helicopter Operators Association).
112 Id. (statement of Frank L. Jensen, Jr., President, Helicopter Association International); see also id. (statement of Andy Logan, on behalf of McDonnell Douglas Helicopter Systems) (Air tour industry members suggesting that perhaps the government "needs to start leading by example and incorporating quiet helicopters in its day-to-day operations over federal lands.").
113 Id. (statement of the Honorable James V. Hansen, Vice Chairman of the House Subcomm. on National Parks, Forests and Public Lands).
114 Agencies Take on Park Overflights, supra note 46; but see NPS Study Recommends Curbs on Overflights; National Park Service Report on Air Traffic Over National Parks, supra note 105 (The National Parks Service addresses most of its concern about the effects of air traffic on wildlife not at the air tour operators, but at the military for reasons such as air force training flights in Alaska (20,000 estimated sonic booms.)).
115 Douglas Kreutz, Helicopter Tours Start Over Pima, Officials Fear Noise May Hurt Pusch Bighorns, ARIZ. DAILY STAR, Dec. 18, 1994, at 1A.
116 Id.
ers of nature's beauty. But their cries are often drowned out by the sound of helicopters. And "[n]oise pollution from the flights interferes with feeding, nesting and resting of birds, and can lead to higher mortality rates and abandonment of the habitat by both birds and animals." "We know intuitively that overflights affect birds . . . [t]here is a lot of anecdotal evidence."

E. Effect on Cultural Resources

Cultural resources located in national parks may be affected by the flight-seeing tours. Conservationists claim that "[s]onic booms from jets and vibrations created by helicopter rotors can damage fragile archaeological, treasures." The park service is "concerned about the effect of aircraft noise, particularly helicopter noise and vibration, on 'prehistoric stone and adobe structures including granaries and cliff dwellings' at Mesa Verde and elsewhere." And the FAA and NPS have asserted that the noise characteristics of helicopters are such that "they tend to excite nearby structural elements at their resonance frequency, causing low frequency vibrations, rattle, and in some cases, damage." "The sound pressure is greatest at structures in the plane of the main rotor, such as could be the case for a helicopter approaching cliff dwellings." Conservationists say that overflights near cultural resources should be eliminated completely, that there should be no risk in these areas.

117 Yozwiak, supra note 69.
118 Hopey, supra note 1; Lee, supra note 6.
119 Lee, supra note 6 (quoting Dan Taylor, resource manager at Hawaii Volcanoes).
120 Lee, supra note 6. Environmentalists also claim that the sonic booms from jets and vibrations can damage geological formations. Id. While it seems they are talking about above ground formations such as arches and spires, this claim appears unfounded. Vibrations from helicopter rotors have a minimal effect compared to the stress exerted on rocks from the blowing wind. Even a sonic boom, which has a greater immediate shock on rocks, has less of a long term effect than the wind. Telephone Interview with Dr. Lee Krystinik, Senior Staff Geologist, Union Pacific Resources Company (Nov. 3, 1995). Dr. Krystinik went on to add that noise regulations in some parts of the United States have hampered scientific studies of geologic formations in remote areas by not allowing helicopters to ferry scientists and their equipment into the area to conduct the studies. Id.
121 Poling, supra note 75.
123 Id.
124 Lee, supra note 6.
F. Safety Issues

Even more important than the noise issue, safety concerns play an important part in the push towards stricter regulation of air tours. "Historically, air taxis have had the highest accident rate of all commercial flights, according to National Transportation Safety Board (NTSB) statistics."125 Consequently, the NTSB has called for a national standard for all air tour operators.126 The NTSB, which investigated 139 air tour accidents between 1988 and 1994, also calls for a database of all air tour operations.127 Since the air tour category is not clearly defined in the federal rules, it is difficult to get accurate statistics on helicopter tours from either the FAA or the NTSB.128 Although most tour operators fly under Part 135 of the federal safety regulations,129 at this time, tour operators flying no more than twenty-five miles from home are governed by Part 91 of the regulations, which is less stringent than Part 135.130 The NTSB would like uniform national standards for pilot training, aircraft maintenance and operating and safety procedures, which if adopted would bring all U.S. air tour operators up to the same standards as other passenger-carrying aircraft.131

IV. LEGISLATIVE AND ADMINISTRATIVE ACTIONS

While the debate still lingers as to whether additional restrictions are necessary, Congress, the FAA, and even President Clin-

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125 David Field, Congress Upset Over Grand Canyon Crashes, WASH. TIMES, Feb. 16, 1995, at B7. In statistics compiled between 1982 and 1992, the fatal accident rate per 100,000 hours of flying was never greater than 0.514 accidents for commuter carriers; for air taxis, it ranged between 0.81 and 1.36. Id.
127 Id.; see also Yenckel, supra note 44 (The NTSB investigated 139 accidents that resulted in 117 fatalities, 86 serious injuries, and 135 minor injuries. Thirty-four of the accidents occurred in Hawaii, 18 in Florida, 16 in Alaska, 15 in Arizona, 9 in California, 6 in Washington, and 5 in Colorado.).
128 Shoup, supra note 82.
129 Yenckel, supra note 44. But see U.S. Scrutinizing Safety of Air Sightseeing, S.F. CHRON., Oct. 10, 1994, at A5 (quoting Robert MacIntosh, a safety board investigator) ("some operators are setting up make shift helicopter pads near scenic areas to circumvent [Part 135]").
130 Yenckel, supra note 44. Part 91 requires less pilot training and less maximum duty hours.
131 Id. The bulk of NTSB's recommendations will require action by the FAA. Id.
have all called for stricter regulation of scenic overflights. Proposals have included a Senate Bill, a House of Representatives Bill, a Presidential Memorandum, and FAA-proposed rules.

A. THE NATIONAL PARKS AIRSPACE MANAGEMENT ACT OF 1995

In June of 1995, Senator Akaka (D-Hawaii) introduced The National Parks Airspace Management Act of 1995 (Senate Bill 905 or the Bill) for the purpose of “minimizing the environmental effect of air tour activities on park units.”

Senate Bill 905 provides that the Administrator of the FAA (Administrator) and the Director of the NPS (Director) would jointly “develop and establish a plan for the management of the airspace above each unit that is affected by commercial air tour flights.” In each park with an airspace management plan, no air tour operator would be allowed to conduct scenic overflights without first entering into an agreement with the Director and the Administrator authorizing the flights. In developing the airspace management plans, the Administrator would defer to the Director regarding park resources and the Director would defer to the Administrator in matters relating to the safe and efficient management of airspace.

The bill potentially limits scenic air tours to national parks that already had commercial air tours as of January 1, 1995, with all other parks designated “flight-free parks.” Any park that currently has no scenic air tours that are deemed to be “incompatible with or injurious to the purposes and values” for which that park was established will also be designated a “flight-free” park.

In order to increase aircraft safety, Senate Bill 905 would create a single standard for certifying air tour operators. Furthermore, the bill authorizes a study to determine the feasibility of requiring air tour operators to install onboard flight tracking.

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133 S. 905, 104th Cong., 1st Sess. § 4(a) (1995). The Director is responsible for identifying parks that require a plan. Id.
134 Id. § 4(h)(1).
135 Id. § 4(c)(1).
136 Id. § 5.
137 Id. The Director, in consultation with the Administrator, would prescribe the criteria for identifying the parks which currently have air tours, but should be established as “flight free” parks. Id.
138 Id. § 7.
systems capable of monitoring the altitude and ground position of their aircraft.139 Finally, Senate Bill 905 would establish a National Park Overflight Advisory Council (the Council).140 The Council would consist of various interest groups141 and advise the Director and Administrator on, among other things, any financial incentives in quiet aircraft technology, the economic effect of the flight restrictions, and recommendations for means of reducing the adverse effects of the flights.142

Senate Bill 905 would not affect emergency flight operations, general aviation, military aviation, or scheduled commercial passenger flights,143 nor would the Bill affect park units in Alaska.144

B. House of Representatives Bill

In addition to Senate Bill 905 introduced in the Senate, U.S. Congresswoman Patsy Mink of Hawaii introduced a bill restricting overflights in specific national parks in Hawaii.145 Representative Mink's bill is similar to SFAR 71 and would require short term sightseeing flights, beginning and ending at the same airport and conducted within a twenty-five mile radius of that airport, to comply with stricter FAA flight standards.146

C. Administrative Actions

1. Advanced Notice of Proposed Rulemaking

In March of 1994, the FAA and the NPS, which together had formed an interagency working group (IWG), requested comments for their Advanced Notice of Proposed Rulemaking

139 Id. § 7(d).
140 Id. § 9.
141 The Council would consist of members from the following: environmental or conservation organizations, citizens’ groups, and other groups with similar interests; commercial air tour industry and organizations with similar interests; representatives of departments or agencies of the federal government; and such other persons as the Administrator and the Director consider appropriate. S. 905 § 9(b).
142 Id. § 9(c).
143 Id. § 8. The exceptions do not extend to commercial aerial photography—the Director and the Administrator will jointly develop restrictions and fee schedules. Id.
144 Id. § 10.
146 Id.
(ANPRM) covering all national parks.\textsuperscript{147} "[T]he two agencies said they want to develop general regulations 'applicable to the entire national park system,' not specific rules for any one park."\textsuperscript{148} The ANPRM set forth proposed rules, despite the fact that the results of the overflights study was not submitted to Congress until the following September. In addition to the proposed rules, the NPS and FAA requested comments on policy and technical questions.\textsuperscript{149} Policy questions included whether air tours should be banned from some of the national parks altogether, and what factors the NPS and FAA should use in evaluating the overflight issue.\textsuperscript{150} Technical questions included whether quiet aircraft technology is a viable solution, and whether the air tours should be governed by Federal Aviation Regulation Parts 135 or 121.\textsuperscript{151}

The proposed rules are designed to reduce park noise over the next fifteen years,\textsuperscript{152} and recommend numerous solutions. One recommendation is voluntary compliance of certain guidelines by the operators, such as minimum altitudes.\textsuperscript{153} Another rule prohibits flights during specific flight free time periods, with "quiet times" published in advance in order for visitors to schedule their trips.\textsuperscript{154}

\textsuperscript{147} ANPRM, 59 Fed. Reg. at 12,740.
\textsuperscript{148} Poling, supra note 75.
\textsuperscript{149} The FAA received 30,726 comments in response to the ANPRM. Notice of Proposed Rule Making, 61 Fed. Reg. 40,120, 40,121 (July 31, 1996); see infra notes 162-73 and accompanying text; see also Collogan, supra note 34. The author referred to the "crisis mentality that accompanied publication" of the ANPRM: "To read the statements that DOT Secretary Federico Peña and Interior Secretary Bruce Babitt issued, you'd think throngs of national park visitors were stumbling out of the woods half deaf because of all that damn airplane noise." Id.; see also Hamilton, supra note 70, at 289 ("While Grand Canyon aerial tour operators supported the adoption of the SFAR, most (if not all) have voiced opposition to the ANPRM.").
\textsuperscript{150} ANPRM, 59 Fed. Reg. at 12,745.
\textsuperscript{151} Id.
\textsuperscript{152} Features, MILWAUKEE J., Nov. 23, 1994, at D5.
\textsuperscript{153} ANPRM, 59 Fed. Reg. at 12,744. There is some dispute as to whether the FAA's advisory circular recommending a voluntary minimum altitude of 2000 feet above ground level in the national parks is being followed. While the Grand Canyon Trust claims this voluntary recommendation is not widely followed, the Aircraft Owners and Pilots Association claim that both "the FAA and the Park Service have publicly acknowledged that the FAA's recommended minimum altitude of 2000 feet above ground level is honored by most transient operators." See Subcommittee Hearing, supra note 20 (testimony of Terry Bracy, Member, Board of Trustees, Grand Canyon Trust, and statement of Phil Boyer, President, Aircraft Owners and Pilots Association).
\textsuperscript{154} ANPRM, 59 Fed. Reg. at 12,744.
Further implementation of the "Grand Canyon Model," which consists of extensive regulations of airspace, routes, and minimum altitudes, has also been considered for all national parks. However, this model does not address the total number of flights and their frequency, or create allowances for continued growth in the number of flights.\textsuperscript{155} For these reasons, the "Grand Canyon Model" should be considered outdated and any similar model implemented at other national parks may only postpone future problems.

The ANPRM proposal includes altitude restrictions, flight free zones, flight corridors, and restrictions on noise through allocation of aircraft noise equivalencies.\textsuperscript{156} Under the aircraft noise equivalency proposal, the IWG would determine "the acceptable amount of aircraft noise exposure on the park surface" and the number of aircraft that could operate within the total noise budget, taking into account various mixes of aircraft types.\textsuperscript{157} "While complex to develop and administer, the noise budget could achieve noise mitigation through directly addressing the issue of noise impact, but would not address the impacts other than noise."\textsuperscript{158} Finally, ANPRM's last proposal sets forth incentives to encourage use of quiet aircraft, such as state and federal tax and fee reductions, exemptions from new restrictions on routes and altitudes, and guaranteed premium routes and landing sites.\textsuperscript{159} The time frame to respond with comments closed over a year ago, however, and the FAA has not yet issued any final rulemaking.

2. Presidential Memorandum

Due to perceived foot dragging on the part of the FAA, in April 1996, President Clinton directed the Secretary of Transportation to issue proposed regulations specifically for the Grand Canyon National Park and Rocky Mountain National Park within ninety days, to issue proposed rulemaking to manage air traffic over national parks identified in the 1994 NPS Report, and to develop appropriate educational materials discussing the importance of natural quiet to park visitors.\textsuperscript{160} The mandate also required the DOT to complete, within five years,

\begin{thebibliography}{99}
\bibitem{155} Id.
\bibitem{156} Id.
\bibitem{157} Id.
\bibitem{158} Id. at 12,744-45.
\bibitem{159} MDHS Sounds Out Parks Plan, FLIGHT INT'L, Apr. 13, 1994.
\end{thebibliography}
“how the [FAA] and NPS will complete the ‘substantial restoration of natural quiet’ . . . as required under the Overflights Act.”

3. Grand Canyon Notice of Proposed Rulemaking

The DOT responded to the Presidential Memorandum in July of 1996 by issuing proposed rules for the codification and amendment of SFAR No. 50-2. These “Special Flight Rules in the Vicinity of the Grand Canyon National Park” were drafted based on comments received from the ANPRM, the NPS Report, a 1995 public hearing on revising SFAR No. 50-2, consultations with native Indians from the Indian reservations surrounding the Grand Canyon, and the FAA’s own assessment of noise and safety issues. The result is a detailed proposal that (a) modifies the lateral and vertical dimensions of the special flight rules area, (b) modifies and expands existing flight free zones and establishes two new flight free zones, (c) establishes new flight corridors and modifies existing ones, and (d) establishes reporting requirements. The new proposal also allows the Dragon Corridor, previously recommended for closure, to remain open. While the proposal is significantly more restrictive than the current SFAR No. 50-2, with the exception of the new reporting requirements, its structure is not an extreme departure from the current SFAR.

The Grand Canyon NPRM also requested comments on additional actions such as the establishment of flight free periods (curfews) for the air tour companies or a cap on the number of scenic overflights or overflight companies operating in the SFAR. “Curfews could be imposed in terms of fixed periods throughout the year, variable periods based on perceived noise impacts in specific areas, or a combination of conditions.” The NPRM’s example of a fixed curfew is a ban on flights from 6 p.m. until 8 a.m. during the summer, and from 5 p.m. to 9 a.m. during the winter. A variable flight free period would depend on a variety of factors, including acoustic monitoring,

161 Id.
162 Id.
164 Id.
165 Id. at 40,123.
166 Id. at 40,125.
167 Id.
168 Id.
but the maximum ban on flights would be from 2 p.m. to 10 a.m. in the Dragon Corridor and from 4 p.m. until 9 a.m. on other routes.\textsuperscript{169}

The Grand Canyon NPRM proposes three general methods to limit scenic overflights—a cap on operations, aircraft, and/or air tour operators.\textsuperscript{170} The FAA in the NPRM also requested comments on a specific NPS proposal to cap the number of flights.\textsuperscript{171}

Under this proposal, each operator would be limited to the number of monthly operations equal to the monthly operations in the base year August 1, 1995 through July 31, 1996. Operators would establish their baseline monthly allocation by certifying to the number of operations conducted each month during the base year.\textsuperscript{172}

The NPS proposal provides that if an operator does not use its entire allocation under the cap, other operators could apply for the allocation with preference given to the operator with the quietest aircraft.\textsuperscript{173}

\section*{V. DISCUSSION}

With a variety of congressional bills and FAA-proposed regulations floating around, it becomes difficult to distinguish between the proposals and determine which one is best for all parties. Obviously, if the FAA promulgates its anticipated rulemaking within the near future, there should be no further need for congressional intervention. But Senator Akaka introduced his legislation because “the pace has been ‘painfully slow and tangible results so far are not readily evident.’”\textsuperscript{174} Environmentalists also prefer legislative action. “[S]ince the policies of one administration can be reversed by another, a long run solution to the problem will require legislation.”\textsuperscript{175}

Air tour operators’ first choice is obviously no new or additional restrictions. However, in choosing between FAA regulations or a senate bill, the FAA regulations are the better option\textsuperscript{176}

\begin{footnotes}
\item[169] \textit{Id.}
\item[170] \textit{Id.} at 40,126.
\item[171] \textit{Id.}
\item[172] \textit{Id.} The FAA would compare the information provided by the operators to the commercial tour use fees the operators are required to pay. \textit{Id.}
\item[173] \textit{Id.}
\item[174] \textit{Sen. Akaka’s Bill Would Give NPS, FAA Joint Oversight of Airspace Over Parks, WKLY. BUS. AVIATION, June 19, 1995, at 261.}
\item[175] \textit{Agencies Take on Park Overflights, supra note 46.}
\end{footnotes}
for the operators. Under the FAA regulations, the aerial tour industry will have the opportunity to voice their opinions on any proposed rulemaking, and the FAA should be more responsive to the air tour operators than Congress.

Regardless of whether the industry is regulated through administrative or legislative action, one of the biggest concerns for air tour operators is the jurisdiction of national park airspace. Air tour operators are determined to keep jurisdiction over scenic air tours with the FAA and out of the hands of the NPS. "To usurp the FAA's authority would be to the detriment of air safety" because regulations proposed by the NPS "come from a land management perspective and not an aviation perspective."177

There are compelling reasons for the air tour industry to remain under the jurisdiction of the FAA. The FAA maintains all air traffic, has the knowledge and expertise, and is authorized by legislation to handle noise and safety issues for aircraft. At the same time, the NPS is overworked and under funded, and simply does not have the expertise to manage scenic overflights over national parks. Nor does the Park Service really have any interest in controlling its own airspace; rather, it believes that the FAA is the appropriate entity for this task.178 While the NPS should be allowed input to the FAA, for example by supplying the FAA with information such as what areas of the parks receive the most visitors, the FAA should remain in exclusive control of scenic overflights.

With these two general comments in mind, I will now evaluate the proposed restrictions for the Grand Canyon, followed by a general discussion of overflight restrictions in other national parks.

A. GRAND CANYON REGULATIONS

Considerably more restrictive than the current regulations, the Grand Canyon NPRM provides a detailed plan for the substantial restoration of "natural quiet to the Grand Canyon."179 It

176 Air Tour Operators Stress to Peña Importance of FAA Jurisdiction Over Airspace, supra note 33; see also HAI Meets with Peña to Discuss Air Access Over Parks, BUS. & COMM. AVIATION, May 1995, at 16.
177 See Air Tour Operators Stress to Peña Importance of FAA Jurisdiction Over Airspace, supra note 33 (quoting Grand Canyon Air Tourism officials).
178 Subcommittee Hearing, supra note 20 (statement of John Reynolds, Deputy Director, National Park Service, Department of the Interior).
179 NPRM, 61 Fed. Reg. at 40,120.
addresses the growth of overflights since SFAR No. 50-2 was enacted in 1988 by revising the current framework of flight corridors and flight free zones.180 Some version of the NPRM should be in force by the end of 1996, in accordance with President Clinton's Earth Day mandate.181

The real test of whether the new proposed regulations are satisfactory is whether air tour operators can fly safely in the revised Special Flight Rules Areas and whether tourists will continue to see enough of the Canyon to make the trip worthwhile. For the most part, the method of limiting overflights to specific corridors in one portion of a national park while steering the ground visitors to a no fly zone is an excellent way to please both groups. This method works in the Grand Canyon because the spectacular scenery is distributed over a large area. The Grand Canyon NPRM attempts to maximize such a plan, by carefully structuring the size and location of flight corridors and no fly zones. Previously the zones were adjacent, so the aircraft operating close to the boundary generated noise well into the flight free zone.182 The new plan hopefully has resolved this problem.

But beyond amending the current SFAR No. 50-2, the additional proposals of curfews and caps are premature at this time. First, a flight free time period would not really address the NPS mandate to restore natural quiet to national parks. A quiet time period during the day would only mean additional aircraft during the flying times, thereby concentrating the noise and potentially leading to more complaints. Second, it is quite possible that flight free times would satisfy neither the air tour operators nor the ground tourists. Many people desire to see the national parks both on the ground and in the air. By restricting the flight times, tourists may not be able to see everything within a limited time frame and could miss out on a planned portion of their trip. At many national parks, such as the Grand Canyon, the major influx of tourists occurs during the summer, while children are out of school. Limiting the flight free time zone during the summer would only create more ground traffic, perhaps preventing thousands of tourists from enjoying a portion of their vacation. It also creates an economic hardship for the air tour operators, not only from losing tourism dollars, but also

180 Id.
182 Rausch, supra note 4.
because the aircraft would be underutilized during the no-fly periods.

Furthermore, a moratorium on the number of air tour flights, aircraft, or companies would have its greatest impact on the 800,000 annual visitors who enjoy scenic overflights. Placing a cap on scenic overflights would limit competition and growth, leading to higher prices.

The NPRM has requested comments on a number of important questions with respect to both the curfew and the cap proposals. Instead of rushing to implement either plan by the end of 1996, a better choice of action would be to fully evaluate the comments to each proposal and determine if either is really necessary after the more restrictive SFAR No. 50-2 is in place. The DOT is already required, under President Clinton's memorandum, to complete a further management plan of the Grand Canyon within five years. If it is proven that either of these actions are necessary, they can be included at that time.

B. Other National Parks

Since SFAR No. 50-2 should be amended and codified for the Grand Canyon National Park by the end of 1996, it is arguably not necessary to promulgate rules covering the remaining national parks. Certainly none of the remaining parks, not even the Hawaiian Islands National Parks, warrant the detailed restrictions set forth in SFAR No. 50-2. But between the congressional bills, President Clinton's mandate, FAA proposed rulemaking, and the NPS recommendations, stricter regulations for some of the other national parks appear inevitable. While it is unlikely to fashion a compromise satisfactory to all parties, there are a few issues on which everyone should agree.

First, any sort of regulations or legislation should definitely exclude Alaska. Although Alaska has approximately fifty million of the eighty million acres of National Park System land, it is unique because of its dependence upon aircraft as a primary source of transportation. Due to the large expanses of na-

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183 Subcommittee Hearing, supra note 20 (testimony of Jonathan A. Widdis, Director of Statewide Aviation, State of Alaska, Department of Transportation and Public Facilities). There is one pilot and aircraft for every 60 Alaskans. Air service is used for basic health care and emergency medical evacuation, wildlife management surveys, mail delivery, grocery and freight deliveries, hunting and fishing, and other recreational back country access. Seventy percent of Alaska's communities are not connected by road or rail and depend totally on air and water transportation. Id.
tional park land, it is impracticable for aircraft to fly around them, and air travel is the only way to visit most of the national parks in Alaska. \textsuperscript{184} Moreover, Alaska does not consider air tours to be creating noise or other problems in its state, and does not want to be regulated by any sort of scenic overflights legislation. \textsuperscript{185} While Senate Bill 905 acknowledges Alaska’s unique situation, the FAA’s proposed ANPRM did not specifically exclude Alaska.

Second, any regulations should exclude emergency flights, NPS flights, and military aviation. A harder question is whether general aviation or scheduled commercial passenger flights should also be excluded from any regulations. While there is a difference between air tour operators who traverse the parks for profit, and commercial airliners or owners of small planes flying over a national park only to get from point A to point B, these aircraft add to the noise problems over our National Park System, \textsuperscript{186} and should also be required to abide by any regulations.

Finally, although it appears the FAA would like to promulgate general rules applicable to the entire national park system, the better choice would be for any restrictions to be park specific. Identical rules across the entire park system would create overly stringent restrictions in some areas, and perhaps insufficient regulations in others.

The above comments would be applicable to either congressional legislation or FAA promulgated rules. Of the numerous proposed solutions, which is the most equitable to the air tour operators and the “natural” group? In researching both sides of the controversy, the use of voluntary agreements and quieter aircraft by far represent the best compromise and should be used as the first step in resolving any noise controversy.

1. Voluntary Agreements

It seems logical that if there is a perceived noise problem by virtue of scenic overflights, the quickest and most efficient solution would be for the government and the air tour operators to enter into a voluntary agreement. This approach, already used for the tourist attractions in New York City, \textsuperscript{187} and to a certain

\textsuperscript{184} Id. Twenty-four publicly-owned airports have approach and departure patterns over, or share boundaries with national parks, and 137 publicly owned airports affect national wildlife refuges. Id.

\textsuperscript{185} See id.

\textsuperscript{186} See supra notes 109-12 and accompanying text.

\textsuperscript{187} See supra note 81-84 and accompanying text.
extent in the Great Smoky Mountains National Park, should be
the preferred method to resolve any noise dispute. Fashioning
an agreement for a specific national park, if needed, will allow
park officials to address the specific noise concerns related to
that individual national park, and allow local air tour operators
to continue providing scenic overflights. While voluntary agree-
ments may not work in all national parks, it may solve perceived
noise complaints in the majority of the parks, especially if the
agreement is coupled with quieter aircraft.

2. Quieter Aircraft

Although not perfect, the use of quieter aircraft is one of the
better solutions for both sides in the controversy. The air tour
industry would be able to continue a viable, economic industry,
air tour visitors would be able to continue enjoying scenic over-
flights, and the quieter aircraft would curb many of the com-
plaints from other park visitors seeking the solitude of nature.
The use of quieter aircraft is recognized by the NPS as a realistic
solution to its goal of substantially restoring natural quiet.188
Requiring quieter aircraft for most operators would entail the use
of helicopters similar to the NOTAR helicopter or Whisper Jet
helicopter. NOTAR (short for no tail rotor) was developed to
increase safety and to perform with substantially less noise.189
The NOTAR helicopter, built by McDonnell Douglas Corpora-
tion, costs approximately $1 million each and are projected to
have lower direct operating costs.190 “The company’s studies
show that on a windless day, a helicopter with a tail rotor flying
at 500 feet can be heard from as far away as 2,000 feet. But . . .
under the same conditions, NOTAR helicopters can’t be heard
until they’re within 500 feet.”191

The Whisper Jet helicopter, which is currently being devel-
oped, uses five blades, instead of the traditional three, to create
a quieter aircraft.192 The more blades a helicopter has, the qui-

189 Gonderinger, supra note 36, at 9. “The main motive for developing the
NOTAR design was to increase safety. . . . [T]ail-rotor systems were responsible
for nearly 20 percent of all single-engine helicopter accidents in the U.S. from
1988 through 1993. The sharp reduction in noise was just an added side bene-
fit.” Id.
190 Id.; MDHS 630N Prototype Makes Surprise Appearance at Heli-expo, HELICOPTER
191 Gonderinger, supra note 36.
192 Elaine Bennett, New Helicopter’s Super Quiet Design Makes Blue Yonder a Little
eter it becomes because each blade is working less to lift the aircrafts' weight. Silencers have also been added to the exhaust of the Whisper Jet, and the tail rotor has been shortened.

While NOTAR and Whisper Jet helicopters are viable solutions to noise reduction, the large price tag may preclude many tour operators from acquiring them. Accordingly, any regulations requiring quieter helicopters should include generous tax incentives and long lead times, allowing the tour operators to make the transition.

Another way to cut the noise would be the use of more fixed wing aircraft. Compared to helicopters, the noise levels from small planes are significantly less. However, in many of our national parks, and especially in Hawaii, a small plane does not have the ability to visit the same sights as a helicopter—such as hovering over a waterfall or maneuvering in tight canyons. Requiring only fixed wing aircraft over our parks would cripple the air tour operators, simply because if the tourists cannot see the scenery that a particular park is known for, they will not pay to go on the scenic overflights.

C. National Park Service Concessions

Although FAA promulgated regulations are the better and much more likely resolution, in the event that scenic overflights do end up subject to legislation, an alternative to Senate Bill 905 would be permitting air tours to become a National Park concession. Although this is a more radical suggestion, and unpopular to the overflight industry, regulating overflights in this manner is a good idea for several reasons. First, it could be used effectively to encourage the voluntary use of quieter aircraft

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193 Id. See also Victoria Griffith, U.S. Residents Demand Peace and Quiet; Citizen Groups Petition the Federal Aviation Administration Over Plans to Build More Runways in Busy Tourists Spots, FIN. POST, July 16, 1996 (space-age materials are also being used to reduce overall weight).

194 Id.

195 Gonderinger, supra note 36. There has been a congressional bill introduced by Senator McCain of Arizona to encourage development of quiet aircraft technology. Id.

196 The idea was initially proposed in 1994 by a senator from Montana. See 140 CONG. REC. E575 (Mar. 24, 1994) (statement of Rep. Williams). "The scenic air tour industry is the only commercial activity taking place in the national parks which is virtually unregulated. The National Park Service has an appropriate permitting process for hotels, outfitters, rental stores, restaurants and all other commercial users of the parks." Id.
through the use of airspace entry fee waivers, preferential air
tour altitudes and routes, and airspace entry allocations based
on FAA noise certification data for each type of aircraft.\textsuperscript{197} Sec-
ond, with the exception of scenic overflights, virtually every
other type of visitor activity is regulated or controlled by the
NPS, insuring there will be no degradation or impairment of
resources and values.\textsuperscript{198} Furthermore, the concessions would
allow the NPS to obtain some monetary benefit from the air
tours.\textsuperscript{199} After all, scenic overflights allow tourists to see the na-
tional parks, similar to ground visitors who have to pay park en-
trance fees.

In addition to allowing the park to receive a share of the reve-
 nue, a park concession would grant the ability to control traffic
volume on a park-by-park basis.\textsuperscript{200} Under this scenario, parks
created to preserve the natural quiet and solitude might have
the ability to prohibit scenic overflights. Other parks would con-
trol traffic either through granting a limited number of conces-
sions, or by limiting each operator to a specific number of daily
flights. This in a sense would be similar to the NPS limiting the
number of permits for rafting the Colorado River through the
Grand Canyon.\textsuperscript{201} The NPS's decision to limit the number of
raft permits has been upheld in court; any legal challenge to
limiting the number of air tour permits also stands a chance of
similarly being upheld.\textsuperscript{202} Like the limitations on raft permits,
limiting the number of flights allowed over a national park
would be beneficial not only to the ground tourists, but would

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\textsuperscript{197} See Subcommittee Hearing, supra note 20 (testimony of Andy Logan, on behalf
of McDonnell Douglas Helicopter Systems).

\textsuperscript{198} ANPRM, 59 Fed. Reg. at 12,740, 12,742 (1994) (to be codified at 14 C.F.R.
pt. 91,135 and 36 C.F.R. pts. 1-7).

\textsuperscript{199} In fact, the NPS already has the power to obtain fees from air tours entering
national park airspace, at least in two of our national parks. The Budget Reconcili-
ciation Act of 1993 amended the Land and Water Conservation Fund Act of
1965, requiring the NPS to impose a commercial tour use fee on each vehicle
entering the Grand Canyon National Park or Haleakala National Park, for the
purpose of providing commercial tour services. ANPRM, 59 Fed. Reg. at 12,741-
42. The fees established by the legislation are $25 per vehicle with a capacity of 25
people or less, and $50 per vehicle with a capacity greater than 25 people. Id.


\textsuperscript{201} Douglas O. Linder, New Direction for Preservation Law: Creating an Environ-

\textsuperscript{202} See Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979),
cert. denied, 446 U.S. 982 (1980); see also George C. Coggins, The Developing Law of
("[T]he Park Service enjoys considerable judicial deference.").
most likely improve the experience for the tourists who actually take the flights.\textsuperscript{203}

Not surprisingly, this proposal scares tour operators. "[E]stablishing air tours as an official park concession . . . would allow the National Park Service to regulate flights 'down to a gnat's eyelash,' in effect taking over the industry."\textsuperscript{204} This suggestion, however, does not advocate that the NPS regulate the air tour industry. Although the NPS would have the ability to limit the number of concessions and gain revenue from them, the FAA would still maintain exclusive control over minimum altitudes, safety regulations, reporting, and other matters of airspace regulation. While this suggestion is less attractive than FAA regulations, if necessary, it is better than a federal statute which mandates stringent fixed regulations for all national parks.

D. UNUSUAL SOLUTIONS

There have been some farfetched alternatives suggested to solve the noise controversy, such as sightseeing balloons or glider flights. One California tour company even wants to bring quiet rides over the Grand Canyon in the form of blimps.\textsuperscript{205} The rides would be up to eight hours in length and include "full bars, dance floors and perhaps even gambling."\textsuperscript{206} Although a blimp ride would solve the quiet controversy, the thought of gazing across the scenic vista of the Canyon and seeing a huge blimp, complete with advertising, creates its own new controversy.\textsuperscript{207} Moreover, tourists should be gazing at the scenery of the Grand Canyon, not dancing and playing slot machines.\textsuperscript{208}

VI. CONCLUSION

"It may take divine vision to resolve the question of how much quiet is enough at our national parks."\textsuperscript{209} The answer, however, is not to see all air tours banned from the national parks; that outlook is both unrealistic and selfish. Our national parks should not just be enjoyed by the hardcore backpacker and in-

\textsuperscript{203} See Linder, supra note 201.
\textsuperscript{204} McKinnon, supra note 42 at AI.
\textsuperscript{205} Editorial, Canyon Airspace Grounds the Blimps, ARIZ. REPUBLIC, Aug. 21, 1995, at B4.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Smith, supra note 4, at AI.
trepidd river rafter. Scenic air tours do not exploit our national parks; instead they are part of the solution to the many problems facing our most popular tourists areas.

The air tour industry should also not have to make all of the sacrifices. In addition to the comments above, there are numerous things the NPS could easily do to help alleviate the noise problem. For starters, a park could direct ground visitors away from aircraft noise, through park information and maps detailing which areas have scenic overflights. The NPS and the government could utilize quieter aircraft in their own flights over a national park, or visitors could be instructed how to identify aircraft overhead, in order to distinguish between air tours and other types of air traffic.

Scenic overflights are a vital part of the tourism-based economy at many of our national parks, allowing visitors to see breathtaking scenery and infusing money into the local economy. Many parks are large enough to accommodate both scenic overflights and other park visitors, and should fully utilize the tours to help resolve the environmental and overcrowding issues facing all national parks. Any further regulations on air tours should recognize the benefits provided by overflights and carefully craft any restrictions to allow scenic overflights to continue to provide their unique access to viewing our national parks.

Subcommittee Hearing, supra note 20 (statement of Frank L. Jensen, Jr., President, Helicopter Association International).