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

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG - 6 2010

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Dear Mr. Armstrong:

This letter is in response to your April 28, 2010 letter regarding Biplane Rides Over Atlanta, Inc.'s (Biplane Rides) commercial air tours over Acadia National Park. In your letter you contend that if Biplane Rides obtains a letter of agreement from the FAA Administrator and the superintendent of Acadia National Park, as described in 14 C.F.R. § 136.37(g)(2), it would not be subject to the five flights per 30-day period limitation found in § 136.37(g)(3).

Section 136.37(g) provides for an exception that permits a limited number of commercial air tours over national parks operated under part 91 rules, without requiring interim operating authority or §136.37 operating authority. To qualify for this exception, the operations must be permitted under part 119 and the operator must obtain a letter of agreement describing the conditions of the operations from the FAA and the Superintendent for the park over which operations would be conducted. *See* § 136.37(g)(1)-(2). We note that air tours conducted under this exception are distinct from air tours conducted over national parks pursuant to operating authority, or interim operating authority, granted by the FAA under § 136.37 or § 136.39, which are not subject to the five-flight limitation of § 136.37(g).

Section 119.1(e)(2) states that part 119 applies to non-stop commercial air tours conducted under the national park air tour provisions of part 136, "unless excepted in § 136.37(g)(2)." In your letter, you assert that because § 136.37(g)(3) is not referenced in § 119.1(e)(2) "there can be no limitation on the number of [p]art 91 flight operations over a national park provided the operator secures a letter of agreement from the Administrator and the [s]uperintendent of the park." Your assertion is incorrect.

Although § 119.1(e)(2) only references § 136.37(g)(2), which states the requirement to obtain a letter of agreement, you are incorrect that the five-flight limitation of § 136.37(g)(3) would not apply to operations conducted under the § 119.1(e)(2) exception. The text of the National Parks Air Tour Management Act of 2000, and the FAA's intent, as stated in the National Parks Air Tour Management Rule's notice of proposed rulemaking, clearly provide that the provisions of § 136.37(g), including the five-flight limitation, apply to operators conducting operations under § 119.1(e)(2).

The National Parks Air Tour Management Act of 2000 established the exception to the general requirements for commercial air tour operations over a national park. The exception states that commercial air tour operations over a national park may be conducted under part 91 if:

> (A) such activity is permitted under part 119 of such title;
> (B) the operator secures a letter of agreement from the Administrator and the national park superintendent for that national park describing the conditions under which the operations will be conducted; and
> (C) the total number of operations under this exception is limited to not more than five flights in any 30-day period over a particular park.

National Parks Air Tour Management Act of 2000 § 803, 49 U.S.C. § 40128(a)(3).

As you can see, the text of the statute clearly establishes a limitation on the number of flights permitted under the exception. Moreover, the statute does not elsewhere provide for an exception under which an operator could conduct unlimited part 91 commercial air tour operations over national parks.

Likewise, when codifying the statute in its regulations, the FAA did not stray from Congress's mandate. The FAA described the exception to the requirement for operators to apply for operating authority before beginning commercial air tour operations as "permit[ing] a commercial air tour operator conducting only a limited number of commercial air tour operations to be excepted from certain requirements of the Act . . . ." *See* 66 Fed. Reg. 21,264, 21,266 (Apr. 27, 2001) (National Parks Air Tour Management Notice of Proposed Rulemaking). The NPRM further stated that the exception is limited to not more than five "flights in any 30-day period over a particular park" and explained that "if there are two operators in a particular park who wish to use this exception, the [five] flights would have to be divided between them." *Id.*

The FAA later added the reference to § 136.37(g)(2) in § 119.1(e)(2) when making changes to the Air Tour Rule in 2007. The preamble to the final rule does not express intent to deviate from the statutory requirement to limit commercial air tour operations over national parks conducted pursuant to this exception. In fact, the final rule noted the continuation of the limitation on the number of commercial air tours over national parks. *See* 72 Fed. Reg. 6884, 6885 n.2 (Feb. 13, 2007) ("The [part 119] exception continues in a limited sense over all other national parks, because the Act allows a total of five commercial air tours per month by someone who does not hold a part 119 certificate.").

Accordingly, operators conducting commercial air tours under the exception provided for in § 136.37(g), and referenced in § 119.1(e)(2), are subject to the provisions of § 136.37(g)(3) which limits operators to five flights in any 30-day period over a particular park. If your client would like to operate commercial air tours over Acadia National Park, without being subject to the five-flight limitation, it would need to apply for a part 119 certificate permitting part 135 operations, and obtain interim operating authority from the FAA. *See* 49 U.S.C. §§ 40128(a)(4), (b), (c) (creating a deadline for existing operators to apply for a certificate, requiring new entrants to apply before conducting commercial air tours over

national parks, and separately setting Air Tour Management Plan and interim operating authority requirements); *see also* 14 C.F.R. §§ 136.39, 136.41; 67 Fed. Reg. 65,662, 65,663 (Oct. 25, 2002); 65 Fed. Reg. 34,368 (May 26, 2000).

This response was prepared by Dean Griffith, Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the Air Transportation Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of additional assistance.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200