



33<sup>rd</sup> Annual Basics of Airport Law Workshop and 2017 Legal Update

## Session #8

# THE LAW OF AIRPORT NOISE

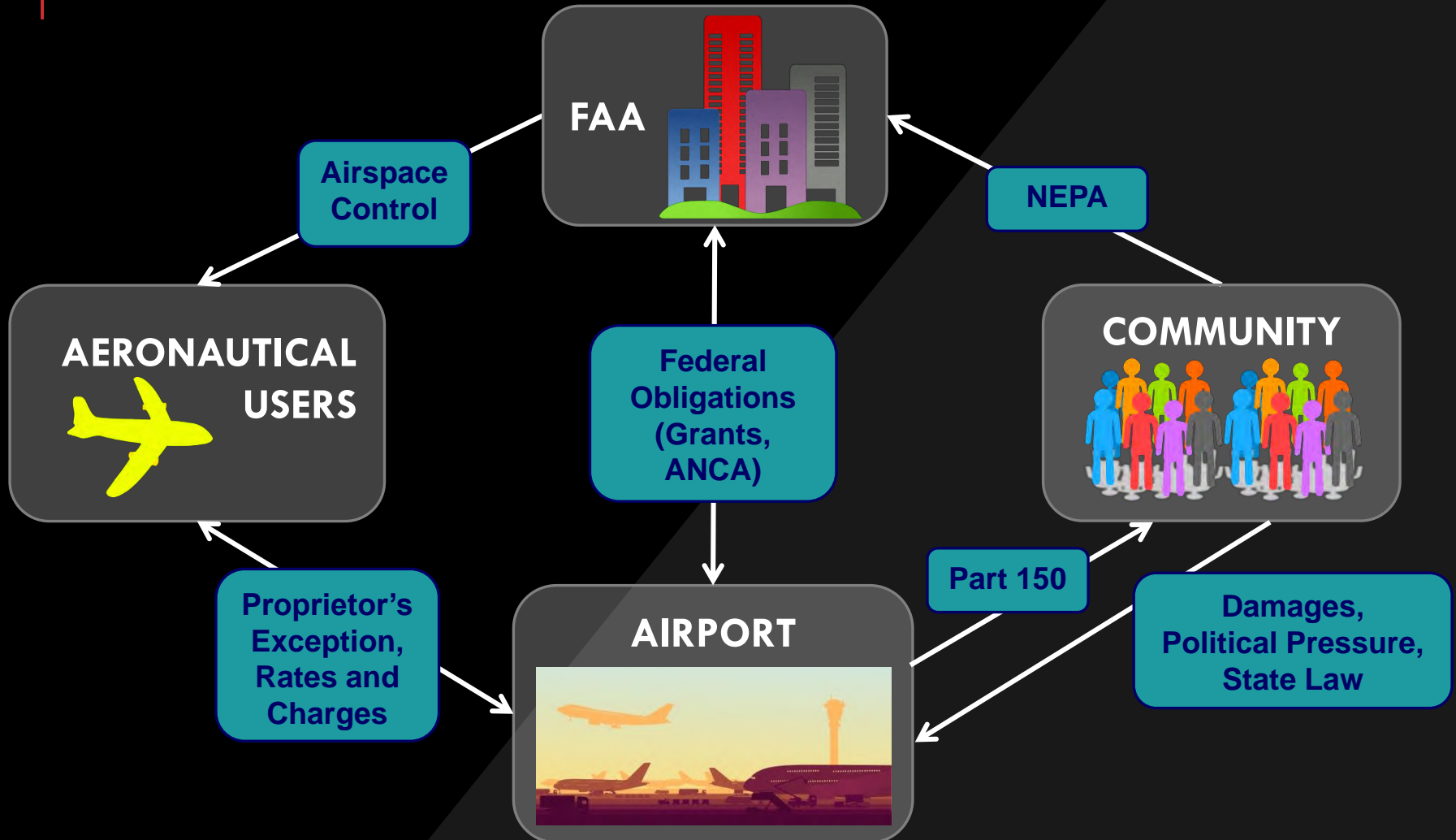
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W. Eric Pilsk

October 16, 2017

# OVERVIEW

- Complex Interplay Among Many Laws
- Overlapping Areas of Authority
- Underlying Issues Require Balancing
  - National v. Local Interests
  - Aviation Users v. Airports v. Community v. FAA
  - How to Define a Noise Problem
- Changing Markets, Technology and Infrastructure Drives New Legal Issues

# LEGAL RELATIONSHIPS



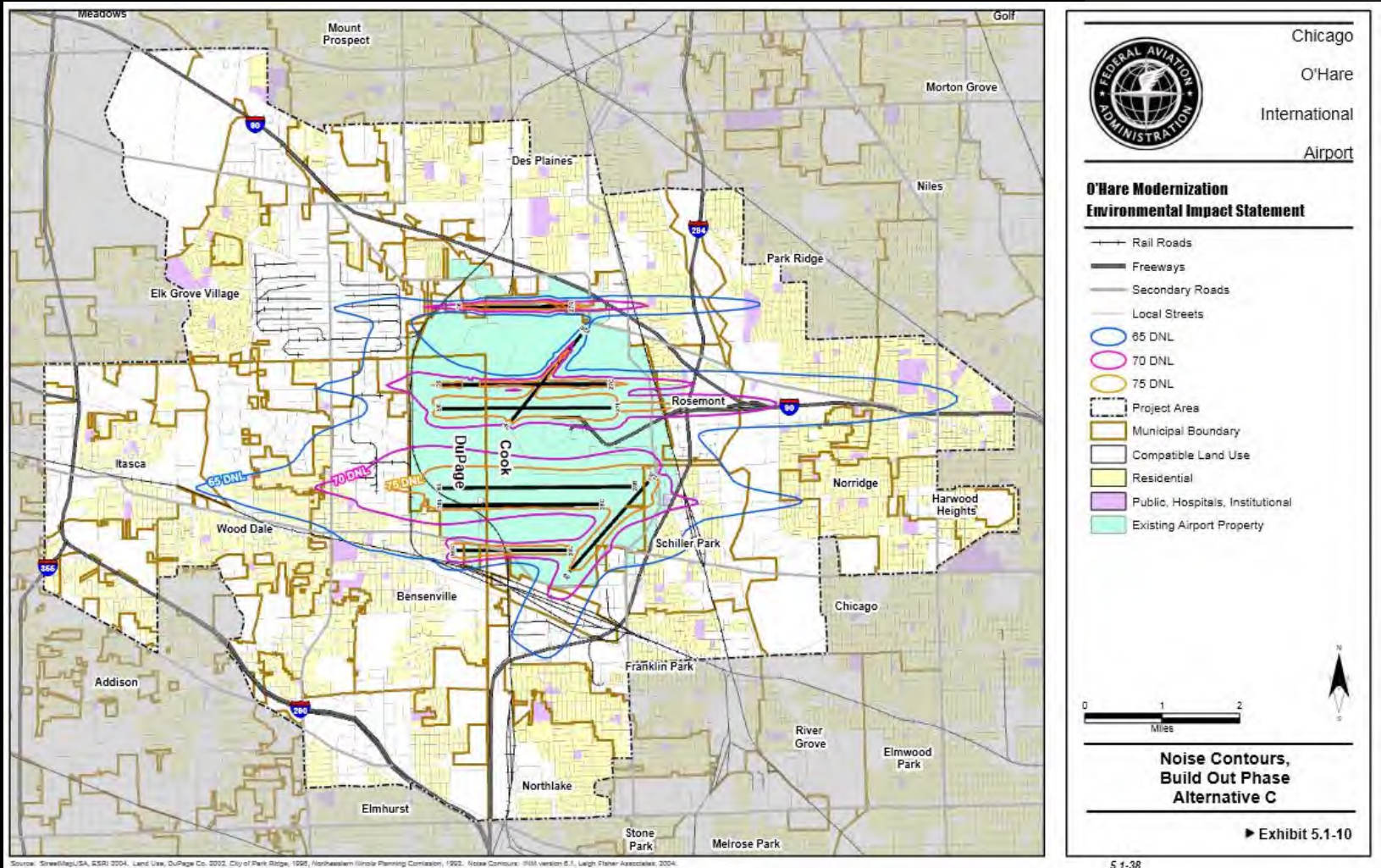
# SHARED RESPONSIBILITY FOR REGULATING NOISE

- Courts
  - Adjudicate Damages Claim and Other Disputes
- Non-Proprietor State and Local Governments
  - Land Use Beyond Airport Fence
- Airport Proprietor/Sponsor
  - Proprietary and Police Power to Control Access
  - Control of Expansion Plans
- Federal Aviation Administration
  - Control of Airspace and Aircraft Certification
  - Oversight of Proprietary Noise Measures
  - Fund Mitigation Measures

# MEASURING NOISE

- Noise is “unwanted sound”
- Noise Metric Systems Help Define when Sound Becomes Noise
- FAA requires use of the A-Weighted Sound Level (dBA) in Decibels
- Decibel Scale Compresses wide range of sound pressures humans can detect to a smaller range
  - Decibel Scale is logarithmic
    - $60 \text{ dB} + 6 \text{ dB} \neq 120 \text{ dB}$
    - $60 \text{ dB} + 60 \text{ dB} = 63 \text{ dB}$

# NOISE METRICS: DNL CONTOURS



Source: StreetMapUSA, ESRI 2004, Land Use, ©Page Co. 2002, City of Park Ridge, 1992, Northeastern Illinois Planning Commission, 1992, Noise Contours: IIM version 5.1, Leigh Fisher Associates, 2004.

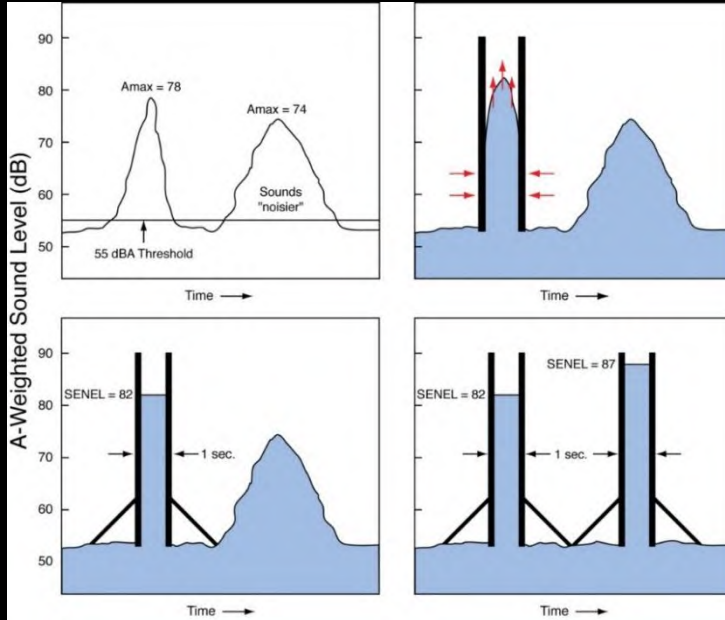
# NOISE METRICS: DNL CONTOURS

- FAA requires consideration of 65, 70 and 75 DNL
  - Airports often show 60 DNL
- Key purpose is identification of non-compatible land uses

# SINGLE EVENT NOISE METRICS

- **Sound Exposure Level (SEL)**

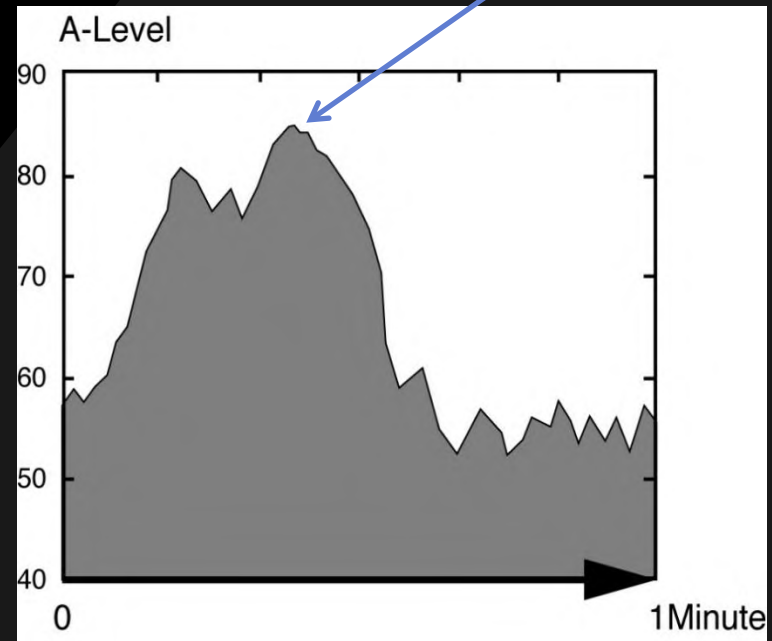
- Total Sound Energy of Single Overflight
- A longer event may seem “noisier,” even if it has a lower or equal maximum level



- **Maximum Sound Level (Lmax)**

- Maximum Decibel Level for Single Overflight

Maximum is appx. 85 dBA





# HOW MUCH NOISE IS TOO MUCH?

- FAA requires use of annual DNL metric for FAA purposes
  - Part 150, Part 161, Grant Compliance, NEPA
  - Other federal laws (NEPA) and agencies, and State and Local law, may permit other metrics
- FAA Noise Exposure Level Standard - DNL 65 dB
  - Some non-residential uses have higher standard - 14 C.F.R. 150, App. A, Table 1.
  - State and Local standards may be lower

# AUTHORITY OF NON-PROPRIETOR LOCAL GOVERNMENT

- Land Use Control
  - New Airports
  - Expansion Beyond Fence
  - Non-Airport Uses Beyond Fence
- Preempted from
  - Restricting operation of aircraft - *City of Burbank v. Lockheed Air Terminal*
  - Regulating “routes, rates or service” - 49 U.S.C. § 41713

# AUTHORITY OF AIRPORT PROPRIETOR

- Authority to adopt Access Restrictions - 49 USC 41713(b)
  - Must be reasonable, nonarbitrary and not unjustly discriminatory
  - FAA Oversight/Approval under ANCA and Grant Assurances
  - Authority To Decide Where and How to Expand
  - No Authority Over Flight Paths or Procedures
- Airline Use and Lease

# AUTHORITY OF FAA

- Authority Over Flight Paths and Procedures
- Authority to Control Noise at Source
  - Aircraft Certification; Stage Classification
  - EPA has no regulatory authority
- Authority to allocate funds under the AIP and to authorize collection and use of PFCs
- Review and Approval of Access Restrictions
  - Including Non-Obligated Airports

# LIABILITY FOR NOISE

- Takings, Nuisance, Trespass Theories
  - *U.S. v. Causby*, 328 U.S. 256 (1946): Established principle that takings can result from aircraft noise
  - *Griggs v. County of Alleghany, Pennsylvania*, 369 U.S. 84 (1962): Established principle that the airport proprietor is the entity responsible for any takings due to aircraft noise
- General Rule: Invasion of Super-Adjacent Airspace AND Substantial Interference With Use and Enjoyment of Property
  - Many variations among states
  - “Take or Damage” states
  - Degree of Interference is Key

# LIABILITY FOR NOISE

- Potential Defenses:
  - State tort immunity act provisions
  - State statute of limitations
  - Varying state constitutional provisions relating to takings and damaging (including SOL)
  - 49 U.S.C. §§ 47506-07 (Limitations on recovering damages for noise)
  - Many Courts Ignore Avigation Easements

# The Law of Airport Noise

Presented to: Patrick Wells  
By:  
Date: October 16, 2017



Federal Aviation  
Administration



Federal Aviation  
Administration

# Federal Aviation Regulations (FARs)





# **FAR Part 36 – Noise Standards, Aircraft type and Airworthiness Certification**



# **FAR Part 91 – General Operating and Flight Rules**



# **FAR Part 150 – Airport Noise Compatibility Planning**



# **FAR Part 161 – Notice and Approval of Airport Noise and Access Restrictions**



# Other Laws



# **Airport Improvement Program (AIP) Grant Assurances**



# Surplus Property Act Deed Restrictions



# State Laws and U.S. Constitution





# National Environmental Policy Act (NEPA)



# Noise Challenges and Path Forward

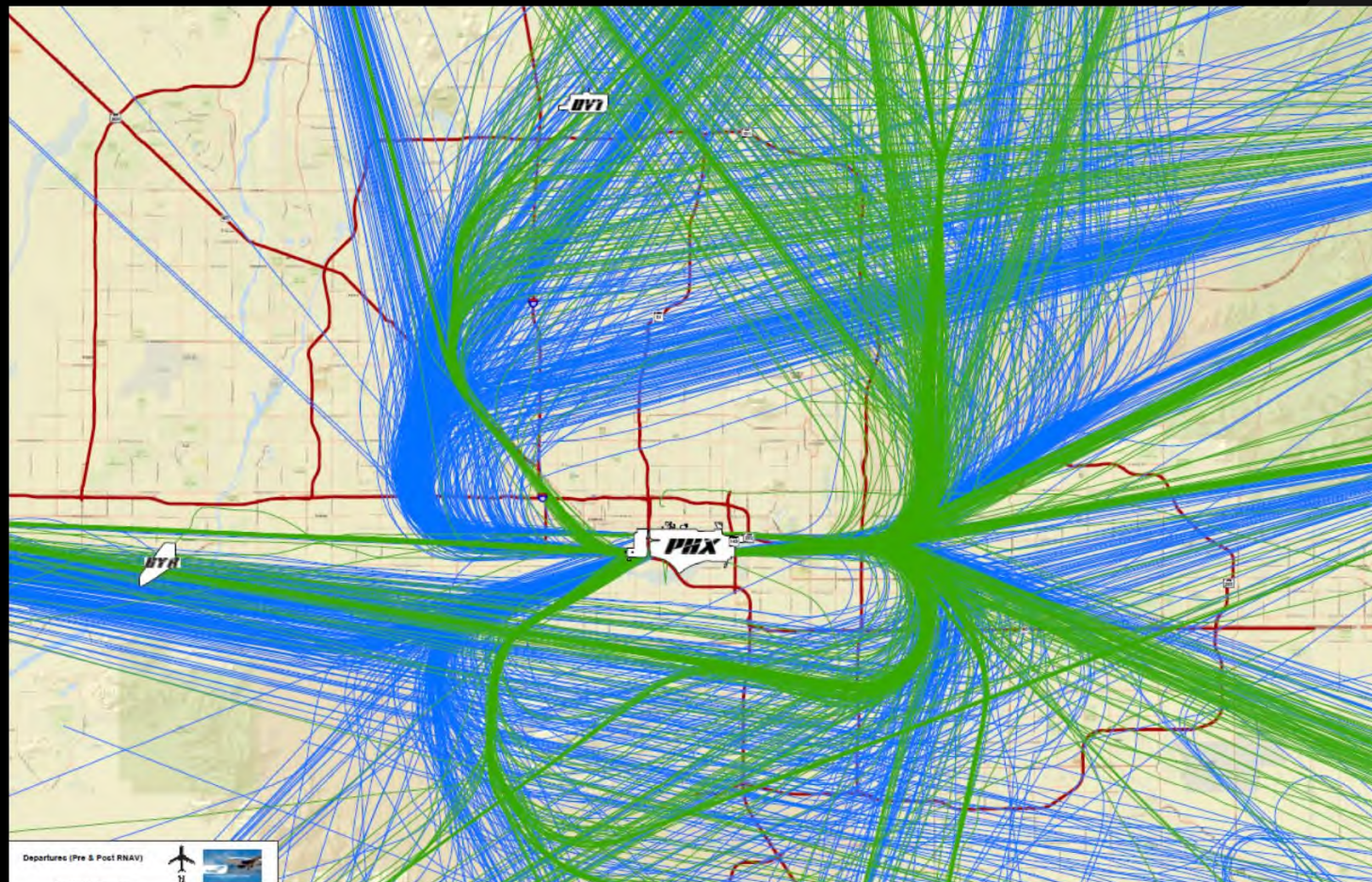


# CURRENT ISSUES: NEXTGEN

- NextGen includes new GPS-based Arrival and Departures Procedures
- New Procedures often move flight paths from established patterns to new areas
- Enormous controversy and litigation
  - NorCal, SoCal, SEA, BWI ...
- City of Phoenix Litigation

# *PHX V. HUERTA*: D.C. CIRCUIT

- Not Metroplex procedures
- But Metroplex planned
- Categorical exclusion



# *PHX V. HUERTA*: PROCESS ISSUES

- 49 U.S.C. §46110 60-day clock starts at time of route publication
- PHX reasonably waited to file
  - Narrow exception: FAA promised to address concerns
- FAA failed to adequately consult with City under:
  - NEPA
  - National Historic Preservation Act
  - Section 4(f)

# *PHX V. HUERTA*: SUBSTANTIVE ISSUES

- FAA unreasonably concluded a categorical exclusion was appropriate
  - 5 DB increase in 45-60 dB contours
  - Community concern
- FAA inappropriately applied DNL 65 standards under NHPA and Section 4(f)
  - Assumed Historic Districts and parks were “urban”
  - Required to consult with city

# *PHX V. HUERTA: TAKE AWAYS*

- FAA not invincible on noise
- FAA/ATO must do better involving airports and community
  - Accelerate ongoing FAA efforts
- Shortcuts in environmental documents are risky
- FAA cannot simply fall back on DNL 65 threshold
- Must “show its work” on Section 4(f)/106 resources
- CATEXes need to be better justified or EAs used if large noise changes (5 dB in DNL 45-60)
- Airport Staff needs to “report up”

# CURRENT ISSUES: NOISE EFFECTS STUDY

- FAA Noise Effects Survey
- Series of Community Surveys to “update the scientific evidence on the relationship between aircraft noise exposure and its effects on communities around airports.”
- Could affect the 65 DNL compatibility standard
  - Implications for NEPA, Part 150, AIP/PFC Funding, Review of Local Restrictions
  - Watch if new data changes state liability laws
- Initial reports expected in near future



# QUESTIONS?

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