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

Office of Airport Safety and
Standards

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

MAR 7 2003

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Dear Messrs. Filler, Spector, and Ross:

RE: Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek Airport Authority, FAA Docket Number 16-02-02

Enclosed is a copy of the Director's Determination in the above-captioned formal complaint under 14 C.F.R. Part 16.

We find that the Yavapai County and the Sedona Oak-Creek Airport Authority, has unjustly discriminated against the Complainant through its application of a renewable two-year license agreement with restrictive provisions that discourage the Complainant from making a substantial investment in the airport. Furthermore, we find that Yavapai County and the Sedona Oak-Creek Airport Authority, through its policies and practices, have constructively granted an exclusive right by imposing requirements that discourage competition among aeronautical providers at the airport. Consequently, we find Yavapai County and the Sedona Oak-Creek Airport Authority in violation of Title 49 U.S.C. Section 47107(a)(1)(5), and related Federal Grant Assurance 22,

Economic Nondiscrimination and Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights*.

Yavapai County, as owner and sponsor of Sedona Oak-Creek Airport, is hereby required to submit a corrective action plan within 30 days to the Director, Airport Safety and Standards, that complies with the requirements of the Order.

Sincerely,

David L. Bennett
Director of Airport Safety
and Standards

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Skydance Helicopters, Inc. d/b/a Skydance Operations, inc., **COMPLAINANT** **V.** **Sedona Oak-Creek Airport Authority (Operator) and Yavapai County, Arizona (Owner and Sponsor)** **RESPONDENTS**	**Docket No. 16-02-02**

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), 14 Code of Federal Regulations (CFR) Part 16.

Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc., (Complainant) has filed a formal complaint pursuant to 14 CFR Part 16 against the Sedona Oak-Creek Airport Authority, (Authority) and Yavapai County, Arizona, (County/Sponsor) of Sedona Oak-Creek Airport. The Sedona Oak-Creek Airport Authority is the operator of the Airport, and Yavapai County is the owner and sponsor of the Airport. Together, the Authority and the County are the Respondents in this complaint. Complainant alleges that the Respondents have violated Title 49 United States Code (U.S.C.) §47107 (a) *General Written Assurances* because the Respondents are engaged in economic discrimination and have failed to comply with Federal Grant Assurance 22, *Economic Nondiscrimination.* The FAA also construes the complaint to allege a violation of grant assurance 23, *Exclusive Rights.*

Complainant is a corporation, and at the time of the complaint, had its principal business at Sedona Oak-Creek Airport, Arizona. Complainant conducts an aeronautical activity providing helicopter sightseeing tours for the public. The issues to be resolved are:

- Whether the Respondents have denied the Complainant reasonable use and access to Sedona Oak-Creek Airport on reasonable terms and conditions for the purpose of leasing space for the construction of a hangar and office under a long-term lease arrangement, and whether the Respondents' actions in this regard constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107(a)(1)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination.*

- Whether the Respondents, through their policies and practices, have constructively granted an exclusive right to commercial operators already on the Airport by virtue of having entered into long-term leases denied to the Complainant, and by imposing a license requirement that discourages competition from potential aeronautical service providers in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights.*

Summary of Issues and Findings

The Complainant alleges that it was denied access to the airport for the purpose of constructing a hangar and office at an estimated cost of $300,000 and operating its helicopter tour business under a 30-year lease arrangement. The Complainant wanted the long lease term to ensure it would be able to recoup its substantial investment. As a condition to signing a 30-year lease, however, the Authority required the Complainant to sign a two-year renewable license that controls the Complainant's ability to conduct business on the airport. The license gave the Authority the discretionary power to terminate the Complainant's business activities, with or without cause, and offered no protection for the Complainant's investment. This effectively could negate the benefit of signing a 30-year lease.

The Authority withdrew its offer of a 30-year lease after the Complainant criticized the restrictive provisions of the license. The Authority, which operates but does not own the airport, noted that its own lease with the County had fewer than 30 years remaining, so could not execute a 30-year lease with the Complainant. The Authority did not offer to execute the Complainant's lease concurrent with its own remaining term length. Nor did the Authority request an extension of its own lease with the County to ensure parallel term lengths, as it has done in the past. Instead the Authority offered the Complainant a two-year rental agreement and renewable license. Later, the Authority offered the Complainant a 10-year lease with a two-year renewable license. The Authority believed the 10-year lease arrangement would permit the Complainant to build its hangar and office. The Complainant rejected both offers because of the continued presence of the restrictive language in the license. The County refused to change the restrictive terms for this Complainant because of the County's concern about uniformity among aeronautical operators who had already agreed to the two-year license. Even though the County attempted to negotiate changes to the license in general, they were unsuccessful.

The lease terms offered, combined with the two-year renewable license and restrictive provisions are inconsistent with the Authority's role to promote and develop the airport. This role was defined in the County's lease agreement with the Authority.

Based on our review and consideration of the evidence submitted and the pertinent laws and policy, we concluded that the Respondents are currently in violation of their grant assurances regarding economic nondiscrimination and exclusive rights.

The basis for our conclusions is detailed in this decision.

II. THE AIRPORT

The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §47101, *et seq.*

The Airport is a public-use general aviation airport located in Sedona, Arizona. Yavapai County is the airport owner and sponsor, responsible for compliance with all Federal grant assurances. The County has delegated management responsibilities under a long-term lease to the Sedona Oak-Creek Airport Authority, a non-profit corporation organized under the laws of the State of Arizona, to promote, develop, and manage Sedona Oak-Creek Airport. [FAA Exhibit 1, Item 3(1)(a)-(e)]

During the last reported twelve-month period ending in 1999, there were 98-based aircraft and 41,500 operations annually at the airport.[1] Since fiscal year 1982, the Airport Sponsor has entered into twelve grant agreements with the FAA and has received a total of $3,996,234 in federal airport development assistance. In 2002, the Airport Sponsor received its most recent AIP grant of $260,000 for apron rehabilitation.[2]

The Federal Government conveyed land that now constitutes Sedona Oak-Creek Airport to Yavapai County under a Deed of Conveyance executed under Section 16 of the Federal Airport Act.[3] Yavapai County is obligated to comply with the covenants included in the Deed.

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[1] FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Airport.

[2] FAA Exhibit 1, Item 2 provides the Airport Sponsor's AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor from fiscal year 1982 to the date of this decision.

[3] See FAA Order 5190.2R, *List of Public Airports Affected by Agreements with the Federal Government*, April 30, 1990.

III. BACKGROUND

A. Airport Tenants

The Sedona Oak-Creek Airport has two groups of aeronautical service providers on the airport that are relevant to this instant complaint. First, the group of scenic tour operators who typically operate under a two-year rental agreement. Second, the group of commercial operators who operate under long-term leases for the purposes of constructing hangars. For ease in reading this determination, we have used the term *aeronautical operator* when referring to the scenic tour operators and *commercial operator* when referring to those leaseholders engaged in hangar construction. Similarly, the use of the term "lease" is generally restricted to those operators holding long-term agreements with the Authority and "rental agreement" is used for those operators holding short-term agreements. These distinctions are made only for ease of reading this specific determination and should not be construed to carry any additional meaning.

B. Sedona Oak-Creek Airport Authority

The Sedona Oak-Creek Airport Authority prepares a budget for the airport subject to County approval, and enters into operating contracts, leases, permits, and agreements. The Authority pays the County an annual rent of one dollar plus net surplus revenue after expenses.[4] [FAA Exhibit 1, Item 3(1)(b)]

In April 1981, the County extended the Authority's lease term[5] to May 1, 2006 to provide a 25-year term for the Authority to permit its subleasees adequate time to amortize capital improvements on the airport. [FAA Exhibit 1, Item 3(1)(a)] The lease also gives the Authority a 25-year option to renew, which would extend the lease to May 2031. The Authority must notify the County no later than two years prior to the expiration of the initial term of its intention to exercise its option. [FAA Exhibit 1, Item 3(1)(a)]

The Authority, as a non-profit corporation, consists of a general membership, board of directors, and officers. A ballot of the general membership at the annual meeting elects the board of directors and new members. An individual cannot become a member if 25 percent or more of the general membership opposes the individual's appointment. Individuals elected to the general membership and the board of directors must be approved by the County's Board of Supervisors. [FAA Exhibit 1, Item 3(1)(e)]

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[4] While the lease agreement between the Authority and the County does not present an issue relative to this instant complaint, we note that the return of net surplus airport revenue to the County may indicate the existence of a potential violation related to FAA's *Policy and Procedures Concerning the Use of Airport Revenue* and Federal Grant Assurance 25, *Airport Revenues*. This is discussed briefly in section VI, Findings and Conclusions.

[5] The initial lease began January 1, 1971 and was due to expire December 31, 1995.

C. Skydance Operations, Incorporated

Skydance Operations, Inc. d/b/a Skydance Helicopters, Inc., the Complainant, holds an air carrier operating certificate under 14 CFR Part 119 and complies with the requirements of 14 CFR Part 135.[6] The Complainant has provided helicopter sightseeing tours to the public at Sedona Oak-Creek Airport beginning March 1, 1994, until its eviction on November 13, 2001. [FAA Exhibit 1, Item 5] During this period, Skydance had a two-year rental agreement for an office and a helicopter-landing pad that was renewed several times. All of the airport's standard rental agreements for aeronautical operators are for two-year terms. [*See* FAA Exhibit 1, Item 5, *Answer*, page 3]

D. History of License Program and Complainant's Allegations regarding Grant Assurance Violations

1. Purpose of the License

In a September 14, 2001, letter to Mr. Tony Garcia of the FAA Western Pacific Regional Headquarters, Airports Division, Mr. Edward McCall, airport manager, identified a number of problems the Authority was having with the airport's scenic tour operators:

> There was wholesale disregard of existing airport regulations, outright stealing of booked passengers from one commercial operator to another, and deceptive signage all over the airport. The classic bait-and-switch technique of used car salesman was routinely used for tour prices and services. There was physical blocking of entrance walkways by personnel or vehicles to direct customers from one company to another. There was harassment and solicitation of airport visitors in public areas to the extent of informing these visitors of unsafe pilots or aircraft of a competing company regardless of any truth. There were distributions of National Transportation Safety Board (NTSB) Accident Reports of competing companies. There was a complete disregard for the Airport's public relations with the community. There was attempted sabotage of aircraft and outright physical violence against personnel as well as aircraft. [FAA Exhibit 1, Item 5(Q)].

The Authority decided that instituting a commercial business license program (license) would help impose order and safety on the airport's eight scenic tour operators. The license was instituted on the advice of the Authority's counsel after a physical altercation on or about September 29, 2000, involving employees of the Complainant and Red Rock Biplane Tours, another scenic tour operator renting space on the airport. Instead of landing at the designated helipad, the Complainant's helicopter landed in front of the Red Rock Biplane hangar, and the helicopter rotor wash picked up debris that damaged an aircraft in the Red Rock Biplane hangar. An altercation resulted. [FAA Exhibit 1, Item 5].

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[6] Part 119 *Certification: Air Carriers and Commercial Operators; Part 135 Operating Requirements: Commuter and On-Demand Operations and Rules Governing Persons on Board such Aircraft.*

also refused to relocate its helicopter operation and threatened litigation if the Authority took any action that would interfere with the continued operation of its business. [FAA Exhibit 1, Item 5F]

In an effort to avoid possible litigation, both the Complainant and the Authority reached an understanding on October 31, 2000. The understanding, memorialized in a letter agreement, called for the Complainant to comply with certain operational restrictions on its helicopter operations, including moving its operation to a new and safer location in exchange for a long-term lease to construct a hangar and office. [FAA Exhibit 1, Item 3(7) (a)] The November 1, 2000, letter agreement documents this discussion and agreement between Edward McCall, airport manager, and Michael Cain of Skydance. The Authority agreed to proceed with negotiations regarding a proposed 30-year lease and construction of an office and hangar facility. The Complainant proposed to invest $300,000 in the construction of a hangar and office and submitted a schematic diagram to the Authority. [FAA Exhibit 1, Item 3(8) (a)-(c)][10]

In a letter dated February 10, 2001, the Authority provided the Complainant with a draft copy of the lease specifying a termination date of May 31, 2031. The draft lease did not identify a commencement date, basic rent, security deposit, location and size of the leasehold. [FAA Exhibit 1 Item 3(10)] In the same letter, the Authority also advised the Complainant that it would have to execute and sign a license with the Authority, which the Authority would provide at a later date. The license would cover a two-year period, renewable subject to business conditions, and would cost $100 per month plus 2½ percent of monthly gross sales.

The Complainant alleges that Mr. Al Bieber, the Authority's Safety Consultant, indicated that only aeronautical operators wanting to construct their own hangars were required to sign the license agreement. [FAA Exhibit 1, Item 3] Mr. Michael Muetzel, a Skydance employee and a member of the Sedona Noise Abatement Committee, reported to have overheard a conversation in which Mr. McCall indicated that only Skydance and Red Rock [Biplane Tours] would be required to sign operating licenses. [FAA Exhibit 1, Item 3(16) (a)]

The Authority denied the charge that only the Complainant and another operator were being required to execute the licenses as evidenced, it said, by the fact that seven operators had signed the license by October 26, 2001. [FAA Exhibit 1, Item 9]

Mr. Muetzel also reported that aeronautical tour operators had been the subject of the May 9, 2001, Sedona Noise Abatement Committee meeting. According to Mr. Muetzel, Mr. McCall told the committee that the Airport was trying to control the number of tour flights by controlling the number of tour operators, and that the airport was soliciting

[10] The parties dispute whether the letter agreement is binding. We need not address this issue, which is an issue of state law. The letter agreement however, is evidence of the parties' intent on the issues addressed therein.

proposals from non-aviation commercial users to reduce the space available for aeronautical use.[11] [FAA Exhibit 1, Item 3(16) (b)]

March 31, 2001, was the termination date for the Complainant's existing rental agreement. The Authority notified the Complainant on March 28, 2001, that it would permit the Complainant to continue its month-to-month tenancy subject to completion of a new lease negotiation as outlined in its November 1, 2000, letter agreement. The Complainant did not believe that this arrangement was a material change from the November 1, 2000, letter agreement. The Authority noted that the Complainant did not object to the offer of a month-to-month arrangement. [FAA Exhibit 1, Item 3] On April 11, 2001, the Complainant received a copy of the proposed license.

3. Continued Lease Negotiations

Complainant's objections. On July 6, 2001, Counsel for Complainant provided comments to the Authority's counsel regarding the lease and license agreement.[12] Counsel for Complainant requested a September 1, 2001, lease commencement date, and objected to the license in its present form. Complainant refused to sign the license as a condition for conducting business on the airport. Counsel for Complainant indicated that:

> [The Complainant] is in full agreement that an operations [license] agreement, which lays out in clear language the expectations, rights and responsibilities of [aeronautical] operators at the airport, which is fair, equitable and which provides adequate provisions for due process and dispute resolution would be desirable for use at the airport, provided that such an operations agreement conformed with Federal law and applied equally to all [aeronautical] operators without discrimination. [FAA Exhibit 1, Item 3(17)]

In a letter dated July 6, 2001, Complainant noted its concerns about the license:

> Paragraph 3. Grant of License. The license could be terminated by the Authority upon any breach of a provision of the lease at the sole discretion of the Authority. The Authority, with or without cause, could revoke the license. Furthermore, all rights for an appeal or to contest the decision would be waived by signing the agreement. The Complainant could be required to terminate all business activities and surrender its leasehold within 7 days.

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[11] Other than this statement, the Record provides no evidence to support or refute this allegation. It should be noted that the airport's Federal Airport Act Section 16 Deed of Conveyance requires the land to be used for airport purposes and any use other than for aeronautical purposes requires FAA review and approval.

[12] Respondents argue that they did not hear from the Complainant for three months after Complainant received the license agreement. However, the record indicates that the Complainant requested additional information from the Respondents and that there was written exchange between the parties during this period. [*See* FAA Exhibit 1, Item 6(3)(a)-(d).]

Paragraph 4. Operating Covenant. The license required that the Complainant refrain from any action that might be objectionable to the Authority or the Airport Patrons. The agreement does not provide a means of determining what is objectionable.

Paragraph 6. License Extension. License extensions would be subject to an increase in fees and costs to be determined by the Authority at its sole discretion and determination.

Paragraph 7.4.5. Airport Functions. This section relieved the Authority of all liability for negligence of the Licensee or acts beyond its control.

[FAA Exhibit 1, Item 3(17)]

Retraction of Thirty-year Lease Offer. On July 30, 2001, the Authority informed the Complainant that a 30-year lease term was no longer feasible because the Authority's term ended in May 2031, several months before the requested September 1, 2031 date. In lieu of a 30-year lease, the Authority offered the Complainant a standard two-year rental agreement and license, stating that all aeronautical operators with expiring rental agreements were required to sign the same license agreement. [FAA Exhibit 1, Item 3(18)] In its August 8, 2001, reply, the Complainant advised the Authority of its intention to file a complaint with the FAA.

August 2001 License Discussion Draft. On August 17, 2001, the Complainant offered a revised draft of the license agreement to the Authority for its review. The Complainant offered another proposed revision on August 20, 2001. [FAA Exhibit 1, Item 20 and 21, respectively] Two days later, the Authority rejected the Complainant's proposed changes to the license agreement. The Authority stated that it could not approve the lease because all leases and licenses must be uniform pursuant to FAA regulations. [FAA Exhibit 1, Item 3(22)]

Ten-year Lease Offer. The Authority extended a counteroffer of a 10-year lease agreement with a five-year renewal option. Under the terms of the offer, the Complainant could build and own a hangar, and would also be required to sign a license. The Complainant refused both the standard two-year term offer and the 10-year term offer. Complainant advised the Authority that it considered the previous offer of a 30-year lease term a binding commitment. The Authority denied that the November 1, 2000, letter agreement was binding. [FAA Exhibit 1, Item 3(23)]

Failing to reach agreement, on August 23, 2001, the Complainant filed an informal complaint with Mr. Tony Garcia, Airport Compliance Specialist for the FAA Western Pacific Regional Headquarters, Airports Division. [FAA Exhibit 1, Item 3(24)]

September 6th License Discussion Draft. During the FAA's informal investigation, and prior to the agency issuing its informal determination, both parties attempted again to

reach an agreement. On September 6, 2001, the Authority offered changes to the Complainant's August 20th draft license agreement. With some modification, the Authority offered to accept the Complainant's proposed changes to Section 3, *Grant of License*, providing for a written notice of breach of contract and an opportunity to cure or remedy the contract breach within 7 days. The Authority wanted the license terminable at the will of either party pursuant to the terms and conditions of the license. The Authority rejected changes to the other paragraphs, including the Complainant's request for additional conditions and terms not previously discussed in correspondence or proposed agreements. The Authority cited its desire to maintain uniformity with the other licenses previously issued. Counsel for the Complainant indicated the Complainant could not sign the license without the remaining changes.

September19th License Discussion Draft. The parties attempted to reach agreement again on September 19, 2001. The Authority states that it did have a productive conversation with Complainant's counsel regarding the lease, but the Complainant never provided any proposed changes to the license. [FAA Exhibit 1, Item 5 and Item 5(R)] Complainant disputes this claim arguing that it reached agreement with Respondents' counsel on a workable agreement only to have it rejected by the Authority. [FAA Exhibit 1, Item 6(1)]

4. Informal Complaint with FAA Western Pacific Region

Complainant's Argument. Complainant argues that the Authority violated its Federal grant assurances when it failed to make the airport available without discrimination and on reasonable terms and conditions. The Authority refused to enter into a ground lease for the construction of hangar facilities on the same or substantially similar terms and conditions afforded to other ground lessees without preconditions, such as a license. Complainant contends that the license, as written, represents an unreasonable standard. Provisions of the license deny the Complainant due process in landlord-tenant disputes. The need to execute a license was not mentioned until February 2001, several months after the Complainant and Mr. McCall, airport manager, signed the November 1, 2000, letter agreement. The Complainant rejects the license and disputes the right of the Authority to require the execution of any license as a precondition to the consummation of the lease. Complainant argues the license proposed by the Authority violates Federal law and is unjustly discriminatory because a number of tour operators have been allowed to renew their rental agreements without signing a license. Furthermore, Complainant states that an Authority board member's request to construct hangars for sale was fast tracked through the approval process. [FAA Exhibit 1, Item 3(19), page 5]

Authority's Response to the Informal Complaint. Mr. McCall, the airport manager, told Mr. Tony Garcia, the FAA airport compliance specialist, that the license had been instituted in an attempt to control safety problems at the airport. The Authority Board of Directors had approved the implementation of the license agreement at its regularly scheduled meeting on October 23, 2000. As of October 26, 2001, seven aeronautical operators, including Red Rock BiPlane Tours, Sky Safari, Solid Edge Aviation, Red Rock Aero Services, Sedona Sky Treks, Aero Sedona, and Arizona Helicopter

Adventures had signed the license agreement. Canyon Mesa Aviation II had not signed the agreement because their rental agreement had not expired and had not come up for renewal since the implementation of the license provision. Skydance Helicopters (the Complainant) refused to sign. Mr. McCall also indicated that all aeronautical operators at the Airport were required to sign the license and no waivers would be granted. To support the Authority's claims regarding safety problems, Mr. McCall provided information regarding the September 29, 2000, incident between Skydance Helicopters and Red Rock BiPlane Tours. [FAA Exhibit 1, Item 5(A) (B)]

FAA Western Pacific Regional Headquarters Regional Determination. In its October 26, 2001, informal regional determination, the FAA indicated that it was asked to address three issues regarding the Complainant's concerns:

(a) Whether the license was an unreasonable leasing standard,

(b) Whether the license would be used to deny the Complainant due process in landlord-tenant disputes, and

(c) Whether the Authority was obligated to comply with the November 1, 2000, letter agreement offering a 30-year lease.

The FAA informal regional determination addressed only the first issue. The other two issues regarding due process and the enforceability of the November 1, 2000, letter agreement were identified as legal contractual matters outside the FAA's authority, to be decided under state law.

In reviewing the reasonableness of the license agreement, the FAA found that the standards in the proposed license agreement were reasonably attainable and were being uniformly applied. The FAA concluded that the business license is not unreasonable or unjustly discriminatory. In the FAA October 26, 2001, letter to the Complainant, the FAA indicated that:

> The owner[13] of an airport developed with FAA administered assistance is responsible for operating its aeronautical facilities for the benefit of the public. This means, for example, that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport for aeronautical use by the public.
>
> The record indicates that the [Sedona Oak-Creek Airport Authority] introduced new and more stringent minimum ... standards. Revising the standards to meet airport-specific circumstances is permissible so long as the new terms remain reasonable, do not result in unjust discrimination, and are applied uniformly and consistently. The Airport Administration

[13] The owner of Sedona Oak-Creek Airport is Yavapai County; the Authority is the *operator* of the airport.

> believes that it must exert more effective control over tenants to ensure safe and efficient use of the airport and provide better service to the public.
> [FAA Exhibit 1, Item 3(27)]

Complainant's Response to FAA. The Complainant took issue with the FAA's findings on the informal complaint. The Complainant argued that the investigation had been one sided and that much of the information provided by the Authority was untrue. Furthermore, the Complainant argued that the FAA had not solicited its views on the information provided by the Authority. The Complainant disputed the following two statements made by the Authority:

(a) The Authority claims it approved the license at an October 23, 2000 board meeting.

The Complainant argued that the statement was completely false and alleges the license was not completed until the middle of April 2001. The Complainant also alleges that the license had been drafted specifically to control the Complainant's business.[14]

(b) The Authority claims seven aeronautical operators had signed the license around the same time that the Complainant was required to sign the license agreement.

The Complainant argues the statement is completely false. According to the Complainant, an Authority letter dated September 11, 2001, indicated that only three operators signed the agreement, and none of them signed it before June 1, 2001, which was long after the Complainant alleged it was being subject to discriminatory treatment. The Complainant indicates that Sedona Sky Treks and Aero Vista, two aeronautical operators on the airport, were not asked to sign a license during rental-agreement renewal. The Complainant also charged that the four aeronautical operators signing the license, Red Rock Biplane Tours, Sky Safari Tours, Solid Edge Aviation, and Red Rock Aero Services are really two companies under two trade names owned by the Brunner family which the Authority considered a single aeronautical operator. The remaining two aeronautical operators who signed, Aero Sedona and Arizona Helicopter were presented with the license only after Complainant charged discriminatory treatment. [FAA Exhibit 1, Item 3(28)]

The Complainant also took exception to the FAA's position that the Complainant objected to the license because the license established a standard at the airport above the level at which the Complainant preferred to conduct its business. The Complainant indicated that it did not object to the standards of operation, only to the unreasonable and arbitrary provisions that the Authority attempted to impose through the license. The

[14] Statement of Mr. Muetzel [FAA Exhibit 1, Item 3(16) (a)]

Complainant requested the FAA to reconsider its position and mediate the dispute between both parties. [FAA Exhibit 1, Item 3(28)]

Authority's Response to FAA. In a follow-up to the Complainant's inquiry, Mr. Garcia contacted Mr. McCall, airport manager, to investigate the Complainant's charges. Mr. McCall indicated that the Authority Board of Directors had approved the use of the license agreement at its October 23, 2000, board meeting. The license was not drafted and implemented until much later. Sky Trek did not sign the license until later due to an administrative oversight, and Aero Vista did not sign because it is no longer operating on the airport. [FAA Exhibit 1, Item 5(S)]

FAA Reply to Complainant. Mr. Garcia conveyed this information to the Complainant along with the FAA's position that the informal determination was upheld. FAA offered to mediate the dispute if the Complainant took a reasoned position to the Authority's concerns about safety. The Complainant denied it was guilty of any offenses or indiscretions at the airport. As a result, the FAA did not see mediation as a viable option and took no further action. [FAA Exhibit 1, Item 8]

5. Eviction of Complainant

On November 1, 2001, the Authority told the Complainant to vacate the premises by November 12, 2001, stating that the Complainant had refused to negotiate in good faith and its rental agreement had expired on March 31, 2001. The Authority had delayed eviction proceedings pending the outcome of the FAA's informal decision on the informal complaint. [FAA Exhibit 1, Item 5(I)(R]

In its Order to Vacate, the Authority requested that the Complainant either sign a new rental/lease agreement, license, and new helicopter landing position agreement or vacate the premises by November 12, 2001. [FAA Exhibit 1, Item 5(V)] The Complainant was evicted on November 13, 2001, after refusing to sign a new agreement. [FAA Exhibit 1, Item 5(W)]

6. Court Action

On November 14, 2001, the Complainant filed a lawsuit in Verde Valley Justice Court under Arizona's Uniform Landlord and Tenant Act, for restitution of the rented premises [FAA Exhibit 1, Item 5(X)] The Authority filed a Motion to Dismiss, indicating that the Complainant lacked jurisdiction because it did not have a rental or lease agreement. The court transferred the matter to the Superior Court, and the Complainant decided not to pursue the matter. [FAA Exhibit 1, Item 5(Z)] On May 8, 2002, the Complainant filed a Notice of Claim and Statement of Claim in the local jurisdiction against the Respondents. [FAA Exhibit 1, Item 5(4)]

7. Part 16 Complaint

Complainant's first Part 16 complaint dated March 5, 2000, was dismissed without prejudice on March 28, 2002 because it had been brought only against the Authority, a non-grant sponsor. The County, the sole sponsor, was a necessary party to the complaint alleging grant assurance violations. [FAA Exhibit 1, Item 10] The Complaint was re-filed on March 30, 2002, against both the Authority and the County. [FAA Exhibit 1, Item 3] The Respondent Authority filed an *answer* May 21, 2002. FAA Exhibit 1, Item 5], which was joined in and adopted by the Respondent County on May 21, 2002 [FAA Exhibit 1, Item 12] Complainant filed a *reply* May 30, 2002. [FAA Exhibit 1, Item 6]

8. Summary Positions of Complainant and Respondents

(a) Complainant's Summary Position

The Complainant is concerned about the risk of investing $300,000 for airport facilities under a 30-year lease that is subject to a two-year renewable license. The Complainant argues it is being prohibited from constructing facilities on the airport under reasonable terms and conditions. Complainant also argues that it is being unfairly discriminated against because terms and conditions extended to others, such as owners of general aviation hangars who were permitted to construct facilities under 30-year leases, are not being offered to the Complainant

(1) Objections to the Licensing Agreement

The Complainant believes that certain provisions of the license agreement are unreasonable because:

- The license is terminable at the will of the licensor.
- The license can be revoked, with or without cause, at the sole discretion of the Airport Authority.
- Upon breach of the agreement, licensee would have 7 days to quit the premises, notwithstanding any long-term lease or the $300,000 that the Complainant would have invested in new facilities.
- The license requires the aeronautical operator to forfeit its appeal rights.

The Complainant recognizes the Authority's right to change its requirements and does not object to signing a business license agreement as long as it is fair and reasonable.

(2) Thirty-year Agreement

The Complainant believes it had a binding agreement with the Authority for a 30-year lease as evidenced by the November 1, 2000, letter agreement signed by the airport manager. The Complainant argues that the license agreement was not identified as a requirement until February 10, 2001. The Complainant is willing to enter into an agreement, including a license agreement provided it is without the restrictive provisions listed above, on terms of less than 30 years that run consecutively with the Authority's remaining lease term.

(b) Respondents' Summary Position

The Respondents argue that the license agreement is needed to impose order and safety on the airport's aeronautical operators. Respondents argue that it is reasonable to require a license agreement as a means of promulgating and enforcing uniform rules and regulations. The license standards are reasonably attainable and are being met by the other aeronautical operators conducting business on the airport. Furthermore, the license has resulted in improved airport operations.

(1) Attempts to Negotiate Agreement

The Authority attempted to negotiate an agreement to address the Complainant's concerns. It could not reach an agreement because the Complainant's proposal would have been substantially different from the agreements signed by the other aeronautical operators on the Airport.

(2) Thirty-year Lease

The Authority can no longer offer a 30-year lease because its own lease term with the County is less than 30 years. The Authority offered the Complainant both a two-year and a 10-year term. The Complainant refused both offers. The November 1, 2000, letter agreement signed by Mr. Edward McCall, airport manager, is not a binding lease agreement; only the president of the Authority has the power to enter into such an agreement.

(3) Complainant's Eviction and Standing

The Complainant was evicted from the Airport on November 13, 2001. The Complainant does not have a lease or rental agreement and, consequently, has no standing. The Complainant is not directly and substantially affected by any alleged noncompliance action. The Complaint should be dismissed.

IV. ISSUES

Upon review of the allegations and the relevant airport-specific circumstances, summarized above in the Background Section, the FAA has determined that the following issues require analysis in order to provide a complete review of the Sponsor's compliance with applicable Federal law and policy:

- Whether the Respondents have denied the Complainant reasonable use and access to Sedona Oak-Creek Airport on reasonable terms and conditions for the purpose of leasing space for the construction of a hangar and office under a long-term lease arrangement, and whether the Respondents' actions in this regard constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107(a)(1)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination.*

- Whether the Respondents, through their policies and practices, have constructively granted an exclusive right to commercial operators already on the Airport by virtue of having entered into long-term leases denied to the Complainant, and by imposing a license requirement that discourages competition from potential aeronautical service providers in violation of Title 49 U.S.C. §40103(e) and related Federal Grant Assurance 23, *Exclusive Rights.*

Our decision in this matter is based on the applicable Federal law and FAA policy, review of the arguments and supporting documentation submitted by the parties and other interested persons, interviews with the parties and other interested persons, and the administrative record reflected in the attached FAA Exhibit 1.[15]

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

[15] FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, and Enforcement of Airport Sponsor Assurances.

A. The Airport Improvement Program

Title 49 U.S.C. §47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. §47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. §47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. §47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[16] FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Four Federal grant assurances apply to the circumstances set forth in this complaint: (1) Grant Assurance 22, *Economic Nondiscrimination;* (2) Grant Assurance 23, *Exclusive Rights;* (3) Grant Assurance 5, *Preserving Rights and Powers;* and (4) Grant Assurance 19, *Operation and Maintenance.* In addition, Yavapai County is obligated to comply with the covenants included in the Section 16 Deed of Conveyance.

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[16] *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

1. Economic Nondiscrimination

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Federal Grant Assurance 22, *Economic Nondiscrimination*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. §47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally-obligated airport

> ...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a)]
>
> ...may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)]
>
> ...may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i)]

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [FAA Order 6A, para. 4-8]

The owner of an airport developed with Federal assistance is responsible for operating the aeronautical facilities for the benefit of the public. [*See* FAA Order 5190.6A, Sec. 4-7(a).] This means, for example, that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport. [*See* Order, Secs. 4-7 and 4-8]

Federal Grant Assurance 22, *Economic Nondiscrimination*, also satisfies the requirements of Title 49 U.S.C. §47107 (a)(5), which requires that fixed-base operators[17] similarly using the airport must be subject to the same charges. Assurance 22 provides, in pertinent part, that the sponsor of a federally obligated airport will ensure that

> ...each fixed-base operator at any airport owned by the sponsor shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c)]

FAA Order 5190.6A describes the responsibilities under Grant Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on fair and reasonable terms without unjust discrimination. [*See* Order, Secs. 4-14(a)(2) and 3-1]

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. [*See* Order, Sec. 3-8(a).]

2. Exclusive Rights

Title 49 U.S.C. §40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Title 49 U.S.C. §47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Grant Assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport

> ...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.

[17] A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. (FAA Order 5190.6A, Appendix 5)

In FAA Order 5190.1A, Exclusive Rights, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F.22 1529 (11th Cir, 1985).]

FAA Order 5190.6A (Order) provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* Order, Ch. 3]

3. Preserving Rights and Powers

Grant Assurance 5, *Preserving Rights and Powers,* of the prescribed sponsor assurances implements the provisions of the Airport and Airway Improvement Act of 1982, 49 U.S.C. §47107 et seq, as amended by Pub. L. No. 103-305 (August 23, 1994), and requires, in pertinent part, that the sponsor of a federally obligated airport

> ...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.

FAA Order 5190.6A describes the responsibilities under Grant Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [*See* Order, Secs. 4-7 and 4-8]

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of airports managed by agencies other than the sponsor.

4. Operation and Maintenance

Grant Assurance 19, *Operation and Maintenance*, places responsibility on the sponsor to operate and maintain the airport in a safe and serviceable condition and in accordance with reasonable minimum standards.

(a) Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [*See* FAA Order 5190.6A, Sec. 3-12]

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport. If such a determination is requested, it is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or whether the standard results in an attempt to create an exclusive right. [*See* Order, Sec. 3-17(b).]

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. [*See* Order, Sec. 3-17(c).]

While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement, or any requirement applied in an unjustly discriminatory manner, could constitute the grant of an exclusive right. [*See* FAA Order 5190.1A, Para. 11.c.]

(b) Use Agreements Involving an Entire Airport

FAA Order 5190.6A provides guidance in cases where sponsors elect to enter into arrangements involving the operation or maintenance of the airport.

Airport sponsors subject to continuing obligations to the Federal Government may enter into contracts to perform airport maintenance or administrative functions. The important point is that the sponsor is in no way relieved of its own obligations to the Government by delegating its airport administrative and operational responsibilities to a third party. [*See* Order 5190.6A, Para. 4-2 (c).]

FAA will at all times look to the airport owner for effecting such actions as may be required to conform to the owner's compliance obligations. A management corporation with a lease of the entire airport, or a tenant operator authorized to perform any of the owner's management responsibilities, shall be considered as resident agents of the airport owner and not as responsible principals.

When the owner elects to rely upon one of the commercial operators or tenants on the airport to carry out the maintenance and operating responsibilities it assumed from the

Government, there is a potential conflict of interest. Any agreement conferring such responsibilities on a tenant must contain adequate safeguards to preserve the owner's control over the actions of its agent. For example, an airport owner shall not delegate its authority to one fixed-base operator to negotiate an operating agreement (lease) with another fixed-base operator. Management responsibilities should preferably be in a contract separate from the contract that leases property or grants airfield use privileges. [*See* Order 5190.6A, Para. 4-2(c).]

If it is contemplated that the management company may itself engage in one or more aeronautical activities, FAA will carefully evaluate such an arrangement. Leasing all available land or improvements suitable for aeronautical activity to one person will, under certain conditions, be construed as evidence of intent to exclude others. Such evidence may be overcome in a lease to a management company if the substance of the following provisions is included:

- The lessee (management company) agrees to operate the airport in accordance with the obligations of the sponsor to the Federal Government under [the agreements with the Federal Government]. In furtherance of this general covenant, but without limiting its general applicability, the lessee specifically agrees to operate the airport for the use and benefit of the public; to make available all airport facilities and services to the public on fair and reasonable terms and without discrimination; to provide space on the airport, to the extent available; and to grant rights and privileges for use of the landing area facilities of the airport to all qualified persons, firms and corporations desiring to conduct aeronautical operations on the airport.

- It is specifically understood and agreed that nothing herein contained shall be construed as granting or authorizing the granting of an exclusive right within the meaning of Title 49 U.S.C. §40103(e).

- The sponsor reserves the right to take any action it considers necessary to protect the aerial approaches of the airport against obstruction, together with the right to prevent the lessee from erecting, or permitting to be erected, any building or other structures on the airport which, in the opinion of the sponsor, would limit the usefulness of the airport or constitute a hazard to aircraft.

- The sponsor reserves the right to develop or improve the airport (landing area of the airport) as it sees fit, regardless of the desires or views of the management company, and without its interference.

- This agreement shall be subordinate to the provisions of any existing or future agreement entered into between the sponsor and the United

States to obtain Federal aid for the improvement or operation and maintenance of the airport.

[FAA Order 5190.6A, Section 6-5]

5. Section 16 Deed of Conveyance

Instruments of conveyance executed under Section 16 of the Federal Airport Act impose upon the grantees certain obligations regarding the use of the lands conveyed and the airport involved. Covenants included in the deeds by which interests in land are conveyed require, in pertinent part:

(a) the grantee will use the property interest for airport purposes;

(b) the airport will be operated as a public airport on fair and reasonable terms and without discrimination;

(c) the grantee will not grant or permit an exclusive right;

(d) any subsequent transfer of property will be subject to the terms of the Deed of Conveyance;

(e) the land shall revert to the United States government if it is not developed for airport purposes or used in a manner consistent with the terms of the conveyance; and,

(f) in the event of a breach of any covenant or condition, the grantee will, on demand, take such action as may be necessary to evidence transfer of title to the premises to the United States.

[FAA Order 5190.6A, Section 3, 2-12, (a)-(f)]

C. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01).]

D. Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters, absent the filing of a complaint under *FAA Rules of Practice for Federally-Assisted Airport Proceedings* (14 CFR Part 16), continue to be set forth in the predecessor order, FAA Order 5190.6 issued August 24, 1973, and incorporated by reference in FAA Order 5190.6A. [*See* FAA Order 5190.6, Sec. 5-3, and FAA Order 5190.6A, Sec. 6-2.] *FAA Rules of Practice for Federally Assisted Airport Proceedings* (14 CFR Part 16) were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996.

VI. ANALYSIS AND DISCUSSION

The Complainant alleges that the Respondents have denied the Complainant reasonable use and access to Sedona Oak-Creek Airport on reasonable terms and conditions for the purpose of leasing space for the construction of a hangar and office under a long-term lease arrangement, and that the Respondents' actions in this regard constitute

unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107 (a)(1)(5), and Federal Grant Assurance 22, *Economic Nondiscrimination.*

The Complaint also is construed to allege that the Respondents, through their policies and practices, have constructively granted an exclusive right to commercial operators already on the Airport by virtue of having entered into long-term leases denied to the Complainant, and by imposing a license requirement that discourages competition from potential aeronautical service providers at Sedona Oak-Creek Airport in violation of Title 49 U.S.C. §40103(e) and Federal Grant Assurance 23, *Exclusive Rights.*

Both of these allegations stem from the Complainant's interest in obtaining a long-term lease to support a substantial investment at the Airport, with the intention of offering aeronautical services to the public. While the Respondents initially offered the Complainant a 30-year lease, they also imposed a requirement for a two-year renewable license agreement that gave latitude to the Respondents to terminate the Complainant's occupancy without regard to the term of the lease. The Complainant argued that the two-year renewable license requirement negated the benefit of the long-term lease.

The Respondents claim that the license and its application to the Complainant's proposed operation is reasonable, not unjustly discriminatory, and not burdensome. The Respondents argue that they have the right to increase minimum standards to enforce good business practices and the safe operation of the airport. The Respondents also argue that several attempts were made to negotiate with the Complainant, but the Complainant's concerns could not be addressed without changing the license agreement in such a way that the Complainant's license would be substantially different from the license agreements signed by other aeronautical operators.

A. Economic Discrimination, Reasonable Terms, and Exclusive Rights

The Complainant argues that the Respondents violated the prohibitions on unjust economic discrimination, including reasonable terms and conditions, and exclusive rights by:

(1) including certain provisions in the license agreement that are unreasonable,

(2) requiring a two-year renewable business license for a 30-year lease,

(3) offering a lease term less than 30 years for a capital expenditure of $300,000 while granting terms of 30-years to others, and

(4) prohibiting the Complainant from constructing facilities on the airport under reasonable terms and conditions that have been extended to others.

As noted in Section V above, *Applicable Federal Law and FAA Policy*, the owner of a federally assisted airport is required to make the airport available to the public (i.e. all

types, kinds and classes of aeronautical activities) on reasonable terms without unjust discrimination.

In conducting our formal investigation, we found there were two types of aeronautical service providers on the Airport that were relevant to this instant Complaint:

- Aeronautical operators signing two-year rental agreements and the two-year license agreement,[18] and

- Commercial operators leasing land to build hangars for aeronautical use under long-term lease arrangements.[19]

Each issue also had three points to consider: (1) whether the terms and conditions for access by the Complainant were reasonable, (2) whether the terms and conditions for access by the Complainant were unjustly discriminatory, and (3) whether the terms and conditions for access by the Complainant resulted in the constructive granting of an exclusive right to other aeronautical service providers, including either aeronautical or commercial operators.

In our analysis of the evidence submitted, we considered each issue based on the aeronautical service provider group most similarly situated to the Complainant, as well as the three points of reasonableness, unjust discrimination, and exclusive rights.

1. **Provisions of the Two-year License Agreement**

The Complainant argues that certain provisions of the license are unreasonable, including:

- License is terminable at the will of the Authority;
- License can be revoked with or without cause at the sole discretion of the Authority;
- Upon licensee's breach of the agreement, licensee had seven days to quit the premises, notwithstanding its lease term or the amount of capital investment; and,
- License requires the aeronautical operator to forfeit its appeal rights.

The Respondents argue that the license standards are reasonably attainable and are being met by the other aeronautical operators conducting business on the airport. Furthermore the license has resulted in improved airport operations. The Respondents focused their

[18] The seven tour operators on the airport comprise the group of aeronautical operators.

[19] The Respondents' *Minimum Standards* do not reflect commercial operators constructing hangars under long-term leases to be aeronautical service providers. The FAA, however, recognizes this as a commercial aeronautical activity.

concerns on the need for uniformity in the license agreements among all aeronautical operators.

In reviewing the issue of the license agreement during the informal investigation, the FAA Western Pacific Regional Headquarters, Airports Division, found that the standards in the proposed license agreement were reasonably attainable and were being uniformly applied. The FAA Regional information determination concluded that the license is reasonable.

We agree with the FAA Western Pacific Regional Headquarters, Airports Division, that the requirement for a license, as a standard by itself, does not form the basis for a violation of the Federal Grant Assurances. Licenses, permits, or rules and regulations can be, and often are, used by airport sponsors to establish standards of conduct on the airport to ensure both good business practices and the safe and efficient operation.

We believe the FAA Western Pacific Regional headquarters, Airports Division, erred in making is informal regional determination by accepting the license as a standard without fully examining the license terms and provisions in light of the Respondents' Federal obligations.

We find the license provisions, as currently written, form an unreasonable requirement for access to a Federally obligated public-use airport in violation of the grant assurances. Furthermore, aeronautical operators at a public-use airport should have the opportunity to cure or address an airport violation, and they cannot be required, as a condition of access, to waive their rights to appeal to the FAA for violations of Federal law and policy on the part of the airport sponsor. As such, we find the license provisions enumerated above to be unreasonable.

2. Two-year Renewable Business License for a Thirty-year Lease

The Complainant is concerned about the risk of investing $300,000 for airport facilities under a 30-year lease, when the business to be conducted in that facility is subject to a two-year renewable license. The Authority argues that it attempted to negotiate an agreement to address the Complainant's concerns. They could not reach an agreement because the terms proposed by, and acceptable to, the Complainant would have been substantially different from the agreements signed by other aeronautical operators.

Similarly Situated

Grant Assurance 22, *Economic Nondiscrimination*, of the sponsor assurances satisfies the requirements of 49 U.S.C. §47107(a)(5). It provides, in pertinent part, that the sponsor of a federally obligated airport

commercial operators – those having long-term leases to construct hangars – were subject to the same two-year license requirement.

Capital Investment

Offering a 30-year lease with a two-year renewable license for a $300,000 capital investment also presents inherent financial impediments.

Under a short-term agreement, such as those signed by the other aeronautical operators, the airport owner bears the risk for financing, cost of capital improvements, and return on investment. This short-term arrangement offers the most flexibility to the airport owner, with charges normally assessed based on direct user fees plus a fee for the rental agreement. The success of this strategy is dependent upon the airport owner's ability to maintain full occupancy of the rented facilities.

Under a long-term lease, the airport owner transfers the cost of the capital improvement and the risk associated with financing to the tenant. In return, the airport owner gives up a degree of flexibility. Prospective tenants considering a substantial investment in the airport generally seek a lease term sufficiently long to ensure that the tenant gets not only a return *of* its investment, but a return *on* its investment as well. The Complainant expressed this concern in its efforts to negotiate a 30-year lease with the Authority in consideration for a $300,000 capital investment for hangar construction.

The two-year renewable feature of the license as applied to the Complainant's circumstances is, in itself, unreasonable. Combining that with the license provisions regarding termination, revocation, breach of agreement, and appeal rights exacerbates the adverse effect of the short period of the business license in comparison to the lease term. For example, the license provides for a seven-day notice to quit with no appeal rights. The lease and license are both silent as to how the Complainant would recover its investment should this provision be implemented.

Making a substantial capital investment in any airport carries a level of financial risk for the aeronautical or commercial operator making that investment. The Respondents' two-year renewable license could burden the potential investor with challenges in obtaining favorable financing. The provisions allowing for termination at the sole discretion of the Authority – with seven days to quit and no appeal options – severely impacts the investor's control over maintaining a continued revenue stream to support its initial investment. The Respondents did not address the Complainant's concerns regarding the impact of a two-year renewable license on the security of the Complainant's investment.

The license requirement, with its two-year term and restrictive provisions, discourages private investment in airport facilities. Private investment, combined with Federal financial assistance and airport user fees, collectively supports the operation of the nation's airports. When an airport owner imposes unreasonable barriers to private

investors, it excludes this essential ingredient in developing a viable airport. In the process, it jeopardizes the Federal investment in those facilities.

The two-year license requirement, as presented, unjustly discriminates against those aeronautical operators asking the airport to give up a certain level of flexibility and control in exchange for making a substantial investment. The nature of the renewable license favors those aeronautical operators who are willing to leave the control and the risk in the hands of the Airport Authority.

Concurrent Terms

The Authority's two-year renewable license term is consistent with, and complementary to, its two-year standard aeronautical operator rental agreement term. For the Complainant, however, attaching a two-year renewable business license to a long-term lease is not consistent and has two potentially serious impacts. First, it could impair the Complainant's ability to get favorable financing for the $300,000 investment. Second, if the Complainant could get financing, the limited time on the license could impair the business operation's ability to generate sufficient return on its investment. For example, assuming the Complainant could get suitable financing, under the 30-year lease with a two-year renewable license arrangement, if the Complainant defaulted on the license for any reason, the business operation would not be able to generate a revenue stream to service the loan.

The Respondents provided same length/concurrent rental and license agreements for other aeronautical operators, while coupling the Complainant's long-term lease with a license agreement whose term was neither of the same length as, nor concurrent with, the long-term lease. Offering the Complainant lease terms coupled with a license agreement of significantly different lengths while offering other aeronautical operators same length/concurrent rental and license agreements is inconsistent with current airport practice and is, therefore, unjustly discriminatory.

Unreasonable, Unjustly Discriminatory

For the reasons discussed above, we find that the Respondent's insistence on execution of a two-year business license with respect to a long-term lease, terminable without cause, and containing a waiver of appeal of federally granted rights, unreasonably denied the Complainant access to the airport and unjustly discriminated against the Complainant.

3. Discriminatory Lease Terms

The Complainant objects to being offered a lease term of less than 30 years for a capital expenditure of $300,000 while the Respondents have granted terms of 30 years to others on the Airport.

Initially the Authority offered the Complainant a 30-year lease. Later, in its July 30, 2001, letter to the Complainant, the Authority indicated that the initial offer of a 30-year term was no longer available because its own lease term expired prior to that in May 2031. We understand that by the time the Complainant provided comments on the lease and license agreement, the Authority only had 29 years and five months remaining on its lease with the County. In lieu of the 30-year lease, the Authority offered the Complainant a two-year term with a two-year renewable license.[20] Several weeks later, the Authority offered the Complainant a 10-year term with a five-year renewal option coupled with the two-year renewable license.

According to the Authority, the 10-year term offer would have permitted the Complainant time to construct a hangar.[21] The record provides no evidence to support the Authority's contention that a 10-year agreement could be considered economically feasible to support the $300,000 investment proposed by the Complainant. Neither does the Complainant argue that the length of the 10-year agreement with a five-year renewal option is not economically feasible to support its proposed investment. Rather, the Complainant's position is that it is entitled to a 30-year lease because the Authority's initial offer of a 30-year lease in the November 1, 2000, letter agreement was binding.[22]

Since the Complainant offers no argument or evidence to suggest or support that a 10-year lease term with a five-year renewal option is not financially feasible, we cannot find that those lease terms are unreasonable. We do find, however, that the Authority's willingness to offer the Complainant only a 10-year lease with a five-year renewal option – when it had previously given other commercial operators building hangars 30-year leases – to be unjustly discriminatory.

The record reflects that commercial operators willing to make substantial investments at the airport were given 30-year lease terms. The Authority attempts to justify the substantially shorter lease term offered to the Complainant by indicating that it could not offer a 30-year lease term because it had only 29 years and five months remaining on its own lease with the County, who is the airport owner and sponsor. While this fact may support the Authority's position that it could not offer a 30-year lease, it does not justify the actual lease terms offered – first two years and then ten years.

Furthermore, we note that it was not until after the Complainant criticized the provisions of the two-year renewable business license agreement that the Authority withdrew its offer of a 30-year lease. The record reflects that a month prior to negotiating its November 1, 2000, letter agreement with the Complainant, the Authority's Board of

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[20] We have already determined that a two-year term is unreasonable for an investment of $300,000. [*See* Item 2, *Two-year Renewable License for a Thirty-year Lease,* on page 27.]

[21] The record does not indicate that the Authority suggested the two-year term would also have provided sufficient time for hangar construction.

[22] As previously mentioned, whether or not the initial lease term of 30 years offered by the Authority in the November 1, 2000, letter agreement is a binding commitment is more appropriately addressed by the Arizona courts under state law and is an issue not cognizable under the grant assurances and 14 CFR Part 16.

Directors had decided to implement a commercial license program. The Authority did not inform the Complainant of this until the following February, and did not provide a copy of the document until April 2001. When the Complainant criticized the license as being unreasonable and unjustly discriminatory, the Authority withdrew its offer of a long-term lease. The explanation provided in the record is that by the time the Complainant provided comments on the lease and license agreement, the Authority no longer had 30 years remaining on its lease with the County. [FAA Exhibit 1, Item 5]

We do not accept this explanation as reasonable justification for offering the Complainant a substantially shorter lease term for the following reasons:

- First, the Authority fails to explain why it cannot obtain an agreement with the County, the airport owner and sponsor ultimately responsible for the grant assurances, to honor the terms of the lease should the Authority's lease with the County not be renewed. Since the County is the airport sponsor recognized by the FAA, it has an obligation to ensure compliance with its Federal obligation to provide access to the airport on reasonable terms and without unjust discrimination.

- Second, the record reflects that, in the past, the Authority has requested lease extensions with the County to ensure long-term leases offered to tenants would run commensurate with the Authority's lease with the County. It did not do so in this case. The Authority provides no explanation as to why it did not request an extension in this instance. [FAA Exhibit 1, Item 3(1)(a)]

- Third, even if we were to accept the Authority's argument and affirmative defense that it could not offer a 30 year lease term because it only had 29 years and 5 months remaining on its lease with the County, the Authority provides no explanation as to why it could not have offered the Complainant a lease term that runs commensurate with the remaining length of its lease with the County. Indeed, had the Authority done so, the difference in the lease terms between the Complainant and other commercial operators making substantial investments at the airport would have been *de minimis.*

For these reasons, we do not find the Authority's explanation for treating the Complainant differently from others making a substantial investment in the airport to be compelling. The Authority has engaged in unjust economic discrimination by refusing to offer the Complainant a similar long-term lease.

4. Exclusive Rights

As discussed above, we find that the Complainant was denied reasonable use and access to the Airport as a result of its refusal to agree to unreasonable and unjustly discriminatory terms in the proposed lease and license agreement offered by the Authority.

The Complainant argues that it was prohibited from constructing hangar and office facilities on the airport under reasonable terms and conditions that have been extended to others engaged in the same activity. The record indicates that other commercial operators on the airport who have constructed hangars did so under long-term leases.[23] By unjustly discriminating against the Complainant, the Authority has denied the Complainant a right or privilege (i.e. a 30-year lease term) enjoyed by others making similar use of the airport. An exclusive rights violation occurs when the airport sponsor excludes others, either intentionally or unintentionally, from participating in an on-airport aeronautical activity.

> *An exclusive rights violation occurs when the airport sponsor excludes others, either intentionally or unintentionally, from participating in an on-airport aeronautical activity. The effect of a prohibited exclusive rights agreement can be manifested by an express agreement, unreasonable minimum standards, or by any other means.* [FAA Order 5190.6A, Sec. 3-8].

For the purposes of evaluating lease terms, the Complainant's proposal to construct a hangar and office is more comparable to other commercial operators constructing hangars than to the aeronautical tour operators who have accepted short-term rental agreements without a commitment to provide a substantial capital investment at the airport.

> *While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement or any requirement, which is applied in an unjustly discriminatory manner, could constitute the grant of an exclusive right.* [*See* FAA Order 5190.1A, Para.11.c.]

Providing long-term lease opportunities for one set of commercial operators constructing hangars while denying the same to another commercial operator desiring to invest in hangar construction results in the constructive grant of an exclusive right to those operators given the preferential long-term leases. Consequently, we conclude that the Respondent has constructively granted an exclusive right of airport use.

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[23] See FAA Exhibit 1, Item 3, page 6; and Item 3(1)(a).

B. Respondents' Affirmative Defenses

The Respondents provided the following four affirmative defenses: (1) the Complainant lacks standing since it holds no current lease or rental agreement; (2) the business license agreement is a reasonable means for increasing the Airports minimum standards; (3) the Authority is prohibited from offering a 30-year lease since the remaining term of its own lease with the County is for less than 30 years; and (4) the November 1, 2000, letter agreement does not constitute a binding agreement. We do not find any of the Respondents' affirmative defenses to be persuasive, nor do we find them successful in rebutting the Complainant's case.

1. Standing

The Respondents note that the Complainant does not have a current lease or rental agreement with the Airport. Without such a lease or rental agreement, Respondents insist the Complainant is not directly and substantially affected by any alleged noncompliance action. Consequently, Respondents conclude the Complainant has no standing to file this complaint under Part 16.

The FAA finds that the Complainant does, indeed, have standing for filing this complaint. Title 14 CFR Part 16.23(a) provides that a person directly and substantially affected by any alleged noncompliance may file a complaint with the Administrator. The Complainant alleges that it is being denied reasonable access to a public-use airport for the purpose of providing commercial aeronautical services to the public. The Complainant meets the "directly and substantially affected" standard of Part 16.23(a). A finding to the contrary would prevent the filing of Part 16 complaints alleging denial of access by parties off the airport who have not been able to gain access to the airport.

2. License Agreement

(a) Reasonableness of Increasing Standards

Respondents argue that the business license agreement is needed to impose order and safety on the airport's aeronautical operators. They argue that it is reasonable to require a license agreement as a means of promulgating and enforcing uniform rules and regulations.

FAA Grant Assurance 19, *Operation and Maintenance*, places responsibility on the sponsor to operate and maintain the airport in a safe and serviceable condition and in accordance with reasonable minimum standards. We concur with the Respondents that they have the right to promulgate and enforce rules and regulations for the purpose of ensuring safety and consistent business practices regarding the use of the airport. A license, permit, or lease is a reasonable legal instrument to fulfill this purpose.

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [*See* FAA Order 5190.6A, Sec. 3-12]

The Airport Manager identified a number of problems the Authority was having with the airport's scenic tour operators prior to the establishment of the license requirements. Those problems were jeopardizing the safety and efficiency of the airport.[24] The administrative record documents the incidents and the complaints received that warranted stronger action from the Authority. The requirement for a business license was a requirement above the existing minimum standards already imposed upon aeronautical operators.

The airport owner may quite properly amend the minimum standards from time to time in order to ensure an adequate quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. [*See* FAA Order 5190.6A, Sec. 3-17(c).]

The Director agrees that the Respondents were well within their authority to require additional standards for the conduct of business on the airport, but not standards that violate the grant assurances.

(b) Timing of the License Requirement

We concur with the Respondents' right to increase the minimum standards at the Airport in order to improve safety. We are not convinced, however, that the timing of these additional standards, or the notice provided to those who may be affected by these increased standards, represents reasonable and not unjustly discriminatory actions on the part of the Respondents.

During the investigation of the informal complaint, the Complainant noted that the Airport Manager did not inform the Complainant of the new requirement for a business license until February 2001. The license requirement was not mentioned in the November 1, 2000, letter agreement for a 30-year lease between the Complainant and the Authority. Yet the Board of Directors had approved this decision and authorized the implementation of a license program in October 2000.

[24] September 14, 2001, letter from Mr. Edward McCall, Sedona Oak-Creek (SEZ) Airport Manager, to Mr. Tony Garcia, FAA Western Pacific Regional Headquarters, Airports Division. [FAA Exhibit 1, Item 5(Q)]

3. Thirty-year Lease

The Authority argues it cannot offer a 30-year lease because its own lease term with the County has fewer than 30 years remaining.

The administrative record does not indicate that the availability of space on the airport is limited by the Authority's lease term. In fact, the record shows that when confronted with a request for tenant lease terms longer than its own lease in the past, the Authority requested the County to extend its own lease in order to enter into a lease arrangement that would provide operators sufficient time to amortize their investment.[25] There is no evidence in the record to indicate that the Authority made a request to the County in this case. Alternatively, the Authority could have offered a lease for the remaining term of its lease, approximately 28 to 29 years, but the record does not indicate a lease of this term was offered.

Furthermore, the County, as a federally obligated owner and sponsor of the airport, is obligated to consider such a tenant request for a lease. FAA Order 5190.6A, para. 4-15 and 4-15(c), respectively, states:

> Unless [the airport owner] undertakes to provide these [aeronautical] services itself, the airport owner has a duty to negotiate in good faith for the lease of such premises as may be available for the conduct of aeronautical services.
>
> If adequate space is available on the airport, and if the airport owner is not providing the service, it is obligated to negotiate on reasonable terms for the lease of space needed by those activities offering flight services to the public, or support services to other flight operators, to the extent that there may be a public need for such services. A willingness by the tenant to lease the space and invest in the facilities required by reasonable standards shall be construed as establishing the need of the public for the services proposed to be offered.

We do not concur with the Respondents' assertion that a 30-year lease is impossible under the specific circumstances of the Airport. In any event, a lease of nearly 30 years would have been possible within the Authority's remaining lease term.

4. November 1, 2000, Letter Agreement

Respondents argue that the November 1, 2000, letter agreement signed by Airport Manager Edward McCall is not a binding lease agreement. Respondents argue that only the president of the Authority has the power to enter into such an agreement.

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[25] FAA Exhibit 1, Item 3(1)(a).

We agree with the FAA Western Pacific Regional Headquarters, Airports Division, that a determination of whether or not the November 1, 2000, letter agreement constituted a binding agreement between both parties is more appropriately addressed by the Arizona courts under state law.

VI. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions and responses by the parties, and the entire record herein, and the applicable law and policy and for the reasons stated above, the Director of the FAA Office of Airport Safety and Standards finds and concludes as follows:

A. The Respondents' requirement for a renewable two-year business license agreement with restrictive provisions effectively denied the Complainant reasonable use and access to Sedona Oak-Creek Airport for the purpose of leasing space for the construction of a hangar and office under a long-term lease arrangement. The Respondents' actions of offering a 30-year lease term to other airport tenants[26] making a substantial investment in the airport, but not to the Complainant, constitutes unjust discrimination. Consequently, we find the Respondent in violation of Title 49 U.S.C. §47107 (a)(1)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination.*

B. The Respondents, through their policies and practices, have constructively granted an exclusive right by imposing requirements that discourage competition among aeronautical service providers at Sedona Oak-Creek Airport in violation of Title 49 U.S.C. §40103(e), and related Federal Grant Assurance 23, *Exclusive Rights.*

In addition to the findings and conclusions on the Complaint's specific issues, the Director also finds evidence from the Administrative Record that may indicate the existence of additional violations:

C. The Authority's lease with the County requires net surplus revenue after expenses to be returned to the County. The FAA considers this net surplus revenue to be airport revenue. If a surplus has been generated from the lease and not used for airport purposes, the Respondents may have violated FAA's *Policy and Procedures Concerning the Use of Airport Revenue* and Federal Grant Assurance 25, *Airport Revenues.*

D. The statement of Mr. Michael P. Muetzel[27] appears to indicate that the airport may be pursuing a leasing policy of encouraging non-aeronautical uses of the

[26] Commercial operators leasing space for hangar construction.
[27] *See* FAA Exhibit 1, Item 3(16)(b).

airport to reduce the amount of airport property available for commercial aeronautical purposes. Such an action may be contradictory to the County's Federal obligations.[28]

ORDER

ACCORDINGLY, the FAA finds the Respondents, Sedona Oak-Creek Airport Authority and Yavapai County, are currently in violation of applicable Federal law and Federal grant obligations.

Yavapai County, as owner and sponsor of Sedona Oak-Creek Airport, is hereby required to submit a corrective action plan within 30 days to the Director, Airport Safety and Standards. Failure to provide an acceptable corrective action plan within the designated time may result in the withholding of discretionary grant funds to Yavapai County for the Sedona Oak-Creek Airport pursuant to 49 U.S.C. §47115.

In addition, the Director orders the following actions:

A. The Director notes the lease between the Sedona Oak-Creek Airport Authority and Yavapai County requires all net surplus revenue after expenses to be returned to the County.[29] The sponsor should submit an accounting of all surplus revenue received for the past six years to FAA Western Pacific Regional Headquarters, Airports Division, within 45 days. This lease provision should also be revised to ensure it complies with Federal policy.

B. The Director is requesting the FAA Western Pacific Regional Headquarters, Airports Division, to conduct a land-use compliance inspection at Sedona Oak-Creek Airport to determine whether aeronautical and non-aeronautical uses of airport property are consistent with the County's approved Airport Layout Plan, and report the results of this land-use inspection to the Manager, FAA Airport Compliance Division, within 180 days.

All Motions not expressly granted in this Determination are denied.

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[28] For example, property conveyed under Section 16 of the Federal Airport Act may not be transferred for the specific purpose of revenue production. [FAA Order 5190.6A, Section 3, 2-11] The Airport Layout Plan is the document depicting the current and planned future use of airport property, including that property conveyed under Section 16. Federal Grant Assurance 29, *Airport Layout Plan*, states in pertinent part, "The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan..." The conversion of any area of airport land to a substantially different use from that shown in an approved layout plan could adversely affect the safety, utility, or efficiency of the airport and constitute a violation of the obligation assumed. [FAA Order 5190.6A, Section 5, 4-17f(2)]

[29] *See* FAA Exhibit 1, Item 3(1)(b).

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and Sections 511(a), 511(b), and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §§47105(b), 47107(a)(1)(4)(5)(7)(13), 47107(g)(1), 47110, 47111(d), 47122, respectively.

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute a final agency action and order subject to judicial review. [14 CFR 16.247(b)(2)] A party to this complaint adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's Determination.

David L. Bennett
Director, Office of Airport
Safety and Standards

Date: March 7, 2003

FAA Exhibit 1
Docket No. 16-02-02

Director's Determination
INDEX OF ADMINISTRATIVE RECORD
Docket No. 16-02-02

Skydance Helicopters, Incorporated, d/b/a Skydance Operations, Incorporated
v.
Sedona Oak-Creek Airport Authority and Yavapai County

The following documents (items) constitute the administrative record in this proceeding:

Item 1. FAA Form 5010 for the Airport.

Item 2. Airport Sponsor AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor since fiscal year 1982.

Item 3. Formal Complaint filed by Roger A. Leonard, General Manager, Cardinals' Pilot Shop, Incorporated, dated 30 March 2002 and docketed 6 April 2002.[30] List of Exhibits includes:

(1.) Sedona Oak-Creek Airport Authority Lease and Incorporating Documents:
- (a.) Supplemental Lease Agreement between Yavapai County and the Sedona Oak-Creek Airport Authority dated 27 April 1981.
- (b.) Agreement between Yavapai County and the Sedona Oak-Creek Airport Authority dated 18 January 1971.
- (c.) Supplemental Lease Agreement Number Two, between Yavapai County and the Sedona Oak-Creek Airport Authority, dated 15 April 1990.
- (d.) Articles of Incorporation of Sedona Oak-Creek Airport Authority dated 28 June 1970.
- (e.) By-Laws of Sedona Oak-Creek Airport Authority, not dated.

(2.) Lease Agreement between Sedona Arizona Airport Services, Inc. and Skydance Helicopters, Inc., dated 22 February 1994.

[30] The Complaint was originally filed on March 5, 2002, solely against the Authority. It was dismissed without prejudice on March 28, 2002, because the County, as the sole grant sponsor, was a necessary party to a Part 16 action alleging grant assurance violations. Item 3 is the amended complaint refiled. [*See* Item 10]

(3.) Letter (Item 3a) from Michael Cain, Skydance Helicopters, Inc., to Burt Blum regarding improvements to helipad, dated 2 May 1994 and Approval Letter (Item 3b) from Jack LaBaron, Airport Manager to Michael Cain, Skydance Helicopters, dated 6 May 1994.

(4.) Skydance Lease Agreements
- (a.) Letter from Michael Cain, Skydance Helicopters, Inc., to Sedona Oak-Creek Airport Administration regarding execution of lease agreement under protest, dated 31 March 1997.
- (b.) Building, Hangar, Hangar Pad or Tie-Down Space Lease Agreement for Skydance Helicopters, Inc., dated 25 April 1997.
- (c.) Building, Hangar, Hangar Pad or Tie-Down Space Lease Agreement for Skydance Helicopters, Inc., undated.

(5.) Skydance Airport Fee Increase
- (a.) Letter from R. Austin Wiswell, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding an airport fee increase, dated 30 September 1998.
- (b.) Letter from R. Austin Wiswell, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding two-year renewal and an airport fee increase, dated 8 March 1999.

(6.) Skydance Lease Extension
- (a.) Letter from R. Austin Wiswell, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding two-year renewal and a revised airport fee increase, dated 23 March 1999.
- (b.) Lease Amendment and Extension between Skydance Helicopters and Sedona Oak-Creek Airport Administration, with Attachment D, Commercial Activity Fee, dated 31 March 1999.

(7.) November 1, 2000, Letter Agreement and Business Cards
- (a.) November 1, 2000, letter agreement between Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding 30-year lease and hangar construction.

(b.) Copy of business cards for Al Bieber, Airport Safety Consultant and Larry L. Buchanan, FAA Principal Operations Inspector, Arizona Flight Standards District Office.

(8.) Plans and Estimates for Hangar Construction

(a.) Facsimile transmission from Skydance Helicopters to Jock, Fleming West regarding rough drawing for hangar, dated 13 December 2000.

(b.) Facsimile transmission from Jock Van Vevlzer, Fleming West to Michael Cain, Skydance Helicopters, Inc., regarding $299,000 budget for hangar construction, dated 27 December 2000.

(c.) Facsimile transmission from Holgate Consulting Engineers to Skydance Helicopters regarding engineering service proposal for hangar construction, dated 8 January 2001.

(9.) Letter from Michael Cain, Skydance Helicopters to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration providing a copy of the proposed hangar diagram and requesting a copy of the 30-year lease, attachments for hangar diagram and site investigation cost estimate by Holgate Engineers, dated 23 January 2001.

(10.) Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., providing a draft copy of the 30-year lease and discussing the need for a two-year business license, dated 10 February 2001.

(11.) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration acknowledging receipt of the lease and requesting a copy of the business license, dated 12 February 2001.

(12) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding the existing lease, 30-year lease and license, dated 5 March 2001.

(13) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, Sedona Oak-Creek Airport Administration regarding confirmation of month-to-month holdover status, dated 29 March 2001.

(14) Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration and Michael Cain, Skydance Helicopters, Inc., regarding month-to-month holdover status pending completion of new lease, dated 28 March 2001.

(15) License Agreement for Commercial Business Activities at the Sedona Oak-Creek Airport, unexecuted and undated copy.

(16) Memorandum (Item 16a) from Michael P. Muetzel to Whom It May Concern regarding license for Skydance Helicopters and Red Rock Biplanes, dated 1 May 2001 and Memorandum (Item 16b) from Michael P. Muetzel to Whom It May Concern regarding tour operations, dated 9 May 2001.

(17) Letter from Steven R. Owens, Counsel for Complainant to Edward J. McCall, Sedona Oak-Creek Airport Administration providing comments on the 30-year lease and license, site diagram attached, dated 6 July 2001.

(18) Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding proposed lease term, dated 30 July 2001.

(19) Letter from Steven R. Owens, Counsel for Complainant to Edward J. McCall, Sedona Oak-Creek Airport Administration regarding 30-year lease and license, dated 8 August 2001, and attached exhibits:

(a) November 1, 2000, letter agreement between Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration and Michael Cain, Skydance Helicopters, Inc., regarding 30-year lease and hangar construction.

(b) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration providing a copy of the proposed hangar diagram and requesting a copy of the 30-year lease, hangar diagram attached, dated 23 January 2001.

(c) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration acknowledging receipt of the lease and requesting a copy of the business license, dated 12 February 2001.

(d) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding existing lease, 30-year lease and license, dated 5 March 2001.

(e) Letter from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, Sedona Oak-Creek Airport Administration regarding confirmation of month-to-month holdover status, dated 29 March 2001.

(f) Letter from Steven R. Owens, Counsel for Complainant to Edward J. McCall, Sedona Oak-Creek Airport Administration providing comments on the 30-year lease and license, site diagram attached, dated 6 July 2001.

(G) (1) Changes to Proposed Lease,
(2) Skydance Helicopter site diagram,
(3) Letter from Steven R. Owens, Counsel for Complainant to Michael Cain, Skydance Helicopters regarding certified letter, dated 13 August 2001 and
(4) Certified mail receipt.

(20) Counsel for Complainant's Blackline changes to License Agreement for Commercial Business Activities at the Sedona Oak-Creek Airport, dated 17 August 2001.

(21) Electronic mail letter (Item 21a) from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding Lease and License revised by Counsel for Complainant (Item 21b), dated 20 August 2001

(22) Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding License, dated 22 August 2001.

(23) Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding Lease and License, dated 23 August 2001.

(24) Letter from Steven R. Owens, Counsel for Complainant to Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters requesting assistance in License dispute, dated 23 August 2001.

(25) Letter from Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters to Edward J. McCall, Sedona Oak-Creek Airport Administration regarding airport leasing standards, dated 7 September 2001.

(26) Letter from Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters to Edward J. McCall, Sedona Oak-Creek Airport Administration regarding License, dated 17 October 2001.

(27) Letter from Tony Garcia, Federal Aviation Administration, Western Pacific Regional Headquarters, Airports Division, to Michael Cain, Skydance Helicopters, Inc., Regional Determination regarding Operating License, dated 26 October 2001.

(28) Letter from Steven R. Owens, Counsel for Complainant, to Tony Garcia, Federal Aviation Administration, Western Pacific Regional Headquarters, Airports Division, regarding FAA regional determination, dated 31 October 2001.

(29) Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration, to Michael Cain, Skydance Helicopters, Inc., regarding vacation of airport premises by November 12, 2001, dated 29 October 2001.

(30) *Helicopter Tour Company Nixed,* Sedona Red Rock News, undated

(31) Airport Sponsor AIP Grant History dated 28 February 2002, listing the Federal Airport Improvement Program provided by the FAA to the Airport Sponsor since fiscal year 1982.

Item 4. Docket Notice from the Office of Chief Counsel, Federal Aviation Administration, dated April 30, 2002.

Item 5. Answer and Motion to Dismiss of the Sedona Oak-Creek Airport Authority, filed by Richard Spector, Spector Law Offices, docketed 21 May 2002.[31] Exhibits include:

A. Memorandum from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Sedona Oak-Creek Airport Board of Directors regarding Incident at Northeast hangar 9/29/00, dated 3 October 2000.

B. Sedona Police Incident Report dated 5 October 2000.

C. Minutes of Special Airport Board of Directors meeting dated 10 October 2000.

D. Letters from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc. regarding:

(1) Helicopter operations, dated 10 October 2000.
(2) Lease Renewal, dated 10 October 2000.

E. Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Larry Brunner, Dakota Territories regarding lease termination, dated 10 October 2000.

F. Letter from Steven R. Owen, Counsel for Complainant to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding Lease, dated 20 October 2000.

G. Letter from Steven R. Owen, Counsel for Complainant to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding Lease and License, dated 6 July 2001.

H. Electronic mail between Steven R. Owen, Counsel for Complainant and Richard Spector, Counsel for Respondents regarding Sedona Oak-Creek Airport Lease, dated 14 and 16 August 2001.

[31] On May 21, 2002, the County filed its joinder in Answer and Motion to Dismiss of the Authority. [*See* Item 12]

I. Letter from Richard Spector, Counsel for Respondents to Steven R. Owen, Counsel for Complainant regarding Ten Day Notice to Quit, dated 30 August 2001.

J. Letter from Richard Spector, Counsel for Respondents to Michael Cain, Skydance Helicopters regarding Ten Day Notice to Quit, dated 30 August 2001.

K. Facsimile Transmission from Michael Cain, Skydance Helicopters, Inc., to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding license, dated 30 August 2001.

L. Facsimile Transmission from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding Lease and License, dated 30 August 2001.

M. Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding Ten Day Notice to Quit, dated 5 September 2001.

N. Facsimile Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding proposed License revisions, dated 6 September 2001

O. Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding License, dated 10 September 2001.

P. Facsimile Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding proposed License revisions, dated 12 September 2001.

Q. Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters regarding License requirement, dated 14 September 2001, attached report titled, *Area Utilized by Sundance Helicopters at Sedona Airport* by Al Bieber, SAA Airport Safety Consultant.

R. Facsimile Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding proposed License revisions, dated 19 September 2001

S. Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters regarding safety and business practices at the airport, dated 5 November 2001, attached:

(1) Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding solicitation policy, policy attached, dated 24 October 2001.

(2) Consumer complaint against Skydance Helicopter, Inc., by Madeline Cassell, undated.

(3) Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding business practices, dated 22 October 2001.

(4) Consumer complaint [name illegible] regarding business practices, dated 29 October 2001.

T. Facsimile Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding eviction proceedings, dated 6 November 2001.

U. Facsimile Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding eviction proceedings, dated 9 November 2001.

V. Facsimile Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding eviction, dated 9 November 2001.

W. Facsimile Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding eviction proceedings, dated 14 November 2001.

X. *Skydance Helicopters, Inc., Plaintiff v. Sedona Oak-Creek Airport Authority, Defendants,* Sworn Complaint in Forcible Entry and Detainer, Civil Action Number CV20016686, Verde Valley Justice Court for Yavapai County, docketed 14 November 2001.

Y. *Skydance Helicopters Awaits Court Date.* Red Rock News, Sedona, Arizona, dated 20 November 2001

Z. Facsimile Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding eviction proceedings, dated 13 December 2001.

1. *Skydance Helicopters, Inc., Plaintiff v. Sedona Oak-Creek Airport Authority, Defendants,* Order Transferring Case to Superior Court, Civil Action Number CV20016686, Verde Valley Justice Court for Yavapai County, undated.

2. Facsimile Letter from Richard Spector, Counsel for Respondents to Steven R. Owens, Counsel for Complainant regarding legal action, dated 17 December 2001.

3. Facsimile Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding legal action, dated 17 December 2001.

4. *Skydance Helicopters, Inc., Plaintiff v. Sedona Oak-Creek Airport Authority, Defendants,* Notice of Claim and Statement of Claim with attachment, Part 16 Complaint, dated 8 May 2002.

Item 6. Complainant's Part 16 Reply and Opposition to Motion to Dismiss, Filed by Marshall S. Filler, docketed 30 May 2002. Exhibits include:

1. Affidavit of Stephen R. Owens, dated 28 May 2002. Exhibits include:

1. Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding License, dated 19 September 2001.

2. License Agreement for Commercial Business Activities at the Sedona Oak-Creek Airport, undated and unexecuted.

3. License Agreement for Commercial Business Activities at the Sedona Oak-Creek Airport with revisions, undated and unexecuted

4. Electronic copy of Letter from Steven R. Owens, Counsel for Complainant to Richard Spector, Counsel for Respondents regarding License, dated 19 September 2001.

5. Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Michael Cain, Skydance Helicopters, Inc., regarding vacation of airport premises by November 12, 2001, dated 29 October 2001.

2. *Minimum Standards for Commercial Activity*, Sedona Oak-Creek Airport

3. Correspondence between Complainant and Respondents regarding Lease and License:
   a. Letter from Stephen R. Owens, Counsel for Complainant to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding Lease and License agreements, dated 25 April 2001.

   b. Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Stephen R. Owens, Counsel for Complainant regarding Lease and License agreements, dated 1 May 2001.

   c. Letter from Stephen R. Owens, Counsel for Complainant to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding Lease and License agreements, dated 7 May 2001.

   d. Letter from Stephen R. Owens, Counsel for Complainant to Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration regarding Lease and License agreements, dated 10 May 2001.

4. Telephone Notes

Item 7. Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters regarding FAA's Regional Determination, dated 5 November 2001.

Item 8. Report of telephone conversations with Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration and Stephen R. Owens, Counsel for Complainant by Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters regarding FAA's Regional Determination, dated 6 November 2001.

Item 9. Letter from Edward J. McCall, General Manager, Sedona Oak-Creek Airport Administration to Tony Garcia, Federal Aviation Administration, Western Pacific Headquarters regarding request for information, dated 19 October 2001, including the following attachments:

a. List of tenants with and without a license, undated
b. October 23, 2000 minutes, Sedona Oak-Creek Airport Authority Board of Directors
c. Revisions to the Sedona Oak-Creek Airport Authority By-laws

Item 10. Formal Complaint filed by Mr. Marshall S. Filler and Mr. John Craig Weller of Filler and Weller, on behalf of Skydance Helicopters, Inc., dated March 5, 2002.

Item 11. Dismissal of the Formal Complaint filed on March 5, 2002, without prejudice for failure to join the County, the sole grant sponsor, as a party, dated March 28, 2002.

Item 12. Joinder in Part 16 *Answer and Motion to Dismiss* of Authority by Respondent Yavapai County dated May 21, 2002.

Item 13. Notice of Extension dated February 7, 2003, extending the date by which a decision in this matter will be issued to March 7, 2003.

Item 14. Excerpts from FAA Order 5190.2R