



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

Aug 27, 1993

Mr. Timothy Whitsitt
County Attorney
530 E. Main Street
Aspen, Colorado 81611

Mr. Scott Smith
Director of Aviation
Pitkin County Airport
0233 East Airport Road
Aspen, Colorado 81611

Dear Messrs. Whitsitt and Smith:

This responds to your letter dated June 30, 1993, in which the County "declines to supplement its [passenger facility charge] application and requests that the Federal Aviation Administration (FAA) approve/disapprove the application prior to the deadline for FAA's decision pursuant to FAR Part 158." This letter concerns outstanding issues under the Airport Noise and Capacity Act of 1990 (ANCA) and does not address grant compliance.

The FAA and the County have corresponded extensively concerning the outstanding issue of ANCA compliance since the fall of 1991. As you know, the issue concerns the "ski season exception" to the curfew on takeoffs one-half hour after sunset. The exception permitted aircraft to takeoff up to two and one-half hours past sunset if operating under instrument flight rules. Based upon information provided to date, that exception was repealed by County Ordinance 90-12, which was first proposed on November 13, 1990, its first reading. It became effective on November 27, 1990.

In a letter dated November 15, 1991, to Mr. Wayne Ethridge of the Board of County Commissioners, the FAA informed the County that there was insufficient information to determine whether the county's repeal of the "ski season exception" complies with ANCA. On January 24, 1992, the County replied, claiming that a Notice of Change sent to the FAA's Flight Data Center in September 1990 established that the repeal was proposed prior to the effective date of ANCA. The County also claimed that the repeal may qualify for a

statutory exemption (ANCA section 9304(a) (2) (C) (vi)), contained in Part 161 section 161.7(b) (7).

On February 5, 1992, the FAA and County officials met to discuss grant and ANCA compliance issues. During that meeting, the FAA reiterated its request for adequate documentation to demonstrate that the exception was proposed before October 1, 1990. County officials offered to provide additional information. Your claim in the June 1993 letter that the January 1992 letter provided the County's final position concerning ANCA is contradicted by the statement in the January 1992 letter that "[w]e will continue to search our records for other documentation reflecting County action to eliminate this exception which undoubtedly predated the November 13 first reading of Ordinance 90-12, which was sent to you previously." Your position is also inconsistent with the offer County officials made during the February 1992 meeting. Since that meeting, the FAA has not received the promised documentation.

For the record, the FAA lacks sufficient information to determine that the County repealed the exception in compliance with ANCA or qualifies for an exemption. The Notice of Change letter is not sufficient to establish that the amendment was legally "proposed" or "in effect." The amendment must be in a form which demonstrates that it was clearly proposed to or by the entity empowered to make the change (such as in a draft ordinance or other regulatory document) prior to October 1, 1990. Please provide us with additional information to show that amendment 90-12 was "proposed" prior to October 1, 1990, and, therefore, is not subject to ANCA with respect to its applicability to Stage 2 aircraft operations.

Your reliance upon the statutory exemption for "...local action[s] that represent the adoption of the final portion of a program of a staged airport aircraft noise or access restriction, where the initial portion of the program was adopted during calendar year 1988 and was in effect [on November 5, 1990]," appears to be misplaced. The information that we have been provided to date does not indicate that a "program of a staged airport restriction" was in effect, or that the initial portion of such program was adopted during calendar year 1988, or that the amendment was planned in 1988 as part of any initial program. Please document the applicability of this exemption, such as with relevant legislative history. If you have additional information to further support this exemption, please provide it to us.

The County claims that it has been waiting for the FAA to commence its informal resolution process under 14 CFR Part 161, Subpart F. You have stated that the FAA is required to complete the informal resolution process and determine the County's eligibility under ANCA before the 120 days for deciding to approve/disapprove your passenger' facility charge (PFC) application expires. Part 161 Subpart F, section 161.503 provides that FAA undertake informal resolution "prior to the initiation of formal action to terminate eligibility " Informal resolution is that period in which the airport operator and the FAA work informally to assure compliance with the ANCA. Communications with the County on ANCA issues, which began in 1991, are part of that informal resolution. We will be happy to continue working with you informally, and we request the promised additional information within the next 30 days in order to proceed. Only if FAA determines that

informal resolution is not successful would the FAA issue a notice of apparent violation to the airport operator and begin proceedings under section 161.505 to terminate eligibility if necessary based on the airport operator's response to that notice.

The FAA does not have discretion to approve your PFC application absent County compliance with ANCA. The FAA has an affirmative obligation to assure ANCA compliance under section 9307 of ANCA, which provides that "under no conditions shall any airport receive revenues under the provisions of the Airport and Airway Improvement Act of 1982 or impose or collect a [passenger facility charge]...unless the Secretary assures that the airport is not imposing any noise or access restriction not in compliance with this subtitle. " Also see ANCA section 9304 (b). The PFC regulations must be read to harmonize with the explicit statutory prohibition on PFC approval unless the Secretary assures compliance with ANCA. The Secretary will not be able to so assure unless the County provides the FAA with sufficient documentation to establish compliance.

Section 161.501 of Part 161, Subpart F, provides that "Rescission of or a commitment in writing signed by an authorized official of the airport operator to rescind permanently not enforce a non-complying restriction will be treated by the FAA as action restoring compliance with ANCA...with respect to that restriction." Action under section 161.501 would enable the FAA to establish immediate compliance with ANCA while we continue informal resolution to determine whether Aspen qualifies for any special exemption to ANCA or determine the extent to which notice, review, and approval requirements of ANCA must be completed before County Ordinance 90-12 may be put into effect in compliance with ANCA.

The FAA will consider any additional documentation as a supplement to the pending PFC application; upon receipt of supplemental information, we will consider your current application to be withdrawn and restart the PFC decision process.

We look forward to working with you to resolve this matter.

Sincerely,

Quentin S. Taylor
Acting Assistant Administrator for Airports