ORDER **5190.6A**

AIRPORT COMPLIANCE REQUIREMENTS

OCTOBER 2, 1989

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Distribution: A-W(PP/AS)-3; A-X(AS)-4; A-FAS-1(MAX) **Initiated By:** AAS-300

RECORD OF CHANGES

DIRECTIVE NO. 5190.6A

CHANGE TO BASIC	SUPPLEMENTS			OPTIONAL	CHANGE TO BASIC	SUPPLEMENTS			OPTIONAL

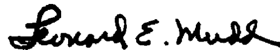
FAA Form 1320-5 (6-80) Use Previous Edition

FOREWORD

1. PURPOSE. This Order provides the policies and procedures to be followed in carrying out the Federal Aviation Administration's (FAA) functions related to airport compliance. It is of interest to other Government agencies, both Federal and state, who are concerned with actions associated with Federal real and personal property.

2. DISTRIBUTION. This Order is distributed to the branch level of the Office of Airport Safety and Standards, the Office of Airport Planning and Programming, to the section level of all regional Airports division, and all Airport District Offices/Field Offices.

3. CANCELLATION. Order 5190.6, Airports Compliance Requirements, dated August 24, 1973, is canceled, except for the enforcement provision (see Chapter 6, Section 2 of this Order).



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CHAPTER 1. SCOPE AND AUTHORITY

1–1. GENERAL. The airport compliance function is a contractually–based program. It does not attempt to control and direct the operation of airports. Rather it is a program to administer valuable rights obtained for the people of the United States at a substantial cost in direct grants of funds and in donations of Federal property.

Such grants and donations are made in exchange for binding commitments designed to assure that the public interest would be served. The FAA bears the important responsibility of seeing that these commitments are met. What these commitments are, how they apply to airports, and what FAA personnel are required to do about them are discussed in the following chapters.

1–2. SCOPE. A description of the several types of basic obligating documents is contained in Chapter 2. The background and guidance for implementing the statutory prohibition against exclusive rights at airports are covered by Chapter 3. An analysis of the various compliance obligations is contained in Chapter 4 together with guidance as to how they will be interpreted and applied. Chapter 5 outlines the procedures for carrying out an effective compliance program. Chapter 6 covers review of leases and enforcement procedures. Chapter 7 provides guidance for amending or releasing airport obligations, and Chapter 8 covers the reverting of airport lands to the Federal Government.

1–3. BACKGROUND OF AIRPORT OBLIGATIONS. The Federal Aviation Act of 1958 and the Civil Aeronautics Act of 1938 which preceded it charges the Administrator with broad responsibilities for the regulation of air commerce in the interests of safety and national defense and for the promotion, encouragement, and development of civil aeronautics. Under these broad powers the FAA seeks to achieve safety and efficiency of the total airspace system through direct regulation of airman, aircraft, and the airspace. The Federal interest in promoting civil aviation has been augmented by various legislative actions which authorize programs for granting property, funds, and other assistance to local communities for the development of airport facilities. In each program the recipient assumes certain obligations, either by contract or by restrictive covenants in property deeds, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport owners in deeds or grant agreements have been generally successful in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance. The Airports Compliance Program embraces the policy and guidelines of the FAA for monitoring the performance of airport owners under its obligations to the Federal Government.

1–4. SOURCES OF OBLIGATIONS. The obligations that airport owners assume in consideration of Federal aid flow from various agreements and statutes, including but not limited to:

a. Grant agreements issued under the various Federal grant programs.

b. Surplus airport property instruments of transfer issued under the provisions of Section 13g of the Surplus Property Act of 1944.

c. Deeds of conveyance issued under Section 16 of the Federal Airport Act of 1946, under Section 23 of the Airport and Airway Development Act of 1970, or under Section 516 of the Airport and Airway Improvement Act of 1982 (AAIA).

d. Section 308(a) of the Federal Aviation Act of 1958 (exclusive rights).

e. Title VI of the Civil Rights Act of 1964.

1–5. AUTHORITY. Responsibility to ensure compliance with airport owner obligations is vested in, or imposed on, the FAA by law or through FAA contractual authority.

a. Surplus Property Transfers. Surplus property instruments of transfer were, and are, issued by the War Assets Administration (WAA) and its successor, the General Services Administration (GSA). However, Public Law (P.L.) 81–311 specifically imposes upon FAA the sole responsibility for determining and enforcing compliance with the terms and conditions of all instruments of transfer by which surplus airport property is or has been conveyed to non–Federal public agencies pursuant to the Surplus Property Act of 1944.

b. Section 16/23/516 Conveyances. Deeds of conveyance issued under Section 16, Section 23, or Section 516 are also issued by agencies other than the FAA. The conveyance document places the administration and enforcement responsibility on the FAA Administrator.

c. Grant Agreements. FAA is vested with jurisdiction over grant agreements because such agree-

ments are executed for and on behalf of the United States by the FAA and its predecessor, the Civil Aeronautics Administration (CAA).

d. Exclusive Right. The FAA is also charged with the responsibility of bringing about or enforcing compliance with the exclusive right provision of Section 308 of the Federal Aviation Act of 1958 and Section 303 of the Civil Aeronautics Act of 1938. Responsibility for enforcement of this provision is vested in FAA by incorporation of the provisions in both statutes under the title captioned "Powers and Duties of the Administrator."

e. To Release, Modify or Amend. The authority of the FAA to release or modify the terms and conditions of airport agreements is variable among the respective types of agreements. P.L. 81–311 prescribes specific circumstances and conditions under which the FAA may release, modify or amend the terms and conditions of surplus property deeds.

CHAPTER 2. TYPES OF AGREEMENTS

SECTION 1. GRANT AGREEMENTS.

2-1. SPONSOR'S OBLIGATIONS.

a. Under the various Federal grant programs, the sponsor of a project agrees to assume certain obligations pertaining to the operation, use and maintenance of the airport. These obligations are embodied in the application for Federal assistance as sponsor's assurances and become a part of the grant offer, and bind the grant recipient upon acceptance. The grant assurances in the several development programs (Federal Airport Aid Program (FAAP), Airport Development Aid Program (ADAP), and Airport Improvement Program (AIP)) are somewhat varied; therefore, each grant agreement should be reviewed in order to determine the airport owner's obligations.

b. Some agreements contain special covenants or conditions directed to an individual situation. This Order is generally not concerned with any special conditions under which the project is to be carried out; such as withholding of funds due to nonacquisition of clear zone areas, acquisition of additional land within a prescribed time limit, etc. However, in unusual circumstances where an assurance was contained as a special covenant or condition, the interpretation in this Order will apply.

2-2. DURATION OF GRANT AGREEMENTS.

a. Obligations relating to the use, operation, and maintenance of the airport remain in full force and effect throughout the useful life of the facilities developed under the project but in no event to exceed 20 years. However, there shall be no limit on the duration of the assurance against exclusive rights or the terms, conditions, and assurances with respect to real property acquired with Federal funds. These provisions remain in effect so long as the airport is used as an airport. The Chief Counsel has indicated that the useful life of an airport or airport facility may be determined to have expired if it is no longer used or needed for the purpose for which it was developed, as well as if the physical life of the facility has expired. Furthermore, the duration of the Civil Rights assurances shall be as specified in the assurance.

b. The preceding subparagraph a. also applies to a private sponsor except that the useful life of project items installed within a facility or the useful life of facilities developed or equipment acquired under an airport development or noise program implementation project shall be no less than 10 years from the date of acceptance of Federal aid for the project.

2-3. PHYSICAL LIFE OF FACILITIES. The physical, useful life of a facility extends only for the period of time during which it is serviceable and usable with ordinary day-to-day maintenance. Reconstruction, rehabilitation, or major repair of a facility without Federal aid does not extend the duration of its useful life within the meaning of that term as used in grant agreements. When a facility needs reconstruction, rehabilitation or major repair in order that it may continue to serve the purpose for which it was developed, its useful life has expired. Regional Airports offices will make this determination. If new grants are issued for reconstruction, rehabilitation, or major repair, a new useful life period begins.

2-4.-2-5. RESERVED

SECTION 2. SURPLUS PROPERTY INSTRUMENTS

2-6. BACKGROUND. Surplus property instruments of disposal are issued under Section 13 of the Surplus Property Act of 1944. The Act authorizes conveyance of property surplus to the needs of the Federal Government. The FAA (or its predecessor CAA) recommends to the GSA which property should be transferred for airport purposes to public agencies. Such deeds are issued by the GSA which has jurisdiction over the disposition of properties that are declared to be surplus to the needs of the Federal Government. Prior to the establishment of the GSA in 1949, instruments of disposal were issued by the WAA.

a. Statutory Authority. P.L. 80-289, approved July 30, 1947, amended Section 13 of the Surplus Property Act of 1944. This authorized the Administrator of WAA (now GSA) to convey to any state, political subdivision, municipality or tax-supported institution, surplus real and personal property for airport purposes without monetary consideration to the United States. These conveyances are subject to the terms, conditions, reservations and restrictions prescribed

therein. Real property cannot be transferred for airport use if a determination has been made by GSA that the highest and best use of the land is industrial. In order for any surplus real or personal property to be transferred, the FAA must determine that it is essential, suitable or desirable for the development, improvement, operations or maintenance of a public airport. This includes property needed to develop sources of revenue from nonaviation businesses at a public airport. Refer to Order 5150.2, Federal Surplus Property for Public Airport Purposes, for guidance on transferring Federal surplus property for public airport purposes.

Prior to the enactment of P.L. 80–289 surplus airport properties were conveyed to public agencies under general authority granted WAA by the Surplus Property Act. The terms and conditions subject to which surplus airport properties were conveyed under this authority were administratively established by WAA and prescribed in its Regulation No. 16, generally referred to as WAA – Reg. 16.

b. Nonairport Property Prior to P.L. 80–289. Prior to the enactment of P.L. 80–289, the WAA took the position that it had no authority to convey to public agencies any property other than that which had been and was intended to be used solely for operation and maintenance of the airport. This precluded the transfer of some types of buildings, facilities, and other nonairport properties comprising parts of an air base as operated by the Government.

c. Revenue–Producing Property. The provision in P.L. 80–289 that includes among the types of airport property, property needed to develop sources of revenue from nonaviation businesses at a public airport, constitutes specific authorization for the transfer of such properties. This is authorized where it has been determined that they are needed and will be used as sources of revenue to defray the cost of operation, maintenance and development of the airport. Originally the form of instrument used to transfer surplus airport properties under P.L. 80–289 made no distinction between obligations imposed where property was conveyed for airport use and those imposed with respect to property conveyed for revenue purposes. The FAA takes the position that each conveyance of revenue–producing property obligates the transferees to use the revenues derived from nonairport use of the property for operation, maintenance or development of the airport. If the land has been identified and agreed upon by the FAA as revenue–producing property (even if it was not so identified on the transfer document) then the revenue must be used on the airport or put into the airport fund.

2–7. TYPES OF INSTRUMENTS OF DISPOSAL. Three basic forms of instruments of disposal have been used to convey surplus airport properties: (1) the form used under WAA – Reg 16 prior to the amendment of the Surplus Property Act of 1944 by P.L. 80–289; (2) the form issued under P.L. 80–289 to convey real or a combination of real and related personal property; and (3) the form issued to convey only personal property. Each individual instrument of disposal must be examined to determine the particular obligations of the grantee or rights of the Government.

a. Conditions Peculiar to Various Instruments. Instruments of disposal under P.L. 80–289 are all substantially similar. In a few cases the National Emergency Use Provision (NEUP) has been omitted (see paragraph c. below). One or more special conditions or restrictions other than those required by law may have been included in some instruments. The instruments of disposal issued under WAA – Regulation 16, however, are not uniform. One variation in WAA – Regulation 16 instruments is the provision relating to joint military use of the airport. Some give the Government the right to unlimited use without charge, and in others the Government use may not exceed a specified percentage of the capacity of the airport if such use interferes with other authorized use of the airport.

b. Obligation to Operate and Maintain Airport. Practically all the WAA – Regulation 16 and P.L. 80–289 instruments conveying real and related personal property contain provisions obligating the grantees to operate and maintain the entire airport where the property is located, regardless of the amount of property conveyed by the instrument. However, instruments of disposal (SF–123) for only personal property contain provisions obligating the grantee only with respect to the use and maintenance of the specific property conveyed.

c. National Emergency Use Provision (NEUP). Practically all WAA – Regulation 16 and P.L. 80–289 instruments of disposal of real and related personal property also contain the NEUP under which the United States has the right to make exclusive or nonexclusive use of the airport or any portion thereof during a war or national emergency. This provision is similar in all such instruments.

2–8. DURATION OF OBLIGATIONS. The duration of the obligation depends upon the properties conveyed.

a. Real Property. All surplus airport property instruments of disposal, except those conveying only personal property, provide that the covenants assumed by the grantee regarding the use, operation and maintenance of the airport and the property transferred shall

be deemed to be covenants running with the land. Accordingly, such covenants continue in full force and effect until released under P.L. 81–311 or other applicable law.

b. Related Personal Property. In most cases instruments conveying real property also convey related personal property. Accountability for this property shall be its useful life not to exceed 1 year.

c. Personal Property (Donable). The term of a surplus airport property instrument of disposal (SF–123) conveying only personal property extends for the period of time during which it is serviceable and usable with ordinary day–to–day maintenance but no longer than 1 year. Reconstruction, rehabilitation or major repair does not extend its useful life within the meaning of that term as used in surplus property instruments. Surplus personal property that has outlived its useful life should be removed from the inventory. Such property may be disposed of by tradein on new equipment. If this is done, accountability for the new property is not required.

2–9.–2.10. RESERVED.

SECTION 3. CONVEYANCES OF NONSURPLUS FEDERAL LAND

2–11. BACKGROUND. While Federal land which has been declared surplus is conveyed under the Surplus Property Act, federally–owned or controlled land which is not surplus may be conveyed for airport purposes under authority contained in Section 516 of the AAIA. Prior to the effective date of this Act, similar authority existed in Section 16 of the Federal Airport Act and Section 23 of the Airport and Airway Development Act of 1970. Unlike surplus property, this land may not be transferred for the specific purpose of revenue production.

2–12. COVENANTS. Instruments of conveyance executed under Section 516, Section 23, or Section 16 impose upon the grantees certain obligations regarding the use of the lands conveyed and the airport involved. Covenants included in the deeds or other instruments by which interests in lands are conveyed under these sections require, among other things that:

a. The grantee will use the property interest for airport purposes, and will develop that interest for airport purposes within 1 year or as set forth in the deed.

b. The airport, together with its appurtenant areas, buildings and facilities, whether or not on the land being conveyed, will be operated as a public airport on fair and reasonable terms and without discrimination.

c. The grantee will not grant or permit any exclusive right forbidden by Section 308 of the Federal Aviation Act.

d. Any subsequent transfer of the property interest conveyed will be subject to the covenants and conditions in the instrument of conveyance.

e. For Section 16 transfers the whole or any part of the property interest conveyed shall revert to the United States in the event the lands in question are not developed for airport purposes or used in a manner consistent with the terms of the conveyance.

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.

In some instances, special conditions or obligations may be imposed upon the grantee by the Government agency issuing the conveyance instrument. Therefore, it will be necessary in each case to consult the particular deed by which the lands are conveyed to determine all the conditions and covenants.

2–13. REVERTER PROVISION. Section 16/23/516 deeds provide for reversion to the United States in the event the lands are not developed or cease to be used for airport purposes.

a. Section 16 Deeds. The Federal Airport Act required that conveyances made under Section 16 "...be made on the condition that the property interest conveyed shall automatically revert to the United States..." if the land is not developed as an airport or ceases to be used for airport purposes. This provision was difficult to administer during the early years since no time limits were specified for beginning use or after ceasing use which would make the reverter operable. Beginning in the early 1960's the deeds provided that the property interest automatically reverts if the land is not developed or used for airport purposes within 3 years or if airport use ceases for a period of 6 months. The 3–year development time was changed to 5 years in 1968. At the same time, the covenants were amended to introduce a right of the Administrator, exercisable 1 year after conveyance, to repossess any part not developed for airport use. In requesting the conveyance of land for approach protection for an existing airport, the provision that the land will revert automati-

cally unless it is used for airport purposes normally was omitted. This exception was made for the reason that immediately upon acquisition the land became a part of the airport and served the approach protection purpose.

b. Section 23/516 Conveyances. Section 23/516 does not continue the automatic reversion of property interests contained in Section 16 but places reversion at the option of the Secretary. Section 16 transfers were made under the provisions of Federal Aviation Regulation (FAR) Part 153. The implementing regulations (FAR Part 154) require that the land be developed for airport purposes within 1 year of the conveyance. If the property is not so developed or used in a manner consistent with the terms of the conveyance, the Administrator may, at his discretion, enter and on behalf of the United States take title to all or any part of the property interests conveyed.

c. Determination as to Exercise of Reverter. In determining whether the reverter provision has become operable in any particular case (because of failure to develop or use the land for airport purposes or because of cessation of airport use) the deed should be examined to ascertain whether it contains applicable time limitations. If the deed does not contain such time periods, as a general rule, 1 year can be considered a reasonable time for developing or using the property for airport purposes and that 6 months of nonairport use a reasonable time for the exercise of the reverter. The regional Airports division can justify the allowance of additional time in this connection when the grantee is able to show that definite effort is being made to conform to requirements. Before a region Airports division decides to revert Section 16/23/516 property, they shall contact the Airport Safety and Operations Division (AAS-300) to discuss the proposed reversion. (See Chapter 8 for Reversion Procedures.)

2-14. DURATION OF COVENANTS AND OBLIGATIONS. Covenants and other provisions of Section 16/23/516 deeds continue in force and effect so long as the land is held by a public agency grantee, its successors or assigns. The FAA has no authority to release land transferred under Sections 16/23/516. If the land conveyed under a Section 16/23/516 deed is no longer used or needed for any airport purpose, FAA has no recourse but to invoke the reverter provision in accordance with the terms of the deed unless the grantee willingly agrees to its voluntary reconveyance. This does not mean, however, that land transferred for approach protection cannot be used for some secondary nonairport purpose (such as road or highway, farming, etc.) so long as such use does not interfere with the airport purposes for which it is needed. However, if the property is used for some secondary nonaeronautical purpose, a fair market value (FMV) should be received for such use and the proceeds used only for airport purposes.

2-15.-2-17. RESERVED

SECTION 4. AP-4 AGREEMENTS

2-18. BACKGROUND.

a. The Development of Landing Areas National Defense (DLAND) and the Development Civil Landing Areas (DCLA) Programs were authorized by various acts during the period 1939 to 1944.

b. Airports developed or improved under these programs were subject to the terms and conditions of an instrument known as an AP-4 Agreement. This was an agreement between the Government and the airport sponsor under which the sponsor provided the land and the Government planned and constructed the airport improvements. Based on consideration of the type of improvements, design standards, construction methods and normal deterioration, the FAA has administratively determined that the useful life of all AP-4 improvements has expired.

2-19. CONTINUING OBLIGATION. Although all AP-4 Agreements have expired, such airports continue to be subject to the statutory exclusive rights prohibition (Section 308(a), Federal Aviation Act). Termination of the agreement relieves the airport owner of only the contractual obligations imposed by it. Since the airport is still one upon which Federal funds have been expended, it is subject to the exclusive rights prohibition for as long as it is operated as an airport, whether or not it remains under the control and jurisdiction of the same public agency.

CHAPTER 3. EXCLUSIVE RIGHTS

SECTION 1. BACKGROUND

3–1. GENERAL. Chapter 4 of this Order describes the responsibilities assumed by the owners of public use airports developed with Federal funds. Among these is the obligation to make all airport facilities and services available on fair and reasonable terms without unjust discrimination. This covenant enjoins the airport owner from granting any special privilege or monopoly in the use of public use airport facilities. The grant of an exclusive right to provide aeronautical services at an airport on which Federal funds have been expended is specifically forbidden by the Federal Aviation Act of 1958. Because of the widespread interest and involvement of this statutory prohibition, this entire Chapter is devoted to guidance on the application of law and FAA policy regarding exclusive rights at public use airports.

3–2. LEGISLATIVE HISTORY.

a. Origin. The Civil Aeronautics Act of 1938 contained language (Section 303) restricting the use of Federal funds for airport development (other than military) to those landing areas certified by the Administrator as being reasonably needed for air commerce or national defense. The same section of the Act also provided 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." This identical language has since been incorporated as Section 308(a) of the Federal Aviation Act of 1958. This provision also applies to surplus and nonsurplus property transferred for public use airport purposes.

b. Recognition of Statutory Prohibition in Agreements. The AP–4 Agreements (see Section 4, Chapter 2) under which many civil airports were improved with Federal funds during the World War II period contained a covenant that such airports would be operated without the grant or exercise of any exclusive right for use of the airport within the meaning of Section 303 of the Civil Aeronautics Act of 1938. Similar language is now used in airport grant agreements to specifically require conformity to this statute as part of the sponsor's assurances. Whether referenced in an agreement or not, the prohibition against exclusive right contained in Section 308 applies to any airport on which any Federal funds have been expended since August 28, 1938, the effective date of the Civil Aeronautics Act.

c. Prohibition Applied to Aeronautical Activities. In 1941, the Attorney General of the United States was called upon to interpret the application of Sec. 303 of the Civil Aeronautics Act. In an opinion dated June 4, 1941, the Attorney General stated "...it is my opinion that the grant of an exclusive right to use an airport for a particular aeronautical activity, such as an air carrier, falls within the provision of Section 303 of the Civil Aeronautics Act precluding any exclusive right for the use of any landing area." Significantly, the Attorney General did not define what an aeronautical activity was other than to cite as an example one type of activity commonly known in 1941—"such as an air carrier." This opinion, however, made it clear that a monopoly covering one activity would not be tolerated merely because the landing area was also available to those engaged in other types of aeronautical activity.

d. Restrictions in Surplus Property Deeds. Following World War II, large numbers of former military installations were conveyed without monetary consideration to local public agencies under the provisions of the Surplus Property Act of 1944. Initially the deeds of conveyance included a covenant that there would be no exclusive right contrary to the provisions of Section 303 of the Civil Aeronautics Act. Subsequently, however, in 1947, the Surplus Property Act was amended by P.L. 80–289 to require the following specific language:

> No exclusive right for the use of the airport at which the property disposed of is located shall be vested (either directly or indirectly) in any person or persons to the exclusion of others in the same class. For the purpose of this condition, an exclusive right is defined to mean—(1) any exclusive right to use the airport for conducting any particular aeronautical activity requiring operation of aircraft; (2) any exclusive right to engage in the sale or supplying of aircraft, aircraft accessories, equipment, or supplies (excluding the sale of gasoline and oil), or aircraft services necessary for the operation of aircraft (including the maintenance and repair of aircraft, aircraft engines, propellers, and appliances.

3–3. DEVELOPMENT OF AGENCY POLICY.

a. Implementation of Federal Airport Act. During the immediate post war years, the CAA (the predecessor of the FAA) was simultaneously engaged in processing the first FAAP development projects and in recommending the conveyance of former military

installations under the surplus property laws. Many of the surplus property conveyances did not literally require conformity to the prohibition against exclusive rights in Section 303 of the Civil Aeronautics Act, but they contained the far more specific restrictions quoted in paragraph 31d above.

b. Early Interpretations of Aeronautical Activity. In approving grants of funds for airport development the CAA/FAA has always insisted that there could be no exclusive right for the use of such airports. Any activity which involved use of the landing area (e.g., flight school, airline, charter service, etc.) was considered to be subject to the statutory prohibition. However, a nonaeronautical activity, such as a restaurant or ground transportation service, was viewed as not subject to the prohibition. In early policy interpretations there were many activities which cater to or support flight operations, but which do not actually use the landing area (such as storage hangars, repair services, aircraft parts sales, and especially the sale of fuel and oil) and were viewed as not being subject to the prohibition. The FAA, as a matter of policy, advised against monopolies for such activities. However, in 1962 the FAA Policy on Exclusive Rights was published in the Federal Register and it declared the exclusive rights of these activities to be in violation of the law.

c. Definition of Aeronautical Activity. On July 17, 1962, the FAA issued Order 0A 5250.1 which defined those aeronautical activities prohibited on an exclusive basis by Section 308(a) of the Federal Aviation Act. On October 12, 1965, this Order was superseded by Order 5190.1, Exclusive Rights at Airports, to further clarify the application of the statutory prohibition. Section 2 of this Chapter explains in detail the types of aeronautical activity covered by the prohibition and the FAA policies for interpreting and applying Section 308(a).

3–4.–3–7. RESERVED.

SECTION 2. POLICY

3–8. BASIS OF POLICY

a. Agency Position. The FAA has concluded that the existence of exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the using public of the benefits of a competitive enterprise. Apart from legal considerations, the FAA considers it inappropriate to provide Federal funds for improvements to airports where the benefits of such improvements will not be fully realized due to the inherent restrictions of an exclusive monopoly on aeronautical activities.

b. Application of Law. The grant of an exclusive right to conduct an aeronautical activity at an airport on which Federal funds have been expended is considered a violation of Section 308(a) of the Federal Aviation Act, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means. As an exception, the existence of an exclusive right to sell only fuel and oil will not be considered to be in violation of Section 308(a) where such right is specifically exempted from the activities prohibited by a deed under the Surplus Property Act of 1944, as amended (P.L. 80–289). However, presence of such an exclusive right would preclude issuance of a grant under the AAIA Act of 1982, as amended. (See Chapter 6, Section 2.)

c. Duration of Prohibition Against Exclusive Rights. Once any Federal funds have been expended at an airport, including a surplus property conveyance, the exclusive rights prohibition is applicable for as long as it is operated as an airport.

3–9. INTERPRETATION.

a. Single Activity Not Necessarily an Exclusive Right. The presence on an airport of only one enterprise engaged in any aeronautical activity will not be considered a violation of this policy if there is no understanding, commitment, express agreement, or apparent intent to exclude other reasonably qualified enterprises. In many instances, the volume of business may not be sufficient to attract more than one such enterprise. As long as the opportunity to engage in an aeronautical activity is available to those meeting reasonable qualifications and standards relevant to such activity, the fact that only one enterprise takes advantage of the opportunity does not constitute the grant of an exclusive right.

b. Single Activity as Treated by Law. The AAIA (P.L. 97–248) includes the following sponsor assurance under Section 511(a)(2):

"...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. For purposes of this paragraph, the providing of services at an airport by a single fixed–based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more

than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport..."

The Chief Counsel rendered an opinion dated December 21, 1982, which concludes that this amendment to Section 308(a) applies to those airports previously obligated under Section 308(a) where a single fixed-based operator (FBO) now exists. This assurance obligates the grant recipients to the same terms and conditions of amended Section 308(a). (Reference Order 5190.1.)

The exclusive rights policies that are outlined herein remain unchanged except for those airports which have a single FBO whose lease agreement with the airport owner must be amended to delete space for a second FBO to do business on the airport. In these cases, it must be determined if it would be unreasonably costly, burdensome, or impractical for more than one FBO to provide such services on the airport. This does not apply where the lease is being amended to delete space due to lack of demonstrable need (see below).

c. Single Activity Due to Space Limitation. The leasing to one enterprise of all available airport land and improvements planned for aeronautical activities will be construed as evidence of an intent to exclude others unless: (1) the lease meets the criteria of and contains the special provisions described in paragraph 6-5c; or (2) it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease.

(1) The complete saturation of space available for the service, storage, and repair of aircraft is prima facie evidence of a serious imbalance in the development of airport facilities. At a new or recently developed airport such saturation reflects poor planning and unrealistic forecasts of need. However, an arbitrary division or restriction to create an opportunity for a competitive enterprise is not required merely to comply with the exclusive rights policy.

(2) A single aeronautical enterprise although meeting all reasonable standards and qualifications should be limited, as a result of this policy, to the lease of such space as is demonstrably needed. If the need for additional space becomes apparent at a later date, such space, as well as any new areas developed for the service and support of aeronautical activities, must be made available to all qualified proponents or bidders, including the incumbent. The advance grant of options or preferences (including right of first refusal) on all future sites to the incumbent enterprise must be viewed as an exclusive right. On the other hand, nothing in this policy should be construed as limiting the expansion of such an enterprise when space requirements become critical and where the proposed lease area will be immediately used to conduct activities, even though it could ultimately result in complete saturation of all space by the one enterprise.

d. Aeronautical Activities Conducted by the Airport Owner (Proprietary Exclusive). The owner of a public-use airport (public or private owner) may elect to provide any or all of the aeronautical services needed by the public at the airport. In fact, the statutory prohibition against exclusive rights does not apply to these owners and they may exercise but not grant the exclusive right to conduct any aeronautical activity. However, these owners must engage in such activities as principals using their own employees and resources. An independent commercial enterprise that has been designated as agent of the owner may not exercise nor be granted an exclusive right. (Reference Chief Counsel opinion dated April 13, 1984.)

(1) As a practical matter most public agencies recognize that these services are best provided by profit-motivated private enterprise. The exceptions are usually those instances in which a municipality or other public agency elects to provide fuel service or aircraft parking. If it does so, whether on an exclusive or nonexclusive basis, it may not refuse to permit an air carrier, air taxi, or flight school to fuel its own aircraft.

(2) The airport owner may establish reasonable standards covering the refueling, washing, painting, repairing, etc., of aircraft, but it may not refuse to negotiate for the space and facilities needed to meet such standards by an activity offering aeronautical services to the public. If the airport owner reserves unto itself the exclusive right to sell fuel, it can prevent an airline or air taxi from selling fuel to others but it must deal reasonably to permit such operators to refuel their own aircraft. The self-service fueling by such flight operators, however, must be done with their own employees and equipment.

(3) An aircraft operator does not have a right to bring a third party, such as an oil company, on the airport to refuel his aircraft. This would be an aeronautical activity undertaken by the fuel company which has only such rights as the airport owner may confer. It should be noted that air carriers invariably insist on a standard condition in their airport contracts reserving the right to obtain fuel from a supplier of their choice. However, this is not a right guaranteed by the terms of a grant agreement.

e. Restrictions on Self–Service.

(1) Any unreasonable restriction imposed on the owners or operators of aircraft regarding the servicing of their own aircraft and equipment may be construed as a violation of this policy. Where no attempt has been made to perform such services for others, aircraft owners should be permitted to fuel, wash, repair, paint and otherwise take care of their own aircraft. A restriction which has the effect of diverting such business to a commercial operator amounts to an exclusive monopoly of an aeronautical activity contrary to law.

(2) Servicing one's own aircraft is not an aeronautical activity that can be preempted by the airport owner which elects to exercise the exclusive right to sell fuel. Quite apart from the prohibition against exclusive rights, the sponsor of an obligated airport is required to operate the airport for the use and benefit of the public on fair and reasonable terms. It may not, as a condition for the use of its airport, impose unreasonable requirements on aircraft operators to procure parts, supplies or services from specified sources. It can however, require the self–fueler, both individuals and operators, to pay the same fuel flowage fee as those operators on the airport who provide fueling services to the public. As long as the aircraft operators do not attempt to offer commodities or services to others, they have a right to furnish their own supplies and to do what is necessary to their aircraft in order to use the facilities of a public use airport.

(3) An airport owner is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities by others. Reasonable rules and regulations should be adopted to confine aircraft maintenance and fueling operations to appropriate locations with equipment commensurate to the job being done. Unless the aircraft owner is in a position to meet such standards with his own equipment and personnel, his right to service his own aircraft does not override the prerogative of the airport owner to control the sources of providing fuel and other aeronautical services. For example, airport agreements do not permit the owner of a private aircraft to contract with an off–airport company to enter upon the airport and refuel his aircraft. This would clearly be the conduct of an aeronautical activity, not by the aircraft owner, but by the fuel company. Also, the airport owner is under no obligation by the terms of the grant assurances to recognize a "CO–OP" (an organization formed by several aircraft owners for the purpose of self fueling) as a single aircraft owner for self fueling purposes. However, fueling activities by a "CO–OP" could be allowed by the airport owner provided appropriate agreements (safety standards, fees, conditions, etc.) were consummated. Where the sponsor has retained, on an exclusive basis, this right to fuel or service the aircraft of others it may prohibit such entries. With respect to fuel, therefore, the aircraft owner may assert the right to obtain fuel where he pleases and bring it onto the airport to service his own aircraft, but only with his own employees and only in conformance with the reasonable safety standards or other reasonable requirements of the airport. This policy also applies to aircraft owners who have obtained supplemental type certificates authorizing the use of automotive gasoline (mogas) in their aircraft and who wish to self service their aircraft with mogas.

(4) Local airport regulations may and should include such restrictions as are reasonably necessary for safety, preservation of facilities and protection of the public interest. For example:

(a) The use of paints, dopes, and thinners should be confined to structures meeting appropriate safety criteria.

(b) Storage and transport of aviation fuel, though not procured for resale, should be subject to reasonable restrictions and minimum standards for equipment, location and handling practices.

(c) Restraints should be placed on the use of aircraft washing solvents to protect sewage and drainage facilities.

(d) Weight limitations should be imposed on delivery trucks (including fuel trucks) and special purpose vehicles such as cranes where needed to protect airport roads and paving.

(e) Time limits should be placed on the open storage of nonairworthy aircraft, wreckage, or unsightly major components.

(f) Such restrictions as may be required by appropriate Federal or state agencies to protect the environment and minimize pollution or other adverse effects.

(g) Restraints should be placed on the storage of nonaeronautical vehicles such as boats, cars, trailers and mobile homes, etc., in hangars or on the aeronautical facilitie areas.

f. Licenses Not Controlled by Airport Owner. The Federal Communications Commission (FCC) authorizes use of special UNICOM frequencies for air–to–ground communication at airports. The primary purpose of the communications station is to disseminate aeronautical data, such as weather, wind direction, runway information, etc. To preclude the issuance of

conflicting reports, the FCC will not license more than one UNICOM station at the same airport. An aeronautical activity having a UNICOM station or similar exclusive privilege has an advantage over competitors in attracting aeronautical users. However, since such an exclusive right is not subject to the airport owner's control, it does not constitute a grant of exclusive rights to which the statutory prohibition of Section 308(a) applies. Airport owners should be encouraged to obtain the UNICOM license in their own names. Through droplines they can make the facility available to all FBO's on an equal basis.

g. Flying Clubs. Flying clubs are nonprofit entities (corporations, associations or partnerships) organized for the express purpose of providing its members with an aircraft or aircraft for their personal use and enjoyment only. The ownership of the aircraft, or aircraft, must be vested in the name of the flying club (or owned ratable by all its members). The property rights of the members of the club shall be equal and no part of the net earnings of the club will inure to the benefit of any form (salaries, bonuses, etc.). The club may not derive greater revenue from the use of its aircraft than the amount for the operation, maintenance and replacement of its aircraft. A flying club qualifies as an individual under the grant assurances and, as such, has the right to fuel and maintain the aircraft with its members. The airport owner has the right to require the flying club to furnish such documents, insurances policies, and maintain a current list of members as reasonably necessary to assure that the flying club is a nonprofit organization rather than a FBO masquerading as a flying club. (See Appendix 8, Sample Flying Club Lease.)

3-10. IMPLEMENTATION OF POLICY.

a. Voluntary Compliance. The FAA will consider as a breach of compliance obligations by the airport owner, any grant of an exclusive right in violation of the policy outlined herein at any airport obligated to the United States as a result of a grant agreement (FAAP/ADAP/AIP), AP-4 agreement, or a conveyance of Federal property under the Surplus Property Act, or under Section 16, 23, or 516. Every reasonable effort shall be made to influence a voluntary termination of the objectionable exclusive right using the guidance and techniques suggested in Chapter 5.

b. Remedies. At any airport where there has been a grant of an exclusive right contrary to law and this policy, that airport and any other airport owned or controlled by the offending airport owner will be ineligible for assistance under AIP and the FAA will not expend Facilities and Equipment (F&E) funds for installations designed to benefit traffic at such airports unless necessary to remedy a safety problem. See Chapter 6, Section 2 for discussion of procedural enforcement matters.

c. Exceptions. Nothing herein shall be construed as precluding the grant of Federal funds where required for the national defense, or when determined by the Administrator to be essential to the national interest.

3-11. IMPROVEMENTS BY OTHER FEDERAL AGENCIES.

a. Expenditures on Civil Airports. From time to time various Federal agencies and activities other than the FAA have expended Federal funds to bring about permanent or temporary improvement of civil airports, usually in furtherance of essential Federal programs for which they are responsible. The Chief Counsel of the FAA has determined that any such expenditures which result in the improvement of airport facilities constitute an expenditure of funds within the meaning of the Federal Aviation Act. Consequently, such action has the effect of imposing the prohibition against the grant of exclusive rights at such an airport. In instances of this kind, the Chief Counsel has concluded that the FAA has primary responsibility for enforcing the prohibition regardless of the source of the Federal funds.

b. Statutory Requirement. As noted in paragraph 31a of this Order the language of Section 308(a) of the Federal Aviation Act not only prohibits exclusive rights but restricts the use of Federal funds for airport development (other than military) to those landing areas certified by the FAA Administrator as being reasonably needed for air commerce or national defense. FAA approval of the National Plan of Integrated Airport System (NPIAS) satisfies this requirement for federally-funded airport development projects. Federal agencies proposing to expend Federal funds on airport improvements not included in the NPIAS are responsible for obtaining a Certificate of Air Navigation Facility Necessity.

c. FAA Responsibility. Whenever consulted, FAA personnel will advise the representatives of other Federal agencies contemplating the improvement of airport facilities as to the applicability of the above described statutory provision. Both the airport owner and the Federal agency involved should understand that the expenditure of such funds will result in the imposition of the prohibition against exclusive rights at such airports.

d. Federally-Owned Airports.

(1) Military and Special Purpose Airports. The prohibition against exclusive rights contained in the Federal Aviation Act does not apply to the actions

of the Federal Government itself. Most federally-owned airports are maintained and operated with funds appropriated for purposes other than the support of civil aviation, usually to accommodate a military or defense related mission. Many of these installations grant operating rights to airlines and other aeronautical activities in order to meet the transportation and civil aviation requirements of on-base activities and residents. This is a secondary use of the airport facilities incidental to their prime mission.

(2) **Joint-Use Arrangements.** At many locations, arrangements are in effect to accommodate the civil aviation requirements of a local community at a military or other federally-owned airport. These arrangements usually involve a lease of space at the Government installation to a non-Federal public agency or private concern. Such a lessee, in granting privileges to conduct aeronautical activities, is subject to applicable Federal statutes and may not grant an exclusive right in violation of Section 308(a) of the Federal Aviation Act.

(3) **Agency Actions.** If a local public agency which operates civil airport facilities under a joint-use lease at a Federal installation is also a party to an agreement with the FAA for development of such facilities, the FAA has the same monitoring and enforcement responsibilities as at locally owned airports with similar agreements.

3-12. ADMINISTRATION OF POLICY. The foregoing policies are not intended to expose purveyors of aeronautical services to irresponsible competition. A prudent airport management should establish minimum standards to be met by all who would engage in a commercial aeronautical enterprise 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, however, be fair, equal and not unjustly discriminatory. That is to say, they must be relevant to the proposed activity, reasonably attainable, and uniformly applied. FAA's position is that the opportunity to offer those aeronautical services not provided by the airport owner must be available to those who meet acceptable standards.

3-13.-3-16. RESERVED.

SECTION 3. QUALIFICATIONS AND STANDARDS

3-17. USE OF MINIMUM STANDARDS.

a. Airport owners should be encouraged to develop and publish minimum standards to be met by commercial operators in advance of negotiations with any prospective tenant or operator. (See Advisory Circular (AC) 150/5190-1, Minimum Standards for Commercial Aeronautical Activities on Public Airports) This will establish a basis for practical negotiations.

b. Where minimum standards are proposed, the FAA representative may comment on the relevance and/or reasonableness of the standards. However, it should be made clear that such opinions are not to be construed as an official endorsement of the proposed minimum standards. The FAA should make an official determination only when the effect of a standard denies access to a public-use airport, and the determination should be limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or the standard results in an attempt to create an exclusive right.

c. In the early stages of airport development the community may encounter difficulty in attracting a competent service agency and it may be necessary to waive standards which, after a period of initial development, would be perfectly reasonable. As a practical matter, the airport owner may quite properly increase the 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 is incompatible with this objective. A standard which a tenant operator is required to meet must be uniformly applicable to all operators seeking the same franchise privileges.