



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

IN THE MATTER OF ORDINANCE 90-12)
ADOPTED BY PITKIN COUNTY,)
COLORADO, ON NOVEMBER 27, 1990)

Sep 30, 1993

NOTICE OF APPARENT VIOLATION

For the reasons set forth herein, the Federal Aviation Administration (FAA) proposes to find that Pitkin County Ordinance 90-12, which repealed a "ski season exception" to a nighttime curfew on operations at Aspen-Pitkin County Airport (Sardy Field), is subject to the requirements of the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. App. 2151, et seq. and was adopted in violation of that statute. The FAA further proposes to find that County Ordinance 90-12 is not "grand fathered" under section 9304(a) (2) of the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. App. 2153(a) (2), or otherwise exempt from the requirements for analysis, notice, and opportunity for public comment contained in section 9304(c) of ANCA, 49 U.S.C. App. 2153(c), and the further requirements for Federal approval under section 9304(b) of ANCA, 49 U.S.C. App. 2153(b). The FAA proposes to make this finding because the restriction in its adopted form does not appear to have been proposed as to operations by Stage 2 aircraft nor in effect as to operations by Stage 3 aircraft before October 1, 1990. Ordinance 90-12 (November 27, 1990) seems to be significantly different from the draft ordinance proposed by the Board of County Commissioners on June 19, 1990, and tabled on August 7, 1990. Because of these significant differences and other reasons explained below, the FAA considers Ordinance 90-12 to have been proposed after October 1, 1990, and, therefore, subject to the requirements of section 9304(c) of ANCA. The June 19 draft ordinance, which proposed to liberalize the nighttime curfew, and the August 7, 1990, special session and public hearing do not appear to have notified the public about any proposal by the county to eliminate the ski season exception and thereby further restrict access.

The Resolution of the Board of County Commissioners at its August 7, 1990, special session and public hearing to table the draft ordinance does not appear to have eliminated the ski season exception. By tabling the draft ordinance, the Board each year. Had the Board not proposed and adopted Ordinance 90-12, access to the airport during the hours covered by the ski season exception would have continued in effect.

BACKGROUND

1. Ordinance 89-3 (October 24, 1989) regulates hours of operation at Aspen-Pitkin County Airport. It prohibits general aviation aircraft from taking off or landing during the period one-half hour after sunset to 7:00 A.M. Scheduled air carriers operating Stage 3 aircraft under Parts 135 or 121 of the Federal Aviation Regulations and who have access to

privately-owned, on-site instrument landing systems are permitted to operate until 11 P.M. (Exhibit 1).

2. Section 6-37 (b) (1), (2), (c), and (d) (1)-(4) of the ordinance established a yearly, limited exception to the prohibition on nighttime operations for general aviation aircraft operators. Under these provisions, general aviation aircraft operating under instrument flight rules (IFR) were permitted to depart on Fridays, Saturdays, and Sundays "until two and one-half hours past sunset local time ...during the period each year beginning with the first Wednesday prior to Thanksgiving through the third Sunday in April of the following year." The airport manager was also authorized to grant similar departure exceptions during high-traffic holiday periods such as Christmas Eve, New Year's Day, and President's Day.

3. On June 19, 1990, the Board introduced, first read, and set for public hearing a draft ordinance "Establishing the hours of airside operations at the Aspen-Pitkin County Airport (Sardy Field)." That ordinance would have repealed sections 6-37 and 6-38 of Ordinance 89-3 in their entirety, and replaced them with provisions permitting all aircraft to operate up until 10:00 P.M. The ordinance would have granted continued access at all hours covered by the ski season exception. (Exhibit 2).

4. On August 7, 1990, the Board held a Special Session and public hearing on the draft ordinance. At the conclusion of the hearing, the Board tabled the draft ordinance indefinitely. (Exhibit 3). On October 23, 1990, by Resolution 90-118, the Board decided not to act on the June 19, 1990, draft ordinance "until such time as the issues raised at the public hearing on August 7 are addressed." (Exhibit 4).

5. The Board introduced, first read, and set for public hearing Ordinance 90-12 to repeal the ski season exception on November 13, 1990. On November 27, 1990, the Board adopted the Ordinance. (Exhibit 5).

6. FAA officials have been exchanging letters and meeting with Pitkin County representatives regarding this ANCA compliance issue since August 1991. By letter dated August 14, 1991, the Chairman of the Board of County Commissioners notified the FAA that Ordinance 90-12 had been adopted. In a second letter of the same date, the County Attorney briefly addressed FAA's concerns about compliance with ANCA. He stated that "[t]his Act appears to have validated and grand fathered the noise and access classifications of Pitkin County which were in effect at the time of adoption of the Act [i]n November 1990." The letter indicated that they hoped to discuss -this with the FAA in a meeting in late August. (Exhibits 6 and 7).

7. Both the Chairman's and the County Counsel's letters of August 14, 1991, responded to a letter dated June 21, 1991, from the Manager of the FAA's Denver Airports District Office, which asked the Chairman for a listing of the operational restrictions in effect and proposed at Sardy Field throughout 1991. The information was requested in connection with the county's pending application for Airport Improvement Program (AIP) funds.

8. In a November 15, 1991, letter the FAA's Assistant Administrator for Airports advised the Chairman of the Board of County Commissioners that the provision of Pitkin County Ordinance 90-12 which removed the ski season exception "may constitute a 'noise or access restriction' within the meaning of Part 161" since the ordinance appeared to restrict the hours of operations of stage 2 and 3 aircraft.

9. In the November 15 letter, the Assistant Administrator indicated that the FAA prefers to resolve apparent violations of ANCA informally, if possible. He recommended that the county "carefully review the enclosed Part 161 ...and provide us as soon as possible with satisfactory evidence of either current compliance with ANCA and Part 161 or evidence that you have taken satisfactory corrective action." He also advised that failure to comply with ANCA would preclude the county from receiving revenues under the Airport and Airway Improvement Act or collecting passenger facility charges (PFC's). (Exhibit 8).

10. On January 24, 1992, the County Attorney expressed appreciation that the FAA had initiated the ongoing informal resolution processes. He asserted that he had located additional documentation showing that "for all practical purposes" the subject access changes became effective before the October 1, 1990, deadline. The documentation (forwarded to the FAA on February 20, 1992 by Pitkin County Special Counsel) consisted of a "Notice of Change" letter dated September 27, 1990, from the Pitkin County Airport Manager to the FAA's National Flight Data Center and a print-out of an October 19, 1990, teletype notification allegedly confirming that change. The "Notice of Change" requested that the FAA amend the Airport/Facilities Directory for the Southwest United States to delete the ski season exception.

11. The County Attorney indicated that the county would continue to search its records, although he asserted that "[i]t seems to us that the elimination of stage 2 departures under this revoked exception was clearly initiated and also effective before the deadlines set forth in ANCA." As to operations by stage 3 aircraft, he noted "[w]e think FAR 161.7(b) (7) may be applicable."

12. The County Attorney asked the FAA to continue to review ANCA compliance without prejudice to the current grant process, or to afford the Board of Commissioners an opportunity to determine whether it wished to forego further grants rather than reenact the night IFR departures exception for stage 3 aircraft. (Exhibit 9).

13. On February 5, 1992, FAA officials met with the County Attorney and several Commissioners in Washington, D.C. to discuss outstanding ANCA and grant compliance issues relating to the nighttime curfew. At this meeting, the FAA reiterated its request for adequate documentation to assure ANCA compliance. The county again promised to provide additional information.

14. In a letter dated June 16, 1993, the Manager of the Airports Division in the FAA's Northwest Mountain Region informed the Pitkin County Director of Aviation that the FAA

had determined that the county's application to collect PFC's dated June 1, 1993, was not substantially complete within the meaning of 14 C.F.R. 158.27(d) (1). The Airports Division Manager reiterated the FAA's request for information that would demonstrate compliance with ANCA and enable the FAA to continue to process the application. (Exhibit 10).

15. On June 30, 1993, the Director of Aviation and County Attorney jointly declined to supplement the PFC application. They asserted that the January 24, 1992, letter had provided the county's position on the applicability of ANCA and that they "looked forward to the discussions with the FAA concerning ANCA compliance that will be required under Subpart F of FAR Part 161." (Exhibit 11).

16. On August 27, 1993, the FAA's Acting Assistant Administrator for Airports advised the Director of Aviation and County Attorney that the Airport Manager's Notice of Change to the Airport/Facilities Directory was not sufficient to establish that the ski season exception had been proposed or was in effect prior to October 1, 1990. Mr. Taylor indicated that the amendment must be in a form that demonstrates that it was proposed to or by the entity empowered to adopt it, such as in a draft ordinance or other regulatory document, prior to October 1, 1990.

17. The Assistant Administrator further explained that Ordinance 90-12 did not appear to be a part of a "program of a staged airport restriction" the initial portion of which was adopted in calendar year 1988. See section 9304(a) (2) (C) (vi) of ANCA, 49 U.S.C. App. 2153(a) (2) (C) (vi) and section 161.7(b) (7). He noted that the informal resolution process had been underway since 1991, and requested that any additional proof of compliance be provided within 30 days to proceed with that process.

18. Finally, he reiterated that the FAA may not provide revenues under the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. App. 2201, et seq., or approve the collection of PFC's "unless the Secretary assures that the airport is not imposing any noise or access restriction not in compliance with [ANCA]." see section 9307 of ANCA, 49 U.S.C. App. 2156. (Exhibit 12).

19. On September 23, 1993, the Pitkin County Manager and Director of Aviation provided the FAA's Acting Assistant Administrator for Airports with a letter allegedly identifying "the documents FAA already has in its files that will enable it to make the required ANCA determination."

20. They maintained that elimination of the "ski season exception" was "grand fathered" as to Stage 2 departures because Section 1 of a draft ordinance published in June, 1990, proposed to delete the "ski season exception." (The June proposal was the subject of the August 7, 1990, Special Meeting and Public Hearing of the Board of Commissioners). They also contended that the Board was constituted to take whatever combination of actions it chose relating to hours of airport operation and that the transcript of the August 7 hearing evidences that repeal of the ski season exception was proposed within the meaning of ANCA.

21. They asserted that the Resolution adopted at the conclusion of the August 7 hearing to table the June 1990 ordinance indefinitely had the effect of eliminating the ski season exception immediately, although the decision was not implemented until February 1991. The county attached an affidavit from the County Manager averring that the August 7, 1990, Board Resolution authorized him, as County Manager, to direct the Airport Manager to notify the FAA National Flight Data Center to show no ski season exception. The County Manager admits that this was done in part because the Airport/Facility Directory had a deadline of October 1 for any changes to previously-published operating procedures and some change was necessary because the Directory specified the dates during the previous winter of 1989.

22. They contended that even if relevant records had been lost, the action by the Airport Manager indicates authorization by the Board of Commissioners. Alternatively, they contend that adoption of Ordinance 90-12 merely formalized the August 7, 1990, decision and, to whatever extent necessary, ratified the timely notice given by the Airport Manager. (Exhibit 13).

23. They indicated that the Board had authorized them to state that "if FAA intends to rule in its Record of Decision on our pending PFC application for whatever reason(s) that the county's elimination of the "ski season exception" was not effective until after October 1, 1990, the county agrees, pursuant to Section 161.501 of FAR Part 161, Subpart F, to permanently not enforce its action to eliminate the 'ski season exception' for IFR operations by stage 3 aircraft until (1) a Federal Court overturns the FAA's ruling in this regard; or (2) the FAA becomes convinced that the county's decision was grand fathered by ANCA; or (3) the county successfully completes the requirements of Part 161 applicable to new restrictions on Stage 3 aircraft."

24. On September 23, 1993, Mr. Jack Corbett of Spiegel & McDiarmid, of counsel to Pitkin County, notified the FAA's Acting Assistant Administrator for Airports that the FAA was not authorized to deny Pitkin County its apportioned entitlement funds under the AAIA without a finding, after a hearing on the AIP application, that the county has violated either its Federal grant assurances or has an access restriction that violates ANCA.

25. Based upon Mr. Corbett's interpretation of the provisions of ANCA, the FAA could issue a "conditional grant" as was allegedly done in Fiscal Year '91 to protect its interests without violating applicable Federal law. He asked the FAA to notify the county by September 24, 1993, of its final decision concerning approval of the county's pending application for AIP entitlement funds. (Exhibit 14).

26. On September 24, 1993, FAA officials contacted the County Attorney and Counsel by telephone to advise them that the FAA has determined that informal resolution has not been successful, and that the FAA intends to initiate the formal process under Subpart F of 14 C.F.R. Part 161. They were advised that the FAA was encouraged by the county's September 23, 1993, offer to permanently not enforce the repeal of the ski season exception as to Stage 3 aircraft, although any specific conditions would have to be agreed-upon in further discussions. The county was encouraged to consider extending that commitment, at

least temporarily, to operations by Stage 2 aircraft to restore compliance. They were advised that, absent such a commitment, sections 9304(e) and 9307 of ANCA, 49 U.S.C. App. 2153, 2156, do not permit the FAA to approve the pending PFC application or the pending application for entitlement funds under the AAIA until the ANCA compliance issue is resolved. Therefore, processing of those applications and funding would be temporarily delayed pending completion of the formal process under Subpart F.

PROPOSED FINDINGS

1. Pitkin County is the owner of Pitkin-County Airport, operating that airport through the Board of County Commissioners.
2. On November 13, 1990, the Board introduced, first read, and set for hearing Ordinance 90-12, proposing to repeal the ski season exception for general aviation aircraft operators at Aspen-Pitkin County Airport.
3. On November 27, 1990, the Board adopted Ordinance 90-12.
4. The June 19, 1990, proposed ordinance to liberalize the curfew and the notice published in the Aspen Times did not provide the public with notice that the Board proposed to repeal the ski season exception without liberalizing the curfew.
5. Ordinance 90-12 was not proposed, approved, adopted, or enacted on or before October 1, 1990.

PROPOSED CONCLUSIONS

1. Ordinance 90-12, repealing the ski season exception for general aviation aircraft users at Pitkin-County Airport, was adopted by Pitkin County in violation of Sections 9304(b) and (c) of ANCA, 49 U.S.C. App. 2153(b) and (c).
2. The draft June 19, 1990, ordinance to liberalize the curfew did not constitute a "proposal" to repeal without liberalizing the curfew the ski season exception within the meaning of ANCA since the draft ordinance and published notice in the Aspen Times did not reasonably apprise the public that the Board was proposing repeal.
3. The Board's informal resolution on August 7, 1990, to table the draft ordinance and maintain the status quo did not result in repeal of the ski season exception or a proposal within the -- meaning of ANCA because the status quo consisted of an ordinance that by its terms would have effectuated the ski season exception for 1990-1991.
4. The September 27, 1990, Notice of Change to the Airport/Facilities Directory for the Southwest U.S. did not constitute a "proposal" within the meaning of ANCA because the Airport Manager was not empowered to repeal or amend the county ordinance to implement the restriction.

5. Whether or not the adoption of Ordinance 90-12 ratified the action of the Airport Manager, that action did not render the Notice of Change a "proposed" restriction on operations within the meaning of ANCA.

PROCEDURES

1. The FAA has repeatedly objected to Ordinance 90-12, stating that it was not "grandfathered" either as to operations by stage 2 or stage 3 aircraft, nor exempt from requirements under Sections 9304(b) and (c). Despite our attempts to informally resolve the issue of compliance with ANCA over the past two years, Pitkin County has not provided sufficient evidence to demonstrate that Ordinance 90-12 qualifies for grandfathering or is exempt from ANCA, particularly as to IFR departures by Stage 3 aircraft. Therefore, the FAA has determined that informal resolution has not been successful and thus issues this notice of apparent violation of ANCA and 14 C.F.R. Part 161 to Pitkin County pursuant to 14 C.F.R. Part 161.503.
2. The procedures set forth in Subpart F of 14 C.F.R. Part 161, 56 Fed. Reg. 48661, September 25, 1991, (copy attached) will be followed in this process to determine compliance with ANCA.
3. Pitkin County shall respond in writing to this notice of apparent violation not later than 20 days after receipt. The county shall provide satisfactory evidence that the county has complied with the requirements of sections 9304(b) and (c) of ANCA.
4. The county shall also state in writing whether the county will agree to defer enforcement of its repeal of the ski season exception (Ordinance 90-12), pending completion of the process to determine compliance under Subpart F of 14 C.F.R. Part 161.
5. If Pitkin County fails to respond to this notice or fails to provide satisfactory evidence of compliance with the Act, the FAA will publish in the Federal Register a notice of proposed termination of eligibility and provide an opportunity for public comment on the notice.
6. A final determination of compliance will be made after consideration of all comments, statements, and data submitted by Pitkin County, and any other available information, in response to this notice and other opportunities for comment by Pitkin County and other interested parties.
7. If the FAA determines that Pitkin County has not complied with the Act, then an order will be issued by the FAA and published in the Federal Register, that (1) terminates eligibility for new airport grant agreements and discontinues payments of airport grant funds, including payments of costs incurred prior to the notice and (2) terminates authority to impose or collect a PFC, or if the airport operator has not received approval to impose a PFC, advises the airport operator that future applications for such approval will be denied in accordance with Section 158.29(a) (1) (v).

CORRECTIVE ACTION

With respect to new restrictions on operations by Stage 2 aircraft proposed after October 1, 1990, and on operations by Stage 3 aircraft in effect after October 1, 1990, at Aspen-Pitkin County Airport, and before a final decision and order is issued by the FAA, Pitkin County may take action to ensure and restore compliance with the Act, 49 U.S.C. App. 2153(b) and (c), and 14 C.F.R. Part 161, by rescinding or committing in writing to rescind or permanently not enforce the repeal of the ski season exception.

In the absence of such corrective action and pending completion of the Subpart F process to determine the county's compliance with ANCA, approval of new grants under the AAIA, including the pending application, and the pending application for approval of PFC collection, will be deferred. See Sections 9304(e) and 9307 of ANCA.

In a telephone conference between Pitkin County and FAA representatives on September 28, 1993, County representatives noted that the Commissioners expressed concern about the effect on flight safety of an agreement to reinstate the ski season exception, even on a temporary and conditional basis. The County representative reported that the Commissioners cited safety as the reason for declining to temporarily reinstate the limited curfew exception at issue or to suspend enforcement of the current restriction.

It is the FAA's intention to promote the highest possible level of safety at Aspen-Pitkin County Airport, as at any airport, consistent with fair, reasonable, and nondiscriminatory access to the National Airspace System. The FAA's review of operational safety issues at Aspen-Pitkin County Airport over the past several years does not indicate that reinstatement of the ski season exception to the curfew would affect safety, and there is no record of safety problems resulting from the exception during the years it was in effect. However, we invite the County to provide any specific evidence that the IFR departures permitted by the ski season exception would not be consistent with an appropriate level of safety. That information will be considered in relation to the corrective action described above.

AUTHORITY

This notice is issued pursuant to the authority contained in sections 307, 313(a) and (c), 601, and 1113(e) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. 1348, 1354(a) and (c), 1371, 1421, and 1502 and sections 9304(b),(c), and (e) and 9307 of ANCA.

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