



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

TO: Ken Norris, Cty. Mgr., Jon Waschbusch, Deputy Cty. Mgr., BOCC, Marti Whitmore, County Attorney

FROM: Lloyd D. Arnold, Director of Aviation

DATE: July 17, 2020

RE: Aeronautical and Non-Aeronautical Use of Airport Property and Through-The-Fence Operations

This memo provides a synopsis of: grant assurances, aeronautical, non-aeronautical, and through-the-fence use of federally obligated commercial service airport property

A. Grants and Grant Assurances

Montrose County utilizes federal Grants through the Aviation Trust Fund in order to effectively operate the airport. Without this funding, MTJ would not be able to maintain the airside and landside operations of the airport. These components have a direct impact on MTJ's ability to attract and keep reliable commercial airline service. Over the past decade, Federal grants secured by the airport have allowed for \$41,937,731 of capital infrastructure improvements, including resurfacing runways and taxiways, building new taxiways, building security fencing, purchasing equipment, and expansion of the Airport Terminal. Because of the growth these grants have afforded Montrose County, the airport is poised to request grant funds to once again expand the terminal. A 30,000 square foot terminal expansion is on track to begin July 15, 2021.

Each time Montrose County, as the sponsor of Montrose Regional Airport (MTJ), accepts a federal grant offer, it accepts the responsibility of operating under 39 separate grant assurances in addition to Federal Aviation Administration (FAA) Orders and Advisory Circulars (AC). Grant Assurances are codified in federal law at 49 USC § 47107. Main components of the grant assurances include:

- Prohibition of exclusive rights
- Use of airport revenue
- Proper maintenance and operation of airport facilities
- Protection of approaches
- Keeping good title of airport property
- Compatible land use
- Availability of fair and reasonable terms without unjust discrimination
- Adhering to the approved airport layout plan
- Self-sustainability
- Sale or disposal of Federally acquired property
- Preserving rights and powers
- Using acceptable accounting and record-keeping systems
- Compliance with civil rights requirements



It is critical that MTJ make every effort to abide by these grant assurance so that the airport's primary funding source is not disrupted.

When the FAA has found airports to be in violation of Grant Assurances, they are ordered to come into compliance within a short period of time (e.g. 30 days) at their own expense. If the Sponsor takes voluntary corrective action after notification of the violation, the FAA will consider the airport to be in current compliance. Failure to come into compliance will result in denial of future grant funding. *Carey v. Afton-Lincoln Cnty. Mun. Airport Joint Powers Bd.*, FAA Docket No. 16-06-06.

B. Aeronautical vs. Non-Aeronautical Businesses and Airport Access

As a matter of FAA policy, any business that requires direct access to runways and taxiways in order to operate is considered an aeronautical business. This includes various businesses such as: radio and navigation equipment shops that install and repair equipment directly on aircraft, aircraft maintenance, engine repair and rebuilding, aircraft testing and manufacturing, aircraft parts testing and manufacturing, aviation museums, aircraft upholstery, aircraft painting, and FBO services.

FAA has concluded that shipping is not an aeronautical activity because direct access to runways and taxiways is not required in order to ship from an airport. FAA Order 5190.6b

Federal grant assurances and orders discourage the use of airport property for non-aeronautical uses by putting strict limitations on leases. They require that all non-aeronautical leases be short term, preferably one year but under no circumstances more than five years.

The ADOs and regional airports divisions may consent to the interim use (not more than five (5) years) for non-aviation purposes of dedicated aeronautical land. This is the case whether or not the land was acquired with grant funds, is surplus property, or is otherwise dedicated for aeronautical use. FAA Order 5190.6b

FAA also requires that lease agreements provide the ability for the airport to recover land on short notice for any aviation related use. FAA Order 5190.6b

If a proposed non-aeronautical use will involve granting a long-term lease or constructing capital improvements, it will be difficult – if not impossible – to recover the land on short notice if it is needed for aeronautical purposes. FAA Order 5190.6b

The following should be considered prior to entering a lease agreement with a non-aeronautical business:

- The property being requested for interim non-aeronautical use must be determined to have no aeronautical demand for use within the proposed interim use timeframe.
- Any non-aeronautical lease agreement must be short term, usually year by year but in any case not more than five years in duration.
- The non-aeronautical operation is compatible with current and future aeronautical operations at the airport.



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

- Non-aeronautical leases on the airport must be at Fair Market Value in accordance with the FAA's Revenue Use Policy (attached).
- The lease agreement shall include language which allows the Airport to terminate the agreement upon notice for any reason and also requires the land to be returned to aeronautical use.

C. Through-The-Fence Agreements

Through-the-fence (TTF) agreements are not supported by the FAA because they create many different situations that can place an airport in violation of its grant assurances or defending itself against complaints regarding grant assurances. An off airport operator is not an obligated entity and the FAA enforces grant assurances through the airport sponsor. These Federal Grant Assurances hold the airports responsible for compliance issues and violations of TTF.

The FAA actively discourages TTF agreements, stating, *“Through-the-Fence” arrangements can place an encumbrance upon the airport property and reduce the airport’s ability to meet its federal obligations. As a general principle, the FAA does not support agreements that grant access to the public landing area by aircraft stored and serviced offsite on adjacent property. Thus this type of agreement is to be avoided since these agreements can create situations that could lead to violations of the airport’s federal obligations.*” FAA Order 5190.6B, § 12.7.

The airport’s interests could be jeopardized if the TTF operator fails to comply with such an agreement, and enforcement of such contract provisions have proven to be costly and time-consuming. As Montrose County found in the early 2000’s, enforcement can be extremely expensive and time consuming. From 2006 through 2012, Montrose County was involved in extensive litigation with through-the-fence operator JetAway.

Chapter 12.7 of Order 5190.6b provides guidance on Agreements granting through-the-fence access. The Order states, *“The federal obligation to make an airport available for the use and benefit of the public does not impose any requirement to permit access by aircraft from adjacent property,”* but goes on to state:

If an airport sponsor chooses to grant “through-the-fence” access, it must ensure that its decision will not result in a violation of its federal obligations, either now or in the future. It has been the FAA’s experience that airport sponsors are often unable to correct violations of the grant assurances that result from “through-the-fence” operations.

A “through-the-fence” access agreement may result in the violation of a number of the sponsor’s federal obligations. Among other things, “through-the-fence” agreements can have the effect of:

- (1). Placing contractual and legal encumbrances or conditions upon the airport property, in violation of Grant Assurance 5, Preserving Rights and Powers;*



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

- (2). *Limiting the airport's ability to ensure safe operations in both movement and non-movement areas, in violation of Grant Assurance 19, Operation and Maintenance;*
- (3). *Creating unjustly discriminatory conditions for on airport commercial tenants and other users by granting access to off-airport competitors or users in violation of Grant Assurance 22, Economic Nondiscrimination;*
- (4). *Effectively granting an exclusive right to the "through-the-fence" operator in violation of Grant Assurance 23, Exclusive Rights, if the operator conducts a commercial business and no on airport operator is able to compete because the terms given to the "through-the-fence" operator are so much more favorable;*
- (5). *Affecting the airport's ability to be self-sustaining, in violation of Grant Assurance 24, Fee and Rental Structure, because the airport may not be in a position to charge "through-the-fence" operators adequately for the use of the airfield;*
- (6). *Weakening the airport's ability to remove and mitigate hazards and incompatible land uses, in violation of Grant Assurance 20, Hazard Removal and Mitigation, and Grant Assurance 21, Compatible Land Use.*
- (7). *Making it more difficult for an airport sponsor to implement future security requirements that may be imposed on airports.*

As a general principle, the FAA does not support agreements that grant access to the public landing area by aircraft stored and serviced offsite on adjacent property. Thus this type of agreement is to be avoided since these agreements can create situations that could lead to violations of the airport's federal obligations.

If Montrose County were to consider a through-the-fence agreement with any entity, the following should be carefully considered:

- Related to on-airport economic discrimination considerations, the County must obtain at least a fair return for its use of the airfield by assessing an access fee for the through the fence access. It should be noted that an airport sponsor may assess any level of fee it determines to be appropriate for through the fence operators so long as that fee is not less than the comparable fee paid by on-airport tenants.
- Similarly to the fee structure, the length and terms of the access permit would need to be at least comparable to on airfield tenants, however they could be more stringent as off airport users do not have standing and are not protected by the grant assurances.
- The County should never grant deeded access to the airport to any entity.
- Any agreement/permit must incorporate safety operational requirements to ensure the access can be conducted safely and not impact airport operations.
- Access would need to also comply with any TSA security requirements.
- Residential development would be incompatible with the County's land use plan.
- The right of access should be explicit and apply only to the through-the-fence operation, and any future changes would require a new agreement.
- The access agreement should have a clause making it subordinate to the County's grant assurances and federal obligations.
- The County shall have the unilateral right to amend or terminate the access agreement to remain in compliance with its assurances and federal obligations.



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

- The through the fence operator shall not have a right to assign its access agreement without the express prior written approval of the County.
- The access agreement should contain termination and insurance articles to benefit the County.
- In addition, non-aeronautical users/businesses do not have standing and are not protected by the grant assurances and are unable to file a complaint with the FAA.

If the airport fails to maintain such control contractually, or exercise it in reality, it may be sanctioned by the FAA for subrogating the responsibilities required under the Grant Assurances. The penalties to an airport can be significant – either losing future grant funds, or losing its certificate of authority.

Additionally, the FAA warns that TTF agreements should not be for extended terms. *“The expiration date of the access agreement should not extend beyond a reasonable period from the sponsor’s perspective. It should not depend upon the full depreciation of the ‘through-the-fence’ operator’s off-airport investment (i.e., 30 years), as would be the case had the investment been made inside the airport.”* FAA Order 5190.6B, § 12.7(h)

D. Specific Considerations:

Following points should be strongly considered when making a decision regarding a TTF operations:

1. The FAA strongly discourages through-the-fence agreements.
 - *“‘Through-the-fence’ arrangements can place an encumbrance upon the airport property and reduce the airport’s ability to meet its federal obligations. As a general principle, the FAA does not support agreements that grant access to the public landing area by aircraft stored and serviced offsite on adjacent property. Thus this type of agreement is to be avoided since these agreements can create situations that could lead to violations of the airport’s federal obligations.”* FAA Order 5190.6B, § 12.7.
 - When adopted, the FAA recommends that TTF leases are for terms of five years or less.
 - Most airports nationwide do not permit any TTF agreements. In 2013, the FAA reported there were a total of 121 such agreements nationwide, of which only 4 were in airports providing commercial service. Compliance Guidance Letter 2013-1: FAA Review of Existing and Proposed Residential Through-the-Fence Arrangements, https://www.faa.gov/airports/airport_compliance/residential_through_the_fence/media/cg/2013-1RTTF.pdf
 - One guidebook regarding TTF agreements notes that airports should be cautious in this regard because “employees and customers of a TTF entity [which is not related to aviation] are typically unfamiliar with airport and aircraft operations which, in turn, can create safety, utility, and efficiency issues for the airport” Stephanie A.D. Ward, et al., *Guidebook for Through-the-Fence Operations*, National Academies of Sciences, Engineering, and Medicine 2014, at 14, <https://doi.org/10.17226/22360>.



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

2. A previous through-the-fence agreement resulted in 13+ years of litigation and cost the taxpayers over \$3.4 million, and continue to cost the taxpayers more in increased insurance premiums. This does not include the value of thousands of hours of time County Employees spent working on litigation.

- From 2006 through 2012, Montrose County was involved in extensive litigation with through-the-fence operator JetAway. During this time, JetAway performed certain unauthorized fixed-base operator service and violated the terms of its lease by permitting unauthorized access to object-free areas.
- While the County was able to secure a restraining order prohibiting JetAway from these actions, JetAway continued to violate its agreement with the County, violate the District Court's ruling regarding permitted activities, and violate the Court's restraining order.
- Disputes over the agreement and JetAway's actions resulted in: 1) three State District Court cases, which included multiple appeals; 2) two administrative complaints with the FAA; and 3) a Federal District Court case. More details regarding Montrose County's litigation that through-the-fence operations create can be found in the following cases:

FAA Docket No. 16-06-01

FAA Docket No. 16-08-01

United States District Court

District Court Montrose County

District Court Montrose County

District Court Montrose County

Case No. 1:07-cv-02563-RPM

Case No. 2006cv18

Case No. 2006cv25

Case No. 2006cv126

The County prevailed in every meaningful way, but even when the Court issued specific restraining orders, JetAway refused to comply, causing significant safety concerns regarding access to the airport. The District Court found that "evidence of continued violations was overwhelming" and that the "violations occurred almost daily."

- The County terminated the TTF agreement with JetAway in 2008 because of its repeated violations. However, the litigation did not end until all appeals had been exhausted in 2012.

3. The Airport has ample designated space for on-airport operations that may be utilized by private companies; any aeronautical-related business can apply to be an on-airport operator.

- The MTJ master plan completed in 2017 outlines areas for commercial service and MTJ is willing to accommodate any aeronautical related business that wished to comply with rules and regulations and operate from airport property. The master plan can be found at <http://www.flymontrose.com/148/Airport-Master-Plan>



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

4. MTJ has completed \$41,937,731 of capital projects in the last 10 years, leveraging \$31,093,719 of federal funding for these projects. A \$20,000,000 Terminal expansion is slated to start July 15, 2021.
 - The FAA is required to monitor Grant Assurance compliance in order to “protect the federal investment” and does inspect off-airport access. If the TTF operator’s actions violate regulations or compromise the safety of the airport or airspace, the FAA may take enforcement action directly against the airport, as the recipient of federal funds. Such enforcement action is usually a corrective plan which must be complied with in a short period of time (eg 30 days), at the airport’s expense, but can also be the implementation of legal action (both administratively and in federal civil court), as well as the withholding of future grant awards. Airports in violation are reported to Congress annually by the FAA.
5. Protecting the Airport as a community asset must be the County’s highest priority, in order to ensure its economic viability benefits all of the residents of Montrose County, rather than a select few.
 - MTJ provided 159,354 enplanements and 157,770 deplanements in 2019, numbers which are expected to grow exponentially over the next 20 years, particularly as the airport expands and attracts new operators. The airport provided an overall economic impact of about \$627,000,000 to the region in the five year period from 2013-2018, and directly and indirectly supports 2,850 jobs on the Western Slope.
 - The County should consider what best serves the interests of the public when making a determination regarding best use of airport resources, and protecting airport assets. *JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs, Montrose Cnty., Colo.*, FAA Docket No. 16-06-01

E. Recommendations

In conclusion, I would recommend the following to the Board of County Commissioners, the community of Montrose, and the region of Western Slope Colorado that utilizes the services of the Montrose Regional Airport:

1. That the County respect Federal Aviation Administration’s explicit recommendation that through-the-fence operations should be avoided. Adhering to these guidelines will protect the grants which have allowed for \$41,937,731 of capital infrastructure improvements over the last 10 years, and will increase the likelihood of future grants, thereby ensuring the economic viability of our airport for years to come
2. That the County prohibit non-aeronautical business from operating at Montrose Regional Airport.



Montrose Regional Airport

2100 Airport Road • Montrose, CO 81401 • (970) 249-3203 • FAX (970) 249-2808

3. That the County permit and encourage the operation of aeronautical businesses which require airport access, but require that they operate exclusively on airport property.