



U.S. Department
of Transportation
Federal Aviation
Administration

Memorandum

Subject: **INFORMATION:** Airport Improvement Program
Grants Provided to the Hawaii Department of
Transportation

Date: APR 25 1997

From: Acting Administrator

Reply to
Attn. of: AWilliams:
267-9000

To: Acting Inspector General

We have reviewed the subject Office of Inspector General (OIG) final report dated September 19, 1996. Our comments are provided below. This response addresses only audit Finding B, recommendations 1 and 2, to the extent those recommendations relate to the issue of payments to the Office of Hawaiian Affairs. The remaining recommendations and issues raised in the audit will be addressed in a separate response.

Finding B. Sponsor Compliance with FAA Requirements. The OIG concluded that the region did not monitor the use of airport revenues. The region relied on sponsor self-certifications, single audits, and third party complaints to ensure compliance with 49 U.S.C. 47107(b). The regional manager, Planning and Programming Branch, Airports Division, stated that they lack the resources necessary to directly monitor the Hawaii Department of Transportation (HDOT) Airports Division's use of airport revenue. As a result of inadequate regional monitoring, the FAA was unaware the HDOT Airports Division paid \$28.2 million to the State of Hawaii Office of Hawaiian Affairs (OHA), for which HDOT received no services; lost at least \$1.7 million in interest income as a result of making payments to OHA; paid \$14.5 million for off-airport work; and did not receive \$6.5 million in sponsor rental value. The HDOT Airports Division will continue to lose about \$9.4 million annually until the region requires the sponsor to comply with 49 U.S.C. 47107(b).

Recommendation 1. The OIG recommends that the FAA initiate procedural steps necessary to reach a final determination regarding noncompliance with grant assurances, and withhold payments on current grants and approval of future grants, if the sponsor does not recover the \$28.2 million in airport revenues paid to OHA for nonairport purposes as of FY 1995, as well as any payments made after FY 1995, and lost interest on the \$28.2 million - \$1.7 million as of June 30, 1995...

Response: Concur. The \$28.2 million in airport revenue paid by HDOT to the OHA does not meet the requirements of the grandfather provisions of 49 U.S.C. 47107(b), and must be considered to have been unlawfully diverted from the airport account. HDOT's response to the audit included the State Attorney General's determination that the OHA payments are considered operating costs cognizant under the Admissions Act of 1959.

Hawaii Revised Statutes § 10-13.5 (1980) requires that "twenty percent of all revenue derived from the public land trust shall be expended by the OHA for the betterment of the conditions of native Hawaiians." In turn, the statute defines revenue as "proceeds, fees, charges, rents, or other income [that] results from the actual use of [public trust lands]." Hawaii Revised Statutes § 10-2. Thus, to the extent that HDOT's airports would be liable under § 10-13.5 because they are situated on public trust land, the FAA construes § 10-13.5 as requiring airport revenue to be paid to OHA.

The 20 percent payment to OHA required under § 10-13.5 of all revenue derived from the public land trust, including airport lands, was not based on "a covenant or assurance in a debt obligation issued no later than September 2, 1982, by the owner or operator," and thus are not grandfathered by 49 U.S.C. 47107(b)(2). Both the legislative history of § 47107(b) and prior interpretations of that section indicate that the phrase "covenant or assurance in a debt obligation" signifies a financial obligation incurred by an airport in a bond or other commercial instrument. Treating the provision of the Admissions Act of 1959, requiring that all public lands ceded back to Hawaii would be held in public trust, as a covenant or assurance in a debt obligation is a broader interpretation of the phrase "debt obligation" than can be supported by the terms of the statute, its legislative history, and prior interpretations. HDOT payments are not grandfathered because they were made under "a law controlling financing by the airport owner or operator" enacted before September 2, 1982, because HRS § 10-13.5 affects only the use of airport revenue. The state statute does not govern the means by which funds or capital are supplied, such as statutes governing debt financing through sale of bonds. Likewise, the requirement for payments to OHA is not contained in the body of laws that govern the means by which funds or capital are supplied. The legislative history of § 47107(b) indicates that the "law controlling financing" exception was not intended to apply to statutes that solely affected the use of airport revenue. Therefore, the Hawaii statute is not a law controlling financing by the airport.

We disagree with the State Attorney General's conclusion that the OHA payments should be considered operating costs of the State's airports under 49 U.S.C. § 47107(b)(1) because they were agreed to as such by the State and the airline users of the airport. The revenue use requirement of 49 U.S.C. § 47107(b)(1) cannot be waived by agreement of the airport sponsor and airport user. For this reason the FAA monitors practices established by

agreement of the airport sponsor and airport users with respect to the requirements for the use of airport revenue, as an exception to the general rule that the FAA will not monitor practices established by agreements in order to encourage direct resolution of disputes. See Notice of Proposed Policy Regarding Airport Rates and Charges, 59 F.R. 29874,29876 (June 9, 1994).

Since the 20 percent payments to OHA have not been justified as capital or operating costs of the airport and do not qualify under the grandfather provisions of 49 U.S.C. 47107(b), HRS § 10-13.5 would appear to conflict with 49 U.S.C. § 47107(b), as applied to HDOT's grant obligated airports.

Accordingly, the \$28.2 million paid to the OHA trust fund plus interest should be reimbursed to the Airports account, and HDOT should ensure that no further payments of airport revenue are diverted to the OHA for services not received by the airport.

Additionally, even assuming the payments to OHA constitute a "debt," the State statutory requirement is not a "debt obligation" within the meaning of § 47107(b). To be grandfathered from the Federal airport revenue diversion prohibition, a debt obligation must be "issued not later than September 2, 1982, by the owner or operator." The term "issuance" relates to financial instruments--that is, "the act of offering securities for sale to investors." Webster's Third New International Dictionary (1971). The OHA statute in question is not a financial instrument and accordingly, is not a "debt obligation. . . issued by" the state of Hawaii within the meaning of § 47107(b) for purposes of applying the grandfather exception.

Recommendation 2. The OIG recommends the FAA ensure the HDOT Airports Division:

- a. does not use airport revenues for nonairport purposes in the future; and
- b. charges market rental rates for sponsor use of airport property.

Response: Concur. Within the limited resources of the Airports Division, the FAA will review payments of airport revenue to other state agencies during compliance inspections.


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