


November 26, 2018

Mr. John Bauer
FAA - NW Mountain Region
Denver Airports District Office
26805 E.68th Avenue, Suite 224
Denver, CO 80249-6381

**Re: *Wyoming Jet Center, LLC. v. Jackson Hole Airport Board* – Informal Complaint
Pursuant to 14 C.F.R. Part 13, dated September 24, 2018**

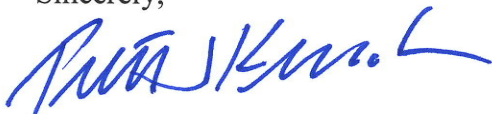
Dear Mr. Bauer: 

This letter is in response to the letter dated October 18, 2018, from Peter Doyle to Jim Elwood, Executive Director, Jackson Hole Airport, with regard to an informal complaint filed with FAA by Mr. Roy Goldberg on behalf of Wyoming Jet Center, LLC, pursuant to 14 C.F.R. Part 13. The Complainant, Wyoming Jet Center and its CEO, Mr. Greg Herrick, allege violations arising under various grant assurances and federal statutes relating to the operation of the Jackson Hole Airport (JAC or Airport) by its sponsor, the Jackson Hole Airport Board (the Board or Sponsor).

The attached document constitutes the Board's initial response (Response), as requested in Mr. Doyle's October 18, 2018, letter to Mr. Elwood. As described in detail in the Response, the Board respectfully requests that FAA find that Wyoming Jet's allegations not substantiated and to advise the parties that the complaint warrants no further FAA action.

We would appreciate the opportunity to meet with you to discuss these issues in order to reach swift resolution. To that end, please feel free to contact me or my colleague, Katie van Heuven at (303) 825-7000 or via e-mail at pkirsch@kaplankirsch.com / cvanheuven@kaplankirsch.com.

Sincerely,



Peter J. Kirsch
Encl.

cc via email: Peter Doyle
Jim Elwood
Michael Morgan
Roy Goldberg

Wyoming Jet Center, LLC v. Jackson Hole Airport Board
Informal Complaint Pursuant to 14 C.F.R. Part 13

Response by Jackson Hole Airport Board

November 26, 2018

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EXHIBITS

Part 13 Complaint

1. September 24, 2018, *Wyoming Jet Center, LLC v. Jackson Hole Airport Board*, Informal Complaint pursuant to 14 C.F.R. Part 13 (with select exhibits)

Guiding Documents

2. 1983 *Agreement Between the United States Department of the Interior and the Jackson Hole Airport Board* and amendments thereto
3. May 1998, *Master Plan Update, Final Report: Jackson Hole Airport (FAR Part 150 Update)* [Excerpts]
4. 2014 *Jackson Hole Airport Board Minimum Standards and Requirements for the Conduct of Commercial Aeronautical Activities*
5. December 16, 2015, *Jackson Hole Airport Conceptual Area Development Plan*

JAC Leases, Operating Agreements, First Rights, and the Asset Purchase Agreement

6. October 1, 1991, *FBO Operating Agreement* (Satellite Aero. Inc.) and addenda thereto
7. October 1, 1991, *FBO Operating Agreement* (JH Aircraft Management Inc.) and addenda thereto
8. May 14, 1996, *Memorandum of Agreement*
9. May 14, 1996, *Assignment Consent Agreement*
10. November 19, 2003, *Agreement To Grant First Right To Lease*
11. November 19, 2003, *First Right To Lease*
12. July 16, 2014, *Extension of FBO Master Operating Agreement (JHA)*
13. July 16, 2014, *Airport Facilities Lease* (North Fuel Facility) and amendments thereto
14. July 16, 2014, *Airport Facilities Lease* (South Fuel Facility) and amendments thereto
15. July 16, 2014, *Airport Facilities Lease* (Hangars No. 2 & 3) and amendments thereto
16. July 16, 2014, *Airport Facilities Lease* (Hangars No. 4 & 5)
17. November 1, 2017, *FBO Operating Agreement* (JHA)
18. March 16, 2018, *First Interstate Bank Financing Commitment*
19. November 1, 2017, *Asset Purchase Agreement*
20. April 27, 2018, *Letter Agreement* (extending closing date for Purchase Agreement)
21. April 27, 2018, *Airport Facilities Lease* (JHA)
22. July 11, 2018, *Supplemental Agreement Regarding Fuel Facility*
23. June 28, 2018, *First Amendment to Asset Purchase Agreement*

JAC Airport Board Meeting Minutes and Resolutions

24. May 14, 1996, *Resolution 96-5*
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36. September 20, 2017, Board Meeting Minutes
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38. November 1, 2017, Resolution 2017-16
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40. June 20, 2018, Resolution 2018-08
41. June 28, 2018, Special Meeting Minutes

Correspondence

42. March 2017, Wyoming Jet Letter, *Notice and Application for Leasehold Interest to operate a second Fixed Base Operation Facility at the Jackson Hole Airport*
43. April 3, 2017, Wyoming Jet Letter, *Continuation of Notice and Application for Leasehold Interest to operate a second Fixed Base Operation Facility at the Jackson Hole Airport*
44. October 18, 2018, FAA Letter to J. Elwood

Litigation: *Greg Herrick et al v. Jackson Hole Airport Board*

45. January 26, 2018, Petition for Declaratory Judgment
46. February 20, 2018, Answer and Counterclaim
47. April 3, 2018, Respondent's and Counterclaimant's Motion for Summary Judgment
48. April 3, 2018, Respondent's and Counterclaimant's Statement of Undisputed Material Facts
49. April 3, 2018, Respondent's and Counterclaimant's Memorandum in Support of Its Motion for Summary Judgment

Financial Reports

50. September 26, 2018, Revised *Operating and Financial Summary Report* (Fiscal Year Ending 06/30/14)
51. September 26, 2018, Revised *Operating and Financial Summary Report* (Fiscal Year Ending 06/30/15)
52. September 26, 2018, Revised *Operating and Financial Summary Report* (Fiscal Year Ending 06/30/16)
53. September 27, 2018, Revised *Operating and Financial Summary Report* (Fiscal Year Ending 06/30/17)

I. INTRODUCTION

This is the fourth separate complaint that Wyoming Jet Center, LLC, (Wyoming Jet) has filed against the Jackson Hole Airport Board (Board) since the fall of 2017 in its effort to thwart the Board's lawful exercise of its proprietary exclusive right. This complaint, like its predecessors, contains a collection of unsubstantiated assertions and speculations framed as legal justifications. In this case they are asserted in an attempt to convince the FAA, rather than the courts, to intervene in the Board's decision-making process. The Part 13 process, however, is not a forum for an unsuccessful bidder to ask the FAA to second-guess valid airport proprietor decisions so long as the sponsor has acted rationally and has complied with its Grant Assurance obligations and federal law. The Board has scrupulously complied, not just with its Grant Assurance and legal obligations, but also with best practices for public and bidder involvement. To the extent there has been any delay in the Board's decision-making process or actions, they are entirely of Wyoming Jet's own making.

Wyoming Jet wants to operate as the second fixed-base operator (FBO) at Jackson Hole Airport (Airport or JAC). The Board has recognized its usual obligation to permit Wyoming Jet to compete fairly against other similarly-situated operators. But Wyoming Jet misses the crucial principle that the Board has a right, *at any time*, to elect to be the sole provider of such services. Instead of accepting that principle, Wyoming Jet attempts to distort the record to create a false picture of a Board that is intent on catering only to the "wealthiest aircraft owners." The problem with this tale is that it is not borne out by the facts.

While the Board considered Wyoming Jet's application to be the second FBO, it ultimately elected to instead retain its proprietary exclusive right. It is understandable that Wyoming Jet is disappointed that its application was unsuccessful. But it is not legally relevant that the Board "admitted" (in Wyoming Jet's words) the basic legal principles that prohibit the grant of an exclusive right to third parties, or that the Board prepared (but never published) a Request for Proposals for a second FBO, as Wyoming Jet points out. Likewise, it is not material that the Board had pre-existing contractual obligations to the existing FBO, which the Board sought to extinguish by buying out that operator. What *does* matter is that the Board acted both rationally and lawfully. It reviewed its options, and then, as required, made the lawful decision it found to be in the best interest of the Airport in order to both preserve space on a severely constrained Development Subzone and best protect the future of the Airport.

To prevent the Board from acting on this decision, Wyoming Jet has filed three prior lawsuits. Substantively, these legal efforts have proven ineffective. One of the lawsuits in the Teton County District Court had to be dismissed voluntarily when it was shown to be groundless. A second has already been determined in the Board's favor by the District Court (although it is now on appeal). The third – still pending – lawsuit is a challenge to the Board's authority to use revenue bonds to purchase the assets of the existing FBO, which bonds are a necessary predicate to the Board's ability to exercise its proprietary exclusive right. The Board has filed a Motion for Summary Judgment in this third case in an attempt to obtain a swift determination. Wyoming Jet cannot file lawsuits attempting to block the exercise of a proprietary right, and now complain that the Board has been "dilatatory" in not completing the transaction to exercise that right. The Board has taken

every step it reasonably can to implement the exercise of its proprietary exclusive right and, but for interference from Wyoming Jet, it would already have been implemented.

The detailed facts in this dispute, while complex, warrant a full explication here to show that the Board has been meticulous about following proper procedure and giving both Wyoming Jet and all other interested parties ample opportunity to participate.

II. STATEMENT OF FACTS

A. Background

1. Airport Overview

The Jackson Hole Airport is the only commercial service airport in the United States that lies entirely within a National Park. Under the 1983 Agreement Between the United States Department of the Interior and the Jackson Hole Airport Board, as amended (Interior Agreement, attached as **Exhibit 2**), the Board is authorized to operate within Grand Teton National Park, with explicit restrictions on overall Airport size and runway length, and a strict cap on the size of the “Development Subzone” in which most buildings and public facilities may be constructed. The passenger terminal building, public parking, rental car facilities, hangars and other fixed base operator (FBO) facilities must all be located in the less-than 30-acre Development Subzone. Because of these severe limits, the Airport has just a single aircraft ramp, which is used by scheduled air carriers on the north and general aviation on the south. *Id.* at ¶¶ 7(a) and (b) and Attachment B (Development Subzone map). Moreover, the area available for general aviation use fluctuates based on the vagaries of air carrier scheduling.

The original Interior Agreement was set to expire in 2033. *Id.* at ¶ 1(a). However, under a 2011 amendment, the Department of Interior authorized two additional 10-year options, in part to ensure that the Board would continue to have more than 20-years remaining on its term, and thus remain eligible for future federal Airport Improvement Program grants. *Id.* at Third Amendment.

In the 35 years since the Interior Agreement was executed, the number of operations at the Airport has expanded significantly, placing further limits on available ramp space. At this point, it is probable that, at peak times, no other airport in the United States packs a greater range of activities into a smaller land area than at the Jackson Hole Airport.

2. FBO History at JAC: 1990’s - 2015

For a brief period in the early 1990’s, two FBOs (Satellite Aero Inc. and JH Aircraft Management, Inc.) operated at the Airport, with both using the same small ramp area. **Exhibit 6** (Satellite Aero Inc. Agreement); **Exhibit 7** (JH Aircraft Management Agreement). This resulted in operational conflicts between the two operations. *E.g.*, **Exhibit 30** (May 17, 2017, Minutes) at 3 (“the limited space [made] it difficult to deal with efficiency and demands”).

In 1996, the two FBOs elected to merge into a single entity, Jackson Hole Aviation LLC (JHA), which took over the full suite of FBO functions in May 1996. **Exhibit 24** (Resolution 96-5); **Exhibit 8** (1996 Memorandum of Agreement); and **Exhibit 9** (1996 Assignment Consent

Agreement). JHA has been the sole FBO operating at the Airport since this merger. JHA has and continues to provide FBO services at JAC through a combination of operating agreements and ground leases.

- Master Operating Agreement. JHA maintained its base of operations and used the facilities at JAC for FBO operations pursuant to the original 1991 FBO Master Operating Agreements (**Exhibits 6 and 7**) which were assigned to JHA per the 1996 Assignment Consent Agreement (**Exhibit 9**). The primary term of the original 1991 Agreements ended on April 13, 2013, with JHA having an option to renew for one additional term of five years. **Exhibit 6** at ¶ 5.1 and **Exhibit 7** at ¶ 5.1. JHA exercised that option and thus extended the term to April 13, 2018.
- Fuel Facility Leases. The Board leased the North Fuel Facility to JHA under a series of one-year leases ending on July 30th of each year. The South Fuel Facility reverted to Board ownership in July 2013, and JHA then exercised its option to lease this Facility for a five-year term ending in July 2017. **Exhibit 13** (North Fuel Facility); **Exhibit 14** (South Fuel Facility).
- Hangars 2 and 3. The Board leased Hangars 2 and 3 to JHA under a series of leases having one-year terms, which expired on June 30th of each year. (**Exhibit 15**) (Hangars Lease).
- Hangars 4 and 5. In April 2014, Hangars 4 and 5 became the property of the Board, and JHA then exercised its option to lease these facilities for a five-year term ending on April 29, 2018. As explained below, because of its investment in additions to these facilities, JHA then had an option to enter into a new lease for an additional five-year term to end on April 30, 2023. **Exhibit 16** (2014 Hangar 4 and 5 Lease) at Recitals and ¶ 5.1.

The contractual history underlying Hangars 4 and 5 and the Master Operating Agreement is somewhat complicated. But relevant to the Wyoming Jet allegations, Hangars 4 and 5 are located on property designated for Airport purposes and managed by the Board under the Interior Agreement. JHA originally owned the Hangar 4 and 5 improvements, but title to them was set to revert to the Board in April 2013, with JHA then having a five-year right to lease them, through April 2018. In 2003 – fifteen years before this lease right was to expire – JHA proposed (at its own cost) to construct an addition to Hangar 4 and to expand and remodel the Hangar 5 lounge/public area. In 2003, the Board recognized that these capital investments would benefit the public and materially enhance the value of facilities that would revert to the Board at the end of the JHA lease. The Board therefore agreed that if JHA spent a minimum of \$1,000,000 on these improvements, it would grant JHA a “first right” to: (1) obtain a new five-year lease for Hangars 4 and 5 from April 2018 until April 2023¹; and also (2) obtain a new FBO Operating Agreement,

¹ The precise “right” that JHA could exercise with regard to the hangars was predicated on a decision the Board had to make between April 2016 and April 2017. Specifically, the 2003 First Right To Lease provided that between April 27, 2016, and April 27, 2017, the Board was required to determine whether Hangars 4 and 5 would continue to be used for general aviation purposes. If the Board made that determination, then JHA had a first right to lease the two hangars for the five years between April 2018 and April 2023. If the Board did not make that determination, then JHA’s “first right” would be converted into a right to build similarly-sized facilities or to lease similarly sized-facilities that might then be available. The First Right To Lease specifies that the Board must tender a lease agreement to JHA within 60 days after its determination on the future use of Hangars 4 and 5. It further stipulates that JHA shall then have 90 days to execute and deliver such lease. **Exhibit 11** (First Right To Lease) at ¶ 2.

having a term from April 2018 to April 2023. *E.g.*, **Exhibit 10** (2003 Agreement To Grant First Right To Lease).

Therefore, when Wyoming Jet filed its application to operate a second FBO at JAC in 2017, the Board was contractually obligated to JHA to enter into both a new Operating Agreement and a lease for Hangars 4 and 5, each for a five-year term beginning in April 2018 and extending through April 2023.

B. The 2015 Conceptual Area Development Plan and Resulting Developments

In 2015, the Board commissioned an analysis of development options in the severely-constrained Development Subzone. **Exhibit 25** (Resolution 2015-3); *see also*, **Figure 1** (Development Subzone Map). The 2015 Conceptual Area Development Plan (Plan) reviewed forecast data in order to plan for aviation demand at JAC through 2040. The forecast analysis revealed that piston-engine traffic had decreased in FAA’s Northwest Mountain Region, and FAA was predicting that, on the national level, the number of active piston-engine aircraft would increase by 0.4% over the next 20 years. By contrast, the data showed that corporate/turbine aircraft were on the rise nationally, and in fact, already represented 78.6% of total general aviation operations at JAC in 2014. **Exhibit 5** (Plan) at Forecast Summary, 4-5. The Plan concluded that, over the next 25 years, small general aviation aircraft activity at JAC would decline or remain steady, but corporate and air taxi aircraft activity would increase. *Id.* at Forecast Summary, 7. As a result, the Plan proposed construction of new, larger general aviation hangars. *Id.* at Concept Development, 3. This is entirely consistent with the prior (1998) Airport Master Plan Update, which found that: “No requirement for additional individual hangars has been identified because of the limited growth expected for smaller general aviation aircraft.” **Exhibit 3** (Master Plan Update) at 5-27.

Based upon the aviation and passenger forecasts, the Plan identified development concepts that would enable the Board to accommodate future activity at JAC while at the same time maintaining the highest and best use of the limited area in which improvements could be made. The Plan acknowledged that this was no easy effort:

During the process of developing the conceptual plans for JAC, it was recognized just how space constrained the airport was in attempting to meet the forecast activity. Although these plans represent a large improvement over existing conditions today, the realization is that due to the constraints that the airport has, *developing the airport to fully meet future activity may not be possible.*”

Exhibit 5 (Plan) at Concept Development, 2 (emphasis added).

Ultimately, on April 19, 2017, the Board determined that the two hangars would continue to be used for general aviation purposes. **Exhibit 28** (Resolution 2017-5). This started the 60 + 90 day clock, such that the Board was required to tender a lease by June 18, 2017, to which JHA was required to respond within 90 days thereafter, *i.e.* approximately mid-September 2017. It is relevant that by the August 2017 meeting, the Board had received and was still considering the offer to purchase JHA’s assets, so it extended the time within which JHA was required to respond to the tendered offer for Hangars 4 and 5 by an additional 60 days – *i.e.*, until mid-November. **Exhibit 35** (August 16, 2017, Minutes) at 5. This explains why the Board was contractually required to act on the JHA Leases and Operating Agreements in November 2017.

Figure 1: JAC Development Subzone



Source: 2015 Conceptual Area Development Plan, Exhibit I-1

The Board has since embarked on a methodical effort to implement these recommendations. The ensuing actions relevant to Wyoming Jet's complaint are described in the subsections below.

1. Construction of a New Fuel Facility

One of the top priorities identified in the Plan was to eliminate the outdated North and South Fuel Facilities, which lacked capacity and available flow rate to meet peak demands. As identified in 2015:

The North and South Fuel Farms are 10 and 25 years old respectively. These facilities are lacking in capacity and available flow rate. The FBO has stated that 350 gallons per minute (gpm) of fuel delivery from the fuel storage tanks to the fuel delivery trucks would meet its need. However, the north fuel farm is limited to 242 gpm and the south fuel farm is limited to 180 gpm of fuel delivery. The limits of the fuel farm has [sic] an impact on the ability for the fuel trucks to fuel departing aircraft in a timely manner, resulting in delays of aircraft operations, particularly on peak holidays and tourist seasons. Although some additional fuel storage tanks may be added to the fuel farms and modifications to the existing system can be performed to improve the fuel delivery flow rate, it would be more advantageous for the airport to construct a new fuel farm at a location where it would have minimal impact on future airport development within the Sub-Zone and would be less visible to the flying public as they enter and exit the airport.

Exhibit 5 (Plan) at Existing Facilities, 11- 12.

In May 2017, the Board entered into a contract to design and build the new fuel facility.² A month later, after considering the additional cost and land area necessary to build a dual-user facility, the Board announced that “upon completion of the New Fuel Facility and expiration of leases on the Existing Fuel Facilities,” it intended to exercise its right to exclusively provide for the purchase, storage and sale of aviation fuels to FBOs (with into-plane delivery and sales continuing to be provided by the FBO(s)), in large part because “Existing Fuel Facilities on the Airport are becoming too small to meet the demand for aviation fuels, and *space within the small Development Subzone of the Airport is not sufficient* for construction of multiple new aviation fuel facilities.” **Exhibit 32** (Resolution 2017-07) (emphasis added); *see also* **Exhibit 31** (June 21, 2017, Minutes) at 3.

The leases for the old fuel facilities have now expired, the new fuel facility is now operational, and the Board is operating all Airport fuel facilities pursuant to its proprietary exclusive right. *E.g.*, **Exhibit 39** (June 20, 2018, Minutes) at 1 and 4; **Exhibit 40** (Resolution 2018-08).

² In order to ensure continued fuel services in the interim, the Board extended the existing JHA leases for the North and South Fuel Facilities for an additional year, pending the construction of the new fuel facility. **Exhibit 30** (May 17, 2017, Minutes) at 4; **Exhibit 13** (North Fuel Facility Lease); **Exhibit 14** (South Fuel Facility Lease).

2. Years 5-15: Replace/Update General Aviation Facilities

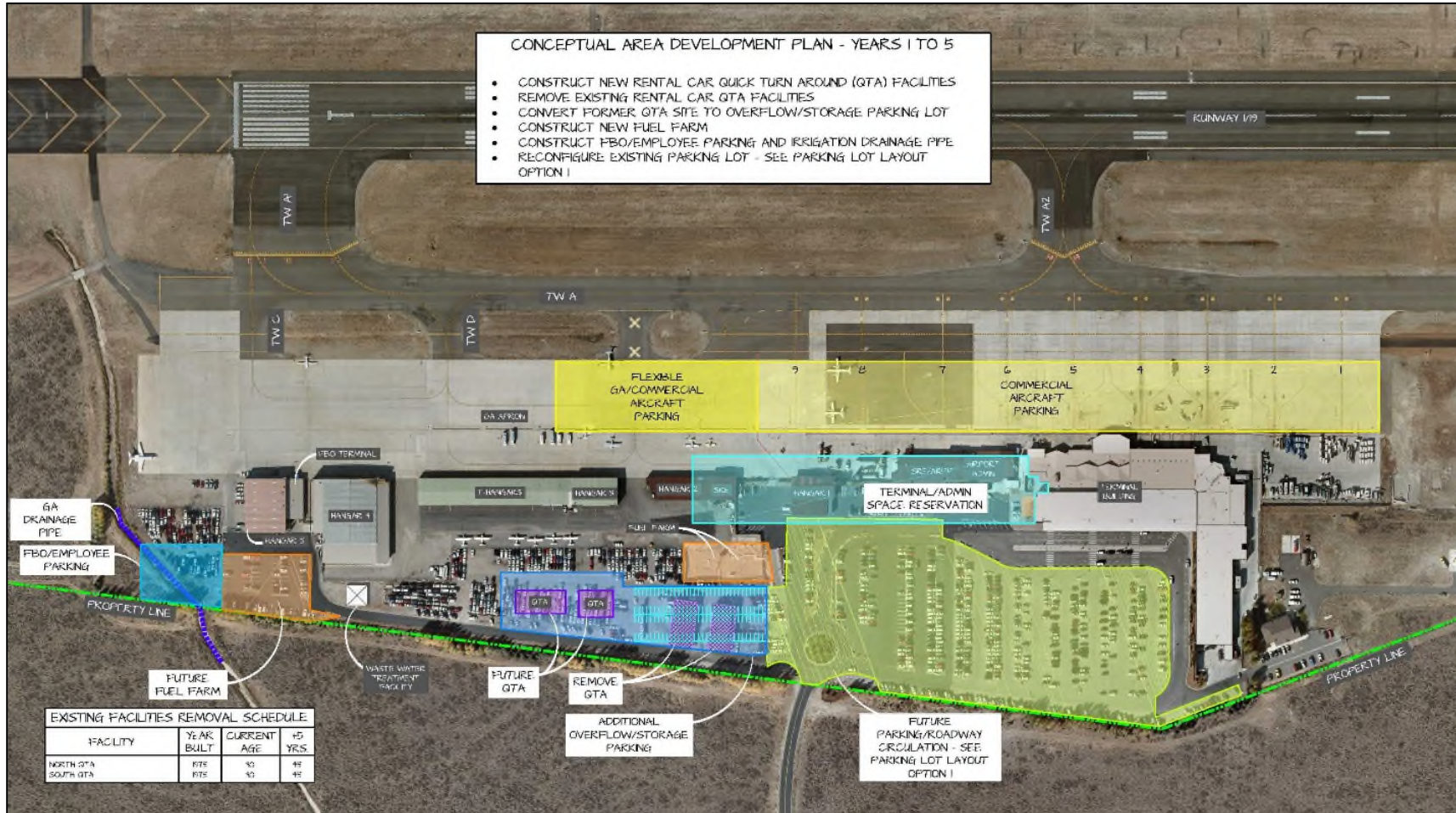
The Plan also recognized that many hangar facilities, as well as the then-existing nested T-hangars, (which were part of Hangar 3) were aging and had multiple deficiencies, including hangar door failure, roof leaks, and drainage infiltration from surrounding paved areas. **Exhibit 5** (Plan) at Existing Facilities, 11. In addition, the Plan found that the existing FBO terminal was limited in size and there was a need for an expanded FBO terminal and additional hangar space. *Id.* As a result, the Plan recommended demolishing Hangars 2 and 3, each of which had “multiple deficiencies,” and replacing these facilities with new general aviation hangars and a new FBO terminal. The Plan concluded that:

[New hangar 6] will provide additional covered storage for larger corporate jets and the new FBO terminal will replace the existing terminal which was constructed in 1990 and is due for an upgrade.

The existing T-hangars, which are located on the east side of the GA parking ramp, will be removed and replaced by up to three larger hangars to be constructed on the east side of where the T-hangars are currently located. The existing T-hangars are 35 years old and in poor condition. The size of the new hangars will be determined in the future prior to design of these facilities.

Id. at Concept Development, 3. See **Figure 2** (Proposed Development Plan for Years 1-5).

Figure 2: Conceptual Area Development Plan Years 1 - 5



Source: *Conceptual Area Development Plan, Exhibit D-1*

The Board has taken key steps to implement this part of the Plan. On January 9, 2017, the Board issued a Request for Qualifications seeking to identify firms to develop and evaluate designs, and assist with bidding and perform construction oversight for: (1) a new FBO terminal with an attached aircraft storage hangar (hangar 6) on the south end of the general aviation apron; and (2) three new storage hangars (hangars 3A, 3B and 3C) between the new fuel facility and existing hangar 4. *See generally*, Complaint at Exhibit 2 (Design RFQ).³

The Board also initiated efforts to demolish the existing Hangar 3, including its T-hangar component, as recommended in the Plan. **Exhibit 26** (February 22, 2017, Minutes) at 3 (noting that hangar tenants had been recently advised that they would need to be temporarily relocated while the work to replace Hangar 3 took place). It is relevant too, that although the Plan also called for the demolition of Hangar 2, the Board instead elected to *renew* that lease in 2017. **Exhibit 15** (Third Amendment to Hangar 2 lease). By way of background, the Hangar 3 complex had to be demolished in order to accommodate the new general aviation parking, which was being funded with a federal grant. *E.g.*, **Exhibit 26** (February 22, 2017 Minutes) at 32 (removal of hangar 3 would accommodate 30,000 square feet of new general aviation parking); **Exhibit 31** (June 21, 2017 Minutes) at 4 (discussing FAA's offer to fund rehabilitation of a portion of the general aviation ramp). Given the resulting displacement, the decision to retain Hangar 2 was critical to avoid additional impacts to general aviation users in the near term. *See, e.g.*, **Exhibit 37** (November 1, 2017, Minutes) at 4-5 (recognizing that Hangar 2 would be removed in the future, but "the intent moving forward is to protect all aircraft type[s]").

C. Request(s) For a Second FBO

In March 2017, Wyoming Jet notified the Board of its interest in operating a second FBO at the Airport. **Exhibit 42** (March 2017 Letter). The Board requested that Wyoming Jet file a formal application as required by the Minimum Standards. **Exhibit 4** (Minimum Standards) at ¶ 1.3. In response, Wyoming Jet filed such an application on April 3, 2017. **Exhibit 43** (April 2017 Letter).

The Board promptly reviewed and considered the Wyoming Jet application at its next meeting two weeks later, on April 19, 2017. Coincidentally, this was the same meeting at which the Board was required to act pursuant to its contractual obligation with JHA to determine the future of Hangars 4 and 5 before the April 27, 2017, deadline, (*see supra*, footnote 1). **Exhibit 27** (April 19, 2017, Minutes) at 6-7. As explained above, the Board decided at this April 2017 meeting that Hangars 4 and 5 would continue to be used for general aviation purposes, and acknowledged JHA's contractual right to lease the two hangars and to extend its FBO Master Operating Agreement through 2023. **Exhibit 28** (Resolution 2017-05).

At the April 2017 meeting, having acted pursuant to its contractual commitment to JHA, the Board turned to consider Wyoming Jet's pending application. In light of the Board's contractual obligations to JHA and the Airport's unique constraints, the Board directed staff to study and report

³ The Design RFQ required that the FBO facility and terminal be approximately 10,000 square feet; the new hangar (hangar 6) adjacent to the FBO facility be 160 x 120 feet; and the three new aircraft storage hangars (Hangars 3A, 3B and 3C) be approximately 12,000 square feet (approximately 120' wide and 100' deep). **Exhibit 1** (Complaint) at Exhibit 2, pp. 7-10.

back on whether there was sufficient land and facilities available to establish a second FBO, whether a second FBO could operate safely⁴, and whether a second FBO at the Airport would be in the best aeronautical interests of the public and the Board. **Exhibit 27** (April 19, 2017, Minutes) at 7; **Exhibit 29** (Resolution 2017-06). The Board announced that upon receipt and review of the staff report, it would take one of three actions: (1) consider the pending Wyoming Jet application for a second FBO; (2) solicit proposals for a second FBO in a competitive and open process; or (3) determine that no applications for a second FBO at the Airport could be considered. It also notified the public that until such decision was made, it would hold in abeyance any pending applications for a second FBO. **Exhibit 29** (Resolution 2017-06).⁵

At the next Board meeting, the Board invited Wyoming Jet and JHA to make presentations on the merits of a second FBO. The Board heard testimony by Wyoming Jet that the second FBO would benefit the Airport by “enhancing general aviation safety, consumer service and satisfaction, and would improve airport revenue.” **Exhibit 30** (May 17, 2017, Minutes) at 2 and Exhibit 1. It also heard testimony from JHA that a second FBO would “reduce ramp space and severely cramp operations.” *Id.* at 2. The Board discussed the merits of both arguments, but ultimately concluded that, though sufficient fuel capacity did not then exist to support two FBOs on the Airport under the Minimum Standards, a second FBO could physically be accommodated at the Airport when the new fuel facility was completed in 2018. Although only Wyoming Jet had submitted a formal proposal for operation of a second FBO at that point, the Board recognized the value of a transparent, competitive process for awarding a contract for a second FBO. Therefore, the Board directed staff to prepare a Request for Proposals for the operation of a second FBO (FBO RFP), and announced its intent to hold all applications for a second FBO in abeyance until completion of the RFP process. *Id.*

At the August 2017 Board meeting, Airport Executive Director Jim Elwood explained that several weeks after the Board’s April 2017 decision to issue the FBO RFP (but before the FBO RFP was ready for publication), JHA had approached Airport staff and “suggested that the inefficiencies associated with the two FBOs operating on the same ramp could be avoided if the Board purchased and operated the single FBO on the Airport.” In response, Airport staff had investigated the viability of this suggestion. In late July, the Board’s attorney entered into a Confidentiality and Non-Disclosure Agreement with JHA for the purposes of exploring the possibility of purchasing all of JHA’s FBO assets (including its operational rights) and exercising proprietary exclusive authority. **Exhibit 35** (August 16, 2017, Minutes) at 4-5. Elwood recommended that the Board direct staff to temporarily postpone issuance of the FBO RFP until the General Aviation Committee and the Board’s attorney had sufficient time to evaluate the concept of exercising proprietary exclusive as to all FBO functions. He also noted that this slight delay would not materially affect the development of a second FBO because a second FBO could not be accommodated until the new fuel facility was operational in 2018. *Id.*

⁴ Any finding that a second FBO could not operate safely would, of course, have been referred to FAA for its determination on this issue.

⁵ JHA had also filed a Request for Development for fuel farm and hangar facilities. The Board decided to hold this request in abeyance along with Wyoming Jet’s application to be the second FBO, while it decided whether to take actions to exercise proprietary exclusive authority over all FBO operations. **Exhibit 29** (Resolution 2017-06).

In response to staff's recommendation, the Board decided to place a hold on the several pending items to give the Board time to make a considered decision on the options. In particular, the Board decided to hold in abeyance all applications for a second FBO; to temporarily postpone issuance of the FBO RFP pending receipt of a recommendation by the General Aviation Committee regarding the possible exercise of its right to proprietary exclusive; and to extend JHA's obligation to act on the Board's tendered lease for Hangars 4 and 5 for 60 days (*see supra*, footnote 1). **Exhibit 35** (August 16, 2017, Minutes) at 5.

In September, the Board decided that it needed an additional month to deliberate on the options under consideration. **Exhibit 36** (September 20, 2017, Minutes) at 5.

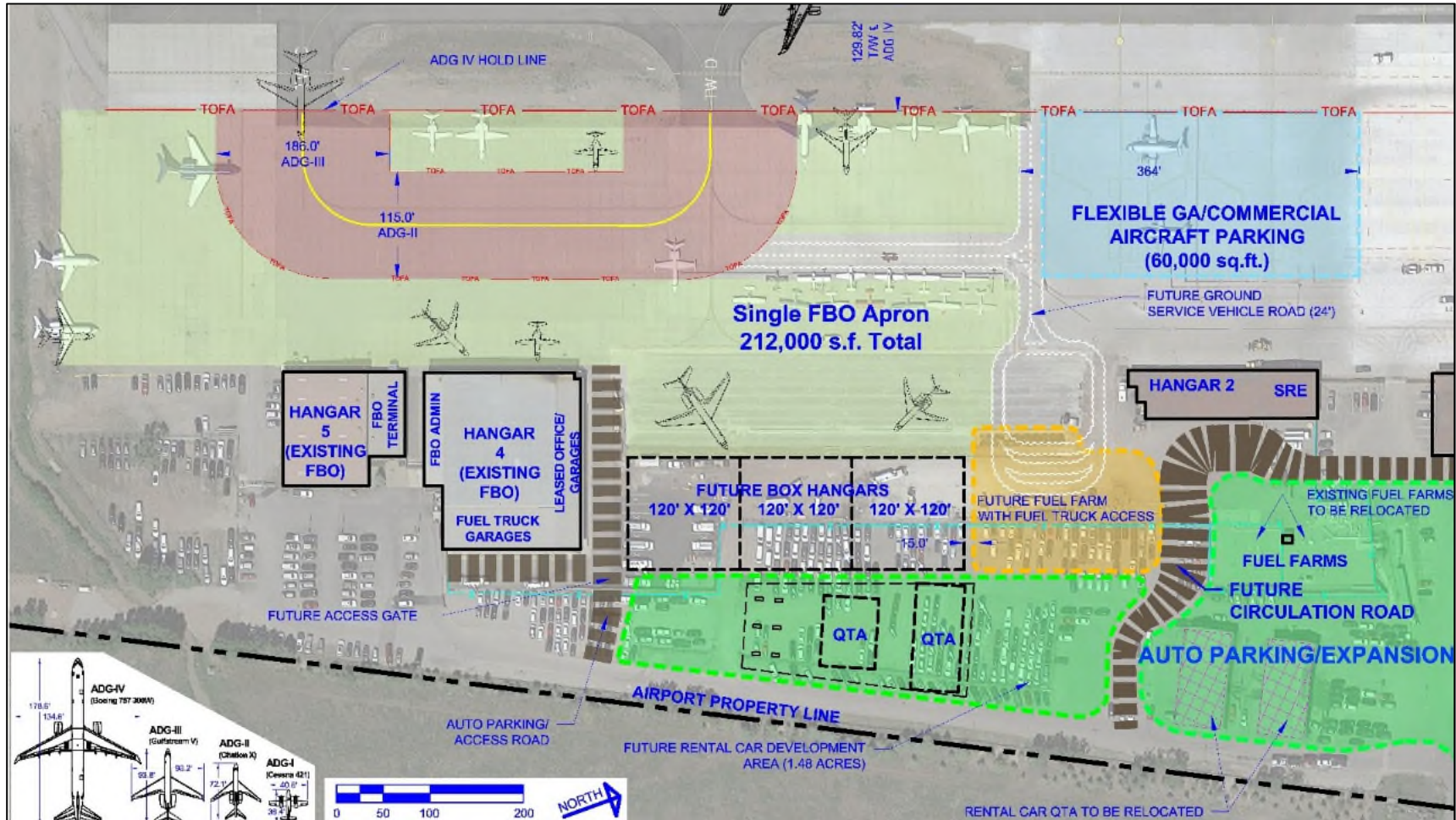
D. The Board's November 1, 2017, Decision

The Board's consideration of its options came to a head at its November 1, 2017 meeting. To avoid further delay, prior to the meeting the Airport staff and legal counsel had prepared two alternative Resolutions for the Board's consideration. The first Resolution was to authorize issuance of an RFP for a second FBO, which was accompanied by the draft RFP document. Complaint at Exhibit 10. The second Resolution was to authorize entry into an Asset Purchase Agreement (Purchase Agreement) for JHA's assets, which was accompanied by the proposed Purchase Agreement. **Exhibit 38** (Resolution 2017-16).

That meeting began with a public reminder that, regardless of its decision on how to proceed with provision of FBO services, the Board was contractually bound to offer the hangar leases and the Operating Agreement extension to JHA. As it was required to do under the 2003 First Right To Lease, the Board approved the five-year lease of Hangars 4 and 5 to JHA and the new five-year Operating Agreement. **Exhibit 37** (November 1, 2017, Minutes) at 3; *see also supra*, footnote 1.

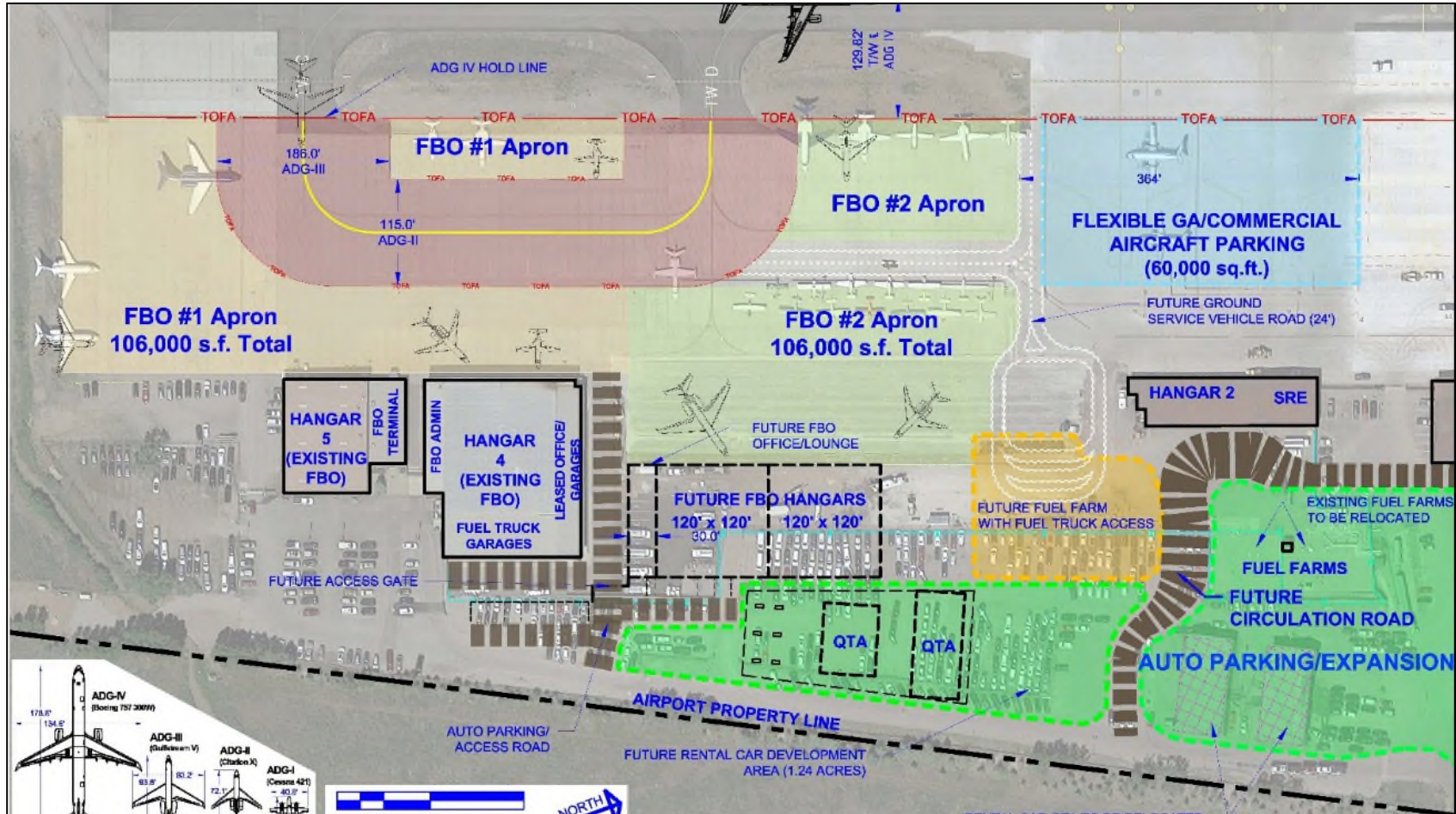
The Board then turned to the question of whether to proceed with a second FBO or instead purchase JHA's assets and exercise its proprietary right to be the exclusive provider of FBO services at JAC. In so doing, the Board considered proposed ramp allocations and probable facilities that could be built with one FBO versus two FBOs. **Exhibit 37** (November 1, 2017, Minutes) at 4 and Exhibit 1. The materials presented to the Board showed that, in the single FBO scenario, there would be space for *three* future 120'x120' FBO hangars, but in the two FBO scenario, there would be space for only *two* 120'x120' hangars. *Compare* **Figure 3** with **Figure 4**.

Figure 3: Single FBO Development Concept (Nov. 1, 2017)



Source: Mead & Hunt, Nov. 1, 2017 Presentation to JAC Board

Figure 4: Two (2) FBO Development Concept



Source: Mead & Hunt, Nov. 1, 2017 Presentation to JAC Board

The reason for the difference is that each FBO must meet the JAC Minimum Standards, which require not just adequate building and ramp space, but also *all* the required ground service equipment to perform the required services, such as aircraft marshalling, ramp parking and tie-down, towing, aircraft cleaning, inflating aircraft tires, changing aircraft engine oil, servicing oleo struts, recharging aircraft batteries and starters, deicing, and servicing oxygen and nitrogen equipment. **Exhibit 4** (Minimum Standards) at ¶¶ 2.1 – 2.6. These requirements mean that duplicate space is needed for the two FBOs' equipment parking (shown in the rectangular space between Hangar 4 and the Future FBO Hangars in **Figure 4**) and also vacant space must be allowed between the future FBO hangars and the fuel facility to accommodate the maneuvering of two fuel servicing operations and the potential for inefficiencies that occur when two operators need to access the fuel facility.

The Board also heard a presentation about a potential Purchase Agreement, under which JHA would sell its assets, including its leases and FBO Operating Agreement, to the Board for a price of \$26 million, on a closing date of April 30, 2018. **Exhibit 19** (Purchase Agreement). The staff presented analysis of the proposed Purchase Agreement, and the costs and benefits of the proposed transaction. Staff recommended that acquisition of JHA would be in the best interest of the public for myriad reasons, including: (1) the FBO acquisition would provide “a strong return on investment and long term financial contribution, helping to ensure diversity of financial base, continued self-sufficiency and reinvestment in the Airport”; (2) the exercise of the proprietary exclusive would avoid the need for duplicate facilities required by a second FBO, which would conserve scarce Airport land; and (3) a single FBO on the airfield would allow for more efficient ramp utilization. **Exhibit 37** (November 1, 2017, Minutes) at Exhibit B.

After hearing presentations by staff and consultants and receiving public comment, including comments from Wyoming Jet, the Board unanimously adopted the Resolution authorizing the purchase of the JHA assets pursuant to the Purchase Agreement and providing in part that:

Effective upon closing of the purchase and sale contemplated by the [Purchase Agreement], the Board shall exercise its proprietary exclusive right to provide FBO services and operate FBO facilities on the Airport, and in that regard to be the exclusive provider of aviation fuel storage and into-plane sale of aviation fuel, aviation ramp services, aircraft maintenance and repair services and aircraft hangaring services on the Airport.

Exhibit 38 (Resolution 2017-16). Because of its adoption of that Resolution, there was no need for the Board to consider (or even publish) the alternative draft, FBO RFP.

E. The State Court Litigation and Its Impacts on the Asset Purchase Agreement

The Board proposed to fund the purchase contemplated by the Purchase Agreement using revenue bonds to be repaid from Airport revenues, including those generated by operations of the FBO to be acquired. The Board solicited proposals from lending institutions, received multiple proposals, selected First Interstate Bank (Interstate Bank) to purchase the bonds, and received a financing commitment. *See*, **Exhibit 18** (Financing Commitment).

Several weeks later, on January 28, 2018, Wyoming Jet filed a Petition in the Teton County District Court asserting that the Board did not have authority under Wyoming law to use revenue bonds to fund the purchase contemplated in the Purchase Agreement. **Exhibit 45** (Petition). Though the Board had secured a commitment for bond financing to fund the purchase of FBO assets, and although First Interstate Bank agreed that the Wyoming Jet lawsuit was probably meritless, the Board was unable to close the financing because, understandably, no financial institution would close a bond financing while the lawsuit was pending. Interstate Bank then issued a revised financing commitment which is contingent on successful resolution of the third Wyoming Jet lawsuit.

The Purchase Agreement was originally set to close on April 30, 2018. **Exhibit 19** (Purchase Agreement) at ¶ 5.1. On April 27, 2018, the Board had to extend that date to June 30, 2018, because of the Wyoming Jet lawsuit. **Exhibit 20** (April 27, 2018, Letter Agreement). In light of the uncertain timing of resolution of the litigation, the Board ultimately extended the closing date until resolution of the lawsuit, with the purchase price to be renegotiated at that time based in part on the remaining term of JHA's operating rights. **Exhibit 41** (June 28, 2018, Minutes); **Exhibit 23** (First Amendment to Purchase Agreement).

At its June 20, 2018, meeting the Board adopted another Resolution which reaffirmed its exercise of the proprietary exclusive right. **Exhibit 39** (June 20, 2018, Minutes) at 4. The Resolution provides in part:

The Board hereby exercises its proprietary exclusive right to provide FBO services and operate FBO facilities on the Airport, and in that regard to be the exclusive provider of into-plane sale and/or delivery of aviation fuel, aviation ramp services, aircraft maintenance and repair services and aircraft hangaring services on the Airport. Said exclusive right shall not extend to aircraft catering services, aircraft cleaning and detailing services, and the transportation off-Airport of persons or property from aircraft landed.

The foregoing exercise of the proprietary exclusive right to provide FBO services shall be effective upon closing of the purchase and sale contemplated by the [Purchase Agreement], or should the [Purchase Agreement] not sooner close, upon the expiration in April 2023 of JHA-LLC's right to operate an FBO on the Airport.

Exhibit 40 (Resolution 2018-08). The effect of this Resolution is that the Board has now exercised its right to be the proprietary exclusive provider of FBO services on the Airport on a date certain, subject to certain conditions precedent. The conditions precedent are either: (1) upon resolution of Wyoming Jet's pending lawsuit and resulting closing under the Purchase Agreement; or (2) upon expiration of JHA's operating rights on the Airport in April 2023. Therefore, the only question is *when*, not *whether*, the Board's exercise of its proprietary exclusive will be perfected. The timing is entirely a function of Wyoming Jet's litigation since, absent that litigation, the Board could immediately execute the Purchase Agreement and proceed as the sole FBO provider on the airfield.

III. SUMMARY OF APPLICABLE LEGAL STANDARDS

A. The Part 13 Process

FAA Airports District Offices (ADOs) are authorized to receive and investigate informal complaints filed pursuant to 14 C.F.R. Part 13 (Part 13), and attempt to resolve the issues raised through the Part 13 process. If an ADO's investigation determines that the airport sponsor may be in violation of a federal law, regulation, or binding obligation, it will take appropriate action to bring the airport sponsor voluntarily into compliance. Conversely, if the investigation does not substantiate the allegation, the parties will be advised that the complaint warrants no further FAA action. *See generally*, FAA Compliance Guidance Letter 2014-01, *Procedures for Accepting and Investigating 14 CFR Part 13 Informal Complaints Alleging Violations of Grant Assurance Obligations and Surplus Property Deed Restrictions* (July 1, 2014).

Not unlike the more formal process under 14 C.F.R. Part 16, a Part 13 complainant bears the burden of demonstrating the alleged noncompliance. *Compare*, 14 C.F.R. § 16.23(k) (burden of proof) *with* FAA Compliance Guidance Letter 2014-01 at ¶ III(C)(1) (Part 13 complainants must clearly identify: (1) the sponsor against which the allegations are made; (2) the specific assurance(s)/deed restrictions alleged to have been violated; (3) the actions and/or inactions which resulted in the alleged violation; and (4) "supporting arguments, information and documentation" on an "issue-by-issue" basis). In both cases, unsubstantiated speculation and arguments do not suffice. *Hicks v. City of Mount Airy*, FAA Docket No. 16-15-07, Director's Determination at 29 (Apr. 29, 2016) ("innuendos and general accusations do not carry the burden of proof necessary for a Complainant to prevail in a Part 16 case"); FAA Compliance Guidance Letter 2014-01 at ¶ III(C)(6) (upon receipt of a Part 13 Complaint, the FAA investigating officer must "separate the facts from any unsubstantiated allegations").

B. Grant Assurance 22, Economic Nondiscrimination

Grant Assurance 22 requires that the airport sponsor "will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." Grant Assurance 22(a); 49 U.S.C. § 47107(a)(1). In essence, "Assurance 22 obligates airport sponsors to treat similarly situated airport tenants in a comparable fashion." *Asheville Jet, Inc. v. Asheville Reg'l Airport Auth.*, FAA Docket No. 16-08-02, Director's Determination at 18 (Oct. 1, 2009).

In order to support a claim of unjust discrimination, the complainant must provide persuasive evidence that a similarly-situated user based at the airport was provided with preferential treatment. The test is two-fold: (1) there must be a similarly situated user and (2) the complainant must have proposed and been denied a similar use. *See Moore v. Sumner Cty. Reg'l Airport Auth.*, FAA Docket No 16-07-16, Director's Determination at 35 – 36 (February 27, 2009), *aff'd*, Final Agency Decision (July 13, 2010).

C. Grant Assurance 23, Exclusive Rights

As a condition of accepting federal grants, airport sponsors must agree that a “person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport.” 49 U.S.C. § 47107(a)(4). Grant Assurance 23 implements that statutory provision and provides that an airport sponsor “will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.” An “exclusive right” is defined to be a “power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right.” FAA Order 5190.6B, *Airport Compliance Manual*, at ¶ 8.2. It can be conferred “by express agreement, by the imposition of unreasonable standards or requirements, or by any other means.” FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports* at 4 (Jan. 4, 2007). However, where the sponsor has not entered into an express agreement, commitment, understanding, or apparent intent to exclude other reasonably qualified enterprises, the FAA “does not consider the presence of only one provider engaged in an aeronautical activity as a violation of the exclusive rights prohibition.” Order 5190.6B at ¶ 8.6.

An important exception to the prohibition on granting exclusive rights is where an airport sponsor itself provides aeronautical services at the airport. FAA guidance provides that an airport sponsor may elect to provide any or all of the aeronautical services needed by the public at the airport. This exception, known as the proprietary exclusive right, allows airport operators to exercise – but not to grant – an exclusive right to provide aeronautical services to the public.” Order 5190.6B at ¶ 8.5; *see also* Advisory Circular 150/5190-6 at ¶ 1.3.b.1 (same).

A sponsor’s exercise of its proprietary exclusive right can be as broad or narrow as it chooses. *See Jet 1 Center, Inc. v. Naples Airport Auth.*, FAA Docket No. 16-04-03, Director’s Determination at 12 (Jan. 4, 2005) (“It is FAA’s intent to allow the public entity having control and responsibility over the airport’s operation to invoke a proprietary exclusive right to conduct any of the aeronautical services needed at the airport without violating Assurance 23, Exclusive Rights.”) Furthermore, a sponsor may invoke its proprietary exclusive right at any time. *Id.* at 17 (“An airport sponsor or owner does not lose its ability to invoke a proprietary exclusive right on its airport regardless of prior arrangements. So long as the airport owner or sponsor is not violating any of its grant obligations by doing so, it may invoke its proprietary exclusive right *at any time.*”) (emphasis added); *see also U.S. Aerospace, Inc. v. Millington Mun. Airport Auth.*, FAA Docket No. 16-98-06, Director’s Determination at 22 - 23 (Oct. 20, 1998) (finding that delay associated with economic analysis of viability of fuel farm did not prevent the sponsor from eventually exercising its proprietary exclusive right to sell fuel).

D. Grant Assurance 24, Fee and Rental Structure

Each federally-assisted airport sponsor is required by statute and grant assurance to have an airport fee and rental structure that will make the airport as self-sustaining as possible under the particular airport circumstances. FAA, *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7720 (Feb. 16, 1999) (Revenue Use Policy); *see also* 49 U.S.C. § 47107(a)(13) and Sponsor Assurance 24. FAA specifically recognizes that individual airports will differ in their

ability to be fully self-sustaining, given differences in conditions at each airport. FAA Order 5190.6B at ¶ 17.5.

The purpose of the self-sustaining rule is to maintain the utility of the federal investment in the airport and minimize the airport's reliance on federal funds and local tax revenue. FAA Order 5190.6B at ¶ 17.5; *Revenue Use Policy*, 64 Fed. Reg. at 7710; FAA, *Policy on Airport Rates and Charges*, 61 Fed. Reg. 31,994, 32,021 (June 21, 1996) (Rates and Charges Policy).

In general, fees for the use of the airfield may not exceed the airport's capital and operating costs. Order 5190.6B at ¶ 17.10. FAA advises that sponsors should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenue may be lawfully spent. However, the agency recognizes that "[r]easonable reserves and other funds to facilitate financing and to cover contingencies are not considered revenue surpluses." *Id.* at ¶ 17.9; *see also*, Rates and Charges Policy, 61 Fed. Reg. at 32,021.

IV. ANALYSIS

A. The Board Is Authorized To Exercise The Proprietary Exclusive Right At Any Time, And Has Done So Lawfully.

The Board's intent to exercise of its proprietary exclusive right is evident:

- On June 21, 2017, the Board announced its *intent to exercise* its right to exclusively provide for the purchase, storage and sale of aviation fuels to FBOs immediately upon completion of the new fuel facility. **Exhibit 31** (June 21, 2017, Minutes); **Exhibit 32** (Resolution 2017-07). The new fuel facility is now operational and the Board is exercising its proprietary exclusive to operate a fuel storage facility on the Airport.
- In November 2017, the Board announced that upon completing the purchase of the JHA assets, it "*shall exercise its proprietary exclusive right* to provide FBO services and operate FBO facilities on the Airport, and in that regard to be the exclusive provider of aviation fuel storage and into-plane sale of aviation fuel, aviation ramp services, aircraft maintenance and repair services and aircraft hangaring services on the Airport." **Exhibit 38** (Resolution 2017-06) (emphasis added).
- On June 20, 2018, the Board reaffirmed its exercise of its proprietary exclusive right. **Exhibit 40** (Resolution 2018-08) ("The Board hereby *exercises its proprietary exclusive right* to provide FBO services and operate FBO facilities on the Airport, and in that regard to be the exclusive provider of into-plane sale and/or delivery of aviation fuel, aviation ramp services, aircraft maintenance and repair services and aircraft hangaring services on the Airport.") (Emphasis added).

To be clear, the Board has always understood that, if it did *not* exercise its proprietary right to operate the FBO, it *would* be required to permit a second FBO to operate at the Airport upon a finding that adequate space is available and upon receipt of a legitimate application by a qualified entity. *E.g.*, Advisory Circular 150/5190-6, ¶ 1.3.b.1 (an airport sponsor has the right to provide

any or all of the aeronautical services needed by the public at the airport); Order 5190.6B at ¶ 8.9(a) (same). But, it is legally irrelevant that the Board’s deliberate, thoughtful, and transparent public debate about whether to exercise its proprietary right occurred after Wyoming Jet indicated an interest in operating a second FBO. Nothing in the law forecloses the exercise of the proprietary exclusive right merely because the consideration of such exercise comes as the result of, or in conjunction with, deliberation over how to accommodate a potentially competing FBO. *Jet 1 Center*, FAA Docket No. 16-04-03, Director’s Determination at 17 (airport sponsor may invoke proprietary exclusive right “at any time”).

This is particularly appropriate at JAC, given its unique development restrictions. *E.g.*, **Exhibit 4** (Minimum Standards) at ¶ 1.1.6 (“The Interior Agreement ... is an extreme restriction on available ground for Airport development ...”); *id.* at ¶ 1.4.4.1 (“any request for construction will be carefully considered by the Board to assure the best use of limited land over the term of the Interior Agreement ...”); **Exhibit 5** (Plan) at Concept Development, 2 (developing the airport to fully meet future activity “may not be possible”). Unlike many other airports with far more generous development options, JAC faces severe development constraints that require that the Board consider the *feasibility* of a second FBO in the Airport’s highly constrained physical environment. **Exhibit 4** (Minimum Standards) at ¶ 2.8.1 (before authorizing new FBO services, the Board must “determine if the land and/or facilities proposed are available for use as an FBO, and whether their use as an FBO is in the best interest of the public, considering the limited size of the Development Sub-Zone defined in the Interior Agreement”).

Wyoming Jet makes much of the fact that the Board previously “acknowledge[ed] that the law and circumstances require a second FBO to compete with JHA.” Complaint at 8. While that is indeed true, it is not material. The law is not bilateral: while an airport sponsor cannot *grant* an exclusive right, it may, at any time, *exercise* an exclusive right for itself. The opportunity for the Board to exercise its exclusive right presented itself in the short window after it had determined there was technically room for a second FBO, but before any RFP for operation of such a second FBO was ready to be issued.

Here, the Board complied with the applicable law. It engaged in a deliberate, thoughtful, and transparently public process after: (1) receiving a request to operate a second FBO from Wyoming Jet; (2) being advised that a competitive process would be the preferred manner for selecting a second FBO operator; and then (3) receiving an offer from JHA to purchase its operation which might obviate the need for a competitive process to select a second FBO to operate at the space-constrained Airport. To reiterate: the fact that the Board initially recognized the legal prohibition against granting exclusive rights in no way affects whether or not it can subsequently accept JHA’s buyout offer in order to exercise its own proprietary exclusive right. *Jet 1 Center*, FAA Docket No. 16-04-03, Director’s Determination at 17 (sponsor may invoke its proprietary exclusive right at any time).

Moreover, Wyoming Jet’s conclusion that “there is no genuine reason for the Board to become the sole FBO” (Complaint at 10) is not only unsubstantiated – it is simply wrong. The evidence before the Board proves the exact opposite.

1. There are operational reasons to exercise the proprietary exclusive right at JAC.

First and foremost, JAC operates under extreme development constraints, and it is well-established that the Board must be uniquely strategic when planning for use of its limited development space. **Exhibit 5** (Plan) at Executive Summary, 4 (“During the process of developing the [Plan], it was recognized just how space constrained the airport was in attempting to meet the forecast activity. ... [and] ... developing the airport to fully meet future activity may not be possible.”)⁶

One of the key constraints is the available ramp space. When two FBOs previously operated at JAC in the 1990s, that operation was inefficient. **Exhibit 30** (May 17, 2017, Minutes) (“[Board Member] Blann said he has seen two FBOs operate at the Airport and the limited space makes it difficult to deal with efficiency and demands.”) Operations have increased dramatically since that time. **Exhibit 5** (Plan) at Forecast Summary, 3 and 5 (air carrier operations at JAC increased by 200% between 2001 and 2014); (business jet operations increased between 2000 and 2008, dropped during the recession, but have experienced a steady rebound since 2010). Under the pressure presented by increased operations, adding a second FBO (which would require duplicate facilities and the need to share the limited ramp space) would add complexity and create an extremely inefficient use of space. **Exhibit 37** (November 1, 2017, Minutes) at Exhibit B. It would also limit the number of available future hangars. *Compare* **Figure 2** and **Figure 3**.

The Board did not find that operation of a second FBO would be physically impossible, but it *did* conclude that two FBOs would introduce long-term operational inefficiencies. That finding materially affected the Board’s decision to exercise the proprietary exclusive right. And, despite Wyoming Jet’s assertion to the contrary, the law simply does not require the Board to make any particular findings to justify the retention of its proprietor’s exclusive right.

2. There are valid financial reasons to exercise the proprietary exclusive right at JAC.

Not only were there valid operational reasons for the Board to exercise the proprietary exclusive right, but the financial underpinning for the Board decision was also sound. The evidence considered by the Board shows that acquisition of the JHA assets has “a strong financial foundation.” Board operation of the FBO will provide “a strong return on investment” and “long-term financial contribution that will help assure diversity of the Board’s financial base, and provide for continued self-sufficiency.” **Exhibit 37** (November 1, 2017, Minutes) at Exhibit B. This is entirely consistent with the Board’s Grant Assurance 24 obligations.

Wyoming Jet underscores the debt obligation that the Board would incur (Complaint at 11) and the fact that the Board would have the right to exercise the proprietary exclusive five years later *at no cost*, when JHA’s leases are set to expire. (Complaint at 5). But the financial analysis presented to the Board demonstrates that *notwithstanding debt service on the \$26 million purchase price*, the Board will receive a net gain in revenue over the next five years if it acquires JHA’s assets now.

⁶ To be clear: the Board is not asserting, and has never concluded that operational complexity and inefficiency, *in and of itself*, would justify rejecting the Wyoming Jet application. To that end, the Board decided to prepare an RFP for a second FBO before receiving the JHA offer.

Exhibit 37 (November 1, 2017, Minutes) at Exhibit B. Wyoming Jet has not, and cannot, refute this data.

The proposal to purchase JHA's assets for \$26 million is not "on-its-face-ridiculous" as Wyoming Jet asserts. Complaint at 5. To the contrary, it is squarely consistent with the Board's fiduciary responsibility and grant assurance obligations. It will enhance the Board's financial position, which can help ensure better aeronautical services. *Id.* at 6 (Board Member Braun's statement). It will enhance the Board's ability to "govern the airport destiny to the future." (Board Member Blann's statement). And it will permit the Board to retain more control over the effects of general aviation, which is extremely important given the Airport's location within Grand Teton National Park. *Id.* (Board Member Gibson Scott's statement).

Wyoming Jet portrays the Board's actions as mere gamesmanship, but offers no facts to support its inflammatory theory. To the contrary, the facts show that the Board reached this extremely difficult decision only after robust deliberation and review of detailed financial and operational data presented by qualified industry experts. **Exhibit 37** (November 1, 2017, Minute) at 6 ("this is the biggest decision the Board has made in a long time") (Board Member Blann). The Minimum Standards expressly stipulate that, when assessing proposed FBO activities at the Airport, the Board:

... must determine if the land and/or facilities proposed are available for use as an FBO, and whether their use as an FBO is in the best interest of the public, considering the limited size of the Development Sub-Zone defined in the Interior Agreement.

Exhibit 4 (Minimum Standards) at 2.8.1. In the end, the Board did just that: It weighed the interests of the private sector and competition against its obligation to ensure the long-term viability of the Airport. **Exhibit 37** (November 1, 2017, Minute) at 6.

B. The Board Has Not Granted Any Impermissible Exclusive Right to Jackson Hole Aviation.

1. Although JHA operated as a sole FBO for many years, the Board never conveyed an impermissible exclusive right.

At no time has the Board ever condoned or promoted an exclusive right for one entity to operate the FBO at JAC. Even though JHA has been the only FBO since 1996, the Board has consistently and vigilantly protected against violations of Grant Assurance 23. The original 1991 Master Operating Agreements with JHA's predecessors-in-interest state clearly that:

The Board has and may allow certain portions of the Airport to be used by other fixed-base or other operators at any time, and Operator shall not interfere in any manner with said other fixed-base operator(s) or with the facilities granted to such operator(s). Nothing herein contained shall be construed to grant or authorize the granting of an exclusive right prohibited by Section 308 of the Federal Aviation Act of 1958, as amended, and the Board reserved the right to

grant to others the privilege and right of conducting any one or all of the aeronautical activities specified herein, or any other activities of an aeronautical nature.

Exhibit 6 (Satellite Aero Operating Agreement) at ¶ 9.8; *see also* **Exhibit 7** (JH Aircraft Management) at ¶ 9.8. The 2003 Agreement To Grant First Right To Lease continues this clear directive. **Exhibit 10** at ¶ E (“the granting of such a first right to lease would be for valuable consideration to the Board, in the public interest, and would not constitute the granting of any exclusive right prohibited by law ...”); *see also* **Exhibit 11** (First Right To Lease) at ¶¶ G. and 5. JHA’s fuel farm leases contain similar terms. *E.g.*, **Exhibit 13** (North Fuel Facility Lease) at ¶ 3.12 (“No Exclusive Right and Compliance with Law”); **Exhibit 14** (South Fuel Facility Lease) at ¶ 3.12 (same). And JHA’s hangar leases are no different. *E.g.*, **Exhibit 15** (Hangar 2 and 3 Lease) at ¶ 9.8 (“Non-Exclusive Right”); **Exhibit 16** (Hangar 4 and 5 Lease) at ¶ 9.8 (same).

The law is well established that the mere absence of competition, *i.e.*, the presence of a single FBO at an airport, is not necessarily a violation of Grant Assurance 23. *Compare*, Wyoming Jet Complaint at 3 (“Prior to 1996, there were two competing FBOs at the Airport, however they merged in 1996, resulting in the sole remaining monopoly-enjoying FBO”) *with* FAA Order 5190.6B at ¶ 8.6 (where the sponsor has not entered into an express agreement, commitment, understanding, or apparent intent to exclude other reasonably qualified enterprises, the FAA “does not consider the presence of only one provider engaged in an aeronautical activity as a violation of the exclusive rights prohibition.”). Predictably, Wyoming Jet does not point to a single instance in which the Board has taken action, or failed to take action, which would promote an exclusive right.

2. The Board’s 2003 Agreement To Grant First Right To Lease did not violate Assurance 23.

Granting options or preferences on future airport lease sites to a single service provider is not *per se* impermissible. An option may be construed as an intent to grant an exclusive right only where it would allow an existing tenant to essentially protect space that it cannot put to gainful aeronautical use in a reasonable period of time (so called impermissible land banking). Order 5190.6B at ¶ 8.7(b)(1). The principle underlying the prohibition on land banking is simple: one FBO should not be able to lease property in excess of its reasonable needs for the purpose of foreclosing or limiting competition. But the key is the FBO’s reasonable needs.

Where the grant of an option is the result of reasonable consideration of the benefits to aeronautical activity at the airport and does not reserve undeveloped space in excess of the tenant’s reasonable future needs, it does not violate Grant Assurance 23. *See, e.g., Wilson Air Ctr., LLC v. Memphis and Shelby Cty. Airport Auth.*, FAA Docket No. 16-99-10, Director’s Determination at 26 - 27 (Oct. 2, 2000) (finding that the award of lease options to one tenant was reasonable, in part because it would assist in the pursuit of the efficient layout of the Airport). This is the case at JAC.

The 2003 First Right To Lease acknowledged a valuable aeronautical contribution by JHA in the form of at least \$1,000,000 of improvements to Airport facilities that would revert to the Board at

the end of the lease. Moreover, there is no specter of impermissible land-banking at JAC. JHA uses, and has always used, all of its real property. There is no vacant JHA leasehold property.

Most importantly for the Wyoming Jet complaint, there is no evidence that the JHA leasehold has, or could, preclude a competitive FBO from operating at JAC. In fact, the Board found precisely the opposite after examining the operational feasibility of a second FBO. **Exhibit 30** (May 17, 2017, Minutes). The Board had limited the lease terms for Hangars 2 and 3 and the North Fuel Facility to one-year, thus making room for a possible second operation, precisely to avoid any assertion that it had entered into long term leases with JHA without requiring it to make a significant capital investment. As with Wyoming Jet's other complaints, this argument is a pure straw man, manufactured solely to justify its legal theory.

As a final matter, the fact that the Board voted to execute the new JHA hangar leases 10 minutes before its vote on the Purchase Agreement is not (indeed, *cannot*) be legally relevant. Besides, the Board was obligated to act on the JHA leases in November 2017 (and not eight months later as Wyoming Jet asserts, *see* Complaint at 5) because of the peculiar mechanics of the First Right to Lease. **Exhibit 11** (First Right) at ¶ 2; *see also supra*, footnote 1.

3. There has been no unreasonable delay in considering the Wyoming Jet application.

Wyoming Jet complains of delays both before and after the Board decision in November 2017 to exercise its proprietary exclusive right. But Wyoming Jet has offered nothing substantive to support its argument that the Board acted unreasonably or in violation of any legal obligation. In fact, the schedule and process that the Board undertook between receipt of Wyoming Jet's formal application in April and its decision in November was exactly what Wyoming Jet sought: the Board carefully considered the Wyoming Jet proposal for a second FBO.

In April 2017, immediately upon receipt of Wyoming Jet's formal application, the Board directed staff to examine: (1) whether there was sufficient land and facilities to support a second FBO, (2) whether a second FBO could operate safely at JAC, and (3) whether a second FBO was in the best interests of the Airport and its users. **Exhibit 29** (Resolution 2017-06). In May, after the Board heard persuasive arguments from Wyoming Jet about the ability to accommodate a second FBO; it agreed with Wyoming Jet, concluded that a second FBO could physically be accommodated at JAC, and directed staff to draft an RFP to solicit bids. **Exhibit 30** (May 17, 2017, Minutes) at 2 and Exhibit 1. In a several-month process that was expedited – not prolonged as Wyoming Jet asserts – the Board had consultants examine and design a potential layout to accommodate a second FBO.

The elapsed time from April to November 2017 was not only minimal compared to most airport planning and development processes but, more importantly, was not prejudicial to Wyoming Jet or any other prospective second FBO applicant because the critical path to development of a second FBO was the operation of the new fuel facility which was not to become operational until 2018. **Exhibit 35** (August 16, 2017, Minutes) at 5. In other words, even if the Board had short-circuited its due diligence, and moved even faster, a prospective new FBO could not have been

able to begin operations any sooner. Wyoming Jet suffered no disadvantage because of the Board's deliberate process.

Moreover, Wyoming Jet's outrage at the delays *after* November 2017 is peculiar given that the schedule has been entirely its own fault. Wyoming Jet alleges that the Board cannot assert its exercise of the proprietary exclusive rights because it is permitting JHA to operate an FBO. But this conveniently ignores the obvious – namely, that the *sole* reason the Board is not already operating the FBO is that Wyoming Jet filed a lawsuit seeking to prevent the Board from doing just that!

It appears that the only remedy that would satisfy Wyoming Jet would be to allow a second FBO to operate at the Airport in the interim period until its lawsuit has been resolved and the Board acquires the FBO assets. But that is not practical at JAC. The layout of newly constructed FBO facilities that would be necessary for a second FBO is not the same as the layout of newly constructed FBO facilities that will be necessary when the Board actually operates a single FBO under its proprietary exclusive right. And the differences are not minor: the location of the offices, the shared ramp space, the roadways *and* parking change depending on whether the Airport is designed for one or two FBOs. **Exhibit 37** (November 1, 2017, Minutes) at 4; *compare, Figure 3 with Figure 4*. Particularly here, where available space is extremely tight, construction of new FBO facilities for a second FBO for only a short period of operation would be extremely wasteful of scarce resources.

The Board's hands are effectively tied. It has exercised its proprietary exclusive right, but cannot act to effectuate that right until Wyoming Jet's lawsuit is resolved. Under these circumstances, the Board's need to wait for resolution of Wyoming Jet's legal action is entirely reasonable. *See, e.g., U.S. Aerospace Inc., FAA Docket No. 16-98-06, Director's Determination* (sponsor's refusal to accept application for operator to use its fuel tanks to provide FBO fueling services, which refusal was based on its desire to first resolve the legal status of the fuel tanks, was neither pretext to support an otherwise improper delay nor impermissible grant of a prohibited exclusive right).

C. The Board Has Not Unjustly Discriminated Against Any Party at JAC.

Wyoming Jet also fails to provide any credible evidence of unjust discrimination at JAC.

Wyoming Jet accuses the Board of unjustly favoring corporate jet aircraft over piston aircraft. Complaint at 6-7 & 11. But this argument is not borne out by the facts. That the Board desires to create a “sense of place” that is representative of a first-class Jackson Hole mountain lodge” is not evidence of discrimination. *E.g., Complaint at 11*. Neither is the Board's decision to remove antiquated hangars to make room for a new above-ground fuel facility and new hangars – particularly when the new hangars will accommodate the displaced aircraft and provide *more* parking on the severely limited ramp. *E.g., Exhibit 26* (February 22, 2017, Minutes) (the demolition of hangar 3 will create 30,000 square feet of additional parking space).

It is important, too, to remember that the need ultimately to replace these facilities had already been identified *two decades earlier*, in the 1998 JAC Master Plan Update, which noted: “By the

year 2013, two of the northerly FBO buildings would be removed as dictated by demand. T-hangars would be replaced by a more efficient arrangement of hangars.” **Exhibit 3** (Master Plan Update) at 6-23. And, the need to focus on turbine-powered aircraft is supported by the forecast data, which showed that the future growth at JAC would be in turbine-powered, not piston powered aircraft. **Exhibit 5** (Plan) at Forecast Summary, 7; *see also*, **Exhibit 3** (Master Plan Update) at 5-27 (“No requirement for additional individual hangars has been identified because of the limited growth expected for smaller general aviation aircraft.”).⁷ Furthermore, the displacement of the prior hangar users – while admittedly inconvenient – is only temporary. *E.g.* **Exhibit 26** (February 22, 2017, Minutes) at 3 (“the 16 planes are at the forefront of the Airport’s concerns and the Airport will help facilitate finding new places during construction”).

In its effort to find some argument to support its assertions of unjust discrimination, Wyoming Jet also complains that the Board has approved fuel price increase “without reference to nearby airports, but instead based on how much is charged for fuel at airports serving far-away ski resorts.” Complaint at 6. Wyoming Jet does not identify any legal violation – because there is none. FAA recognizes that individual airport sponsors will differ in their ability to be fully self-sustaining, given differences in conditions at each airport. Order 5190.6B at ¶ 17.5. Under this principle, airport sponsors have wide latitude to set rates and charges. Moreover, the 1983 Interior Agreement also requires that the rates of the Board’s lessees must be fair and reasonable, but in this context, “reasonableness:”

. . . shall be judged primarily by comparison with those current for airports of comparable character under similar conditions, with due consideration for length of season, availability and costs of labor and materials, a reasonable rate of return on capital invested, and other factors affecting pricing at the Jackson Hole Airport.

Exhibit 2 (Interior Agreement) at ¶ 9(b). Wyoming Jet’s desire that fuel prices at the Airport should reflect prices at “nearby airports” completely ignores the unique factors affecting prices in Jackson Hole, and is not supported by any applicable legal standard.

Finally, Wyoming Jet asserts that its CEO was told by someone that the Board was “planning to replace the light GA t-hangars with larger ‘jet hangars.’ ” Complaint at 6. This allegation is not only unsupported (the Complaint does not disclose the identity of the individual who purportedly made this statement), but it is also entirely at odds with the Board’s policy, goal or desire with respect to serving light general aviation aircraft at the Airport. As Executive Director Jim Elwood stated at the February 2017 Meeting: “[T]he Airport anxiously wants the 16 airplanes back and at a rate that is reasonable to the tenants.” **Exhibit 26** (February 22, 2017, Minutes) at 3

⁷ It is also difficult to understand how Wyoming Jet can credibly complain that the Board’s new hangars discriminate against piston aircraft when Wyoming Jet proposes to use similar-sized hangars for its FBO operation. *Compare*, Complaint at Exhibit 2 (Design RFQ) p. 9 (calling for three 120’ x 100’ aircraft storage hangars) *and* Complaint at 6 (chiding the Board for dismantling the outdated facilities in order to “make room for large jet hangars”), *with* **Exhibit 43** (Wyoming Jet FBO application) at 1 (proposing to construct 120’ x 120’ hangars).

D. The Financial Statement Issue Is A Red Herring.

Since 2013, all Airport net revenues have been pledged to secure repayment of revenue bonds used to fund the Airport Terminal Building expansion. These funds are contingently pledged for repayment of this debt. Since issuance of those bonds in 2013, Airport staff has considered those revenues (and the cash in reserve funds derived therefrom) as being “restricted” for purposes of their annual reporting to FAA because they are pledged to bond repayment. Accordingly, the Airport has reported that it has \$0 in “unrestricted” funds.

FAA’s Form 5100-127 (*Operating and Financial Summary*) instructs preparers that “Unrestricted Cash and Investments are cash and investments that have no externally imposed restrictions on their use. Unrestricted Cash and Investments may be designated by airports for other commitments.” *E.g.*, **Exhibits 50 - 53** (Revised Forms 5100-127 for fiscal years 2014 – 2017) at 2.⁸ Recognizing the complexity of this concept, FAA’s form explicitly states: “To further understand unrestricted cash and investments, as well as other items in the Form 127, please refer to this entity’s Comprehensive Annual Financial Report or contact the airport directly.” *Id.*

It is regrettable that Wyoming Jet did not follow FAA’s recommendation and raise its concern about the Airport’s financial reporting prior to filing its Part 13 Complaint. Regardless, the issue is now moot. Upon being provided with a copy of Wyoming Jet’s Part 13 complaint, the Board immediately reviewed this issue with FAA and determined that it should include its internally-restricted funds in the “Unrestricted Cash and Investments” line for reporting to the FAA. The issue was swiftly resolved. On September 26 and 27 (mere days after the Complaint was filed), staff filed updated forms with FAA to correct this line item to reflect its understanding of the meaning of the form’s instructions. **Exhibits 50 - 53.**

For the record, there was never any formal violation, but that did not deter Wyoming Jet from hypothesizing that the Board may have been “trying to hide its ‘accumulation of surplus aeronautical revenues.’” Complaint at 12. This is speculative nonsense. The Board’s finances are audited each year, those audits are made public, and the Board has in no way concealed its finances. Moreover, the Board has been financing significant capital improvements year over year – which expenditures are widely reported and openly documented. That the Board has reserves that will help finance these improvements is not only evidence of good management, but also entirely consistent with FAA’s *Compliance Manual*. FAA Order 5190.6B ¶ 17.9 (“Reasonable reserves and other funds to facilitate financing and to cover contingencies are not considered revenue surpluses.”) The Board welcomes FAA’s scrutiny of its reserve funds and is confident that, in light of the Board’s Capital Improvement Plan, such revenues are not in fact “surplus.”

⁸ This language is somewhat misleading and Airport staff has interpreted it to mean that, when reporting “Unrestricted Cash and Investments,” sponsors should not list cash or investments that are pledged either externally or internally.

E. The Board's Fee and Rental Structure Is Fair And Reasonable.

Wyoming Jet's *ad hominem* attacks on the Board are not related to any grant assurance obligations and are inappropriate in a Part 13 proceeding. Further discussion of these arguments and Wyoming Jet's rates and charges is unnecessary, because FAA has already determined that Wyoming Jet has not substantiated any violation of Grant Assurance 24. **Exhibit 44** (October 18, 2018, FAA Letter) at 2.

V. CONCLUSION

The Board and its staff take seriously their obligations to comply with both the letter and the spirit of the law and their Grant Assurance obligations in deciding to exercise the proprietary exclusive right. The Board has acted deliberately, relying upon technical data and expert advice in evaluating the practical and financial wisdom of exercising its legal right. It has acted carefully, to ensure that the rights of all parties (including both the existing FBO and prospective additional FBOs) are fully protected and respected. It has acted transparently, hearing from interested parties and carefully considering each party's arguments, before taking action. And, to the extent there has been any delay in the process, it is due solely to the impediments that Wyoming Jet itself has erected to thwart a swift resolution of the question of control over FBO facilities.

In the end, Wyoming Jet may indeed be unhappy with the Board's decision. While that is understandable, it is not legally cognizable. Wyoming Jet cannot point to a single action, a single deliberation, a single statement or a single fact that undermines the rationality or legitimacy of the Board's decision to exercise its proprietary exclusive right. Wyoming Jet has failed to present evidence, much less meet its burden under Part 13, to demonstrate any violation of the Board's Grant Assurance obligations.

Respectfully submitted this 21st day of November, 2018,

Jackson Hole Airport Board

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