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## CURRENT STATE OF THE LAW IN AIRCRAFT NOISE POLLUTION CONTROL

MAIRIN K. NORTH

### INTRODUCTION

Noise, defined as "unwanted sound,"<sup>1</sup> has become a global problem.<sup>2</sup> It is said that the United States is the noisiest country on the planet, with noise pollution reaching crisis proportions.<sup>3</sup> There are countless sources of noise; construction equipment, industrial machinery, automobiles, and aircraft are some of the more glaring examples. There are many adverse effects, both physiological and behavioral, from noise; hearing loss or impairment, interference with sleep, fatigue, pain in the auditory systems, loss of equilibrium, stress and debilitating effect on human organs, speech interference, dream interruption, hindrance of concentrated mental effort, interference with task performance, annoyance and irritability, interference with relaxation and recreation, and feelings of loss of privacy.<sup>4</sup>

Attention has been focused on aircraft noise abatement due to the severity of the problem.<sup>5</sup> In the United States approximately six million people live where the levels of aircraft noise create a significant annoyance.<sup>6</sup> Further, approximately 600,000 of these citizens live in areas severely impacted by aircraft noise.<sup>7</sup>

Other aspects of aircraft noise pollution which makes a solution desirable are its monetary cost to airport proprietors and the safety hazards caused by airport noise-abatement procedures. In the last five years, noise-related litigation for nuisance and inverse condem-

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<sup>1</sup> J. HILDEBRAND, NOISE POLLUTION AND THE LAW 5 (1970).

<sup>2</sup> *Id.* at 4.

<sup>3</sup> Hatfield, *Noise, the Gathering Crisis*, 1 ENV'T L. 33 (1970).

<sup>4</sup> HILDEBRAND, *supra* note 1, at 4, 78-79; P.L.I., CURRENT DEVELOPMENTS IN ENVIRONMENTAL REGULATION AND LITIGATION 121-22 (1976); U.S. DEP'T OF TRANSPORTATION, AVIATION NOISE ABATEMENT POLICY 17 (1976) [hereinafter cited as DOT NOISE POLICY].

<sup>5</sup> Hatfield, *supra* note 3, at 58.

<sup>6</sup> DOT NOISE POLICY, *supra* note 4, at 17.

<sup>7</sup> *Id.*

nation have resulted in airport proprietors paying over \$25,000,000 in legal judgments and settlements and over \$3,000,000 in legal fees, expert testimony, and other defense efforts.<sup>8</sup> Airport noise controls, such as taking off and landing over water, have caused the International Federation of Air Line Pilots Association to rate several U.S. airports as "critically deficient" in safety features.<sup>9</sup>

Although aircraft noise cannot be eliminated unless man returns to the glider,<sup>10</sup> technology, which must bear great responsibility for noise pollution, can provide some answers.<sup>11</sup> Quieter aircraft have been designed and there are "retrofit"<sup>12</sup> packages available for reducing noise levels of older aircraft. Man must work in conjunction with technology to find a solution to this global problem.

### *Traditional Legal Remedies*

The traditional legal remedies for one adversely affected by aircraft noise have been nuisance actions and inverse condemnation suits. Plaintiffs look to the courts to compensate them for the damage caused by noise. It was hoped that the monetary costs to the defendants would result in some elimination of noise.

The leading case of this type is *United States v. Causby*,<sup>13</sup> in which the United States Supreme Court held that continued low-altitude flights by U.S. military aircraft, which made the plaintiff's property unsuitable for a chicken farm, constituted a wrongful taking of an air easement, entitling the plaintiff to compensation under the fifth amendment. This decision, combining elements of trespass and elements of nuisance, marked "the advent of the theory of inverse condemnation."<sup>14</sup> Although the court recognized that the

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<sup>8</sup> *Id.* at 18.

<sup>9</sup> NEWSWEEK, April 11, 1977, at 53.

<sup>10</sup> DOT NOISE POLICY, *supra* note 4, at 2.

<sup>11</sup> HILDEBRAND, *supra* note 1, at 4.

<sup>12</sup> Retrofit involves a physical modification of present aircraft.

<sup>13</sup> 328 U.S. 256 (1946).

<sup>14</sup> Russell, *Aircraft/Airport Noise: Current Legal Remedies and Future Alternatives*, 42 INS. COUNS. J. 92 (1975). "Inverse condemnation is the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 101 n.1 (1962).

air is a public highway and that Congress had placed navigable airspace within the public domain,<sup>15</sup> the flights in question were not found to be within the navigable airspace which Congress placed within the public domain. The court found that a landowner has, as an incident to his ownership, a claim to the superadjacent airspace, and further that invasions of this airspace were "in the same category as invasions of the surface."<sup>16</sup> The finding of an actual invasion of the plaintiff's property, an element of trespass, distinguished the case from a legalized nuisance case.<sup>17</sup>

The later case of *Griggs v. Allegheny County*<sup>18</sup> was also based upon a theory of inverse condemnation. There, the plaintiff and his family were forced to move by the noise, vibration and danger from regular and frequent low altitude flights over their home. The noise on takeoff was comparable "to the noise of a rivetting machine or steam hammer" and on let down "to that of a noisy factory."<sup>19</sup> The United States Supreme Court held the local governmental airport authority liable for a taking of an air easement, so that compensation was required by the fourteenth amendment.<sup>20</sup> The court reasoned that it was the local authority that decides whether to build an airport and where to locate it<sup>21</sup> and concluded that in designing the airport it did not acquire enough private property by constitutional standards,<sup>22</sup> i.e., to satisfy the fourteenth amendment's requirement of just compensation.

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<sup>15</sup> Under those statutes [Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. § 171, as amended by Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. § 401] the United States has 'complete, and exclusive national sovereignty in the air space' over this country. 49 U.S.C. § 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce through the navigable air space of the United States.' 49 U.S.C. § 403. And 'navigable air space' is defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. § 180.

328 U.S. 256, 260 (1945).

<sup>16</sup> *Id.* at 265.

<sup>17</sup> *Id.* at 262. The court distinguished the case from *Richards v. Washington*, 233 U.S. 546 (1913) in which property owners whose land was adjacent to a railroad line were unable to recover for damages resulting from the noise, vibration and smoke caused by the train.

<sup>18</sup> 369 U.S. 84 (1962).

<sup>19</sup> *Id.* at 87.

<sup>20</sup> *Id.* at 84-85.

<sup>21</sup> *Id.* at 84.

<sup>22</sup> *Id.* at 90.

The federal courts have followed *Causby* in requiring a physical invasion of the airspace over the plaintiff's property as a prerequisite to recovery. *Batten v. United States*<sup>23</sup> represents the position that a physical trespass on or above the plaintiff's land is a requirement of a "taking." In *Batten*, the Tenth Circuit Court of Appeals found that although the vibrations, smoke, and noise produced by military jet aircraft interfered with the use and enjoyment of the plaintiff's property, such interference was not a taking<sup>24</sup> because there was no physical invasion. The court said, "We are cited to no decisions holding that the U.S. is liable for noise, vibration, or smoke without a physical invasion. In *Causby*, *Griggs*, and a number of lower court decisions . . . there were regular flights over the property. Absent such a physical invasion recovery has been uniformly denied."<sup>25</sup>

The court in *Batten* recognized that some state constitutions avoid this result by providing the "private property shall not be *taken or damaged* for public use without compensation,"<sup>26</sup> while the fifth amendment to the U.S. Constitution simply provides "nor shall private property be *taken* for public use, without just compensation."<sup>27</sup> Therefore, in the courts of states so providing, compensation can be awarded for damage caused by noise and vibration without a direct physical overflight. Federal courts and the courts of states whose constitution makes no provision for "damaging" of property require a physical overflight for compensation.

Also responsible for the difference between the federal courts and some state courts is the adoption by some state courts of the dissent in *Batten*, that "a constitutional taking does not necessarily depend on whether the Government physically invaded the property damaged."<sup>28</sup> For these courts the constitutional test in each case is:

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whether the asserted interest is one in which the law will protect;

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<sup>23</sup> 306 F.2d 580 (10th Cir. 1962).

<sup>24</sup> *Id.* at 585.

<sup>25</sup> *Id.* at 584.

<sup>26</sup> *Id.* at 583-84 (emphasis added). 2A. NICHOLS, EMINENT DOMAIN § 6.44, at 151-52 (3d ed. 1976) lists those states whose constitutions provide that private property should neither be taken nor damaged for public use without just compensation.

<sup>27</sup> U.S. CONST. amend. V (emphasis added).

<sup>28</sup> 306 F.2d at 586.

if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the Citizen, requires the burden imposed to be borne by the public and not by the individual alone.<sup>29</sup>

*Thornburg v. Port of Portland*<sup>30</sup> and *Martin v. Port of Seattle*<sup>31</sup> are the leading cases representing this line of thought.

In *Thornburg*, the Supreme Court of Oregon said that it found the dissent in *Batten* to represent the better-reasoned analysis of the legal principles involved.<sup>32</sup> The plaintiffs contended that systematic flights passing close to, but not directly over, their land constituted a taking of an easement.<sup>33</sup> The Oregon Constitution only allowed compensation for "taking," not for "damaging."<sup>34</sup> The court was squarely presented with the question of whether a noise- nuisance can amount to a taking.<sup>35</sup> The court said "there is a question, in each case, as a matter of fact, whether or not the governmental activity complained of has resulted in so substantial an interference with the use and enjoyment of one's land as to amount to a taking of private property for public use."<sup>36</sup> The court felt this question was "equally relevant whether the taking is trespassory or by a nuisance,"<sup>37</sup> i.e., whether the flights passed over the land or not. The reasoning of the court was that a "nuisance can be such an invasion of the rights of a possessor as to amount to a taking, in theory at least, any time a possessor is in fact ousted from the enjoyment of his land."<sup>38</sup> It held that a taking occurs whenever the government acts in such a way as to substantially deprive an owner of the useful possession of that which he owns, whether by repeated trespass or by repeated non-trespassory invasions called "nuisance."<sup>39</sup>

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<sup>29</sup> *Id.* at 587.

<sup>30</sup> 233 Or. 178, 376 P.2d 100 (1962).

<sup>31</sup> 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

<sup>32</sup> 376 P.2d at 104.

<sup>33</sup> *Id.* at 102.

<sup>34</sup> *Id.* at 103; see Stoebe, *Condemnation By Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 225 (1967).

<sup>35</sup> 376 P.2d at 101.

<sup>36</sup> *Id.* at 105.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 106.

In *Martin v. Port of Seattle*, the trial court held that with respect to those property owners whose land was subjected to direct overflights by aircraft, the overflights amounted to a taking of an air easement and for the property owners whose land was near but not directly under the flights, the flights accounted to a damaging of their property.<sup>40</sup> The Supreme Court of Washington affirmed, saying it was substantially in agreement with the trial court but would not stress any of the proposed distinctions between "taking" and "damaging" of a property right, as the Washington Constitution provided a basis for compensation in either instance.<sup>41</sup>

The court expressed its preference for the dissent in *Batten*<sup>42</sup> and said that it was "unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land."<sup>43</sup> In discussing *Causby* and *Griggs*, the court found that "the reliance placed upon the high noise level by the Supreme Court in both decisions, without detectable preoccupation with its angle of incidence, strongly indicates that the holdings are not limited to those instances where the aircraft passes directly over the land."<sup>44</sup>

The question of what legal remedies are available in light of a federal preemption in the field of aircraft noise regulation was presented in *Luedtke v. County of Milwaukee*.<sup>45</sup> The Seventh Circuit Court of Appeals held that since federal laws and regulations have preempted local control of aircraft flights the defendants could not be charged with negligence, the creation of a nuisance, or violation of a state law making it lawful for an aircraft to fly at such low altitudes as to interfere with the then-existing use of the land and water below, as long as the flights were in accordance with federal laws and regulations.<sup>46</sup> If the flights had in fact resulted in a "taking" of the plaintiff's property, they could seek compensa-

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<sup>40</sup> 391 P.2d 540, 543 (Wash. 1964), cert. denied, 379 U.S. 989 (1965).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 546.

<sup>43</sup> *Id.* at 545.

<sup>44</sup> *Id.*

<sup>45</sup> 521 F.2d 387 (7th Cir. 1975).

<sup>46</sup> *Id.* at 391.

tion in an inverse condemnation action.<sup>47</sup>

Inverse condemnation suits by private citizens, although they may result in compensation for the damage caused by noise, are not real solutions—they do not solve the problem by abating or eliminating noise in any way, and have not served as an effective anti-noise device. Consequently, other alternatives have been turned to; among them are political solutions.

### *Political Solutions*

Various political solutions were examined by Joseph Vittek, Jr., in a 1972 article on airport noise control.<sup>48</sup> These solutions include alternatives to air service such as improved railways or highways, relocation of airports in less populated areas, renovation of present airports, zoning the land around airports so that land use is compatible with noise and imposition of airport taxes based on noise levels. A limitation and curfew on the type of aircraft that can use a facility, the number of operations permitted, and the time of those operations was another political solution considered.<sup>49</sup>

None of these solutions is ideal for various reasons. Rail and highway transportation are not free from noise, are expensive to construct, and cannot match the speed of air service. Most airport relocation efforts have been blocked by residents in the selected area, and, even if a new airport is built, the older airport may not be permanently closed. Additional land is not always available for renovation of present airports, and increased neighborhood objection is inevitable since there will probably not be enough land for sufficient noise dissipation and since more aircraft will use the expanded facilities. Zoning of the land around airports is an ineffective solution because existing uses of property surrounding older airports often cannot be zoned out of existence. As for taxation, most airports are operated by government units

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<sup>47</sup> *Id.*; see *San Diego Unified Port Dist. v. Superior Court of San Diego*, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), which followed *Luedtke* and said "nothing in the *Burbank* decision suggests an airport operator is relieved by federal law of the common law duty to act notoriously as a proprietor. If the Port District has tortiously managed and maintained the facilities at Lindbergh Field to the harm of some or all of the plaintiffs, the action is not precluded by the doctrine of federal preemption." 136 Cal. Rptr. at 567.

<sup>48</sup> Vittek, *Airport Noise Control—Can Communities Live Without It? Can Airlines Live With It?*, 38 J. AIR L. & COM. 473, 492 (1972).

<sup>49</sup> *Id.* at 484-89.



and are tax-exempt, and many airports are located in different political subdivisions from the people most affected by the noise.<sup>50</sup>

Curfews, such as airport night curfews during the hours people sleep, deserve special mention since they are increasing nationally and internationally<sup>51</sup> and seem a partial solution. Unrestricted curfews, however, could adversely affect scheduled airline service, congestion during non-curfew hours, air cargo, U.S. mail, banks, employment and industry.<sup>52</sup> Further, as a result of federal preemption of the field, curfews may only be imposed by a state or locality operating as an airport proprietor.<sup>53</sup>

### *Local Regulation and Federal Preemption*

Local regulation represents another method of aircraft noise control. Local governments have attempted to abate aircraft noise through regulation based on their police powers. In regulating noise, however, they face a potential conflict between state and federal spheres of control, and a possible Supremacy Clause problem. "[F]ederal control is exclusive when a conflict does arise and the area would be pre-empted by the national government under the supremacy clause."<sup>54</sup>

The first major cases dealing with federal preemption in this area were *Allegheny Airlines, Inc. v. Village of Cedarhurst*<sup>55</sup> and *American Airlines, Inc. v. Town of Hempstead*,<sup>56</sup> both involving Kennedy Airport in New York. *Cedarhurst* was a 1956 case involving a suit to enjoin enforcement of a village ordinance prohibiting air flights at less than 1000 feet when passing over the village of Cedarhurst.<sup>57</sup> The Second Circuit Court of Appeals held that the federal regulatory system had preempted the airspace field below

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<sup>50</sup> *Id.*

<sup>51</sup> Koziharow, *Airport Curfews Jeopardize Commerce*, AV. WEEK & SPACE TECH., Feb. 23, 1976, at 27.

<sup>52</sup> *Id.* at 28.

<sup>53</sup> See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973).

<sup>54</sup> Vittek, *supra* note 48, at 494.

<sup>55</sup> 238 F.2d 812 (2d Cir. 1956).

<sup>56</sup> 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

<sup>57</sup> 238 F.2d at 812.

as well as above 1000 feet from the ground, so the ordinance was invalid.<sup>58</sup>

Next, the Town of Hempstead attempted to regulate noise levels rather than air traffic, hoping in this way to avoid the federal preemption found in *Cedarhurst*. The district court, however, found the ordinance invalid as conflicting with Federal Aviation Administration (FAA) landing and takeoff regulations for Kennedy Airport, holding that "the legislation operates in an area committed to federal care, and noise limiting rules operating as do those of the ordinance must come from a federal source."<sup>59</sup> The court had found it the "legal equivalent of the invalid Cedarhurst Ordinance"<sup>60</sup> for "the aircraft and its noise are indivisible; . . . [t]o exclude the aircraft noise from the Town is to exclude the aircraft . . . . [T]he ordinance does not forbid noise except by forbidding flights."<sup>61</sup>

The City of Burbank attempted to distinguish its ordinance from those of Cedarhurst and Hempstead and thus hopefully avoid the fate that met those ordinances. Instead of regulating the flights of aircraft themselves, Burbank attempted regulation of flights by limiting the number of hours of airport land use. A city ordinance placed an 11 P.M. to 7 A.M. curfew on jet flights from the Hollywood-Burbank airport. The United States Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*<sup>62</sup> considered this ordinance and held it unconstitutional on the grounds of the Supremacy Clause.<sup>63</sup>

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<sup>58</sup> *Id.* at 813, 815; see *City of Newark v. Eastern Airlines*, 159 F. Supp. 750 (D.N.J. 1958).

<sup>59</sup> 272 F. Supp. at 231.

<sup>60</sup> *Id.* at 230.

<sup>61</sup> *Id.*

<sup>62</sup> 411 U.S. 624.

<sup>63</sup> *Id.* at 626. In determining whether Congress had intended to preempt the field, the court looked to the tests set forth in *Rice v. Santa Fe Elevator Corps.*, 331 U.S. 218 (1947).

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . [Or] the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose . . . . Or the state policy may produce a result incon-

Writing for the majority, Justice Douglas found a federal pre-emption of "airspace management," through section 1508 of the Federal Aviation Act<sup>64</sup> which provides that the "United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." He further found that the Noise Control Act of 1972,<sup>65</sup> which had been passed subsequent to the District Court and Court of Appeals judgments, although having no express provision for preemption, reaffirms and reinforces the conclusion that FAA, now in conjunction with the EPA, has full control over aircraft noise, preempting state and local control . . . . It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption.<sup>66</sup>

Justice Rehnquist, dissenting in the five to four decision, wrote that:

because noise regulation has traditionally been an area of local, not national, concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactment we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.<sup>67</sup>

In regard to the Federal Aviation Act,<sup>68</sup> therefore, Rehnquist found that the "Congress was not concerned with the problem of noise created by aircraft and did not intend to pre-empt its regulation."<sup>69</sup> As to section 611 of the Federal Aviation Act,<sup>70</sup> added by the 1968 amendments, he again found no preemptive intent.<sup>71</sup> Finally, with respect to the 1972 Noise Control Act,<sup>72</sup> he found that it "quite

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sistent with the objective of the federal statute.  
331 U.S. at 230.

<sup>64</sup> Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970 and Supp. V.), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

<sup>65</sup> 42 U.S.C. §§ 4901-4918 (1970).

<sup>66</sup> 411 U.S. at 633.

<sup>67</sup> *Id.* at 643 (quoting *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947)).

<sup>68</sup> 49 U.S.C. §§ 1301-1542 (1970).

<sup>69</sup> 411 U.S. at 644.

<sup>70</sup> 49 U.S.C. § 1431 (1970).

<sup>71</sup> 411 U.S. at 645-52.

<sup>72</sup> 42 U.S.C. §§ 4901-4918 (1970).

clearly intended to maintain the status quo between federal and local authorities.”<sup>73</sup>

The finding of federal preemption of airport noise control in *Burbank* led to a forecasting that the federal government would assume liability for noise along with its preemption of control. This was, however, not to be the case. This issue of who should bear the liability arose in the 1973 case of *Aaron v. City of Los Angeles*,<sup>74</sup> an inverse condemnation action against the City as proprietor of the Los Angeles International Airport.<sup>75</sup> The plaintiffs sought to recover for diminution of the value of their property due to jet noise. The City contended in defense that since there was federal preemption of navigable airspace, the City was immune from liability.<sup>76</sup> The California Court of Appeals answered that “the fact the flights are within the navigable airspace does not immunize the owner and operator of an airport for failure to appropriate the land and airspace necessary to provide an adequate approach way,”<sup>77</sup> citing among other cases, *Griggs*, *Martin*, and *Thornburg*.<sup>78</sup> The City also contended that since there was federal preemption of aircraft noise control, the government must bear liability for the damages.<sup>79</sup> The court, however, held that the contention that federal preemption precluded all state activity in aircraft noise control had been rejected in a previous case, *Loma Portal Civic Club v. American Airlines, Inc.*<sup>80</sup> The City was not

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<sup>73</sup> 411 U.S. at 652.

<sup>74</sup> 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975).

<sup>75</sup> That the airlines should bear liability for a “taking” of property was expressly rejected in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), where the court said:

It is argued that though there was a ‘taking,’ someone other than [Allegheny County] was the taker—the airlines or the C.A.A. acting as an authorized representative of the United States. We think, however, that [the County], which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense.

369 U.S. at 89. See *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

<sup>76</sup> 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

<sup>77</sup> 115 Cal. Rptr. at 173.

<sup>78</sup> *Id.*; see text accompanying notes 16-18, 28-42 *supra*.

<sup>79</sup> 115 Cal. Rptr. at 173.

<sup>80</sup> 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964). Owners of property near a public airport brought suit to enjoin commercial airlines from performing

"powerless to take steps to alleviate the problem of jet noise,"<sup>81</sup> since as an airport proprietor it could make rules regulating the use of the airport.<sup>82</sup> The court pointed out that in both the *Burbank* and *Hempstead* cases,<sup>83</sup> where the noise regulations were held invalid, the municipality was not the owner and operator of the airport,<sup>84</sup> and that in footnote fourteen of the *Burbank* decision, the Supreme Court had "expressly avoided decision as to the powers of a municipality as proprietor of the airport."<sup>85</sup>

In *Air Transport Association of America v. Crotti*<sup>86</sup> the *Burbank* footnote was also discussed where the District Court of Northern California said "that correlating right of proprietorship control is recognized and exempted from judicially declared federal preemption by footnote 14."<sup>87</sup> It accepted the footnote as making a distinction between a municipality's exercise of police power (the situation in *Burbank*) and a municipality's exercise of its power as an owner-operator of an airport.<sup>88</sup> In *Crotti*, the Air Transport Association sought declaratory and injunctive relief on the ground that California airport and aircraft noise standards were invalid under the Supremacy Clause and the Commerce Clause as implemented by controlling federal legislation and regulations.<sup>89</sup> The court found some of the state noise regulations<sup>90</sup> a per se unlawful

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certain flight operations. The defendants argued that refusal to grant the injunction could be supported on the ground of federal preemption, i.e., that state action affecting any aspect of flight operations is precluded by the extensive pattern of federal regulation in the field. The court disagreed and said:

[A]s was said in *Dowd Box Co. v. Courtney*, 368 U.S. 502. . . .

In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts.

394 P.2d at 554.

<sup>81</sup> 115 Cal. Rptr. at 175.

<sup>82</sup> *Id.*; see *Port of New York Authority v. Eastern Airlines, Inc.*, 259 F. Supp. 745 (E.D.N.Y. 1966) and *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969).

<sup>83</sup> See text accompanying notes 56, 59-73 *supra*.

<sup>84</sup> 115 Cal. Rptr. at 175.

<sup>85</sup> *Id.*

<sup>86</sup> 389 F. Supp. 58 (N.D. Cal. 1975).

<sup>87</sup> *Id.* at 64.

<sup>88</sup> *Id.* at 63.

<sup>89</sup> 389 F. Supp. at 58.

<sup>90</sup> "SENEL (Single Event Noise Exposure Levels) prohibitions applied to the

exercise of police power in the federally preempted area of aircraft in flight.<sup>91</sup> Other state noise regulations<sup>92</sup> were held not per se invalid as an invasion of a federally preempted area,<sup>93</sup> but were apparently a lawful exercise of local government proprietary powers. *Crotti* thus illustrates that local regulation by a municipality acting as an airport proprietor in the field of noise control does not necessarily invade a federally preempted area. Later cases have also recognized this and upheld local regulation by a municipality acting as an airport proprietor.<sup>94</sup>

### *Local Regulation and the Commerce Clause*

In addition to being declared invalid due to federal preemption, local regulations can be declared void because they unduly burden interstate commerce and are thus unconstitutional under the Commerce Clause.<sup>95</sup> It would not make any difference in such cases whether the local government was acting in its proprietary capacity

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inseparable feature of noise generated by an aircraft directly engaged in flights." 389 F. Supp. at 62.

<sup>91</sup> *Id.* at 65.

<sup>92</sup> "CNEL (Community Noise Equivalent Level) standards prescribed for continued operation of airports with monitoring requirements, which focus upon the arrival of a prescribed ultimate maximum noise level and limiting the land uses subjected thereto around airport facilities." 389 F. Supp. at 62.

<sup>93</sup> 389 F. Supp. at 65. The court did not reach the question of whether the CNEL regulations were "in fact unrealistic, arbitrary and unreasonable, and an abuse of police powers constituting an unlawful burden or infringement upon any United States constitutional right of privilege held by a proprietor of an airport, or an unreasonable burden upon interstate and foreign commerce as utilized by aircraft." *Id.*

<sup>94</sup> See *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976), where the court held the city acting as airport proprietor was not precluded on the ground of federal preemption from regulation by a city ordinance which prohibited all aircraft exceeding a certain noise level from landing or taking off between the hours of 11:00 P.M. and 7:00 A.M., although it was clear that this ordinance would constitute an impermissible exercise of police power in an area preempted by Congress if passed by a state or local government not the proprietor of the airport. 418 F. Supp. at 420-25; and *British Airways Board v. Port Authority of N.Y.*, 558 F.2d 75 (2d Cir. 1977), where the court recognized the power of an airport proprietor to impose use restrictions based on noise considerations, but found it vested only with the power to promulgate reasonable non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs.

<sup>95</sup> U.S. CONST. art. I, § 8, cl. 3; see Goldstein, *Aviation Noise Abatement: Is There Room for Local Regulation?*, 60 CORNELL L. REV. 269, 286 (1975); Stein, *The Effect of the Federal Pre-emption of Noise Control and Air Pollution on Local Initiative: Can Prometheus be Unbound?*, 38 J. AIR L. & COM. 427, 432-33 (1972).

or not. As one commentator has noted, "In the absence of congressional action, the commerce clause seems to protect the free flow of interstate commerce from the hostile actions of state or local governments even when they take such actions in their proprietary capacity."<sup>98</sup>

In *American Airlines, Inc. v. Hempstead*,<sup>97</sup> the court found a Commerce Clause violation. "Legislation . . . that denies access to navigable air space by local rule cannot be regarded as a plain and forbidden exertion of the power to regulate commerce as such."<sup>98</sup> The Court mentioned the problem that could be created if neighboring towns imposed different and inconsistent rules.<sup>99</sup>

The District Court in the *Burbank* case<sup>100</sup> based its decision on both the Supremacy Clause and Commerce Clause in finding the ordinance unconstitutional. The Court of Appeals and the Supreme Court affirmed on Supremacy Clause grounds alone,<sup>101</sup> but the Supreme Court implied that the Commerce Clause could also have been the basis of the decision, noting that "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of FAA in controlling air traffic flow."<sup>102</sup>

In *National Aviation v. City of Hayward*<sup>103</sup> commercial airplane operators sought a declaration of unconstitutionality of a city ordinance which prohibited all aircraft exceeding a certain noise level from landing or taking off from the Hayward Air Terminal. Plaintiffs argued that the ordinance burdened interstate commerce by forcing them to make their flights from another airport and thereby impairing their ability to deliver the mail and newspapers

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<sup>98</sup> Goldstein, *supra* note 95, at 292-93. See *Kansas City S. Ry. v. Kaw Valley Drainage Dist.*, 233 U.S. 75 (1914) which held that "freedom from interference on the part of the State is not confined to a simple prohibition of laws impairing [interstate commerce], but it extends to interference by any ultimate organ." 233 U.S. at 78.

<sup>97</sup> See text accompanying notes 56, 59-61 *supra*.

<sup>98</sup> 272 F. Supp. at 232.

<sup>99</sup> *Id.*; see *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

<sup>100</sup> See text accompanying notes 62-73 *supra*.

<sup>101</sup> 411 U.S. at 626.

<sup>102</sup> *Id.* at 639.

<sup>103</sup> 418 F. Supp. 417 (N.D. Cal. 1976).

to their customers.<sup>104</sup> The court found any burden on interstate commerce was incidental and not excessive when weighed against the legitimate goal of controlling noise levels at the airport during late evening and morning hours.<sup>105</sup> It recognized the possibility that other municipalities might enact similar ordinances which would together then create an impermissible burden, but found that possibility was mere speculation at this time.<sup>106</sup>

### *The Federal Aviation Act and The Noise Control Act of 1972*

In addition to traditional legal remedies, political solutions, and local regulation, federal regulation has been considered a remedy to aircraft noise pollution. Prior to 1968, the FAA prescribed noise abatement regulations under the authority of section 307(e) of the Federal Aviation Act.<sup>107</sup> In 1968, Congress adopted section 611 of the Federal Aviation Act<sup>108</sup> which authorized the Administrator of the FAA to prescribe regulations for control and abatement of aircraft noise and sonic boom. That section, as amended, requires the FAA to publish Environmental Protection Agency (EPA) proposed regulations as a notice of proposed rulemaking. "[I]f the FAA does not adopt an EPA proposal as a final rule after notice and comment, it is obliged to publish an explanation for not doing so in the Federal Register."<sup>109</sup>

On November 18, 1969, the FAA promulgated the first aircraft noise regulations in Federal Aviation Regulations, Part 36.<sup>110</sup> These regulations set a limit on noise emissions of large aircraft of new design.<sup>111</sup> In 1973, the Part 36 standard was extended to cover all newly manufactured aircraft of already certificated types.<sup>112</sup>

The Noise Control Act of 1972<sup>113</sup> supplemented the FAA's rule-making authority. The Noise Control Act represents the federal government's first comprehensive venture into the field of noise

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<sup>104</sup> *Id.* at 427.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 428.

<sup>107</sup> 49 U.S.C. § 1348(c) (1970).

<sup>108</sup> 49 U.S.C. § 1431 (1970).

<sup>109</sup> 49 U.S.C. § 1431 (1970); DOT NOISE POLICY, *supra* note 4, at 30.

<sup>110</sup> 14 C.F.R. Part 36 (1977).

<sup>111</sup> DOT Noise Policy, *supra* note 4, at 30.

<sup>112</sup> *Id.*

<sup>113</sup> 42 U.S.C. §§ 4901-4918 (1970).



pollution control,<sup>114</sup> dealing with several sources of noise, including aircraft noise. Its purpose was to "establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products."<sup>115</sup> The Noise Control Act begins with the findings of Congress "that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population . . ."<sup>116</sup> and "that, while primary responsibility for control of noise rests with state and local governments, federal action is essential to deal with major noise sources in commerce, control of which require national uniformity of treatment."<sup>117</sup>

The Noise Control Act established a complicated arrangement between the EPA and the FAA.<sup>118</sup> Under the Act, the Administrator of the EPA was directed to conduct a nine month study of the

- (1) adequacy of FAA flight and operational noise controls;
- (2) adequacy of noise emission standards on new and existing aircraft;
- (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and
- (4) additional measures available to airport operators and local governments to control aircraft noise.<sup>119</sup>

The EPA Administrator also makes recommendations for aircraft noise standards,<sup>120</sup> although under section 611 of the Federal Aviation Act, the final decision as to the regulations is left to the FAA without the necessity of the EPA's consent.<sup>121</sup>

Although the FAA acted promptly in promulgating regulations for aircraft of new design in 1969 and newly manufactured aircraft of already certificated types in 1973, it has been accused of regula-

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<sup>114</sup> Note, *The Noise Control of 1972—Congress Acts to Fill the Gap in Environmental Legislation*, 58 MINN. L. REV. 273, 284 (1973).

<sup>115</sup> 42 U.S.C. § 4901 (1970).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Russell, *supra* note 14, at 97.

<sup>119</sup> 42 U.S.C. § 4906 (1977).

<sup>120</sup> 42 U.S.C. § 4906 (1977); see Note, *Environmental Law: The Noise Control Act of 1972*, 27 OKLA. L. REV. 55, 57 (1974).

<sup>121</sup> 49 U.S.C. § 1431 (1976).

tory paralysis in regard to aircraft already manufactured and operating.<sup>122</sup> Unfortunately, these older aircraft contribute the most to the noise pollution problem, with over seventy-seven per cent of the operating fleet not meeting federal noise standards.<sup>123</sup> The FAA finally took action regarding these aircraft with the adoption of the Aviation Noise Abatement Policy in November, 1976.<sup>124</sup>

### *The Aviation Noise Abatement Policy*

The FAA had been under pressure to act from several directions. In Congress, Representative Norman Mineta of California, introduced the Aircraft Noise Reduction and Airport Protection Act<sup>125</sup> in the House of Representatives on May 13, 1976, simultaneously accusing the FAA of a "prolonged labor"<sup>126</sup> and pointing out that although retrofit had been within the authority of the FAA since 1968, a retrofit rule has never been promulgated.<sup>127</sup> The proposed Act directed the FAA to promulgate regulations prescribing noise standards for operation of civil subsonic aircraft and prohibited the operation of aircraft that do not meet such requirements at the end of a five year period.<sup>128</sup> The proposed Act also authorized grants to individuals to retrofit or replace noncomplying aircraft with appropriations out of the Airport and Airway Trust Fund.<sup>129</sup> Mineta said "The real impact of this bill is to get the FAA and the Transportation Department to move."<sup>130</sup>

Pressure was also being brought by the states. A suit was filed by Illinois, Massachusetts and New York in the U.S. District Court for the District of Columbia asking for a "mandatory injunction directing FAA Administrator John L. McLucas either to adopt recommended noise abatement regulations or publish a detailed

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<sup>122</sup> DOT, NOISE POLICY, *supra* note 4, at 30.

<sup>123</sup> DOT NEWS, *Remarks Prepared for Delivery by Sec. of Trans. W. T. Coleman, at a News Conference on Aviation Noise and Aircraft Replacement Policy, Washington, D.C., Nov. 18, 1976, at 3.*

<sup>124</sup> DOT NOISE POLICY, *supra* note 4.

<sup>125</sup> H.R. 13783, 94th Cong., 2d Sess. (1976).

<sup>126</sup> CONG. REC. E2578 (daily ed. May 13, 1976).

<sup>127</sup> *Id.*

<sup>128</sup> H.R. 13783, Digest of Public General Bills, 94th Cong., 2d Sess., pt. 2 (1976).

<sup>129</sup> *Id.*

<sup>130</sup> AV. WEEK & SPACE TECH., June 7, 1976, at 33.

explanation for failing to prescribe such regulations."<sup>131</sup> A notification document sent earlier by Illinois said:

while there may previously have been arguable excuses for the Administration's failure to adopt regulations governing aircraft noise, the technology which has readily been available for a number of years now, the failure to at least publicly comment upon, if not adopt, regulations proposed and submitted by the Environmental Protection Agency pursuant to the Noise Control Act is inexcusable.<sup>132</sup>

In the fall of 1976, action was finally taken by the FAA. On October 21, 1976, President Ford advised the FAA and the Department of Transportation (DOT) that he had accepted their recommendation that action should be taken to extend current noise standards to domestic U.S. commercial airplanes in not more than eight years. He thereupon directed the FAA to promulgate noise compliance regulations not later than January 1, 1977.<sup>133</sup> In addition, the President put Congress on notice that he "will not accept its failure to act" on aviation regulatory reform.<sup>134</sup> Ford placed part of the blame on Congress, charging that "one reason U.S. commercial airlines have been unable to meet FAA noise standards is that some airlines could not afford to because of the outmoded regulatory approach of the CAB."<sup>135</sup>

At a news conference on November 18, 1976, Secretary of Transportation, William T. Coleman, Jr., announced the Aviation Noise Abatement Policy of the DOT and FAA, saying that "Aircraft noise is the number one aviation environmental problem facing this Department,"<sup>136</sup> and that although "some might argue that Federal action has been delayed too long, we hope the future . . . will show that this delay . . . has enabled us to develop a policy that will work and that will have a more lasting value over the longer term."<sup>137</sup>

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<sup>131</sup> AV. WEEK & SPACE TECH., Nov. 1, 1976, at 29.

<sup>132</sup> Kozicharow, *Illinois to Sue Over Noise Rules*, AV. WEEK & SPACE TECH., Aug. 2, 1976 at 28.

<sup>133</sup> DOT Noise Policy, *supra* note 4, at 1.

<sup>134</sup> *Id.*

<sup>135</sup> Aviation Daily, Oct. 22, 1976, at 282.

<sup>136</sup> DOT NEWS, *Remarks Prepared for Delivery by Sec. of Trans. W. T. Coleman, Jr., at a News Conference on Aviation Noise and Aircraft Replacement Policy*, Washington, D.C., Nov. 18, 1976, at 1.

<sup>137</sup> *Id.* at 2.

The Aviation Noise Abatement Policy announced by Coleman contains a Federal Action Plan, an Air Carrier Action Plan and a plan for Local Actions. Part of the Federal Action Plan deals with aircraft source noise regulation. For currently operating aircraft it establishes a schedule under which all jet aircraft in domestic service must comply, with Part 36 noise levels within six to eight years, starting January 1, 1977. Aircraft not meeting the levels must be retrofitted or retired from the fleet.<sup>138</sup> In regard to aircraft of foreign countries, which were not to be covered by the regulations issued pursuant to the statement, the Policy announced that:

the United States will work through the International Civil Aviation Organization to reach agreement with other nations on means to abate aircraft noise. If agreement is not reached in three years, it is the intention of the federal government to require aircraft flown by carriers of other countries to meet U.S. established noise levels at the end of five additional years.<sup>139</sup>

More stringent noise standards were scheduled to be completed by the FAA by March 1, 1977, for future design aircraft, reflecting recent advances in noise suppression technology.<sup>140</sup> Finally, for supersonic aircraft, the Policy announced that the FAA would promulgate an applicable noise regulation not later than thirty days after the conclusion of the sixteen month demonstration period, which ended November 24, 1977.<sup>141</sup>

Operating procedures represent another part of the Federal Action Plan. The Policy announced that the FAA had taken regulatory action regarding operating procedures designed to abate noise, including minimum altitude rules and approach procedures. Departure rules were to be developed within one year.<sup>142</sup>

The Policy also announced as part of the Federal Action Plan an airport development aid program.<sup>143</sup> Acting under authority granted in the 1976 amendments to the Airport and Airway Development Act,<sup>144</sup> "the FAA will establish a high priority for the

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<sup>138</sup> DOT NOISE POLICY, *supra* note 4, at 6, 7.

<sup>139</sup> *Id.* at 7.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 8.

<sup>142</sup> *Id.* at 8; DOT NEWS, *Coleman Announces Policy on Aviation Noise Abatement*, Nov. 18, 1976, at 3.

<sup>143</sup> DOT NOISE POLICY, *supra* note 4, at 8.

<sup>144</sup> 49 U.S.C. §§ 1701-1742 (1970).

allocation of discretionary Airport and Airway Trust Funds for airport land acquisition to ensure compatible use of land near airports, the purchase of noise suppressant equipment, the construction of physical barriers and other noise reduction activities."<sup>145</sup> Further, the DOT will encourage the development of new airports and replacements for older airports in areas with large populations adversely affected by noise, with federal financing to be conditioned on effective noise abatement planning.<sup>146</sup> Beyond that, Congress will be requested to amend the Airport and Airway Development Act to include the acquisition, installation, and operation of airport noise monitoring equipment among airport proprietor activities eligible for federal aid funding.<sup>147</sup>

Airport noise policy comprised the final part of the Policy's Federal Action Plan. It voiced the intentions of the FAA to assist airport proprietors and sponsors in attaining noise abatement goals and development of noise abatement plans, including use restrictions such as curfews. The FAA also indicated its willingness to fund a selective number of model plans.<sup>148</sup>

The Policy's Air Carrier Action Plan stresses aircraft compliance with Part 36 regulations and the financing necessary for compliance.<sup>149</sup> To comply with the federal rules air carriers must either retrofit or retire many of their planes within eight years. Financing will be necessary to meet this deadline.

Finally, the Policy discusses that Local Actions should be taken to complement the Federal and Air Carrier Plans. Such local action should include land use planning and zoning and land development activities in areas surrounding airports in a manner ensuring that land use is compatible with the noise exposure in the area and construction standards and programs to ensure insulation from aircraft noise. Further provision should be made for notice of aircraft noise exposure to purchasers of real estate near airports.<sup>150</sup>

The division of the Aviation Noise Abatement Policy into a

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<sup>145</sup> DOT NOISE POLICY, *supra* note 4, at 8.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 9.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 10.

Federal Action Plan, an Air Carrier Action Plan, and suggestions for Local Actions is consistent with the stated principle that the federal government, airport proprietors, state and local governments, air carriers, air travelers and shippers, and residents all have authority and responsibilities for noise abatement, and must plan and act in coordination.<sup>151</sup> In discussing the legal responsibilities of different concerned groups, the Policy summarizes the legal framework with respect to noise:

1. The federal government has preempted the areas of air space use and management, air traffic control, safety and the regulation of aircraft noise at its source. The federal government also has substantial power to influence airport development through its administration of the Airport and Airway Development Program.
2. Other powers and authorities to control airport noise rest with the airport proprietor—including the power to select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations—subject only to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management.
3. State and local governments may protect their citizens through land use controls and other policy power measure not affecting aircraft operations. In addition, to the extent they are airport proprietors, they have the powers described in paragraph 2.<sup>153</sup>

Criticism of the Aviation Noise Abatement Policy has focused mainly on the financing aspect of aircraft replacement and modification, replacement being more desirable than retrofit and more costly. The criticism is directed to the Policy's lack of a financing program. It leaves unanswered the question of who will foot the bill. The airline industry has just passed through a difficult financial period, making the financing of new aircraft an even more critical issue. The industry has been faced with substantial increases in fuel prices, inflation in the cost of other materials, traffic levels down due to the economic recession, and substantial excess capacity in equipment purchased in the 1960's for a predicted demand growth that did not occur.<sup>153</sup> Now, as a result of the FAA's

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<sup>151</sup> *Id.* at 5, 6.

<sup>152</sup> *Id.* at 34.

<sup>153</sup> *Id.* at 24-25; Barron's, May 16, 1977, at 9.

action, the airline industry is faced with the cost of meeting the new noise requirements, estimated by the DOT at \$5.8-7.9 billion.<sup>154</sup>

The fact that the Policy did not contain a financing program has been criticized by both airlines and politicians. A TWA official said, "The one thing we didn't want is for financing to be considered separately."<sup>155</sup> It has been said that DOT Secretary Coleman had been in favor of an accompanying financing program, but that White House officials were leery of having the federal government get involved in the financing and re-equipping of an industry and thus setting a bad precedent for other industries facing costly environmental regulation.<sup>156</sup>

Hearings on the financing question were held on December 1, 1976, and several alternative means of financing were suggested. The Air Transport Association proposed a two per cent ticket and waybill surcharge to be deposited in an escrow account in which the airlines would have drawing rights. The Aviation Consumer Action Project (a Ralph Nader organization) was in favor of the airlines' receiving subsidy payments from the Airport and Airway Development Trust Fund. White, Weld & Co. recommended an aircraft replacement cooperative owned by U.S. airlines with capital acquired from ticket surcharges, revenue bonds, voluntary subscriptions, loan guarantees fees, investment income and repayment of prior investments. During the hearing, the banking and investment community expressed their reluctance to make any commitments so long as the airlines failed to attain a reasonable return on investments.<sup>157</sup> Aircraft manufacturers Boeing, McDonald-Douglas, and Lockheed were in favor of a plan to use a portion of the user tax.<sup>158</sup>

Other reactions to the financing problem include the National Passenger Traffic Association's (NPTA) opposition to any program which would result in an increase in fare levels: "We do oppose any financing scheme which will result in further punitive

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<sup>154</sup> U.S. Dep't of Transp., *Financing of Aircraft Noise Reduction Requirements Statement of Issues for Public Hearing*, Nov. 1976 at 10.

<sup>155</sup> *AV. WEEK & SPACE TECH.*, Nov. 29, 1976 at 21.

<sup>156</sup> *Id.*

<sup>157</sup> Ellingsworth, *Noise Policy Stirs Industry/DOT Debate*, *AV. WEEK & SPACE TECH.*, Dec. 6, 1976, at 24.

<sup>158</sup> *Aviation Daily*, Dec. 3, 1976, at 190.

fare increases on our business travelers."<sup>159</sup> The NPTA favors the use of surpluses in the Airport and Airways Trust Fund for financing. NPTA President, C. Patrick Dovan, explained that "while noise control is a desirable objective, the interest of the public in low-cost air transportation is, in our view, superior to that objective."<sup>160</sup> The Airport Operators Council International, on the other hand, favored user taxes and felt that federal assistance "should not, under any circumstances, deplete funding for airport/airway development programs" which depend on the Airport and Airway Trust Fund.<sup>161</sup>

As always, the problem seems to be dollars. The FAA has at last moved towards reducing aircraft noise in almost eighty per cent of the commercial airline fleet. It has taken eight years to take this step knowing it would be an expensive one. But the FAA has weighed the economic cost of retrofit and replacement against the cost, economic, physical, and social, of aircraft noise and determine that the airlines, and, ultimately, the public, must bear the estimated \$5.8-7.9 billion cost of retrofit and replacement.

The suggested alternative methods of financing have been translated into proposed legislation.<sup>162</sup> For financing of retrofit and replacement of noncomplying aircraft, the proposed bills look to use of Airport and Airway Trust Fund revenues and a two percent surcharge on air fares and way bills. They also suggest amendment of the Federal Aviation Act and the Airport and Airway Development Act. The DOT's own recommendation would be funding provided by a two percent surcharge.<sup>163</sup> Where Congress decides the funds for compliance with the new noise requirements will come from remains to be seen.

Criticism of the Aviation Noise Abatement Policy has also come from Senate Aviation Subcommittee Chairman Howard Cannon. Cannon has said:

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Aviation Daily*, Dec. 10, 1976, at 229.

<sup>162</sup> H.R. 14027, 94th Cong., 2d Sess. (1976); H.R. 8729, 95th Cong., 1st Sess. (1977); S. 747, 95th Cong., 1st Sess. (1977); H.R. 3802, 95th Cong., 1st Sess. (1977).

<sup>163</sup> *Airport & Aircraft Noise Reduction: Hearings before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 525 (1977) (statement by Brock Adams).



I am keenly disappointed by efforts of the lame-duck Administration to push through highly controversial and poorly thought-out policies on aircraft noise. I would have hoped that after the voters expressed their preference in the presidential election, the members of Mr. Ford's team would have left to the incoming Administration the difficult, controversial task of developing a sensible aircraft noise policy.<sup>164</sup>

Cannon further said that aircraft noise, while bothersome to perhaps a few million Americans at most, is not a pressing environmental problem.<sup>165</sup> Cannon wrote to Secretary Coleman asking that he leave the final decision to the Carter Administration.<sup>166</sup> Coleman's reply was that "I could not in good conscience leave to the Carter Administration the complex question of basic aircraft noise regulation after such extensive analysis, debate and effort within the bureaucracy, the industry, and on the Hill. Noise relief is long overdue and I am sure the next President would not welcome further delay."<sup>167</sup> President Carter, therefore, was left with something in the nature of a *fait accompli*.

### Conclusion

Noise relief has been long overdue. Although property owners have the traditional legal remedy of inverse condemnation actions, these are not real solutions to the noise problem. Political solutions are not ideal for various reasons. Local regulations can be partially effective, but they meet problems of federal preemption and the Commerce Clause. Under the federal statutory scheme the federal government has the authority and the responsibility to take steps towards noise pollution control. Though the FAA has been slow in taking some of these steps, the Aviation Noise Abatement Policy announced in November, 1976 indicates its recognition of its responsibility and its willingness to work in coordination with all groups concerned to effectively deal with the noise problem. All that remains to be said is "After battle sleep is best, After noise, tranquility."<sup>168</sup>

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<sup>164</sup> Aviation Daily, Dec. 2, 1976, at 177.

<sup>165</sup> *Id.*

<sup>166</sup> Aviation Daily, Dec. 3, 1976, at reverse side of 188.

<sup>167</sup> Aviation Daily, Dec. 7, 1976 at reverse side of 214.

<sup>168</sup> Roden Berkeley Noel, 1834-1894.