

1982

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Recommended Citation

Ricarda L. Bennett, *Airport Noise Litigation: Case Law Review*, 47 J. AIR L. & COM. 449 (1982)
<https://scholar.smu.edu/jalc/vol47/iss3/4>

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AIRPORT NOISE LITIGATION: CASE LAW REVIEW

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AIRPORT NOISE LITIGATION: CASE LAW ANALYSIS

AIRCRAFT NOISE law is slowly evolving through judicial interpretation and legislative enactment. The struggle between simultaneously maintaining the power to control aircraft noise and avoiding the responsibility for damages caused by noise, presents a dilemma that causes confusion among various governmental authorities and private entities. The courts, in their attempt to interrelate the maze of competing social, economic and governmental objectives, have focused on the airport proprietor's authority and the methods through which to control airport noise. Their decisions have set some legal precedents and have created a multitude of unfilled expectations. Therefore, prior to the promulgation of more legislation, it is advisable to gain some historical perspective on the judicial trends in airport noise litigation. This perspective can be obtained by examining cases decided since the 1973 Supreme Court airport noise decision, *City of Burbank v. Lockheed Air Terminal, Inc.*¹

This article focuses on legislation only as it impacts the various judicial decisions. The emphasis is on the analysis of factual situations and judicial decisions. These cases define the

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¹ 411 U.S. 624 (1973).

predominant issues arising out of the conflict between control of the source of aircraft noise and liability for aircraft noise-related damages.

The significant issues in the various aircraft/airport noise cases analyzed in this article can be organized under four topic headings that track the judicial progress in the area of airport noise litigation:

- I. Which governmental or private entity have the courts historically held responsible for aircraft noise-related damages?
- II. What is the scope of the airport proprietary and the non-proprietary use restrictions?
- III. What are the current legal theories and trends in awarding aircraft noise-related damages?
- IV. What are the effects of land use planning and environmental impact statements on airport noise control?

I. WHO IS LIABLE?

The issue of which governmental or private entity will carry the financial burden for aircraft noise-related damages is argued in conjunction with the issue of who controls the noise source causing the damage. While the federal government professes to have the sole right to control the use and management of airspace, and the aircraft noise source, it has declined responsibility for injury to persons or property caused by aircraft noise. For the most part, the plaintiffs and courts have looked to airport proprietors for monetary compensation. These airport proprietors have argued that, lacking control of the noise source, they should be absolved from responsibility for aircraft noise-related damages. They have pointed to the airplane manufacturers as the responsible parties, based on the failure to produce a "quiet" airplane, and to the federal government, based on enactment of legislation preempting noise source and airspace management.

The Supreme Court decision in *Griggs v. Allegheny County*² set the standard for subjecting the airport proprietor

² 369 U.S. 84 (1962).

to responsibility and concomitant financial liability for aircraft noise-related damages. In *Griggs*, Mr. Justice Douglas, writing for the majority, held the local county government responsible, as owner-operator of the airport, because the county had the authority to acquire adequate land adjacent to the airport.³ The county was liable in damages to the plaintiff landowner who had been deprived of the use and enjoyment of his property by direct aircraft overflight.⁴ The local government, as the airport proprietor, and not the Federal Aviation Administration (FAA), had established an avigational easement over Mr. Griggs' property by reason of the direct aircraft overflights.⁵ This action had substantially deprived Mr. Griggs of the use and enjoyment of his property without just compensation. Thus, it was the governmental airport proprietor, and not the FAA, who was liable for compensatory damages.⁶

In his dissent, Mr. Justice Black disagreed with this conclusion.⁷ He argued that the FAA, as an agency of the federal government, had supervised, approved, and in large part paid for the airport construction.⁸ He reasoned that the federal government should have assumed the financial responsibility because Congress had initiated a comprehensive regulatory scheme that not only preempted the airspace at high altitudes, but also restricted the low altitude airspace necessary for the takeoff and approach to airports.⁹

Congress, however, has endorsed the majority position of Mr. Justice Douglas in *Griggs*, and has enacted legislation to clarify this area of primary authority. The Noise Control Act of 1972¹⁰ emphasized that federal action is essential to deal with "major noise sources in commerce, control of which re-

³ *Id.* at 89-90.

⁴ *Id.* at 86-87, 90.

⁵ *Id.* at 89-90.

⁶ *Id.*

⁷ *Id.* at 91.

⁸ *Id.* at 91-92, 94.

⁹ *Id.* at 92.

¹⁰ Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 4901-4918 (1972 & Supp. 1981)).

quires national uniformity of treatment."¹¹ But, ultimately, Congress intended that "the primary responsibility for control of noise rests with State and local governments."¹² Other legislation, regulations, and policy statements stress that the responsibility of noise control rests with the airport proprietor: the Airport and Airway Development Act of 1970, and 1976 and 1981 amendments;¹³ the Aviation Noise Abatement Policy of 1976;¹⁴ the Airlines Deregulation Act of 1978;¹⁵ the

¹¹ *Id.* § 4901(a)(3).

¹² *Id.* The intent of Congress to maintain a shared responsibility for aircraft noise control between the federal and local governments is evident in the congressional deliberations. See S. REP. NO. 1160, 92d Cong., 2d Sess. (1972); H.R. REP. NO. 842, 92d Cong., 2d Sess. (1972); 118 CONG. REC. (daily eds. Feb. 29, Oct. 12, Oct. 13, and Oct. 18, 1972). For example, in S. REP. NO. 1160, the comments are that the:

States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

S. REP. NO. 1160, 92d Cong., 2d Sess. 10-11 (1972).

¹³ 49 U.S.C. § 1701 (1970), as amended by Pub. L. No. 94-353 (1976) and Pub. L. No. 97-35 (1981). The Airport and Airway Development Act of 1970, as amended in 1976 (the Act), authorizes and directs the FAA to fund airport development and planning. The Act provides, among other things, that funds will not be granted for the airport development project unless the airport proprietor has given fair consideration to the interests of the communities in or near where an airport development may be located. This implies a requirement to consider the effects of the airport on the health and welfare of the community. *Id.* §§ 1712(f), 1716(f).

¹⁴ Aviation Noise Abatement Policy of 1976, U.S. Dept. of Transportation (Nov. 18, 1976) [hereinafter cited as DOT/FAA Aviation Noise Abatement Policy]. This policy statement was jointly issued by the Department of Transportation and the Federal Aviation Administration in an effort to define the various responsibilities of federal, state, and local governments concerning airport noise abatement. The report focused upon federal funding for airport noise control planning grants, and also outlined a variety of noise abatement actions airport proprietors could employ in their abatement plans. A section of the report which analyzed the legal responsibilities of the various parties with regard to the noise control issue, commented that the authority of an airport operator "to control what types of aircraft use its airport, to impose curfews or other use restrictions, and, subject to FAA approval, to regulate runway use and flight paths" was not preempted. *Id.* at 34.

¹⁵ Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a), (b) (Supp. II 1978). The Airline Deregulation Act provides that the federal government preempts any state, political subdivision, or interstate agency in enacting or enforcing any law, rule, or regulation relating to rates, routes, or services of any interstate air carriers. It also, however, acknowledges that nothing under the preemption section should be con-

Aviation Safety and Noise Abatement Act of 1979;¹⁶ and the Airport Noise Compatibility Planning Regulations of 1981.¹⁷

The legislative history¹⁸ of the 1968 addition of section 611 to the Federal Aviation Act of 1958 was examined by Mr. Justice Douglas in the body of the *Griggs* opinion, and further scrutinized in the oft quoted Footnote 14 of *Burbank*.¹⁹ This legislative history consisted of a letter from then Secretary of Transportation Boyd to the Senate Commerce Committee reviewing the proposed legislation. In the letter, Boyd stressed that the proposed legislation would not affect the rights of a state or local public agency, as the proprietor of an airport, to issue nondiscriminatory noise control regulations.²⁰ Mr. Justice Douglas concluded in *Burbank*, that the non-proprietor municipality was preempted by federal legislation from im-

strued to limit the proprietary powers of the various governmental agencies as the owner or operator of an airport.

¹⁶ Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C.A. §§ 2101-2108, 2121-2125 (West Supp. 1982). After an airport proprietor has submitted an aircraft noise abatement plan to the Secretary of Transportation, the proprietor may, with FAA approval, implement measures that include the use of flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding the airport. *Id.* § 2104(a)(4).

¹⁷ 14 C.F.R. § 150 (1981).

¹⁸ 49 U.S.C. § 1431 (1976). Part of the legislative history is contained in S. REP. NO. 1353, 90th Cong., 2d Sess. 6-7 (1968). The Senate Report stated that the bill is an amendment to a statute describing the powers and duties of the federal government with respect to air commerce. It also noted:

It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments. . . . "The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of the local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

Id. (quoting in part a letter written by the Secretary of Transportation to the Committee on Commerce, dated June 22, 1968).

¹⁹ *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 635 n.14 (1973).

²⁰ *Id.* at 635-36.

posing a curfew on airport operations.²¹ At the same time, he left open the question of how much authority a municipality as airport proprietor had to control these very same airport/aircraft operations.²²

A three judge district court, in *Air Transport Association v. Crotti*,²³ acknowledged the pervasive power of the federal government under the Supremacy Clause,²⁴ but ruled that the airport proprietor, who is liable for the consequences of airport operations, had the right to control the use of the airport at his own initiative or at the direction of the state. Moreover, this concept of proprietary control included "the basic right to determine the type of air service a given airport proprietor wants his or her facilities to provide, as well as the type of aircraft to utilize those facilities. . . ."²⁵ Proprietorship control is outside the scope of federal preemption, according to the court's rather liberal interpretation of Footnote 14 in the *Burbank* opinion. There were, however, certain aspects of the California regulatory scheme that were disallowed on the ground of preemption, such as the imposition of sanctions on aircraft for exceeding a noise level measured by the single event noise exposure level (SENEL).²⁶

District Judge Peckham, in *National Aviation v. City of Hayward*²⁷ reached the same conclusion as the *Crotti* court on the issue of federal preemption of proprietary regulations—in this case a noise-related night curfew imposed by a municipal airport proprietor. Judge Peckham refused to base his conclusions on Footnote 14 of *Burbank*, but instead focused on the Congressional intent not to interfere with the proprietor's powers to control airport noise levels.²⁸ He emphasized that both Congress and the FAA had the power to enact legislation providing a uniform system of federal regulations, but since

²¹ *Id.* at 638-39.

²² *Id.* at 636 n.14.

²³ 389 F. Supp. 58 (N.D. Cal. 1975).

²⁴ U.S. Const. art. VI, cl. 2.

²⁵ 389 F. Supp. at 64.

²⁶ *Id.* at 65.

²⁷ 418 F. Supp. 417 (N.D. Cal. 1976).

²⁸ *Id.* at 421 (citing S. REP. No. 1353, 90th Cong., 2d Sess. 6-7 (1968)).

"at the present time, Congress and the FAA do not appear to have preempted the area then the City of Hayward, as proprietor of Hayward Air Terminal, cannot be enjoined from enforcing ordinance 75-023 C.S. on preemption grounds."²⁹

The issues of federal preemptory powers under the Supremacy Clause of the Constitution and airport proprietary rights to determine noise exposure by controlling airport operations were thoroughly litigated in *British Airways Board v. Port Authority of New York and New Jersey*.³⁰ The trial and appellate courts were forced to decide a controversial and decidedly political issue: whether the supersonic Concorde should be allowed to conduct test flights into New York's John F. Kennedy (JFK) Airport. After two rounds at the federal district court level, and the accompanying appellate decisions, the Concorde was allowed to operate out of JFK. The basis of the decision was not preemption by federal control of aircraft flight operations, nor the order of William T. Coleman, Secretary of Transportation,³¹ but rather the Port Au-

²⁹ 418 F. Supp. at 425.

³⁰ 431 F. Supp. 1216 (S.D.N.Y.) (Concorde I), *rev'd*, 558 F.2d 75 (2d Cir.), *on remand*, 437 F. Supp. 804 (S.D.N.Y.) (Concorde II), *aff'd*, 564 F.2d 1002 (2d Cir. 1977). In response to Secretary of Transportation William T. Coleman's announcement on February 4, 1976, that the Anglo-French Concorde SST had permission to land at Dulles International Airport (Dulles) outside of Washington, D.C., and at John F. Kennedy International Airport (JFK) in New York City, the Port Authorities of the respective airports on March 11, 1976 denied the Concorde landing rights pending further study of the airplane's potential noise effects on the surrounding communities near JFK. Not willing to lose another revolution, the British Airways Board and Compagnie Nationale Air France (British Airways and Air France), the operators of the Concorde, sought injunctive relief alleging that the Port Authority's power to act in the area of airport noise regulation had been preempted by the federal government, and specifically preempted by Secretary Coleman's decision regarding the landing rights. The Court of Appeals for the Second Circuit, reversing the District Court for the Southern District of New York, held that the Port Authority was *not* preempted from banning the Concorde. 558 F.2d at 78-82. The appellate court did not stop there, but remanded the case to the district court for determination of whether or not the Port Authority's 13-month delay in formulating a noise regulation for the Concorde was unreasonable, and whether such a delay was discriminatory and an undue burden on commerce. The subsequent decisions were referred to as *Concorde II*. The district court examined the issues and decided that the Port Authority had the power to regulate the airplane noise, but that the undue delay in promulgating such a regulation was discriminatory. 437 F. Supp. 804, 818 (S.D.N.Y.), *aff'd*, 564 F.2d 1002 (2d Cir. 1977).

³¹ *The Secretary's Decision on Concorde Supersonic Transport*, February 4, 1976,

thority's abdication of its responsibility in failing to establish fair regulations for the Concorde flights within a reasonable time period.³²

Chief Judge Irving Kaufman, in the final *Concorde II* appellate decision, affirmed the airport proprietor's power to regulate noise levels.³³ He concurred with Judge Pollack, who wrote the second district court decision, and stressed that airport operator's noise regulations must be "reasonable, nonarbitrary and nondiscriminatory."³⁴

In the first trial (*Concorde I*), at the district court level, Judge Pollack decided that the local Port Authority's regulations banning the Concorde operations should fail because they conflicted with federal administrative orders issued by the then Secretary of Transportation Coleman.³⁵ Judge Pollack concluded that the "policy of the Federal Aviation Administration (FAA) in allowing airport proprietors to impose use restrictions pertinent to the perceived local noise problem is a delegated authority, reviewable by and subject to the overriding control of federal authority when exercised."³⁶ In *Concorde I*, it was exercised by Secretary of Transportation Coleman.

The United States Court of Appeals for the Second Circuit, under Chief Judge Irving Kaufman, quickly perceived the implications of the lower court ruling which opened up possibilities of shifting financial responsibility to the federal government. Kaufman reversed the decision as "simply untenable

reprinted in *Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation - Current and Proposed Federal Policy in the Abatement of Aircraft Noise*, 94th Cong., 1st & 2d Sess. 567-631 (1976) [hereinafter cited as *Secretary's Decision*]. On February 4, 1976, Secretary of Transportation William T. Coleman, Jr., issued a report which granted provisional authorization for the Concorde SST to land at selected airports in the United States. A more comprehensive analysis of the Coleman Report can be found in Donen, *British Airways v. Port Authority: Its Impact on Aircraft Noise Regulation*, 43 J. AIR L. & COM. 691 (1978).

³² 437 F. Supp. 804, 818 (S.D.N.Y. 1977).

³³ *British Airways Board v. Port Authority*, 564 F.2d 1002 (2d Cir. 1977).

³⁴ *Id.* at 1002.

³⁵ 431 F. Supp. 1216, 1225-26 (S.D.N.Y. 1977). See *supra* note 31 and accompanying text.

³⁶ 431 F. Supp. at 1222 (citing 49 U.S.C. § 1301 (1976)).

and erroneous."³⁷ Judge Kaufman cited the federal government's amicus curae brief, which raised for the first time on appeal the issue of the reasonableness of the Port Authority's delay.³⁸ He also examined statements by Secretary of Transportation Adams, former Secretary Coleman, and President Carter, who unanimously agreed that Coleman's Order did not preempt the Port Authority's right to exclude the Concorde, pursuant to a reasonable, nondiscriminatory noise regulation.³⁹ Once again the policies enumerated under *Griggs*⁴⁰ and implied in *Burbank*⁴¹ were upheld, thus reaffirming that the authority to restrict noisy aircraft, along with the concomitant liability for damages, were the responsibility of the airport proprietor.

The case was then remanded to the federal district court under Judge Pollack.⁴² In *Concorde II*, Judge Pollack dissolved the ban on Concorde test flights and concluded from the evidence that the Port Authority, by its inaction, had no intention of taking the responsibility of setting noise standards applicable to the Concorde.⁴³ He stressed that the seventeen month delay in determining applicable noise regulations was "unreasonable, discriminatory and unfair and an impingement on commerce and on national and international interests of the United States."⁴⁴ Thus, while the Port Authority had the power to establish acceptable noise rules, it forfeited its privilege to regulate the Concorde by its unreasonable delay.⁴⁵

The Port Authority appealed this decision, and *Concorde II* went back before the three judge panel headed by Judge Kaufman.⁴⁶ In this final appellate decision, Judge Kaufman

³⁷ 558 F.2d 75 (2d Cir. 1977). The court remanded for an evidentiary hearing to determine the reasonableness of the Port Authority's 13 month ban.

³⁸ *Id.* at 82.

³⁹ *Id.* at 81.

⁴⁰ 369 U.S. 84 (1962). See *supra* text accompanying note 2.

⁴¹ 411 U.S. 624 (1973). See *supra* text accompanying note 1.

⁴² *British Airways Board v. Port Authority*, 437 F. Supp. 804 (S.D.N.Y. 1977).

⁴³ *Id.* at 818.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *British Airways Board v. Port Authority*, 564 F.2d 1002 (2d Cir. 1977).

affirmed, emphasizing that the Port Authority could not "stall when all the information at its disposal either confirms the SST's ability to meet existing noise rules or is impotent to dissuade other responsible officials that the impact of Concorde's low frequency energy emissions on airport neighbors will not be more than minimal at most."⁴⁷

Airport proprietors are not entirely satisfied with the distinction of having sole financial responsibility for damages arising from noisy aircraft. They have tried on several occasions to share the fame and frustration with other parties, notably the airplane manufacturers. In *City of Los Angeles v. Japan Air Lines Co., Ltd.*,⁴⁸ the city, as owner-proprietor of the Los Angeles International Airport, attempted to obtain equitable or contractual indemnification from the air carriers, two jet airframe manufacturers and two jet engine manufacturers, as reimbursement from an inverse condemnation suit held against the city. The California court reasoned that the air carriers were not authorized under the California Code of Civil Procedure to exercise the right of eminent domain to the airspace over or adjacent to Los Angeles International Airport.⁴⁹ The California Code of Civil Procedure, section 1239.3, specifically provided that air easements may be acquired by a county, city, port district, or airport district if such "taking" is necessary.⁵⁰ Additionally, in the leasing agreements entered into by the air carriers with the municipal airport proprietor,

⁴⁷ *Id.* at 1012.

⁴⁸ 41 Cal. App. 3d 416, 116 Cal. Rptr. 69 (Cal. Ct. App. 1974).

⁴⁹ *Id.* at 428, 116 Cal. Rptr. at 77.

⁵⁰ *Id.* at 427, 116 Cal. Rptr. at 77 (citing CAL. CIV. PROC. CODE § 1239.3 (West 1965) (repealed 1976)). California Civil Code section 1001 pertains to acquisition of property by eminent domain and stated, in part, that "[a]ny person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure." CAL. CIV. CODE § 1001 (West 1954) (repealed 1976). Section 1238, subdivision 20 of the Code of Civil Procedure specifies airport use as a use for which property may be so acquired. CAL. CIV. PROC. CODE § 1238(20) (West 1954) (repealed 1976). However, the Code of Civil Procedure section 1239.3 contains a limitation on who can acquire title to the airspace above the surface of property or an easement in such airspace. The Code specifies that only a county, city, port authority, or airport district is authorized to "take" if necessary to prevent the loss of use and enjoyment of real property in the vicinity of the airport. CAL. CIV. PROC. CODE § 1239.3 (West 1966) (repealed 1976).

there was no indication that the parties intended the airlines to indemnify the city for using flight paths in the manner contemplated by and provided for in the lease.⁵¹ Therefore, without the eminent domain mandate or any contractual liability, the air carriers did not have to indemnify the city. The city, as owner/proprietor, was solely liable for the noise-related damages.⁵²

Wisconsin property owners in *Luedtke v. County of Milwaukee*,⁵³ attempted to hold the county, as airport proprietor, and five federally certified airlines liable for taking their property through an avigation servitude. The plaintiff property owners charged the defendants with negligence, creating a nuisance, and violating a Wisconsin statute dealing with liability for low altitude, dangerous or damage-causing flights.⁵⁴ The plaintiffs maintained that the defendants had subjected their property to an avigational easement without just compensation and, therefore, violated the fifth and fourteenth amendments to the United States Constitution.⁵⁵ The court dismissed the fifth amendment charges against all the defendants, holding that there was no taking by the federal government.⁵⁶ The court also dismissed the fourteenth amendment cause of action against the airlines. The court acknowledged that the flight of the aircraft over land might cause a "taking" of the subject property, but ruled that the plaintiffs had to look to the county, which by its creation and operation of the airport, should be held responsible.⁵⁷ The district court expressly rejected the contention that the airlines, whose opera-

⁵¹ 49 Cal. App. 3d at 429, 116 Cal. Rptr. at 78.

⁵² *Id.* at 431, 116 Cal. Rptr. at 80.

⁵³ 371 F. Supp. 1040 (E.D. Wis. 1974), *aff'd in part and vacated and remanded in part on other grounds*, 521 F.2d 387 (7th Cir. 1975).

⁵⁴ 371 F. Supp. at 1040. The Wisconsin statute which the plaintiffs claimed was violated, made it unlawful, among other things, for an aircraft to fly "at such a low altitude as to interfere with the then existing use to which the land or water, or the space over land or water, is put by the owner" 521 F.2d 387 at 391 (quoting Wis. STAT. ANN. § 114.04 (West 1974)).

⁵⁵ 521 F.2d at 389.

⁵⁶ *Id.* The court stated that the fifth amendment did not apply to actions by state agencies or private parties. *Id.*

⁵⁷ *Id.*

tions were authorized by federal regulations, could be held liable to the plaintiffs.⁵⁸ The court concluded that an inverse condemnation claim against the county, as the airport proprietor, was the proper cause of action.⁵⁹ The district court, therefore, dismissed the fourteenth amendment claim against the county on the ground that the plaintiff had instituted these proceedings in a state court, in which monetary damages were recoverable.⁶⁰

The City of Los Angeles, in *Aaron v. City of Los Angeles*,⁶¹ in an effort to avoid liability, argued that airplanes were the proximate cause of the noise and, therefore, the federal government, which regulates the flight in navigable airspace, should be liable for the damages.⁶² The court ruled, however, that, while the federal government exerts some control over navigable airspace, this did not immunize the city, as the airport proprietor, for failure to appropriate, by eminent domain or otherwise, the land and airspace necessary to provide for adequate aircraft approaches.⁶³

The State of Illinois brought an action in federal district court in *State of Illinois v. Butterfield*,⁶⁴ against two agencies of the federal government, the FAA and the Civil Aeronautics Board (CAB), and their chief administrators. The state sought relief from the substantial increase in aircraft operations, noise pollution and air pollution at O'Hare International Airport. The suit charged that the FAA's policy of unlimited growth at O'Hare, its authority to approve flight paths, and the resulting pattern of aircraft operations constituted federal action affecting the quality of the environment and, therefore, required that an environmental impact statement (EIS) be

⁵⁸ 371 F. Supp. at 1043. In this case, the airlines were governed by the Federal Aviation Act of 1958, as amended. 49 U.S.C. §§ 1301-1552 (1976 & Supp. III 1979).

⁵⁹ 521 F.2d at 389. The court noted that the plaintiff did not allege that the airlines had violated any federal laws or regulations. *Id.*

⁶⁰ *Id.* at 390.

⁶¹ 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Cal. Ct. App. 1974), *cert. denied*, 419 U.S. 1122 (1975).

⁶² 40 Cal. App. 3d at 487, 115 Cal. App. 3d at 173.

⁶³ *Id.*

⁶⁴ 396 F. Supp. 632 (N.D. Ill. 1975).

prepared by the FAA and CAB,⁶⁵ pursuant to the National Environmental Policy Act of 1969 (NEPA).⁶⁶ The district court agreed with the plaintiff's contentions that the FAA and CAB should be compelled to file an EIS before continuing to increase aircraft traffic and operations at O'Hare. The court noted that the EIS should be done, even though the airport was already very busy prior to the enactment of NEPA.⁶⁷

The plaintiffs also claimed that the defendants (FAA and CAB) failed to utilize existing technological advancements with regards to controlling aircraft noise and air pollution emissions. This failure resulted in "inflicting injury on persons and property in the neighborhood of O'Hare and creating a nuisance in the State of Illinois."⁶⁸ The plaintiffs, who wanted to hold the FAA and CAB liable, argued that the *Griggs* case⁶⁹ was no longer valid because the Federal Aviation Act of 1958⁷⁰ had created a structure which provided for total federal control over the routing of commercial air carriers and over the design of aircraft and airports.⁷¹ The court, however, followed the holding in *Griggs* and ruled that the City of Chicago, as owner-operator of O'Hare, not the FAA or the CAB, was the only proper defendant in the action.⁷²

Three other cases in recent years have dealt with the concept of responsibility for property loss due to avigational easements arising from aircraft overflights. First, in *Alevizos v.*

⁶⁵ *Id.* at 635. The state also claimed that the FAA failed to comply with the Administrative Procedure Act, and that the defendants had created a nuisance in Illinois. *Id.* at 636.

⁶⁶ The National Environmental Policy Act of 1969 (NEPA), Pub L. No. 91-190 (codified as amended at 42 U.S.C.A. §§ 4331-4335, 4341-4347, 4361-4370 (West 1977 & Supp. 1982)), outlines a formal procedure in which the effects of noise on the surrounding communities are balanced against suggested air traffic regulatory decisions. Section 102 of NEPA directs (1) that the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the broad policies of that Act and (2) that all federal agencies furnish a detailed statement of the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.A. § 4332(2)(c) (West 1977).

⁶⁷ 396 F. Supp. at 640.

⁶⁸ *Id.* at 643.

⁶⁹ *Griggs v. Allegheny Co.*, 369 U.S. 84 (1962).

⁷⁰ 49 U.S.C. §§ 1301-1552 (Supp. 1979).

⁷¹ 396 F. Supp. at 644.

⁷² *Id.*

Metropolitan Airports Commission of Minneapolis and St. Paul (MAC),⁷³ the court held that the property owners could bring inverse condemnation proceedings against MAC to obtain compensation for the acquisition by MAC of avigational easements over their property. The court reasoned that because MAC had the power necessary to operate and manage the airports, by implication it also had the power to acquire avigational easements in order to carry out this responsibility. Thus, the landowners had the right to maintain a mandamus action to compel the commencement of condemnation proceedings against their properties,⁷⁴ if they could show a direct and substantial invasion of their property rights.⁷⁵

Two New York state court cases have explored the issue of whether the federal government's pervasive control over navigable airspace, as implemented by the FAA clearance zone regulations, constituted a prior taking of airspace over property. Both *Kupster Realty Corp. v. State of New York*,⁷⁶ and *3775 Genesee Street Inc. v. State of New York*,⁷⁷ held that there were no provisions in either the Federal Aviation Act of 1958, or subsequent regulations thereunder, authorizing the enforcement of a hazard finding against any private landowner for construction that might infringe upon navigable airspace.⁷⁸ Apparently, the judicial interpretation of Congressional intent relative to clearance zone restrictions was that the limitation is achieved only through voluntary compliance by the private landowners affected.⁷⁹ Thus, the clearance zone restrictions per se did not constitute a prior taking, and further, any compensation for inverse condemnation must come from the municipal airport operator and not from a federal agency like the FAA.⁸⁰

⁷³ 216 N.W.2d 651 (Minn. 1974).

⁷⁴ *Id.* at 665.

⁷⁵ *Id.* at 662.

⁷⁶ 93 Misc. 2d 843, 404 N.Y.S.2d 225 (N.Y. Ct. Cl. 1978).

⁷⁷ 99 Misc. 2d 59, 415 N.Y.S.2d 575 (N.Y. Ct. Cl. 1979).

⁷⁸ *3775 Genesee Street Inc. v. New York*, 415 N.Y.S.2d 575, 579 (N.Y. Ct. Cl. 1979); *Kupster Realty Corp. v. New York*, 404 N.Y.S.2d 225, 230 (N.Y. Ct. Cl. 1978). See 49 U.S.C. §§ 1348, 1501 (1976); 14 C.F.R. § 77 (1981).

⁷⁹ 404 N.Y.S.2d at 230.

⁸⁰ 415 N.Y.S.2d at 579. See *Kupster Realty Corp. v. New York*, 404 N.Y.S.2d at

In one California case, *San Diego Unified Port District v. Superior Court (Britt)*,⁸¹ federal preemption of navigable airspace shielded the airport proprietor from liability for noise-related damages caused by aircraft in flight. The court, however, did not allow the Supremacy Clause to be a total umbrella from liability, but rather ruled that the airport proprietor would not be immune from liability for tortious mismanagement of the airport and its facilities.⁸²

The California Supreme Court, in *Greater Westchester Homeowners Association v. City of Los Angeles*,⁸³ did not entirely agree with *Britt*. The court reasoned that there was no federal immunity for the airport proprietor from tort damage liability due to excessive airport noise, resulting from either aircraft in flight or the airport's location and operations.⁸⁴ The city, as the airport operator, was once again held to be monetarily responsible for property damage and personal injury related to aircraft noise.

A review of the federal and state cases demonstrates that the judiciary still adheres to the *Griggs* decision. This adherence to *Griggs* strongly emphasizes that responsibility for the consequences of noisy aircraft is with the airport proprietor, regardless of whether the proprietor is a public entity or a private party. The airport proprietor has the authority to control noise levels through the determination of the airport's location, the direction of the runways and therefore the direction of flight of the aircraft, and through the construction and the operation of the airport. It is evident that federal plenary powers in the area of navigable airspace do not shield the airport proprietor against legal, and thus financial, responsibility for damages due to aircraft noise.

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⁸¹ 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (Cal. Ct. App.), cert. denied sub nom., *Britt v. San Diego United Port Dist.*, 434 U.S. 859 (1977).

⁸² 67 Cal. App. 3d at 377, 136 Cal. Rptr. at 567.

⁸³ 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal Rptr. 733 (1979), cert. denied, 449 U.S. 820 (1980).

⁸⁴ 26 Cal. 3d at 99-100, 603 P.2d at 1335-36, 160 Cal. Rptr. at 739.

II. WHAT IS THE SCOPE OF AIRPORT USE RESTRICTIONS?

Over the years the courts have attempted to define which governmental or private agency can promulgate noise control regulations and to what extent. Confrontations in the courtroom abound between various combinations of governmental entities, whether or not they are airport proprietors, as to the rights and limitations of those who control, or think they can control, aircraft noise. The distinction that the courts seem to have drawn is based on the source of authority for issuing the regulation, as well as the nature of the regulation or the activity regulated.

A. Proprietor Airport Use Restrictions

The United States Supreme Court in *Griggs*⁸⁵ placed the primary responsibility for injuries to property caused by aircraft noise on the local airport proprietor, to the exclusion of the federal government or the air carriers. Basing their decision on this judicially determined principle of liability, the Supreme Court in *Burbank*⁸⁶ held that the Noise Control Act of 1972 preempted the City of Burbank's exercise of its police power⁸⁷ in attempting to impose a curfew on the privately owned airport. The Court also alluded to a letter from the Secretary of Transportation that discussed the power of the municipal airport proprietor to issue its own controls.⁸⁸ The *Griggs* and *Burbank* decisions clearly imply that, because the airport proprietor is responsible for the consequences of aircraft related noise, it should have the requisite authority to regulate aircraft activity.

The reasoning in *Griggs* and *Burbank* is supported by the rulemakers in their attempt to establish a statutory scheme for the regulation of aircraft noise. Congress did not intend the Noise Control Act of 1972 to alter the rights of "[a]irport owners acting as proprietors [to] deny the use of their airports

⁸⁵ *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

⁸⁶ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

⁸⁷ *Id.* at 633.

⁸⁸ *Id.* at 635 n.14.

to aircraft on the basis of noise considerations"⁸⁹ The FAA, in its 1976 report entitled "Aviation Noise Abatement Policy,"⁹⁰ attempted to define the areas in which the airport proprietor had authority to implement directly aircraft use restrictions, to make proposals to the appropriate local governmental entity, or to request that proposed noise regulations be reviewed by the FAA and the general public. The airport proprietor is limited, of course, by the constitutional caveats that these use restrictions must not be unjustly discriminatory or arbitrary, nor interfere unreasonably with interstate or foreign commerce, nor impede or interfere with the federal management and control of navigable airspace encompassing air safety and air traffic control.⁹¹ The rulemakers placed the responsibility on the airport proprietor to control airport noise, but they declined to guide the proprietor adequately in issuing use restrictions. Consequently, as the following cases will attest, this gray area is slowly being defined in the courtroom.

*British Airways Board v. Port Authority of New York and New Jersey*⁹² dealt with the right of the proprietor to regulate noise exposure at the airport by controlling airport operations. The federal appellate court held that the proprietor could regulate airport activities in a nondiscriminatory manner. Evidence showed that the Port Authority had already issued two nondiscriminatory restrictions: 1) no jets could land at JFK without prior airport permission; and 2) the noise levels of all aircraft must not be greater than 112 PNdB (Perceived Noise Level in decibels).⁹³ Although these were voluntary restrictions, in the sense that no sanctions attached to a violation,

⁸⁹ S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968) (citing with approval excerpt of a letter from the Secretary of Transportation).

⁹⁰ DOT/FAA Aviation Noise Abatement Policy, *supra* note 14, at 55-57.

⁹¹ 43 Fed. Reg. 28,417 (1978).

⁹² 431 F. Supp. 1216 (S.D.N.Y.) (Concorde I), *rev'd*, 558 F.2d 75 (2d Cir.), *on remand*, 437 F. Supp. 804 (S.D.N.Y.) (Concorde II), *aff'd as modified*, 564 F.2d 1002 (2d Cir. 1977).

⁹³ 437 F. Supp. at 808. The court explained that the perceived noise method of measuring sound includes not only the physical intensity of the sound, but also its frequency and duration, and thus, obtains a truer measure of people's psychological reaction to noise. *Id.* An explanation of the use of Perceived Noise Level is found in the Federal Aviation Regulations (FARs), at 14 C.F.R. §A36.5 (1981).

they were, nonetheless, an attempt by the proprietor to govern permissible noise levels of airplanes.

The propriety of a clear attempt to exercise proprietary power was the subject of litigation in *National Aviation v. City of Hayward*.⁹⁴ In *Hayward*, the city, as the proprietor of the Hayward Air Terminal, passed an ordinance that prohibited all aircraft exceeding a noise level of 75 dB(A) (a weighted sound level) from operating at the airport between the hours of 11:00 pm and 7:00 am. The court found the ordinance valid.⁹⁵ The plaintiff air freight company, National Aviation, argued that this ordinance was a preempted exercise of the police power and, in addition, that it imposed an impermissible burden on interstate commerce. The federal district court addressed both issues. The court examined the reasoning from the *Griggs* decision and the more recent *Crotti* holding, but decided that legislative intent must control in the instant case.⁹⁶ Judge Peckham held that, absent a more definite showing by the FAA and Congress of an intent to preempt this area, an airport proprietor who is responsible for the airport operations has the right to promulgate regulations aimed at aircraft noise abatement.⁹⁷ Judge Peckham distinguished the city's ordinance from the one initiated by the City of Burbank.⁹⁸ He noted that the Hayward ordinance was imposed and enforced by the City of Hayward as the airport proprietor. The court also noted that the ordinance carried a criminal penalty of six months in jail and/or a five hundred dollar fine. This was not sufficient evidence, however, for the court to determine that its promulgation was an exercise of the city's police power.⁹⁹ Judge Peckham characterized the city as wearing two hats in trying to control airport noise. The city, as the protector of the health and welfare of the people, used its po-

⁹⁴ 418 F. Supp. 417 (N.D. Cal. 1976).

⁹⁵ *Id.* at 420-29.

⁹⁶ *Id.* at 424. In Judge Peckham's opinion, it was not Congress' intent to prevent airport proprietors from excluding any aircraft on the basis of noise considerations. See S. REP. No. 1353, 90th Cong., 2d Sess. 7 (1968).

⁹⁷ 418 F. Supp. at 424.

⁹⁸ *Id.*

⁹⁹ *Id.* at 425.

lice powers in the enactment of the airport curfew, but the ordinance was adopted by the city in its capacity as the proprietor of Hayward Air Terminal.¹⁰⁰

The court found no evidence to conclude that the Hayward ordinance would impose an impermissible burden upon interstate commerce. The argument that other municipalities may be tempted to pass similar ordinances and thus together create an impermissible burden on interstate commerce, was too speculative for the court.¹⁰¹ The court viewed the matter of noise control as one of peculiarly local concern, stating that, if Congress or the governmental agencies, such as the FAA, want to preempt this area, they will have to take more definitive steps to indicate their intention to provide a uniform regulatory scheme.¹⁰²

Meanwhile, in the Midwest, three governmental entities joined forces to exclude jets from using a general aviation airport in the *City of Blue Ash, Ohio v. McLucas*.¹⁰³ The City of Blue Ash, the City of Cincinnati, who owned the airport, and the Hamilton County Regional Airport Authority, who operated the airport, tacitly agreed to pass almost identical resolutions prohibiting jet aircraft from using the airport.¹⁰⁴ The plaintiffs brought this action to compel the FAA to delete a published notice in the *Airman's Information Manual*¹⁰⁵ that the airport was closed to jets "not meeting FAR 36 noise limits."¹⁰⁶ Because this notice implied that jets which met FAR 36 noise limits could fly in, the United States Court of Appeals affirmed the district court's decision to dismiss the case on legal technicalities. The court noted, however, that the federal government had preempted the powers of the state and local governments and their agencies from using their police

¹⁰⁰ *Id.* at 424.

¹⁰¹ *Id.* at 427.

¹⁰² *Id.* at 424.

¹⁰³ 596 F.2d 709 (6th Cir. 1979).

¹⁰⁴ *Id.* at 711.

¹⁰⁵ The *Airman's Information Manual* is an FAA informational publication for aircraft pilots. *Id.* It provides information on the restrictions and facilities at individual airports across the country.

¹⁰⁶ *Id.* FAR 36 refers to the noise standards for subsonic jet aircraft published in 14 C.F.R. § 36 (1981).

powers to control noise by regulating the flight of airplanes. Yet the federal government had not preempted the right of the state or local agencies, as proprietors, from establishing nonarbitrary and nondiscriminatory noise level regulations. In dismissing the case, the court did not address the issue of whether the tripartite agreement resulted from the exercise of proprietary power or police power.¹⁰⁷

A recent district court case consistent with the policy of local proprietary discretion in aircraft noise abatement matters is the California case of *Santa Monica Airport Association v. City of Santa Monica*.¹⁰⁸ The City of Santa Monica, as owner/proprietor of a general aviation airport, passed several ordinances that affected aircraft and airport operations and the noise levels in the surrounding community. The court, using a two-prong test of equal protection and interstate commerce, upheld the constitutionality of all the ordinances, with the exception of the total restriction on jet aircraft and a related ordinance imposing a large fine on jet landings or takeoffs.¹⁰⁹ Several ordinances adopted by the municipality acted to: (1) totally restrict aircraft takeoff operations during the week between the hours of 11:00 pm and 7:00 am; (2) allow helicopter operations, but ban helicopter pilot training; (3) prohibit touch and go training operations of propeller aircraft on the weekends; and (4) impose a noise level restriction of 100 dB(A), as defined by an integrated noise measure called a single event noise exposure level (SENEL), and attach a criminal penalty and a fine for any violation of the noise limit.¹¹⁰

It is interesting to note that Judge Hill, in upholding the SENEL measure in *Santa Monica*, rejected the distinction made in *Crotti*,¹¹¹ in which it was decided that the imposition of a SENEL was an attempt to regulate the noise levels of

¹⁰⁷ *Id.* at 712-13.

¹⁰⁸ 481 F. Supp. 927 (C.D. Cal. 1979).

¹⁰⁹ *Id.* at 935.

¹¹⁰ *Id.* at 933-34. A single event noise exposure level (SENEL), in decibels, is the "noise exposure level of a single event, such as an aircraft flyby, measured over the time interval between the initial and final times for which the noise levels of a single event exceeds the threshold noise level." CAL. ADMIN. CODE tit. 21, R. 5006(d) (1977).

¹¹¹ *Air Transport Ass'n v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975).

aircraft in flight, and thus an interference in a federally preempted area.¹¹³ The two SENEL ordinances were similar in both cases and contained provisions for criminal penalties. In *Crotti*, however, the court took the view that such an ordinance was an unlawful exercise of the state's police powers because it operated in the exclusive federal domain of navigable airspace, interstate and foreign commerce.¹¹³

A comparison can be made between the curfew ordinances of *Santa Monica* and the ordinances in another California United States District Court case, *National Aviation v. City of Hayward*.¹¹⁴ Both ordinances limited aircraft operations to specified hours, but the *Hayward* restriction was based upon noise level, while the *Santa Monica* restriction proscribed the type of flight operation that could take place. Both courts examined the effects of their respective ordinances on interstate commerce, but found the balance in favor of allowing the local community to control noise levels.¹¹⁵

Airport proprietors are motivated by social and economic objectives to place use restrictions on airport and aircraft operations. The dilemma is the desire for a quiet environment, coupled with the attempt to maintain a viable airport to service the transportation needs of the community. If Congressional intent is that airport proprietors may promulgate non-discriminatory restrictions on airport use, then there must be more definitive Congressional guidance, through such agencies as the FAA or CAB, as to what regulations are acceptable. Otherwise, there is the potential of litigation each time the proprietor attempts to impose restrictions that are perceived to infringe upon the federally preempted area of navigable airspace.

B. Non-Proprietor Airport Use Restrictions

The goal of airport use restrictions is to achieve a quiet

¹¹³ *Id.* at 65.

¹¹³ *Id.*

¹¹⁴ *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976).

¹¹⁵ 418 F. Supp. at 428. See also *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927, 938-40 (C.D. Cal. 1979).

community environment. The problem is to determine what public or private agencies can implement use restrictions in order to carry out this aim. As discussed in the previous section, the courts are disposed to allow a municipal airport proprietor to govern airport operations as long as the restrictions do not abridge constitutionally reserved federal powers. Courts for the most part, however, perceive an attempt by a non-proprietary state or local government to restrict airport operations as a prohibitive exercise of police powers. Mr. Justice Douglas addressed this issue directly in *Burbank*¹¹⁶ when he ruled that non-proprietary restrictions were federally preempted. After this seemingly clear proclamation, however, the courts, as will be seen in the following cases, are not in accord regarding non-proprietary airport use restrictions.

In *County of Cook v. Priester*,¹¹⁷ the trial court ruled that the local county government, non-proprietary, could not attach restrictions dealing with landing and takeoff visual flight patterns or runway load bearing capacity, as conditions for granting a special use permit for the construction of a private airport.¹¹⁸ The county appealed from the portion of the trial court's decision dealing with the runway load bearing capacity. The county argued that it was using its police powers to protect the safety of the citizens living in the area surrounding the airport. The county specifically denied that its special use permit was in any way motivated by noise considerations.¹¹⁹ The evidence failed to show that aircraft weight by itself bore a direct relationship to the safety of the residents. The Illinois appellate court noted that heavier aircraft were not necessarily more unsafe, because of the improvements in aircraft technology.¹²⁰

The next two cases focus on the attempt by one municipality to control the operations of an airport owned and operated by another municipality. *United States of America v. City of*

¹¹⁶ *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

¹¹⁷ 22 Ill. App. 3d 964, 318 N.E.2d 327 (1974), *aff'd*, 62 Ill. 2d 357, 342 N.E.2d 41 (1976).

¹¹⁸ 318 N.E.2d at 330-31.

¹¹⁹ *Id.* at 329.

¹²⁰ *Id.* at 334.

New Haven,¹²¹ brought an end to the attempts by the City of East Haven to regulate overflights from an airport owned, operated, and located in the City of New Haven. The City of East Haven, in an effort to reduce the noise level in its community by prohibiting the use of an airport runway physically located in New Haven, threatened to enforce a contempt order if any aircraft operating from this runway flew over the clear zone at the end of the runway, which lay within the jurisdiction of East Haven.¹²² The court concluded that Congress had legislated pervasively in this area of navigable air space. Consequently, state or local provisions conflicting with these regulations, whether legislatively or judicially inspired, were invalid, including those of the City of East Haven.¹²³

The court in *Township of Hanover v. Town of Morristown*,¹²⁴ attempted to reach a compromise in a legal battle between Morristown, the owner of the airport, and Hanover, the location of the airport. The citizens of Hanover wanted to prohibit the physical and operational expansion of the airport. The lower chancery court did not proscribe the physical expansion of the airport, but did place some operational restrictions on it.¹²⁵ These restrictions were divisible into those dealing with the navigable airspace and those characterized as ground operations. Two and a half years after the lower court entered the judgment to implement these various restrictions, Morristown, in reliance upon the United States Supreme Court's decision in *Burbank*,¹²⁶ was granted its motion to vacate the part of the original judgment dealing with a preferential runway scheme and the jet aircraft curfew. The noise abatement procedures recommended for ground operations, however, were allowed to stand. It appears from *Hanover* that the non-proprietor, Hanover, was able to dictate the noise

¹²¹ 367 F. Supp. 1338 (D. Conn. 1973), *aff'd*, 496 F.2d 452 (2d Cir.), *cert. denied*, 419 U.S. 958 (1974).

¹²² *Id.* at 1340.

¹²³ *Id.* at 1341.

¹²⁴ 108 N.J. Super. 461, 261 A.2d 692 (1969), *aff'd*, 135 N.J. Super. 529, 343 A.2d 792 (N.J. Super. Ct. App. Div. 1975).

¹²⁵ 261 A.2d at 707-08.

¹²⁶ *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

abatement procedures that focused on airport ground operations.¹²⁷

California was again the forum of controversy with two cases that examined the power of the state to restrict aircraft and airport operations. In *Air Transport Association of America v. Crotti*,¹²⁸ the court reversed the State of California's airport noise regulations. Those regulations were passed in an effort to achieve a community noise level of 65 dB(A) by December 31, 1985, in areas adjacent to airports. The first regulation set a maximum community noise equivalent level (CNEL)¹²⁹ for a residential community noise exposure level of 65 dB(A) by December 31, 1985. The second regulation required the establishment of maximum single event noise exposure levels (SENEL) for aircraft operations at each of the airports.¹³⁰ Violations of the SENEL noise limit by an aircraft operator constituted a misdemeanor punishable by a fine of one-thousand dollars.¹³¹

The *Crotti* court interpreted *Burbank* to proscribe the use of police power but not proprietary control.¹³² The court reasoned that the right to control airport operations necessarily flows from the airport operator's liability for the consequences of the airport operations.¹³³ This right of proprietorship control can be at the airport operator's own initiative or *directed by state police power*, and this authority to control is exempted from federal preemption. The court perceived that local airport authorities were political subdivisions of the state, and as such, the state had the right to reach down and direct

¹²⁷ See *Township of Hanover v. Town of Morriston*, 135 N.J. Super. 529, 343 A.2d 792, 796 (N.J. Super. Ct. App. Div. 1975).

¹²⁸ 389 F. Supp. 58 (N.D. Cal. 1975). See also *supra* notes 23-26 and accompanying text.

¹²⁹ California defines the community noise equivalent level (CNEL) in decibels, as the "average daytime noise level during a 24-hour day, adjusted to an equivalent level to account for the lower tolerance of people during evening and night time periods relative to the daytime period." CAL. ADMIN. CODE tit. 21, R. 5006(f) (1977).

¹³⁰ 389 F. Supp. at 61-62. For a definition of SENEL, see *supra* note 110.

¹³¹ 389 F. Supp. at 62.

¹³² *Id.* at 64.

¹³³ *Id.* at 63.

their activities to some degree.¹³⁴

The question is: To what degree? The court determined that the state could dictate regulations dealing with airport ground operations, such as land use planning or shielding of ground facilities, and the regulation directing the use of CNEL was not, therefore, per se invalid. The court did not address the issue of what would happen if the CNEL standard mandated by the state, as a practical matter, required the airport proprietor to restrict the frequency of aircraft operations or the type of operational activities—an issue which flirts with controlling air traffic and thus navigable airspace. The court decided, however, that the enforcement of the noise measure SENEL invaded this very area of federal preemption and it characterized the SENEL regulations as indicating state exercise of its police power, as well as interference with aircraft in direct flight.¹³⁵

In light of this ruling, it is interesting to note the approach taken in an attempt by the State of California to impose an extended curfew on commercial airline operations at a municipally operated airport, in *San Diego Unified Port District v. Gianturco*.¹³⁶ The court held that the state could not direct the port district, the airport proprietor, to exercise its proprietary powers to abate noise in this manner. This holding seems to be in direct opposition to *Crotti*. In *Crotti*, the state did not implement specific *directions* for the airport proprietor to follow, but rather made *suggestions* as to the noise abatement procedures available to the proprietor to achieve the CNEL of 65 dB(A). The court in *Gianturco* undoubtedly saw the implication that, if the state were successful in attaching a condition to a use variance, then other agencies of the government could attach conditions to licenses, permits or variances, and thus control airport activities.

As shown by the analysis of the previous cases, the courts have carefully guarded the airport proprietor's authority to control airport operations. The courts have approved legisla-

¹³⁴ *Id.* at 64.

¹³⁵ *Id.* at 65.

¹³⁶ 457 F. Supp. 283 (S.D. Cal. 1978).

tively or judicially imposed restrictions on a very limited basis, and only in cases where there is no interference in a federally preempted area. The courts and the federal government will, in all probability, continue this trend in support of airport proprietor-generated regulations. If non-airport proprietors were allowed to enact regulations that restrict airport operations, it might well invite a decline in economic growth for the airport and the communities served by them. On the other hand, the rules adopted by airport proprietors appear to be tempered by the economic interest of maintaining a viable and profitable airport enterprise. More importantly, if the airport proprietors are to be held liable for noise-related damages, then they should have the regulatory means to promulgate noise abatement procedures and possibly decrease the chances of additional aircraft noise inspired litigation.

III. LEGAL THEORIES AND TRENDS IN AWARDING DAMAGES

When people in their homes are subjected, on a daily basis, to the sound of aircraft takeoffs and landings, they may seek judicial relief from the noise. Ideally, they would like the court to issue an injunction and have the aircraft operations cease and desist. Being realistic, however, the annoyed community usually realizes that an injunction is not a practical solution to such a complex problem, and instead seeks monetary relief.

The following analysis of recent court decisions will indicate that many of the legal theories underlying the causes of action for aircraft noise damage have expanded. The traditional constitutional theory of inverse condemnation has broadened in scope, along with the tort theory of nuisance. It is evident from the cases that the courts are awarding residents near an airport, who are subjected to excessive noise, monetary relief, not only for property damages but also for emotional and mental distress caused by aircraft noise.

A. *Inverse Condemnation*

Inverse condemnation is the deprivation of private property by a legal authority, dedicating the property to a public use

without providing just compensation to the owner.¹³⁷ The theory involves the use of the airspace in such a manner that noise levels generated by aircraft cause land values to decrease. When the governmental entity fails to follow the approved legal procedures for acquiring the private property, or at least an aviation easement with respect to it, then the land owner traditionally initiates legal action against the public entity to recover the value of the property right that has been forfeited.

In most federal courts, the property owner must prove there was a sufficient loss of use and enjoyment of the land to constitute a taking under the fifth amendment.¹³⁸ This rule denies recovery for consequential damages in the absence of any taking. As a result, many states have included in their constitutions a provision which, in substance, provides that private property shall not be taken or damaged by public use without compensation.¹³⁹ The federal obligation, however, has not yet been enlarged either by statute or by constitutional amendment.

The federal cases that have dealt with the issue of inverse condemnation have held that, for a landowner to recover damages for aircraft generated noise under the theory of inverse condemnation, the offending aircraft had to fly below a prescribed altitude, directly over the property in question.¹⁴⁰ This position was affirmed in a lower court decision, *Batten v. United States*,¹⁴¹ in which the plaintiff was denied recovery because there were no direct aircraft overflights.¹⁴²

State court decisions have deviated from the federal trend by allowing recovery to landowners both under and near the

¹³⁷ See generally, 26 AM. JUR. 2D *Eminent Domain* §§ 153-173 (1966).

¹³⁸ See, e.g., *United States v. Causby*, 328 U.S. 256 (1946).

¹³⁹ See, e.g., CAL. CONST. art. I, § 14; MINN. CONST. art. I, § 13 (requiring compensation where private property is "taken, destroyed or damaged"); WASH. CONST. art. I, § 16, amend. 9 (referring to a "taking" or "damaging" or private property).

¹⁴⁰ *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

¹⁴¹ 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955, rehearing denied, 372 U.S. 925 (1963).

¹⁴² *Id.* at 583-85.

flight paths. The courts in *Thornburg v. Port of Portland*,¹⁴³ and *Martin v. Port of Seattle*,¹⁴⁴ acknowledged, but rejected, the line of federal cases that required direct overflights. The court in *Martin* formulated its rejection by saying: "We are 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."¹⁴⁵

A more recent state decision, *Alevizos v. Metropolitan Airports Commission of Minneapolis and St. Paul* (MAC),¹⁴⁶ followed this trend and did not require direct aircraft overflight for plaintiffs to recover damages. The property could be close to, but not directly under the flight path.¹⁴⁷ The Minnesota court's interpretation of taking, like that in *Thornburg* and *Martin*, included property adjacent to the flight path. These holdings were not limited by the federal court decisions in *United States v. Causby*¹⁴⁸ and *Griggs v. Allegheny County*.¹⁴⁹

¹⁴³ 233 Or. 178, 376 P.2d 100 (1962).

¹⁴⁴ 64 Wash. 2d 309, 391 P.2d 540 (1964).

¹⁴⁵ 391 P.2d at 545.

¹⁴⁶ 298 Minn. 471, 216 N.W.2d 651 (1974).

¹⁴⁷ 216 N.W.2d at 659.

¹⁴⁸ 328 U.S. 256 (1946).

¹⁴⁹ 369 U.S. 84 (1962). The state courts have interpreted the federal decisions in *Causby* and *Griggs* in two ways in order to achieve their purpose of allowing recovery to landowners for damages due to airplane noise. Some state courts have noted a language difference between the state constitutions and the federal constitution. The fifth amendment to the United States Constitution requires the stricter test of a "taking" of property, whereas many state constitutions allow compensation when private property is "taken, destroyed, or damaged." See, e.g., MINN. CONST. art. I, § 13. See also *supra* note 139.

While courts have recognized the difference in the language in the constitutions, this difference has not been the determinative factor in granting compensation. Instead, a number of state courts have allowed property owners to recover by interpreting the *Causby* and *Griggs* cases as allowing recovery based on a nuisance theory. For example, the court in *Thornburg*, a case in a state having a constitution with provisions similar to the United States Constitution, held that a compensable taking occurs whenever governmental activity substantially interferes with the useful possession of property, either by repeated trespasses or by repeated nontrespassory invasions called nuisances. *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 106 (1962).

The court of appeals in a California case, *Aaron v. City of Los Angeles*,¹⁵⁰ affirmed the trial court's decision to hold a municipal airport operator liable for the taking or damaging of property "where the owner can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property and interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share."¹⁵¹ The court also stressed there was no reasonable basis for making a legal distinction between the effects of flyby aircraft and the same effects of flyover aircraft.¹⁵²

In order to support the theory of inverse condemnation and allow the landowner to recover for the deprivation of private property, it is necessary to show a definite and measurable diminution of market value in the property. In *Adams v. County of Dade*,¹⁵³ the plaintiffs met their burden of showing that the operation of the Miami International Airport was "a direct and substantial invasion of their respective property rights."¹⁵⁴ The plaintiffs, however, failed to demonstrate a subsequent diminution in property value, because the values had actually increased due to inflation and the demand for real property in Dade County.¹⁵⁵ There was no provision in the Florida constitution for compensation if the property was damaged or destroyed.¹⁵⁶ The Florida court, therefore, followed the general rule that condemnation can only lie where there is a taking, and the test of damages in inverse condemnation is still the reduction of fair market value.¹⁵⁷ The court

¹⁵⁰ 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975).

¹⁵¹ 115 Cal. Rptr. at 170.

¹⁵² *Id.* at 171 n.8.

¹⁵³ 335 So. 2d 594 (Fla. Dist. Ct. App.), *cert. denied*, 344 So. 2d 323 (Fla. 1976).

¹⁵⁴ *Id.* at 595.

¹⁵⁵ *Id.* at 596.

¹⁵⁶ NOISE REG. REP. (BNA) No. 25, at A-11 (April 28, 1975). See FLA. CONST. art. X, § 6. Cf. MINN. CONST. art. I, § 13 (allowing compensation where private property is "taken, destroyed, or damaged").

¹⁵⁷ NOISE REG. REP. (BNA) No. 25, at A-11 (April 28, 1975).

held that the plaintiffs were not entitled to relief.¹⁵⁸ The appeals court affirmed the lower court ruling as to the failure of the homeowners to prove a "taking." The court concluded that this appellate decision did not preclude them from bringing another inverse condemnation action at some future date.¹⁵⁹

Two New York cases, *Kupster Realty Corp. v. State of New York*¹⁶⁰ and *3775 Genessee Street, Inc. v. State of New York*,¹⁶¹ attest to New York's attempt to relieve itself from present and future liability for property damages due to aircraft noise, through the formal acquisition of aviation easements. In both cases the court reasoned that the state acquired, through the easement, a right to make noise,¹⁶² but this was a "finite, specific right, encompassing no more than the noise levels shown."¹⁶³ If, in the future, the landowners can prove damages due to an increase in air traffic and jet usage, they can bring an action in inverse condemnation and recover for the additional burden on the aviation easement.¹⁶⁴

In *Highline School District, King County v. Port of Seattle*,¹⁶⁵ the plaintiff school district, initially brought an action against the port, as airport proprietor, seeking recovery of noise-related damages, and claimed inverse condemnation, nuisance, and trespass.¹⁶⁶ The state supreme court dismissed the latter two causes of action, stating inverse condemnation to be the proper cause of action for loss of property rights in Washington, because the "evolution of this theory in the airport cases has made reliance on traditional tort theories unnecessary."¹⁶⁷

¹⁵⁸ 335 So. 2d at 596.

¹⁵⁹ *Id.*

¹⁶⁰ 93 Misc. 2d 843, 404 N.Y.S.2d 225 (Ct. Cl. 1978).

¹⁶¹ 99 Misc. 2d 59, 415 N.Y.S.2d 575 (Ct. Cl. 1979).

¹⁶² 415 N.Y.S.2d at 585. See also *Kupster Realty Corp. v. New York*, 93 Misc. 2d 843, 404 N.Y.S.2d 225, 234 (Ct. Cl. 1978).

¹⁶³ 404 N.Y.S.2d at 235.

¹⁶⁴ *Id.* at 236.

¹⁶⁵ 87 Wash. 2d 6, 548 P.2d 1085 (1976).

¹⁶⁶ *Id.* at 1086-87.

¹⁶⁷ *Id.* at 1092.

B. Trespass

Contrary to the holding in *Highline School District*, the principles of tort law were recognized in other state courts.¹⁶⁸ The legal theory of trespass is defined as "transgression or offense which damages another person's . . . property."¹⁶⁹ In practical terms, when related to aircraft noise problems, the debate over trespass has often revolved, as in inverse condemnation cases, on the proximity of the airplane to the land in question. The view in the state courts has been that airplane noise is the relevant consideration, not the location of the airplane over the land.¹⁷⁰

In *In Re Ramsey*,¹⁷¹ the appellate court affirmed the trial court which had concluded that the proper cause of action was trespass.¹⁷² The appellate court held that, when airplanes stray from their established glide paths and fly directly over the plaintiff's property, an action lies in trespass and not in inverse condemnation.¹⁷³ The state appellate court distinguished *Ramsey* from the federal cases by noting that the limited number of aircraft operations in this case would not be substantial enough to represent the type of taking contemplated in *Causby* and *Griggs*.¹⁷⁴

C. Nuisance

Another tort theory that has become more accepted in the last few years, much to the dismay of airport proprietors, is the theory of nuisance. Briefly, nuisance is a nontresspassory invasion of another's interest in the private use and enjoyment of his or her land.¹⁷⁵ Traditionally, legal actions founded upon nuisance have only granted relief where there is a de-

¹⁶⁸ See, e.g., *Hub Theatres, Inc. v. Massachusetts Port Auth.*, 370 Mass. 153, 346 N.E.2d 371, cert. denied, 429 U.S. 891 (1976) (nuisance); *In Re Ramsey*, 31 Pa. Commw. 182, 375 A.2d 886, 888 n.4 (1977) (trespass).

¹⁶⁹ BLACK'S LAW DICTIONARY 1347 (rev. 5th ed. 1979).

¹⁷⁰ See, e.g., *Alevizos v. Metropolitan Airports Comm'n*, 216 N.W.2d 651 (Minn. 1974).

¹⁷¹ 31 Pa. Commw. 182, 375 A.2d 886 (1977).

¹⁷² 375 A.2d at 866-67.

¹⁷³ *Id.* at 887.

¹⁷⁴ *Id.* at 889.

¹⁷⁵ RESTATEMENT (SECOND) TORTS 821D (1979).

crease in the value of the property rights. Relief has not been granted for aircraft noise-related effects on the people themselves. Courts, however, have broadened the scope of their decisions and interpreted liability for aircraft noise to include the perceived harm to the mental and emotional well-being of people.¹⁷⁶

In *HUB Theatres, Inc. v. Massachusetts Port Authority*,¹⁷⁷ the Supreme Court of Massachusetts affirmed a lower court's decision to dismiss an action brought by plaintiff drive-in theatre owners, against the Massachusetts Port Authority, for recovery under the tort theory of nuisance for aircraft overflights from Logan International Airport.¹⁷⁸ In this case, a Massachusetts state statute prohibited this cause of action as a basis for recovery.¹⁷⁹ The rationale was that a state can pass a statute allowing certain actions which otherwise would be considered a nuisance. The court noted, however, that even though the state statute sanctions certain conduct, it cannot be construed to allow negligent conduct.¹⁸⁰ The plaintiff's case was dismissed for failure to allege that the Port Authority was conducting the airport activities negligently, or that such activities were unreasonable or unnecessary.¹⁸¹ The Massachusetts court recommended that the plaintiffs bring their action against Logan Airport under a theory of inverse condemnation.¹⁸²

In a federal court case, *Virginians for Dulles v. Volpe*,¹⁸³ the plaintiffs brought an action, based on nuisance and constitutional theories, against the FAA as the operator of the airport. These two causes of action were employed in an effort to abate noise from jet aircraft operating from Washington National Airport. The citizens' group argued the airlines to be

¹⁷⁶ See, e.g., *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal.), *aff'd*, 647 F.2d 3 (9th Cir. 1979) (opinion withdrawn from publication in the Federal Reporter at the request of the Ninth Circuit Court of Appeals).

¹⁷⁷ 370 Mass. 153, 346 N.E.2d 371, *cert. denied*, 429 U.S. 891 (1976).

¹⁷⁸ 346 N.E.2d at 373.

¹⁷⁹ *Id.* at 373.

¹⁸⁰ *Id.* at 374.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 541 F.2d 442 (4th Cir. 1976).

the "instrumentality by which the FAA creates a nuisance."¹⁸⁴ The nuisance concept was brought under the fifth and ninth constitutional amendments. It was alleged that the fifth amendment encompassed the right to be protected from injury to health and that the ninth encompassed the right to privacy and protection from personal injury.¹⁸⁵ The plaintiffs were unable to support the allegations with evidence of *specific* personal injuries related to noise from the airport, so the arguments failed.¹⁸⁶ The circuit court in *Virginians for Dulles* also reasoned that federal laws and regulations have preempted the federal common law of nuisance, in so far as emissions from airplanes are concerned.¹⁸⁷

In *San Diego Unified Port Authority District v. Superior Court, (Britt)*¹⁸⁸, the California Court of Appeals concurred with the spirit of *Virginians for Dulles* by denying recovery for damages caused by noise from aircraft in flight, because the federal government controlled the navigable airspace.¹⁸⁹ This action was distinguished, in the court's opinion, from one allowing recovery from the airport proprietor under a nuisance theory for personal and property injuries arising from tortious mismanagement of the airport itself.¹⁹⁰ The court concluded that if it levied damages for aircraft flight related noise, thereby permitting local liability, this would be tantamount to state regulation of an area that is within exclusive federal jurisdiction.¹⁹¹

The most recent case broadening the scope of an airport proprietor's liability under a nuisance theory is *Greater Westchester Homeowners' Association v. City of Los Angeles*.¹⁹² In *Greater Westchester*, homeowners were successful in their

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 67 Cal. App. 3d 361, 136 Cal. Rptr. 557, cert. denied sub nom., *Britt v. San Diego Unified Port Dist.*, 434 U.S. 859 (1977).

¹⁸⁹ 67 Cal. App. 3d at 377, 136 Cal. Rptr. at 567.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), cert. denied, 449 U.S. 820 (1980).

nuisance action against the municipal airport proprietor, claiming emotional and mental distress caused by excessive noise, smoke, and vibrations emanating from jet aircraft using Los Angeles International Airport.¹⁹³ The court ruled that federal regulations and laws do not shield the airport proprietor from tort damage liability. Excessive airport noise is a combination of aircraft operations, location of the runways and facilities, and noise abatement procedures. These factors are all advocated and controlled by the airport proprietor, subject to FAA supervision.¹⁹⁴

Under traditional nuisance theory, findings of emotional distress necessitate a related physical injury.¹⁹⁵ The trial court, however, did not base its findings of emotional distress upon any physical injury, such as hearing loss. Instead, the court based the amount of recovery upon the plaintiffs' personal testimony as to the intensity of the effects and duration of aircraft noise exposure.¹⁹⁶ The ruling also included the admonition that compensation for these past injuries would *not* prohibit these same plaintiffs from bringing the same cause of action for subsequent injuries from the continuing aircraft nuisance.¹⁹⁷ This rather liberal interpretation of personal injury nuisance law, as it relates to aircraft noise, was a clear warning to airport operators to take a more affirmative position in seeking aircraft noise abatement solutions.

The appellate court also denied the defendant's argument that the California statute¹⁹⁸ provided the airport with immu-

¹⁹³ The trial of the direct condemnation and nuisance actions was bifurcated and substantial direct and inverse condemnation judgments in favor of the plaintiffs were entered and satisfied. The trial court felt that the plaintiffs had established the existence of an actionable nuisance which would justify damages and recovery independent of plaintiffs' claims for diminution of their property value. 26 Cal. 3d at 92, 603 P.2d at 1330-31, 160 Cal. Rptr. at 734.

¹⁹⁴ *Id.* at 99, 603 P.2d at 1336, 160 Cal. Rptr. at 739.

¹⁹⁵ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971).

¹⁹⁶ 26 Cal. 3d at 92, 603 P.2d at 1331, 160 Cal. Rptr. at 734.

¹⁹⁷ See NOISE REG. REP. (BNA) No. 37, at A-29 (Oct. 6, 1975) (discussing the holding of the trial court in Greater Westchester Homeowners' Ass'n v. City of Los Angeles, No. C-931-989 (Cal. Sup. Ct.)).

¹⁹⁸ 26 Cal. 3d at 93, 603 P.2d at 1331, 160 Cal. Rptr. at 735 (citing CAL. CIV. CODE § 3482 (West 1970)). This California statute provides: "Nothing which is done or maintained under the express authority of a state can be deemed a nuisance."

nity from nuisance liability. The defendant city argued that aircraft operations are expressly sanctioned by statutory law which provides, in effect, that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."¹⁹⁹ The California Supreme Court concluded that the statutory sanction plea was unavailable to the municipal airport proprietor concerning acts which, by their very nature, constitute a nuisance.²⁰⁰ These acts, according to the supreme court, must be expressly authorized by the statute to insure that the legislature intended to sanction a nuisance. In other words, while the statute designates the use of the runways for aircraft, it does not expressly authorize the excessive noise levels of the aircraft on the runways.²⁰¹

The decisions holding an airport proprietor liable for aircraft noise-related damages have increased in number and in scope. From the earlier cases requiring direct aircraft overflights,²⁰² to ones allowing adjacent flybys,²⁰³ to the *Greater Westchester*²⁰⁴ ruling allowing recovery for noise-related emotional distress, it is easy to see that the airport proprietors have more than a casual concern with their increasing susceptibility to liability.

IV. EFFECTIVENESS OF LAND USE PLANNING AND ENVIRONMENTAL IMPACT STATEMENTS

A. *Effectiveness of Land Use Planning In Airport Noise Control*

While it seems that the federal government has preempted a major portion of the area dealing with aircraft noise control, it is important to recognize those aspects over which the federal government has not assumed jurisdiction. The United States Constitution has delegated to the state and local gov-

¹⁹⁹ *Id.*

²⁰⁰ 26 Cal. 3d at 101, 603 P.2d at 1336-37, 160 Cal. Rptr. at 740.

²⁰¹ *Id.*

²⁰² See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 798 (1946). See also *supra* notes 127-29 and accompanying text.

²⁰³ See, e.g., *Alevizos v. Metropolitan Airports Comm'n*, 216 N.W.2d 651 (Minn. 1974). See also *supra* notes 137-38 and accompanying text.

²⁰⁴ 603 P.2d 1329 (Cal. 1979). See *supra* notes 183-91.

ernments the traditional responsibility for the health, welfare, and safety of their citizens.³⁰⁵ This responsibility implies the following powers: to control local zoning; to acquire an interest in the land through easements, including avigational easements; to develop compatible land use guidelines; to exact building codes; or to determine airport locations. The following cases exemplify the efforts of various local authorities to implement concepts associated with developing a noise control plan.

Two decisions in New Jersey held that the federal government does not preempt state or local governmental authority in determining the location of a private heliport.³⁰⁶ The federal legislation contemplated that state or local governments should retain the power to regulate ground activities not directly involving aircraft operations.³⁰⁷ In both cases, *Garden State Farms, Inc. v. Bay II*³⁰⁸ and *Application of Ronson Corp.*,³⁰⁹ the court advised the State Commissioner of Transportation that, while he had discretionary power to determine the location of the heliport, he should consider the local interests and recognize that local zoning ordinances are important in selecting an aviation facility location which is compatible with the surrounding land uses.³¹⁰

Local municipalities can use their zoning powers to prohibit the construction of an airport or to determine the type of compatible land use in the areas adjacent to the airport. An Illinois case, *Wright v. County of Winnebago*,³¹¹ provides an example of an attempt by the county to prevent construction of a private airport. The court dismissed the case for other

³⁰⁵ U.S. Const. amend. V.

³⁰⁶ *Garden State Farms, Inc. v. Bay II*, 136 N.J. Super. 1, 343 A.2d 832 (1975), *rev'd*, 146 N.J. Super. 438, 370 A.2d 37 (N.J. Super. Ct. App.), *modified and aff'd*, 77 N.J. 439, 390 A.2d 1177 (1978); *Application of Ronson Corp.*, 164 N.J. Super. 68, 395 A.2d 866 (1978).

³⁰⁷ Federal Aviation Act of 1958, 72 Stat. 731 (codified as amended at 42 U.S.C. § 1301 (1976)).

³⁰⁸ 390 A.2d 1177 (1978).

³⁰⁹ 395 A.2d 866 (1978).

³¹⁰ *Garden State Farms, Inc. v. Bay, II*, 77 N.J. 439, 390 A.2d 1177, 1185 (1978); *Application of Ronson Corp.*, 146 N.J. Super. 68, 395 A.2d 866, 868 (1978).

³¹¹ 391 N.E.2d 772 (Ill. 1979).

reasons, but held that the county could zone on the basis of aircraft noise, because "the FAA does not preempt local, or state power to decide whether to allow new private airports on the basis of potential noise problems."²¹²

In *LaSalle National Bank v. County of Cook*,²¹³ the municipalities used zoning powers to restrict the property near airports to nonresidential use. The plaintiff in *LaSalle* sought a zoning change from manufacturing to multiple family residential, but the appellate court affirmed the lower court's decision to uphold the validity of the county ordinance which restricted building height.²¹⁴ The court reasoned that this was a proper exercise of the police power because there was an appropriate need, due to increased air traffic, to protect the public from air hazards.²¹⁵ Further, because the land could still be used for industrial development, this ordinance did not create an avigation easement amounting to a taking of private land for public use without just compensation.²¹⁶

The local governmental authority or the airport commission can acquire an interest in the land adjacent to an airport by formally imposing a height restriction and taking an avigation easement.²¹⁷ If the airport commission has the power to take avigational easements in order to operate the airport,²¹⁸ it can also be compelled to acquire an avigation easement for compensation through inverse condemnation actions, if the aircraft overflights are of such magnitude as to directly and substantially invade property rights.²¹⁹

In order for an airport and its immediate community to co-exist, the airport operator, local municipality, and the state government must take affirmative action in developing a viable noise control/land use compatibility plan. The federal gov-

²¹² *Id.* at 778.

²¹³ 34 Ill. App. 3d 264, 340 N.E.2d 79 (1975).

²¹⁴ 340 N.E.2d at 92.

²¹⁵ *Id.* at 89.

²¹⁶ *Id.* at 88-89.

²¹⁷ See, e.g., *3775 Genesee Street, Inc. v. New York*, 415 N.Y.S.2d 575 (Ct. Cl. 1979); *Kupster Realty Corp. v. New York*, 93 Misc. 2d 843, 404 N.Y.S.2d 225 (Ct. Cl. 1978). See also *supra* notes 150-53 and accompanying text.

²¹⁸ See *Alevizos v. Metropolitan Airport Comm'n*, 216 N.W.2d 651 (Minn. 1974).

²¹⁹ 216 N.W.2d at 662.

ernment will not infringe upon local or state government attempts to rezone the land, acquire air easements, impose building codes or height restrictions, or locate an airport, if it is pursuant to a legitimate state interest in protecting the health, welfare, and safety of its citizens.

B. *The Effectiveness of an Environmental Impact Statement In Airport Noise Control*

The National Environmental Policy Act of 1969 (NEPA),²²⁰ includes the requirement that an environmental impact statement (EIS) be prepared for all major federal actions that may significantly affect the quality of the environment.²²¹ It must contain detailed plans of the project, and a forecast of the possible environmental consequences, as well as feasible project alternatives.²²² NEPA is aimed at requiring federal officials, not private parties, to regulate their activities in compliance with certain procedures or goals as defined by Congress. Some states have passed similar statutes requiring an environmental impact report (EIR) whenever a project is contemplated that could conceivably affect the environment.²²³ Often federal or state governmental agencies, such as FAA and CAB or government officials, are named as parties in litigation seeking to halt airport expansion by alleging failure on the part of the agency to prepare an EIS, or if one has been filed, then by alleging inadequacy in the report's preparation.²²⁴

The requirement that an EIS be prepared is not limited to the inception of a totally new project. If there is a possible effect on the environment due to the contemplated initiation of a major federal action involving an on-going project, then an EIS would also be required.²²⁵ In a United States District Court case in Illinois, *State of Illinois v. Butterfield*,²²⁶ the

²²⁰ 42 U.S.C. §§ 4321-4326 (1976).

²²¹ 42 U.S.C. § 4332(2)(c) (1976).

²²² *Id.*

²²³ See, e.g., CAL. PUB. RES. CODE §§ 22002.1, 21061 (West 1977 & Supp. 1982); CAL. ADMIN. CODE tit. 14, R. 15000-15203 (1978).

²²⁴ See *infra* notes 226-38 and accompanying text.

²²⁵ 42 U.S.C. § 4332(2)(C) (1976).

²²⁶ 396 F. Supp. 632 (N.D. Ill. 1975).

former FAA administrator, Alexander Butterfield, and the FAA regional administrator, John Cyrocki, were charged with failure to prepare an EIS as required by NEPA.²²⁷ The suit dealt with the increase of aircraft operations and the accompanying noise and air pollution at Chicago's O'Hare International Airport. The federal agencies of FAA and CAB were charged with implementing several actions, such as approved installation of equipment, which resulted in enlarging the airport's capacity to handle more aircraft.²²⁸ The court determined that this substantial increase, at an already very busy airport, was adequate evidence to indicate the need for an EIS, and compelled the FAA and CAB to prepare one before continuing to increase air traffic and operations at O'Hare.²²⁹

The FAA in *Virginians for Dulles v. Volpe*²³⁰ argued that no EIS was necessary for the two federally operated and owned airports because there was no major federal action planned within the meaning of NEPA.²³¹ The United States District Court, however, found that there was a substantial increase in the population near the airport and a growing number of aircraft operations. There was also an indication in the federal budget that a modernization of Washington National Airport was contemplated in the near future. This fact was enough to support the need for the FAA to perform an EIS study before initiating any further airport expansion.²³²

Some construction projects are joint ventures, undertaken by the state and federal government. In *City of Romulus v. County of Wayne*,²³³ the city and the school board of Romulus wanted to halt the construction of a third parallel runway at Wayne County Airport, or, at least, prevent the use of federal funding until an adequate EIS had been prepared. The FAA had initially prepared an EIS study, but the district court found that the statement lacked a great deal of informa-

²²⁷ *Id.* at 635-36.

²²⁸ *Id.*

²²⁹ *Id.* at 646.

²³⁰ 541 F.2d 442 (4th Cir. 1976).

²³¹ *Id.* at 445.

²³² *Id.* at 446-47.

²³³ 392 F. Supp. 578 (E.D. Mich. 1975), *vacated*, 634 F.2d 347 (6th Cir. 1980).

tion regarding the impact of the proposed runway on the environment.²³⁴ The court could not stop the construction of the entire project, because the project was not solely federal, but it did enjoin further federal funding until the EIS met the NEPA requirements.²³⁵ The federal defendants then supplemented the environmental impact statement, and the district court dissolved the injunction.²³⁶

Over the years, state and federal agencies have learned from experience that it is more efficient to perform an acceptable EIS at the beginning of a project, than risk jeopardizing the project or incurring unanticipated expenditures after it is underway. Thus, since 1975, few cases concerned with airport expansion have dealt with the failure to perform an EIS, or the inadequacy of an EIS. When they do, however, as in the Luke Air Force Base case, *Westside Property Owners v. Schlesinger*,²³⁷ the court will probably find that the federal government has done an admirable job in considering the environmental effects and balancing the reasonable alternatives.²³⁸

AIRPORT NOISE LITIGATION: CASE LAW IMPLICATIONS

This article's extensive review of the relevant judicial decisions on aircraft noise litigation indicates that the courts continue to hold airport proprietors liable for damages resulting from aircraft noise. At the same time, the judiciary is expanding the legal theories associated with noise litigation and is granting recovery for noise-related effects on people under a

²³⁴ *Id.* at 586-89.

²³⁵ *Id.* at 595-96. The record did not allow the court to enjoin the entire project because 50 percent of the funds were local, not federal, and therefore, were not subject to NEPA requirements. *Id.* at 596.

²³⁶ 634 F.2d at 348. The plaintiffs appealed the district court's dissolution order, arguing that the revised EIS was still inadequate and that the government failed to reevaluate the project after drafting the addendum. During the time this appeal was pending, the runway had been completed and the plaintiff's argument that the district court erred in dissolving the preliminary injunction and permitting the runway construction to continue was moot. Pending a decision on the merits, the appellate court vacated the order of the district court granting and dissolving the injunction preventing construction of the runway. This case was then remanded to the district court for further proceedings on any remaining issues. *Id.* at 349.

²³⁷ 415 F. Supp. 1298 (D. Ariz. 1976), *aff'd*, 597 F.2d 1214 (9th Cir. 1979).

²³⁸ *Id.* at 1304.

nuisance theory for emotional distress, as well as under the traditional inverse condemnation theory for deprivation of property. As a result of this increase in potential liability, airport proprietors and municipality non-proprietors, with or without federal guidance, are implementing airport use restrictions, in an attempt to decrease objectionable noise levels and avoid possible lawsuits. Due to the lack of definitive federal direction in these regulatory matters, the courts have been forced into the position of rulemakers to determine, on a case by case basis, how close the use restrictions come to encroaching upon an area historically perceived to be federally preempted.

In an effort to avoid aircraft noise exposure problems before they arise, municipalities and airport operators with land acquisition power, are purchasing land, rezoning, or acquiring aviation easements in the communities adjacent to the airports. Finally, federal or state controlled agencies have learned to accommodate the requirements for the preparation of adequate environmental impact statements and reports when they undertake projects that could conceivably influence the environment.

Judicial history from *Griggs* in 1962 to *Greater Westchester* in 1980 has consistently placed liability for aircraft noise effects experienced by property owners squarely on the airport proprietor. The federal government, unless acting as an airport proprietor, has been absolved from financial responsibility for airport related noise problems. The courts, up to this point, have not been persuaded by the arguments of airport proprietors that the federal government, through its agencies such as FAA or CAB, and accompanying federal laws and regulations, have so totally controlled air commerce that it should be the legally responsible party in a lawsuit for noise damages.

The FAA's position, as implied in the "Aviation Noise Abatement Policy" of November 1976,²⁸⁹ is to avoid complete federal preemption of the field of aviation noise abatement.

²⁸⁹ See DOT/FAA Aviation Noise Abatement Policy, *supra* note 14.

The federal government perceives that the control and reduction of airport noise should remain a mutual responsibility of airport proprietors, users, and the government. In the FAA Notice of Air Transport Association Petition for Rulemaking on Airport Noise Abatement,²⁴⁰ however, the Air Transport Association (ATA) attempted to calm the FAA's apparent fears of financial liability, and reasoned that federal preemption could co-exist, under the concept of shared responsibility with the airport proprietors, and still not impose financial liability on the federal government.²⁴¹

Traditionally, the landowner had to prove that aircraft flew directly over the property at a specified minimal altitude and with such frequency as to constitute a taking of the property by depriving the owner of substantial use and enjoyment. This was the classic rubric derived from the salient federal cases in the field, *Causby*²⁴² and *Griggs*.²⁴³ Times have changed, however, and state courts will consider awarding damages under inverse condemnation for aircraft noise generated from flybys adjacent to the property boundary lines, as well as for direct overflights. The state courts have interpreted state constitutional concepts of inverse condemnation to include the taking and damaging of property by aircraft noise. Thus, a landowner can be awarded damages for aircraft noise, even though the property is not directly under the flight path, if there is a taking or damaging of the property resulting in a diminution of market value.

Some state courts have allowed recovery under the civil tort theory of nuisance, which includes property and personal injury. In *Great Westchester*,²⁴⁴ the trial court considered emotional distress to be a compensable injury, and awarded the plaintiff homeowners damages caused, according to the court, by "a loss to the homeowner of the use and enjoyment of his home which results in his annoyance, discomfort, mental or

²⁴⁰ 44 Fed. Reg. 52,076 (1979).

²⁴¹ *Id.* at 52,077-78.

²⁴² *United States v. Causby*, 328 U.S. 256 (1946).

²⁴³ *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

²⁴⁴ 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980).

emotional distress."²⁴⁵

The court, in *Great Westchester*, made another statement that could herald the financial facts of life for the airport proprietor's future. The judge ruled that the injured plaintiffs could bring suit again, at some later date, for damages from continuing emotional and mental distress attributable to aircraft noise.²⁴⁶ If the airport operators are faced with this expensive prospect, they are left with no choice but to try and attenuate objectionable noise levels before they find themselves again in front of the magistrate.

While the airport has an economic incentive to abate the noise levels, the necessary authority to achieve this goal is limited by the federal plenary powers over interstate commerce and navigable airspace. The "Aviation Noise Abatement Policy," published by the FAA/Department of Transportation in 1976, stated that the FAA would "review and advise" the airport operator as to the acceptability of any operational use restrictions that the airport proprietors might want to impose.²⁴⁷ The FAA declined an invitation, however, to "review and advise," the San Diego Port District in a dispute with the State of California over whether to extend a curfew.²⁴⁸ If the federal government fails specifically to identify, through legislation or in an advisory capacity, acceptable use restrictions, and the airport operators continue to promulgate their own regulations in an effort to reduce financial and noise exposure levels, then courts are left with the task of bringing some order to this confusion.

Aviation noise case law indicates that airport operators will not limit the proprietary use restrictions to airport ground operations alone. The number and type of regulations imposed on airport users at the city-operated Santa Monica airport is a prime example of how far a municipal airport proprietor is willing to challenge federal preemptory powers. The United

²⁴⁵ NOISE REG. REP. (BNA) No. 37, at A-30 (Oct. 6, 1975) (quoting *Greater Westchester Homeowners' Ass'n v. City of Los Angeles*, No. C-931-989 (Cal. Sup. Ct.)).

²⁴⁶ NOISE REG. REP. No. 37, at A-29 (Oct. 6, 1975).

²⁴⁷ DOT/FAA Aviation Noise Abatement Policy, *supra* note 14, at 58-60.

²⁴⁸ *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978).

States District Court upheld all the restrictions, with the exception of the jet ban, on constitutional grounds.²⁴⁹

The court ruled that Santa Monica's use restrictions were nondiscriminatory and did not impose an undue burden upon interstate commerce.²⁵⁰ The fact that Santa Monica is a small general aviation airport undoubtedly influenced the court in its finding that even the completely exclusionary nighttime curfew would pose only an incidental burden upon interstate commerce.

Santa Monica is the most recent in a line of cases²⁵¹ in which the courts applaud the airport's use restrictions, promulgated in an effort to alleviate the noise problems. The opinion in *Crotti* indicated that an airport proprietor had the right to determine the type of air service, the type of aircraft, and the permissible noise levels for the aircraft using its facilities.²⁵² If this is an indication of the direction of future judicial reasoning when courts are ultimately confronted with other proprietor imposed use restrictions, then it is not inconceivable that several airports across the country could institute curfews specifying different time intervals for aircraft operations. Additionally, airports could promulgate different noise level related curfews, similar to the curfew in *Hayward*, that excludes aircraft with certain noise levels from operating during specified hours.²⁵³ If this occurred at enough airports across the country, the impact upon interstate commerce would not be "too speculative,"²⁵⁴ but would indeed introduce further chaos into the air commerce system.

The area of aviation noise abatement, for obvious reasons, is one that needs a system of uniform regulations. State and local governments, in an effort to protect the health and wel-

²⁴⁹ *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981) (opinion withdrawn from publication in the Federal Reporter at the request of the Ninth Circuit Court of Appeals).

²⁵⁰ 481 F. Supp. at 928.

²⁵¹ *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transp. Ass'n of America v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975).

²⁵² 389 F. Supp. at 64.

²⁵³ 418 F. Supp. at 418.

²⁵⁴ *Id.* at 428.

fare of their citizens, often impose use restrictions on airports when existing zoning ordinances are not effective in controlling the noise exposure levels. In the opinion of this author, *Township of Hanover v. Town of Morristown*²⁵⁵ indicated that a municipality that was not an airport proprietor may impose restrictions dealing with ground operations, such as noise barriers, or limitation of engine testing to certain hours.²⁵⁶ Realistically, in light of *Burbank*,²⁵⁷ the courts would not be disposed to allow the municipality, as a non-operator, to control aircraft flight operations.

The municipality does, however, have powers not preempted by the federal government to provide for a quieter environment through land use planning. The case law indicates that state or local governmental authorities can use their zoning powers to determine whether the areas adjacent to airports will be open air buffer zones or will be developed for non-residential use.²⁵⁸

The private airport operator can acquire an interest in the land adjacent to an airport through air easements, but cannot rezone the land to prohibit residential development in the vicinity of the airport. The private airport operator has limited ability to control the land adjacent to the airport unless the municipality that is impacted by the airport will cooperate. While Burbank Airport, at one time, might have been the only privately owned and operated commercial airport in the country, there are currently many instances in which commercial airports are located within the jurisdiction of one city, but operated under the authority of another. For example, Ontario Airport, which is located in San Bernardino County, is operated by the Los Angeles Department of Airports. Under such circumstances, it would be beneficial for the airport proprietor to have a specific contractual agreement with the landlord municipality that would assure the airport proprietor of

²⁵⁵ 343 A.2d 792 (N.J. Super. 1975).

²⁵⁶ *Id.* at 796.

²⁵⁷ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

²⁵⁸ *LaSalle Nat'l Bank v. County of Cook*, 34 Ill. App. 3d 264, 340 N.E.2d 79 (1975).

enough control over adjacent land to prevent residential development up to the edge of the runways.

This area of land use planning is also ripe for federal guidance in terms of uniform regulations. Some airports, such as New York's Westchester County Airport, are physically located in, or impact, more than one municipality, or even more than one state, each with different zoning regulations. Moreover, some states have no established zoning practices. The federal government, throughout its many funding programs, could provide incentives for the municipality and the state, such as under the Air Installation Compatible Use Zone (AICUZ) policies²⁵⁹ to instigate land use programs and zoning regulations that would take into consideration the impact of an airport on the community, and would either acquire the land or rezone it, in an effort to avoid paying damages in a court of law.

The fundamental issues litigated over the years have not changed and are a reflection of the federal government's apparent fear that financial liability for airport noise damage may attach if there is a federally inspired uniform system of regulations in the field of aviation noise control. If the federal government abdicates its responsibility in this area, then it falls to the courts to attempt, on a case by case assessment, to define the airport proprietor's authority in determining reasonable means to control aircraft noise.

²⁵⁹ 32 C.F.R. § 256 (1981). The Air Installation Compatible Use Zone (AICUZ) policies contained in Part 256 emphasize measures to reduce or control noise from flight and flight-related activities. There are also provisions for land acquisition within the defined compatible use area. Since land use compatibility is the primary objective of the AICUZ studies, Part 256.8 provides guidance as to specific land uses and whether each land use is compatible with the proposed existing airport or airport activities. *Id.*