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JUDICIAL AND REGULATORY DECISIONS

VALIDITY OF MUNICIPALITY'S REGULATION OF AIRCRAFT ALTITUDE

IN *All-American Airlines, Inc. et al. v. Village of Cedarhurst et al.*[1] the district court granted a preliminary injunction restraining enforcement of a village ordinance regulating flight of aircraft over Cedarhurst, Long Island, New York, on the theory that the ordinance was unconstitutional in that it conflicted with the Civil Aeronautics Act of 1938[2] and regulations issued thereunder. These regulations authorized flight of aircraft over the Village at altitudes of less than 1000 feet when approaching, landing at, and leaving New York International Airport (Idlewild),[3] whereas the ordinance required a minimum altitude of 1000 feet.[4]

The Court of Appeals for the Second Circuit affirmed this decision,[5] stating that the validity of the ordinance, as against the authority of the federal government to control and regulate air commerce, was sufficiently questionable to sustain the injunction pending the outcome of litigation concerning its enforcement. The court, however, would not definitely declare the ordinance invalid at that preliminary stage of the proceedings, nor would it deny the authority of the Village under its police powers to pass such an ordinance.[6] The court indicated that the defendants (the Village, individual officials and landowners)[7] were entitled to an immediate trial upon the issues of fact raised by their counterclaim for an injunction based upon nuisance and trespass theories.[8] Thus, while the opinion does not entirely accept plaintiffs' constitutional argument, the court indicated that defendants' strongest position would be an affirmative attack based upon the theory that flight of aircraft at low altitudes constitutes a nuisance or a trespass.[9]

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[1] 106 F. Supp. 52 (E.D. N.Y. 1952).

[2] 52 STAT. 977 (1938), 49 U.S.C. §401 *et seq.* (1951); U. S. CONST. Art. I, §8, Cl. 3, Art. VI, §2.

[3] 14 CODE FED. REGS. §60.1 *et seq.* See *infra*, note 24.

[4] The disputed ordinance is set out in All-American Airlines Inc. v. Village of Cedarhurst, 201 F. 2d 273, 276 (2nd Cir. 1953).

[5] 201 F. 2d 273 (2nd Cir. 1953).

[6] MC K. CONSOL. LAWS c. 63 §§90 & 93 (N.Y. Village Law 1951).

[7] The plaintiffs are ten airlines operating out of Idlewild, together with certain pilots representing themselves and other interested pilots, and the Port of New York Authority, which leases the land from New York City and maintains the airport. The Administrator of Civil Aeronautics and the Civil Aeronautics Board were permitted to intervene as plaintiffs.

[8] The individual defendants on behalf of all the property owners and citizens of the Village counterclaimed for an injunction to abate the alleged nuisance and enjoining the plaintiff airlines from committing trespasses upon the property of the defendants. Brief for Appellants, Appendix, pp. 52a-58a, All-American Airlines v. Village of Cedarhurst, 201 F. 2d 273 (2nd Cir. 1953). In All-American Airlines v. Village of Cedarhurst, 111 F. Supp. 677 (E.D. N.Y. 1953) intervenors' motion to dismiss the counterclaim was denied. On April 22, 1953 the plaintiffs' motion to dismiss the counterclaim, in so far as it alleges a class action on behalf of all property owners and citizens of the Village, was granted. These cases are now being appealed. (This information was supplied in a letter from the Deputy General Counsel of the U. S. Dept. of Commerce.)

[9] All-American Airlines v. Village of Cedarhurst, *supra*, note 5 at 276. The court stated that defendants' counterclaim for an injunction was based upon what in essence was the principle of *U. S. v. Causby*, 328 U. S. 256 (1946). This decision found that flights of aircraft over private land may be so low as to be a direct and immediate interference with enjoyment and use of the land and as such constitute a taking of private property for public use for which respondents

The principle case raises questions which have plagued the courts and legal writers ever since the commercial possibilities of aviation became a reality.[10] The basic conflict of interest between the large-scale commercial airport and the adjacent property owner is graphically illustrated at the Idlewild Airport; and there also remains the unsettled dispute between state and national sovereignty over airspace.[11] Underlying these problems is the question of to what extent the supremacy clause of the Federal Constitution[12] should be used to defeat a Village's good faith attempt to safeguard the lives and property of its inhabitants.

Under the Air Commerce Act of 1926,[13] the United States has "complete and exclusive national sovereignty in the airspace" above this country.[14] Under this Act and the Civil Aeronautics Act of 1938,[15] any citizen of the United States is granted "a public right of freedom of transit" in air commerce through the "navigable" airspace above the United States.[16] ("Navigable airspace" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.")[17] These provisions coupled with an interpretation of the *Causby* case[18] give force to the theory that either no state sovereignty exists in navigable airspace, or that the Federal Government has such paramount power[19] therein as to make state sovereignty of no practical importance.[20] By state "sovereignty" it is not meant that abstract concept of sovereignty or that self-sufficient source from which all specific political powers are derived, but rather the right of the state to control certain activity in the face of the generally paramount authority of the Federal Government. In the field of air commerce the Federal Government's authority has been specifically exercised, and the question remains whether a state through its police powers can now exercise its right to control (sovereignty) in an area which by statute and judicial interpretation is said to be susceptible to, or preempted by only national control. The import of this theory is that, while there still remains a dispute as to whether non-navigable airspace is subject to the concurrent jurisdiction of the state and federal governments,[21] it is clear that the

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(plaintiffs) were entitled to compensation under the Fifth Amendment. The remedy made available under this decision was monetary damages. It is doubtful if its principle could support an injunction as indicated by the court, although it might strengthen defendants' case for a trespass by indicating that one owns so much of the airspace above his private land as he can occupy or use.

[10] See Hugin, *Airspace Rights and Liabilities*, 27 NOTRE DAME LAW. 66 (1952); Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 LAW & CONTEMP. PROB. 539 (1946).

[11] See Dinu, *State Sovereignty in the Navigable Airspace*, 17 J. AIR L. 43 (1950); Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. AIR L. 27 (1948).

[12] U. S. CONST. Art. VI, §2.

[13] 44 STAT. 548 (1926), 49 U.S.C. §171 *et seq.* (1951).

[14] 44 STAT. 572 (1926), 49 U.S.C. §176(a) (1951).

[15] 52 STAT. 977 (1938), 49 U.S.C. §401 *et seq.* (1951).

[16] 52 STAT. 980 (1938), 49 U.S.C. §403 (1951).

[17] 44 STAT. 574 (1926), 49 U.S.C. §180 (1951).

[18] 328 U. S. 256 (1946). The court apparently divided the airspace over the United States into two zones. In the lower zone next to the earth's surface private ownership of the airspace was recognized for purposes of claiming an unlawful interference. But in the upper zone (navigable airspace) paramount control belonged to the Federal Government. This would be consistent with the Congressional declaration that such airspace is "within the public domain."

[19] For further exposition of this theory see Cooper, *op. cit. supra*, note 11.

[20] United States v. California, 332 U. S. 19 (1947). The Court at p. 36 cited the *Causby* case in support of their finding that when national rights are involved the Federal Government occupies a paramount position as against state sovereignty. It would follow, that if, as seems apparent from the citation of the *Causby* case in the *California* opinion, "navigable airspace" involves considerations of national rights, then the Federal Government is dominant in that region.

[21] See note 29, *infra*.

Federal Government has an exclusive right to control in that airspace denominated by Congress as "navigable."[22] If this "zone" theory of the *Causby* case carries legal weight, it would appear that notwithstanding its police powers, the state, or a subdivision (such as the defendant Village), would be precluded from exercising any control whatever over the flight of aircraft within navigable airspace over its boundaries. As might be expected, the state courts express a different view, one court concluding that the right of the state to control is based on the practical necessity of self-protection.[23]

The dispute over the state's right to regulate "navigable" airspace, while it may be important in other similar cases, need not be troublesome in the *Cedarhurst case.* Since the minimum safe altitudes of flight over this congested area is designated as 1000 feet,[24] it can be argued that the exceptions, and other regulations for turning, approaching, maneuvering, etc.,[25] do not prescribe, as was noted in the *Causby* case,[26] minimum safe altitudes of flight (above which is navigable airspace), but govern merely the conduct of take-off and landing operations. If so, the constitutional issue is not "sovereignty," but whether, as a matter of fact, enforcement of the Village ordinance would necessarily result in a conflict with federal regulations or in an intrusion into a field dominated by federal control. Therefore, before there is a determination on the constitutionality of the ordinance, the effect of this ordinance upon any compliance by plaintiffs with the federal regulations should be established as a fact. Consideration should be given to the following questions: 1) To what extent would enforcement of the ordinance result in conflict with the regulations? 2) Are the regulations mandatory in the sense that they demand that aircraft fly at lower altitudes, or are they only permissive in that they would sanction flight at lower altitudes *when necessary* for landing or taking-off? (In this connection inquiry into technical flight and runway difficulties would be proper, for if it could be established that before approaching Cedarhurst, flight above 1000 feet is attainable with safety, then compliance with the ordinance would not necessarily invite a conflict with the federal regulations.)

Under the above analysis and assuming that the regulations are mandatory, plaintiffs would prevail only if they are able to demonstrate factually that they will violate the federal law[27] by obeying the state law, or vice versa.[28] However, when actual conflict between federal and state law is shown the federal law is supreme.[29]

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[22] See note 17, *supra.*

[23] Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 389 (1930); *cf.* Erickson v. King, 218 Minn. 98, 15 N.W. 2d 201 (1944); *cf.* Parker v. Granger 4 Cal. 2d 668, 52 P. 2d 226 (1935).

[24] 14 CODE FED. REGS. §60.17 provides that except when necessary for landing and taking-off, the minimum safe altitude of flight over congested areas is 1000 feet.

[25] 14 CODE FED. REGS. §600.1 *et seq.;* 14 CODE FED. REGS. §601.1 *et seq.;* 14 CODE FED. REGS. §§601.1981, 601.2238. These regulations established civil airways, control areas and control zones. See also Technical Standard Order of the Administrator TSO-N 18, April 26, 1950 in which the Administrator has established airport criteria for clearance areas for 1) approaching, 2) maneuvering, 3) turning, 4) landing and 5) taking-off from Idlewild: (many of these pass over Cedarhurst at altitudes of less than 1000 feet).

[26] 328 U. S. 256 at 263 (1946).

[27] 52 STAT. 1015 (1938), 49 U.S.C. §621 (1951).

[28] Southern Ry. Co. v. Reid, 222 U. S. 424, 442 (1912).

[29] The case of Bethlehem Co. v. State Board, 330 U. S. 767 (1947), cited by the Court of Appeals in the principal case in support of national supremacy, would give the supremacy and commerce clauses *broader interpretations* in that conflict would not be a necessary prerequisite for unconstitutionality if the state attempted to legislate in a field in which Congress had asserted general jurisdiction. *cf.* Napier v. Atlantic Coast Line 272 U. S. 605 (1926); Cooley v. Wardens of the Port of Phila., 12 How. 299 (1851). Thus, the factual determination de-

The individual defendants, anticipating that the ordinance might be declared invalid, have sought security for their lives and property in their counterclaim[30] which is, in essence, based upon tort principles of nuisance and trespass as applied to the field of aviation law.[31] The objective of the counterclaim is to enjoin flight from a particularly objectionable runway. The doctrines of trespass and nuisance therein relied upon involve distinct legal theories. In nuisance actual damage to an interest of the complainant must be shown.[32] In trespass it is necessary to show that a possessory interest in property has been invaded. The airspace into which the aircraft intrudes must be airspace in which the surface landowner retains a property interest. Actually, the interest is often intangible, and most legal theories[33] have been inadequate because the conflict of interests between the airport and aircraft operator on the one hand, and the adjoining landowner on the other, is so dependent on variable facts that it permits no solution by a fixed legal formula.[34]

The courts have been reluctant to completely deny rights in airspace to the surface owner. Thus, while the maxim "he who owns the soil owns it to the heavens" has been specifically rejected,[35] a fairly workable rule has been evolved by which right to the exclusive possession of airspace extends upwards only to that point necessary for the full use and enjoyment of the land, the balance being regarded as open (and navigable) airspace.[36] Under this theory the landowner would have a dominant right of occupancy for purposes incident to the use and enjoyment of the surface, and an unreasonable interference with his actual occupancy of the land would be actionable. More recently, the courts have been prone to grant relief against an unreasonable interference with the complete enjoyment of land on a nuisance rather than a trespass theory.[37] This trend seems justifiable because it is practical; that is, the courts want proof of actual damage and interference with one's use and enjoyment of the land, and not merely a showing that an aircraft in low flight invaded a landowner's alleged airspace rights.

In defendants' counterclaim there are specific allegations which raise certain factual issues relating to nuisance.[38] Whether their case is strong

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scribed in the text might well be avoided if the court could be persuaded that the ordinance, as an attempt at local regulation of air traffic, was an intrusion in a field of air commerce preempted by exhaustive and complete regulation by the Federal Government. See the concurring opinion of Mr. Justice Jackson in Northwest Airlines v. Minnesota, 332 U. S. 292 (1944), on the question whether it was the intent of Congress to exclusively occupy the field of air traffic regulation.

[30] See note 8, *supra.*

[31] See German, *The Conflicting Interests of Airport Owners and Near-by Property Owners*, 20 KAN. CITY L. REV. 138 (1952).

[32] Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Swetland v. Curtiss Airports Corp., 55 F. 2d 201 (6th Cir. 1931).

[33] RHYNE, AIRPORTS AND THE COURTS 154-162 (1944); Rhyne, *Airport Legislation and Court Decisions*, 14 J. AIR L. 289 (1947).

[34] Swetland v. Curtiss Airports Corp., 55 F. 2d 201 (6th Cir. 1931); Bell & Pogue, *The Legal Framework of Airport Operations*, 14 J. AIR L. 253 (1952).

[35] United States v. Causby, 328 U. S. 256 (1946); See also Sweeney, *Adjusting to the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. 329, 531 (1932).

[36] United States v. Causby, *supra;* Northwest Airlines v. Minn., 322 U. S. 292 (Concurring opinion of Mr. Justice Jackson); Swetland v. Curtiss Airports Corp., 55 F. 2d 201 (6th Cir. 1931).

[37] Anderson v. Souza, 38 Cal. 2d 825, 243 P. 2d 497 (1952); Barrier v. Troutman, 231 N.C. 47, 55 S.E. 2d 923 (1949); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E. 2d 245 (1942); Swetland v. Curtiss Airport Corp., 55 F. 2d 201 (6th Cir. 1931).

[38] There are allegations that the acts of plaintiffs cause great annoyance and vibration and deprive defendants of the quiet use and peaceful enjoyment of their property. Further, that aircraft flights at altitudes from 162 feet to 1000 feet render the homes of defendants unfit for peaceful habitation, interrupt

enough to warrant injunctive relief is doubtful. An airport is not a nuisance per se, but it may become such from the manner of its construction or operation, or because of its unsuitable location.[39] Airports have been held to be nuisances because of dust, noise, lights, congregation of crowds, or justified apprehension of damages.[40] But whether or not a nuisance has been created depends upon the particular facts of each case. Therefore defendants' problem is twofold: first, they must prove facts which constitute a nuisance, and second, they must convince the court that injunctive relief is justified.

Defendants' counterclaim raises the question whether the individual defendants will be precluded from showing a nuisance or trespass upon proof by the plaintiffs that the manner in which their aircraft are operated substantially complies with the federal regulations authorizing flight of aircraft at altitudes of less than 1000 feet. The *Swetland*[41] case has indicated that the federal regulations prescribing altitudes for flight of aircraft do not determine the rights of a surface owner either as to trespass or nuisance. That is, these regulations are not to be construed as authoring flight of aircraft at such low altitudes as to interfere with the reasonable use and enjoyment of land.[42] On the factual issue this is a point in defendants' favor.

Assuming that case law would permit a finding of nuisance or continuing trespass, the defendants face their greatest obstacle in the judiciary's growing reluctance to afford injunctive relief which would effectively stifle the operation of a large airport greatly affected with the public interests.[43] The controlling factor is the adjusting of two public interests: 1) the interest of society and the individual land owner in preventing interferences with use and enjoyment of private property; and 2) the public interest in fostering and preserving growth and safety in commercial aviation. Where the inconveniences and hardships to the latter caused by injunctive relief outweigh the benefits to the former, such relief should not be granted.[44] In

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the rest and sleep of the residents, adversely affecting their health, depreciating the value of their buildings and property, and creating in this and other ways a nuisance to the damage of defendants. Brief for Appellants, Appendix pp 52a-58a, All-American Airlines v. Village of Cedarhurst, 201 F. 2d 273 (2nd Cir. 1953).

[39] Crew v. Gallagher, 358 Pa. 541, 58 A. 2d 179 (1948); Oechsle v. Ruhl, 140 N.J. Eq. 355, 54 A. 2d 462 (1947); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E. 2d 245 (1942); Swetland v. Curtiss Airports Corp., 55 F. 2d 201 (6th Cir. 1932).

[40] Depreciation of property has been held not to be grounds for nuisance. See Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A. 2d 87 (1942).

[41] 55 F. 2d 201 at 203 (1931); *cf.* Anderson v. Souza, 38 Cal. 2d 825, 243 P. 2d 497 (1952).

[42] See United States v. Causby, *supra*, note 9 where a federal regulation approving a glide angle did not prevent the ultimate holding against the Government.

[43] But see the case of Antonik v. Chamberlain, 81 Ohio app. 465, 78 N.E. 2d 752, 758 (1947), in which it was held that federal regulations which determine minimum safe altitudes of flight also contain exceptions which grant a license to fly at lower altitudes above private land when landing or taking-off. However, this license is revoked when abused and such abuse exists upon a showing of nuisance or upon proof of an appropriation of the owner's property without just compensation. Antonik v. Chamberlain, *supra*. By appropriation it is meant a taking such as the kind seen in United States v. Causby, 328 U. S. 256 (1946); *cf.* Portsmouth Harbor Land and Hotel Co. v. United States, 260 U. S. 327 (1922).

[44] Kuntz v. Werner Flying Service, 257 Wis. 405, 43 N.W. 2d 476 (1950); Antonik v. Chamberlain, 81 Ohio app. 465, 78 N.E. 2d 752 (1947). Idlewild's great size is attested to by the findings of the trial judge. All-American Airlines v. Village of Cedarhurst, 106 F. Supp. 521 (E.D. N.Y. 1952). Its cargo shipments are comparatively large, while its property investment is upwards of one hundred million dollars, and its gross operating revenues in excess of three million dollars. The airport serves more than 300 flights per day transporting some 2,500,000 passengers per year, 800,000 for overseas passage.

none of the cases in which injunctions were granted for nuisance or trespass were the courts dealing with an airport of Idlewild's magnitude, and in one of the cases in which some measure of relief was granted, the *Kersey* case, the court, in upholding a petition for injunction against a demurrer, indicated that "if on trial it should appear that it is indispensable to the public interest that the airport should continue to be operated in its present condition, it may be that petitioner should be denied injunctive relief.[45]

CONCLUSION

The ultimate disposition of the *Cedarhurst* case may be expected to indicate that conflicts between the large airport and the adjoining landowner are not to be resolved by the methods which defendants tried. State or municipal prohibitory action runs the risk of burdening interstate commerce, conflicting with federal statutes or regulations, or interfering in a field preempted by national control. Resort to a prayer for injunctive relief by the landowner upon grounds of nuisance or trespass will usually prove futile with respect to the large airport because of the public and governmental interest in its continued operation.

These conclusions do not mean that those in the individual defendants' position should be entirely remediless. While the growth of modern aviation must necessarily be favored, this growth should not be permitted to interfere with private property rights without paying its way.[46] Aside from ex parte relief in the form of land purchases by the industry, defendants may have a remedy through an assessment of permanent damages under a permanent nuisance doctrine. Depreciation in the value of defendants' property would be one basis upon which the jury could assess permanent damages. It is true that defendants here do not seek monetary relief,[47] but such relief should ease their plight.

EXECUTIVE PROHIBITION AGAINST FLIGHT OVER NATIONAL FOREST — A TAKING OF PRIVATE PROPERTY UNDER THE FIFTH AMENDMENT

IN December, 1949, the President issued an Executive Order[1] creating an airspace reservation in those areas in Northern Minnesota within the boundaries of the Superior National Forest which had previously been designated by the Secretary of Agriculture as "roadless areas." After January 1, 1951, all aircraft were prohibited in these areas below an altitude of 4,000 feet except for emergency landings, low level flight for safety purposes, official business, or for the conduct of rescue operations. Persons who had customarily flown to and from private lands were permitted, subject to the regulations of the Secretary of Agriculture, to operate aircraft within these areas until January 1, 1952. Violators of these provisions were to be subject to penalties prescribed by the Civil Aeronautics Act of 1938.[2] After the effective date of this order, four persons repeatedly violated its provisions. Three of these, Messrs. Perko, Skala, and Zupancich, were owners of resort

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[45] Kuntz v. Werner Flying Service, *supra* note 46; Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E. 2d 245 (1942).

[46] Delta Air Corp. v. Kersey, *supra* note 47. In Kuntz v. Werner Flying Service, *supra* note 47, the court pointed out that money damages would be adequate relief. This would be consistent with the trend away from injunctions.

[47] United States v. Causby, *supra* note 9.

[1] Executive Order No. 10092, 14 FED. REG. 7637 (1949).

[2] 52 STAT. 973 (1938), 49 U.S.C. §401 (1946).

properties located entirely within the boundaries of the designated areas, having obtained their title from land patents of the United States. They maintained summer residences there to operate these resorts, and in this way they earned their livelihood. Air transport afforded the only practical means of access to these properties, other than canoe or boat in the summer and on foot or snowshoes in the winter.[3] The fourth violator, a Mr. West, operated a commercial aviation service from Ely, Minnesota, and served the resorts of the other three. In March, 1952, the United States brought suit in the District Court for the District of Minnesota to enjoin these people from continuing to violate the executive order in any way. A permanent injunction was issued,[4] the court of appeals affirmed this decision,[5] and the Supreme Court denied certiorari.[6]

One of the issues raised by the defense was whether this executive order had a statutory basis. The Air Commerce Act of 1926[7] provides that the President may set aside airspace reservations for "national defense or other governmental purposes. . . ." Since there was clearly no national defense basis for this order, the specific problem presented by the *Perko* case is what was the "other governmental purpose(s)" toward which the Executive Order was directed?[8] The district court said that the construction of the phrase "other governmental purposes" in this provision of the Air Commerce Act is one of first impression in the *Perko* case.[9]

The creation of National Forests is authorized by the Forest Reserve Act of 1897[10] for the express purposes of improving and protecting the forests, securing favorable conditions for water flowage, and furnishing timber for the use of citizens of the United States.[11] Since the passage of this act and the creation of the Superior National Forest,[12] there have been significant extensions of the original National Forest policy in the Lake Superior region. The Shipstead-Nolan Act of 1930[13] withdrew certain lands within that region from all forms of entry and appropriation under the public land laws. The express purpose of this Act was conservation of the natural beauty of the shore lines for recreational use.[14] Further expan-

[3] 108 F. Supp. 315, 316 (D. Minn. 1952).

[4] United States v. Perko, 108 F. Supp. 315 (D. Minn. 1952).

[5] Perko v. United States, 204 F. 2d 446 (8th Cir. 1953).

[6] 74 S. Ct. 48 (1953). Mr. Justice Black and Mr. Justice Douglas were of the opinion that certiorari should have been granted.

[7] 44 STAT. 570 (1926), 49 U.S.C. §174 (1946).

[8] The defendants urged, in the district court and the court of appeals, that "other governmental purposes" is to be construed to mean other governmental purposes akin to national defense. They pointed out that the only airspace reservations so far created have been those in areas where atomic energy projects are located. Both courts rejected this contention on the basis of the meager legislative history. They cited a Senate debate involving a conference report on the Air Commerce Act, in which Senator Bingham stated that the President is authorized, by the terms of that Act, to set apart airspace reservations for military, postal, and other purposes. 67 CONG. REC. 9355 (1926).

[9] *Id.* at 322.

[10] 30 STAT. 34 (1897), 16 U.S.C. §475 (1946).

[11] See 23 OPS. ATT'Y. GEN. 589 (1901), indicating that these purposes are to be construed narrowly. The Attorney General indicated that the creation of a game reservation in a national forest was not to be implied to be within the stated purposes.

[12] The Superior National Forest was created by Presidential Proclamation in 1909. 35 STAT. 2223 (1909).

[13] 46 STAT. 1020 (1930), 16 U.S.C. §577 (1946).

[14] An indication of Congressional concern with preserving the primitive condition of the area is to be found in the House Committee Report, H.R. REP. No. 1945, 71st Cong., 2d Sess. (1930). The defendants, in their briefs, indicated that the basic purpose of the Shipstead-Nolan Act was to prevent private power interests from building a dam.

sion of this policy took place in 1948 with the passage of the Thye-Blatnik Act.[15] This Act authorized the Secretary of Agriculture to acquire any lands within the Superior area where, in his opinion, exploitation or potentialities for exploitation threatened to impair the natural features of the "remaining wilderness canoe country."[16] In this way Congress intended to discourage commercial development of the area,[17] and on this basis there is support for the district court's finding that there is a federal policy of preserving the Superior region in its wilderness state. The creation of "planeless areas" is well calculated to preserve the wilderness character of this plot,[18] and therefore the Executive Order is directed to a valid "governmental purpose."

There is, however, a fundamental problem created by this conclusion. The reason for the air ban is that it tends to carry out the policy of discouraging commercial development in the area by preventing the use of aircraft to bring in building materials and supplies.[19] But, since air travel is the only practical means of access, the effect of the air ban is to deprive private property owners of ingress and egress to their property. Does the governmental purpose in maintaining the wilderness area extend to maintaining an area which is privately owned in an inaccessible state of nature? Or, ultimately, does the exclusive national sovereignty in navigable airspace recognized by the Air Commerce Act of 1926[20] entitle the Federal Government to deprive a surface landowner of the only practical means of access to his property?

It seems at least doubtful that Congress intended to create an *inaccessible* recreational area. The very legislation that established national forests, the Forest Reserve Act of 1897,[21] expressly provided that nothing therein should "be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests. . . ."[22] The district court stated that this provision does not aid the defendants, since nothing in the air ban prohibits utilization of defendants' property. This condition is contrary to its own finding that the effect of the air ban was, for all practical purposes, to make the Superior area inaccessible. In subsequent legislation there are further indications that Congress did not intend these statutes to be used to deprive private property owners of access to their property. During debate on the Shipstead-Nolan Act, Senator Nolan stated that the bill was not intended to restrict the use or occupancy of private lands, whether for agriculture, mining or other development.[23] The Department of Agriculture, in its regulations, expressly provides that roads are to be allowed in the roadless areas if necessary for ingress to and egress from

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[15] 62 STAT. 568 (1948), 16 U.S.C. §577(c) (Supp. 1949).

[16] *Ibid.*

[17] H.R. REP. No. 2186, 80th Cong., 2d Sess. (1948). There was no specific provision in this Act for acquisition of properties like those of Perko, Skala, and Zupancich when those resorts were built; they all were purchased before 1948. But the policy of no commercial development had been in existence since 1939, when the Forest Service of the Department of Agriculture issued a regulation setting forth that policy, 3 CODE FED. REGS. §251.20 (1939), under authority granted to the Secretary of Agriculture to regulate "occupancy and use" of national forests by the Forest Reserve Act of 1897, 30 STAT. 35 (1897), 16 U.S.C. §551 (1946).

[18] The argument that 23 OPS. ATT'Y. GEN. 589 (1901) discourages regulation of national forests for purposes other than to conserve timber and water resources seems to have spent its force, since the history of national forest legislation has indicated that maintenance of recreational areas is clearly consistent with the maintenance of national forest reserves.

[19] See H.R. REP. No. 2196, 80th Cong., 2d Sess. (1948).

[20] 44 STAT. 572 (1926), 49 U.S.C. §176 (1946).

[21] See note 10 *supra.*

[22] 30 STAT. 36 (1897), 16 U.S.C. §478 (1946).

[23] 72 CONG. REC. 12464 (1930).

private property.[24] In fact, by 1948, the Department was convinced that the only way it could prevent the exercise of private property rights in a manner inconsistent with maintaining the area as a wilderness was to acquire such property.[25] Congress, in passing the Thye-Blatnik Act,[26] apparently adopted this position of the Department of Agriculture, since the Act seems to require that if there is a use of private property inconsistent with the wilderness policy, the Department must take steps to acquire such property.[27] Thus, Congress apparently intended to protect private property owners while furthering its national forest policy.

As a result of the Executive Order and the district court's injunction, three individuals have been practically excluded from enjoyment of their property. Is any relief available to them? The Fifth Amendment provides that "No person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for a public use without just compensation."[28] Does a denial of ingress to and egress from property constitute a compensable "taking" under this language of the Fifth Amendment?[29]

Some courts analyze injury to ingress and egress by considering them as an independent property right with an existence and value apart from the aggregate of rights, duties, and privileges which constitute the concept of property ownership. These courts speak of an easement of ingress and egress.[30] It is submitted that the problem of the *Perko* case is that of resolving the conflict of interest between the enjoyment of private property, and a governmental policy requiring interference with that enjoyment. Such a problem is best approached without resort to a property concept of ingress and egress. The basic issue to be resolved is whether the extent of government interference here has exceeded the limitations of the Fifth Amendment, and it is submitted that such an inquiry must be framed in terms of defining a "taking," since it is clear that Perko's interest is "property" within the meaning of the Fifth Amendment. Insofar as it is at all helpful to apply the law of easements to an injury to ingress and egress, it appears that no court has recognized an easement of ingress and egress by air.[31]

The problem of what constitutes a taking under the Fifth Amendment remains unsettled.[32] The trend seems to be to extend the liability of the

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[24] 36 CODE FED. REGS. §251.20(a) (1939).

[25] Department of Agriculture report in support of the Thye-Blatnik Act: U. S. CODE CONG. SERV., 80th Cong., 2d Sess. 1948 (1948).

[26] See note 15 *supra.*

[27] See Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (N.D. Cal. 1946), which indicates that the only feasible method of preserving scenic features of privately owned land is the use of the power of eminent domain. The district court held that an ordinance which sought to preserve scenic values by forbidding a mining company to carry on its operation violated the Fourteenth Amendment. The ordinance was described as a means without substantial relation to the end sought to be attained. See also H.R. REP. No. 2186, 80th Cong., 2d Sess. (1948) and U. S. CODE CONG. SERV., 80th Cong., 2d Sess. 1948 (1948). The latter report states the position of the Department of Agriculture.

[28] U. S. CONST. AMEND. V.

[29] The question of recovery for injury to property rights has not yet been litigated in the Perko case. Since both the district court and court of appeals proceeding were in equity, both courts declined to pass on the issue.

[30] See, e.g., United States v. Welch, 217 U. S. 333 (1910); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 188 (1943); Burnquist v. Cook, 220 Minn. 48, 19 N.W. 2d 394 (1945). Tiffany recognizes such an easement, but it is not an easement in the usual property sense, and he indicates that the designation of such an easement is of limited application. TIFFANY LAW OF REAL PROPERTY §§792-794 (3d. ed. 1939).

[31] The Illinois Supreme Court, apparently the only court yet faced with such a problem, rejected the recognition of such an easement. Rockford Electric Co. v. Browman, 339 Ill. 212, 171 N.E. 189 (1930).

[32] See Note, 4 VANDERBILT L. R. 673 (1951).

United States to keep pace with its expanding activities[33]— tempered by the consideration that too great an extension of the taking concept may unnecessarily restrict the United States in its public works ventures.[34] Some confusion arises from the use of "taking" to mean, on the one hand, an actual physical taking, and on the other an interference with the legal relationships which constitute property ownership.[35] Originally, it was held that actual physical invasion of property was necessary to constitute a taking.[36] But with the growing appreciation that property consists not only in tangibles, but in an aggregate of legal rights, that rigid interpretation of taking gave way to a broader one that interferences with that aggregate of legal rights connected with ownership of property constitutes a taking.[37]

Cormack, in his article *Legal Concepts in Cases of Eminent Domain*,[38] argues very forcefully that it is neither necessary nor desirable to retain technical property considerations in the law of eminent domain. His approach, which goes to the fundamental nature of the eminent domain concept, is that considerations of social policy should control, bearing in mind that government cannot compensate the individual for every injury to his property. The problem can best be approached by balancing the burden placed on the individual against the benefit which will accrue to the public. This approach does not supply a legal rule, but requires a determination of each case on its particular facts.[39]

There are, however, some general principles in the case law which act as guideposts. It is well settled, for example, that governmental acts — short of acquisition of title or actual occupancy — which have the effect of destroying or interrupting the lawful use of property, are takings if the effects are so complete as to deprive the owner of all beneficial interest in his property.[40] There is some tendency to state this principle even more broadly, that is, to classify some mere restrictions on use and enjoyment as takings.[41] The

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[33] *Ibid.*

[34] Note, 95 U. PENN L. R. n.7 (1946).

[35] For an excellent analysis of this conflict in definition, see Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE LAW J. 222 (1931).

[36] *Ibid.*; see also Note 95 U. PENN. L. R. n.7 (1946).

[37] It is not within the scope of this discussion to trace the historical development of the taking concept, but it is necessary to indicate the historical problems in definition of the concept to appreciate the unsettled state of the law. The analysis in Cormack, *supra* note 35, traces this development in detail up to 1924.

For purposes of this analysis, the highlights of the development can be discerned by a reading of cases involving flooding of property by governmental acts. It was in such a case, Pumpelly v. Green Bay Co., 13 Wall. 166 (1871), that the physical conception of taking was first abandoned. That case stated for the first time that actions short of absolute conversion of real property could be held to be takings. But complete abandonment of the physical conception was slow to develop. The cases continued to require a showing of permanent flooding. United States v. Lynah, 188 U. S. 445 (1903). Not until United States v. Cress, 243 U. S. 316 (1917), was a partial flooding held to be a taking, on the theory that it is the character of the invasion, not the amount of damage that determines a taking. But the cases still required a physical invasion to some extent. In fact, shortly after the Cress decision, the requirement of actual permanent invasion was reinstated. Sanguinetti v. United States, 264 U. S. 146 (1924). Not until 1950 was it held that the destruction of agricultural value without an actual overflowing could be a taking. United States v. Kansas City Life Insurance Co., 339 U. S. 799 (1950).

[38] Cormack, note 35 *supra*.

[39] Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922); United States v. Pewee Coal Co., 341 U. S. 114, 117 (1951); California v. Marin Water District, 17 Cal. 2d 699, 111 P. 2d 651 (1941).

[40] United States v. General Motors, 323 U. S. 373 (1945); *In re* Sansom Street, 293 Penn. 843, 143 Atl. 134 (1928); 1 NICHOLS, LAW OF EMINENT DOMAIN §107 (2d ed. 1917).

[41] Miller v. Beaver Falls, 368 Penn. 189, 82 A. 2d 34 (1951); 1 NICHOLS, LAW OF EMINENT DOMAIN §101 (2d ed. 1917).

"use and enjoyment" principle can be carried quite far to protect the rights of private property owners against unreasonable encroachments of sovereign power; the government need not receive any benefit from its interference with property rights, since the damage to the owner by itself determines the existence of a taking.[42]

Two outstanding applications of the "use and enjoyment" principle are to be found in *Portsmouth Harbor Company v. United States*[43] and *United States v. Causby*.[44] In the *Portsmouth* case, the United States installed a shore battery and discharged its guns over the plaintiff's summer resort. Plaintiff sued the United States, claiming that the effect of the firing was to frighten people off the premises, thus depriving him of the use of his property as a resort. The Supreme Court held that there was a taking[45] and directed that the owner be compensated for the loss he suffered. In the *Causby* case, low flying army planes caused noise and glare, interfering with the use of Causby's farm for chicken raising, and disturbing the sleep and mental well-being of the Causby family. The Court declared that this action constituted a taking,[46] marking a most significant extension of the "use and enjoyment" principle.[47] In addition, some courts have specifically held that permanent injury to, or destruction of, rights of ingress and egress are takings of private property for public use.[48]

The fairest solution to the problem of the *Perko* case would have been government acquisition of the property of Perko, Skala, and Zupancich. But this could not be done, since the Thye-Blatnik Act prohibits acquisition of tracts of less than 500 acres which have permanent structures, if the owner files written objections.[49] These properties are less than 500 acres each, and the owners would certainly have filed written objections. However, by choosing to secure the issuance of the Executive Order rather than instituting condemnation proceedings, the Department of Agriculture cannot escape the Congressional purpose to protect private property owners. Although the validity of the Executive Order is not open to attack, the owners have another remedy by which to effectuate the Congressional purpose. Applying the principle of the destruction of ingress and egress, and applying the "use and enjoyment" principle as extended in the *Causby* case, there appears to be a taking of property belonging to the defendants in the principal case, and they should be compensated for their loss.[50]

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[42] United States v. Miller, 317 U. S. 369 (1942); Miller v. Beaver Falls, 368 Penn. 189, 82 A. 2d 34 (1951).

[43] 260 U. S. 327 (1922).

[44] 328 U. S. 256 (1946).

[45] The court actually based the taking on a theory of implied contract, derived from the intentional acts of the United States. The Perko case is stronger in that respect. The air ban was specifically directed at certain persons, or at least a certain class of persons. That is not true of the action in the Portsmouth case.

[46] Mr. Justice Black dissented on this point.

[47] See 328 U. S. 256, 261 (1946) (Opinion of Mr. Justice Douglas).

[48] Central Trust Co. v. Hennen, 90 Fed. 593 (6th Cir. 1898); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 188 (1943); Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W. 2d 361 (1942). The most frequent expressions of this principle are cases involving state, county or municipal improvements which destroy the use of streets affording access to property, or the effect of which are to place the property owner in a cul-de-sac. An extensive citation of such cases is unnecessary, since the principle is well established. See Note 15 L.R.A. (N.S.) 49 (1908); 96 A.L.R. 639 (1934).

[49] See note 15 *supra*.

[50] "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416 (1922).