Avigation Easements, and Lawsuits for Inverse

Condemnation and for Nuisance

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1. INTRODUCTION

A. Definition of an Avigation Easement

The term "avigation easement" is of recent vintage. A Lexis computerized search of California appellate decisions for that term revealed the oldest published decision was *Snoed v. County of Riverside* (1963) 218 Cal.App.2d 205. The decision referred to former Code of Civil Procedure §§ 1239.2 and 1239.4 which authorized counties to acquire "airspace or air easements through eminent domain proceedings, in airspace above property if the taking of such is necessary to protect the approaches to airports." (At page 208)

Former Code of Civil Procedure §§ 1239.2 and 1239.4 were adopted by Stats 1945 ch 1242. [These sections were repealed by Stats 1975, c. 1275, p. 3409, § 1, operative July 1, 1976.]

California Public Utilities Code § 21652 was added by Stats 1975 ch 1240 § 72, and became operative July 1, 1976. This section states in relevant part as follows:

> (a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation, or otherwise:
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> . . .
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> (2) Airspace or an easement in such airspace above the surface of property where necessary to permit imposition upon such property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to the operation of aircraft to and from the airport.

The next line of inquiry is when avigation easements are required. In *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602, the court stated:

> (3) "Avigation easements are required only when the noise, vibration, fumes, fuel particles and inconvenience caused by low-flying aircraft interfere with the use and enjoyment of the underlying property to the extent it amounts to a taking.' [Citations.]"

B. Length of Avigation Easements

Avigation easements may be given for a term of years, or be given subject to a condition subsequent. For example, the author found a document recorded December 2, 1993 as Document No. 93-0839558, Official Records of Orange County, California, and entitled "Agreement For Second Amendment and Restatement, Clearance/Restrictive Easement". The parties to that agreement were Rossmoor Partners, L.P., a California limited partnership, and the United States of America. The agreement states at paragraph 6:

> 6. Term of Easements. . . . After the cessation of military aircraft use, the foregoing easements (and the Declaration of Restrictions and Supplemental Declaration of Restrictions with respect to all properties lying outside of the Total property) shall thereupon automatically terminate, and the airspace and the rights to the use of the surface of lands shall revert to the Grantor, their heirs, administrators, executors, successors and assigns and the persons lawfully entitled thereto.

The second amendment refers to an earlier "Clearance/Restrictive Easement Deed" recorded April 11, 1989 as Document No. 89-190208, and a "Restatement Clearance/Restrictive Easement" recorded July 27, 1989 as Document No. 89-396190.

Another document was located, entitled "Supplemental Declaration of Restrictions". This document was dated July 10, 1974, and was recorded July 16, 1974 in Book 11197, Page 415. The parties to the agreement were Rossmoor Corporation and the United States of America. The agreement provides that the use restrictions imposed on Leisure World "shall terminate and thereafter be of no force and effect at such time as the United States manifests the intent that thereafter the Air Station will no longer be used as a facility for the operation of military aircraft."

The above referenced Supplemental Declaration incorporated an earlier Declaration of Restrictions dated March 16, 1963 and recorded in Book 6472, Page 430. The original Declaration also contains a termination clause:

> 6. This instrument shall be deemed canceled, and all the covenants and restrictions herein contained shall terminate, upon the happening of any one of the following events:
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> B. The cessation, as indicated by public acknowledgment of the operating agency, of operation of the Air Station as an airport by the operating agency, or by actual cessation of such operation by the operating agency for a period in excess of one year.

C. Other Contractual Provisions Contained in Avigation Easements

Commencing approximately twenty years ago, the County of Orange started requiring developers in south Orange County, as well as in northeast Irvine, and other areas to grant avigation easements over their new home tracts. The County of Orange did not pay the developers for these avigation easements, and the new homes have been sold for prices which do not reflect the diminution in value caused by the avigation easements.

This writer obtained a copy of an "Aircraft Operations, Sound, Air Space and Avigation Easement Deed" recorded July 2, 1979 in Book 13213, Page 1111 covering a development in Aliso Viejo. The grantee was the County of Orange, The easement recites:

> "This easement is granted for any use by any aircraft, present or future, from or to the Marine Corps Air Facility at El Toro and any other airport or air facility which is or may be located at or near the site of said Marine Corps Air Station, including any future change or increase in the boundaries, volume of operation or noise or pattern of air traffic thereof."

This particular easement applied to the affected property "above a mean sea level of 1500 feet." In analyzing such an easement, the height of the terrain must be subtracted.

The form of avigation easement currently utilized by the County of Orange no longer contains any height restriction. Because the form of the avigation easement used by the County has varied from time to time, each recorded avigation easement must be carefully read. For example, this writer has an "Easement Deed, Aircraft Operations, Sound, Air Space and Avigation Easement Deed" given by El Toro Mini-Partners to the County of Orange, where the covered property is described as being "above an elevation of 620 feet." This deed apparently refers to elevation above terrain, rather than sea level. The deed was recorded May 17, 1988, as Instrument No. 88-229369.

The newer developments in northeast Irvine are covered by an avigation easement "above a mean sea level of 1500 feet". This easement deed was recorded June 24, 1994, as Instrument No. 94-0422081. However, the easement granted by The Irvine Company to the County has little to no value, since commercial planes using El Toro cannot attain the required altitude within two miles after takeoff. The easement is not a model of good drafting. It is even unclear whether it was intended to apply to a commercial airport operating at El Toro, since it states:

> "A. This easement shall not apply to military aircraft operations, military aircraft sound and noise, military aircraft avigation and flights and hazards therefrom originating and/or terminating at the United States Marine Corps Air Station at El Toro."

D. Avigation Easements Obtained by Prescription

California law provides that easements may be obtained by prescription, (which is also known as adverse possession). The required elements are: 1) open and notorious use of the easement, which is 2) continuous and uninterrupted, 3) hostile to the true owners, and 4) under a claim of right. *Berry v. Shragia* (1978) 76 Cal.App.3d 876. In addition, such elements must continue for a period of five years. Recent appellate decisions have held that avigation easements are covered by the general rule on obtaining easements by prescription. In *Pacific Gas & E. Co. v. Peterson* (1969) 270 Cal.App.2d 434, the court at footnote 3 referred to the statutes which authorize the obtaining of avigation easements by condemnation, and then stated: "Thus, it is arguable that an avigation easement can be acquired by prescription if all of the essential elements of adverse use are present."

Easements by prescription do not require the airport authority to condemn or pay for them. They become legally enforceable five years after the airplanes start flying. However, the easements are only for the flight routes which have been utilized, and for the type of aircraft flown. An airport authority does not have the right to increase the number of flights, change the overflight areas, or change the type of aircraft. Any attempt to make such changes without instituting condemnation proceedings constitutes the "overburdening" of an easement, and may subject the airport authority to lawsuits by all affected property owners for nuisance, inverse condemnation, injunction, and declaratory relief.

2. THE LAW WITH RESPECT TO AIRCRAFT OVERFLIGHTS

As late as 1955, the California Court of Appeal stated the general rule that any aircraft flying over the land of another is a trespasser. *La Com v. Pacific Gas & Electric Co.* (1955) 132 Cal.App.2d 114. The court then stated that a temporary invasion of air space by an aircraft is privileged (i.e., no liability attaches) so long as such overflight does not interfere unreasonably with the possessor's enjoyment. [In that case an aircraft collided with overhead wires of an electric company which were on the landing approach to an airport. A dissenting judge criticized the majority opinion of no liability for applying "horse-and-buggy law to the airplane age."]

Aircraft overflights are expressly permitted by the United States Code. 49 USC § 40103 states: "(a) Sovereignty and Public Right of Transit. - (1) The United States Government has exclusive sovereignty of airspace of the United States. (2) A citizen of the united States has a public right of transit through the navigable airspace." "Navigable airspace" is defined by § 40102 as follows:

> (30) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

In *City of Los Angeles v. Japan Air Lines Co., Ltd.* (1974) 41 Cal.App.3d 416, 421, the court stated that federal regulations require jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is required for a safe landing.

As previous quoted in this legal memorandum,

> (3) "'Avigation easements are required only when the noise, vibration, fumes, fuel particles and inconvenience caused by low-flying aircraft interfere with the use and enjoyment of the underlying property to the extent it amounts to a taking.' [Citations.]" (Emphasis supplied) *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602.

The separate elements underlined in the foregoing quotation should each be considered, since noise is not the sole criteria.

3. "OVERBURDENING" OF AVIGATION EASEMENTS

Avigation easements acquired by prescription are limited by hours of operation, number of landings and take-offs, size and models of planes, landing and take-off patterns, vibrations caused, fuel particles, and so forth. Where an airport operator expands operation, the easements may be deemed to be "overburdened".

California Civil Code § 811, which was enacted in 1872, provides in archaic language the manner in which an easement may be extinguished:

> A servitude is extinguished:
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> . . .
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> 3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or
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> 4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

In *Crimmins v. Gould* (1957) 149 Cal.App.2d 383, the Court of Appeal upheld the order of the trial court that a driveway easement for ingress and egress had been extinguished by misuse. In that case a buyer of a parcel of land improved with an orchard obtained an appurtenant easement on adjoining land for a right of way for ingress and egress. Defendants, who were the subsequent owners of the parcel, subdivided it into 6 residential lots, and an adjacent parcel (which had no easement rights) was subdivided into another 23 residential lots. Defendants sought to use the private easement for the owners of all 29 lots.

In the *Crimmins* case, the plaintiff had conceded that the change in use from orchard to residential estates did not extinguish the easement, i.e., for the 6 lots only. The court of appeal recognized that in cases involving extraordinary or excessive use, the servient owner is entitled to an injunction. The court stated that an injunction could not grant plaintiff real relief, when the defendants had attempted to tie two public streets into the private driveway easement. The court quoted from 28 Corpus Juris Secundum 729, § 62, that an easement is lost when it is impossible to sever the increased burden.

The *Crimmins* case referred to the Maryland case of Knotts v. Summit Park Co. (1924) 146 Md. 234 and quoted from that case: " . . . the necessarily increased burden upon the servient estate brought about by the development of the entire tract, of which the dominant tenement formed a small part, worked an abandonment. . . ."

No decision was found in California where the doctrine of extinguishment of easements was applied to an avigation easement. However, simple logic compels the same result.

In the case of the proposed El Toro International Airport, the court may not enjoin flights between 11 p.m. and 7 a.m. because of federal law. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 627, 633.

4. INVERSE CONDEMNATION

Inverse condemnation is basically the converse of condemnation. Under condemnation, the governmental agency files suit to acquire avigation easements. Under inverse condemnation, the property owner has to sue the governmental agency. If no suit is brought for a period of 5 years, the governmental agency acquires the avigation easements by prescription, i.e., for free.

A. Noise Levels Necessary for Inverse Condemnation

Airport operators place great reliance upon the Court of Appeal decision in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602. In that decision, the language in footnote 2 basically summarizes the holding:

> Footnote 2. The evidence substantially supports the court's determination that CNEL values exceeding 65 decibels are sufficiently intrusive to amount to a taking or to give rise to a prescriptive easement, and that lesser CNEL values are not.

Several additional quotes from the decision provide more illumination as to the court's thinking:

> The ambient noise level in the San Fernando Valley where the Airport is located, i.e., the level of noise emanating from sources other than aircraft using the Airport, can rise as high as the low 60's decibel CNEL level.
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> The court concluded CNEL contours provided a consistent and accurate means for distinguishing between the various plaintiffs' claims, and that the cutoff line should be drawn at the 65 decibel CNEL level. The latter determination was based on expert testimony that new residential construction within the 65 decibel CNEL contour should include soundproofing, but that residents in areas below the 65 decibel contour would not generally be seriously annoyed by aircraft noise. It was also based on the ambient noise level in the San Fernando Valley, and the fact that the 65 decibel level is the noise level established by the State Department of Transportation as the permissible noise level for airports located near or in residential communities. (Cal.Code Regs., tit. 21, § 5012.) [Underlining added by this writer]

Contra to the above *dicta* are various comments contained in the Airport Land use Commission for Orange County, draft "Airport Environs Land Use Plan, Proposed 1997 Amendment". Page 22 of that draft plan states that a CNEL between 60 to 65 is "conditionally acceptable", and that sound attenuation must be used as required by the California Noise Insulation Standards, Title 25, California Code of Regulations. Additionally, residential use sound attenuation is required to ensure that the interior CNEL does not exceed 45 dB.

The draft plan would delete language appearing under the high noise impact of 65 dB CNEL and above that pains and similar outdoor living areas are normally unacceptable. For residential housing in the moderate noise impact area (60 dB CNEL to 65), the draft plan admits that, "Single noise events in this area create serious disturbances to many inhabitants." Also, "the Commission strongly recommends that residential units be limited or excluded from this area unless sufficiently sound attenuated." The draft plan additionally contains the following new language:

> "The dedication/recordation of Avigation Easements, in a form following the most current County of Orange model, in favor of the owner/operator of the affected airport shall be required in conformance with the California Airport Noise Standards. Title 21, California Code of Regulations. Likewise, written disclosure of aircraft noise impacts to initial/subsequent buyers/tenants shall be required."

The above is a tacit concession that a 65 CNEL noise contour or higher is not required to bring an inverse condemnation suit.

Another appellate decision in which noise levels was discussed is *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10. The court found that an avigation easement had been obtained by prescription for noise levels equal to 80.3 CNEL.

The County's noise contours for a commercial airport at El Toro show only a very small portion of the new city of Laguna Woods to be within the 65 CNEL noise level. However, the projected SENEL numbers show substantial aircraft noise extending from Dana Point to the final landing approach at El Toro International Airport.

This writer does not recall any discussion in the E.I.R. concerning the ambient noise level in the Saddleback Valley, Irvine, Tustin or surrounding areas. This appears to be a very relevant line of inquiry, since 65 CNEL in an extremely quiet area would impact residents much more severely than in the very noisy San Fernando Valley.

B. Time Period in Which to File Suit for Inverse Condemnation

In *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, the court held that 5 years is the applicable limitations period for bringing an inverse condemnation action. (Several years earlier the 5-year limitation period was approved by the California Supreme Court in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 867: "As the inverse condemnation claim was filed within the five-year statute of limitations . . .")

The court in *Institoris* recited the oft repeated rule that the date that a cause of action accrues is a question of fact. The court also stated:

> . . . In an inverse condemnation action involving overflight aircraft noise, the cause of action accrues "when the flights interfered with the use and enjoyment of plaintiffs' properties and resulted in a diminution of their market value,' not when the interference later falls *below* that level. The cause of action accrues when the aircraft noise jumps markedly, not when it falls off. (*Aaron v. City of Los Angeles*, *supra*, 40 Cal.App.3d 471, 492.)

In *Dremen v. County of Ventura* (1974) 38 Cal.App.3d 84, 88, the court came up with the unique holding that the 5-year prescriptive period does not run against vacant land! This is because the overflights did not interfere with plaintiffs actual use and enjoyment of their land, since there was no such use and enjoyment.

C. Damages which are Recoverable in Inverse Condemnation

The property owner is entitled to recover the decrease in his property value. In *County of San Diego* (1986) 184 Cal.App.3d 112, the court opined that "The weight of the evidence was that the avigation easement amounted to at least a fifty percent taking of this corner."

In *Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471, 484, the court stated that in order to recover, a plaintiff must show a "measurable reduction in market value resulting from the operation of the airport".

Airport operators can be expected at inverse condemnation trials to produce "appraisers" who are willing to testify (without undue blushing) that the airport increases property values. Numerous studies have documented reductions in property values to be between 20 to 35 percent.

D. A Public Entity which Lacks Eminent Domain Power Can Still be Sued for Inverse Condemnation

The California Supreme Court held in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862 that an inverse condemnation action can be maintained against a public entity which lacks eminent domain power. This very logical decision rejected the previous "mechanical view" to the contrary.

E. Class Action Suits for Inverse Condemnation

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, the California Supreme Court held that government claims statutes do not prohibit class actions against governmental entities for inverse condemnation and nuisance. In that case the court found various factual reasons for not certifying a class, even though it might be theoretically possible. The reasons given were: insufficient community of interest, each class member's right to recover depends on facts peculiar to his case, lack of substantial benefits to the court and parties, each parcel of real property is unique, and inadequacy of representation (since the plaintiff lawyers sought only diminution in market value, and had failed to request damages for annoyance, inconvenience, and discomfort, actual injuries to the land, and costs of minimizing future damages). Based on the reasons given by the court, it is unlikely that a court would certify a class action for inverse condemnation and/or nuisance.

It is noted that the court in *Aaron*, *supra*, commented in footnote 3 that that case originally involved some 750 parcels.

5. NUISANCE LAWSUITS

A. Nuisance Lawsuits Compared With Suits for Inverse Condemnation

The general rule stated by various appellate decisions is that a lawsuit for inverse condemnation by a property owner seeks *property* damages arising from airport operations, whereas a lawsuit for nuisance is brought by either an owner or tenant for *personal* injuries arising from airport operations. The validity of this general rule is doubtful in view of the decision in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447.

B. Statute of Limitations for Nuisance Lawsuits

In *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, the Court of Appeal held that the statute of limitations for bring a nuisance lawsuit is 1 year from the date the cause of action accrues.

C. Nuisance Lawsuits May be Barred where Airport Operator has Obtained Easements by Prescription

The court in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602 held that where an airport operator has acquired avigation easements by prescription, such easements "precludes recovery for property damage on either public or private nuisance theory".

D. Government Tort Claims Act

The *Institoris* decision held that because the airport authority was a governmental entity, the plaintiff had to strictly comply with the mandatory requirements and time limits. The decision referred to the former language of Government Code § 911.2 which required a claim relating to a cause of action for death or injury to person to be presented not later than the 100th day after the accrual of the cause of action. Therefore, the plaintiff could have recovered only for the period from 100 days preceding the filing of the claim until the date of filing the complaint. And, a new lawsuit would have to be filed every 100 days.

Government Code § 911.2 was amended by Stats 1987, ch 1208, which changed the 100-day period to "six months". Plaintiffs now only have to file two lawsuits a year.

E. Continuing vs. Permanent Nuisance

In *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862 the California Supreme Court held that plaintiffs may elect to treat airport noise and vibrations as a continuing or as a permanent nuisance. The reason this is important is that successive lawsuits can be filed over a continuing nuisance, and the statute of limitations never runs, whereas the contrary is true of a permanent nuisance.

F. Federal Preemption of Local Regulation of Airport Noise

Airport operators often claim that Federal laws preempt local regulation of airport noise, and that lawsuits may not be brought. This argument was rejected eighteen years ago by the California Supreme Court in Greater Westchester Homeowners Assn. v. City of Los Angeles (1979) 26 Cal.3d 86. Writing six years later in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 872, 873 the California Supreme Court stated:

> (5) We do not deal with such an extensive privilege. Federal preemption of local regulation of airport noise is not absolute. In *Greater Westchester, supra*, 26 Cal.3d 86, we concluded that federal preemption does not operate to wholly eliminate local responsibility for airport noise control. . . . The message of *City of Burbank* and *Greater Westchester* is clear: state law damage remedies remain available against an airport proprietor despite the fact that federal law precludes interference with commercial flight patterns and schedules.
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> The airport operator's separate duty to reduce noise, and hence, separate nuisance liability, is particularly compelling in the present case. Defendant is a public entity charged with responsibility for the "acquisition, operation, repair, maintenance, improvement and administration" of the airport as a public airport. (Gov. Code, § 6546.1.) Not only does defendant play a proprietary role in the airport's operations, but it is expressly required by statute to make all reasonable efforts to curb noise pollution at the airport. . . . Thus, despite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or other noise reducing devices. The privilege is not absolute.

The court of appeals commented on the *Greater Westchester* decision in *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232. The decision stated that "a nuisance cause of action brought against a municipality for personal injuries and emotional distress caused by aircraft noise is *not* barred by federal preemption."

A recent Minnesota case was found which summarizes various federal decisions. In State of Minnesota v. Metropolitan Airports Commission (1994) 507 N.W.2d 19, 22, the court stated:

> [2] . . . We conclude that federal law permits some state control over airport noise so long as there is no attempted control of aircraft flight.
>
> [3] Federal law generally preempts the field of "airspace management," "aircraft flight," and, more specifically, "aircraft noise." See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 627, 633, . . . In Burbank, the United States Supreme Court struck down, on the basis of federal preemption, a local ordinance that prohibited takeoffs from an airport between 11 p.m. and 7 a.m. Id. At 626, 640, 93 S.Ct. At 1856, 1863.

A 1977 California Supreme Court decision drew a fine line as to recoverable damages. In San Diego Unified Port Dist. v. Superior Court (1977) 67 Cal.App.3d 361, 377, the court stated:

> However, nothing in the *Burbank* decision suggests an airport operator is relieved by federal law of the common law duty to act nontortiously as a proprietor. If the Port District has tortiously managed and maintained the facilities at Lindbergh Field to the harm of some or all of the plaintiffs, the action is not precluded by the doctrine of federal preemption.
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> . . . Nevertheless, recovery for tort damages at trial should be limited to those damages, if any, which arise out of the operation of the airport itself and should not include damages caused by aircraft in flight.

G. Proprietary Control by Airport Proprietors

The federal court decision in Air Transport Association of America v. Crotti (1975) 389 F.Supp 58 furnishes guidance as to permissible control of noise by an airport proprietor. Several quotations provides the flavor of the decision:

> [3][4][5] It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport . . . Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities. . . . [5] 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. . . .
>
> [6] We conclude that the CNEL provisions and regulations are not per se invalid as delving into and regulating a field of aircraft operation engaged in direct flight, which is pre-empted unto the federal government under the Constitution and the laws of the United States.
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> . . .
>
> [7] The SENEL provisions and regulations are not so favored. We are satisfied and conclude that the SENEL provisions and regulations of noise levels which occur when an aircraft is in direct flight, and for the levying of criminal fines for violation, are a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce.

6. AVIGATION EASEMENTS AND NAVIGABLE AIR SPACE

Navigable air space under federal law is generally that air space which is at least 1,500 feet above terrain. (See previous discussion) Most large aircraft utilize a 3 degree descent for their landings. This writer has used trigonometry to compute that aircraft will descend into private air space (i.e., lower than 1,500 feet) at a distance of 5.4 miles from runway touch down. This computation, however, has to be adjusted to account for the higher topography at such distance as compared with the runway. For example, if the elevation at 5.4 miles out is 200 feet higher than the runway, the 5.4 mile figure would be extended to 6.1 miles to account for the additional 200 feet in elevation.

Private air space may not be invaded for a landing approach to an airport without payment of just compensation. Such invasion would constitute a violation of private property rights and would constitute trespass. Since aircraft will vary from the center line of the prescribed landing approach, a triangular pattern will develop from plotting the path of various landing aircraft. Thus, the invasion of private air space may involve a substantial number of homeowners. No minimum CNEL need be shown in order for property owners to successfully sue for invasion of their air space.

7. DISCLAIMER

This memorandum is intended for general informational purposes only. The legal issues raised in this memorandum are substantial, and require further legal research, analysis, and study. The conclusions reached are solely those of the author and are based upon California law. This memorandum is not intended to constitute legal advice, and should not be relied upon. Each case depends upon unique facts and applicable statutes, regulations and decisions.

If legal advice is desired, the reader should consult his or her attorney who is authorized to give legal advice in the state where the reader resides or owns real property.

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