EMINENT DOMAIN: OREGON SUPREME COURT HOLDS AIRCRAFT NOISE NUISANCE SUFFICIENT FOR CONSTITUTIONAL TAKING OF PRIVATE PROPERTY

INCREASED air traffic and use of jet aircraft have focused attention on the problem of resulting damage to private property due to the projection of noise and vibration.[1] Property law concepts and remedies normally applied to cases involving aircraft interference with use of property have tended to produce confusion and arbitrary distinctions. A particularly troublesome problem arises where a private landowner attempts to recover under the eminent domain theory against a governmental body responsible for the alleged harm to the land. A significant new approach to this problem was taken recently when the Oregon Supreme Court in *Thornburg v. Port of Portland*[2] resorted exclusively to the theory of nuisance, rather than trespass, to establish the requisite constitutional "taking" in a suit against a municipality.

Plaintiffs, owners of land adjacent to Portland International Airport, brought an action against the Port of Portland for inverse condemnation[3] alleging that noise and vibration from aircraft flying over and near their property resulted in defendant's taking an easement of flight. The trial court decided, as a matter of law, that there could be a taking only by reason of flights directly over plaintiffs' property at heights of less than 500 feet,[4] thereby limiting the

[1] See generally Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958); Morris, *Jetport Showdown in Jersey*, Saturday Evening Post, Dec. 17, 1960, p. 29; Weibel, *Problems of Federalism in the Air Age—Part I*, 24 J. AIR L. & COM. 127 (1957); Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 HARV. L. REV. 1581 (1961).

[2] 376 P.2d 100 (Ore. 1962).

[3] "Inverse condemnation" describes a cause of action against a governmental defendant to recover the value of property "taken" even though there has been no formal exercise of the power of eminent domain by the taking agency. *Id.* at 101 n.1; see also 22A WORDS AND PHRASES 231 (perm. ed. 1958).

The action in *Thornburg* was based on the Oregon constitutional prohibition of governmental taking of private property for public use without just compensation. The applicable provision of ORE. CONST. art. I, § 18, which is identical in language to the fifth amendment of the Constitution of the United States, has been construed to have the same meaning. Cereghino v. State, 370 P.2d 694 (Ore. 1962).

[4] As applicable to this case, 500 feet is the minimum safe altitude for aircraft flight as prescribed by regulation, 14 C.F.R. § 60.17 (1962), and constitutes the floor of navigable airspace. 49 U.S.C. § 1301 (24) (1958). Some cases indicate flights above the minimum safe altitudes are beyond the landowner's objection. See Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960).

jury to consideration of flights actually trespassing the airspace below 500 feet over plaintiffs' land. Limited in this manner, the jury found that there had not been a requisite taking. In a four to three decision the supreme court reversed and held that noise originating outside this "owned" airspace could create a nuisance sufficient to be a taking.[5]

At common law, a landowner was generally considered to have unlimited ownership of the airspace above his land.[6] However, in light of developments in the aviation industry, courts have modified this common law rule with theories ranging from the "privilege of flight" doctrine recognizing unlimited ownership subject to an easement of flight[7] to the "actual use" theory limiting ownership to space which is physically occupied.[8] The most widely used theory gives the landowner title to the airspace he is able to use or occupy in the enjoyment of the surface of his land.[9]

In suits between private parties, as distinguished from suits against the government, several concepts have been applied to the problem of aircraft interference with the use of property. The

[5] The rationale of the majority involved the logical progression of finding that (1) noise can be a nuisance (2) which can give rise to a property interest (an easement) the law will protect (3) that can be taken by substantial interference with the use of the surface (4) when the noise comes straight down from above one's land or (5) when it comes from some direction other than the vertical. Thornburg v. Port of Portland, 376 P.2d at 106 (Ore. 1962). This is the practical application of the test suggested by the dissent in Batten v. United States, 306 F.2d 580, 587 (10th Cir. 1962).

[6] This concept is called the "ad coelum" doctrine. See, *e.g.*, Peabody v. United States, 231 U.S. 530 (1913); Ackerman v. Ellis, 81 N.J.L. 1, 79 Atl. 883 (1911); Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716 (1906). *But see* Pickering v. Rudd, 4 Camp. 219, 220-21, 171 Eng. Rep. 70, 71 (1815). See generally PROSSER, TORTS § 13 (2d ed. 1955); Bouvé, *Private Ownership of Airspace* (pts. 1-2), 1 AIR L. REV. 232, 376 (1930); Hackley, *Trespassers in the Sky*, 21 MINN. L. REV. 773 (1937); Annot., 42 A.L.R. 945 (1926).

[7] Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A.2d 87 (1942); UNIFORM AERONAUTICS ACT §§ 3, 4; RESTATEMENT, TORTS § 194 (1934).

[8] Hinman v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936), *cert. denied*, 300 U.S. 654 (1937).

[9] *E.g.*, Cory v. Physical Culture Hotel, Inc., 14 F. Supp. 977 (W.D.N.Y. 1936); Swetland v. Curtiss Airports Corp., 41 F.2d 929 (N.D. Ohio 1930), *modified*, 55 F.2d 201 (6th Cir. 1932); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960). This "possible effective possession" also seems to be the theory of United States v. Causby, 328 U.S. 256 (1946). See Weibel, *Problems of Federalism in the Air Age—Part I*, 24 J. AIR L. & COM. 127, 133-34 (1957). *But see* Rhyne, *Airport Legislation and Court Decisions*, 14 J. AIR L. & COM. 289, 295 (1947).

In addition to the theories noted in the text, some courts suggest that minimum altitudes of flight should determine the extent of airspace ownership. See, *e.g.*, Burnham v. Beverly Airways, 311 Mass. 628, 42 N.E.2d 575 (1942); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949).

trespass theory bases liability on the actual invasion of property "owned," thereby making the definition of owned airspace determinant of the right to recover.[10] An alternate theory of recovery in suits between private parties proceeds on the basis of "nuisance."[11] The nuisance theory might properly be thought of as a logical supplement to an action in trespass where the latter presents difficulties in applying the formal trespass elements. This involves the abandonment of the cornerstone of trespass, physical intrusion into private property, and the basing of liability on unreasonable interference with the use and enjoyment of the surface.[12] Most courts faced with alternative theories of recovery find it unnecessary to pass upon the trespass allegation and decide the liability issue solely in terms of nuisance.[13] The few courts which have retained the trespass vocabulary have, in effect, adopted a nuisance standard to determine commission of a trespass.[14]

However, litigation between private parties has become less important in recent years due to concentration of airport ownership and air traffic regulation in federal, state, and local agencies. Instead, inverse condemnation actions[15] against governmental bodies for constitutional taking of private property have become paramount.[16] To fit aircraft cases into the "eminent domain" concept, courts talk in

[10] See, *e.g.*, Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Capitol Airways, Inc. v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E.2d 776 (1939); Burnham v. Beverly Airways, 311 Mass. 628, 42 N.E.2d 575 (1942). Injunctive relief may be proper under the doctrine of continuing trespass. See Hyde v. Somerset Air Serv., Inc., 1 N.J. Super. 346, 61 A.2d 645 (1948); Annot., 60 A.L.R.2d 310, 379 (1958).

[11] *E.g.*, Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A.2d 87 (1942); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934). The normal remedy for nuisance is injunctive relief, Atkinson v. Bernard, Inc., 223 Ore. 624, 355 P.2d 229 (1960); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949); Annot., 140 A.L.R. 1362-69 (1942), but an injunction may be denied altogether where damages would be sufficient. Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947).

[12] See Mace, *Ownership of Airspace,* 17 U. CINC. L. REV. 343, 361, 367 (1948); 35 ORE. L. REV. 296, 299 (1956).

[13] *E.g.*, Delta Air Corp. v. Kersey, 193 Ga. 862, 869, 20 S.E.2d 245, 249 (1942); Hyde v. Somerset Air Serv., Inc., 1 N.J. Super. 346, 351-52, 61 A.2d 645, 647-48 (1948).

[14] See, *e.g.*, Cheskov v. Port of Seattle, 55 Wash. 2d 416, 421-24, 348 P.2d 673, 676-78 (1960); Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947); Note, 74 HARV. L. REV. 1581, 1583 (1961).

[15] See note 3 *supra*.

[16] Both municipal and federal governments may be liable under the Constitution of the United States. Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); see generally Annot., 77 A.L.R.2d 1355-66 (1961). It is the actual flight of aircraft which constitutes the taking, not statutory pre-emption as navigable airspace. See Griggs v. Allegheny County, *supra* at 89-90. 30 FORDHAM L. REV. 803, 808 (1962).

terms of flight easements that are valued by determining the difference in market value of the surface of the land before and after the taking of such easement.[17] This, in effect, recognizes the impropriety of injunctive relief and limits recovery to money damages, while circumventing the doctrine of "sovereign immunity" which bars actions in trespass and nuisance against governmental bodies. The problem in these inverse condemnation cases is thus one of determining when aircraft noise and vibration can amount to a taking. The strict concept of taking envisions actual seizure or permanent ejection of the owner from his property by a physical entry or interference depriving him of all beneficial use of the land.[18] However, the modern view holds that any substantial interference with private property by a governmental body if accompanied with trespass is a taking to the extent of damages suffered even though title and possession is undisturbed.[19] The degree of interference necessary is a question of fact to be determined by the circumstances of the case, but it seems clear that trespassory interference actionable at common law is a taking.[20] On the other hand, non-trespassory interference though substantial is not a taking unless it deprives the owner of all beneficial use of the land.[21] The latter distinction creates a class of noncompensable "consequential damage" cases resulting from acts done in the proper exercise of governmental powers and not directly trespassing upon nor peculiarly affecting private property, though the consequences may be an actual impairment of its use.[22] These consequential damages are considered the

[17] See United States v. Causby, *supra* note 16; Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959); Highland Park, Inc., v. United States, 161 F. Supp. 597 (Ct. Cl. 1958). An easement is a property interest the law will protect. See NICHOLS, EMINENT DOMAIN § 5.72 (3d ed. 1950) [hereinafter cited as NICHOLS]. For the solution to the problem of when taking occurs and the running of the statute of limitations see Bacon v. United States, 295 F.2d 936 (Ct. Cl. 1961); Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961); Herring v. United States, 162 F. Supp. 769 (Ct. Cl. 1958); Highland Park, Inc. v. United States, *supra*.

[18] 2 NICHOLS §§ 6.2, 6.22.

[19] *E.g.*, United States v. Dickinson, 331 U.S. 745 (1947); United States v. Causby, 328 U.S. 256 (1946); Levene v. City of Salem, 191 Ore. 182, 229 P.2d 255 (1951); Moeller v. Multnomah County, 218 Ore. 413, 345 P.2d 813 (1959). *Compare* 2 NICHOLS § 6.3 *with id.* §§ 6.1[1], 6.38, 6.38[1].

[20] United States v. Dickinson, *supra* note 19; 2 NICHOLS § 6.1[1].

[21] United States v. General Motors Corp., 323 U.S. 373 (1945); Transportation Co. v. Chicago, 99 U.S. 635 (1878); Batten v. United States, 306 F.2d 580 (10th Cir. 1962); Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957); Moeller v. Multnomah County, 218 Ore. 413, 345 P.2d 813 (1959); 2 NICHOLS §§ 6.1[1], 6.38.

[22] *E.g.*, United States v. Willow River Power Co., 324 U.S. 499 (1945); Richards v. Washington Terminal Co., 233 U.S. 546 (1914); Transportation Co. v. Chicago,

proper sharing of the common burden of incidental damages arising from a legalized nuisance.[23]

Since an actual entry upon the land is of prime importance except in the single instance where the landlowner is deprived of all beneficial use of this property, all courts have found it necessary to find a physical trespass upon the airspace owned coupled with substantial interference with the use and enjoyment of the surface of the property before allowing recovery under inverse condemnation. In *United States v. Causby*,[24] the leading federal case of inverse condemnation involving aircraft, the Supreme Court held that continuous invasion of airspace by low flying aircraft so as to substantially interfere with the use of the surface of the land itself is a constitutional taking of an easement of flight. The Court's analysis of the problem assumed private ownership of at least as much airspace as the owner can occupy or use. Though the test applied to define owned airspace was a nuisance standard, it is clear the decision was posited on the existence of both physical invasion and substantial damage.[25]

The lower federal courts have followed the *Causby* case, being

supra note 21; Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956); Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958); see Moeller v. Multnomah County, *supra* note 21.

[23] Richards v. Washington Terminal Co., 233 U.S. 546 (1914); Batten v. United States, 306 F.2d 580 (10th Cir. 1962); Moore v. United States, 185 F. Supp. 399 (N.D. Tex. 1960).

[24] 328 U.S. 256 (1946), 14 J. AIR L. & COM. 112 (1947). The basic rationale of *Causby* had been developed previously in Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (coastal guns fired over land).

[25] United States v. Causby, 328 U.S. 256, 262 n.7, 265-66 (1946). Owned airspace extended upward to such altitude that continuous flights through it would be unreasonable interference with the surface use—a nuisance standard. *Id.* at 264-65; *cf.* Harvey, *supra* note 1, at 1316-17. However, once defined, the Court noted that it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking. United States v. Causby, *supra* at 265-66. Thus, the requisite taking hinges on the existence of two elements—substantial damage and the character of the invasion—except in the single instance, not applicable here, where all beneficial use is taken from the owner. *Id.* at 261-62. As to the character of the invasion, the only possible alternatives are physical and non-physical—the classical distinction between trespass and nuisance. It is clear the Court was thinking in terms of physical invasion. *Id.* at 262 n.7. Therefore, it seems that *Causby* not only embraced a trespass requirement but also positively rejected taking solely on the basis of nuisance. The practical effect would be that a landowner could recover on a pure nuisance theory only for flights directly over his property; a result accomplished by defining the upward limit of "owned airspace" by a nuisance standard, *i.e.*, substantial interference with the surface use. *Causby* would, however, maintain the distinction between damages and taking where the noise was projected from outside the boundaries horizontally.

careful to use "actual intrusion on private property" to distinguish between a requisite "taking" and noncompensable "consequential damages."[26] *Matson v. United States*[27] found a taking of a flight easement for flights over plaintiff's property at eighty five feet but indicated that, under the *Causby* decision, flights above the 500 foot regulated ceiling are "beyond the reach of the landowner's objection to interference with his property rights."[28] More recently, the Court of Appeals for the Tenth Circuit in *Batten v. United States*,[29] a case almost identical factually to *Thornburg*, found that there had been a substantial interference with plaintiffs' use and enjoyment of their land, but over a vigorous dissent of the Chief Judge held there was no constitutional taking because there had been no physical invasion of owned airspace.[30] The result of the federal cases is a settled requirement of trespass for recovery in inverse condemnation actions.

Whether the trespass requirement is a valid criteria for limiting recovery largely depends on policy considerations. In disputes between private litigants the use of nuisance rather than trespass seems

[26] Batten v. United States, 306 F.2d 580 (10th Cir. 1962); Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956); Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958).

[27] 171 F. Supp. 283 (Ct. Cl. 1959). This decision takes on added significance since it was written by a member of the Court participating in the *Causby* decision—Mr. Justice Reed—sitting by designation in the Court of Claims.

[28] *Id.* at 286. In fact, *Causby* only held that glide path for take-off and landing were not in the navigable airspace under the then existing statutes, United States v. Causby, 328 U.S. at 263-64, and expressly indicated the decision did not pertain to the status of navigable airspace. *Id.* at 263. However, Congress has redefined navigable airspace to include glide path for take-off and landing, 72 Stat. 737, 739, 49 U.S.C. § 1301 (24) (1958), as well as minimum safe altitudes prescribed by regulations. See 14 C.F.R. § 60.17 (1956). Since *Causby* defined owned airspace in terms of substantial interference with the surface use, it would be an anomalous situation if Congress could appropriate this airspace without compensation by the mere desiguation of "navigable airspace." Consistency requires that such classification be an immaterial factor in detemining a taking, except to the extent that courts might presume minimum safe altitudes to be reasonable. See Griggs v. Allegheny County, 369 U.S. 84, 87-88 (1962), 30 FORDHAM L. REV. 803 (1962); 376 P.2d at 111-12 (dissenting opinion); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960); see also Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956) (reasonable flight below 500 feet).

[29] 306 F.2d 580 (10th Cir. 1962).

[30] Apparently all jurisdictions follow the federal line of cases noted without significant modification. The dissenting judge in *Thornburg* pointed out that there are no jurisdictions, state or federal, construing the same constitutional provision, which rely solely on the law of nuisance in eminent domain cases. 376 P.2d at 111. The majority did not dispute this point, but instead applied the principle of reasonableness embodied in *Causby* while rejecting its limited scope of applicability resulting from the trespass requirement. *Id.* at 107.

more appropriate in solving aircraft interference cases in that the nuisance analysis can be better used to weigh the conflicting interests of plaintiff, defendant, and public while trespass recognizes the interest of the landowner only when there is physical invasion of the property.[31] While in suits between private parties the nuisance approach may produce more equitable results due to its flexibility and methodology, when the defendant is a governmental body there is the further consideration of the concept of dual ownership of property which vests in a sovereign the right to impose a "legalized nuisance" on private property without liability for damage.[32] This concept is based on settled public policy of encouraging government initiated improvements without inordinate expense.[33] Since it is necessary to distinguish between damages and taking, the method adopted has been to place an objective limitation in the form of actual trespass into owned property plus substantial damage.

Notwithstanding these policy considerations and the settled eminent domain concept applied by most courts, *Thornburg* takes a new approach by using a nuisance theory exclusively to support a requisite taking and unequivocally rejecting trespass as an essential element for recovery.[34] There is no doubt that the approach adopted in *Thornburg* and the *Batten* dissent is distinct from the federal rule requiring trespass as essential to taking and has the result of eliminating the difference between "consequential damages" and "taking." *Thornburg,* in effect, gives landowners a remedy, without supporting legislation, for damages against governmental bodies where interference is substantial enough to support a common law nuisance suit. The court's main objection to the requirement of trespass seems to be its arbitrary allowance or disallowance of recovery in cases involving a substantial identity in the degree of property interference. For example, under the trespass theory, recovery is allowed for flights at 499 feet but refused for flights at

[31] See Keeton, *Trespass, Nuisance, and Strict Liability,* 59 COLUM. L. REV. 457, 464-70 (1959).

[32] See cases cited note 21 *supra;* 2 NICHOLS § 6.38[1].

[33] See 376 P.2d at 114 (dissenting opinion); see also 2 NICHOLS § 6.38[1].

[34] The court had at least two alternatives. First, it could have insisted that plaintiffs bring their action in nuisance under the doctrine of Wilson v. City of Portland, 153 Ore. 679, 58 P.2d 257 (1936). See 376 P.2d at 116 (dissenting opinion). Second, the *Thornburg* case could have been decided within the bounds of established eminent domain concepts by holding the projection of noise onto property to be a trespass within the broad language of Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790 (1959).

501 feet; allowed for noise projected straight down but refused when the noise is projected from outside the "owner" airspace.[35] Though such arbitrariness is undesirable, the question remains whether it is of sufficient moment, when measured against the cost to the public, to vastly increase the concept of constitutional taking to include governmental liability for damages generally considered a sovereign property right.

Any conclusion must take into account the fact that the test applied in *Thornburg* would turn the nationwide aircraft problem over to the jury with nothing more than a "fair and just" standard to be applied against an impersonal governmental body.[36] Due to the superiority of constitutions over legislation, once the *Thornburg* doctrine is established as a constitutional test to determine when a taking has occurred, it will normally be outside the legislative power to change it. Any adjustment that may later become necessary to protect the public interest would have to be accomplished by cumbersome constitutional amendment procedure or by the judiciary.[37] On the other hand, the legislature is not constitutionally prohibited from providing for "fair and just" compensation for "non-taking" damages suffered by property owners if such a course is in the public interest. In view of these considerations, it would seem

[35] 376 P.2d at 109.

[36] *Id.* at 107; Batten v. United States, 306 F.2d 580, 587 (10th Cir. 1962). It is significant to note that Congress rejected trial by jury in suits against the government in the Federal Tort Claims Act, 28 U.S.C. § 2402 (1958). Of major concern in the area of eminent domain should be the unpredictability of jury application of a non-objective "fair and just" standard. Though *Causby* removed part of the traditional objectivity by defining the upward reaches of owned airspace in terms of nuisance, a municipality could still reasonably estimate the cost of flight easements consisting of standard glide paths for take-off and landing. However, under *Thornburg*, not only would the cost be unpredictable but the almost total non-objectivity of the standard would increase litigation. Also inherent in consistent application of the *Thornburg* rule is the problem that any new aircraft producing more noise than its predecessors would automatically extend the horizontal taking zone—no small problem when contemplating developments in the rocket field.

[37] *Causby* may well be developing into a good illustration of judicial modification of a broad rule. Indications are already appearing that some courts consider the *Causby* rule defining "owned airspace" as going too far. The trend in lower federal courts seems to be toward viewing *Causby* as holding flights above the regulation minimum safe altitudes beyond the reach of landowners' objection. See Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959), see note 26 *supra*. At least one state court views the regulation minimum safe altitudes as *conclusively* reasonable. Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960); see 376 P.2d at 111-12 (dissenting opinion).

that the fears expressed by the dissenting judge in *Causby* as to the utility of "eminent domain" in meeting the problems of the air age would be even more pertinent to the *Thornburg* extension of the *Causby* principle.[38]

[38] United States v. Causby, 338 U.S. 256, 268-75 (1946) (dissenting opinion). It is not intended to imply that landowners should not be compensated for diminution of property value caused by interference amounting to a common law nuisance. It is proposed, however, that "eminent domain" is not the place to pigeonhole the problem.