

M *CBJ Law Department*
MEMORANDUM

To: Mayor and Assembly
From: John R. Corso, City & Borough Attorney
Subject: Flightseeing Initiative
Date: July 6, 2000

Introduction

Local regulation of aircraft noise is difficult but doable. New York City has done it, and so have Long Beach and Santa Monica. Juneau can do it too, especially if it follows Ray Preston's advice to "approach the FAA early on and initiate a dialogue".¹ Although staff and local citizens began a dialogue with the FAA in May, that conversation has been overtaken by the Tourist Flight Initiative, which has made all the big decisions. The FAA may or may not agree with these decisions. If it does not, CBJ is between a federal rock and a municipal hard place: the FAA can withhold grant funds until the initiative is changed, but the initiative cannot be changed for one year after adoption.

The attached Tourist Flight Initiative (TFI) is now before the Assembly for adoption. It is organized into three sections. This memo will address each section in turn. The Assembly prefers to avoid legal technicalities, so case citations, discussion of semicolons, and the like are banished to endnotes. A copy of this memo, with all authorities listed in the endnotes, is posted at www.cbjlaw.com

If the Assembly were to adopt the TFI, some of the drafting problems discussed in this memo could be resolved at City Hall through implementing ordinances and regulations, provided that they accomplish no substantive change in the initiative.²

Section 1 of the Initiative

A. Description

The first section of the TFI is entitled "Findings; Request to Forest Service". It declares that a basic level of peace and quiet is a constitutional right, that the cumulative effect of tourist flights infringes on this right, that the infringement causes discomfort, that the government has taken no meaningful action, and that certain measures are therefore necessary. The operative part of the section is 1(b), which requests that the U.S. Forest Service limit the number of Juneau Icefield landing permits.

B. Drafting Issues

Section 1 contains a few drafting problems, but they pose no serious issues.³

C. Substantive Issues

Usually, the purpose of legislative findings is to provide a scientific, statistical, or other factual basis for a law. This factual basis supports the law when it undergoes judicial scrutiny. The language in Section 1 contains no verified facts,⁴ but instead makes several declarations. These declarations are probably best viewed not as true findings, but as a statement of the Assembly's purpose and intent. Such statements are a common feature of legal documents. They help to interpret and apply the document. If the TFI appears on the ballot, the findings could be viewed as a public opinion poll, a feature that might be useful in dealing with federal agencies.

The TFI declares that peace and quiet is guaranteed by the Privacy Clause of the Alaska Constitution. This statement has no legal significance. Constitutional interpretation is the province of the courts, not the Assembly or the voters. Moreover, the right to privacy contained in the Alaska Constitution limits intrusions by government agencies such as the police, not by private parties such as flightseeing businesses.⁵ However, this error is harmless because as a general matter, noise control ordinances are within CBJ's home rule powers: no state constitutional authority is necessary.

The operative part of Section 1 is paragraph (b), which urges the U.S. Forest Service to limit Juneau Icefield landing permits. This presents no substantive issues. It is common for CBJ and other municipalities to urge state and federal agencies to take various kinds of action.

Section 2 of the Initiative

A. Description

Section 2 of the initiative identifies certain businesses, and subjects them to several limitations.⁶ Generally speaking, the businesses are those which hold icefield landing permits and those which frequently conduct "tourist flights"; a special term defined by the TFI. These flights are prohibited throughout Juneau all day Saturday and from 5pm to 9am every other day of the week during the tourist season.

Weekend and evening flight curfews are a familiar element in airport noise control programs adopted by other cities. They are premised on the idea that it is reasonable to limit noise while people are trying to sleep or relax. New York City has successfully imposed evening and weekend curfews on flight operations in a downtown heliport.⁷ Santa Monica has imposed an evening curfew and limitations on low approaches on weekends.⁸ Long Beach has imposed separate noise limits for daytime and nighttime flight operations.⁹ The federal government itself has imposed noise-related restrictions on flightseeing operations in the Grand Canyon and other national parks.¹⁰

All municipal noise programs must operate within narrow limits allowed by federal law. If cities stray outside these limits, they are brought up short by the courts. New York City, for example, attempted to impose extra limitations on large helicopters. Santa Monica attempted to ban all jet aircraft. These regulations on particular aircraft were struck down in the very same rulings that approved the general curfews.

The federal government regulates aviation through statutes which grant it "complete and exclusive" authority over the airspace of the United States.¹¹ It exercises this authority in the interest of a uniform national air transportation system.¹² Generally speaking, this power preempts local aircraft noise ordinances,¹³ but there are some important exceptions. One exception is known as the "proprietor exception." It allows cities to limit flight operations in the vicinity of airports which they own, provided that they do so only on the basis of noise and in accordance with federal procedures.¹⁴ Also, municipalities may regulate the siting of airports through their land use ordinances.¹⁵

B. Drafting Issues

Section 2(a) says that the TFI applies to any business which operates aircraft during the “tourist season”¹⁶ if it falls within any of three classes: (1) those which “had”¹⁷ more than 20 tourist flights per day or 100 per week in June, July or August of 1999; (2) any new business which “has” more than 30/day or 60/week in June, July and August of 2000 or any year thereafter, or (3) those “with permits” to land helicopters on the Juneau icefield.¹⁸

Use of the past tense “had” appears to create a permanent class: any business which had the specified number of flights in 1999 is forever subject to the limitation, even if its business declines after 1999. However, a new business is subject to the TFI only if it has the specified number of flights at the time the law is applied. Notice that in 1999 the flights are counted in June, July, *or* August. Thereafter they are counted in June, July, *and* August. A post-1999 business could thus avoid the TFI by suspending or reducing flights in any one of the specified months. I am uncertain of the reason for this wording.¹⁹

Section 2(b) prohibits flights and tourist flights on Saturday or between 5pm and 9am on other days. The prohibition applies to supply and maintenance flights “to prepare for the day’s tourist flights” and “at days end”. Apparently, supply and maintenance flights in the middle of the day are not subject to the TFI.

The terms “flight” and “tourist flight” are central to the TFI: they describe who is subject to the law and how they are limited.²⁰ The two terms are used more or less interchangeably in the provisions of the TFI: usually “tourist flight” appears first, followed by several “flights” in no discernable pattern. This lack of rigor would be harmless were it not for the fact that the terms are subject to two inconsistent definitions. A “flight” is a flight within Juneau.²¹ A “tourist flight” is a flight within Juneau that carries tourists. This inconsistency could be a fruitful source of litigation.²²

The definition of tourist flight also hinges on the purpose of the flight and the identity of the passengers. A flight “for the purpose of sightseeing” is a tourist flight regardless of who is on board. A flight “for the purpose of transporting tourists to lodges or some other point of interest”²³ is a tourist flight regardless of whether they do any sightseeing. There is no exception for emergency flights.

A tourist is someone, other than a resident of CBJ²⁴ who is visiting on a short-term basis. “Short term basis” is not defined in the TFI, but could be addressed in a regulation, as could the issue of when a flight “is for the purpose of” sightseeing or tourist transportation. Regulations would also be necessary to decide what happens when a passenger returns on a different flight, or on a boat. Regulations could also address how flight operators would establish the residency and visit plans of passengers. Presumably, the passengers would show proof of residency, sign an affidavit regarding their planned length of stay, etc. I have attached a flow chart that tracks the many criteria contained in the TFI and helps to understand how the legislation will be applied.

Section 2(c) establishes a \$1000 civil penalty for violation of the ordinance. A civil penalty can be imposed upon proof “by a preponderance of the evidence” rather than the tougher criminal standard of “beyond a reasonable doubt”. However, if CBJ loses a civil action it pays the other side’s attorney fees.

C. Substantive Issues

Section 2 presents two kinds of legal issues: regulation at the airport and regulation outside the airport.

At the airport, the situation would be simpler if Section 2 imposed a curfew on *all* flights between 5pm and 9am, or *all* flights on Saturday. If it did, the TFI would have a better chance under federal law because it would discriminate only on the basis of noise.²⁵ However, the TFI also discriminates according to how many flights a business offers, whether the flights return to Juneau, whether they are for flightseeing, and whether they are carrying visitors. It is true that application of these criteria would result in fewer flights and therefore

less noise, but so would limiting all flights carrying people born in even-numbered years: a criterion which is totally unrelated to noise. Perhaps CBJ can prove what the TFI assumes: that aircraft operated by large businesses and those carrying visitors are noisier than aircraft operated by small businesses and those carrying residents, but the proof is not here and the TFI is. If the proof never arrives, or if it shows up supporting criteria different than those in the TFI, Juneau will have a preemption problem.

It will also have grant and revenue problems. Over the past 17 years, CBJ has received \$30 million in grants from the FAA. Over the next 6 years it expects to receive \$35 million more. Last year, CBJ collected \$600,000 in passenger facility charges at the airport. All of these funds would be put in jeopardy by the TFI because of its non-noise criteria and because it would be adopted outside of the FAA-approved noise study required by the Aviation Safety and Noise Abatement Act of 1979²⁶, the Airport and Airway Improvement Act of 1982²⁷, or the Airport Noise and Capacity Act of 1990.²⁸

The loss of future grant funds – particularly \$20 million currently expected in discretionary grants – is a very real possibility according to Daphne Fuller and Jonathan Cross, of the Office of the General Counsel, in FAA headquarters. They told us so in a June 1st teleconference with airport staff, three members of the Peace and Quiet Coalition, and me. It will be difficult to avoid this penalty: FAA-approved noise studies are detailed, scientific, and time-consuming. There is no guarantee that they would validate any part of the TFI and little chance they could be completed before the 2001 tourist season.²⁹ A summary of airport grant funding is attached.

Grant-based remedies have been an effective enforcement tool for the FAA, as noted by the Natural Resources Defense Council in a recent report³⁰ on helicopter noise control in New York:

If a heliport is established, but the locality would like to keep control of the facility, it should not accept federal money for any construction project. Avoiding federal funds can be a costly step to reduce federal control, but it seems to work. Accepting federal money establishes a contractual relationship that allows the FAA to impose federal conditions on what the local jurisdiction may do at the heliport at least during the life of the improvement or grant project. The New York City heliport case appears to suggest that it can work.

The TFI also raises substantive issues about regulation outside the airport area. The Supreme Court has made it clear³¹ that municipalities may only regulate aviation noise as necessary to protect their own airports from lawsuits. Cities may not exercise control over air space outside the airport, even if the flights in question are purely local, as New York City discovered when it tried to control sightseeing helicopter traffic within the city but outside any heliport it owned. The court said no.³² In Juneau, this issue would be tested by the FAA or the operators in the form of an injunctive lawsuit rather than a denial of grant funds.

It might be possible to argue that outside the airport, the curfew is not a regulation of air space or condition of a federal grant, it is just a regulation of land use – launching and landing aircraft – and therefore the Era heliport on Douglas and floatplanes in Gastineau Channel may lawfully be limited in the same fashion as CBJ regulates the construction and use of ramps to launch and land boats. A threshold issue for regulation of Era would be a state statute, AS 34.75.030, which prohibits municipal regulation of the level of noise at a private airport facility.³³ More significantly, we could expect Era and Gastineau Channel floatplane operators to claim grandfather rights as nonconforming uses under the CBJ code, just like the homeowner who may leave her house where it stands, even though the borough has changed the sideyard setback ordinance. Finally, it should be noted that CBJ land use laws generally turn on the issuance, denial, and violation of permits held by landowners, not the use of public land by nonowners.³⁴

It is possible that limitations on flightseeing in the Grand Canyon and other sites under the National Parks Overflight Act presage a new era in aviation regulation. Perhaps Congress or the FAA will create a new category in addition to noise: call it “intrusion”. It could address commercial air tours, electronic news gathering, and other forms of aviation that tend to intrude on solitude, privacy, or serenity. As yet, there is no legal authority for this proposition,³⁵ but if the Assembly adopts the TFI, CBJ will have the opportunity (if not the grant funding) to make some new law: always an interesting prospect for the Law Department.

Section 3 of the Initiative

A. General Considerations

Section 3 of the TFI is intended to limit construction of new heliports. It accomplishes this with a direct prohibition, with limitations on zoning, and with a prohibition on municipal noise studies for new heliports.

B. Drafting Considerations

The wording of the noise impact requirement is difficult to understand. The initiative allows a new heliport only if the total noise impact resulting from its construction and use would be less than that which existed in 1999. It is difficult to see how construction of anything – even a graveyard – would actually reduce noise levels from some previous year unless the graveyard replaced, for example, a boiler factory. This may be the purpose of the provision: to allow construction of a new quiet heliport only upon decommissioning of an old noisy heliport or some other noisy facility.

C. Substantive Issues

Section 3 poses no significant legal issues. As noted above, it is well established the municipalities may use their zoning powers to control airport siting. The requirement for cancellation of any pending noise study would require a negotiated termination with payment to the contractor.

Conclusion

The initiative requests the Forest Service to limit icefield landing permits. It directly imposes limits on construction of new heliports in Juneau. These provisions raise no significant legal issues.

The initiative also limits tourist flights at the airport and outside the airport. Limitations at the airport are not supported by FAA-approved noise studies. There is probably not enough time to complete these studies before the initiative takes effect. Staff will inquire about the availability of accelerated or informal studies, but even if relief is available, the studies are likely to require at least some changes in the terms of the initiative, and the initiative cannot be changed for one year after adoption. Accordingly, there is a significant risk that enforcement of the initiative will prompt the FAA to withhold millions of dollars in grants and revenues essential for operation and improvement of the airport.

Limitations on takeoffs and landings outside the airport are somewhat less problematic. It might be possible to characterize these as a proper exercise of local land use authority rather than an invasion of federal airspace authority. The FAA or the flight operators are likely to test this theory with a federal lawsuit seeking to enjoin the limitation. Even if CBJ prevailed in the lawsuit, present operators would claim grandfather rights as nonconforming uses under the present CBJ zoning regulations: Assembly action would be required to extinguish these rights, and to reposition the land use code toward land users rather than its present focus on permits, developers, and land owners.

JRC/szl

Attachments

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1. Memorandum, Ray Preston to Assembly Planning and Policy Committee, January 28, 2000.
2. The Passenger Fee Initiative was implemented in this fashion. However, the Tourist Flight Initiative is a significantly larger and more complex measure than the Passenger Fee Initiative, and for that reason it is more difficult to implement “without any change in substance”.
3. Section 1(3) distinguishes between “actual” and “psychological” noise-induced discomfort. This unfortunate wording implies that psychological discomfort is not real. This implication could generate claims that the initiative is premised on imaginary harm. It would have been better to refer to “physical” and psychological discomfort, but the error should cause no harm: it is widely recognized that psychological discomfort is real.

Section 1(3) also asserts that the noise created by tourist flights is “incessant” when in fact it is seasonal. This error could be relevant to future FAA noise studies at the Juneau airport. These studies are usually conducted over a full one-year period, but this procedure could misrepresent conditions in Juneau. If CBJ wishes a seasonally-adjusted procedure, it may be necessary to ask that the agency ignore use of the term “incessant” in the initiative.

4. True factual findings – noise measurements, aircraft traffic counts, passenger demographics, etc. – could be very useful in the event the TFI is subject to legal challenge. However, it is possible that such factual findings would point to flight restrictions or other remedies different from those required by the TFI. This would put CBJ in an awkward situation because the remedies in the initiative cannot be changed for a period of one year after adoption.
5. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989).
6. The TFI also imposes an affirmative obligation “to provide relevant information” to the City and Borough. The grounds for determining relevancy are not specified. Presumably, they will be provided by ordinance or regulation.
7. *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (C.A.2 (N.Y.) 1998). The city also imposed a phase-out of all weekend flights and an overall reduction of 47% in helicopter flight operations.
8. *Santa Monica Airport v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981).
9. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (C.A.9 (Cal.) 1991).
10. These restrictions are authorized by the Parks Overflight Act, 16 U.S.C. §1601. The act does not apply outside national parks or anywhere in Alaska.
11. Section 1108(a) of the Federal Aviation Act, 49 U.S.C. § 1508(a).

12. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303. Justice Frankfurter commented that “Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel, and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.”

13. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).

14. The exception is intended to allow cities to protect themselves against claims by people living near the airport that their property has been taken by the local government without just compensation and they are entitled to payment. At least one court has extended this analysis to permit the city to “enhance the quality of the city’s human environment.” *Santa Monica Airport, supra*.

15. *Gustafson v. City of Los Angeles* (6th Circuit Court of Appeals, 1996). This case, which allowed a city to prohibit seaplane landings on a lake, turned on a provision of the Federal Aviation Act, 49 U.S.C. §§ 40101-41901, which expressly disavowed any attempt to preempt local land use laws.

16. Both fixed-wing and rotary aircraft are subject to the TFI. “Tourist season” is not defined as a general term. It could mean the June-July-August period used in one part of the TFI, or it could mean the period May 1 through September 30 used in another part.

17. The term “had” is not defined. It could mean “scheduled”, “offered”, or “conducted”. I suspect there is little practical difference, but flight operator plaintiffs may argue otherwise.

18. The icefield permit criterion would apply to scientific endeavors, such as the University of Idaho Glaciological and Arctic Sciences Institute Survey of the Juneau Icefield conducted by Maynard Miller, if it uses helicopters.

19. There may be no reason. The TFI is notably inconsistent in its terminology differentiating between 1999 and post-1999 businesses. It applies to 1999 businesses which have more than a certain number of flights “on any day”, but for post-1999 businesses the flights are measured “on any given day”. For 1999 businesses, it applies to tourist flights “originating within the City and Borough”, but for post-1999 businesses, it applies to all tourist flights. These may be distinctions without differences, but a well-written law should not have distinctions without differences: they make trouble and are evidence of poor craftsmanship.

20. The language of the TFI does not directly limit flight operators: it uses the passive voice to say “there may not be” flights on evenings and weekends. The usual language in this sort of law is an active prohibition such as “no business shall offer or conduct”.

21. The definition includes the term being defined.

22. “Within Juneau” is my shorthand for TFI language that creates more inconsistencies. The TFI actually says that a “flight” is one which takes off from a site in CBJ and returns to “the same or a different site” in CBJ. However, a “tourist flight” is one which originates in CBJ and returns to “the place of origin” within the same day. Thus, a “flight” may return to a different site, but a “tourist flight” may

not. The difficulty is, of course, compounded by the fact that the word “flight” is defined as a term on its own and also appears in the defined term “tourist flight”. This circular usage is as irritating as the comical locution “9AM in the morning” which appears twice in the TFI, as does “5 PM in the evening”.

23. It is unclear whether use of the plural term “tourists” means a flight with 1 tourist aboard is exempt. Neither is it clear what to make of the plural “lodges” next to the singular “point of interest”.

24. The TFI lacks the commas which I have inserted at this point and in its original form could be read to say that a tourist is a person other than “a resident who is in Juneau for a short-term visit”. In other words, it would cover flights by residents who are here permanently, which is pretty much everyone.

25. The evening/weekend criteria would appear to discriminate on the basis of time or schedule, rather than noise. However, the purpose of the proprietor exemption is not to regulate noise for its own sake, but to regulate the annoyance that residents experience as a result of airport operations. Cities get sued for noise that occurs when people are trying to sleep, or noise that breaks their windows, or noise that set their teeth on edge. Cities, therefore, may regulate such noise provided they regulate *all* aircraft that break windows, *all* aircraft that set teeth on edge, etc.

26. 49 U.S.C. §47501.

27. 49 U.S.C. §47101.

28. 49 U.S.C. §47521 *et. seq.*, 14 C.F.R. Part 161.

29. The regulations governing these “Part 161 studies” are extremely complex. I am presently working with the Peace and Quiet Coalition to follow up on its question of whether the regulations would allow abbreviated 161 procedures for the smaller aircraft covered by the TFI. In our conversations to date, the agency has not suggested that such relief is available, but we have not asked it outright.

30. *Needless Noise: the Negative Impacts of Helicopter Traffic in New York City and the Tri-States Region*. Caroline Cunningham, Natural Resources Defense Counsel, December, 1999. An excerpt from this excellent report is available on the CBJ Law website; the entire document is available for \$5.00 via the Counsel’s website at www.nrdc.org.

31. See note 11, *supra*.

32. *National Helicopter, supra*.

33. CBJ would defend against application of this statute by arguing that land-use regulation of the Era heliport would not be intended to “regulate the level of noise”, merely the hours of operation. This argument would be complicated by the stated purpose of the TFI: to control noise.

34. The submerged lands under the Gastineau Channel and the navigable water of the channel are owned by the State of Alaska and are held in public trust for its citizens. Alaska Statehood Act, §6(m); AS 44.03.010 and .020.

35. This argument was suggested by Robert Reges of the Peace and Quiet Coalition. Like all Mr. Reges' cutting-edge arguments, what it lacks in authority it makes up for with brio.

AN INITIATIVE FOR AN ORDINANCE RELATING TO TOURIST FLIGHTS

BE IT ENACTED BY VOTERS OF THE CITY AND BOROUGH OF JUNEAU ALASKA:

Section 1. Findings; Request to Forest Service (a) (1) The Citizens of the City and Borough of Juneau hereby find and declare that the citizens and residents of the City & Borough have the right to a basic level of peace and quiet and that this right is a part of the Right of Privacy under the Constitution of the State of Alaska;

(2) That the increase in tourist flights by both helicopters and fixed wing aircraft has created a cumulative effect which infringes upon the citizens' right to peace and quiet;

(3) That the noise created by tourist flights has reached nuisance proportions, is incessant, and is of such magnitude, duration and intensity as to cause actual or psychological discomfort to persons of ordinary sensibilities;

(4) That neither the federal government nor municipal government has taken meaningful action to mitigate or control the noise; and

(5) That in order to mitigate and control the effects of noise from the tourist flights, certain measures are necessary beginning with the effective date of this Initiative.

(b) The Citizens of the City and Borough of Juneau hereby request the U.S. Forest Service to begin gradually reducing the total number of helicopter landing permits for the Juneau Icefield. Thus it is requested that beginning in calendar year 2001, the number of permits will be reduced over a three-year period so that by calendar year 2003 the total number of landing permits will not exceed the total number of actual landings in calendar year 1994: 11,647. It is further requested that the number of landing permits not exceed this level for all future years.

Section 2. Applicability; Curfews; Flight-Free Day (a) This Section applies to every business, including any affiliated business, that operates fixed winged aircraft or helicopters during the tourist season which had more than 20 tourist flights on any day or 100 in any week originating within the City and Borough during the months of June, July, or August of 1999. It applies to every business with permits for helicopter landings on the Juneau Icefield. This ordinance also applies to any new business which has more than 15 tourist flights on any given day, or more than 60 flights in any given week during the months of June, July, and August in any year beginning in the year 2000 or thereafter. Each business to which this section applies shall provide relevant information and documents to the City Manager or his designee as requested.

(b) Beginning with the effective date of this Initiative, for the period beginning on May 1 to September 30 of each year, there may not be any tourist flights before 9 AM in

the morning or after 5 PM in the evening. This means that no flight may begin before 9 AM and all flights must be completed by 5 PM. During this same time period, there may not be any tourist flights on Saturdays. For purposes of this subsection, this includes flights of supplies, or for maintenance or things of a preparatory nature in order to prepare for the day's tourist flights or any such flights that might take place at day's end.

(c) A person who violates the provisions of this section is liable for a civil penalty in the amount of \$1,000 for each violation.

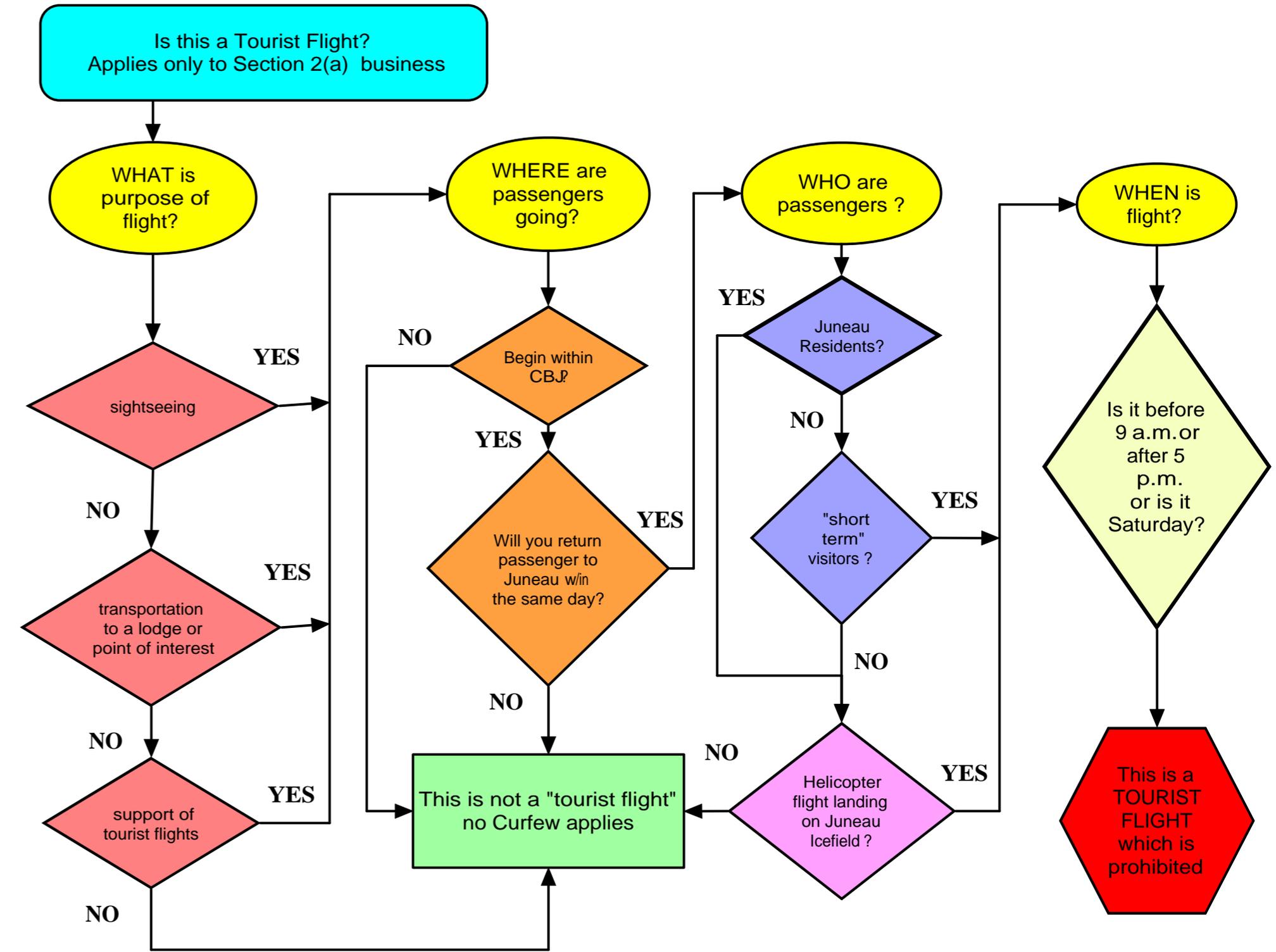
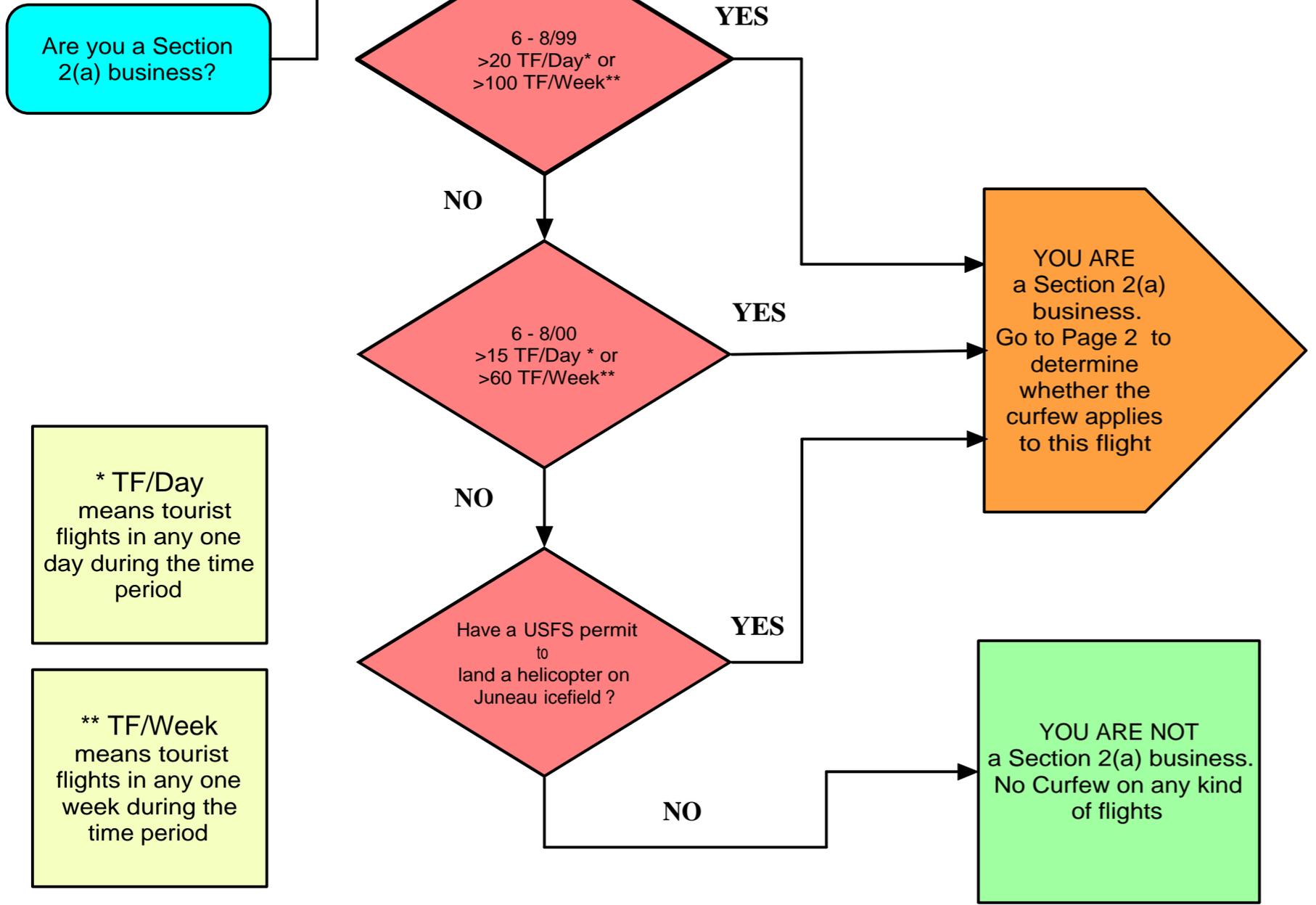
Section 3. Restrictions On New Heliports

Based on the findings in Section I of this Initiative, the following restriction will apply to the construction of any new heliport within the City and Borough of Juneau. Following the effective date of this Initiative, no new heliport may be constructed unless it is demonstrated that the total noise impact on people and wildlife which would result from its construction and use would actually be reduced from that which existed in 1999. For a period of one year from the effective date of this initiative, the Assembly of the City and Borough may not take any action to expand the zones in which heliports become a permissible conditional use. Finally, the City and Borough of Juneau may not spend public money on any studies or tests of any kind for any new heliports. The City shall cancel any such contract existing on the effective date of this initiative.

Section 4. Definitions

- (1) "Affiliated business" is one controlled by, or is under common control with some other business.
- (2) "Flight" means one flight, by one aircraft; taking off from some site within the City and Borough and a return to the same site or a different site within the City and Borough;
- (3) "Tourist flights" are flights by helicopters and fixed wing aircraft which originate within the City and Borough of Juneau for the purpose of sightseeing or for the purpose of transporting tourists to lodges or some other point of interest where the passengers are returned to the place of origin within the same day. They include all flights which include helicopter landings on the Juneau Icefield.
- (4) "Tourist" is a person other than a resident of the City and Borough of Juneau who is visiting the City and Borough and its surrounding area on a short-term basis.

AN INITIATIVE FOR AN ORDINANCE RELATING TO TOURIST FLIGHTS



FAA Grants for Juneau International Airport
total by fiscal year

Fiscal Year	FAA Grant Number	Project Description	Discretionary	Entitlement	Total by Project	Total by Fiscal Year
1983	01	Construct, pave apron, hardstands, utility relocate	523,302	1,542,486	2,065,788	2,065,788
1985	03	Purchase Land for Development		781,310	781,310	781,310
1986	02	Master Plan Update		255,789	255,789	255,789
1987	04	Replace Culvert	16,163	588,376	604,539	604,539
1988	05	Install security fencing, acquire snow removal equipment (SRE)	22,118	532,760	554,878	602,330
	06	Erosion Protection	6,189	41,263	47,452	
1989	07	Construct, pave, mark and light partial parallel taxiway A, replace float plan basin culvert, construct, pave and marck access road.	2,225,470	3,931,955	6,157,425	6,157,425
1991	08	SRE, radios, sweeper brooms, security equipme	9,965	791,607	801,572	801,572
1992	09	Acquire ARFF Vehicls, SRE, rotating beacon		794,446	794,446	794,446
	10	Reconstruct Taxiway A, improve access roads, acquire security equipment		481,499	481,499	481,499
1993	11	Reconstruct Taxiway B, improve access road, irr	588	947,477	948,065	948,065
1994	12	Install mandatory signs	22,442	719,417	741,859	741,859
	13	Acquire SRE and security vehicls, Duck Creek relocate EA		304,688	304,688	471,711
	14	Ramp access to terminal loading stairs		167,023	167,023	
1995	15	R/W and T/W Lighting replacement	107,446	816,644	924,090	1,252,215
	16	Conduct Master Plan		328,125	328,125	
	17	Enlarge hardstands, provide blast pads pavement; chip seal for ramp and taxiway	700,000	533,750	1,233,750	
1996	18	Acquire deicing equipment	281,480	20,000	301,480	788,980
	19	Install security fencing, acquire SRE loader	126,563	360,937	487,500	
	20	N. Terminal Heating Renovation, R/W 8-26 Rehab design		372,614	372,614	
1997	21	R/W 8-26 Rehab, install centerline lighting, rehab taxiway A lighting	3,900,000	1,110,987	5,010,987	5,511,651
	22	Acquire SRE I		500,664	500,664	
1998	23	Acquire SRE II		280,626	280,626	1,007,322
	24	Acquire Security access control system		70,500	70,500	
	25	Design SRE and snow chemical storage bldg.		656,196	656,196	
1999	26	Rehab air carrier and GA aprons		968,920	968,920	1,470,388
	27	Acquire SRE		240,000	240,000	
	28	Rehab N. Terminal access		261,468	261,468	

2000	29	R/W Safety Area I	3,668,935	3,668,935	
	21	Amendment for centerline light controls	384,795	384,795	4,053,730
Grand totals			7,941,726	22,455,257	30,396,983

Future Projects using FAA Grants for Juneau International Airport

Fiscal Year	Project Description	FAA Discretionary	FAA Entitlement	Local Funding	Est. Total by Project
2001	Rehab Terminal Building Exterior		1,300,000	86,667	1,386,667
	RTR Equip Relocate (Road, New Site Devel)		500,000	33,333	533,333
	RSA Ph II EA / EIS, Mitigation, Design		1,000,000	66,667	1,066,667
2002	RSA Ph II EA / EIS, Mitigation, Construction	9,000,000	2,300,000	753,333	12,053,333
	ARFF Replacement Vehicle		500,000	200,000	700,000
	RTR Area Development		1,000,000	66,667	1,066,667
	Snow Removal Equipment (*via direct appropriation)	11,000,000			11,000,000
2003	135 Ramp Reconstruction		2,700,000	180,000	2,880,000
	Terminal Expansion Feasibility Study/Design Ph I		100,000	6,667	106,667
2004	New Air Carrier Ramp Construction		1,800,000	120,000	1,920,000
	Terminal Expansion Feasibility Study/Design Ph II		500,000	33,333	533,333
	Acquire Security Equipment - Fencing		500,000	33,333	533,333
2005	Site Prep for NW Quadrant Development		2,000,000	133,333	2,133,333
2006	West GA Area Paving		1,350,000	90,000	1,440,000
Grand totals:		20,000,000	15,550,000	1,803,333	37,353,333

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MEMORANDUM

DATE: January 28, 2000

TO: Tom Garrett, Jim Powell,
Frankie Pillifant, Ken Koelsch, Members of
Assembly of the City and Borough
and of the Policy and Planning Committee

FROM: Ray C. Preston

SUBJ: Whether Municipal Regulation of
Aircraft Noise is Preempted by Federal Law

INTRODUCTION

This memorandum addresses the issue of whether action by the City and Borough of Juneau aimed at reducing the noise from tourist flights would have a conflict with federal jurisdiction. The legal question has been framed in terms of "federal preemption." The issue of preemption has many facets, and this memorandum does not attempt to address all of them. However, there are two factual aspects that should be noted at the outset. The first is that the problem which exists in Juneau is a purely localized problem. The problem stems from flights that both originate in Juneau and terminate in Juneau; this means that interstate commerce is not involved except in a very tangential way. The second aspect is that the entire history of federal action with regard to noise has to do strictly with passenger jets. Indeed, virtually all of the case law has to do with attempts by municipalities to control noise of passenger and transport jets. This is not the case with regard to Juneau's tourist flights.

AIRCRAFT NOISE; MUNICIPAL CONTROL AND FEDERAL PREEMPTION

For at least the past 30 years, or so, there have indeed been conflicts between municipalities and various other interest holders regarding the problem of aircraft noise. At different times and in different ways, municipalities have made efforts to control the amount of noise from aircraft. And there have been lawsuits. One of those lawsuits was decided by the U.S. Supreme Court in 1973. It was the case of *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 US 624,

93 S.Ct. 1854, 36 L Ed2d 547 (1973). This case was decided by the Supreme Court on May 14, 1973. The case concerned an ordinance adopted by the City of Burbank which made it unlawful for jet aircraft to take off from the Hollywood-Burbank Airport between the hours of 11 p.m. and 7 a.m. the following day. Lockheed sued in federal court for injunctive relief. The District Court issued an injunction, the Circuit Court affirmed and the U.S. Supreme Court also affirmed. The court held that the Federal Aviation Administration in conjunction with the EPA has full control over aircraft noise, preempting state and local control.

While the case was before the court, and before it was decided, Congress had passed an Act entitled "The Noise Control Act of 1972," now codified at 42 USC 4901 *et. seq.* It is clear that the passage of this Act (approved by Congress on October 27, 1972) heavily influenced the court's decision. Early in the court's decision, the court states that

The Federal Aviation Act of 1958 . . . as amended by the Noise Control Act of 1972 . . . and the regulations under it . . . are central to the question of pre-emption.

Id. at 625. The opinion then quotes liberally from the Noise Control Act and makes extensive reference to the legislative history of the Act:

The 1972 Act, by amending § 611 of the Federal Aviation Act, also involves the Environmental Protection Agency (EPA) in the comprehensive scheme of federal control of the aircraft noise problem. Under the amended § 611(b)(1), FAA, after consulting with EPA, shall provide "for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title." Section 611(b)(2) as amended, provides that future certificates for aircraft operations shall not issue unless the new aircraft noise requirements are met. Section 611(c)(1), as amended provides that not later than July 1973 EPA shall submit to FAA proposed regulations to provide such "control and abatement of aircraft noise and sonic boom" as EPA determines is "necessary to protect the public health and welfare."

Id. at 628. Largely because of the 1972 Noise Control Act, the court then concluded that "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." Id. at 633.

Yet, the Burbank decision was a 5 to 4 decision. Justice Rehnquist, one of the dissenters. He stated in part:

Appellees do not contend that the noise produced by jet engines could not reasonably be deemed to affect adversely the health and welfare of persons constantly exposed to it; control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of the police power possessed by States and local governing bodies. Because noise regulation has traditionally been an area of local, not national concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactments "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Id. at 643, quoting from *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 (1947).

It is also to be noted that 26 years have now passed since the Burbank decision. During that time period, the composition of the Supreme Court has changed. During this same time period, and has already been noted, virtually all efforts made by the federal government regarding aircraft noise have focused on passenger jets, not noise from helicopters or propeller driven aircraft. It is also important that the tourist flights producing the noise in Juneau both originate in Juneau and terminate in Juneau. Thus, interstate commerce is not involved except tangentially.

Note should also be taken that EPA apparently never did produce anything meaningful in the area of aircraft noise. As a result of the 1972 Act, The Office of Noise Abatement and Control (ONAC) in the EPA was established. However, this office was defunded nearly 20 years ago. It was defunded in 1981 during the Reagen administration and apparently has remained defunded ever since. See the article by Professor Sidney A. Shapiro of the University of Kansas School of Law which is available on the Internet at

<http://www.nonoise.org/library/shapiro/shapiro.htm> ¹ The following is taken from this article:

EPA told Congress that ONAC should be disbanded because an austere federal budget required that some current federal programs be eliminated, the benefits of noise control were highly localized, and noise control could be carried out by State and local governments without the presence of a federal program. These arguments reflected a "rebuttable presumption" in favor of local regulatory programs that guided the Reagan administration. Whenever possible, the administration sought to return control over "local lifestyles to local decisionmakers.

According to the Reagan federalism philosophy, noise is a local problem because noise pollution does not travel very far and it is quickly dissipated. Accordingly, local regulation is more efficient since local government can more easily respond to different types of local conditions. Requiring local governments to fund their own noise abatement means that they must decide whether this activity is more important than other responsibilities they have. The failure to fund noise abatement activities can therefore be attributed to the low priority given these activities by local governments.

Footnotes omitted. ONAC has remained unfunded ever since. In 1997, an effort was made in Congress to pass a bill entitled "The Quiet Communities Act of 1997." However, the bill, H.R. 536 (introduced by Congresswoman Lowey in the House and S. 951 introduced by Senator Torricelli in the Senate) was not passed. This Act would have directed the Administrator of the EPA to reestablish ONAC. However, it lost in the Senate by a vote of 69 to 27.

The original defunding and the refusal of Congress to re-establish ONAC Congress may be seen as assent by Congress to the view that noise is a local problem after all.

It may also be fairly stated that when it comes to the noise from helicopters and propeller driven aircraft, the federal government in fact never did take any action

¹ Anyone reading this memorandum is encouraged to read Prof. Shapiro's article. In addition to tracing the history of EPA's Office of Noise Control, the article addresses the issue of private rights of actions and options for state and local governments.

to control or abate this noise.² Query whether municipalities remain helpless in the face of federal inaction.

It is also noted that the Burbank case was not a complete end to municipal control and regulation. See *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991). See also *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996). In the Alaska Airlines case, the 9th Circuit noted that even in the Burbank case, the Supreme Court “. . . left the door open to noise regulations imposed by municipalities acting as airport proprietors. . .” (page 982). In the City of Lake Angelus case, the 6th Circuit held that

The designation of plane landing sites is not pervasively regulated by federal law, but instead is a matter left primarily to local control. In contrast to the pervasive scheme of federal regulation of aircraft noise found in *Burbank*, we fail to identify any language in the Act the regulations promulgated pursuant to the Act, or the legislative history of the Act, which by implication preempts enforcement of the City's ordinances prohibiting the operation of seaplanes on Lake Angelus.

Id. at 784.

In light of all these aspects, it appears that if the city took appropriate action to reduce the amount of noise its citizens are subjected to by tourist flights, it might well survive a challenge based on grounds of federal preemption. The preemption issue is not open and shut. Significant aspects to be considered are the peculiarly local aspects already mentioned. The problem is not with passenger jets coming here from somewhere else, or leaving here for distant destinations. The problem has to do entirely with small aircraft which both take off from Juneau and whose destination is Juneau. Action to be considered might include curfews limiting the times during the day that tourist flights may take place; establishing one or more “flight-free” days, establishing “flight-free zones”, and limiting the number of flights that each operator will be allowed. However, it is the view of the author of this memorandum that it may be a mistake to attempt to regulate the noise of aircraft in flight. Apart from enforcement problems, such ordinances, ones that I call traditional noise ordinances, are all aimed at noise which emanates from a particular point source, whereas a large part of the problem in Juneau is the fact that it is the result of a number of different aircraft in the sky all at the same time. Further, a large part of the problem in Juneau is not so much the sheer decibel level, but the fact that it is incessant; it begins early in the morning and lasts all day long without a break.

² In 1990, Congress passed the Airport Noise and Capacity Act. This act requires all commercial airlines to convert their fleets from Stage 2 to Stage 3 noise certification levels, a quieter plane, by the year 2000. Here again the focus is exclusively on passenger jets.

Finally, I wish to note even in the wake of *Burbank*, there apparently are more than a few instances where municipalities have succeeded in establishing curfews even for passenger and cargo jets. However, it appears that in those instances, it was necessary for the municipality to work closely with the FAA from the beginning.

CONCLUSION

Given certain unique facets of Juneau's problem with noise from tourist flights, the general history of federal preemption cases in this area should not deter efforts and action by the municipality to solve this problem. However, it may be best to approach the FAA early on and initiate a dialogue. This dialogue should begin at a high level, not with FAA representatives in Juneau or even Alaska. The FAA may recognize that this is a purely local problem which does not conflict with FAA jurisdiction.

*1123 768 P.2d 1123

79 A.L.R.4th 75, 57 USLW 2501, 116
Lab.Cas. P 56,337,
4 IER Cases 129

Clarence G. LUEDTKE, Appellant,

v.

NABORS ALASKA DRILLING, INC., Appellee.**Paul M. LUEDTKE, Appellant,**

v.

NABORS ALASKA DRILLING, INC., Appellee.**Nos. S-2074, S-2127.**

Supreme Court of Alaska.

Feb. 17, 1989.

Rehearing Denied March 9, 1989.

Two former employees brought action against employer challenging their discharge after they refused to submit to urinalysis screening for drug use. The Superior Court, Third Judicial District, Anchorage, Peter A. Michalski, J., found against employees, and employees appealed. The Supreme Court, Compton, J., held that: (1) drug testing program did not violate state constitutional right to privacy; (2) employer's actions did not give rise to cause of action for invasion of privacy; and (3) discharge of employees did not violate implied covenant of good faith and fair dealing.

Affirmed in part, reversed in part, and remanded.

Matthews, C.J., filed concurring opinion.

1. CONSTITUTIONAL LAW ☞82(6.1)
92 ----
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and
Applications
92k82(6.1) In general.

Formerly 92k82(6)
Alaska 1989.

Employer's drug testing program did not violate employees' right to privacy guaranteed by State Constitution, since constitutional right to privacy does not extend to actions of private parties. Const. Art. 1, § 22.

2. MASTER AND SERVANT ☞4
255 ----
255I The Relation

- 255I(A) Creation and Existence
255k2 Contracts of Employment
255k4 Implied contracts.

Alaska 1989.

Public policy supporting protection of employee privacy exists, and violation of policy by employer may rise to level of breach of implied covenant of good faith and fair dealing.

3. MASTER AND SERVANT ☞30(1.5)
255 ----
255I The Relation
255I(C) Termination, Discharge, and
Discipline
255I(C)2 Discharge or Discipline
255k30 Grounds and Liabilities
255k30(1.5) Cause or reason, and necessity
therefor.

[See headnote text below]

3. MASTER AND SERVANT ☞30(1.15)
255 ----
255I The Relation
255I(C) Termination, Discharge, and
Discipline
255I(C)2 Discharge or Discipline
255k30 Grounds and Liabilities
255k30(1.15) Good faith and fair dealing
requirement; bad faith
and motive.

Alaska 1989.

Employees hired on at-will basis can be fired for any reason that does not violate implied covenant of good faith and fair dealing; however, employees hired for specific term may not be discharged before expiration of term except for good cause.

4. MASTER AND SERVANT ☞20
255 ----
255I The Relation
255I(C) Termination, Discharge, and
Discipline
255I(C)1 In General
255k20 Indefinite term.

Alaska 1989.

Employees' employment was at-will, since neither of employees had any formal agreement for specified term, and employer never gave indication of definite duration for employment or definite endpoint to employment, but instead merely provided benefits consistent with modern employer/employee relations.

5. LABOR RELATIONS ☞4

232A ----

232AI In General

232Ak4 Rights of employers in general.

Alaska 1989.

Where employer is justified in determining through drug tests whether their employees are possibly impaired on job by drug usage off job, drug test must be conducted at time reasonably contemporaneous with employee's work time, and employee must receive notice of adoption of drug testing program.

6. MASTER AND SERVANT ☞30(1.15)

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k30 Grounds and Liabilities

255k30(1.15) Good faith and fair dealing requirement; bad faith and motive.

Alaska 1989.

Employer's discharge of two employees for refusing to submit to urinalysis screening for drug use did not violate implied covenant of good faith and fair dealing, where one employee was given notice of future test and second employee had notice and opportunity to schedule his test at reasonable time.

7. MASTER AND SERVANT ☞43

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k34 Actions for Wrongful Discharge

255k43 Questions for jury.

Alaska 1989.

Whether employer breached implied covenant of good faith and fair dealing when it suspended employee for drug use after employee's urine sample was tested for drugs without employee's knowledge was question for trier of fact.

8. TORTS ☞8.5(4)

379 ----

379k8.5 Invasion of Privacy

379k8.5(4) Invasions actionable in general.

Alaska 1989.

Former employee, who was suspended for drug use after his urine was tested for drug usage without his knowledge, could not maintain action for invasion of privacy against employer; intrusion was not

unwarranted since employer was entitled to test its employees for drug usage, and although employee was not aware of any test being performed on his urine sample, he did know that whatever the results were they would be reported to employer.

9. TORTS ☞8.5(4)

379 ----

379k8.5 Invasion of Privacy

379k8.5(4) Invasions actionable in general.

Alaska 1989.

Former employees, who refused to take urinalysis screen tests for drug use, had no cause of action for invasion of privacy against employer, where intrusion was prevented from taking place.

10. COSTS ☞194.25

102 ----

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.25 In general.

Formerly 102k194.24

Alaska 1989.

Award of \$25,000 in attorney fees against former employee in former employee's action against employer alleging that drug testing program violated right to privacy, covenant of good faith and fair dealing, and was invasion of privacy was proper given fact that trial lasted four days and was based on uncertain legal theories.

***1124** Don Clocksin, Wagstaff, Pope & Clocksin, Cooperating Atty. for the Alaska Civil Liberties Union, Anchorage, and Douglas P. Elliott, Anchorage, for appellant Clarence G. Luedtke.

Charles W. Coe, Smith, Coe & Patterson, P.C., Anchorage, for appellant Paul M. Luedtke.

Mary Poteet, Winner & Associates, Anchorage, for appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

COMPTON, Justice.

This case addresses one aspect of drug testing by employers. A private employer, Nabors Alaska Drilling, Inc. (Nabors), established a drug testing program for its employees. Two Nabors employees, Clarence Luedtke and Paul Luedtke, both of whom worked on drilling rigs on the North ***1125** Slope,

refused to submit to urinalysis screening for drug use as required by Nabors. As a result they were fired by Nabors. The Luedtkes challenge their discharge on the following grounds:

1. Nabors' drug testing program violates the Luedtkes' right to privacy guaranteed by article I, section 22 of the Alaska Constitution;
2. Nabors' demands violate the covenant of good faith and fair dealing implicit in all employment contracts;
3. Nabors' urinalysis requirement violates the public interest in personal privacy, giving the Luedtkes a cause of action for wrongful discharge; and
4. Nabors' actions give rise to a cause of action under the common law tort of invasion of privacy.

Nabors argues that the Luedtkes were "at will" employees whose employment relationship could be terminated at any time for any reason. Alternatively, even if termination had to be based on "just cause," such cause existed because the Luedtkes violated established company policy relating to employee safety by refusing to take the scheduled tests.

This case raises issues of first impression in Alaska law including: whether the constitutional right of privacy applies to private parties; some parameters of the tort of wrongful discharge; and the extent to which certain employee drug testing by private employers can be controlled by courts.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Luedtkes' cases proceeded separately to judgment. Because they raised common legal issues, on Nabors' motion they were consolidated on appeal.

A. Paul's Case.

1. Factual Background.

Paul began working for Nabors, which operates drilling rigs on Alaska's North Slope, in February 1978. He began as a temporary employee, replacing a permanent employee on vacation for two weeks. During his two weeks of temporary work, a permanent position opened up on the rig on which he was working and he was hired to fill it. Paul began as

a "floorman" and was eventually promoted to "driller." A driller oversees the work of an entire drilling crew.

Paul started work with Nabors as a union member, initially being hired from the union hall. During his tenure, however, Nabors "broke" the union. Paul continued to work without a union contract. Paul had no written contract with Nabors at the time of his discharge.

During his employment with Nabors, Paul was accused twice of violating the company's drug and alcohol policies. Once he was suspended for 90 days for taking alcohol to the North Slope. The other incident involved a search of the rig on which Paul worked. Aided by dogs trained to sniff out marijuana, the searchers found traces of marijuana on Paul's suitcase. Paul was allowed to continue working on the rig only after assuring his supervisors he did not use marijuana.

In October 1982, Paul scheduled a two-week vacation. Because his normal work schedule was two weeks of work on the North Slope followed by a week off, a two-week vacation amounted to 28 consecutive days away from work. Just prior to his vacation, Paul was instructed to arrange for a physical examination in Anchorage. He arranged for it to take place on October 19, during his vacation. It was at this examination that Nabors first tested Paul's urine for signs of drug use. The purpose of the physical, as understood by Paul, was to enable him to work on offshore rigs should Nabors receive such contracts. Although Paul was told it would be a comprehensive physical he had no idea that a urinalysis screening test for drug use would be performed. He did voluntarily give a urine sample but assumed it would be tested only for "blood sugar, any kind of kidney failure [and] problems with bleeding." Nabors' policy of testing for drug use was not announced until November *1126 1, 1982, almost two weeks after Paul's examination.

In early November 1982, Paul contacted Nabors regarding his flight to the North Slope to return to work. He was told at that time to report to the Nabors office in Anchorage. On November 5, Paul reported to the office where a Nabors representative informed him that he was suspended for "the use of alcohol or other illicit substances." No other information was forthcoming from Nabors until November 16 when Paul received a letter informing him that his urine had tested positive for cannabinoids. The letter informed

him that he would be required to pass two subsequent urinalysis tests, one on November 30 and the other on December 30, before he would be allowed to return to work. In response Paul hand delivered a letter drafted by his attorney to the Manager of Employee Relations for Nabors, explaining why he felt the testing and suspension were unfair. Paul did not take the urinalysis test on November 30 as requested by Nabors. On December 14, Nabors sent Paul a letter informing him he was discharged for refusing to take the November 30 test.

2. Procedural Background.

Following his discharge, Paul applied for unemployment compensation benefits with the Alaska State Department of Labor (DOL). DOL initially denied Paul benefits for the period of December 12, 1982 through January 22, 1983 on the ground that his refusal to take the urinalysis test was misconduct under AS 23.20.379(a). Paul appealed that decision and on January 27, 1983, the DOL hearing officer concluded that the drug re-test requirement was unreasonable. On that basis, the hearing officer held that Paul's dismissal was not for misconduct. Nabors appealed to the Commissioner of Labor, who sustained the decision of the appeals tribunal.

Paul initiated this civil action in November 1983. He asserted claims for wrongful dismissal, breach of contract, invasion of privacy, and defamation. Nabors moved for and was granted summary judgment on the invasion of privacy claim, on both the constitutional and common law tort theories. Prior to trial Paul voluntarily dismissed his defamation claim. The trial court, in a non-jury trial, held for Nabors on Paul's wrongful dismissal and breach of contract claims.

Paul appeals the trial court's rulings with regard to his wrongful dismissal, breach of contract, and invasion of privacy claims.

B. Clarence's Case.

1. Factual Background.

Clarence has had seasonal employment with Nabors, working on drilling rigs, since the winter of 1977-78. Prior to beginning his first period of employment, he completed an employment application which provided for a probationary period.

In November 1982 Clarence became subject to

the Nabors drug use and testing policy. In mid-November a list of persons scheduled for drug screenign was posted at Clarence's rig. His name was on the list. The people listed were required to complete the test during their next "R & R" period. (FN1) During that next "R & R" period Clarence decided he would not submit to the testing and informed Nabors of his decision.

Nabors offered to allow Clarence time to "clean up" but Clarence refused, insisting that he thought he could pass the test, but was refusing as "a matter of principle." At that point Nabors fired Clarence. The drug test that would have been performed on Clarence was the same as that performed on Paul.

2. Procedural Background.

Following his discharge Clarence also sought unemployment compensation benefits with the DOL. Nabors objected because it believed his refusal to submit to the drug test was misconduct under AS 23.20.379(a). After a factual hearing and two appeals, the Commissioner of Labor found that "Nabors has not shown that there is any connection between off-the-job drug use and on-the-job performance." Thus, there was no showing that Nabors' test policy was related to job misconduct. Furthermore, the Commissioner adopted factual findings that 1) no evidence had been submitted by Nabors linking off-duty *1127 drug use with on-the-job accidents, and 2) Nabors was not alleging any drug use by Clarence.

Clarence filed his complaint in this case in November 1984. He alleged invasion of privacy, both at common law and under the Alaska Constitution, wrongful termination, breach of contract, and violation of the implied covenant of good faith and fair dealing. The trial court granted summary judgment in favor of Nabors on all of Clarence's claims. No opinion, findings of fact or conclusions of law were entered.

Clarence appeals the award of summary judgment on all counts.

II. DISCUSSION

A. The Right to Privacy.

The right to privacy is a recent creation of American law. The inception of this right is generally credited to a law review article published in 1890 by

Louis Brandeis and his law partner, Samuel Warren. Brandeis & Warren, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890). Brandeis and Warren observed that in a modern world with increasing population density and advancing technology, the number and types of matters theretofore easily concealed from public purview were rapidly decreasing. They wrote:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops."

Id. at 195 (footnotes omitted). Discussing the few precedential cases in tort law in which courts had afforded remedies for the publication of private letters or unauthorized photographs, Brandeis and Warren drew a common thread they called "privacy." They defined this right as the principle of "inviolable personality." *Id.* at 205.

While the legal grounds of this right were somewhat tenuous in the 1890's, American jurists found the logic of Brandeis and Warren's arguments compelling. The reporters of the first Restatement of Torts included a tort entitled "Interference with Privacy." (FN2) By 1960, Professor Prosser could write that "the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts." Prosser, *Privacy*, 48 Calif.L.Rev. 383, 386 (1960). He cited cases in which private parties had been held liable in tort for eavesdropping on private conversations by means of wiretapping and microphones, or for peering into the windows of homes. *Id.* at 390. In addition, while Brandeis and Warren were mainly concerned with the publication of private facts, Professor Prosser identified four different manifestations of the right to privacy: intrusion upon the plaintiff's seclusion; public disclosure of embarrassing private facts; publicity which places the plaintiff in a false light; and appropriation, for the defendant's pecuniary advantage, of the plaintiff's name or likeness. *Id.* at 389. Professor Prosser's categories form the framework of the expanded tort of invasion of privacy found in the Restatement (Second) of Torts. (FN3)

Eventually the right to privacy attained sufficient recognition to be incorporated in several state constitutions. See Alaska Const. art. I, § 22 (adopted 1972); Cal. Const. art. I, § 1 (adopted 1972); Haw. Const. art. 1, § 6 (adopted 1978); Mont. Const. art. II, § 10 (adopted 1972).

Interpreting the Constitution of the United States, the United States Supreme Court in 1965 held that a Connecticut statute banning the use of birth control devices by married couples was "repulsive to the notions of privacy surrounding the marriage relationship." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510, 516 (1965). The Supreme Court wrote that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." 381 U.S. at 484, 85 S.Ct. at 1681, 14 L.Ed.2d at 514 (citations omitted). Justice Goldberg's concurrence suggested that the right of marital privacy was fundamental to the concept of liberty. See 381 U.S. at 486, 85 S.Ct. at 1682, 14 L.Ed.2d at 516 (Goldberg, J., concurring). Since *Griswold* the Supreme Court has found the federal constitutional right of privacy to apply to a number of other situations. See *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52, 60 (1974) (maternity leave regulations struck down for "penaliz[ing] the pregnant teacher for deciding to bear a child."); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of privacy broad enough to encompass a woman's decision whether or not to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (regulation which made contraceptives less available to unmarried than married couples invalidated). But see *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (due process clause of Fourteenth Amendment does not confer any fundamental right on homosexuals to engage in acts of consensual sodomy).

Thus, the concept of privacy has become pervasive in modern legal thought. But a clear definition of this right, so fundamental to ordered liberty, has eluded both courts and legal scholars. It is the fundamental nature of the concept that leads to such great difficulty in application. One commentator has written:

Can ... the protection of privacy provide a base from which to reason, a clue for policy?

The doubt in this regard comes not from the concept's meagerness but from its amplitude, for it has a protean capacity to be all things to all lawyers, and, as often defined and defended, it lacks readily apparent limitations of its own.... [I]f privacy is indeed the most comprehensive of rights, is it not then too vast and weighty a thing to invoke in specific legal settings for specific and narrowly defined purposes?

A legal concept will do us little good if it expands like a gas to fill up the available space. Take the example of justice: One cannot draw the line where it stops, or starts, in law courts, and with good reason, since such comprehensive and philosophical concepts ought to be everywhere felt but nowhere fixed in our imperfect legal institutions. A properly legal concept must be a principle that translates into a rule; and the rule, in turn, must translate into a set of applications. But no such translations are feasible unless we impose some definite conceptual limits.

Gerety, *Redefining Privacy*, 12 Harv.C.R.-C.L.L.Rev. 233, 234 (1977) (footnotes omitted). But Gerety's definition of privacy, "an autonomy or control over the intimacies of personal identity," *id.* at 236, expansive as it seems, is criticized by Professor Tribe for "slight[ing] those equally central outward-looking aspects of self that are expressed less through demanding secrecy, sanctuary or seclusion than through seeking to project one identity rather than another upon the public world." L. Tribe, *American Constitutional Law* § 15-1, at 1303 (2d ed. 1988).

In this case the plaintiffs seek to fit their cases within at least one of four legal frameworks in which the right to privacy has found expression: constitutional law, contract law, tort law, and the emerging mixture of theories known as the public policy exception to the at-will doctrine of employment law.

***1129 B. The Right to Privacy Under the Alaska Constitution.**

The Alaska Constitution was amended in 1972 to add the following section:

Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Alaska Const. art. I, § 22. We observe initially

that this provision, powerful as a constitutional statement of citizens' rights, contains no guidelines for its application. Nor does it appear that the legislature has exercised its power to apply the provision; the parties did not bring to our attention any statutes which "implement this section."

The Luedtkes argue that this court has never clearly answered the question of whether article I, section 22 applies only to state action or whether it also governs private action. The Luedtkes urge this court to hold that section 22 governs private action. This question was broached in *Allred v. State*, 554 P.2d 411 (Alaska 1976). In *Allred* this court was faced with the question of whether a psychotherapist-patient privilege exists in Alaska. We found the privilege in the common law rather than under the constitutional right to privacy:

Since it is apparent that [the psychotherapist] was not a police agent, we do not perceive any state action that would trigger the constitutional privacy guarantees....

Allred, 554 P.2d at 416.

Our dictum in *Allred* comports with traditional constitutional analysis holding that the constitution serves as a check on the power of government: "That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism." L. Tribe, *American Constitutional Law*, § 1-2, at 2 (2d ed. 1988). In the same vein, we have written in regard to Alaska's constitutional right to privacy: "[T]he primary purpose of these constitutional provisions is the protection of 'personal privacy and dignity against unwarranted intrusions by the State.'" *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P.2d 138, 148 (1977) (quoting *Weltz v. State*, 431 P.2d 502, 506 (Alaska 1967) (referring to article I, section 14 guarantees against unreasonable searches and seizures). In *Ravin v. State*, 537 P.2d 494, 499 (Alaska 1975), we quoted the Supreme Court's statement that

fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

(quoting *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542, 549 (1969)).

In *United States Jaycees v. Richardet*, 666 P.2d 1008, 1013 (Alaska 1983), this court expressly held that article 1, sections 1 and 3 of the Alaska Constitution apply only to state action. (FN4) In that case plaintiff challenged the membership policies of the Jaycees that specifically excluded women from full membership. The court observed that article 1, section 1 guarantees equality "under the law," suggesting a limit only on legal power. But the court held that section 3, which contains an absolute ban on sexual discrimination without mention of state or private action, also required state action as a general principle. The court wrote: "[T]he American constitutional theory is that constitutions are a restraining force against the abuse of governmental power...." 666 P.2d at 1013 (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 394 (Alaska 1970)) (emphasis in original).

We are aware, however, of constitutional clauses which prohibit private action. The *1130 Thirteenth Amendment of the United States Constitution, prohibiting slavery, applies to private action. *See, e.g., Clyatt v. United States*, 197 U.S. 207, 216, 25 S.Ct. 429, 49 L.Ed. 726, 729 (1905). The privacy clause of the California Constitution has been construed to apply to private action. *See, e.g., Chico Feminist Women's Health Center v. Butte Glenn Medical Soc'y*, 557 F.Supp. 1190, 1202-03 (E.D.Cal.1983) (woman's choice regarding abortion protected against private interference under state constitutional right to privacy); *Kinsey v. Macur*, 107 Cal.App.3d 265, 165 Cal.Rptr. 608, 612 (1980) (letters regarding defendant's behavior, some of which contained personal facts, stated a cause of action for tortious invasions of constitutional right to privacy). However, the history surrounding the 1972 adoption of the privacy amendment by the voters of California evinces a clear intent that the clause applies to private as well as governmental action. *See White v. Davis*, 13 Cal.3d 757, 120 Cal.Rptr. 94, 105-106, 533 P.2d 222, 233-34 (1975). The promoter's literature contains frequent references to intrusive activities of "government and business." *See id.*

[1] The parties in the case at bar have failed to produce evidence that Alaska's constitutional right to privacy was intended to operate as a bar to private action, here Nabors' drug testing program. Absent a history demonstrating that the amendment was intended to proscribe private action, or a proscription of private action in the language of the amendment itself, we decline to extend the constitutional right to

privacy to the actions of private parties.

C. Wrongful Termination.

[2] In *Mitford v. de LaSala*, 666 P.2d 1000, 1007 (Alaska 1983), this court held that at-will employment contracts in Alaska contain an implied covenant of good faith and fair dealing. In *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788 (Alaska 1986), we acknowledged that violation of a public policy could constitute a breach of that implied covenant. We wrote:

The [plaintiff's] claim, concerning alleged termination in violation of public policy, is in accord with a theory of recovery accepted in many states. We have never rejected the public policy theory. Indeed, it seems that the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing which we accepted in *Mitford*.

Knight, 714 P.2d at 792 (citations omitted). We conclude that there is a public policy supporting the protection of employee privacy. Violation of that policy by an employer may rise to the level of a breach of the implied covenant of good faith and fair dealing. However, the competing public concern for employee safety present in the case at bar leads us to hold that Nabors' actions did not breach the implied covenant.

1. The Luedtkes Were At-Will Employees.

[3] [4] First, we address the Luedtkes' arguments that they were not at-will employees, but rather that they could be fired only for good cause. (FN5) The key difference between these two types of employment is *1131 whether the employment contract is for a determinable length of time. Employees hired on an at-will basis can be fired for any reason that does not violate the implied covenant of good faith and fair dealing. (FN6) However, employees hired for a specific term may not be discharged before the expiration of the term except for good cause. Neither of the Luedtkes had any formal agreements for a specified term, so any such term, if it existed, must be implied.

In *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958 (Alaska 1983), we held that where an employer promised employment that would last until the employee's retirement age, and that age was readily determinable, a contract for a

definite duration would be implied. We also held that no additional consideration need be given the employee to create a contract for a definite term.

The Luedtkes' cases are distinguishable from that of the plaintiff in *Eales*. The Luedtkes received benefits, such as medical insurance and participation in a pension or profit sharing plan, which continued as long as they were employed. (FN7) However, Nabors never gave an indication of a definite duration for their employment, nor a definite endpoint to their employment. Instead, Nabors merely provided benefits consistent with modern employer/employee relations.

2. There Is a Public Policy Supporting Employee Privacy.

The next question we address is whether a public policy exists protecting an employee's right to withhold certain "private" information *1132 from his employer. We believe such a policy does exist, and is evidenced in the common law, statutes and constitution of this state. In determining the existence of this policy, the Illinois Supreme Court's decision in *Palmateer v. International Harvester*, 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981), is relevant. *Palmateer* involved the discharge of an employee for informing local law-enforcement authorities about the potentially illegal activities of a co-worker. The court held that this discharge violated the public policy supporting citizen involvement in crime prevention. In identifying this public policy, the *Palmateer* court did not rely on a specific statutory prohibition. Rather, it looked to citizen rights, duties and responsibilities. The court wrote:

There is no precise definition of the term [public policy]. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be

No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but

public policy nevertheless favors citizen crime-fighters.

421 N.E.2d at 878-79, 880 (citations omitted). Thus, we look to the entire body of law in the State of Alaska for evidence of citizen rights, duties and responsibilities, to determine the public policy with regard to employee privacy. See also *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899 (3d Cir.1983) (court derived from United States and Pennsylvania constitutions' free speech guarantees a public policy which prohibited employer from firing employee who refused to participate in employer lobbying effort).

Alaska law clearly evidences strong support for the public interest in employee privacy. First, state statutes support the policy that there are private sectors of employee's lives not subject to direct scrutiny by their employers. For example, employers may not require employees to take polygraph tests as a condition of employment. AS 23.10.037. In addition, AS 18.80.200(a) provides:

It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy, or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety and general welfare of the state and its inhabitants.

This policy is implemented by AS 18.80.220, which makes it unlawful for employers to inquire into such topics in connection with prospective employment. This statute demonstrates that in Alaska certain subjects are placed outside the consideration of employers in their relations with employees. The protections of AS 18.80.220 are extensive. This statute has been construed to be broader than federal anti-discrimination law. See *Simpson v. Alaska State Comm'n for Human Rights*, 423 F.Supp. 552, 556 (D.Alaska 1976), *aff'd*, 608 F.2d 1171 (9th Cir.1980); *Hotel Employees Local 879 v. Thomas*, 551 P.2d 942, 946, 947 (Alaska 1976); *Loomis Electric Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976). We believe it evidences the legislature's intent to liberally protect employee rights.

Second, as previously noted, Alaska's constitution contains a right to privacy clause. While we have

held, *supra*, that this clause does not proscribe the private action at issue, it can be viewed by this court as evidence of a public policy supporting *1133 privacy. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d at 900 (finding evidence of public policy in free speech clauses of Pennsylvania and United States Constitutions). The *Palmateer* court wrote that "a matter must strike at the heart of a citizen's social rights, duties, and responsibilities" to be termed a public policy. *Palmateer*, 421 N.E.2d at 878-79. Certainly the fact that the citizenry has incorporated the right to privacy into the Alaska Constitution strongly supports the contention that this right "strike[s] at the heart of a citizen's social rights."

Third, there exists a common law right to privacy. The Restatement (Second) of Torts § 652B provides:

Intrusion upon Seclusion One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

While we have not expressly considered the application of this tort in Alaska, we have recognized its existence. See *Siggelkow v. State*, 731 P.2d 57, 62 (Alaska 1987); *State v. Glass*, 583 P.2d 872, 880-81 (Alaska 1978).

Thus, the citizens' right to be protected against unwarranted intrusions into their private lives has been recognized in the law of Alaska. The constitution protects against governmental intrusion, statutes protect against employer intrusion, and the common law protects against intrusions by other private persons. As a result, there is sufficient evidence to support the conclusion that there exists a public policy protecting spheres of employee conduct into which employers may not intrude. The question then becomes whether employer monitoring of employee drug use outside the work place is such a prohibited intrusion.

3. The Public Policy Supporting Employee Privacy Must Be Balanced Against the Public Policy Supporting Health and Safety.

Since the recent advent of inexpensive urine tests for illicit drugs, most litigation regarding the use of these tests in the employment context has concerned government employees. The testing has been

challenged under the proscriptions of federal fourth amendment search and seizure law. This body of law regulates only governmental activity, and as a result is of limited value to the case at bar, which involves private activity. (FN8) However, the reasoning of the federal courts regarding the intrusiveness of urine testing can illuminate this court's consideration of the extent to which personal privacy is violated by these tests. (FN9)

*1134 In *Capua v. City of Plainfield*, 643 F.Supp. 1507 (D.N.J.1986), city firefighters sued to enjoin random urinalysis tests conducted by the fire department. The court wrote:

Urine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public. The proposed test, in order to ensure its reliability, requires the presence of another when the specimen is created and frequently reveals information about one's health unrelated to the use of drugs. If the tests are positive, it may affect one's employment status and even result in criminal prosecution.

We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" Society come to life.

Id. at 1511. While there is a certain amount of hyperbole in this statement, it does portray the *potential* invasion that the technology of urinalysis makes possible. It is against this potential that the law must guard. Not all courts view urine testing with such skepticism, believing the intrusion justified in contemporary society.

Judge Patrick Higginbotham assumed a more cynical stance in *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057 (5th Cir.1987) (denying stay pending appeal), *opinion on appeal*, 816 F.2d 170 *cert. granted*, 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988), observing that there is little difference between the intrusiveness of urine testing and the intrusiveness of other affronts to privacy regularly accepted by individuals today. He wrote:

The precise privacy interest asserted is elusive, and the plaintiffs are, at best, inexact as to just what that privacy interest is. Finding an objectively reasonable expectation of privacy in urine, a waste product, contains inherent contradictions. The district court found such a right of privacy, but, in fairness, plaintiffs do not rest there. Rather, it appears from the plaintiffs' brief that it is the manner of taking the samples that is said to invade privacy, because outer garments in which a false sample might be hidden must be removed and a person of the same sex remains outside a stall while the applicant urinates. Yet, apart from the partial disrobing (apparently not independently challenged) persons using public toilet facilities experience a similar lack of privacy. The right must then be a perceived indignity in the whole process, a perceived affront to personal identity by the presence in the same room of another while engaging in a private body function.

It is suggested that the testing program rests on a generalized lack of trust and not on a developed suspicion of an individual applicant. Necessarily there is a plain implication that an applicant is part of a group that, given the demands *1135 of the job, cannot be trusted to be truthful about drug use. The difficulty is that just such distrust, or equally accurate, care, is behind every background check and every security check; indeed the information gained in tests of urine is not different from that disclosed in medical records, for which consent to examine is a routine part of applications for many sensitive government posts. In short, given the practice of testing and background checks required for so many government jobs, whether any expectations of privacy by these job applicants were objectively reasonable is dubious at best. Certainly, to ride with the cops one ought to expect inquiry, and by the surest means, into whether he is a robber.

Id. at 1061 (Higginbotham, J., concurring). As Judge Higginbotham observes, society often tolerates intrusions into an individual's privacy under circumstances similar to those present in urinalysis. We find this persuasive. It appears, then, that it is the reason the urinalysis is conducted, and not the conduct of the test, that deserves analysis.

This court discussed, on the one hand, the reasons society protects privacy, and, on the other hand, the

reasons society rightfully intrudes on personal privacy in *Ravin v. State*, 537 P.2d 494 (Alaska 1975). *Ravin* addressed the issue of whether the state could prohibit the use of marijuana in the home. We held that it could not. We observed that "the right to privacy amendment to the Alaska Constitution cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right." *Id.* at 502. Rather, we "recognized the distinctive nature of the home as a place where the individual's privacy receives special protection." *Id.* at 503. However, we recognized also that this "fundamental right" was limited to activity which remained in the home. We acknowledged that when an individual leaves his home and interacts with others, competing rights of others collectively and as individuals may take precedence:

Privacy in the home is a fundamental right, under both the federal and Alaska constitutions. We do not mean by this that a person may do anything at anytime as long as the activity takes place within a person's home. There are two important limitations on this facet of the right to privacy. First, we agree with the Supreme Court of the United States, which has strictly limited the *Stanley* guarantee to possession for purely private, noncommercial use in the home. And secondly, we think this right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

Id. at 504.

The *Ravin* analysis is analogous to the analysis that should be followed in cases construing the public policy exception to the at-will employment doctrine. That is, there is a sphere of activity in every person's life that is closed to scrutiny by others. (FN10) The boundaries of that sphere are *1136 determined by balancing a person's right to privacy against other public policies, such as "the health, safety, rights and privileges of others." *Ravin*, 537 P.2d at 504.

The Luedtkes claim that whether or not they use marijuana is information within that protected sphere into which their employer, Nabors, may not intrude. (FN11) We disagree. As we have previously observed, marijuana can impair a person's ability to function normally:

The short-term physiological effects are relatively undisputed. An immediate slight increase in the pulse, decrease in salivation, and a slight reddening of the eyes are usually noted. There is also impairment of psychomotor control.

Ravin, 537 P.2d at 506.

We also observe that work on an oil rig can be very dangerous. We have determined numerous cases involving serious injury or death resulting from accidents on oil drilling rigs. (FN12) In addition, in Paul's case the trial court expressly considered the dangers of work on oil rigs. It found:

13. It is extremely important that the driller be drug free in the performance of his tasks in order to insure the immediate safety of the other personnel on the particular drill rig.

14. It is extremely important that the driller be drug free in the performance of his tasks in order to insure the safety and protection of the oil field itself and the oil resource contained within it.

[5] Where the public policy supporting the Luedtkes privacy in off-duty activities conflicts with the public policy supporting the protection of the health and safety of other workers, and even the Luedtkes themselves, the health and safety concerns are paramount. As a result, Nabors is justified in determining whether the Luedtkes are possibly impaired on the job by drug usage off the job.

We observe, however, that the employer's prerogative does have limitations.

First, the drug test must be conducted at a time reasonably contemporaneous with the employee's work time. The employer's interest is in monitoring drug use that may directly affect employee performance. The employer's interest is not in the broader police function of discovering and controlling the use of illicit drugs in general society. In the context of this case, Nabors could have tested the Luedtkes immediately prior to their departure for the North Slope, or immediately upon their return *1137

from the North Slope when the test could be reasonably certain of detecting drugs consumed there. Further, given Nabors' need to control the oil rig community, Nabors could have tested the Luedtkes at any time they were on the North Slope.

Second, an employee must receive notice of the adoption of a drug testing program. By requiring a test, an employer introduces an additional term of employment. (FN13) An employee should have notice of the additional term so that he may contest it, refuse to accept it and quit, seek to negotiate its conditions, or prepare for the test so that he will not fail it and thereby suffer sanctions. (FN14)

[6] [7] These considerations do not apply with regard to the tests both Paul and Clarence refused to take. Paul was given notice of the future tests. He did not take the November 30 test. As a result, Nabors was justified in discharging Paul. Clarence had notice and the opportunity to schedule his test at a reasonable time. However, he refused to take any test. As a result, Nabors was justified in discharging Clarence. Neither discharge violated the implied covenant of good faith and fair dealing.

The question whether Paul's *suspension* breached the covenant of good faith and fair dealing is for the trier of fact. *See ARCO Alaska v. Akers*, 753 P.2d 1150, 1155 (Alaska 1988). On remand, the trial court should determine whether the covenant has been breached, taking additional evidence if necessary.

D. Common Law Right to Privacy Claims.

We recognize that "[t]he [common law] right to be free from harassment and constant intrusion into one's daily affairs is enjoyed by all persons." *Siggelkow v. State*, 731 P.2d at 57 (Alaska 1987). As previously discussed, that law is delineated in the Restatement (Second) of Torts § 652B, entitled *Intrusion upon Seclusion*. (FN15) That section provides: "One who intentionally intrudes ... upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability ... if the intrusion would be highly offensive to a reasonable person."

[8] [9] It is true, as the Luedtkes contend, that publication of the facts obtained is not necessary. Instead, the liability is for the offensive intrusion. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 247-48 (9th Cir.1971). However, courts have construed "offensive intrusion" to require either an

unreasonable manner of intrusion, or intrusion for an unwarranted purpose. *See Sistok v. Northwestern Tel. Sys., Inc.*, 189 Mont. 82, 615 P.2d 176, 182 (1980) (surreptitious recording of telephone conversations may be unreasonable); *Froelich v. Werbin*, 219 Kan. 461, 548 P.2d 482, 485 (1976) (hair sample taken from hospital trash not invasion of privacy); *Senogles v. Security Benefit Life Ins. Co.*, 217 Kan. 438, 536 P.2d 1358, 1362-63 (1975) (transmission of plaintiff's medical records to life insurance company justified); *McLain v. Boise Cascade Corp.*, 271 Or. 549, 533 P.2d 343, 345-46 (1975) (surveillance of workers' compensation claimant by filming his activities outside his home does not give rise to invasion of privacy claim). Paul has failed to show either that the manner or reason for testing his urine was unreasonable. During his physical, he voluntarily gave a urine sample for the purpose of testing. Therefore, he cannot complain that urine *1138 testing is "highly offensive." *Compare Dietemann*, 449 F.2d at 246 (plaintiff did not know he was being filmed) *with Sistok*, 615 P.2d at 178 (recording of conversation was unknown to plaintiff). Paul can only complain about the purpose of the urine test, that is, to detect drug usage. However, we have held, *supra*, that Nabors was entitled to test its employees for drug usage. As a result, the intrusion was not unwarranted. Paul complains additionally that he was not aware his urine would be tested for drug usage. In this regard we observe that Paul was not aware of any of the tests being performed on his urine sample. Nor did he know the ramifications of those tests. But he did know that whatever the results were they would be reported to Nabors. Therefore, his complaint about a particular test is without merit. We conclude that for these reasons Paul could not maintain an action for invasion of privacy with regard to the urinalysis conducted October 19.

As to the urinalyses Paul and Clarence refused to take, we hold that no cause of action for invasion of privacy arises where the intrusion is prevented from taking place. *See Gretencord v. Ford Motor Co.*, 538 F.Supp. 331, 333 (D.Kan.1982) (no intrusion took place where employee refused to allow security guards to search vehicle.)

E. Attorney's Fees.

[10] The Luedtkes' final arguments are that the trial court erred in awarding attorney's fees to Nabors in both cases. Clarence's brief contains a statement of this issue but no argument. It is therefore waived. *Wetzler v. Wetzler*, 570 P.2d 741, 742 n. 2 (Alaska

1977). Paul argues that the fees were excessive given the short, non-jury trial and the public nature of the questions presented.

Civil Rule 82 grants the trial court discretion in its attorney's fees award. Alaska R.Civ.P. 82. As we have previously noted, we will not reverse a fee award unless the trial court has abused its discretion to the extent that the award, is "manifestly unreasonable." *Steenmeyer Corp. v. Mortenson-Neal*, 731 P.2d 1221, 1226 (Alaska 1987) (quoting *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973)). We do not find manifest unreasonableness in the award of \$25,000 against Paul for a four-day trial based on uncertain legal theories. Nor do we find the public interest nature of the lawsuit to overcome Paul's private interest in regaining his employment. *See Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 553 (Alaska 1983).

In addition, Paul complains on appeal that the attorney's fees affidavit was not supported by an itemized statement of services rendered. Trial courts should base their awards on itemized statements. *See Moses v. McGarvey*, 614 P.2d 1363, 1374 n. 32 (Alaska 1980). However, we will not overturn a fee award for this reason when, as in Paul's case, no itemized statement was requested by the complaining party in its motion for reconsideration of the fee award.

IV. CONCLUSION

For the reasons expressed above, the decision of the trial court in the case of *Paul M. Luedtke v. Nabors Alaska Drilling, Inc.* is AFFIRMED in part and REVERSED in part. The case is REMANDED to the trial court to determine whether Nabors breached the implied covenant of good faith and fair dealing in regard to Paul's suspension. The attorney's fee award must also be reconsidered by the trial court, consistent with this disposition.

For the reasons expressed above, the decision of the trial court in the case of *Clarence G. Luedtke v. Nabors Alaska Drilling, Inc.* is AFFIRMED.

MATTHEWS, C.J., concurs.

MATTHEWS, Chief Justice, concurring.

I agree with the majority's conclusion that Nabors was justified in discharging both appellants. Further I agree that on remand the trial court should determine

whether Nabors breached the covenant of good faith and fair dealing by suspending Paul Luedtke because he tested positive for *1139. using marijuana during a twenty-eight day leave period, without first notifying him that it was against company policy for employees to use marijuana at any time.

The critical element in Paul Luedtke's suspension claim is the alleged failure of Nabors to notify its employees that they were expected to refrain from using marijuana during their weeks on leave. It seems to me that a jury might find, if there was such a failure, that it amounted to conduct which was so unfair as to be a violation of the covenant of good faith and fair dealing. I do not, however, share the view that an employer may not impose as a condition of employment a requirement that its employees refrain from all use of marijuana at all times. (FN1)

In the private sector, the establishment of employment criteria has traditionally been left to employers, except as to such relatively narrow but important categories as race, religion, gender, and age. AS 18.80.220. So, if an employer wants to impose a condition of continued employment that none of its employees use marijuana at any time, I can see no legal impediment, apart from the possibility that advance notice of the condition may be required.

It may be that the covenant of good faith and fair dealing also requires that any employment criterion have some relationship to a legitimate employer concern. If a relationship is required, it would be easily met in the case of an employer whose policy it is to hire no one who used marijuana or other consciousness altering substances. Safety is a prime concern, as today's majority opinion makes clear. Those who use marijuana off duty are more likely to use or be influenced by marijuana on duty than those who do not use it at all. Moreover, considerations of lost productivity, absenteeism, and medical insurance rates may justify a total abstinence employment criterion. Drug use, including alcohol, has been estimated to cost employers between \$60 billion and \$100 billion per year. (FN2) Thus I believe that a private employer could, with proper notice, impose as a condition of employment a requirement that its employees not use marijuana at any time.

FN1. Clarence worked the same schedule as Paul-- two weeks on the rig, one week off.

FN2. See Restatement of Torts § 867 (1939):

A person who unreasonably and seriously

interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.

FN3. See Restatement (Second) of Torts §§ 652A-I (1977).

FN4. Alaska Const. art. 1, § 1 provides:

Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Const. art. 1, § 3 provides:

Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section.

FN5. In this regard, Clarence argues that the decision by the Commissioner of Labor that he was not fired for misconduct should act collaterally to estop Nabors from claiming Clarence was fired for just cause. We disagree.

Both this court and the Supreme Court have discussed standards for using administrative adjudications as collateral estoppel. In *DeNardo v. State*, 740 P.2d 453, 456 (Alaska 1987), *cert. denied*, 484 U.S. 919, 108 S.Ct. 277, 98 L.Ed.2d 239 (1987), we wrote: "it is settled that res judicata precludes relitigation by the same parties, not only of claims raised in the first proceeding, but also of those relevant claims that could have been raised."

In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642, 661 (1966), the Supreme Court wrote:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

This case fails the tests enunciated by both courts because the issue of Clarence's misconduct is different than the issue of whether Nabors' discharge of Clarence was wrongful. The adjudication before the commissioner did not involve the same issues, nor is the commissioner empowered to determine the culpability of Nabors' conduct. AS 23.20.340.

*1139_ FN6. For a general discussion of the at-will employment doctrine in Alaska see Crook, *Employment at Will: The "American Rule" and Its Application in Alaska*, 2 Alaska L.Rev. 23 (1985).

FN7. Clarence testified:

Q Okay. Did anyone make any promise of job security to you?

A Well, there were little things like, you know, the pension plans, references on a--you know, on a loan for a house or somethin' like that. There was--it was--it was understood and I was--I would infer that, I would get that from that, that, yes, you were a steady personnel (sic), you were permanent.

Q So, from the fact that you had a pension and the fact that they would be (sic) a reference on a house loan you understood that you would be permanently employed, is that right?

A Yes.

Q Were there any other reasons that would make you think you were permanently employed?

A Profit sharing plan, stock--you know, stock purchase program, things like that.

Q But no one ever made any statements to you that would lead you to think you were permanently employed, no one ever had any conversations is what I'm getting at.

A I don't recall right now, I can't say yes or no on that, I'd have to think about that.

Q But right now you can't--nothing comes to mind as to....

A No, I would--just like I'd say, anything would be like interpretations, you know, references,

things I've mentioned, promotions. I don't think an individual would get a promotion if they were plannin' on lettin' 'em go two weeks down the line or somethin' like weeks down the line or somethin' like that. If they took you from one position and promoted you to somethin' higher, I can't understand why they'd do that to somebody who was gonna be let go in a couple of weeks, kind of an implication that there would be employment there for you.

Paul testified:

A Working on the rig, perform a function, they tell you you're a good hand, you can--you got a home here: at night after work, around the dinner table, nothing formal, you know, but....

Q So you're not thinking of any one particular instance?

A No.

Q Was there any specific time period mentioned? I think you had said a sentence to the effect, you've got a home here. Was any time period mentioned?

A No.

Mr. Colver: Objection. Question has been asked and answered.

Q No, no time period?

A (Witness nods negatively)

These "statements" are ambiguous and informal. No specific duration of employment was mentioned.

Clarence also pleads that because he had a probationary period when he started with Nabors, the end of the probationary period should imply the beginning of employment for a definite term. This implication has been rejected by other courts. See *Rupinsky v. Miller Brewing Co.*, 627 F.Supp. 1181, 1186-87 (W.D.Pa.1986); *Crumley v. Memorial Hospital, Inc.*, 509 F.Supp. 531, 536-37 (E.D.Tenn.1979), *aff'd*, 647 F.2d 164 (6th Cir.1981). We reject it for the purposes of the case at bar.

FN8. Recently a California superior court addressed

the question of drug testing of college athletes in *Hill v. National Collegiate Athletic Association*, (Cal.Super. August 10, 1988). As noted *supra*, California's right to privacy applies to both public and private action. *Hill* is clearly grounded on the broad application of California's right. See *Hill*, Slip Op. at 24. Therefore, *Hill*, like cases involving state action, is of limited value in analyzing the case at bar.

FN9. These cases generally analyze the drug testing requirements in the context of fourth amendment search and seizure law. The courts generally hold that the taking of urine is a seizure. As a result, many courts have held that individualized suspicion is necessary before urinalysis may be conducted. See *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 672 F.Supp. 779 (D.N.J.1987) (township police officers); *Taylor v. O'Grady*, 669 F.Supp. 1422 (N.D.Ill.1987) (county department of corrections employees); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F.Supp. 1560 (C.D.Cal.1987) (transit bus drivers and maintenance workers); *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D.Ohio 1987) (police academy cadets); *American Fed'n of Gov't Employees v. Weinberger*, 651 F.Supp. 726 (S.D.Ga.1986) (department of defense testing of civilian employees holding "critical" jobs); *Lovvorn v. City of Chattanooga*, 647 F.Supp. 875 (E.D.Tenn.1986) (city firefighters); *Capua v. City of Plainfield*, 643 F.Supp. 1507 (D.N.J.1986) (city firefighters).

However, some courts have held that individualized suspicion is not necessary. These courts generally hold that the employee's expectation of privacy is lessened because of the type of employment. In other words, because of the category of job held, the search is "reasonable." See *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir.1987) (school bus attendant); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.) cert. granted, 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988) (customs service employees who work in drug enforcement, carry firearms, or have access to classified information); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir.1987) (state department of corrections employees); *American Fed'n of Gov't Employees v. Dole*, 670 F.Supp. 445 (D.D.C.1987) (department of transportation

employees concerned with public health, safety, national security and law enforcement).

Some courts have addressed the question of urinalysis tests conducted after conduct has brought the specific employee to the attention of superiors. These courts generally uphold the use of the tests. See *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N.R.R. Co.*, 802 F.2d 1016 (8th Cir.1986) (railroad employees tested after incident which could have resulted from human error, or after extended furlough); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976) (bus drivers following serious accident); *Smith v. White*, 666 F.Supp. 1085 (E.D.Tenn.1987) (nuclear power plant employees who were observed using drugs outside work); *Everett v. Napper*, 632 F.Supp. 1481 (N.D.Ga.1986), *aff'd in pertinent part*, 833 F.2d 1507 (11th Cir.1987) (firefighter identified as *1139_ customer by narcotics dealer); *Allen v. City of Marietta*, 601 F.Supp. 482 (N.D.Ga.1985) (electrical company employees who had been observed smoking marijuana by informer).

*1139_ FN10. Courts in other jurisdictions have specifically found a public policy supporting the protection of employee privacy. In *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W.Va.1984), the West Virginia Supreme Court held that an employer's demand that employees take a polygraph test violated that state's publicly recognized interest in privacy and resulted in a cause of action for wrongful discharge. The court stated: "[T]he public policy against such testing is grounded upon the recognition in this State of an individual's interest in privacy." 325 S.E.2d at 117. *But see Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (App.1977) (discharge upheld where at-will employees refused to sign consent to submit to a psychological stress evaluation test).

In *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982), the Massachusetts Supreme Judicial Court considered whether employees could refuse to answer certain questions on an employment questionnaire. The court wrote:

[I]f the questionnaire sought to obtain information in circumstances that constituted an "unreasonable, substantial or serious interference

with [the employee's] privacy" in violation of the principles expressed in G.L.C. 214, § 1B, the discharge of an employee for failure to provide such information could contravene public policy and warrant the imposition of liability on the employer for the discharge. In short, if Bristol-Myers had no right to ask the questions that the plaintiffs declined to answer, Bristol-Myers could be liable for discharging the plaintiffs for their failure to answer those questions.

Id. 431 N.E.2d at 912 (footnote omitted). The court eventually held that the question asked, headed "AIMS," was not so intrusive as to result in a wrongful discharge. *Id.* at 913-14.

In *Slohoda v. United Parcel Service*, 193 N.J.Super. 586, 475 A.2d 618 (1984), a New Jersey court held that an employee discharged as a result of his marital status could maintain a cause of action against his employer for invasion of privacy in contravention of public policy.

FN11. Paul and Clarence also complain that the type of test used by Nabors, the "emit" test, is unreliable. We decline to address this issue for the following reasons: Paul does not contest the accuracy of the positive result in the test performed without his knowledge, and there is *no evidence* that the refusal by either Luedtke to submit to further testing was influenced by concern over the accuracy of Nabors' testing procedure.

FN12. *See, e.g., Mine Safety Appliances v. Stiles*, 756 P.2d 288 (Alaska 1988) (plaintiff suffered permanent, debilitating injury when metal cover fell on head); *Exxon Corp. v. Alvey*, 690 P.2d 733 (Alaska 1984) (plaintiff suffered substantial paralysis of legs and other injuries when he fell in hole at drilling site); *Parker Drilling Co. v. O'Neill*, 674 P.2d 770 (Alaska 1983) (employee killed when platform on which he was standing fell approximately twenty feet after platform was struck by "traveling block" weighing several tons); *Rig Tenders, Inc. v. Santa Fe Drilling Co.*, 536 P.2d 114 (Alaska 1975) (employee fell to his death when crane he was using to unload tender was pulled off drilling rig as a result of ice activity around the tender).

FN13. Note that where the employment agreement is at-will, continuing to work after a modification of

that agreement is sufficient consideration to support the modification. *See Yartzoff v. Democrat-Herald Pub. Co.*, 281 Or. 651, 576 P.2d 356, 359 (1978); 1A A. Corbin, *Corbin on Contracts* § 175, at 122 (1963). Thus there is no support for the argument that the Luedtkes' employment contracts could not be modified to provide for drug testing. The question before the court is whether those modifications are reasonable.

FN14. *See Note, Drug Testing of Public and Private Employees in Alaska*, 5 Alaska L.Rev. 133, 138-39 (1988) (author suggests Alaska decisions point to need for notice of possible grounds for termination).

FN15. There are four branches of the common law right to privacy. *See supra*. However, only the Intrusion upon Seclusion branch is contended by the Luedtkes to have been violated in this case.

*1139_ FN1. The following language in the majority's opinion implies that an employer may not impose a total abstinence requirement:

As a result, Nabors is justified in determining whether the Luedtkes are possibly impaired on the job by drug usage off the job.

We observe, however, that the employer's prerogative does have limitations.

First, the drug test must be conducted at a time reasonably contemporaneous with the employees' work time. The employer's interest is in monitoring drug use that may directly affect employee performance. The employer's interest is not in the broader police function of discovering and controlling the use of illicit drugs in general society. In the context of this case, Nabors could have tested the Luedtkes immediately prior to their departure for the North Slope, or immediately upon their return from the North Slope when the test could be reasonably certain of detecting drugs consumed there.

FN2. *Note, Drug Testing of Public and Private Employees in Alaska*, 5 Alaska L.Rev. 133, 133 (1988). A recent survey puts the cost at more than \$100 billion per year. N.Y. Times, Dec. 12, 1988 (Business Section), at 1, col. 1.

*81 137 F.3d 81

**NATIONAL HELICOPTER CORP. OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,
v.
The CITY OF NEW YORK; The Council of the City of New York;
The City Planning Commission of the City of New York; The
New York City Economic Development Corporation,
Defendants-Appellants-Cross-Appellees.**

Dockets 97-7082, 97-7142.
United States Court of Appeals,
Second Circuit.
Argued Sept. 8, 1997.
Decided Feb. 17, 1998.

Helicopter company that served as fixed-base operator for city helicopter facility brought action against city and various city subdivisions, seeking injunctive relief against enforcement of city resolution approving issuance of special permit setting restrictions on facility's use. The United States District Court for the Southern District of New York, Sonia Sotomayor, J., 952 F.Supp. 1011, granted permanent injunction in part and denied it in part. Parties cross-appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) company had standing to challenge operating conditions imposed by resolution; company did not waive right to challenge conditions; (3) city acted in both proprietary and police capacity in imposing conditions; (4) city could impose curfews on facility operations pursuant to proprietor exception to federal preemption of aviation regulation; (5) application of proprietor exception was justified with regard to requirement that facility phase out weekend operations; (6) district court abused its discretion by enjoining condition requiring 47% overall reduction in facility operations; and (7) city could not impose condition restricting certain sightseeing routes.

Affirmed in part, reversed in part, and remanded.

Jon O. Newman, Circuit Judge, concurred in part and dissented in part and filed a separate opinion.

1. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

C.A.2 (N.Y.) 1998.

Company that served as fixed-base operator for city helicopter facility had standing to challenge operating conditions imposed by city resolution approving issuance of facility's special permit and request for proposals seeking new fixed-base operator; conditions would seriously impact company's business, both as operator, if again selected, and as potential future user of facility.

2. [COMPROMISE AND SETTLEMENT k12](#)

89 ----

89I In General
89k10 Construction of Agreement
89k12 Matters included.

C.A.2 (N.Y.) 1998.

Company serving as fixed-base operator for city helicopter facility did not waive its right to challenge conditions imposed on facility operations by city resolution approving issuance of facility's special permit when company executed settlement stipulation in which it waived its claims regarding city agency's acts or omissions in connection with "any conditions relating to the special permit required under the City's Zoning Resolution"; waiver did not evidence intent by company to release city for claims regarding conditions that could be imposed upon special permit not yet granted, but rather concerned only claims regarding special permit requirement and manner in which agency pursued it.

3. [RELEASE k1](#)

331 ----
331I Requisites and Validity
331k1 Nature and requisites in general.

C.A.2 (N.Y.) 1998.

Release freely entered into that clearly waives right to pursue cause of action is binding.

4. RELEASE k30
331 ----
331II Construction and Operation
331k30 Scope and extent in general.

C.A.2 (N.Y.) 1998.

Release should not be read to include matters of which parties had no intention to dispose.

5. [AVIATION k224](#)

48B ----
48BV Airports and Services
48Bk224 Regulation and use in general.

[See headnote text below]

5. [MUNICIPAL CORPORATIONS k53](#)

268 ----
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 In general.

C.A.2 (N.Y.) 1998.

City acted in both proprietary and police capacity when it imposed operating conditions on special permit issued to city helicopter facility, and therefore proprietor exception to federal preemption of aircraft and airspace regulation applied to review of challenge to those conditions asserted by facility's fixed-based operator; permit process involved participation of number of different city agencies, some acting as owner and some as protectors of public. 49 U.S.C.A. § 41713(b)(1, 3).

6. [STATES k18.5](#)

360 ----
360I Political Status and Relations

360I(B) Federal Supremacy; Preemption
360k18.5 Conflicting or conforming laws or regulations.

C.A.2 (N.Y.) 1998.

Supremacy Clause of United States Constitution invalidates state and local laws that interfere with or are contrary to laws of Congress. U.S.C.A. Const. Art. 6, cl. 2.

7. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

C.A.2 (N.Y.) 1998.

As proprietor, city had power to promulgate reasonable, nonarbitrary and nondiscriminatory regulations governing helicopter facility. 49 U.S.C.A. § 41713(b)(3).

8. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

[See headnote text below]

8. [MUNICIPAL CORPORATIONS k53](#)

268 ----

268II Governmental Powers and Functions in General

268k52 Political Status and Relations

268k53 In general.

C.A.2 (N.Y.) 1998.

Regulations promulgated by city as proprietor of helicopter facility, pursuant to proprietor exception to federal preemption of aviation regulation, had to avoid even appearance of irrational or arbitrary action. 49 U.S.C.A. § 41713(b)(3).

9. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

[See headnote text below]

9. [MUNICIPAL CORPORATIONS k53](#)

268 ----

268II Governmental Powers and Functions in General

268k52 Political Status and Relations

268k53 In general.

C.A.2 (N.Y.) 1998.

Pursuant to proprietor exception to federal preemption of aircraft and airspace regulation, city could regulate only narrowly defined subject matter with regard to its helicopter facility, including aircraft noise and other environmental concerns at local level. 49 U.S.C.A. § 41713(b)(3).

10. [FEDERAL COURTS k814.1](#)

170B ----

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk814 Injunction

170Bk814.1 In general.

C.A.2 (N.Y.) 1998.

Court of Appeals reviews orders granting or denying injunctive relief for abuse of discretion.

11. [AVIATION k228](#)

48B ----

48BV Airports and Services

48Bk228 Charges.

[See headnote text below]

11. [MUNICIPAL CORPORATIONS k53](#)

268 ----

268II Governmental Powers and Functions in General

268k52 Political Status and Relations

268k53 In general.

C.A.2 (N.Y.) 1998.

City could, pursuant to proprietor exception to federal preemption of aviation regulation, impose weekday and weekend curfews restricting operations at its helicopter facility so as to eliminate nighttime flights; protection of local residential community from undesirable heliport noise during sleeping hours was primarily matter of local concern. 49 U.S.C.A. § 41713(b)(3).

12. [AVIATION k224](#)

48B ----

48BV Airports and Services

***81** 48Bk224 Regulation and use in general.

[See headnote text below]

12. [MUNICIPAL CORPORATIONS k53](#)

268 ----

268II Governmental Powers and Functions in General

268k52 Political Status and Relations

268k53 In general.

C.A.2 (N.Y.) 1998.

Application of proprietor exception from federal preemption of aviation regulation was justified with regard to city resolution requiring city helicopter facility to phase out weekend operations, based on city's desire to protect area residents from significant noise intrusion during weekend; restriction was reasonable and not arbitrary, despite fact that city agency's proposal underlying environmental impact statement had contemplated shifting sightseeing operations from weekdays to weekends. 49 U.S.C.A. § 41713(b)(3).

13. [INJUNCTION k85\(1\)](#)

212 ----

212II Subjects of Protection and Relief

212II(E) Public Officers and Entities

212k85 Enforcement of Statutes, Ordinances, or Other Regulations

212k85(1) In general.

C.A.2 (N.Y.) 1998.

District court abused its discretion when it enjoined enforcement of condition imposed by city resolution requiring 47% overall reduction in operations at city helicopter facility; although percentage was based on scenario different from that upon which resolution was based, city could reduce operations upon finding that excessive noise problem existed, pursuant to its powers under proprietor exception to federal preemption of aviation regulation, and percentage set was reasonable, given finding that such reduction would substantially reduce noise at facility. 49 U.S.C.A. § 41713(b)(3).

14. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

C.A.2 (N.Y.) 1998.

Restrictions adopted pursuant to environmental impact statement (EIS) prepared in connection with special permit application for city helicopter facility were not unreasonable due to EIS' allegedly flawed nature; EIS was prepared by experienced environmental sciences company that was initially hired by party challenging restrictions, and empirical support for relevant conditions was reasonable and therefore sufficient for purposes of determining whether restrictions were permissible under proprietor exception to federal preemption of aviation regulation. 49 U.S.C.A. § 41713(b)(3).

15. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

[See headnote text below]

15. [MUNICIPAL CORPORATIONS k53](#)

268 ----

268II Governmental Powers and Functions in General

268k52 Political Status and Relations

268k53 In general.

C.A.2 (N.Y.) 1998.

City resolution's prohibition against use of city helicopter facility by certain type of helicopter and other helicopters of similar size was unreasoned discrimination based on size, and thus did not fall within proprietor exception to federal preemption of aviation regulation, notwithstanding city's claim that specified helicopter was noisiest aircraft using facility. 49 U.S.C.A. § 41713(b)(3).

16. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

[See headnote text below]

16. [STATES k18.17](#)

360 ----

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.17 Aviation; airports.

C.A.2 (N.Y.) 1998.

Although proprietor exception to federal preemption of regulation for aircraft and airspace allows reasonable regulations to protect against excessive noise, that power may not be used to discriminate. 49 U.S.C.A. § 41713(b)(3).

17. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

[See headnote text below]

17. [STATES k18.17](#)

360 ----

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.17 Aviation; airports.

C.A.2 (N.Y.) 1998.

Regulation imposed pursuant to proprietor exception to federal preemption of aircraft and airspace regulation, and purporting to reduce noise, cannot bar aircraft on any other basis. 49 U.S.C.A. § 41713(b)(3).

18. [AVIATION k224](#)

48B ----

48BV Airports and Services

48Bk224 Regulation and use in general.

[See headnote text below]

18. [MUNICIPAL CORPORATIONS k53](#)

268 ----

268II Governmental Powers and Functions in General

268k52 Political Status and Relations

268k53 In general.

C.A.2 (N.Y.) 1998.

City could not impose condition of use on city helicopter facility that restricted certain sightseeing routes, inasmuch as law controlling flight paths through navigable airspace was completely preempted by federal aviation law; proprietor exception to preemption did not apply. 49 U.S.C.A. §§ 40103(a)(1), 41713(b)(3).

19. [AVIATION k228](#)

48B ----
48BV Airports and Services
48Bk228 Charges.

[See headnote text below]

19. MUNICIPAL CORPORATIONS k53

268 ----
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 In general.

C.A.2 (N.Y.) 1998.

Proprietor exception to federal preemption, allowing municipality to promulgate reasonable regulations to fix noise levels at and around airport at acceptable amount, gives no authority to local officials to assign or restrict routes. 49 U.S.C.A. §§ 40103(a)(1), 41713(b)(3).

20. INJUNCTION k85(1)

212 ----
212II Subjects of Protection and Relief
212II(E) Public Officers and Entities
212k85 Enforcement of Statutes, Ordinances, or Other Regulations
212k85(1) In general.

C.A.2 (N.Y.) 1998.

Injunction properly barred enforcement of provision of city resolution requiring helicopters using city helicopter facility to be marked for identification from ground, given that condition existed solely to enforce different condition that impermissibly sought to restrict sightseeing flight routes and interfered with Federal Aviation Administration's duty to prescribe air traffic regulations for identifying aircraft. 49 U.S.C.A. § 40103(b)(2).

21. COMMERCE k82.45

83 ----
83II Application to Particular Subjects and Methods of Regulation
83II(K) Miscellaneous Subjects and Regulations
83k82.45 Aviation.

C.A.2 (N.Y.) 1998.

Any action that city properly conducted pursuant to its powers as proprietor of helicopter facility, pursuant to proprietor exception from federal aviation regulation approved by Congress, could not violate Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; 49 U.S.C.A. § 41713(b)(3).

***84** Ellen S. Ravitch, New York City (Jeffrey D. Friedlander, Acting Corporation Counsel of the City of New York, Stephen J. McGrath, Deborah Rand, New York City, of counsel), for Defendants-Appellants-Cross-Appellees.

Donald W. Stever, New York City (Janis M. Meyer, Clarke Bruno, Daniel Altman, Dewey Ballantine, New York City, of counsel), for Plaintiff-Appellee-Cross-Appellant.

Steven A. Mirmina, Washington, DC (Timothy M. Biddle, Lorraine B. Halloway, Crowell & Moring LLP, Washington, DC, of counsel), filed a brief for Amicus Curiae Helicopter Association International in support of Plaintiff-Appellee-Cross-Appellant.

Before: WINTER, Chief Judge, NEWMAN, and CARDAMONE, Circuit Judges.

Judge NEWMAN concurs in part and dissents in part in a separate opinion.

CARDAMONE, Circuit Judge:

This case concerns Manhattan's East 34th Street Heliport (Heliport or facility). In May 1996 New York City's Economic Development Corporation (Economic Development Corporation or Corporation), the agency responsible for administering the City's heliports, issued a Request for Proposals (Request) seeking a new fixed-base operator for the Heliport. The Request imposed certain restrictions on the use of the Heliport based on City law. Plaintiff National Helicopter Corporation of America (National Helicopter or National), which had been the Heliport's fixed-base operator for the past 20 years, filed an action in the United States District Court for the Southern District of New York, challenging the validity of those restrictions on the grounds that the regulation of airports is a field preempted by federal law. On January 7, 1997 Judge Sonia Sotomayor granted in part and denied in part National Helicopter's motion seeking permanent injunctive relief. The defendant City of New York, its Council, Planning Commission, and Economic Development Corporation, appeal from that judgment. National Helicopter cross-appeals.

BACKGROUND

Developers desiring to make use of City land must comply with New York City's Zoning Resolution, which "regulat[es] and restrict[s] the location of trades and industries and the location of buildings designed for specific uses within the City of New York, *85 and for such purposes divid[es] the City into districts." New York City Zoning Resolution § 11-01. Certain uses, "whose location or control requires special consideration," are permitted only if they have been granted a special permit by the City Planning Commission (Planning Commission). *Id.* § 74-01. The construction and operation of a heliport is one such use requiring a special permit. *Id.* § 74-66. An applicant seeking to obtain a special permit must work through layers of agencies, departments, commissions and corporations that comprise the City bureaucracy. Such work is no sport for the short-winded.

When the City planned to develop a heliport on land it owned along the East River and adjacent to the F.D.R. Drive and 34th Street, it (through the Department of Marine and Aviation) applied for and in 1971 obtained from the Planning Commission a special permit to operate the Heliport for a term of five years. The facility, one of four public heliports in Manhattan, opened in 1972. National became its fixed-base operator in 1973 when it entered into a lease with the Department of Marine and Aviation for an initial term of 10 years. (FN1) National subsequently renewed its lease and remained the fixed-base operator until August 1997 when it was legally evicted, although it remains entitled to use the Heliport for helicopter flights.

Prior Disputes Between the Parties

National's 20-plus-year relationship with the City has been far from harmonious. Each time a dispute has arisen, the parties have reached a settlement agreement committing National to perform certain

obligations in exchange for continued permission to remain the Heliport's operator. Several of these settlement agreements are relevant to the issues now on appeal. The first agreement was executed in 1985, following a 1982 action brought by the City for National's failure to pay rent. The 1985 agreement required National to apply to the Planning Commission for a new special permit to allow for the continued operation of the Heliport because the City's original permit to operate the facility had expired in 1976. The City, in return, allowed National to renew its lease retroactively, enabling it to continue as the Heliport's fixed-base operator for a second period of ten years, effective October 4, 1983. In a subsequent 1989 settlement stipulation, the City agreed to extend National Helicopter's fixed-base operator lease until October 1995 and, in exchange, National Helicopter agreed to an 11 p.m. to 7 a.m. curfew of its operations.

Pursuant to the 1985 settlement agreement and as part of the special permit application process, National was required to prepare an Environmental Impact Statement (EIS) to assess the Heliport's effect on its surrounding environment. National hired Young Environmental Services to do this work, but Young had failed to complete the project by 1993. Following another rent dispute, the Economic Development Corporation (successor to the Department of Marine and Aviation and its successor, the Department of Ports and Trade), as the current agency in charge of administering the City-owned heliports, assumed responsibility for completing the EIS. National agreed to reimburse the City for its costs.

Another rent dispute developed in 1993, causing the City to serve a notice of termination of National's fixed-base operator lease because National had not made the agreed-upon rental payments spelled out in a prior settlement. In response, National filed an action against the City in New York State Supreme Court seeking a stay of eviction. The parties resolved this dispute in a series of settlements commencing on January 10, 1994. The final such settlement, entered on February 13, 1996, provided that the City would allow National to continue its occupancy of the Heliport on a month-to-month basis until July 31, 1996 at which time the City could eject National pursuant to an executed Order of Ejectment. National Helicopter further agreed to waive any claims that were *86 or could have been raised in its state court action against the City.

The Special Permit Application

Meanwhile, on June 29, 1995 the Economic Development Corporation and the Department of Business Services, as co-applicants, filed with the Planning Commission an application for a special permit to allow for the continued operation of the Heliport. The agencies' application discussed their proposal to attain the City's goals of redistributing sightseeing flights away from the Heliport to other City heliports by restricting tourist operations to Saturday and Sunday flights only and limiting the number of flights to a maximum of four per hour during a 12-hour operating day. The agencies hoped that these restrictions would reduce total operations at the Heliport by 47 percent.

Under New York City law, before the Planning Commission may award a special permit, the affected community boards, the borough president, the New York City Council, and the public must review the significant land use decision. *See* New York City Charter § 197-c. Pursuant to this review procedure, the Planning Commission certified the agencies' application, including a draft EIS, as complete on August 7, 1995. The Planning Commission referred the application to Manhattan Community Board 6 and the Manhattan borough president for consideration. Both opposed the application unless various conditions--including a curfew and the prohibition of weekend sightseeing operations--were met. On November 29, 1995 the City Planning Commission conducted a public hearing to consider comments from the affected

community board, representatives of New York University's medical facilities located near the Heliport, and other community members.

The final EIS, issued on December 27, 1995, evaluated noise data measured at seven receptor sites surrounding the Heliport. It considered the impact of a 47 percent reduction in operations, as discussed in the application for the special permit, and concluded that the proposed reduction would decrease noise levels, both in magnitude and significant impact.

On January 9, 1996 the City Planning Commission recommended awarding the special permit to the Economic Development Corporation and the Department of Business Services for a period of ten years and subject to a variety of restrictions. On March 6, 1996 following a public hearing addressing the City Planning Commission's recommendations, the City Council enacted Resolution 1558, approving the issuance of the special permit, subject to the following conditions: (1) the restriction of weekday operations to between 8 a.m. and 8 p.m.; (2) the restriction of weekend operations to between 10 a.m. and 6 p.m.; (3) the phasing out of weekend operations entirely; (4) the reduction of operations by a minimum of 47 percent overall; (5) the barring of Sikorsky S-58Ts, or helicopters of a similar size, from use of the Heliport for sightseeing operations; (6) the prohibition of sightseeing flights over Second Avenue and the requirement that such flights heading north and south fly only over the East and Hudson Rivers; and (7) the requirement that helicopters using the Heliport be marked for identification from the ground. The Economic Development Corporation incorporated these conditions into its May 6, 1996 Request seeking a new fixed-base operator for the facility.

On May 15, 1996 National filed its first amended complaint in the district court seeking to enjoin the conditions imposed by the City Council's Resolution 1558. Although National originally moved for a preliminary injunction, the parties consented to stay the enforcement of Resolution 1558 and suspend the Request until the court rendered a final judgment on the merits.

The District Court's Decision

In an opinion entered January 7, 1997 Judge Sotomayor permanently enjoined the City from enforcing all but two of Resolution 1558's provisions. *National Helicopter Corp. v. City of New York*, 952 F.Supp. 1011 (S.D.N.Y.1997). She first determined that National had not waived its right to challenge conditions adopted in connection with the Council's special permit when it signed the February 1996 stipulation. *Id.* at 1021-22. Next, the district court, although generally *87 recognizing federal preemption over the regulation of aircraft and airspace, observed that municipalities that are proprietors of local airports--like the City with respect to this Heliport--may regulate an airport's noise levels in a "reasonable, nonarbitrary and non-discriminatory" manner. *Id.* at 1026 (quoting *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F.2d 75, 84 (2d Cir.1977) (Concorde I)). With that standard in mind, the district judge upheld the weekday and weekend curfews (conditions # 1 and # 2) as reasonable regulations of noise at the Heliport. Conversely, she determined that the other conditions exceeded the scope of the City's authority pursuant to the proprietor exception, and permanently enjoined their enforcement. *Id.* at 1026-32.

ANALYSIS

I Threshold Matters

A. *Standing*

[1] Before turning to the merits, we must first dispose of two threshold matters: standing and waiver. The City maintains that National does not have standing to challenge the conditions imposed in Resolution 1558 and the Request. It also maintains that even if appellant has standing to challenge the Resolution's conditions, it has waived its rights to challenge them.

We address the standing issue first. The basis for the City's standing argument is that because National does not have a valid expectation of becoming the Heliport's next fixed-base operator, it lacks sufficient interest in the controversy regarding the City regulation to challenge it. *See Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972) (explaining that standing addresses the question "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy"). National's interest, as the district court recognized, extends beyond its status as a fixed-base provider; it may operate as a user of the Heliport in the future. 952 F.Supp. at 1019-20. The conditions of the City's Resolution, if enforced, would seriously impact National's business, both as an operator and as a user.

We are unable to agree with the City's view of the Request to the extent it asserts that certain conditions, *i.e.*, the ban on the Sikorsky S-58T helicopter, the sightseeing route restriction, and the markings requirement, only apply to a fixed-base operator. The Request states that those conditions apply to "all sightseeing helicopter service providers based at the [Heliport]" and defines such providers as companies that have subcontracted with the fixed-base operator to base their operations at the Heliport. National Helicopter, even if it was not granted fixed-base operator status, could subcontract with the fixed-base operator to base its operations at the facility. Thus, National has a sufficient stake in the resolution of this controversy to give it standing.

B. Waiver

[2] Turning to the alleged waiver, the City asserts that National is precluded from challenging Resolution 1558's conditions because it bargained away that right when it executed the February 13, 1996 stipulation. The stipulation contained a clause in which National waived any and all claims with respect to the Economic Development Corporation's "acts or omissions regarding the EIS ..., the [land use review] application, or any conditions relating to the special permit required under the City's Zoning Resolution."

[3] [4] A release freely entered into that clearly waives a right to pursue a cause of action is binding. *See National Union Fire Ins. Co. v. Woodhead*, 917 F.2d 752, 757 (2d Cir.1990); *Bank of America Nat'l Trust & Sav. Assoc. v. Gillaizeau*, 766 F.2d 709, 713 (2d Cir.1985). But a release should not be read to include matters of which the parties had no intention to dispose. *Lefrak SBN Assocs. v. Kennedy Galleries, Inc.*, 203 A.D.2d 256, 257, 609 N.Y.S.2d 651 (2d Dep't 1994); *see also Gettner v. Getty Oil Co.*, 226 A.D.2d 502, 503, 641 N.Y.S.2d 73 (2d Dep't 1996) (stating that the "meaning and coverage of a release depends on the controversy being settled"); *East 56th Plaza, Inc. v. Abrams*, 91 A.D.2d 1129, 1130, 458 N.Y.S.2d 953 (3d Dep't 1983) ("This intent must be clearly established and cannot be inferred *88 from doubtful or equivocal ... language, and the burden of proof is on the person claiming the waiver of the right.").

Reading the waiver language in its entirety, and considering the controversy being settled, it is far from evident that National intended to release the City for claims regarding conditions that may have been imposed upon the special permit the City Council had not yet granted. The waiver that plaintiff signed

concerned only claims regarding the requirement of a special permit and the manner in which the Economic Development Corporation pursued it. National therefore could not challenge the application process undertaken by the Economic Development Corporation as improper under City law, *i.e.*, the Zoning Resolution and the City Charter, but it could pursue a substantive claim that the conditions ultimately imposed by the City Council violate federal law. *Cf. Summit School v. Neugent*, 82 A.D.2d 463, 468, 442 N.Y.S.2d 73 (2d Dep't 1981) (requiring the narrow interpretation of waivers where matters of public policy are concerned).

II The Proprietor Exception

[5] We now address the merits of the controversy. National contends that the conditions imposed under Resolution 1558 and the Request are defective because they are preempted by federal law. The City, on the other hand, avers that it carefully assessed and imposed all the conditions pursuant to its power as the proprietor of the Heliport.

[6] The Supremacy Clause of the United States Constitution invalidates state and local laws that "interfere with or are contrary to, the laws of congress." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824)). Congress preempted state and local regulations "related to a price, route or service of an air carrier" when it passed § 1305(a) of the Airline Deregulation Act, now recodified at 49 U.S.C. § 41713(b)(1) (1994). *Cf. id.* § 40101, *et seq.* (1994) (Federal Aviation Act); *id.* § 44715 (1994) (Noise Control Act); *id.* § 47521, *et seq.* (1994) (Airport Noise and Capacity Act) (acts implying preemption of noise regulation at airports).

In enacting the aviation legislation, Congress stated that the preemptive effect of § 1305(a) did not extend to acts passed by state and local agencies in the course of "carrying out [their] proprietary powers and rights." *Id.* § 41713(b)(3). Under this "cooperative scheme," Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population. *See Concorde I*, 558 F.2d at 83-84 (discussing the 1968 amendment to Federal Aviation Act and Noise Control Act legislative history in which Congress specifically reserved the rights of proprietors to establish regulations limiting the permissible level of noise at their airports); S.Rep. No. 96-52, at 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 89, 101 (proclaiming that the Aviation Safety and Noise Abatement Act was not "intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise"); *cf. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 635-36 n. 14, 93 S.Ct. 1854, 1859, 1860-61 n. 14, 36 L.Ed.2d 547 (1973) (acknowledging that while the federal government has "full control over aircraft noise, pre-empting state and local control" under their police power, the "authority that a municipality may have as a landlord is not necessarily congruent with its police power").

Hence, federal courts have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more "limited role for local airport proprietors in regulating noise levels at their airports." *City and County of San Francisco v. F.A.A.*, 942 F.2d 1391, 1394 (9th Cir.1991). Under this plan of divided authority, we have held that the proprietor exception allows municipalities to promulgate "reasonable, nonarbitrary and non-discriminatory" regulations of noise and other environmental concerns at the local level. *Concorde I*, 558 F.2d at 84 (regulations of noise levels); *see also Western Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 658 F.Supp. 952, 957

(S.D.N.Y.1986) (permissible regulations of noise and other environmental concerns), *aff'd*, 817 F.2d 222 (2d Cir.1987).

National does not dispute the viability of the proprietor exception. It maintains instead that the City, in enacting Resolution 1558, did not act in its proprietary capacity, but rather under its police power, and therefore is not entitled to rely on the proprietor exception. As a result, the conditions the resolution imposed, it continues, are presumptively invalid. *See City of Burbank*, 411 U.S. at 633, 635-36 n. 14, 93 S.Ct. at 1859, 1860-61 n. 14 (invalidating curfew on airport operations imposed pursuant to city's police power); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1315 n. 22 (9th Cir.1981) (listing cases invalidating curfews imposed pursuant to municipalities' police power).

The Economic Development Corporation, acting in a proprietary capacity, was extensively involved in the permit application process and issued the Request. It proposed to change operations at the Heliport by reducing operations by 47 percent and imposing a curfew. Since there was participation by a number of different City agencies in the permit process, some acting as owner, *e.g.*, the Economic Development Corporation, some as protectors of the public, *e.g.*, the City Planning Commission, we think the City acted in both a proprietary and a police capacity when it imposed the conditions upon the special permit. The proprietor exception is accordingly applicable to our evaluation of Resolution 1558 and the Request. *See United States v. State of New York*, 552 F.Supp. 255, 264 (N.D.N.Y.1982) (reasoning that a curfew imposed by the State of New York pursuant to its police and proprietary powers was entitled to analysis under the proprietor exception), *aff'd per curiam on other grounds*, 708 F.2d 92 (2d Cir.1983).

III The Reasonableness of the Restrictions

[7] [8] [9] As a proprietor, the City, as noted, has the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations. Those regulations must avoid even the appearance of irrational or arbitrary action. *See British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 564 F.2d 1002, 1005 (2d Cir.1977) (Concorde II). Further, the City may regulate only a narrowly defined subject matter--aircraft noise and other environmental concerns at the local level. *See Western Air Lines*, 658 F.Supp. at 957.

[10] The City asserts that all seven of the conditions imposed upon the special permit fall within its power under the proprietor exception. It contends the district court erred when it permanently enjoined five of those conditions (conditions # 3-7). National counters that it was error not to strike all seven conditions. We review orders granting or denying injunctive relief for an abuse of discretion. *See Nikon Inc. v. Ikon Corp.*, 987 F.2d 91, 94 (2d Cir.1993) ("Abuse of discretion can be found if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law."). With this in mind, we analyze in order the conditions imposed.

Weekday and Weekend Curfews (Conditions # 1 and # 2)

[11] We agree with the district court that the weekday and weekend curfews imposed should be upheld. The protection of the local residential community from undesirable heliport noise during sleeping hours is primarily a matter of local concern and for that reason falls within the proprietor exception. *See Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F.Supp. 927, 938-39 (C.D.Cal.1979), *aff'd*, 659 F.2d 100 (9th Cir.1981); *see also Concorde I*, 558 F.2d at 83 ("It is perhaps more important ... that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access.").

We note that at least two district court decisions in this Circuit have enjoined curfews. *See United States v. County of Westchester*, 571 F.Supp. 786, 797 (S.D.N.Y.1983) (enjoining curfew on all night flight operations at airport imposed regardless of accompanying emitted noise as unreasonable, arbitrary, discriminatory and overbroad); *State of New York*, 552 F.Supp. at 265 (enjoining *90 night-time curfew on all aircraft, regardless of decibel level emitted by individual aircraft, as "overbroad and constitutionally impermissible in view of federal pre-emption of regulations concerning noise and planes in flight"). To the extent that these decisions have stricken curfews for their failure to target the noisiest aircraft or the noisiest times of operation, they have since been overturned by our opinion in *Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.*, 727 F.2d 246, 251 (2d Cir.1984), which permits proprietors to reduce *cumulative* noise levels, as opposed to only targeting peak noise levels or the noise level produced by an individual aircraft.

Elimination of Weekend Operations (Condition # 3)

[12] We are unable to sustain the district court's enjoining of condition # 3, which eliminated weekend operations at the Heliport, for reasons similar to those just stated with respect to conditions # 1 and # 2. The regulation requiring the facility's operator to phase out operations on Saturdays and Sundays is based on the City's desire to protect area residents from significant noise intrusion during the weekend when most people are trying to rest and relax at home. We agree with those courts that have held such reasoning as ample justification for the application of the proprietor exception. *See Santa Monica Airport Ass'n*, 481 F.Supp. at 939 (recognizing that "the interest being protected, the minimization of noise during the weekend hours when the need for leisure and rest in the residential community is the highest, is a matter of peculiar local concern" and upholding a weekend ban on touch-and-go, stop-and-go and low approach operations).

We find such a restriction to be reasonable and not arbitrary. *See Concorde I*, 558 F.2d at 84. The fact that the Economic Development Corporation's proposal, on which the EIS is based, contemplated shifting sightseeing operations from weekdays to the weekend does not alter this conclusion. The Corporation determined, and the EIS confirmed, that the Heliport was a source of excessive noise. That is a sufficient basis on which a proprietor may impose a weekend curfew.

The Reduction of Operations by 47 Percent (Condition # 4)

[13] The City conditioned the continuation of operations at the Heliport on an overall 47 percent reduction in those operations, despite the fact that the specific percentage reduction was based on a scenario different from the one envisioned by the Economic Development Corporation when it filed the permit application and proposed the 47 percent reduction. In its application, the Corporation proposed limiting flights to four per hour, operating only a 12-hour day, and ceasing tourist flights during the work week. Those changes, the Corporation estimated, would reduce operations at the Heliport by 47 percent. By the time the application emerged from the land use review process, however, the permit required the cessation of sightseeing operations during the *weekend* instead of during the work week, but still mandated a reduction in operations of 47 percent.

The district court held that the 47 percent reduction was arbitrary and unreasonable because, based in part on the shift in approach, there was no evidence that it was "in any way calibrated to achieve any particular noise based result." 952 F.Supp. at 1029. While we agree that the mandated 47 percent reduction in operations was not backed by any study reflecting the appropriate scenario or demonstrating

that such specific percentage of noise reduction was the ideal, we also believe that the proprietor was entitled to eliminate a portion of the Heliport's operations upon reaching a conclusion that a problem of excessive noise existed. Based on the EIS's conclusion that a 47 percent reduction in operations would result in a substantial noise reduction at the Heliport, we believe that, in this case, the relevant condition was reasonable.

In *Western Air Lines*, 658 F.Supp. at 953, the court evaluated the "perimeter rule" that the New York and New Jersey Port Authority had imposed at LaGuardia Airport, forbidding airlines from conducting nonstop flights beyond 1,500 miles in and out of the airport. The Port Authority had conducted a study of LaGuardia's capacity, circulated questionnaires to interested parties (e.g., airlines, the *91 Federal Aviation Administration, the Department of Transportation), and determined that the perimeter rule was necessary to combat the airport's congestion problem. *Id.* at 959-60. The district court upheld the Port Authority's action as reasonable. *Id.* at 960 ("[T]his Court will not second guess the actions of the Port Authority as long as they are reasonable.").

Just as the evidence supported LaGuardia's "perimeter rule," the EIS prepared by the City supports the proposition that the elimination of 47 percent of the Heliport's operations will result in a significant reduction in the noise emitted from it. We do not believe the change in the approach for reducing the facility's operation alters such a conclusion. Recognizing there was too much noise at the Heliport, the City determined that curtailing a significant portion of its operations would reduce noise levels. It is unrealistic to insist that a proprietor justify by some scientific method a specific percentage reduction in operations in order to achieve the general result of a reduction of excessive noise.

Moreover, we find it difficult to imagine how whatever percentage that is chosen--whether it is 15, 25, or 47 percent--would not be considered arbitrary. Thus, we believe the EIS adequately supports the conclusion that a 47 percent reduction in operations will improve the environmental quality of the Heliport's surrounding areas, however that reduction may be determined. For example, it may be pursuant to a curfew, a per hour limit, or a curtailment of operations, and so long as the mandated reduction is nonarbitrary and sufficiently reasonable a court may uphold the City's power to enforce such restriction. See *Global Int'l Airways Corp.*, 727 F.2d at 251 (affirming a restriction targeting cumulative noise level based on the "reasonable prospect of a beneficial effect").

[14] We also reject National's argument that the restrictions adopted pursuant to the EIS are unreasonable because of the EIS' flawed nature. We do not require that studies offered as empirical support for a proprietor's actions be conducted pursuant to any one specific methodology, accepted in scientific communities as the *most* appropriate way of conducting an analysis. Rather, the test is one of reasonableness. The EIS at issue was prepared by an environmental sciences company, initially hired by National, with experience in heliports, assessing environmental impacts, and planning airport noise compatibility. Its noise analysis was based on data received from seven receptor sites surrounding the Heliport. We conclude that the empirical support for the relevant conditions contained in the EIS is reasonable and therefore sufficient for preemption analysis purposes. The district court consequently abused its discretion when it enjoined the enforcement of condition # 4.

Prohibition on Certain Helicopters (Condition # 5)

[15] [16] [17] The City urges that the prohibition on Sikorsky S-58Ts and other helicopters of a similar size is reasonable because they are the noisiest aircraft using the Heliport. Although the proprietor

exception allows reasonable regulations to protect against excessive noise, that power may not be used to discriminate. *See Concorde II*, 564 F.2d at 1012-13 (dissolving ban on flights of supersonic jet Concorde). In this case, the City placed restrictions on certain aircraft because of their size--not the noise they make--despite evidence that larger helicopters are not necessarily noisier than smaller ones. A regulation purporting to reduce noise cannot bar an aircraft on any other basis. *See City and County of San Francisco*, 942 F.2d at 1398 (analyzing *Concorde I* and *Concorde II* and holding that airport proprietor's regulation banning retrofitted aircraft from operating at airport was unjust discrimination). The City's ban on the Sikorsky S-58T and other helicopters of that size is unreasoned discrimination on account of an aircraft's size. Hence, the district court's enjoining of this condition was not an abuse of its discretion. Because this condition of the Resolution must be stricken on preemption grounds, we need not reach or decide National's equal protection argument.

Restrictions on Sightseeing Routes (Condition # 6)

[18] [19] The City claims the invasive nature of helicopter noise justifies the condition *92 restricting sightseeing routes to the East River and the Hudson River. This argument, as the trial court recognized, evidences a misunderstanding of federal aviation law. Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted. *See, e.g., Concorde I*, 558 F.2d at 83 ("[L]egitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level."); *City of Burbank*, 411 U.S. at 626-27, 93 S.Ct. at 1856-57 (recognizing the federal government's possession of exclusive national sovereignty in U.S. airspace); 49 U.S.C. § 40103(a)(1) (stating that the federal government has "exclusive sovereignty of airspace of the United States"). The proprietor exception, allowing reasonable regulations to fix noise levels at and around an airport at an acceptable amount, gives no authority to local officials to assign or restrict routes. As a result, the City unlawfully intruded into a preempted area when it curtailed routes for the flights of certain Heliport aircraft. This condition was properly enjoined.

The Markings Requirement (Condition # 7)

[20] Because we affirm the district court's injunction of the route mandate, the condition that helicopters using the facility be marked for identification from the ground, which exists solely to enforce the route requirement, becomes moot. Moreover, the condition interferes with the Federal Aviation Administration's duty to "prescribe air traffic regulations ... for ... identifying aircraft." 49 U.S.C. § 40103(b)(2). The district court did not abuse its discretion when it enjoined the markings requirement.

IV The Commerce Clause

[21] Finally, we turn to National's declaration that the conditions in Resolution 1558 and the Request violate the Commerce Clause of the U.S. Constitution. Congress approved the proprietor exception. Consequently, any action the City properly conducted pursuant to its powers as a proprietor cannot violate the Commerce Clause. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 1047, 75 L.Ed.2d 1 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.").

CONCLUSION

For the foregoing reasons, the City may not be enjoined from imposing weekday and weekend curfews. Insofar as the judgment appealed from refused to enjoin these curfews, it is affirmed. Insofar as the judgment appealed from enjoined the City from enforcing the designation of sightseeing routes, markings requirement, and prohibition of Sikorsky S-58T and other similar sized aircraft, it is also affirmed. Insofar as the judgment appealed from enjoined the elimination of weekend operations and the 47 percent mandatory reduction in operations, it is reversed and the injunction vacated.

Accordingly, the judgment appealed from is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

JON O. NEWMAN, Circuit Judge, concurring in part and dissenting in part:

I concur in all aspects of the Court's opinion except the approval of the condition of the special permit that requires a 47 percent reduction in the operations of the East 34th Street Heliport. As to that condition, I agree with the District Court that the 47 percent figure, indisputably derived from circumstances no longer applicable, is arbitrary and unreasonable, and that the condition requiring this percentage reduction should be enjoined.

We all agree with the legal proposition that local airport proprietors are entitled to promulgate "reasonable" and "nonarbitrary" regulations to reduce noise levels. *See British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75, 84 (2d Cir.1977). We also agree with the factual proposition that a 47 percent reduction in operations will reduce noise levels. For the Court, those two propositions are the end of the matter; for me, they are only the beginning. *93 The fact that a selected percentage of reduced operations will result in reduced noise levels cannot possibly be sufficient to establish that the particular percentage was selected in a reasonable and nonarbitrary manner. For example, if the decision-makers picked the percentage number by throwing a dart at a display of numbers from 1 to 100, use of the particular number hit would be manifestly arbitrary, despite the resulting lowering of noise levels from reduced operations. So would a number derived from the average of the ages of the decision-makers.

Of course, the arbitrariness of a percentage selected on a demonstrably arbitrary basis, *i.e.*, one with no rational relationship to the regulatory purpose, does not necessarily mean that a percentage is reasonable only if supported by scientific analysis. Though an analysis of decibel levels, actual or potential injuries to eardrums, and degree of harm likely to be avoided by particular degrees of reduction in operations would provide an especially reasonable basis for selecting a required percentage reduction, I agree with the Court that a scientific study is not required for a reasonable decision. When dealing with something as intangible as annoyance from aircraft noise, regulators are entitled to exercise their judgment, on some reasonable basis, in determining the degree of noise reduction they choose to require.

Moreover, though a reasonably selected percentage reduction *in noise level* would be preferable, I am willing to assume, at least for the argument, that a city acts reasonably when it requires a reasonable reduction *in aircraft operations* in the expectation that the reduction in operations will result in reduction in noise level. *See Global International Airways Corp. v. Port Authority of New York and New Jersey*, 727 F.2d 246, 251 (2d Cir.1984) (regulation upheld because of "reasonable prospect" that it would have beneficial effect on noise level). (FN1) But the selection of the percentage of reduction in operations must nonetheless be reasonable. If the number selected here, 47, were viewed in isolation, the inference

would be available, if not irresistible, that the number was selected arbitrarily, at least in the absence of some indication of a reasonable basis for selecting that number. (FN2) But in this case, the record indisputably reveals the source of the number 47. It is the percentage by which operations would have been reduced if, as contemplated by the permit application, sightseeing flights from the East 34th Street Heliport were prohibited during weekdays. However, the City's final requirements dropped the prohibition on weekday sightseeing flights and replaced it with a prohibition on weekend sightseeing flights. Nevertheless, the City required the same 47 percent reduction in operations that would have resulted from a prohibition that is no longer applicable. The number is the expected result of an abandoned proposal; it is not the product of the exercise of any judgment on the part of the City's decision-makers.

The majority properly notes that "the proprietor was entitled to eliminate a portion of the Heliport's operations upon reaching a conclusion that a problem of excessive noise existed." 137 F.3d at 90. It then states, "Based on the EIS's conclusion that a 47 percent reduction in operations would result in a substantial noise reduction at the Heliport, we believe that, in this case, the relevant condition was reasonable." *Id.* With deference, I do not believe that the EIS's conclusion provides a proper basis for the Court to determine that the 47 percent figure remains reasonable, once the factual predicate on which it was based (banning weekday sightseeing flights) has been abandoned.

***94.** The EIS was entitled to conclude that a 47 percent reduction in operations would result in a "substantial" noise reduction. It would have been equally entitled to conclude that an operations reduction of 46, 48, or 49 percent (or likely any number above 10, or perhaps 20) would also have resulted in a "substantial" noise reduction. But the undeniable fact is that the City's decision-makers have required use of the 47 percent figure for no reason other than its equivalence to the percentage of operations reduction that would have resulted from a now abandoned prohibition. Upholding use of the 47 percent figure because it, like many other numbers, will yield a substantial noise reduction replaces reasoned decision-making with coincidence. The record provides no reasoned explanation as to why the 47 percent number remains reasonable, and demonstrably reveals why its selection is unreasonable.

For these reasons, I respectfully dissent in part.

FN1. The lease was actually executed between the Department of Marine and Aviation and Island Helicopters, Inc., a wholly-owned subsidiary of National Helicopter. For the sake of simplicity, we refer to actions taken by both Island Helicopters and National Helicopter as having been taken by National Helicopter.

FN1. The relationship between the regulation of operations and the resulting reduction in noise level was far more direct in *Global* than in the pending case. In *Global*, the regulation specified percentages of "noise compliant airplanes" that operators of heavy subsonic jets must use in each calendar quarter. *See Global*, 727 F.2d at 249-50. In the pending case, there is only a percentage reduction of all operations.

FN2. Though the issue does not arise on this appeal, I think there would be a plausible argument that the selection of a number representing a familiar fraction, *e.g.*, 50 percent for one half, or 33 1/3 percent for one third, would be reasonable since it would represent the decision-makers' intuitive guess as to the general degree of reduction (whether of noise or operations) they wished to require. But it cannot be seriously maintained that the decision-makers arrived at the number 47 by making even an intuitive guess.

U.S. 9th Circuit Court of Appeals Reports

Santa Monica Airport v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981)

Santa Monica Airport Association, a California Corporation, National Business Aircraft Association, Inc., a New York Not-for-profit Corporation, General Aviation Manufacturers Association, a District of Columbia Nonprofit Corporation, Appellants/cross-appellees,

v.

City of Santa Monica, a Municipal Corporation; Perry Scott; Donna Swink; John Bambrick; Christine Reed; Pieter Van Den Steenhoven; Ruth Yannatta; and William Jennings,

APPELLEES/CROSS-APPELLANTS.

Nos. 79-3550, 79-3589 and 79-3590.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted December 4, 1980.

Decided April 23, 1981.

As Amended on Denial of Rehearing and Rehearing En Banc September 23, 1981.

Robert Cleaves, Marina Del Rey, Cal., for Santa Monica Airport Ass'n.

Joseph A. Wheelock, Jr., Latham & Watkins, Los Angeles, Cal., Judith Richards Hope, Wald, Harkrader & Ross, Washington, D.C., for Nat. Business Aircraft Ass'n and General Aviation Manufacturers Ass'n.

Peter P. Steenland, Washington, D.C., for U.S.A.

Stanley E. Remelmeyer, Torrance, Cal., for City of Torrance.

Richard L. Knickerbocker, Jones, Knickerbocker & Fuller, Beverly Hills, Cal., Shane Stark, Santa Monica, Cal., for City of Santa Monica.

Sylvia Cano, Los Angeles, Cal., for State of Cal.

[1] AMENDED OPINION

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS and GOODWIN, Circuit Judges, and MURPHY, [fn*] District Judge.

[fn*] The Honorable Thomas F. Murphy, Senior United States District Judge for the Southern District of New York, sitting by designation.

GOODWIN, Circuit Judge

[2] A coalition of airport users challenged the City of Santa Monica's airport noise reduction ordinances in the district court. They appeal from the resulting judgment which denied most of the relief they were seeking.

[3] After an increase in the use of jet aircraft and helicopters, the City of Santa Monica enacted several ordinances to reduce noise at the city-owned and operated airport. Section 10101 imposed a night curfew

on takeoffs and landings; §§ 10111C prohibited certain low aircraft approaches on weekends; §§ 10105A2 prohibited helicopter flight training; §§ 10105B established a maximum single event noise exposure level (SENEL) of 100 dB.[fn1]; §§ 10105A1 prohibited jets at the airport and §§ 10105E provided a fine for any jet landings or takeoffs.

[4] Appellants asserted the invalidity, on various grounds, of all of the above regulations. In a well-reasoned opinion, the district court found that the ordinances: (1) were not preempted by federal law; (2) did not violate grant agreements between the FAA and Santa Monica or breach any airport lease; (3) did not violate the Federal Aviation Act; and (4) that the first four ordinances did not violate the Equal Protection or Commerce Clauses. The district court did find, however, that the categorical ban on all jet aircraft and the penalty statute violated the Equal Protection and Commerce Clauses. We affirm.

[Preemption Issue]

[5] Appellants contend that the ordinances in question are preempted by the comprehensive nature of federal control of civil aviation, and cite *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). In that case, the Supreme Court struck down on preemption grounds Burbank's jet curfew ordinance as an unauthorized extension of state police power into the federal domain. But in doing so, the court expressly left open the question of "what limits, if any, apply to a municipality as a proprietor . . ." should it decide to enact similar ordinances. 411 U.S. at 635-36 n. 14, 93 S.Ct. at 1860-61 n. 14.[fn2] The caveat may have been thought necessary in view of the Court's earlier decision in *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585, reh. denied, 369 U.S. 857, 82 S.Ct. 931, 8 L.Ed.2d 16 (1962), which held municipal airport owners liable for Fifth Amendment "takings" of private property resulting from unreasonable airport use with respect to neighboring lands. Municipal airport owners needed some means of limiting their liability under Griggs. Environmental quality control ordinances by municipal airport proprietors are among those means.

[6] Appellants argue that Burbank's footnote 14 did not endorse and should not be relied upon to create a municipal-proprietor exemption from federal preemption. They contend that a municipal-proprietor exemption would render Burbank meaningless.[fn3] Their argument, while overstated, has some superficial appeal. Nevertheless, the argument is not persuasive.

[7] The Supreme Court in Burbank instructed us to "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 411 U.S. at 633, 93 S.Ct. at 1859, quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

[8] The Second Circuit in *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75 (2nd Cir.), on remand, 437 F. Supp. 804, mod., 564 F.2d 1002 (1977), and the district court in *National Aviation v. City of Hayward, Cal.*, 418 F. Supp. 417 (N.D.Cal. 1976), marshalled impressive excerpts from the legislative history of the Federal Aviation Acts which show that, in light of *Griggs*, Congress was not preempting a municipal airport proprietor's right to enact noise ordinances. See 558 F.2d at 83-84, 418 F. Supp. at 420-422.[fn4] But see *San Diego Etc. v. Super. Ct. for Cty. of San Diego*, 67 Cal.App.3d 361, 367, 136 Cal.Rptr. 557, 561 (4th Dist.), cert. denied, 434 U.S. 859, 98 S.Ct. 184, 54 L.Ed.2d 132 (1977). Because Congressional intent not to preempt all regulation by municipal-proprietors is clear, the district court correctly concluded that these ordinances were not preempted.[fn5]

[9] Appellants make two additional preemption arguments. They argue that even if there is a municipal proprietor exception for noise regulations, the 100 dB SENEL regulation is preempted.[fn6] First, they contend that Santa Monica's SENEL regulation is invalid because it frustrates the United States' exclusive

control over aircraft flight and management. They argue that because this SENEL measures and limits the noise created by planes taking off and landing, it is preempted by federal supremacy.

[10] The district court rejected this argument. It concluded that SENEL was not a regulation of airspace or aircraft in flight, but instead a reasonable regulation by an airport proprietor of noise made by aircraft. The court said:

"[A] municipal operator of an airport in my view can govern the noise levels of planes which have taken off from it both before and for a reasonable distance after the wheels have left the ground . . ."

[11] We agree.

[12] We have held that the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation. We further hold that the municipal proprietor exception allows the City to choose the SENEL method involved here, despite the SENEL's monitoring of noise created by planes as they are ascending or descending.

[municipality flexibility in fashioning its noise regulations]

[13] The legislative history shows that Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs. See, e. g., *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84-85 (2nd Cir. 1977) (and authorities cited therein). The legislative history does not suggest that Congress intended only to allow municipalities the option of excluding certain classes of aircraft. See *National Aviation v. City of Hayward, Cal.*, 418 F. Supp. 417, 421-24 (N.D.Cal. 1976) (upholding a 112 dB SENEL ordinance by a municipal proprietor); *British Airways*, supra, 558 F.2d at 83-84; S.Rep. No. 92-1160, 92nd Cong., 2d Sess. (1972) (reprinted in (1972) U.S. Code Cong. & Ad. News 4655; S. Rep. No. 1353, 90th Cong., 2d Sess. (1968) (reprinted in (1968) U.S. Code Cong. & Ad. News 2688, 2694). The reasonable inference, not contradicted by the legislative history, is that Congress intended to allow a municipality flexibility in fashioning its noise regulations. See *Hayward*, supra, 418 F. Supp. at 425, n. 13.

[14] There was evidence that the City's SENEL system was one of the most direct, effective and least costly methods of monitoring and regulating noise. This SENEL regulates that noise for which the City is liable. Thus, we hold that in this instance, the SENEL method used by the City does not render its otherwise proper noise regulations unlawful.

[15] The appellants have also argued that "preemption as applied" invalidates the 100 dB SENEL ordinance. The district court summarized this claim as follows:

"Plaintiffs say that because the SENEL system induces such [unsafe] practices within the airspace and as a part of flight [by causing pilots to attempt to `beat the box'], it amounts to a local regulation of airspace and flight which matters are within the exclusive domain of the federal government. This is essentially what is meant by the claim of `preemption as applied.'" *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927, 941 (C.D.Cal. 1979), aff'd., 647 F.2d 3 (9th Cir. 1981).

[16] The district court rejected this argument. It noted that the SENEL ordinance did not regulate airspace or flight. It reasoned that the tendency to violate a certain law does not render the law improper or illegal. These arguments are sound. Appellants have cited no authority which convinces us that the district court was incorrect. The principles of comity and federalism militate against our invalidating a state or local regulation unless it is written in unlawful terms, or because, on its face, it is preempted. We have no

warrant to strike down an ordinance merely because the public reacts to it in a manner inconsistent with federal law.

[17] Accordingly, we reject the "preemption as applied" argument.

[18] Other points briefed and argued by the parties were fully and correctly answered in the district court's opinion.[fn7]

[19] Affirmed.

[fn1] dB is an abbreviation for decibels, a noise measurement.

[fn2] In footnote 14, the Court said:

"The letter from the Secretary of Transportation also expressed the view that `the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' (Emphasis added.) This portion as well was quoted with approval in the Senate Report. Ibid.

"Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as `proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." 411 U.S. at 635-36, n. 14, 93, S.Ct. at 1860-61 n. 14.

[fn3] In Burbank, the City of Burbank did not own the airport. Appellants claim that these peculiar ownership circumstances would limit Burbank merely to its special facts should we hold that ordinances enacted by municipal owners are not preempted by federal law. We do not think so. The impact of our holding will probably be less than appellants suggest. Burbank will continue to prohibit adjacent cities from trying to control noise at airports they do not own. See, e. g., *Allegheny Airlines v. Village of Cedarhurst*, 238 F.2d 812 (2nd Cir. 1956) (Cedarhurst preempted from passing noise ordinances regarding flights into New York City's airport); *American Airlines, Inc. v. City of Audubon Park*, 297 F. Supp. 207 (W.D.Ky. 1969), *aff'd* 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845, 90 S.Ct. 78, 24 L.Ed.2d 95 (1969) (Audubon Park preempted from passing ordinance regulating noise at Louisville's airport); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1017, 89 S.Ct. 620, 21 L.Ed.2d 561 (1969), (Hempstead preempted from passing ordinances affecting noise at New York City's airport).

[fn4] Plaintiffs respond to this legislative history argument by saying that this argument was made to the Burbank court and rejected. This response is not accurate. The Supreme Court expressly reserved the question as to municipal proprietors. Burbank, 411 U.S. 635-36, n. 14, 93 S.Ct. 1860-61, n. 14.

[fn5] Plaintiffs also argue that even if Griggs is used to justify a municipal-proprietor exemption to preemption, that exception should be limited to ordinances necessary to avoid Griggs liability. The problem

with this argument is that it assumes that Griggs liability is limited to Fifth Amendment takings. Nothing in Griggs indicates such a limitation. Liability may well be imposed upon a municipality on theories other than inverse condemnation. The City of Santa Monica should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment.

[fn6] During the course of this litigation, Santa Monica amended its SENEL ordinance to prohibit noise in excess of 85 dB. (Santa Monica is considering reenacting the 100 dB ordinance, however.)

On rehearing, it was urged that the preemption arguments apply and must be addressed, regardless of which SENEL ordinance applies. Accordingly, we examined the merits of the 100 dB SENEL preemption arguments even though the final text of the ordinance is not settled. See *Brockington v. Rhodes*, 396 U.S. 41, 90 S.Ct. 206, 24 L.Ed.2d 209 (1969) (per curiam).

[fn7] 481 F. Supp. 927 (C.D.Cal. 1979).
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*977 951 F.2d 977

**ALASKA AIRLINES, INC.; Qwest Commuter Corp.; Westair
Incorporated, Plaintiffs-Appellees,**
v.
**CITY OF LONG BEACH; Long Beach City Council; Evan Braude;
Wallace Edgerton, et al.; Jan Hall; Thomas J. Clark;
Ernie Kell; James R. Wilson; Eunice Sato; Ed Tuttle;
Warren Harwood; Ray Grabinski; Marc A. Wilder,
Defendants-Appellants.**
**LONG BEACH UNIFIED SCHOOL DISTRICT; Long Beach Hugh, Inc.,
Defendants-Intervenors,**
v.
**PACIFIC SOUTHWEST AIRLINES, et al.; Aircal Inc.; America
West Airlines; United Air Lines; American Airlines, Inc.;
Ozark Airlines, Inc.; Wings West Airlines, Inc.; Federal
Express Corporation; Airserv; Delta Air Lines, Inc.;
Continental Air Lines, Inc., Plaintiffs-Intervenors-Appellees.**
**ALASKA AIRLINES, INC.; Qwest Commuter Corp.; Westair
Incorporated, Plaintiffs-Appellees,**
and
**Pacific Southwest Airlines, Inc.; Federal Express
Corporation; Airserv; Aircal Inc.; United Air Lines;
American Airlines, Inc.; Ozark Airlines, Inc.; Wings West
Airlines, Inc., aka American Eagle; America West Airlines;
Delta Air Lines, Inc.; Continental Air Lines, Inc.,
Plaintiffs-Intervenors-Appellees,**
v.
**CITY OF LONG BEACH; Long Beach City Council, and its
members, Defendants-Appellants.**

Nos. 88-6745, 89-55278.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 15, 1989.

Submission Deferred Aug. 20, 1990.

Re-Argued and Submitted Oct. 9, 1990.

Decided Oct. 24, 1991.

As Amended on Denial of Rehearing and Rehearing En Banc Jan. 9, 1992.

Permanent injunction enjoining operation of city's ordinance restricting noise at municipal airport was entered by the United States District Court for the Central District of California, Laughlin E. Waters, J., and city appealed. The Court of Appeals held that: (1) ordinance was not preempted by federal law despite contention that ordinance provision requiring flight operators to indemnify city for noise judgments

removed city's right to claim the proprietor exemption from federal preemption; (2) ordinance did not violate commerce clause; (3) ordinance did not violate equal protection in restricting air carriers as opposed to general aviation; (4) ordinance violated procedural due process in providing for reduction of allocated flights at airport based on noise violations without notice or hearing; and (5) due process challenge was ripe for review even though airport manager had not yet cut off a carrier's flights.

Affirmed.

Beezer, Circuit Judge, filed a concurring opinion.

1. STATES k18.7
360 ----
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.7 Occupation of field.

[See headnote text below]

1. STATES k18.11
360 ----
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 Congressional intent.

C.A.9 (Cal.) 1991.

Under the supremacy clause, federal law preempts state law when Congress expressly or impliedly indicates intention to displace state law, or when state law actually conflicts with federal law. U.S.C.A. Const. Art. 6, cl. 2.

2. AVIATION k224
48B ----
48BV Airports and Services
48Bk224 Regulation and use in general.

C.A.9 (Cal.) 1991.

Municipal airport owner may contract away its proprietorship rights, and thus lose the right to regulate noise.

3. AVIATION k224
48B ----
48BV Airports and Services
48Bk224 Regulation and use in general.

[See headnote text below]

3. STATES k18.17
360 ----

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.17 Aviation; airports.

C.A.9 (Cal.) 1991.

City which owned airport did not lose right to claim the proprietor exemption from federal preemption of municipal aircraft noise restrictions, by reason of ordinance requiring flight operators to indemnify city for any judgment for nuisance, noise, inverse condemnation or other damages awarded as a result of flight operations, where city remained liable for noise and continued to be proprietor of the airport. U.S.C.A. Const. Art. 6, cl. 2; Federal Aviation Act of 1958, § 105(b)(1), as amended, 49 U.S.C.A. § 1305(b)(1).

- 4. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

[See headnote text below]

- 4. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

For facially neutral ordinance restricting airport noise to violate commerce clause, burdens of the ordinance had to so outweigh the putative benefits as to make the ordinance unreasonable or irrational, and it was inappropriate for district court to conduct a close balancing process to arrive at a quasi-legislative judgment about whether the effects of the ordinance on interstate commerce were greater than its beneficial effects on the environment. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 5. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

[See headnote text below]

- 5. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

Ordinance imposing flight and noise limitations at municipal airport did not violate the commerce clause; goal of reducing airport noise to control liability and improve esthetics of the environment was

legitimate and permissible, and ordinance applied equally to interstate and intrastate flights, and to air carriers based within the state as well as those from outside the state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 6. COMMERCE k12
 - 83 ----
 - 83I Power to Regulate in General
 - 83k11 Powers Remaining in States, and Limitations Thereon
 - 83k12 In general.

C.A.9 (Cal.) 1991.

Ordinance may be struck down on commerce clause grounds if its purpose is in fact to disfavor interstate commerce or its benefits are illusory or insignificant, but where neither is the case, ordinance would violate commerce clause only if the particular means chosen to achieve its goals are irrational, arbitrary or unrelated to those goals. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 7. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

[See headnote text below]

- 7. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

Municipal airport noise ordinance imposing the lowest noise limits on runways overflying freeway and golf course, as opposed to those overflying residential areas, was not unreasonable or arbitrary, so as to violate commerce clause, where there was evidence that runways with the lower noise limits did not presently have capacity to handle the larger and more noisy aircraft. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 8. AVIATION k101
 - 48B ----
 - 48BII Airlines *977 and Other Carriers
 - 48BII(C) Regulation of Operation and Management
 - 48Bk101 Regulation in general.

[See headnote text below]

- 8. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

Noise ordinance placing greatest burden in terms of flight limits on air carriers at municipal airport was not arbitrary or unreasonable, in violation of commerce clause, although general aviation flights were involved in significantly more noise complaints than were air carrier flights, where air carriers were more amenable to numerical flight limits and ordinance contemplated possible reduction in general aviation flights as well. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 9. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

[See headnote text below]

- 9. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

Municipal airport noise ordinance limiting the number of daily air carrier flights was not arbitrary or unreasonable, so as to violate commerce clause, on ground that total noise produced by fixed number of flights could vary significantly depending on the sorts of planes used. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 10. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

[See headnote text below]

- 10. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

Municipal airport noise ordinance imposing fees for violations of daily and nighttime noise limits was not arbitrary and unreasonable in violation of commerce clause when ordinance simply provided for fee to be established by resolution of city council; it could not be said that such provision was arbitrary without predicting that city council would act in an unreasonable fashion. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 11. AVIATION k224
 - 48B ----
 - 48BV Airports and Services

48Bk224 Regulation and use in general.

Formerly 92k234.5

[See headnote text below]

11. CONSTITUTIONAL LAW k234.6
92 ----
92XI Equal Protection of Laws
92k234.5 Regulation of Use of Public Facilities or Services
92k234.6 In general.

C.A.9 (Cal.) 1991.

Ordinance restricting the number of flights by air carriers at municipal airport would not violate equal protection unless it was not rationally related to legitimate interest of the city; right to avoid reduction in number of allocated flights was not fundamental, and air carriers were not a suspect classification. U.S.C.A. Const.Amend. 14.

12. AVIATION k224
48B ----
48BV Airports and Services
48Bk224 Regulation and use in general.

Formerly 92k234.5

[See headnote text below]

12. CONSTITUTIONAL LAW k234.6
92 ----
92XI Equal Protection of Laws
92k234.5 Regulation of Use of Public Facilities or Services
92k234.6 In general.

C.A.9 (Cal.) 1991.

Municipal airport noise ordinance singling out air carriers, as opposed to general aviation, for numerical restrictions on flights was rational, and did not violate equal protection, in that it was only as to air carriers with published schedules that limitations could have predictable effect. U.S.C.A. Const.Amend. 14.

13. CONSTITUTIONAL LAW k277(1)
92 ----
92XII Due Process of Law
92k277 Property and Rights Therein Protected
92k277(1) In general.

C.A.9 (Cal.) 1991.

Air carriers had property interest in number of flights they had been allocated in municipal airport, which could not be taken away without procedural due process, even though such a license is not the subject of an absolute entitlement. U.S.C.A. Const.Amend. 14.

- 14. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

Formerly 92k291.5

[See headnote text below]

- 14. CONSTITUTIONAL LAW k291.6
 - 92 ----
 - 92XII Due Process of Law
 - 92k291.5 Regulation of Use of Public Facilities or Services; Governmental Grants or Loans
 - 92k291.6 In general.

C.A.9 (Cal.) 1991.

Provisions of municipal ordinance denying opportunity for notice and hearing in connection with reduction in air carrier's number of permissible flights at municipal airport for cause, based on carrier's exceeding cumulative noise level and having highest average single event noise level, violated procedural due process requirements. U.S.C.A. Const.Amend. 14.

- 15. CONSTITUTIONAL LAW k46(1)
 - 92 ----
 - 92II Construction, Operation, and Enforcement of Constitutional Provisions
 - 92k44 Determination of Constitutional Questions
 - 92k46 Necessity of Determination
 - 92k46(1) In general.

C.A.9 (Cal.) 1991.

Due process challenge to municipal ordinance providing for reduction of air carriers' number of permissible flights at municipal airport based on noise violations, without opportunity for notice and hearing, was ripe for review even though airport manager had not yet cut off any carrier's flights under the ordinance, as the threat of action was real. U.S.C.A. Const.Amend. 14.

- 16. FEDERAL COURTS k13
 - 170B ----
 - 170BI Jurisdiction and Powers in General
 - 170BI(A) In General
 - 170Bk12 Case or Controversy Requirement
 - 170Bk13 Particular cases or questions, justiciable controversy.

C.A.9 (Cal.) 1991.

Suit to enjoin construction of a law may not meet the case or controversy requirement for justiciability if there is not direct threat that the law will be construed in a given way and, similarly, where it is

impossible to know whether party will ever be found to have violated statute, or how, if such a violation is found, those charged with enforcing the statute will respond, challenge to the statute is premature.

- 17. FEDERAL COURTS k13
 - 170B ----
 - 170BI Jurisdiction and Powers in General
 - 170BI(A) In General
 - 170Bk12 Case or Controversy Requirement
 - 170Bk13 Particular cases or questions, justiciable controversy.

C.A.9 (Cal.) 1991.

Fact that party is not yet engaged in regulated conduct need not preclude that party's challenge to the regulation on ripeness grounds where it is clear that the regulation is sure to work the injury alleged.

- 18. COMMERCE k82.45
 - 83 ----
 - 83II Application to Particular Subjects and Methods of Regulation
 - 83II(K) Miscellaneous Subjects and Regulations
 - 83k82.45 Aviation.

C.A.9 (Cal.) 1991.

City's denial to commuter airlines of all access to municipal airport, under city's interpretation of preliminary injunction's flight limits did not violate commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

- 19. AVIATION k224
 - 48B ----
 - 48BV Airports and Services
 - 48Bk224 Regulation and use in general.

C.A.9 (Cal.) 1991.

City's denial to commuter airlines of all access to municipal airport was ***977** invalid, where municipal noise ordinance would have allowed commuters to use the airport and injunction, imposing air carrier flight limits in connection with invalidation of ordinance, did not provide a ceiling for all flights.

***980** Dennis, Shafer, Young & Wish, Alan M. Shafer, Richard P. Towne, Los Angeles, Cal., for plaintiff-appellee Alaska Airlines, Inc.

Sheppard, Mullin, Richter & Hampton, Don T. Hibner, Jr., Mark Riera, Los Angeles, Cal., for plaintiff-in-intervention, American Airlines, Inc.

Rintala, Smoot, Jaenicke & Brunswick, J. Larson Jaenicke, Los Angeles, Cal., for plaintiff-in-intervention, Continental Airlines, Inc.

Preston, Thorgrimson, Ellis & Holman, Thomas G. Allison, Paul J. Lawrence, Seattle, Wash., for plaintiff-in-intervention, Delta Air Lines, Inc.

Graham & James, Leo J. Vander Lans, Los Angeles, Cal., for plaintiff-in-intervention, Federal Exp. Corp.

Belcher, Henzie & Biegenzahn, James M. Derr, Los Angeles, Cal., for plaintiff-in-intervention, Trans World Airlines, Inc.

Paul, Hastings, Janofsky & Walker, Robert S. Span, Judith L. Meadow, Santa Monica, Cal., for plaintiff-in-intervention, United Air Lines, Inc.

Donovan, Leisure Newton & Irvine, Terry S. Sterling, Los Angeles, Cal., for plaintiff-in-intervention, U.S. Air, Inc.

Latham & Watkins, John J. Lyons, Kirk A. Wilkinson, Los Angeles, Cal., Winthrop, Stimson, Putnam & Roberts, John E. Gillick, Washington, D.C., for plaintiff-in-intervention America West Airlines, Inc.

Lee L. Blackman, McDermott, Will & Emery, Los Angeles, Cal., Roger P. Freeman, Deputy City Atty., Long Beach, Cal., for the defendants-appellants.

Appeal from the United States District Court for the Central District of California.

Argued Sept. 15, 1989, before SCHROEDER, BOOCHEVER and BEEZER, Circuit Judges.

Reargued Oct. 9, 1990, before TANG, SCHROEDER and BEEZER, Circuit Judges.

PER CURIAM:

I. INTRODUCTION

We review a permanent injunction following ten years of litigation over efforts by the City of Long Beach to regulate noise emanating from aircraft using the Long Beach Municipal Airport. The litigation has been waged between the city, which owns and operates the airport, and various commercial airline passenger carriers who contended that the city's ordinances unfairly limit their flights. The city here appeals the district court's judgment permanently enjoining operation of the city's most recent ordinance and preventing the city from reducing the number of permitted daily carrier flights below 40. The district court ruled that the ordinance was unlawful on several grounds, including the following: (1) the ability of the city to regulate noise at the airport was preempted by federal law; (2) the flight and noise limitations impermissibly burdened interstate commerce; (3) several of the provisions were arbitrary, capricious, or not rationally related to legitimate governmental *981 concerns; (4) the ordinance discriminated against air carriers in violation of equal protection; and (5) the ordinance denied procedural due process because it authorized reductions in flights without opportunity for a hearing. The district court also ruled that the city had impermissibly denied all access to a class of commuter airlines under a preliminary injunction issued during the pendency of the litigation. It held that the city had erroneously interpreted that injunction as requiring such exclusion, that the original ordinance similarly did not require such exclusion, and that such exclusion impermissibly burdened interstate commerce.

The ordinance contains a nonseverability clause expressly providing that if one provision of the ordinance is held to be unlawful, the entire ordinance will be without force and effect. Thus, if we agree

with any of the district court's grounds for its injunction, we must affirm. Because we agree with the district court that the provisions of the ordinance denying opportunity for notice and hearing in connection with flight reductions violate principles of due process, we affirm the injunction. We also affirm the district court's ruling that the preliminary injunction did not authorize the city to exclude the commuters. In order to avoid unnecessary future litigation, we consider in this opinion the principal other grounds upon which the district court's injunction rests, and we conclude that the district court erroneously relied upon them.

II. BACKGROUND

The airport began operations in 1923 on city property surrounded mainly by residential housing. Throughout its history, the airport has had heavy military and general aviation usage. In 1981, the city council adopted its first noise control ordinance, the "Aircraft Noise Control Regulation" which limited air carrier flights to fifteen per day and required carriers to use quieter equipment.

This litigation was filed on June 23, 1983 by Alaska Airlines. Other commercial airlines have subsequently intervened. In December of 1983, the district court ruled, on the record before it, that there was an insufficient basis to support the fifteen-flight restriction. It entered a preliminary injunction prohibiting the city from reducing the number of daily carrier flights below eighteen.

Following entry of the preliminary injunction, the city undertook an extensive study of the noise situation at the airport, funded under 14 C.F.R. §§ 150.1-150.35 by funds from the Federal Aviation Administration. The study was called the "Part 150 Task Force Study." The federal regulations call for development of a "noise compatibility program" ("NCP"). The city submitted its final NCP and implementing ordinance to the FAA for review in July of 1986. Apparently they still have not received FAA approval. This appeal does not directly involve issues concerning the FAA regulations.

In the meantime, prior to completion of the report based upon the Task Force's preliminary recommendations, and apparently in part spurred by numerous noise-related nuisance and inverse condemnation claims filed by residents affected by airport operations, the city went forward with preparation and adoption of an ordinance. The principal elements of the ordinance included a limit of 65 decibels on the Community Noise Equivalent Level ("CNEL"). In addition it limited the number of air carrier jet flights and set noise limits for individual aircraft. The document is lengthy and technical.

Following adoption of the 1986 ordinance, the city moved the district court to vacate the pending injunction, and the air carriers moved the court to modify the injunction to permit additional flights. Pending trial, the district court ordered the city to increase the number of daily carrier flights to 26, and this court affirmed without published opinion. *See* 815 F.2d 714 (9th Cir.1987).

The case was tried in March and April of 1988, and the district court ultimately entered a Memorandum of Decision and Findings of Fact and Conclusions of Law invalidating the ordinance. The city appeals both from the entry of the judgment and *982 the post-judgment order increasing the minimum number of allowable flights from 26 to 40.

III. PREEMPTION

[1] Under the supremacy clause, (FN1) federal law preempts state law when Congress expressly or impliedly indicates an intention to displace state law, or when state law actually conflicts with federal law. *Wardair Canada v. Florida Department of Revenue*, 477 U.S. 1, 6, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986). In 1973, the Supreme Court held that the pervasive scope of federal regulation of the airways implied a congressional intention to preempt municipal aircraft noise restrictions based upon the police power. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-40, 93 S.Ct. 1854, 1862-63, 36 L.Ed.2d 547 (1973). The Court left the door open to noise regulations imposed by municipalities acting as airport proprietors, however, based on such municipalities' legitimate interest in avoiding liability for excessive noise generated by the airports they own. *Id.* at 635-36 n. 14, 93 S.Ct. at 1860-61 n. 14. See *Griggs v. Allegheny County*, 369 U.S. 84, 88-90, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585 *reh'g denied*, 369 U.S. 857, 82 S.Ct. 931, 8 L.Ed.2d 16 (1962). After *Burbank*, Congress expressly provided that the proprietary powers and rights of municipal airport owners are not preempted by federal law. 49 U.S.C. § 1305(b)(1). We recognized that municipally owned airports qualify for a proprietor exemption from preemption in *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 102-104 (9th Cir.1981).

[2][3] Here, the air carriers argue that the ordinance's indemnity clause removes the city's right to claim the proprietor exemption because it shifts liability to airport users. Section 16.45.130 of the ordinance states: "Commencement of flight operations at Long Beach airport shall be deemed to constitute an undertaking to indemnify the City of Long Beach for any judgment for nuisance, noise, inverse condemnation or other damages awarded against the City as a result of flight operations of that user at the Long Beach airport." With such a provision, they contend, the reasons for allowing the municipality to regulate airport noise as a proprietor disappear.

A municipality may contract away its proprietorship rights, and thus lose the right to regulate noise. See *Pirolo v. City of Clearwater*, 711 F.2d 1006, 1009-10, *reh'g denied*, 720 F.2d 688 (11th Cir.1983). In this case, however, the ordinance merely establishes a right of recovery for damages actually awarded against the city. The city is thus still liable for noise, and continues to be the proprietor of the airport. See *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1316-17 (9th Cir.1981) (*per curiam*), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982) (ownership, operation, promotion and ability to acquire necessary approach easements comprise proprietorship of airport); see also *Air Cal, Inc. v. City and County of San Francisco*, 865 F.2d 1112, 1117-18 (9th Cir.1989) (scope of proprietary powers).

Furthermore, we have held that the rationale for the exemption extends beyond purely financial concerns. "The [proprietor] should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the City's human environment." *Santa Monica Airport Ass'n*, 659 F.2d at 104 n. 5. The indemnity clause thus does not remove the city's power to regulate under the proprietor exemption. The city's authority to control airport noise is not preempted by federal law. *Id.* at 102-104. (FN2)

***983 IV. COMMERCE CLAUSE ANALYSIS**

[4][5] The district court held that the ordinance impermissibly burdens interstate commerce. The commerce clause, of course, forbids discrimination against interstate commerce. The district court recognized that the ordinance does not on its face discriminate against interstate commerce. It expressly stated that it sought "[t]o balance competing interests" and that "[a]ccommodation must be made by both sides." It therefore weighed the "valid concerns of the Long Beach community" against "the demand for vibrant, safe, fair and efficient national transportation system" and concluded that the ordinance impermissibly burdened interstate commerce. We find that this close balancing process was inappropriate.

For a facially neutral statute to violate the commerce clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational. Such is the case where the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism of in-state industry over out-of-state industry. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), for example, the Supreme Court held unconstitutional an Arizona statute that prohibited a local melon grower from shipping its produce to California for packing. Produce packed in California could not be labeled as Arizona produce. The admitted purpose of forbidding this grower's practice was to force the grower to stop shipping its superior quality fruit to California and to pack instead in Arizona. Arizona's stated goal was to enhance the reputation of Arizona growers by enabling this grower's fruit to be labelled Arizona produce. 397 U.S. at 144, 90 S.Ct. at 848. The Court described the state's interest in such enhancement as "tenuous," 397 U.S. at 145, 90 S.Ct. at 849, and ultimately found this articulated purpose to be one that a state may not legitimately seek to advance through means that affect interstate commerce. Regarding the statute's effect of blocking interstate shipments, the Court noted that "[s]uch an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved," but found the interest there at stake to be one that was ultimately impermissible. 397 U.S. at 146, 90 S.Ct. at 849.

Similarly, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), a facially neutral law was found in its operation to discriminate against commerce from outside the state. The North Carolina statute prohibited the display of state apple grades on closed containers of apples shipped into North Carolina. The result was that apples from Washington, which had a superior grading system that Washington used in lieu of the USDA system, had to enter North Carolina with no grade at all. The Supreme Court placed upon the state the burden of justifying its facially neutral statute, since it was found to have a disparate impact upon out-of-state apple producers. The Court found that, far from protecting consumers from confusion resulting from varying grading systems, the statute deprived consumers of any information on the quality of the out-of-state apples. 432 U.S. at 353-54, 97 S.Ct. at 2446-47. Thus, it actually undermined the goals set forth as its justifications, and caused local consumers to be less likely to buy out-of-state apples. Because the statute, in practice, discriminated against interstate commerce and served no other, legitimate purpose, the Court invalidated it.

In *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978), the Court again invalidated a statute because its negative impact on interstate commerce lacked any legitimate justification. The Court found that a Wisconsin statute regulating the length and configuration of trucks that could be operated on the state's roads burdened interstate ~~*984~~ commerce without making any discernible contribution to highway safety, the asserted goal of the statute. (FN3) Since the state was unable to offer any evidence that the regulation did anything to advance its purported

purpose, that regulation could not pass even the most lenient of commerce clause tests. The Court suggested, however, that a regulation that did have some legitimate justification would easily pass the test it employed. See 434 U.S. at 447, 98 S.Ct. at 797 (plurality opinion) ("[o]ur holding is a narrow one, for we do not decide whether laws of other States ... would be upheld if the evidence produced on the safety issue were not so overwhelmingly one-sided as in this case."); *id.* at 450, 98 S.Ct. at 798 (concurrence) ("[h]ere the Court does not engage in a balance of policies; ... [i]nstead, after searching the factual record developed by the parties, it concludes that the safety interests have not been shown to exist as a matter of law.").

More recently, the Court has upheld a facially neutral statute against an assertion that it impermissibly burdened interstate commerce, because it found the purpose behind the regulation to be legitimate and permissible. *Northwest Central Pipeline v. State Corporation Commission of Kansas*, 489 U.S. 493, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). The regulation permanently cancelled natural gas producers' entitlements to certain quantities of gas if production was delayed for too long. The purpose of the regulation was to combat an imbalance in natural gas sources that had been created by the failure of some producers to use their allotments in a timely fashion. The Court found that this was a permissible purpose, related to the state's legitimate interest in conservation and the protection of property rights, whose effect on interstate commerce was not directly discriminatory. 489 U.S. at 522-26, 109 S.Ct. at 1280-82. Addressing the question of whether the law nevertheless impermissibly burdened interstate commerce under *Pike*, the Court concluded that because the effect on such commerce was not "clearly excessive" in comparison with the state's legitimate interest, the law must be upheld. *Id.* at 526, 109 S.Ct. at 1282. Thus, once the Court found that the articulated purpose behind the statute was not illegitimate, the statute was easily found to pass constitutional muster.

The ordinance here at issue has neither of the problems that have caused the Supreme Court to strike down regulations as creating impermissible burdens on interstate commerce. The stated purpose of the ordinance is not illusory, as in *Hunt* or *Raymond Motor*, and does not favor in-state industry over out-of-state industry, as in *Pike*. The goal of reducing airport noise to control liability and improve the aesthetics of the environment is a legitimate and permissible one. See *Santa Monica Airport Ass'n*, 659 F.2d at 104 n. 5. The ordinance applies equally to interstate and intrastate flights, and to air carriers based within California as well as those from outside of that state. The ordinance thus regulates evenhandedly to further this legitimate interest.

[6] The district court erroneously made a quasi-legislative judgment about whether the ordinance's effects on interstate commerce were greater than its beneficial effects on the environment. The court could properly have struck down this ordinance on commerce clause grounds if its purpose was in fact to disfavor interstate commerce or its benefits were illusory or insignificant, but neither is the case. Therefore, the ordinance would violate the commerce clause only if the particular means chosen to achieve its goals were irrational, arbitrary or unrelated to those goals. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190-92, 58 S.Ct. 510, 516-18, 82 L.Ed. 734 (1938). See *Raymond Motor*, 434 U.S. 429, 98 S.Ct. 787 (law struck down because unrelated to goal); *Hunt*, 432 U.S. 333, 97 S.Ct. 2434 (law struck down because it undermined *985 articulated purpose). We therefore turn to an analysis of the particular provisions alleged to suffer from such an infirmity.

V. WHETHER SPECIFIC SECTIONS WERE UNREASONABLE OR ARBITRARY

The district court held that several of the provisions enacted were so arbitrary, capricious or unrelated to any governmental purpose as to render the ordinance unconstitutional. There are several provisions in the ordinance which appear at first blush to be arbitrary or irrational; however, on closer analysis they must be seen as furthering legitimate governmental goals. We discuss the principal provisions attacked by the carriers.

[7] Runways 25L and 7R are subject to the lowest noise maxima for aircraft that use them. See Ordinance § 16.45.030. These runways, however, overfly a freeway and a golf course, respectively. Thus, it is argued that it is unreasonable to place the strictest limits on aircraft that use them, as opposed to other runways that overfly residential areas.

It is not clear from the record, however, that these runways could be used for some of the larger and more noisy aircraft without improvement. In fact, there are strong suggestions to the contrary. The district court stated, for example, that these runways have "the capacity, *with reasonable pavement modifications to prevent deterioration,*" to handle such jets (emphasis added). The district court thus implicitly acknowledged that the noise level set forth in the ordinance represents the maximum physical capacity of these runways. For this reason, the ordinance cannot be said to be arbitrary on this ground.

[8] The ordinance appears to place the greatest burden in terms of flight limits on air carriers, although the city's quarterly noise reports indicate that general aviation flights are involved in significantly more noise complaints than are air carrier flights. These restrictions on carriers, however, are not irrational. Air carriers, with their published schedules, are more amenable to the numerical flight limits contained in the rest of the ordinance. The looser type of regulation of general aviation, based on aggregates, contained in section 16.45.120(C) cannot be said to be an unreasonable way to regulate the noise of general aviation user groups. The ordinance contemplates possible reductions in general aviation flights as well. Ordinance § 16.45.120(C). We cannot say that the provisions limiting carrier flights are arbitrary or unreasonable.

[9] Section 16.45.70(C) limits the number of daily air carrier flights to 32. As the district court found, the total noise produced by 32 flights could vary significantly depending upon what sorts of planes were used. Thus, the district court concluded that the choice of the number 32 was arbitrary. What the ordinance seeks to accomplish, however, is not simply the limitation of noise for its own sake; rather, it seeks to limit the annoyance that residents experience as a result of the airport's operation. It is not unreasonable to believe that the number of times the disturbance occurs could be as relevant as the cumulative noise created by the total number of such disturbances.

[10] The district court found that sections 16.45.050 and 16.45.060, which impose fees for violations of daily and nighttime noise limits, respectively, were arbitrary and unreasonable because the fees imposed "do not appear to be proportionate to the problem being addressed." Section 16.45.060 does not say what the fee for violation of nighttime regulations is; rather, it simply provides for such a fee to be established by resolution of the City council. We cannot say that such a provision is arbitrary without predicting that the city council will act in an unreasonable fashion.

In sum, we cannot hold that any of the substantive provisions of the ordinance are completely arbitrary or unreasonable. Virtually any effort to impose specific limitations on flights and noise levels

could be subject to similar attacks and create endless litigation. We find that each of the challenged provisions is sufficiently supported by a reasonable and legitimate justification. Therefore, the ordinance does not violate the commerce clause.

*986 VI. EQUAL PROTECTION

[11][12] The district court held that the ordinance violated the equal protection rights of the air carriers, finding that it imposes "the entire burden of noise reduction on [the carriers] while, effectively, leaving other users of the airport unregulated." There is no dispute that the right to avoid reduction in the number of allocated flights is not a fundamental one, and the air carriers are not a suspect classification; therefore, we cannot find that the ordinance violates the principles of equal protection unless it is not rationally related to a legitimate interest of the City. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303-05, 96 S.Ct. 2513, 2516-18, 49 L.Ed.2d 511 (1976). As we have already noted, the singling out of air carriers for numerical restrictions is rational given the fact that because air carriers alone have regular, published schedules, it is only upon them that such limitations could have a predictable effect. The ordinance thus does not violate the carriers' equal protection rights.

VII. PROCEDURAL DUE PROCESS.

The district court's final basis for invalidating the ordinance, and the one on which we uphold the district court's order, is that the ordinance denies the air carriers procedural due process. Specifically, the ordinance authorizes the airport manager, alone and without a hearing, to require carriers to reduce flights. It further provides that the determination of the airport manager "shall be conclusive unless it is demonstrated to lack a rational basis." The ordinance provides no procedures for notifying carriers of a contemplated change to allow them to challenge the determination of the airport manager.

[13] We agree with the air carriers that they have a property interest in the number of flights that they have been allocated. Because of the advertisement and public announcement of flights, maintenance of these allocations is crucial to the continued functioning of their enterprise. A license such as these allocations, which is not the subject of an absolute entitlement but which nevertheless becomes "essential in pursuit of a livelihood," is "not to be taken away without that procedural due process required by the fourteenth amendment." *Bell v. Burson*, 402 U.S. 535, 540, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90 (1971).

[14] Here, under the scheme that the ordinance seeks to impose, reduction in the number of permissible flights would be ordered automatically once the airport manager finds that a given carrier exceeds a certain cumulative noise level and had the highest average single event noise level. Ordinance § 16.45.120. Such a determination constitutes, for all intents and purposes, a revocation for cause. In *Bell*, the Court held that the revocation of a license for cause could not occur before notice and a meaningful hearing was provided. See 402 U.S. at 541-42, 91 S.Ct. at 1590-91. Leave to land one's planes at the airport is similarly a property interest closely associated with the pursuit of a livelihood; therefore, due process also requires notice and a hearing before flight allocations can be revoked. Because the ordinance does not provide such procedural protections, it cannot be upheld.

[15][16] The city does not seriously defend the ordinance itself. Rather, it argues that the challenge to the ordinance is not ripe because the airport manager has not yet cut off any carriers' flights. Indeed,

where there is no direct threat that a law will be construed in a given way, a suit to enjoin such a construction may not meet the case or controversy requirement for justiciability. See *International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954). Similarly, where it is impossible to know whether a party will ever be found to have violated a statute, or how, if such a violation is found, those charged with enforcing the statute will respond, any challenge to that statute is premature. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 303-05, 99 S.Ct. 2301, 2311-12, 60 L.Ed.2d 895 (1979). See also *Renne v. Geary*, --- U.S. ----, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991).

[17] As the *Babbitt* Court pointed out, however, the line that the case or controversy *987 requirement draws between justiciable and nonjusticiable issues is often a fine one. See 442 U.S. at 297, 99 S.Ct. at 2308. Thus, the fact that a party has not yet engaged in the regulated conduct in question need not preclude that party's challenge to the regulation where it is clear that the regulation "is sure to work the injury alleged." 442 U.S. at 300, 99 S.Ct. at 2309. Given that the language of the ordinance here at issue is mandatory, providing that the air carrier with the highest average single event noise level "shall ... reduce flights," it is clear that at least one of the appellees will be deemed the noisiest carrier and will consequently be required to reduce flights.

Where, as here, the threat of action is very real, courts have permitted challenges to legislative enactments that are alleged to lack necessary procedural protections before they are implemented to work any actual deprivation. See, e.g., *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir.1984) (finding justiciable the NAACP's facial challenge to the City's parade ordinance, since it could reasonably fear that the City would exercise the unfettered discretion in enforcement that the terms of the ordinance provided); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir.1980) (plaintiff need not go through any procedures contemplated by the ordinance where his challenge was to the very requirement that he be subject to such procedures), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). See generally 4 Davis *Administrative Law Treatise* §§ 25:1-16 (describing the *International Longshoremen's* decision, upon which the city relies, as an example of an "extreme" philosophy that was held by the Supreme Court during the late 1940s and early 1950s, but which has subsequently been disavowed in favor of a standard of ripeness that allows a person to challenge a legislative enactment when that person is faced with a choice between compliance with the enactment and sanctions for noncompliance). We hold that the air carriers' challenge to the procedural provisions of the ordinance is ripe for our review, and agree with the air carriers that the absence of adequate procedural protections renders the ordinance constitutionally infirm.

VIII. THE COMMUTER AIRLINES

[18] There is another issue before us, which lies outside of the analysis of the city's ordinance. During the pendency of the original preliminary injunction, entered before this case was tried, the city denied commuter airlines all access to the airport. The city's asserted reason for this denial was its interpretation of the preliminary injunction as not allowing it to permit any flights in addition to the number specified therein, which was the number allocated to the scheduled carriers. The district court found that this interpretation of the injunction was incorrect, and ruled that neither the injunction nor the ordinance allowed the city to work such an exclusion. It also found that this exclusion impermissibly burdened interstate commerce.

The city dealt with the commuters, as it dealt with the other air carriers, in a manner that did not distinguish between intrastate and interstate commerce. Its purpose, to control noise and liability, is a legitimate one. Like the ordinance, the city's ban on commuter flights thus cannot be said to violate the commerce clause. The district court's decision to the contrary was erroneous.

[19] We agree with the district court, however, that the city's asserted basis for excluding the commuters is invalid. The injunction does not provide a ceiling for all flights, thereby requiring the exclusion of the commuters. The ordinance itself would have allowed commuters to use the airport. There is thus nothing in the record that offers any justification for the city's decision to deny access to the commuters. We therefore affirm the district court's order that the city cease to exclude the commuters.

IX. CONCLUSION

The district court erred in finding that the ordinance was preempted by federal law, impermissibly burdened interstate commerce, violated equal protection principles, and was arbitrary, capricious, or otherwise not rationally related to legitimate governmental concerns. The district court *988. was correct, however, in its determination that the provision authorizing reduction in flights without adequate notice and opportunity to be heard impermissibly denies procedural protections in conjunction with the deprivation of an important interest. Because of the ordinance's nonseverability clause, this procedural flaw is fatal. We therefore find that the district court appropriately enjoined enforcement of the ordinance. We also find that the district court correctly concluded that the exclusion of commuters was not mandated either by the ordinance or by the preliminary injunction.

AFFIRMED.

BEEZER, Circuit Judge, concurring:

I agree that the ordinance denied the air carriers procedural due process. Because this conclusion is sufficient to void Long Beach City Ordinance C-6278 (July 22, 1986) and to affirm the district court's judgment, I do not believe it necessary or appropriate to address other grounds on which the judgment may have been based.

FN1.

U.S. Const. art. VI, cl. 2.

FN2.

Although the authority of airport proprietors to enact noise regulations is not preempted by federal law, this authority is not without limits. *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1393 (9th Cir.1991) (" 'the power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory' "). Airport proprietors who exceed their regulatory authority risk having federal funds withheld by the Federal Aviation Administration. *Id.* at 1394-95. Whether the FAA is required to approve of a local noise regulation is a different question from whether the regulation is constitutional, and the analysis in *City and County of San Francisco*, has no application to this case.

FN3.

Only eight Justices participated in the *Raymond Motor* decision. Both the lead opinion, for a plurality of four, and the concurring opinion, for the other four Justices, note that the State of Wisconsin had not asserted a legitimate safety-based justification for the regulation. See 434 U.S. at 447-48, 98 S.Ct. at 797-98; *id.* at 450-51, 98 S.Ct. at 798-99.

National Park System: administration; declaration of findings and purpose

16 U.S.C.A. § 1a-1

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 1--NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND
SEASHORES
SUBCHAPTER I--NATIONAL PARK SERVICE

Current through P.L. 106-38, approved 7-22-99

§ 1a-1. National Park System: administration; declaration of findings and purpose

Congress declares that the national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States, its territories and island possessions; that these areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States; and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system. Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 1c of this title, shall be consistent with and founded in the purpose established by section 1 of this title, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

CREDIT(S)

1992 Main Volume

(Pub.L. 91-383, § 1, Aug. 18, 1970, 84 Stat. 825; Pub.L. 95-250, Title I, § 101(b), Mar. 27, 1978, 92 Stat. 166.)

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. House Report No. 91-1265, see 1970 U.S. Code Cong. and Adm. News, p. 3785.

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1978 Acts. House Report No. 95-581 (Part I and II) and House Conference Report No. 95-931, see 1978 U.S. Code Cong. and Adm. News, p. 463.

References in Text

This Act, referred to in text, means Pub.L. 91-383, Aug. 18, 1970, 84 Stat. 825, as amended. As originally enacted, Pub.L. 91-383 contained sections 1 to 4, the first 3 of which enacted sections 1a-1 and 1a-2 and amended sections 1b and 1c of this title. Pub.L. 94-458 amended Pub.L. 91-383 by adding sections 5 to 12, which enacted sections 1a-3 to 1a-7, amended sections 17j, 460n-5, 463, 470a, and 559, and repealed sections 10, 10a, 17b-1, and 415 of this title. For complete classification of this Act to the Code, see Tables.

Amendments

1978 Amendments. Pub.L. 95-250 provided that the promotion and regulation of the various areas of the National Park System, as defined in

section 1c of this title, be consistent with and founded in the purpose established by section 1 of this title, to the common benefit of all the people of the United States, and that the authorization of activities be construed and the protection, management, and administration of these areas be conducted in light of the high public value and integrity of the National Park System and not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

Removal of Feral Burros and Horses from Death Valley National Monument

Pub.L. 102-381, Title I, Oct. 5, 1992, 106 Stat. 1384, provided in part: "That in fiscal year 1993 and thereafter, the National Park Service may use helicopters and motorized equipment at Death Valley National Monument for removal of feral burros and horses."

Study of Air Traffic Over Grand Canyon

Pub.L. 102-581, Title I, § 134, Oct. 31, 1992, 106 Stat. 4887, provided that:

"(a) Study.--The Administrator of the Federal Aviation Administration, in consultation with the Director of the National Park Service, the State of Arizona, the State of Nevada, the Clark County Department of Aviation, affected Indian tribes, and the general public, shall conduct a study on increased air traffic over Grand Canyon National Park.

"(b) Report.--The Administrator of the Federal Aviation Administration shall submit to Congress a report on the results of the study conducted under subsection (a). The report shall include the following:

"(1) A report on the increase in air traffic over Grand Canyon National Park since 1987.

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"(2) A forecast of the increase in air traffic over Grand Canyon National Park through 2010.

"(3) A report on the carrying capacity of the airspace over Grand Canyon National Park to ensure aviation safety and to meet the requirements established by section 3 of the Act of August 18, 1987 (Public Law 100-91; 101 Stat. 676) [set out in a note under this section], including the substantial restoration of natural quiet at the Park.

"(4) A plan of action to manage increased air traffic over Grand Canyon National Park to ensure aviation safety and to meet the requirements established by such section 3 of the Act of August 18, 1987 [section 3 of Pub.L. 100-91, set out in a note under this section], including any measures to encourage or require the use of quiet aircraft technology by commercial air tour operators."

Study to Determine Appropriate Minimum Altitude for Aircraft Flying Over National Park System Units

Pub.L. 100-91, Aug. 18, 1987, 101 Stat. 674, provided that:

"Section 1. Study of park overflights

"(a) Study by Park Service.--The Secretary of the Interior (hereinafter referred to as the 'Secretary'), acting through the Director of the National Park Service, shall conduct a study to determine the proper minimum altitude which should be maintained by aircraft when flying over units of the National Park System. The Secretary of Transportation, acting through the Administrator of the Federal Aviation Administration (hereinafter referred to as the 'Administrator'), shall provide technical assistance to the Secretary in carrying out the study.

"(b) General requirements of study.--The study shall identify any problems associated with overflight by aircraft of units of the National Park System and shall provide information regarding the types of overflight which may be impacting on park unit resources. The study shall distinguish between the impacts caused by sightseeing aircraft, military aircraft, commercial aviation, general aviation, and other forms of aircraft which affect such units. The study shall identify those park system units, and portions thereof, in which the most serious adverse impacts from aircraft overflights exist.

"(c) Specific requirements.--The study under this section shall include research at the following units of the National Park System: Cumberland Island National Seashore, Yosemite National Park, Hawaii Volcanoes National Park, Haleakala National Park, Glacier National Park, and Mount Rushmore National Memorial, and at no less than four additional units of the National Park System, excluding all National Park System units in the State of Alaska. The research at each such unit shall provide information and an evaluation regarding each of the following:

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"(1) the impacts of aircraft noise on the safety of the park system users, including hikers, rock-climbers, and boaters;

"(2) the impairment of visitor enjoyment associated with flights over such units of the National Park System;

"(3) other injurious effects of overflights on the natural, historical, and cultural resources for which such units were established; and

"(4) the values associated with aircraft flights over such units of the National Park System in terms of visitor enjoyment, the protection of persons or property, search and rescue operations and firefighting.

Such research shall evaluate the impact of overflights by both fixed-wing aircraft and helicopters. The research shall include an evaluation of the differences in noise levels within such units of the National Park System which are associated with flight by commonly used aircraft at different altitudes. The research shall apply only to overflights and shall not apply to landing fields within, or adjacent to, such units.

"(d) Report to Congress.--The Secretary shall submit a report to the Congress within 3 years after the enactment of this Act [Aug. 18, 1987] containing the results of the study carried out under this section. Such report shall also contain recommendations for legislative and regulatory action which could be taken regarding the information gathered pursuant to paragraphs (1) through (4) of subsection (c). Before submission to the Congress, the Secretary shall provide a draft of the report and recommendations to the Administrator for review. The Administrator shall review such report and recommendations and notify the Secretary of any adverse effects which the implementation of such recommendations would have on the safety of aircraft operations. The Administrator shall consult with the Secretary to resolve issues relating to such adverse effects. The final report shall include a finding by the Administrator that implementation of the recommendations of the Secretary will not have adverse effects on the safety of aircraft operations, or if the Administrator is unable to make such finding, a statement by the Administrator of the reasons he believes the Secretary's recommendations will have an adverse effect on the safety of aircraft operations.

"(e) FAA review of rules.--The Administrator shall review current rules and regulations pertaining to flights of aircraft over units of the National Park System at which research is conducted under subsection (c) and over any other such units at which such a review is determined necessary by the Administrator or is requested by the Secretary. In the review under this subsection, the Administrator shall determine whether changes are needed in such rules and regulations on the basis of aviation safety. Not later than 180 days after the identification of the units of the National Park System for which research is to be conducted under subsection (c), the Administrator shall submit a report to Congress containing the results of the review along with recommendations for legislative and regulatory action which are needed to implement any such changes.

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"(f) Authorization.--There are authorized to be appropriated such sums as may be necessary to carry out the studies and review under this section.

"Sec. 2. Flights over Yosemite and Haleakala during study and review

"(a) Yosemite National Park.--During the study and review periods provided in subsection (c), it shall be unlawful for any fixed wing aircraft or helicopter flying under visual flight rules to fly at an altitude of less than 2,000 feet over the surface of Yosemite National Park. For purposes of this subsection, the term 'surface' refers to the highest terrain within the park which is within 2,000 feet laterally of the route of flight and with respect to Yosemite Valley such term refers to the upper-most rim of the valley.

"(b) Haleakala National Park.--During the study and review periods provided in subsection (c), it shall be unlawful for any fixed wing aircraft or helicopter flying under visual flight rules to fly at an altitude below 9,500 feet above mean sea level over the surface of any of the following areas in Haleakala National Park: Haleakala Crater, Crater Cabins, the Scientific Research Reserve, Halemau Trail, Kaupo Gap Trail, or any designated tourist viewpoint.

"(c) Study and review periods.--For purposes of subsections (a) and (b), the study period shall be the period of the time after the date of enactment of this Act [Aug. 18, 1987] and prior to the submission of the report under section 1. The review period shall comprise a 2-year period for Congressional review after the submission of the report to Congress.

"(d) Exceptions.--The prohibitions contained in subsections (a) and (b) shall not apply to any of the following:

"(1) emergency situations involving the protection of persons or property, including aircraft;

"(2) search and rescue operations;

"(3) flights for purposes of firefighting or for required administrative purposes; and

"(4) compliance with instructions of an air traffic controller.

"(e) Enforcement.--For purposes of enforcement, the prohibitions contained in subsections (a) and (b) shall be treated as requirements established pursuant to section 307 of the Federal Aviation Act of 1958 [section 1348 of Title 49, Transportation]. To provide information to pilots regarding the restrictions established under this Act [this note], the Administrator shall provide public notice of such restrictions in appropriate Federal Aviation Administration publications as soon as practicable after the enactment of this Act [Aug. 18, 1987].

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"Sec. 3. Grand Canyon National Park

"(a) Noise associated with aircraft overflights at the Grand Canyon National Park is causing a significant adverse effect on the natural quiet and experience of the park and current aircraft operations at the Grand Canyon National Park have raised serious concerns regarding public safety, including concerns regarding the safety of park users.

"(b) Recommendations.--

"(1) Submission.--Within 30 days after the enactment of this Act [Aug. 18, 1987], the Secretary shall submit to the Administrator recommendations regarding actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights. The recommendations shall provide for substantial restoration of the natural quiet and experience of the park and protection of public health and safety from adverse effects associated with aircraft overflight. Except as provided in subsection (c), the recommendations shall contain provisions prohibiting the flight of aircraft below the rim of the Canyon, and shall designate flight free zones. Such zones shall be flight free except for purposes of administration and for emergency operations, including those required for the transportation of persons and supplies to and from Supai Village and the lands of the Havasupai Indian Tribe of Arizona. The Administrator, after consultation with the Secretary, shall define the rim of the Canyon in a manner consistent with the purposes of this paragraph.

"(2) Implementation.--Not later than 90 days after receipt of the recommendations under paragraph (1) and after notice and opportunity for hearing, the Administrator shall prepare and issue a final plan for the management of air traffic in the air space above the Grand Canyon. The plan shall, by appropriate regulation, implement the recommendations of the Secretary without change unless the Administrator determines that implementing the recommendations would adversely affect aviation safety. If the Administrator determines that implementing the recommendations would adversely affect aviation safety, he shall, not later than 60 days after making such determination, in consultation with the Secretary and after notice and opportunity for hearing, review the recommendations consistent with the requirements of paragraph (1) to eliminate the adverse effects on aviation safety and issue regulations implementing the revised recommendations in the plan. In addition to the Administrator's authority to implement such regulations under the Federal Aviation Act of 1958 [section 1301 et seq. of Title 49], the Secretary may enforce the appropriate requirements of the plan under such rules and regulations applicable to the units of the National Park System as he deems appropriate.

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"(3) Report.--Within 2 years after the effective date of the plan required by subsection (b)(2), the Secretary shall submit to the Congress a

report discussing--

"(A) whether the plan has succeeded in substantially restoring the natural quiet in the park; and

"(B) such other matters, including possible revisions in the plan, as may be of interest.

The report shall include comments by the Administrator regarding the effect of the plan's implementation on aircraft safety.

"(c) Helicopter flights of river runners.--Subsection (b) shall not prohibit the flight of helicopters--

"(1) which fly a direct route between a point on the north rim outside of the Grand Canyon National Park and locations on the Hualapai Indian Reservation (as designated by the Tribe); and

"(2) whose sole purpose is transporting individuals to or from boat trips on the Colorado River and any guide of such a trip.

"Sec. 4. Boundary Waters Canoe Area Wilderness

"The Administrator shall conduct surveillance of aircraft flights over the Boundary Waters Canoe Area Wilderness as authorized by the Act of October 21, 1978 (92 Stat. 1649-1659) for a period of not less than 180 days beginning within 60 days of enactment of this Act [Aug. 18, 1987]. In addition to any actions the Administrator may take as a result of such surveillance, he shall provide a report to the Committee on Interior and Insular Affairs [now Committee on Natural Resources] and the Committee on Public Works and Transportation of the United States House of Representatives and to the Committee on Energy and Natural Resources and the Committee on Commerce, Science, and Transportation of the United States Senate. Such report is to be submitted within 30 days of completion of the surveillance activities. Such report shall include but not necessarily be limited to information on the type and frequency of aircraft using the airspace over the Boundary Waters Canoe Area Wilderness.

"Sec. 5. Assessment of National Forest System wilderness overflights

"(a) Assessment by Forest Service.--The Chief of the Forest Service (hereinafter referred to as the 'Chief') shall conduct an assessment to determine what, if any, adverse impacts to wilderness resources are associated with overflights of National Forest System wilderness areas. The Administrator of the Federal Aviation Administration shall provide technical assistance to the Chief in carrying out the assessment. Such assessment shall apply only to overflight of wilderness areas and shall not apply to aircraft flights or landings adjacent to National Forest System wilderness units. The assessment shall not apply to any National Forest System wilderness units in the State of Alaska.

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"(b) Report to Congress.--The Chief shall submit a report to Congress within 2 years after enactment of this Act [Aug. 18, 1987] containing the results of the assessments carried out under this section.

"(c) Authorization.--Effective October 1, 1987, there are authorized to be appropriated such sums as may be necessary to carry out the assessment under this section.

"Sec. 6. Consultation with Federal agencies

"In conducting the study and the assessment required by this Act [this note], the Secretary of the Interior and the Chief of the Forest Service shall consult with other Federal agencies that are engaged in an analysis of the impacts of aircraft overflights over federally-owned land."

[Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Public Works and Transportation of the House of Representatives treated as referring to the Committee on Transportation and Infrastructure of the House of Representatives, see section 1(a)(9) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.]

[Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Natural Resources of the House of Representatives treated as referring to the Committee on Resources of the House of Representatives, see section 1(a)(8) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.]

REFERENCES

LIBRARY REFERENCES

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U.S. Supreme Court Reports

NORTHWEST AIRLINES v. MINNESOTA, 322 U.S. 292 (1944)

NORTHWEST AIRLINES, INC. v. MINNESOTA.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 33.

Argued October 19, 20, 1944.

Decided May 15, 1944.

A corporation which was incorporated under the laws of Minnesota, and which had its principal place of business in that State, owned and operated in interstate commerce a fleet of airplanes; for all of the planes, a city within the State was the home port registered with the Civil Aeronautics Authority and the overhaul base; and none of the planes was continuously without the State during the whole tax year. *Held* that a general Minnesota personal property tax applied to all personal property within the State and without discrimination applied on the corporation's entire fleet of airplanes did not violate the commerce clause, nor the due process clause of the Fourteenth Amendment, of the Federal Constitution. Pp. 293, 300.

[213 Minn. 395](#), [7 N.W.2d 691](#), affirmed.

CERTIORARI, 319 U.S. 734, to review the affirmance of a judgment for the State in a suit against the company to recover delinquent personal property taxes.

Mr. Michael J. Doherty, with whom *Mr. W.E. Rumble* was on the brief, for petitioner.

Mr. Andrew R. Bratter and *Mr. George B. Sjoselius*, Assistant Attorney General of Minnesota, with whom *Messrs. J.A.A. Burnquist*, Attorney General, and *James F. Lynch* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER announced the conclusion and judgment of the Court.

The question before us is whether the Commerce Clause or the Due Process Clause of the Fourteenth Amendment bars the State of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of

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settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn.

Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana,

Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from State to State, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, § 273.01), Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the State. [213 Minn. 395](#) Page 294, [7 N.W.2d 691](#). A new phase of an old problem led us to bring the case here. 319 U.S. 734.

The tax here assessed by Minnesota is a tax assessed upon "all personal property of persons residing therein, including the property of corporations . . ." Minn. Stat. 1941, § 272.01. It is not a charge laid for engaging in interstate commerce or upon airlines specifically; it is not aimed by indirection against interstate commerce or measured by such commerce. Nor is the tax assessed against planes which were "continuously without the State during the whole tax year," *N.Y. Central & H.R.R. Co. v. Miller*, [202 U.S. 584](#), 594, and had thereby acquired "a permanent location elsewhere," *Southern Pacific Co. v. Kentucky*, [222 U.S. 63](#), 68; and see *Cream of Wheat Co. v. Grand Forks*, [253 U.S. 325](#), 328-330.

Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes - its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota - are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the "home port" of all its planes. The relation between Northwest and Minnesota - a relation existing between no other State and Northwest - and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*, [316 U.S. 174](#), 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature

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and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to

no other State. It is too late to suggest that this taxing power of a State is less because the tax may be reflected in the cost of transportation. See *Delaware Railroad Tax*, 18 Wall. 206, 232.

Such being the case, it is clearly ruled by *N.Y. Central & H.R.R. Co. v. Miller*, *supra*. Here, as in that case, a corporation is taxed for all its property within the State during the tax year none of which was "continuously without the State during the whole tax year." Therefore the doctrine of *Union Transit Co. v. Kentucky*, [199 U.S. 194](#), does not come into play. The fact that Northwest paid personal property taxes for the year 1939 upon "some proportion of its full value" of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, *i.e.*, a taxing situs, elsewhere.[\[fn1\]](#) That
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was the decisive feature of the *Miller* case, and it was deemed decisive as late as 1933 in *Johnson Oil Co. v. Oklahoma*, [290 U.S. 158](#), which was strongly pressed upon us by Northwest. In that case it was not the home State, Illinois, but a foreign State, Oklahoma, which was seeking to tax a whole fleet of tank cars used by the oil company. That case fell outside of the decision of the *Miller* case and ours falls precisely within it. "Appellant had its domicile in Illinois," as Mr. Chief Justice Hughes pointed out, "and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere." 290 U.S. at 161.[\[fn2\]](#) This constitutional basis for what Minnesota did reflects practicalities in the relations between the States and air transportation. "It has been customary to tax operating airplanes at their overhaul
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base." Thompson, *State and Local Taxation Affecting Air Transportation* (1933) 4 J. Air L. 479, 483.

The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier "engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run." *Union Transit Co. v. Kentucky*, *supra*, at 206. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. (Thus, for instance, "The coaches of the company . . . are daily passing from one end of the State to the other," in *Pullman's Car Co. v. Pennsylvania*, *supra*, at 20, citing the opinion of the court below in 107 Pa. 156, 160.) The continuous protection by a State other than the domiciliary State - that is, protection throughout the tax year - has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. For reasons within its own sphere of choice Congress at one time chartered interstate carriers and at other times has left the chartering and all that goes with it to the States. That is a practical fact of legislative choice and a practical fact

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from which legal significance has always followed. That far-reaching fact was recognized, as a matter of course, by Mr. Justice Bradley in his dissent in the *Pullman's Car Co.* case, *supra*, at 32. Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State.^[fn3] And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.

Such was the unanimous decision in the *Miller* case or the *Miller* case decided nothing. The present case is precisely the case which Mr. Justice Holmes assumed the *Miller* case to be. By substituting Minnesota for New York we have inescapably the facts of the present case: "Suppose, then, that the State of Minnesota had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed

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if it is permanently out of the State. . . . But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the State of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *N.Y. Central & H.R.R. Co. v. Miller, supra*, at 596-597.^[fn4] Surely, the power of the State of origin to "tax its own corporations for all their property within the State during the tax year" cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as the property is not "continuously without the State during the whole tax year," *N.Y. Central & H.R.R. Co. v. Miller, supra*, at 594, even when, as in the *Miller* case, from 12% to 64% of the property was shown to have been used outside of New York during the tax year, but in no one visited State permanently, that is, for the whole year. And that is the decisive constitutional fact about the *Miller* case - that although from 12% to 64% of the rolling stock of the railroad was outside of New York throughout the tax year, New York was nevertheless allowed to tax it all because no part was in any other State throughout the year.

To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional

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innovation. It is to introduce practical dislocation into the established taxing systems of the States. The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the States and interstate transportation and communication conducted on land and thereby forming a part of the organic life of these States. Although a part of the taxing systems of this country, the rule of

apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce.^[fn5] To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.

The doctrine in the *Miller* case, which we here apply, does not subject property permanently located outside of the domiciliary State to double taxation. But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere. And what the *Miller* case decided is that neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.

Each new means of interstate transportation and communication has engendered controversy regarding the

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taxing powers of the States *inter se* and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been the source of difficulty and dissatisfaction for us, see J.B. Moore, *Taxation of Movables and the Fourteenth Amendment* (1907) 7 Col. L. Rev. 309; Groves, *Intergovernmental Fiscal Relations*, Proceedings Thirty-fifth Annual Conference, National Tax Association, p. 105, and have equally plagued the British federal systems, see Report of the [Australian] Royal Commission on the Constitution, (1929) c. XII (p. 127), c. XIX (p. 187), c. XXIII (at p. 259); Report of the [Canadian] Royal Commission on Dominion-Provincial Relations, (1940) Bk. I, c. VIII, Bk. II, § B, c. III. In response to arguments addressed also to us about the dangers of harassing state taxation affecting national transportation, the concurring judge below adverts to the power of Congress to incorporate airlines and to control their taxation. But insofar as these are matters that go beyond the constitutional issues which dispose of this case, they are not our concern.

Affirmed.

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In the *Miller* case, the New York Central Railroad introduced evidence that during the taxable years in question, a proportion of its cars, ranging from about 12% to 64%, was used outside of New York. This figure was arrived at by using the ratio between Central's mileage outside of New York and its total mileage. The comptroller nevertheless ruled that all of Central's cars were taxable in New York, the State of domicile. On review of this ruling as applied in the first tax year involved, the New York Court of Appeals remitted the proceedings to the comptroller to determine whether any of the rolling stock was used exclusively out of the State. 173 N.Y. 255, 65 N.E. 1102. No such evidence was introduced for any tax year, although there was evidence to show "that a certain proportion of cars, although

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not the same cars, was continuously without the State during the whole tax year." [202 U.S. 584](#), 594. The comptroller made no reduction in the tax, and this action was affirmed by the Appellate Division (89 App. Div. 127, 84 N.Y.S. 1088), the Court

of Appeals (177 N.Y. 584, 69 N.E. 1129) and on review here.

[fn2] Page 296

In the *Johnson Oil Co.* case, *supra*, this Court reaffirmed not less than three times that the State of domicile has jurisdiction to tax the personal property of its corporation unless such property has acquired an "actual situs" in another State. And by "actual situs" it meant, as its references to *Union Transit Co. v. Kentucky*, *supra*, and the *Miller* case indicate, what those cases required for "actual situs" before the constitutional power of the domiciliary State to tax could be curtailed, namely continuous presence in another State which thereby supplants the home State and acquires the taxing power over personality that has become a permanent part of the foreign State. Surely the situs which personal property may acquire for tax purposes in a State other than that of the owner's domicile cannot be made to depend on some undefined concept of "permanence" short of a tax year, leaving the adequate size of the fraction of the tax year for judicial determination in each year. Such a doctrine would play havoc with the tax laws of the forty-eight States. It would multiply manifold the recognized difficulties of ascertaining the domicile of individuals. See *Texas v. Florida*, [306 U.S. 398](#); *District of Columbia v. Murphy*, [314 U.S. 441](#).

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In the most recent apportionment case to come before this Court, *Nashville, C. & St. L. Ry. v. Browning*, [310 U.S. 362](#), we merely sustained the application by the Tennessee Railroad Commission and the Tennessee Supreme Court of a "familiar and frequently sanctioned formula" for apportionment on a mileage basis against the claim of the inapplicability of this formula in the circumstances of that case because of the disparity in the revenue-producing capacity between the lines in and out of Tennessee. Mathematical exactitude in making the apportionment has never been a constitutional requirement. That is the essence of the *Browning* holding. No suggestion can be found at any stage of that litigation in any wise touching the present problem, namely, whether the domiciliary State is constitutionally limited in taxing all the movables that come within it except by the *Union Transit* doctrine, that a proportion which had during the entire tax year been within another State cannot be taxed in the domiciliary State.

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In speaking of "occasional excursions to foreign parts" and "random excursions" (202 U.S. at 597), Mr. Justice Holmes merely put colloquially the legally significant fact that neither any specific cars nor any average of cars was so continuously in any other State as to have been withdrawn from the home State and to have established for tax purposes an adopted home State.

[fn5] Page 300

And that the constitutional power of the domiciliary State to tax vessels is precisely the same as its power to tax rolling stock is conclusively shown by the Court's reliance in the *Miller* case on a case decided a week before, namely, *Ayer & Lord Co. v. Kentucky*, [202 U.S. 409](#).

MR. JUSTICE BLACK, concurring:

I concur in the judgment of the Court and in substantially all that is said in the opinion, but I would not in this case foreclose consideration of the taxing rights of States other than Minnesota.

I believe there is small support in reason or in the

Constitution for the doctrine that the Commerce Clause in and of itself prohibits a state from applying its general tax laws to transactions and properties in interstate commerce unless it is able to make two correct prophecies as to what this Court ultimately may hold, namely, (1) The permissible total of taxes which might be imposed by an aggregate of states on the taxed properties or transactions; and (2) The proportion of this total which the state itself

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fairly may claim. See dissenting opinions in *Adams Manufacturing Co. v. Storen*, [304 U.S. 307](#), 316; *Gwin, White & Prince v. Henneford*, [305 U.S. 434](#), 442. Extension of this dubious doctrine to the new problems of air transport gives promise of little but tax confusion.

The differing views of members of the Court in this and related cases illustrate the difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce. These problems, it seems to me, call for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution. See dissenting opinion, *McCarroll v. Dixie Greyhound Lines*, [309 U.S. 176](#), 183.

MR. JUSTICE JACKSON, concurring:

This case considers for the first time constitutional limitations upon state power to tax airplanes. Several principles of limitation have been judicially evolved in reference to ships and to railroad rolling stock. The question is which, if any, of these should be transferred to air transport.

We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons v. Ogden*, 9 Wheat. 1, came before this Court. Any authorization of local burdens on our national air commerce will lead to their multiplication in this country. Moreover, such an example is not likely to be neglected by other revenue-needy nations as international air transport expands.

Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery

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of the universe has been modified. Today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat. 1, to *United States v. Appalachian Power Co.*, [311 U.S. 377](#). Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Congress has recognized the national responsibility for

regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to

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the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether. Our function is to determine what rule governs in the absence of such legislative enactment.

Certainly today flight over a state either casually or on regular routes and schedules confers no jurisdiction to tax. Earlier ideas of a state's sovereignty over the air above it might argue for such a right to tax, but it is one of those cases where legal philosophy has to take account of the fact that the world does move.

Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. *Hays v. Pacific Mail S.S. Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; cf. *Ayer & Lord Tie Co. v. Kentucky*, [202 U.S. 409](#). I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again.

What, then, remains as a basis for Minnesota's claim to tax this entire fleet of planes at their full value as property of the State of Minnesota? They have been within the state only transiently and in the same manner in which they have been in many states: to serve the public and to be serviced. The planes have received no "protection"

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or "benefit" from Minnesota that they have not received from many others. It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. But no distinction whatever can be pointed out between those extended by Minnesota and those extended by any state where there is a terminal or a stopping place.

But it is said that Minnesota incorporated the company. Of course it is her right to tax the company she has created and the franchise she has granted. I suppose there are many ways that she

franchise she has granted. I suppose there are many ways that she might constitutionally measure the value of this privilege. If she chartered a corporation on condition that all property it might acquire, tangible or intangible, should be taxable under her laws, I do not think a company which accepted such a charter could appeal to the Constitution to give back what it voluntarily contracted away. But no such stipulation has been made in the charter in this case. The tax imposed here is a general *ad valorem* property tax on the full value of every plane of the fleet operated by this company. Domicile of an owner is a usual test of power to tax intangibles, but has not generally been a conclusive test of taxability of tangible property situated elsewhere. If we should suppose that this corporation had a Delaware charter instead of a Minnesota one, and had nothing in Delaware except its agent, but operated otherwise in Minnesota exactly as it has done, would we say that the entire right to tax the fleet moved to Delaware because it was the corporation's state of domicile? I do not think that domicile, in the facts of this case, is decisive of Minnesota's claim to tax the tangible property of the company wherever situate.

It is strongly and plausibly advocated that the theory of apportionment of the total value among the several states of operation, heretofore applied to state taxation

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of railroad rolling stock, be transferred to air transportation. This would mean that each state of operation (no one ventures to say whether flight alone or both flight and landing would be required) could tax a proportion of the total value.

The apportionment theory is a mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. It is a practical, but rather illogical, device to prevent duplication of tax burdens on vehicles in transit. It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes.

It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help. The best analogy that I find in existing decisions is the "home port" theory applied to ships. See *Hays v. Pacific Mail S.S. Co., St.*

Louis v. Ferry Co., Morgan v. Parham, supra. There is difficulty in the application of this doctrine to air commerce, I grant. There is no statutory machinery for fixing the home port. If federal registration established statehood as it establishes nationality, the home port doctrine would be easy to apply. However, on the record before us it seems unquestioned that Minnesota is in an operational as well as in a domiciliary sense the home port of this fleet. On that doctrine Minnesota can tax the fleet, but its right to do so is exclusive,

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for no other state can acquire jurisdiction to tax merely because it provides a port of call. I therefore concur in the conclusion reached by the opinion of MR. JUSTICE FRANKFURTER. I do not accept the opinion because it falls short of commitment that Minnesota's right is exclusive of any similar right elsewhere. It is, I know, difficult to judge and dangerous to foreclose claims

of other states that are not before us. That is the weakness of the judicial process in these tax questions where the total problem that faces an industry reaches us only in installments. If the reasoning should hereafter be extended to support full taxation everywhere, it would offend the commerce clause, as I see it, even more seriously than apportioned taxation everywhere.

The evils of local taxation of goods or vehicles in transit are not measured by the exaction of one locality alone, but by the aggregation of them. I certainly do not favor exemption of interstate commerce from its "just share of taxation." But history shows that fair judgment as to what exactions are just to the passer-by cannot be left to local opinion. When local authority is taxing its own, the taxed ones may be assumed to be able to protect themselves at the polls. No such sanction enforces fair dealing to the transient. In all ages and climes those who are settled in strategic localities have made the moving world pay dearly. This the commerce clause was designed to end in the United States.

The rule I suggest seems most consonant with the purposes of the commerce clause among those found in our precedents. But the whole problem we deal with is unprecedented. I do not think we can derive from decisional law a satisfactory adjustment of the conflicting needs of the nation for free air commerce and the natural desire of localities to have revenue from the business that goes on about them.
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I concur in the affirmance of the judgment below, but only because the record seems to me to establish Minnesota as a "home port" within the meaning of the old and somewhat neglected but to me wise authorities cited.

MR. CHIEF JUSTICE STONE, dissenting:

In my opinion the Minnesota levy imposed an unconstitutional tax on petitioner's vehicles of interstate transportation in violation of the commerce clause, and for that reason the judgment below should be reversed.

Petitioner, a Minnesota corporation, is owner of a large number of airplanes which it uses exclusively in interstate transportation moving on regular schedules and over fixed routes extending through eight states between Chicago, Illinois, and the Pacific coast, with the usual landing fields and maintenance bases at intermediate points, including Minneapolis and St. Paul, Minnesota. It is stipulated that on May 1, 1939, 14% of the total mileage of the prescribed interstate routes was in Minnesota and that 16% of the daily plane mileage of all petitioner's interstate planes was in that state.

Although the Minnesota statute taxing personal property directs that it shall be listed for taxation on May 1st of each year and assessed for taxation at its value on that date, Minn. Stat. 1941 § 273.01, the state taxing authorities have levied on petitioner, and the Minnesota Supreme Court and this Court have sustained, an annual tax on the full value of all its planes used in interstate commerce which have come into the state at any time during the year. It is evident that if, with the Minnesota tax now sustained, other states are left free to impose a further or comparable tax on the same property for the same tax period, a serious question is raised whether the tax is not a prohibited burden on interstate commerce.

It is no longer doubted that interstate business "must pay its

way" by sustaining its fair share of the property

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tax burden which the states in which the interstate business is done may lawfully impose generally on property located within them. See *Western Live Stock v. Bureau*, [303 U.S. 250](#), 254-5 and cases cited. Obviously interstate business bears no undue part of that burden if the personal property tax imposed on it by a given state is - like a tax on real estate located there - exclusive of all other property taxes imposed by other states, as is the case with the taxation of vessels, *Old Dominion S.S. Co. v. Virginia*, [198 U.S. 299](#); *Southern Pacific Ry. v. Kentucky*, [222 U.S. 63](#) and cases cited; cf. *N.Y. Central & H.R.R. Co. v. Miller*, [202 U.S. 584](#), or if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state, as has until now been the rule as to railroad cars. *Marye v. Baltimore & Ohio R. Co.*, 127 U.S. 117, 123-4; *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18; *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70; *Union Transit Co. v. Lynch*, [177 U.S. 149](#); *Union Transit Co. v. Kentucky*, [199 U.S. 194](#); *Germania Refining Co. v. Fuller*, 245 U.S. 632; *Union Tank Line Co. v. Wright*, [249 U.S. 275](#); *Johnson Oil Co. v. Oklahoma*, [290 U.S. 158](#).

If the tax levied here were held to be exclusive of all property taxes imposed on petitioner's airplanes by other states there could be no serious question of an undue burden on interstate commerce. That question arises now only because the rationale found necessary to support the present tax leaves other states free to impose comparable taxes on the same property used in interstate commerce which Minnesota has already taxed for the entire taxable year and at its full value.

Such, I think, is the necessary consequence of the Court's decision and judgment now given. They do not sustain the tax on the ground that Minnesota, as the state of petitioner's domicile, has exclusive power to tax respondent's

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planes which pass in and out of Minnesota in performance of their interstate functions. They do not deny that the planes are constitutionally subject, to some extent, to personal property taxes by the states through which they pass. Our decisions, as will presently appear, establish that they are, and that vehicles of interstate transportation moving from the state of the owner's domicile over regular routes within the jurisdiction of other states also acquire a tax situs there, so that, to an extent presently to be considered, they may be taxed by each of the states through which they pass. In fact the record discloses that petitioner's interstate planes, already taxed by Minnesota for their full value, are in addition subjected to personal property taxes in six of the seven other states through which they fly.

But if petitioner's airplanes, which are taxable for some portion of their value in each of the states in which they carry on interstate transportation over fixed routes and regular schedules, are also taxed for their full value by Minnesota, the state of the domicile, it is evident that merely because they are engaged in interstate commerce they may be subjected to multiple state taxation far in excess of their value, and far beyond any tax which any one of the states concerned could under its established system of taxation impose on vehicles whose movements are confined within its territorial limits. It is a scheme of property taxation on which, so far as the decision now rendered gives us any hint, the commerce clause sets no restriction, but which is so burdensome in its operation as compared with the taxes imposed on intrastate vehicles that few interstate carriers

could support it and survive economically.

The case thus sharply presents in a new form the old question whether the commerce clause affords any protection against multiple state taxation of the physical

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facilities used in interstate transportation which, because they move from state to state, are exposed to full taxation in each, save only as the due process and commerce clauses may prevent. Although the question is new in form it is old in substance and this Court has considered it so often in other but similar relationships that the answer here seems plain.

Of controlling significance in this case are certain elementary propositions, so long accepted and applied by this Court that they cannot be said to be debatable here, although they seem not to have been taken into account in deciding this case either here or in the Minnesota Supreme Court. The first is that the constitutional basis for the state taxation of the airplanes, which are chattels, is their physical presence within the taxing state, and not the domicile of the owner. *Union Transit Co. v. Kentucky*, *supra*; *Johnson Oil Co. v. Oklahoma*, *supra*, 161-2 and cases cited. In this respect, as this Court has often pointed out, the taxation of chattels rests on a different basis than does the taxation of intangibles, which have no physical situs and may be reached by the tax gatherer only through exertion of the power of the state over the person of those who have some legal interest in the intangibles. *Union Transit Co. v. Kentucky*, *supra*, 205-6; *Schwab v. Richardson*, [263 U.S. 88](#), 92; *Frick v. Pennsylvania*, [268 U.S. 473](#), 494; *Blodgett v. Silberman*, [277 U.S. 1](#), 16-18; *Wheeling Steel Corp. v. Fox*, [298 U.S. 193](#), 209-10; *Curry v. McCannless*, [307 U.S. 357](#), 363-6; *Graves v. Elliott*, [307 U.S. 383](#); *Graves v. Schmidlapp*, [315 U.S. 657](#); *State Tax Comm'n v. Aldrich*, [316 U.S. 174](#).

A state may, within the Fourteenth Amendment, tax a chattel located within its limits, although its owner is domiciled elsewhere. *Brown v. Houston*, 114 U.S. 622; *Coe v. Errol*, 116 U.S. 517; *Pullman's Car Co. v. Pennsylvania*, *supra*; *Old Dominion S.S. Co. v. Virginia*, *supra*.

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But due process precludes the state of the domicile from taxing it unless it is brought within that state's boundaries. *Delaware, L. & W.R. Co. v. Pennsylvania*, [198 U.S. 341](#); *Union Transit Co. v. Kentucky*, *supra*; *Frick v. Pennsylvania*, *supra*, 489 *et seq.* It is plain then that for present purposes, and so far as the Fourteenth Amendment is concerned, respondent's airplanes, which are chattels regularly moving over fixed interstate routes, are subject in some measure to the taxing power of every state in which they regularly stop on their interstate mission.^[fn1]

In some instances it may be that vehicles of transportation moving interstate are so sporadically and irregularly present in other states that they acquire no tax situs there, *Hays v. Pacific Mail S.S. Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Ayer & Lord Tie Co. v. Kentucky*, [202 U.S. 409](#), and hence remain taxable to their full value by the state of the domicile because they are not taxable elsewhere, *N.Y. Central & H.R.R. Co. v. Miller*, *supra*; *Southern Pacific Co. v. Kentucky*, *supra*. But that is not the case as to any of the planes here involved. And our decisions establish that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence, and for that reason remain taxable at the domicile even if never

FOR THAT REASON REMAIN TAXABLE AT THE DOMICILE EVEN IF NEVER
 present there, the state's power to tax chattels depends
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on their physical presence and is neither added to nor subtracted
 from because the taxing state may or may not happen to be the
 state of the owner's domicile.

We need not consider to what extent the due process clause
 limits the taxing power of each state through which airplanes or
 other vehicles of interstate transportation pass, to the taxation
 of part only of their value, fairly related to their use within
 the state, or precluded the Minnesota Supreme Court from
 extending to tangible property moving in more than one state the
 rule of *Curry v. McCanless*, *supra*, and subsequent cases,
 permitting full taxation of intangibles by each state having a
 substantial relationship to the interest taxed. For we are
 dealing here with tangible instrumentalities of interstate
 commerce, entitled as such to the protection afforded by the
 commerce clause from unduly burdensome state taxation, even
 though the tax might otherwise be within the constitutional power
 of the state. And it is plain, as this Court has often held, that
 if one state may impose a personal property tax at full value on
 an interstate carrier's vehicles of transportation, and other
 states through which they pass may also tax them for the same tax
 period, the resulting tax would be destructive of the commerce by
 imposing on it a multiple tax burden to which intrastate carriers
 are not subjected.

This Court has never denied the power of the several states to
 impose a property tax on vehicles used in interstate
 transportation in the taxing state. It has recognized, as we have
 seen, that such instruments of interstate transportation, at
 least if moving over fixed routes on regular schedules, may thus
 acquire a tax situs in every state through which they pass. And
 it has met the problem of burdensome multiple taxation by the
 several states through which such vehicles pass by recognizing
 that the due process clause or the commerce clause or both
 preclude

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each state from imposing on the interstate commerce involved an
 undue or inequitable share of the tax burden. In *Nashville, C. &
 St. L. Ry. v. Browning*, [310 U.S. 362](#), 365, we recently
 considered "the guiding principles for adjustment of the state's
 right to secure its revenues and the nation's duty to protect
 interstate transportation." We declared that "The problem to be
 solved is what portion of an interstate organism may
 appropriately be attributed to each of the various states in
 which it functions." And, in sustaining the tax, apportioned
 according to mileage, upon the entire property, including rolling
 stock, of an interstate railroad, imposed by Tennessee, the state
 of the owner's domicile, in which its principal business office
 and over 70% of its trackage was located, we said that the state
 could not "use a fiscal formula . . . to project the taxing power
 of the state plainly beyond its borders."

This Court has accordingly held invalid state taxation of
 vehicles of interstate transportation unless the tax is equitably
 apportioned to the use of the vehicles within the state compared
 to their use without, whether the tax is laid by the state of the
 domicile or another.[\[fn2\]](#) Such an

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apportionment has been sustained when made according to the
 mileage traveled within and without the state, *Pullman's Car
 Co. v. Pennsylvania*, *supra*, 26, or the average number of
 vehicles within the taxing state during the tax period. *Marye
 v. Baltimore & Ohio R. Co.*, *supra*; *American Refrigerator Transit
 Co. v. Hall*. *supra*. 82; *Union Transit Co. v. Lynch*.

.../docvue.htm?QueryText=((Northwest+Airlines+)%3CIN%3ECA)&Collections=USCASE 07/07/2000
 supra. [fn3]

But if the tax is laid without apportionment or if the apportionment, when made, is plainly inequitable so as to bear unfairly on the commerce by compelling the carrier to pay to the taxing state more than its fair share of the tax measured by the full value of the property, this Court has set aside the tax as an unconstitutional burden on interstate commerce, whether it be in form on the rolling

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stock, *Union Transit Co. v. Kentucky*, supra; *Union Tank Line Co. v. Wright*, supra; *Johnson Oil Co. v. Oklahoma*, supra, or on the carrier's entire property, *Fargo v. Hart*, [193 U.S. 490](#); or on a franchise or right to do business, *Allen v. Pullman's Car Co.*, [191 U.S. 171](#); *Wallace v. Hines*, [253 U.S. 66](#); *Southern Ry. Co. v. Kentucky*, [274 U.S. 76](#); cf. *Norfolk & Western R. Co. v. Pennsylvania*, 136 U.S. 114.

Upon like principles this Court has consistently held that a tax laid by a state on gross receipts from interstate commerce, which is comparable to a property tax at full value on vehicles of interstate transportation, violates the commerce clause unless equitably apportioned. *Galveston, H. & S.A. Ry. Co. v. Texas*, [210 U.S. 217](#); *Oklahoma v. Wells, Fargo & Co.*, [223 U.S. 298](#); see *Cudahy Packing Co. v. Minnesota*, [246 U.S. 450](#), 453-5; *Pullman Co. v. Richardson*, [261 U.S. 330](#), 338-9. To the same effect as to capital stock taxes, see *Atchison, T. & S.F. Ry. Co. v. O'Connor*, [223 U.S. 280](#), 285 and cases cited.

In many the tax was held invalid although imposed by the state of the domicile of the taxpayer. *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326, 342, overruling *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Crew Levick Co. v. Pennsylvania*, [245 U.S. 292](#); *New Jersey Telephone Co. v. Tax Board*, [280 U.S. 338](#); *Fisher's Blend Station v. Tax Commission*, [297 U.S. 650](#); *Puget Sound Co. v. Tax Commission*, [302 U.S. 90](#); *Adams Mfg. Co. v. Storen*, [304 U.S. 307](#); *Gwin, White & Prince v. Henneford*, [305 U.S. 434](#); see *Western Live Stock v. Bureau*, supra. The same rule is applied to the taxation by the domicile of goods carried interstate, *Case of the State Freight Tax*, 15 Wall. 232; *Eureka Pipe Line Co. v. Hallanan*, [257 U.S. 265](#); and the taxation of goods in transit generally, *Hughes Bros. Co. v. Minnesota*, [272 U.S. 469](#).

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In *Galveston, H. & S.A. Ry. Co. v. Texas*, supra, 228, in which a tax on gross receipts of a railway engaged in interstate commerce was condemned because not apportioned, the Court declared, "Of course, it does not matter that the plaintiffs in error are domestic corporations." The like rule, applied to the taxation by the state of the owner's domicile of railroad property, including rolling stock, was approved in *Nashville, C. & St. L. Ry. v. Browning*, supra. And in *Bacon v. Illinois*, [227 U.S. 504](#), 511-12, the Court was at pains to point out that the power of a state to tax goods in transit is not affected by the fact that it is or is not the domicile of the owner. These cases clearly establish that, whatever relevance domicile may at times have to the power of a state under the due process clause to tax tangibles, it has none to the question whether the exercise of that power so burdens interstate commerce as to violate the commerce clause.

It cannot be said either in point of practicality or of legal theory that anything is added to Minnesota's power to tax by reason of the fact that all of petitioner's aircraft are

registered with the Civil Aeronautics Authority with St. Paul, Minnesota, designated as their "home port." Section 501 of the Civil Aeronautics Act, 52 Stat. 1005, [49 U.S.C. § 521](#), requiring the registration with the Authority of aircraft, merely provides that a certificate of registration "shall be conclusive evidence of nationality for international purposes." Neither the statute nor the regulations adopted under it attach any other consequences to the registration of airplanes at a particular "home port." The much more detailed provisions of R.S. §§ 4141, 4178 as amended, requiring registration of vessels at a particular home port and the painting of the name of that port on the stern of the vessel, have been held irrelevant to state power to tax, even though the port of enrollment is also one at which the vessel regularly calls, *St.*

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Louis v. Ferry Co., *supra*; *Ayer & Lord Tie Co. v. Kentucky*, *supra*; see *Southern Pacific Co. v. Kentucky*, *supra*, 68, 73.

Nor is it of any significance for tax purposes whether Minnesota is "as a business fact the home state of the fleet." While the existence of a business domicile has been thought to afford a basis for the state taxation of intangibles, on the theory that they have become localized there, *Wheeling Steel Corp. v. Fox*, *supra*, 211 *et seq.*, the constitutional bases for the taxation of tangibles and of intangibles are, as we have seen, quite different, and under our decisions, to which we have referred, the only basis for the taxation of tangibles is their physical presence in the taxing jurisdiction. And even the taxation of intangibles of interstate carriers is subject to the rule of apportionment wherever the tax without it would subject the commerce to the burden of multiple state taxation. The "unit rule" for the taxation of interstate carriers applies to tangibles and intangibles alike and requires an equitable apportionment of the tax on both. *Adams Express Co. v. Ohio*, 165 U.S. 194, 222, 226; 166 U.S. 185, 223-4, 225; *Fargo v. Hart*, *supra*, 499; *Oklahoma v. Wells Fargo & Co.*, *supra*, 300; *Wallace v. Hines*, *supra*, 69-70; *Southern Ry. Co. v. Kentucky*, *supra*, 81.

Moreover, the difficulties of applying to aircraft a rule of taxation at a "home port" are essentially those which have led, long since, to the abandonment of the idea by this Court as applied to vessels. Compare *St. Louis v. Ferry Co.*, *supra*; *Ayer & Lord Tie Co. v. Kentucky*, *supra*. While it appears from the present record that petitioner maintains at St. Paul, Minnesota, its airplane and engine overhauling base, at which the principal repairs to planes and engines are made, it also operates maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle,

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Washington, at which points it maintains crews of mechanics and maintenance equipment. It owns and leases hangars and office space at all of its stopping points, each of which are manned by its employees. On the tax day, May 1, 1939, petitioner's planes made no scheduled stop in St. Paul. Thus a number of states have a physical relationship to petitioner's business - by reason of the movement of planes, over the fixed routes, the landing of planes, the maintenance and operation of repair and service equipment, landing fields, hangars, and office buildings, with their attendant employees - which, for practical purposes, is as substantial in nature as that claimed for Minnesota.

Even if we could say on this record that Minnesota and it alone can be regarded as the "home state," we have no assurance that in taxing planes operated by other and more complex business

organizations, one state will have any greater claim to that designation than several others, and the Court's opinion furnishes no test to guide in the choice among them, if choice has any relevance. Nor does it say that the power to tax vehicles of interstate transportation at the domicile or the "home port" is exclusive. Obviously, unless it is deemed to be thus exclusive it does not foreclose any state within which the planes move on fixed routes from imposing a like tax burden. And if it is deemed to be exclusive the other states must be denied their just claims to collect an equitable tax on property regularly used within them in carrying on an interstate business. North Dakota, for instance, in taxing the planes regularly landing within its borders, is not taxing rights originating in and safeguarded by Minnesota, or exercising any rights attributable to Minnesota. No reason appears why North Dakota should be denied the right to tax the planes to the extent that they are within its borders, or why, to that extent, Minnesota

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has any relationship to them sufficient either to enable it to tax them or to preclude North Dakota from taxing them.

The taxation of vehicles of interstate transportation in a business organized and conducted as is petitioner's is as capable of apportionment, and the insupportable multiple tax burden on interstate commerce is as readily avoided by apportionment of the tax, as in the case of the taxation of tangible and intangible property of railroads, railroad car supply companies, express companies, and the like which we have repeatedly held to be subject to the rule of apportionment. To refuse now to apply the rule of apportionment to petitioner's airplanes, after a half century of its application by this Court as the means of avoiding prohibited multiple state tax burdens on vehicles of interstate transportation; to extend to airplanes moving interstate over fixed routes on regular schedules, the rule that intangibles may be taxed at the business domicile whether or not taxed elsewhere; and to revive the abandoned doctrine that vessels may be taxed in full at their home port, while rejecting the correlative rule that they are exempt from taxation elsewhere, is to disregard the teachings of experience and of precedent. It subjects a new and important industry to state tax burdens, essentially discriminatory in their effect on interstate commerce, to which other interstate carriers are not subject and which it was the very purpose of the commerce clause to avoid.

Respondent places its reliance on *N.Y. Central & H.R.R. Co. v. Miller, supra*. There the Court sustained a franchise tax by the state of domicile including in its measure the full value of freight cars moving in and out of the state, often out of the taxpayer's possession for an indefinite time, and moving in the service of other roads on their independent business. The decision proceeded on the assumption, not tenable here but which the facts of that case were thought to support, that the cars were not

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shown to have moved so regularly or continuously in any state or group of states outside the domicile as to gain a tax situs there. The Court in distinguishing the case from *Pullman's Car Co. v. Pennsylvania, supra*, which sustained a state tax on a foreign railroad corporation, measured by the intrastate mileage of cars passing in and out of the taxing state, said (pp. 597-8):

"But in that case it was found that the `cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State.' The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of

them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home."

The present case raises the question which the *Miller* case found it unnecessary to decide but which this Court has consistently answered by requiring the apportionment of a tax on vehicles of interstate transportation according to their regular use within and without the taxing state. In the *Miller* case it appeared that the cars moved not only over the carrier's own tracks, but also were interchanged with other railroads, and thus, as the Court pointed out, moved about almost at random throughout the United States. No evidence was offered tending to show in what states the cars moved, or with what degree

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of regularity they were present in any particular state or group of states other than New York. The Court was thus not called upon to consider whether New York could tax the cars if they moved between New York and other named states with such regularity that an "average of cars" could be said to be continuously so moving in those other states. Here, on the other hand, it is stipulated and found that all of petitioner's planes are "continuously engaged in flying from state to state in the course of [petitioner's] operations" and that those operations are on regular schedules along fixed routes through eight states. The total mileage of regular routes and the total daily mileage on those routes both in Minnesota and outside are definitely stipulated and found. Hence there is no warrant for saying that their presence in each of the states through which they pass is not as regular and continuous in nature as it is in Minnesota. These findings establish that, while no particular plane is permanently within any state, its planes are continuously flying in, and an average number or a percentage of the total is regularly, i.e., "permanently" within, each of the states through which they pass. Here, as was the case in *Pullman's Car Co. v. Pennsylvania*, *supra*, the same planes are "running into, through, and out of" each of the states along petitioner's routes and an "average" of planes is continuously within each of those states.^[fn4]

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We are not now concerned with the proper apportionment of taxable values among the states outside the state of Minnesota. Since the movement of the planes, wherever they go, is over fixed routes and on regular schedules, they acquire a tax situs outside Minnesota to the extent that they do not move within it. Hence the extent to which they move in and are taxable by one state outside Minnesota rather than another is irrelevant. It is enough that the Minnesota tax is for full value and that Minnesota's fiscal formula imposes a prohibited burden on interstate commerce because it is used "to project the tax power of the state plainly beyond its borders," to reach instruments of interstate commerce which are taxable elsewhere, and that the extent of that projection may be measured by comparing either the plane or the

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route mileage over fixed routes in Minnesota with like mileage over fixed routes in the states outside Minnesota.

Both before and since the *Miller* case this Court has ruled that vehicles of interstate transportation regularly moving to and from the state of domicile from and to other states acquire a tax situs in the latter, and that the state of domicile cannot constitutionally levy on them an unapportioned property tax. *Union Transit Co. v. Kentucky, supra; Johnson Oil Co. v. Oklahoma, supra; Nashville, C. & St. L. Ry. v. Browning, supra.* In *Johnson Oil Co. v. Oklahoma, supra*, 161-2, where the cars moved from and to Oklahoma to and from various states including Illinois, the state of domicile, we declared that the cars had acquired a tax situs outside Illinois and were to that extent not taxable by Illinois. The court rested its decision on the rule, stated without qualification, that "When a fleet of cars is habitually employed in several States - the individual cars constantly running in and out of each State - it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States."[\[fn5\]](#) Those cases should control

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now. For here we are confronted with a scheme of taxation imposed on vehicles of interstate transportation located within the taxing state for only a limited and specified part of their active life. For the rest, they are in other states, moving over fixed routes of travel where, under our decisions, they plainly have a tax situs, and where they are in fact taxed in six of the seven states other than Minnesota through which they pass.

The tax now sustained is so obviously disproportionate to the protection afforded to the taxed property by the taxing state as to place a constitutionally intolerable burden on interstate commerce. But it is a burden which is capable of equitable adjustment which would satisfy constitutional requirements by the application of the principles of apportionment which this Court has repeatedly sanctioned, and which it is the constitutional duty of the State of Minnesota to apply. The application of these principles does not call for mathematical exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside. But a reasonable attempt must be made to tax only so much of the value as is fairly related to use within the taxing state. *Union Tank Line Co. v. Wright, supra*, 282; *Great Northern Ry. v. Weeks, supra*, 144; *Nashville, C. & St. L. Ry. v. Browning, supra*, 365.

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It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they have exercised it. The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do. The jurisdiction of Minnesota to tax "must be determined on a basis which is consistent with the like jurisdiction of other States." *Johnson Oil Co. v. Oklahoma, supra*, 162. Minnesota cannot justify its imposition of an undue proportion of the total tax burden which can be imposed on an interstate carrier by saying that other states have taken or may take less than their share of the tax. It is enough that the tax exposes petitioner to "the risk of a multiple burden to which local commerce is not exposed," *Adams Mfg. Co. v. Storen, supra*, 311; *Gwin, White & Prince v. Henneford, supra*, 439, and cases cited. To hold otherwise would be to measure Minnesota's power to tax, not by constitutional standards, but by the action of other states over which neither Minnesota nor petitioner has any control and to leave petitioner's tax to be

measured from year to year, not according to any legal standard, but by the unpredictable uncontrolled action of other states.

The judgment should be reversed and the case remanded for further proceedings in the course of which the state court would be free, if so advised, to inquire to what extent, if at all, the tax may, in harmony with state law, be apportioned in conformity to principles heretofore announced by this Court, and to that extent sustained.

MR. JUSTICE ROBERTS, MR. JUSTICE REED, and MR. JUSTICE RUTLEDGE join in this dissent.

[fn1] Page 312

We need not consider here whether the jurisdiction of a state over air above it - as distinguished from the control of a private landowner over air above his land - affords a basis for taxation of planes which regularly fly over the state but do not regularly land within its borders. For in six of the seven states, other than Minnesota, over which petitioner's airplanes regularly fly, they also make regular scheduled landings. Plainly those states have jurisdiction to tax a proportionate part of their value and to that extent the judgment of the Minnesota Supreme Court, permitting taxation in full by the domicile, is erroneous, and the cause should be remanded for further proceedings.

[fn2] Page 314

The rule, generally applied, that vessels are taxable only by the domicile, *Hays v. Pacific Mail S.S. Co.*, 17 How. 596, 597; *St. Louis v. Ferry Co.*, 11 Wall. 423, 430, 431-2; *Morgan v. Parham*, 16 Wall. 471, 475; *Transportation Co. v. Wheeling*, 99 U.S. 273, 279-80; *Ayer & Lord Tie Co. v. Kentucky*, [202 U.S. 409](#), 421; *Southern Pacific Co. v. Kentucky*, [222 U.S. 63](#), 68, 69, 77, is no exception to these rules. For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all. See *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18, 23; *Southern Pacific Co. v. Kentucky*, *supra*, 75. The suggestion in the earlier cases, see *Hays v. Pacific Mail S.S. Co.*, *supra*, 600; *St. Louis v. Ferry Co.*, *supra*; *Morgan v. Parham*, *supra*, that vessels were to be taxed exclusively at the home port, whether or not it was the domicile, was rejected in *Ayer & Lord Tie Co. v. Kentucky*, *supra*, and *Southern*

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Pacific Co. v. Kentucky, *supra*, and has never been revived. But where the vessels operate wholly on waters within one state, they have been held to be taxable there, *Old Dominion S.S. Co. v. Virginia*, [198 U.S. 299](#), and not at the domicile, *Southern Pacific Co. v. Kentucky*, *supra*, 67, 72, a result which, like the rule of apportionment in taxing railroad cars, avoids the burden of multiple taxation.

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Similarly taxes by the state of domicile or other states on the carrier's entire property including rolling stock have been sustained if apportioned according to mileage, *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus*, 154 U.S. 421; *Adams Express Co. v. Ohio*, 165 U.S. 194, 166 U.S. 185; *American Express Co. v. Indiana*, 165 U.S. 255; *Adams Express Co. v. Kentucky*, 166 U.S. 171; *Wells, Fargo & Co. v. Nevada*, [248 U.S. 165](#); *St. Louis & E. St. L. Ry. Co. v. Hagerman*, [256 U.S. 314](#); *Southern Ry. Co. v. Watts*, [260 U.S. 519](#); *Nashville, C. & St. L. Ry. v. Browning*, [310 U.S. 362](#) or a combination of

... v. *Browning*, [310 U.S. 362](#), of a combination of relevant factors, *Rowley v. Chicago & N.W. Ry. Co.*, [293 U.S. 102](#); *Great Northern Ry. Co. v. Weeks*, [297 U.S. 135](#). Likewise gross receipts taxes, if properly apportioned or otherwise limited to receipts from business done within the state, have been upheld, *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492; *Maine v. Grand Trunk Ry. Co.*, 142 U.S. 217, as explained in *Galveston, H. & S.A. Ry. Co. v. Texas*, [210 U.S. 217](#), 226; *United States Express Co. v. Minnesota*, [223 U.S. 335](#); *Cudahy Packing Co. v. Minnesota*, [246 U.S. 450](#); *Pullman Co. v. Richardson*, [261 U.S. 330](#); cf. *New York, L.E. & W.R. Co. v. Pennsylvania*, 158 U.S. 431.

[fn4] Page 322

It is true that here there is no evidence of the average number of planes present within Minnesota or any other state during the tax year. But where the movement through the state is regular and continuous, as it is here and was not in the *Miller* case, apportionment may be made by showing the plane mileage or route mileage within and without the state. *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18; *Nashville, C. & St. L. Ry. v. Browning*, [310 U.S. 362](#), and cases cited. The Minnesota court here did not rest its decision on the ground that petitioner had sought to apportion by mileage instead of by average number of cars, and had introduced no evidence to support the latter type of apportionment. If it had it might well have

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remanded the cause to permit any deficiencies of proof to be remedied. It held rather that regardless of the nature of proof of apportionment Minnesota, as the state of the domicile, could tax the cars for their entire value.

In this respect also the case is unlike the *Miller* case. There, as the record reveals, the carrier's evidence showed only the car mileage within and without the state, and its owned track mileage within and without the state. But since the cars moved over irregular routes without fixed schedules, car mileage afforded no basis of apportionment, without proof also that the cars were present in particular states with sufficient regularity to acquire a tax situs there. Owned track mileage likewise failed to afford a basis of apportionment, in the absence of some proof that the tracks were regularly used by the cars in question. Nor did the carrier lack opportunity to make fuller proof. The cause as it came here involved five successive tax years, as to each of which the carrier was afforded a hearing with opportunity to introduce evidence. The carrier having failed despite this repeated opportunity to introduce evidence which would, on any theory of apportionment, support a conclusion that any particular proportion of cars had acquired a tax situs elsewhere, this Court, as it pointed out, was not called upon to apply the rule of *Pullman's Car Co. v. Pennsylvania*, *supra*, or to consider whether, consistently with the commerce clause, property used as an instrumentality of commerce may be subjected to the risk of double taxation.

[fn5] Page 324

In *Union Transit Co. v. Kentucky*, [199 U.S. 194](#), it appeared that the cars of the Transit Company, the taxpayer, moved in and out of Kentucky, the state of domicile. The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number "permanently located" outside it only by proof of gross earnings within and without the state. In holding that the state of domicile could not tax tangible personal property "permanently located in other states" (p. 201), it is clear that the Court was limiting the taxing power of the state of domicile to the extent

that the cars moving between Kentucky and other states had, under the rule of apportionment, gained a tax situs outside the state because they were "located and employed" there (p. 211). This is evident from its citation (p. 206) of *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18, and *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, as cases involving property "permanently located" in the taxing states. Both cases involved

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rolling stock continuously moving into and out of the taxing state and sustained taxes upon a proportion of the carrier's total rolling stock based respectively upon the track mileage or upon the average number of cars used within the taxing state. Had the Court intended to exempt, from the domicile's power to tax, only property which never came into the domicile it would have been necessary for it to discuss also the contention that the Union Transit Company had been denied the equal protection of the laws because railroads were taxed only upon the value of their rolling stock used within the state determined by the proportionate mileage within the state (pp. 202, 211).

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City of Burbank v. Lockheed Air Terminal, Inc.
No. 71-1637
Argued February 20, 1973
Decided May 14, 1973
411 U.S. 624

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Syllabus

Appellees sought an injunction against enforcement of a Burbank city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the Hollywood-Burbank Airport. The District Court found the ordinance unconstitutional on Supremacy Clause and Commerce Clause grounds, and the Court of Appeals affirmed on the basis of the Supremacy Clause, with respect to both preemption and conflict.

Held: In light of the pervasive nature of the scheme of federal regulation of aircraft noise, as reaffirmed and reinforced by the Noise Control Act of 1972, the Federal Aviation Administration, now in conjunction with the Environmental Protection Agency, has full control over aircraft noise, preempting state and local control. Pp. 626-640.

457 F.2d 667, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which STEWART, WHITE, and MARSHALL, JJ., joined, *post*, p. 640. [411 U.S. 625]

DOUGLAS, J., lead opinion

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Court, in *Cooley v. Board of Wardens*, 12 How. 299, first stated the rule of preemption which is the critical issue in the present case. Speaking through Mr. Justice Curtis, it said:

Now the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port, and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

. . . Whatever subjects of this power are in their nature national, or admit only of

one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id. at 31.

This suit, brought by appellees, asked for an injunction against the enforcement of an ordinance adopted by the City Council of Burbank, California, which made it unlawful for a so-called pure jet aircraft to take off from the Hollywood-Burbank Airport between 11 p.m. of one day and 7 a.m. the next day, and making it unlawful for the operator of that airport to allow any such aircraft [411 U.S. 626] to take off from that airport during such periods.{1} The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Airlines originating in Oakland, California and departing from Hollywood-Burbank Airport for San Diego every Sunday night at 11:30.

The District Court found the ordinance to be unconstitutional on both Supremacy Clause and Commerce Clause grounds. 318 F.Supp. 914. The Court of Appeals affirmed on the grounds of the Supremacy Clause both as respects preemption and as respects conflict.{2} 457 F.2d 667. The case is here on appeal. 28 U.S.C. § 1254(2). We noted probable Jurisdiction. 409 U.S. 840. We affirm the Court of Appeals.

The Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, as amended by the Noise Control Act of 1972, 86 Stat. 1234, and the regulations under it, 14 CFR pts. 71, 73, 75, 77, 91, 93, 95, 97, are central to the question of preemption.

Section 1108(a) of the Federal Aviation Act, 49 U.S.C. § 1508(a), provides in part,

The United States of America is declared to possess and exercise complete and [411 U.S. 627] exclusive national sovereignty in the airspace of the United States. . . .

By §§ 307(a), (c) of the Act, 49 U.S.C. §§ 1348(a), (c), the Administrator of the Federal Aviation Administration (FAA) has been given broad authority to regulate the use of the navigable airspace "in order to insure the safety of aircraft and the efficient utilization of such airspace . . ." and "for the protection of persons and property on the ground. . . ."{3}

The Solicitor General, though arguing against preemption, concedes that, as respects "airspace management," there is preemption. That, however, is a fatal concession, for, as the District Court found:

The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding

communities. Such a result is totally inconsistent with the objectives of the federal statutory [411 U.S. 628] and regulatory scheme.

It also found "[t]he imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace."

Curfews such as Burbank has imposed would, according to the testimony at the trial and the District Court's findings, increase congestion, cause a loss of efficiency, and aggravate the noise problem. FAA has occasionally enforced curfews. See *Virginians for Dulles v. Volpe*, 344 F.Supp. 573. But the record shows that FAA has consistently opposed curfews, unless managed by it, in the interests of its management of the "navigable airspace."

As stated by Judge Dooling in *American Airlines v. Hempstead*, 272 F.Supp. 226, 230, *aff'd*, 398 F.2d 369:

The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decibel limit.

The Noise Control Act of 1972, which was approved October 27, 1972, provides that the Administrator, "after consultation with appropriate Federal, State, and local agencies and interested persons," shall conduct a study of various facets of the aircraft noise problems and report to the Congress within nine months,{4} *i.e.*, by July, 1973. The 1972 Act, by amending § 611 of the Federal [411 U.S. 629] Aviation Act,{5} also involves the Environmental Protection Agency (EPA) in the comprehensive scheme of federal control of the aircraft noise problem. Under the amended § 611(b)(1), 86 Stat. 1239, 49 U.S.C. § 1431(b)(1) (1970 ed., Supp. II), FAA, after consulting with EPA, shall provide

for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title.{6}

Section 611(b)(2), [411 U.S. 630] as amended, 86 Stat. 1239, 49 U.S.C. § 1431(b)(2) (170 ed., Supp. II), provides that future certificates for aircraft operations shall not issue unless the new aircraft noise requirements are met.{7} Section 611(c)(1), as amended, provides that, not later than July, 1973, EPA shall submit to FAA proposed regulations to provide such "control and abatement of aircraft noise and sonic boom" as EPA determines is "necessary to protect the public health and welfare." FAA is directed within 30 days to publish the proposed regulations in a notice of proposed rulemaking. Within 60 days after that publication, FAA is directed to commence a public hearing on the proposed rules. Section 611(c)(1). That subsection goes on to provide that, within "a reasonable time after the conclusion of such hearing and after consultation with EPA," FAA is directed

either to prescribe the regulations substantially as submitted by EPA, or prescribe them in modified form, or publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission, together with its reasons therefor. Section 611(c)(2), as amended, also provides that, if EPA believes that FAA's action with respect to a regulation proposed by EPA "does not protect the public [411 U.S. 631] health and welfare from aircraft noise or sonic boom," EPA shall consult with FAA and may request FAA to review and report to EPA on the advisability of prescribing the regulation originally proposed by EPA. That request shall be published in the Federal Register; FAA shall complete the review requested and report to EPA in the time specified, together with a detailed statement of FAA's findings and the reasons for its conclusion, and shall identify any impact statement filed under § 102(2)(C) of the National Environmental Policy Act of 1969, {8} 83 Stat. 853, 42 U.S.C. § 4332(2)(c), [411 U.S. 632] with respect to FAA's action. FAA's action, if adverse to EPA's proposal, shall be published in the Federal Register.

Congress did not leave FAA to act at large, but provided in § 611(d), as amended, particularized standards:

In prescribing and amending standards and regulations under this section, the FAA shall --

- (1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;
- (2) consult with such Federal, State, and interstate agencies as he deems appropriate;
- (3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
- (4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
- (5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

The original complaint was filed on May 14, 1970; the District Court entered its judgment November 30, 1970; and the Court of Appeals announced its judgment [411 U.S. 633] and opinion March 22, 1972 -- all before the Noise Control Act of 1972 was approved by the President on October 27, 1972. That Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control.

There is, to be sure, no express provision of preemption in the 1972 Act. That, however, is not decisive. As we stated in *Rice v. Santa Fe Elevator Corp.*,

331 U.S. 218, 230:

Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption. As Mr. Justice Jackson stated, concurring in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. [411 U.S. 634] They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel, and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.

Both the Senate and House Committees included in their Reports clear statements that the bills would not change the existing preemption rule. The House Report stated:{9}

No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

The Senate Report stated:{10}

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

These statements do not avail appellants. Prior to the 1972 Act, § 611(a) provided that the Administrator

shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom.

82 Stat. 395. Under § 611(b)(3), the Administrator was required to

consider whether any proposed standard, [411 U.S. 635] rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in

the public interest.

82 Stat. 39. When the legislation which added this section to the Federal Aviation Act{11} was considered at Senate hearings, Senator Monroney (the author of the 1953 Act) asked Secretary of Transportation Boyd whether the proposed legislation would "to any degree preempt State and local government regulation of aircraft noise and sonic boom." {12} The Secretary requested leave to submit a written opinion, and in a letter dated June 22, 1968, he stated:

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

According to the Senate Report,{13} it was

not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local government,

and the Report concurred in the views set forth by the Secretary in his letter.{14}
[\[411 U.S. 636\]](#)

The Senate version of the 1972 Act as it passed the Senate contained an express preemption section.{15} But the Senate version never was presented to the House. Instead, the Senate passed, with amendments, the House version;{16} the House, also with amendments, then concurred in the Senate amendments.{17} The Act as passed combined provisions of both the House and Senate bills on the subject that each had earlier approved. When the blended provisions of the present Act were before the House, Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, in urging the House to accept the amended version, said:{18}

I cannot say what industry's intention may be, but I can say to the gentleman what my intention is in trying to get this bill passed. We have evidence that, across America, some cities and States are trying [\[411 U.S. 637\]](#) to pass noise regulations. Certainly we do not want that to happen. It would harass industry and progress in America. That is the reason why I want to get this bill passed during this session.

When the House approved the blended provisions of the bill, Senator Tunney moved that the Senate concur. He made clear{19} that the regulations to be considered by EPA for recommendation to FAA would include:

proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and *modifications in the number, frequency, or scheduling of flights* [as well as] . . . *the imposition of curfews on noisy airports*, the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission

standards on new and existing aircraft -- with the expectation of a retrofit schedule to abate noise emissions from existing aircraft -- *the imposition of controls to increase the load factor on commercial flights, or other reductions in the joint use of airports*, and such other procedures as may be determined useful and necessary to protect public health and welfare.

(Emphasis added.)

The statements by Congressman Staggers and Senator Tunney are weighty ones. For Congressman Staggers was Chairman of the House Committee on Interstate and Foreign Commerce, which submitted the Noise Control Act and Report, and Senator Tunney was a member of the Senate Committee on Public Works, which submitted the Act and Report.

When the President signed the bill, he stated that

many of the most significant sources of noise move in [411 U.S. 638] interstate commerce and can be effectively regulated only at the federal level.{20}

Our prior cases on preemption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question. *Cf. Hines v. Davidovitz*, 312 U.S. 52; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440. Control of noise is, of course, deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not known. The procedures under the 1972 Act are under way.{21} In addition, the Administrator has imposed a variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection [411 U.S. 639] of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." 49 U.S.C. § 1431(d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow.{22} The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960, FAA rejected a proposed restriction on jet operations at the Los Angeles airport between 10 p.m. and 7 a.m. because such restrictions could "create critically serious problems to all air transportation patterns." 25 Fed.Reg. 1764-1765. The complete FAA

statement said:

The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p.m. and [411 U.S. 640] 7 a.m. under certain surface wind conditions has also been reevaluated, and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded, therefore, that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce.

This decision, announced in 1960, remains peculiarly within the competence of FAA, supplemented now by the input of EPA. We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

Affirmed.

REHNQUIST, J., dissenting

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court concludes that congressional legislation dealing with aircraft noise has so "pervaded" that field that Congress has *impliedly* preempted it, and therefore the ordinance of the city of Burbank here challenged is [411 U.S. 641] invalid under the Supremacy Clause of the Constitution. The Court says that the 1972

Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control.

Ante at 633. Yet the House and Senate committee reports explicitly state that the 1972 Act to which the Court refers was not intended to alter the balance between state and federal regulation which had been struck by earlier congressional legislation in this area. The House Report H.R.Rep. No. 92-842, in discussing the general preemptive effect of the entire bill, stated:

The authority of State and local government to regulate use, operation, or movement of products is not affected at all by the bill. (The preemption provision discussed in this paragraph does not apply to aircraft. *See* discussion of aircraft noise below.)

Id. at 8. The report went on to state specifically:

No provision of the bill is intended to alter in any way the relationship between the

authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

Id. at 10.

The report of the Senate Public Works Committee, S.Rep. No. 92-1160, expressed the identical intent with respect to preemption:

States and local governments are preempted from establishing or enforcing noise emission standards for aircraft [*see American Airlines v. Hempstead*, 272 F.Supp. 226 (EDNY 1967)], unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers [411 U.S. 642] of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

Id. at 10-11.

In the light of these specific congressional disclaimers of preemption in the 1972 Act, reference must necessarily be had to earlier congressional legislation on the subject.^{1} It was on the basis of these earlier enactments that the Court of Appeals concluded that Congress had preempted the field from state or local regulation of the type that the city of Burbank enacted.

The Burbank ordinance prohibited jet takeoffs from the Hollywood-Burbank Airport during the late evening and early morning hours. Its purpose was to afford local residents at least partial relief, during normal sleeping hours, from the noise associated with jet airplanes. The ordinance in no way dealt with flights over the city, *cf. American Airlines v. Hempstead*, 272 F.Supp. 226 (EDNY 1967), *aff'd*, 398 F.2d 369 (CA2 1968), *cert. denied*, 393 U.S. 1017 (1969), nor did it categorically prohibit all jet takeoffs during those hours.

Appellees do not contend that the noise produced by jet engines could not reasonably be deemed to affect [411 U.S. 643] adversely the health and welfare of persons constantly exposed to it; control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of the police power possessed by States and local governing bodies. Because noise regulation has traditionally been an area of local, not national, concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactments,

we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This assumption derives from our basic constitutional division of legislative competence between

the States and Congress; from

due regard for the presuppositions of our embracing federal system, *including the principle of diffusion of power not as a matter of doctrinaire localism, but as a promoter of democracy. . . .*

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (emphasis added). Unless the requisite preemptive intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that

the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

Since Congress' intent in enacting the 1972 Act was clearly to retain the *status quo* between the federal regulation and local regulation, a holding of implied preemption of the field depends upon whether two earlier congressional enactments, the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, and the 1968 noise abatement amendment to that Act, 49 [411 U.S. 644] U.S.C. § 1431, manifested the clear intent to preclude local regulations, that our prior decisions require.

The 1958 Act was intended to consolidate in one agency in the Executive Branch the control over aviation that had previously been diffused within that branch. The paramount substantive concerns of Congress were to regulate federally all aspects of air safety, *see, e.g.*, 49 U.S.C. § 1422 and, once aircraft were in "flight," airspace management, *see, e.g.*, 49 U.S.C. § 1348(a). *See* S.Rep. No. 1811, 85th Cong., 2d Sess., 5-6, 13-15. While the Act might be broad enough to permit the Administrator to promulgate takeoff and landing rules to avoid excessive noise at certain hours of the day, *see* 49 U.S.C. § 1348(c), Congress was not concerned with the problem of noise created by aircraft, and did not intend to preempt its regulation. Furthermore, while Congress clearly intended to preempt the States from regulating aircraft in flight, the author of the bill, Senator Monroney, specifically stated that FAA would not have control "over the ground space" of airports.{2}

The development and increasing use of civilian jet aircraft resulted in congressional concern over the noise associated with those aircraft. Hearings were held over a period of several years, resulting in a report, but no legislation. The report of the House Committee on Interstate and Foreign Commerce, H.R.Rep. No. 36, 88th Cong., 1st Sess., shows clearly that the 1058 Act was thought by at least some in Congress neither to preempt local legislative action to alleviate the growing noise problem nor to prohibit local curfews:

Until Federal action is taken, the local governmental authorities must be deemed to possess the [411 U.S. 645] police power necessary to protect their citizens and

property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level.

* * * *

Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce. Some airport operators have exercised the proprietary right to restrict in a reasonable manner the use of any runway by limiting either the hours during which it may be used or the types of civil transport aircraft that may use it.

H.R.Rep. No. 36, 88th Cong., 1st Sess., 27.

Several years after the conclusion of these hearings, Congress enacted the 1968 noise abatement amendment, 82 Stat. 395, which added § 611 to the 1958 Act, 49 U.S.C. § 1431, and which was the first congressional legislation dealing with the problem of aircraft noise. On its face, {3} § 611, as added by the 1968 amendment, neither preempted the general field of regulation of [411 U.S. 646] aircraft noise nor dealt specifically with the more limited question of curfews. The House Committee on Interstate and Foreign Commerce, after reciting the serious proportions of the problem, outlined the type of federal regulation that the Act sought to impose:

The noise problem is basically a conflict between two groups or interests. On the one hand, there is [411 U.S. 647] a group who provide various air transportation services. On the other hand, there is a group who live, work, and go to schools and churches in communities near airports. The latter group is frequently burdened to the point where they can neither enjoy nor reasonably use their land because of noise resulting from aircraft operations. Many of them derive no direct benefit from the aircraft operations which create the unwanted noise. Therefore, it is easy to understand why they complain, and complain most vehemently. The possible solutions to this demanding and vexing problem which appear to offer the most promise are (1) new or modified engine and airframe designs, (2) special flight operating techniques and procedures, and (3) planning for land use in areas adjacent to airports so that such land use will be most compatible with aircraft operations. *This legislation is directed toward the primary problem, namely, reduction of noise at its source.*

(Emphasis added.) H.R.Rep. No. 1463, 90th Cong., 2d Sess., 4. Far from indicating any total preemptive intent, the House Committee observed:

Rather, the committee expects manufacturers, air carriers, all other segments of the aviation community, and State and local civic and governmental entities to continue and increase their contributions toward the common goal of quiet.

Ibid.

The Senate Commerce Committee's view of the House bill followed a similar vein:

This investment by the industry is representative of one of the avenues of approach to aircraft noise reduction, that is, the development of aircraft which generate less noise. Another approach to noise reduction is through the establishment of special flight [411 U.S. 648] operating techniques and procedures. The third principal control technique which merits serious consideration is the planning for land use in areas near airports so as to make such use compatible with aircraft operations. This is a matter largely within the province of State and local governments. While all of these techniques must be thoroughly studied and employed, the first order of business is to stop the escalation of aircraft noise by imposing standards which require the full application of noise reduction technology.

A completely quiet airplane will not be developed within the foreseeable future. However, with the technological and regulatory means now at hand, it is possible to reduce both the level and the impact of aircraft noise. Within the limits of technology and economic feasibility, it is the view of the committee that the Federal Government must assure that the potential reductions are in fact, realized.

S.Rep. No. 1353, 90th Cong., 2d Sess., 2-3. With specific emphasis on preemption, the Senate Committee observed:

Relation to Local Government Initiatives

The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments. [411 U.S. 649]

In this regard, we concur in the following views set forth by the Secretary in his letter to the Committee of June 22, 1968:

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F.Supp. 226 (U.S.D.C. E. D., N.Y.1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be

created by aircraft using the airport. Airport owners, acting as proprietors, can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft, [411 U.S. 650] and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and, for that purpose, to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this, and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.

Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard.

Id. at 6-7.

In terms of preemption analysis, the most reasonable reading of § 611 appears to be that it was enacted to enable the Federal Government to deal with the noise problem created by jet aircraft through study and regulation of the "source" of the problem -- the mechanical and structural aspects of jet and turbine aircraft design. The authority to

prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom,

49 U.S.C. § 1431(a), while a broad grant of authority to the Administrator, cannot fairly be read as prohibiting the States from enacting every type of measure which [411 U.S. 651] might have the effect of reducing aircraft noise in the absence of a regulation to that effect under this section. The statute established exclusive federal control of the technological methods for reducing the output of noise by jet aircraft, but that is a far cry from saying that it prohibited any local regulation of the times at which the local airport might be available for the use of jet aircraft.

The Court of Appeals found critical to its decision the distinction between the local government as an airport proprietor and the local government as a regulatory agency, which was reflected in the views of the Secretary of Transportation outlined in the Senate Report on the 1968 Amendment. Under its reasoning, a local government unit that owned and operated an airport would not be preempted

by § 611 from totally, or, as here, partially, excluding noisy aircraft from using its facilities, but a municipality having territorial jurisdiction over the airport would be preempted from enacting an ordinance having a similar effect. If the statute actually enacted drew this distinction, I would, of course, respect it. But, since we are dealing with "legislative history," rather than the words actually written by Congress into law, I do not believe it is of the controlling significance attributed to it by the court below.

The preemption question to which the Secretary's letter was addressed related to "the field of noise regulation insofar as it involves controlling the *flight* of aircraft" (emphasis added), and thus included types of regulation quite different from that enacted by the city of Burbank that would be clearly precluded. *See American Airlines v. Hempstead, supra*. But more important is the highly practical consideration that the Hollywood-Burbank Airport is probably the only nonfederal airport in the country used by federally certified air carriers that is not owned and operated by a state or local [411 U.S. 652] government.^{4} There is no indication that this fact was brought to the attention of the Senate Committee, or that the Secretary of Transportation was aware of it in framing his letter. It simply strains credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews.

Considering the language Congress enacted into law, the available legislative history, and the light shed by these on the congressional purpose, Congress did not intend, either by the 1958 Act or the 1968 Amendment, to oust local governments from the enactment of regulations such as that of the city of Burbank. The 1972 Act quite clearly intended to maintain the *status quo* between federal and local authorities. The legislative history of the 1972 Act, quite apart from its concern with avoiding additional preemption, discloses a primary focus on the alteration of procedures within the Federal Government for dealing with problems of aircraft noise already entrusted by Congress to federal competence. The 1972 Act set up procedures by which the Administrator of EPA would have a role to play in the formulation and review of standards promulgated by FAA dealing with noise emissions of jet aircraft. But because these agencies have exclusive authority to reduce noise by promulgating regulations and implementing standards directed at one or several of the causes of the level of noise, local governmental bodies are not thereby foreclosed from dealing with the noise problem by every other conceivable method. [411 U.S. 653]

A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a

facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the Supremacy Clause merely because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control. Yet, if this may be done, the Court's opinion surely does not satisfactorily explain why a local governing body may not enact a far less "intrusive" ordinance such as that of the city of Burbank.

The history of congressional action in this field demonstrates, I believe, an affirmative congressional intent to allow local regulation. But even if it did not go that far, that history surely does not reflect "the clear and manifest purpose of Congress" to prohibit the exercise of "the historic police powers of the States" which our decisions require before a conclusion of implied preemption is reached. Clearly Congress could preempt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of FAA by 49 U.S.C. § 1431 is sufficient to authorize him to promulgate regulations effectively preempting local action. But neither Congress nor the Administrator has chosen to go that route. Until one of them does, the ordinance of the city of Burbank is a valid exercise of its police power.

The District Court found that the Burbank ordinance would impose an undue burden on interstate commerce, [411 U.S. 654] and held it invalid under the Commerce Clause for that reason. Neither the Court of Appeal nor this Court's opinion, in view of their determination as to preemption, reached that question. The District Court's conclusion appears to be based, at least in part, on a consideration of the effect on interstate commerce that would result if all municipal airports in the country enacted ordinances such as that of Burbank. Since the proper determination of the question turns on an evaluation of the facts of each case, *see, e.g., Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), and not on a predicted proliferation of possibilities, the District Court's conclusion is of doubtful validity. The Burbank ordinance did not affect emergency flights, and had the total effect of prohibiting one scheduled commercial flight each week and several additional private flights by corporate executives; such a result can hardly be held to be an unreasonable burden on commerce. Since the Court expresses no opinion on the question, however, I refrain from any further analysis of it. {5}

Footnotes

DOUGLAS, J., lead opinion (Footnotes)

1. Burbank Municipal Code § 20 32.1. The ordinance provides an exception for "emergency" flights approved by the City Police Department.
2. The Court of Appeals held that the Burbank ordinance conflicted with the runway preference order, BUR 7100.5B, issued by the FAA Chief of the Airport

Traffic Control Tower at the Hollywood-Burbank Airport. The order stated that

[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the lowest practicable minimum. . . .

The Court of Appeals concluded that the ordinance

interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress.

457 F.2d 667, 676. In view of our disposition of this appeal under the doctrine of preemption, we need not reach this question.

3. Section 307 provides in relevant part as follows:

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace, and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. . . .

* * * *

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

4. Section 7(a) provides:

The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phase-out of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act.

5. Section 611 of the Federal Aviation Act, 49 U.S.C. § 1431, was added in July, 1968. Act of July 21, 1968, Pub.L. 90-411, 82 Stat. 395. Prior to amendment by the 1972 Act, it provided in part that the Administrator,

[i]n order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom.

49 U.S.C. § 1431(a).

6. Section 611(b)(1), as amended, reads:

In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that, if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

7. Subsection (b)(2) provides:

The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

8. Section 102 reads in part as follows:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -- . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -- (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

Section 611(c)(3) of the Federal Aviation Act, as amended, provides that, if

FAA files no statement under § 102(2)(C) of the National Environmental Policy Act,

then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (b) EPA's proposed regulations.

9. H.R.Rep. No. 92-842, p. 10.

10. S.Rep. No. 92-1160, pp. 10-11.

11. *See* n. 5, *supra*.

12. Hearing before the Aviation Subcommittee of the Senate Committee on Commerce on S. 707 and H.R. 3400, Aircraft Noise Abatement Regulation, 90th Cong., 2d Sess., 29.

13. S.Rep. No. 1353, 90th Cong., 2d Sess., 6.

14. The letter from the Secretary of Transportation also expressed the view that

the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners, *acting as proprietors*, can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

(Emphasis added.) This portion as well was quoted with approval in the Senate Report. *Ibid*.

Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality, yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.

15. 118 Cong.Rec. 35868.

16. *Id.* at 35886.

17. *Id.* at 37075.

18. *Id.* at 37083.

19. *Id.* at 37317.

20. 8 Weekly Comp. Pres.Docs. 1582, 1583 (Oct. 28, 1972).

21. The Administrator has adopted regulations prescribing noise standards which must be met as a condition to type certification for all new subsonic turbojet-powered aircraft. 14 CFR pt. 36. On January 30, 1973, FAA gave advance notice of proposed rulemaking for the control of fleet noise levels (FNL) of airplanes operating in interstate commerce. 38 Fed.Reg. 2769. (The regulations would not pertain to carriers also operating in foreign commerce). The proposed rules are designed to limit FNL prior to July 1, 1978, when the covered aircraft become subject to the requirements of 14 CFR pt. 36.

The FNL would be determined as a function of the takeoff and approach noise levels of each airplane in the fleet and the number of takeoffs and landings of the fleet. Until July 1, 1976, the cumulative noise level of any fleet subject to regulation could not exceed the FNL during the previous 90-day base period. In 1976, each fleet would be required to reduce its FNL by 50% of the difference between the original base-period level and the level ultimately required by 14 CFR pt. 36.

22. In order to insure efficient and safe use of the navigable air space, FAA uses centralized "flow control," regulating the number of aircraft that will be accepted in a given area and restricting altitudes and routes that may be flown. Flow control has resulted in the Los Angeles Air Route Traffic Control Center's holding aircraft on the ground at the Hollywood-Burbank Airport.

Prior to April, 1970, 21 regional Air Route Traffic Control Centers exercised independent control over traffic flow in their areas. In April, 1970, FAA established a Central Flow Facility to coordinate flow control throughout the Air Traffic Control system. This change was necessitated because no regional center "had enough information to make a judgment based on the overall condition of the ATC system. . . ." Fourth Annual Report of the Secretary of Transportation for Fiscal Year 1970.

REHNQUIST, J., dissenting (Footnotes)

1. Statements or comments of individual Senators or Representatives on the floor of either House are not to be given great, let alone controlling, weight in ascertaining the intent of Congress as a whole, *see, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921); *McCaughn v. Hershey Chocolate Co.*,

283 U.S. 488, 494, (1931); *cf. Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 464 (1937). This guidance is particularly appropriate in this case, as the statements of two individual Congressmen quoted in the Court's opinion are at odds with the views expressed in the committee reports.

2. Hearings before the Subcommittee on Aviation of the Senate Committee on Interstate and Foreign Commerce (hereafter Commerce Committee), on S. 3880, Federal Aviation Agency Act, 85th Cong., 2d Sess., 279.

3.

(a) Consultations; standards; rules and regulations.

In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment modification, suspension, or revocation of any certificate authorized by this subchapter.

(b) Considerations determinative of standards, rules, and regulations.

In prescribing and amending standards, rules, and regulations under this section, the Administrator shall --

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.

(c) Amendment, modification, suspension, or revocation of certificate; notice and appeal rights.

In any action to amend, modify, suspend, or revoke a certificate in which violation [of] aircraft noise or sonic boom standards, rules, or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the Administrator if it

finds that control or abatement of aircraft noise or sonic boom and the public interest do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

49 U.S.C. § 1431.

4. The record is not exactly clear on this point, but it does appear to be the case. Although there are several airports owned by municipalities or other governmental units that are located outside of the boundaries of the units, there does not appear to be any other privately owned airport, at which certified air carriers operate, in the country.

5. Although cited by the Court, this situation is clearly not a *Cooley* situation, in which the control of aircraft noise

admitt[s] only of one uniform system, or plan of regulation, [which] may justly be said to be of such a nature as to require exclusive legislation by Congress.

Cooley v. Board of Wardens, 12 How. 299, 319 (1852). The court below also held, but by a divided vote, that the Burbank ordinance was invalid because it was in conflict with a clearly articulated federal policy, to-wit, a non-mandatory runway preference order of the FAA tower chief at Burbank which requested pilots to use a particular runway at night. The Court does not decide this case on that ground; I see no occasion to express in detail my views on the conflict issue, except to note my doubt as to the correctness of the disposition of that question.

Cases citing this case . . .

The following 10 case(s) in the USSC+ database cite this case:

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991)
Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989)
Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985)
Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982)
Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981)
Maryland v. Louisiana, 451 U.S. 725 (1981)
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)
Ray v. Atlantic Richfield, 435 U.S. 151 (1978)
Jones v. Rath Packing, 430 U.S. 519 (1977)
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973)

*778 76 F.3d 778

64 USLW 2565

Robert GUSTAFSON, Plaintiff-Appellee/Cross-Appellant,
v.
CITY OF LAKE ANGELUS; Donald Althoff, Mayor of the City of
Lake Angelus; Michael Stefani, Chief of Lake
Angelus Police Force,
Defendants-Appellants/Cross-Appellees.

Nos. 93-2508, 93-2537.

United States Court of Appeals,

Sixth Circuit.

Argued March 20, 1995.

Decided Feb. 27, 1996.

Rehearing and Suggestion

for Rehearing En Banc

Denied April 3, 1996.

City resident brought suit to challenge city ordinances prohibiting operation of seaplanes on city lake. The United States District Court for the Eastern District of Michigan, Paul V. Gadola, J., 856 F.Supp. 320, granted summary judgment in favor of plaintiff on issue of federal preemption and granted summary judgment in favor of defendants on plaintiff's constitutional claims. Parties appealed. The Court of Appeals, Contie, Circuit Judge, held that: (1) Federal Aviation Act did not preempt city ordinances, and (2) ordinances did not deprive plaintiff of equal protection or due process rights.

Affirmed in part, reversed in part, and remanded.

Nathaniel R. Jones, Circuit Judge, concurred in judgment and filed opinion.

Batchelder, Circuit Judge, concurred and filed opinion.

1. STATES  18.3
360 ----
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 Preemption in general.

C.A.6 (Mich.) 1996.

Will of Congress to monopolize area of legislation may be expressed in authorizing statute and in regulations enacted pursuant to that statute.

2. STATES  18.3
360 ----
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 Preemption in general.

C.A.6 (Mich.) 1996.

Statute is preemptive if Congress, in enacting federal statute, expresses clear intent to preempt state law.

3. STATES  18.7
360 ----
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption

78k108.1 In general.
C.A.6 (Mich.) 1996.

Claim premised on violation of Supremacy Clause through preemption is not cognizable under § 1983. U.S.C.A. Const. Art. 6, cl. 2; 42 U.S.C.A. § 1983.

***780** ON APPEAL from the United States District Court for the Eastern District of Michigan.

Thomas M. Slavin (argued and briefed), Steven M. Chait (briefed), Sullivan, Ward, Bone, Tyler, Fiott & Asher, Southfield, MI, for Robert Gustafson.

John D. Staran (briefed), James L. Howlett (argued), Beier & Howlett, Bloomfield Hills, MI, for City of Lake Angelus, Donald Althoff, Michael Stefani.

Koteles Alexander (briefed), Alexander, Gebhardt, Aponte & Marks, Silver Spring, MD, for Michigan Mun. League, National Institute of Mun. Law Officers.

Donald C. Frank (briefed), Pratt & Frank, Okemos, MI, for Seaplane Pilots Ass'n.

Before: JONES, CONTIE, and BATCHELDER, Circuit Judges.

CONTIE, J., delivered the opinion of the court. JONES (p. 792), and BATCHELDER (p. 793), JJ., delivered separate concurring opinions.

CONTIE, Circuit Judge.

Defendants-appellants/cross-appellees, the City of Lake Angelus, Donald Althoff, Mayor of the City of Lake Angelus, and Michael Stefani, Chief of the Lake Angelus Police Force, appeal the district court's grant of summary judgment to plaintiff-appellee/cross-appellant, Robert Gustafson, holding that city ordinances prohibiting the operation of seaplanes on the surface of Lake Angelus are preempted by federal law. (FN1) Plaintiff Gustafson cross-appeals from the district court's grant of summary judgment to defendants in regard to plaintiff's 42 U.S.C. §§ 1983 and 1988 claims that the ordinances denied his due process and equal protection rights in violation of the Fourteenth Amendment and that he should be awarded attorneys fees. For the following reasons, we affirm in part and reverse in part.

I.

Plaintiff Robert Gustafson, a seaplane pilot, brought suit against defendants, the City ***781** of Lake Angelus (the "City") and various city officials, challenging city ordinances prohibiting the operation of seaplanes on the surface of Lake Angelus as preempted by federal law. Plaintiff sought declaratory and injunctive relief against enforcement of the ordinances. Plaintiff also presented a claim under 42 U.S.C. § 1983 for the violation of his constitutional rights caused by enforcement of the ordinances and sought an award of attorneys fees pursuant to 42 U.S.C. § 1988.

Plaintiff owns a waterfront home on Lake Angelus, an inland lake in Oakland County, Michigan, that is approximately one and one-half miles long and three-quarters of a mile wide. The City of Lake Angelus is a residential community consisting of about 140 homes around the lake and lies within the airport traffic area and control zone of the FAA air traffic control tower located at the Oakland-Pontiac airport.

Plaintiff Gustafson has been certified as a seaplane pilot by the Federal Aviation Administration ("FAA"). On August 9, 1991, plaintiff landed a rented seaplane on Lake Angelus and then docked and moored the plane at his home on the shore of the lake. Subsequently, a city police officer notified plaintiff that he had violated two city ordinances concerning seaplanes and warned him not to land his seaplane on the lake again. Plaintiff was not prosecuted for violating the ordinances.

Plaintiff was in violation of city ordinances 66(E) and 25(J). Ordinance 66(E) is an amendment to the City's zoning ordinance, which reads in relevant part: (FN2)

4.10. *Nuisances prohibited.* Land may not be used for any of the following purposes, all of which are declared to be public nuisances:

E. The mooring, docking, launching, storage, or use of any ... aircraft powered by internal combustion engines....

Ordinance 25(J) is an amendment to the City's nuisance ordinance, and states that the following is a public nuisance:

J. The landing upon the lands, waters, or ice surface within the Village of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft.

After plaintiff was warned not to land his seaplane on the lake, he asked the city council to rescind or modify the ordinances. In response to plaintiff's efforts, on September 10, 1991, the city council issued a resolution declaring that ordinances 25(J) and 66(E) were intended to "protect the public health, safety, and general welfare" of the people and property of the City. The council listed "noise, danger, apprehension of danger, pollution, apprehension of pollution, contamination and infestation from other bodies of water, destruction of property values, and interference with other lawful uses of the lake enjoyed by the great majority of citizens, including boating, sailing, fishing, swimming, and other recreational uses," as ways in which the welfare of the City was protected by the ordinances.

Plaintiff filed this action in the United States District Court for the Eastern District of Michigan, contending that the ordinances are preempted by federal and state law and that they violate his constitutional rights. He asked the court to: (1) declare that ordinances 25(J) and 66(E) are void, unenforceable, and unconstitutional pursuant to 28 U.S.C. § 2201; (2) issue a permanent injunction enjoining defendants from enforcing the ordinances; and (3) award costs and attorneys fees to plaintiff pursuant to 42 U.S.C. § 1988 for the alleged constitutional violations under 42 U.S.C. § 1983.

On October 21, 1993, the district court heard the parties' cross-motions for summary judgment and plaintiff's motion for declaratory judgment and a permanent injunction. On October 22, 1993, the district court issued *782 an opinion. Pursuant to 28 U.S.C. § 2201, the court found that ordinances 25(J) and 66(E) governing the operation of seaplanes on the surface of Lake Angelus are preempted by federal law. The court granted plaintiff Gustafson's motion for summary judgment on this issue and issued a permanent injunction against the City from enforcing the ordinances.

However, in regard to plaintiff's claim under 42 U.S.C. § 1983 for violations of his constitutional rights, the court granted the City's motion for summary judgment. The court stated that even though it had decided the case based on federal preemption, the court would address the section 1983 claim in order to determine if plaintiff was deserving of costs and attorneys fees under 42 U.S.C. § 1988. After examining plaintiff's constitutional claims, the court found they were without merit. The court determined that plaintiff failed to show that his due process or equal protection rights were violated and that he made no showing that the ordinances were overbroad, ambiguous, or vague. In addition, the court found that in order to support the ordinances, the City had presented multiple rationales, which were rationally related to legitimate government interests. For these reasons, the court granted the City's motion for summary judgment on plaintiff's 42 U.S.C. § 1983 claim and determined that plaintiff should not be awarded costs and attorneys fees pursuant to 42 U.S.C. § 1988.

Defendants filed a timely notice of appeal in regard to the district court's issuance of a permanent injunction prohibiting the City from enforcing the ordinances against the operation of seaplanes on the surface of Lake Angelus. Plaintiff Gustafson filed a cross-appeal, challenging the portions of the district court's opinion that found no violation of due process or equal protection rights pursuant to 42 U.S.C. § 1983 and denied costs and attorneys fees pursuant to 42 U.S.C. § 1988.

II.

We must first decide whether the district court erred in determining that the City of Lake Angelus ordinances 25(J) and 66(E), which prohibit the operation of seaplanes on the surface of Lake Angelus, are preempted by federal law.

[1] The doctrine of preemption springs from the Supremacy Clause of the Constitution: "[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2; *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). As interpreted by Chief Justice Marshall, "in every case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). Preemption is predicated on congressional intent. The will of Congress to monopolize an area of legislation may be expressed in the authorizing statute and in the regulations enacted pursuant to that statute. *Hillsborough County, Florida v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

[2] [3] [4] A statute may be construed as preemptive under three circumstances. *Id.* First, Congress, in enacting a federal statute, may express a clear intent to preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752 (1983). Second, absent express preemption, federal law may have an implied preemptive effect if Congress revealed this intent by "occupying the field" of regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). There is implied preemption when there is a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153, 102 S.Ct. at 3022. There is a third type of preemption when state law actually conflicts with federal *783 law. Such conflict occurs where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

[5] The focus of a preemption inquiry is on congressional intent. In the present case, we must determine whether Congress, in passing the Federal Aviation Act, 49 U.S.C. §§ 40101-41901 [formerly 49 U.S.C. §§ 1301-1557] (FN3) intended to preempt the right of a local government to designate and regulate aircraft landing areas, specifically seaplane landings on a lake. Plaintiff concedes that Congress has not expressly spoken on this issue, but argues that the City's ordinances are preempted under the second prong of the preemption doctrine--pervasive federal regulation of the field.

The district court in *Gustafson v. City of Lake Angelus*, 856 F.Supp. 320 (E.D.Mich.1993) found that the dictates of the Federal Aviation Act ("the Act") and the regulations enacted pursuant to it implied that Congress intended that the designation of landing sites for seaplanes is preempted by federal law. The district court found that former section 1508(a) of the Act stated: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States...." Furthermore, the district court found that Congress expressly directed the formulation of comprehensive regulations governing aircraft operations pursuant to former sections 1348(a) & (c), and therefore, the ordinances at issue are preempted by federal law.

[6] It is true that the Act indicates that the FAA has exclusive authority in regulating the airspace over the United States. Section 40103(b)(1) [former § 1348(a)] reads in relevant part:

The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the *navigable airspace* and assign by regulation or order the use of the *airspace* necessary to ensure the safety of aircraft and the efficient use of airspace.

49 U.S.C. § 40103(b)(1) (emphasis added). Section 40103(b)(2) [former § 1348(c)] provides as follows:

The Administrator shall prescribe air traffic regulations on the *flight of aircraft* (including regulations on safe altitudes) for--

- (A) navigating, protecting, and identifying aircraft;
- (B) protecting individuals and property on the ground;
- (C) using the navigable airspace efficiently; and
- (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 40103(b)(2) (emphasis added). However, we believe the United States' sovereign regulation of the airspace over the United States and the regulation of aircraft in flight is distinguishable from the regulation of the designation of plane landing sites, which involves local control of land (or, in the present case, water) use.

The district court's analysis that ordinances 66(E) and 25(J) are preempted by federal law relied heavily upon the Supreme Court's opinion in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). In *Burbank*, the Supreme Court stated that in light of the pervasive nature of the scheme of federal regulation of aircraft noise, the FAA, in conjunction with the Environmental Protection Agency ("EPA"), has full control over aircraft noise, preempting state and local regulation. *Id.* at 638, 93 S.Ct. at 1862. Therefore, the Supreme Court held that the City of Burbank could not use municipal curfews to impose noise regulations on aircraft operations. In the present case, the *784 district court relied on the Supreme Court's language in *Burbank*, which stated that the FAA has broad authority to regulate the use of the navigable airspace, in holding that the City's ordinances are preempted under the second prong of the preemption doctrine--pervasive federal regulation of the field.

We believe the district court read *Burbank* much too broadly in finding it to be dispositive in the present case. The district court failed to comprehensively examine the federal statutes and regulations pertaining to aircraft landing areas in order to glean the existence of preemptive pervasiveness, which is the proper approach established by the Supreme Court in *Burbank*. When the Court in *Burbank* turned to the FAA regulations to determine federal pervasiveness in the regulation of aircraft noise, it discovered: (1) the existence of express language in a Senate Report, which stated that "States and local governments are preempted from establishing or enforcing noise emission standards...."; (2) the existence of two agencies, the EPA and the FAA, with control over aircraft noise; and (3) the imposition of a variety of regulations governing noise by the Administrator of the FAA. *Id.* at 628-34, 93 S.Ct. at 1856-60. The Court in *Burbank* focused upon the fact that the Federal Aviation Act, the attendant regulations, the legislative history of the Act, the Noise Control Act, and the EPA clearly identified noise regulation as a field fully regulated by the federal government. The combination of these factors made it obvious that in regard to noise control, Congress intended to occupy the field of regulation. *Id.* at 638, 93 S.Ct. at 1862. Based on this evidence of pervasiveness, the Court in *Burbank* determined that aircraft noise was so comprehensively and strictly regulated by the federal government that it precluded enforcement of state or local laws on the same subject. *Id.* at 638-39, 93 S.Ct. at 1862-63.

In contrast, in the present case, an examination of the Federal Aviation Act and regulations concerning seaplanes and aircraft landing sites indicates that the designation of plane landing sites is not pervasively regulated by federal law, but instead is a matter left primarily to local control. In contrast to the pervasive scheme of federal regulation of aircraft noise found in *Burbank*, we fail to identify any language in the Act, the regulations promulgated pursuant to the Act, or the legislative history of the Act, which by implication preempts enforcement of the City's ordinances prohibiting the operation of seaplanes on Lake Angelus.

The applicable statutes and regulations indicate the following. In regard to federal preemption, the Act states:

(b) Preemption.--(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. 41713(b)(1) [former § 1305(a)(1)]. The plain language of 41713(b)(1) expressly prohibits States from regulating aviation rates, routes, or services, but the City of Lake Angelus ordinances do not infringe on these expressly preempted fields. The FAA has acknowledged that land use matters within the federal aviation framework are intrinsically local. For example, the regulation concerning the procedures governing the establishment of a civil airport indicates the following: (FN4)

FAA determinations.

(a) The FAA will conduct an aeronautical study of an airport proposal and, after consultations with interested persons, as appropriate, issue a determination to the proponent and advise those concerned of the FAA determination.... While determinations *785 consider the effects of the proposed action on the safe and efficient use of airspace by aircraft and the safety of persons and property on the ground, *the determinations are only advisory.... A determination does not relieve the proponent of responsibility for compliance with any local law, ordinance or regulation, or state or other Federal regulation. Aeronautical studies and determinations will not consider environmental or land use compatibility impacts.*

14 C.F.R. § 157.7(a) (emphasis added). Clearly, the FAA defers to local zoning ordinances, since this regulation requires the establishment of an airport in compliance with a municipality's land use plan. As the regulation states, the proponent of the establishment of an airport must comply with any local law, ordinance or regulation. (FN5) Moreover, the regulation indicates that environmental impact and land use compatibility are matters of local concern and will not be determined by the FAA. Thus, in contrast to *Burbank*, in which the Supreme Court stated that the FAA made clear its intent to pervasively regulate aircraft noise, FAA regulation 14 C.F.R. § 157.7 indicates that the FAA does not intend to pervasively regulate the designation of the location of airports. We find no regulations governing the designation of the location of private airfields or seaplane landing sites. Under 14 C.F.R. § 157.7, the FAA recognizes that within the federal aviation framework, local zoning ordinances governing land use must be complied with. We believe this rationale applies in the present case, which concerns water use. Under the general provisions of the Act, an airplane landing area is defined as follows:

"landing area" means a place on land *or water*, including an airport or intermediate landing field, used, or intended to be used, for the takeoff and landing of aircraft, even when facilities are not provided for sheltering, servicing, or repairing aircraft, or for receiving or discharging passengers or cargo.

49 U.S.C. § 40102(28) [former § 1301(27)] (emphasis added). Since a landing area includes a body of water, we find no merit to plaintiff's argument that "the inland waters," such as Lake Angelus, are part of the navigable airspace of the United States over which the federal government exerts preemptive control. The inland waters are part of the earth's surface, and water (as well as land) use compatibility are matters of local control.

The district court relied on two federal regulations concerning the operation of aircraft on the surface of the water to find pervasive preemption of the field. We disagree with the district court's analysis in this regard. 14 C.F.R. § 91.115(a) states:

Right-of-way rules: Water operations.

(a) *General.* Each person operating an aircraft on the water shall, insofar as possible, keep clear of all vessels and avoid impeding their navigation, and shall give way to any vessel or other aircraft that is given the right-of-way by any rule of this section.

This regulation pertains to the safe operation of seaplanes in order to avoid collisions and contains no specifications for seaplane landing sites. 14 C.F.R. § 91.119 states:

Minimum safe altitudes: General

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

....

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

This regulation is also directed to the operational safety of seaplanes, not to the designation of landing areas or restrictions on access rights. We do not believe these two regulations pertaining to "right of way rules" and "minimum safe altitudes" illustrate an intent by Congress to pervasively regulate the field and to exert exclusive federal control over seaplane landing sites. To the contrary, there is no scheme of federal regulation designating locations for seaplane landings. The district court confused federal regulation of "the navigable airspace" and "the flight of *786 aircraft" with regulation of use of the water surface itself, and erred in viewing the City's ordinances as pertaining to aircraft operations rather than to municipal water use. Because there is no pervasive, extensive, or complete federal regulatory scheme that controls seaplane landing sites, we find that no reasonable inference may be drawn under the second prong of the preemption doctrine that Congress left no room for the states or local governments to regulate in this area. *See Hillsborough County, Florida, v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719-20, 105 S.Ct. 2371, 2378-79, 85 L.Ed.2d 714 (1985).

Moreover, there is nothing in the City's ordinances which conflicts with or impedes the objectives of federal law under the third prong of the preemption doctrine. For example, the portion of ordinance 25(J) that prohibits "[t]he landing upon the lands, waters, or ice surface within the Village of Lake Angelus of any aircraft" does not make compliance with federal aviation law impossible or create obstacles to the attainment of federal goals. The pertinent language in the ordinances does not impinge upon the "exclusive sovereignty of airspace of the United States," 49 U.S.C. § 40103(a)(1) [former § 1508(a)], nor does it interfere with the congressional mandate to insure the safety of aircraft and the efficient utilization of airspace pursuant to 49 U.S.C. § 40103(b)(2) [former § 1348(c)]. Instead, the ordinances are limited to the regulation of the lake surface within the borders of the City, and there is no conflict with federal law. The prohibition against landing seaplanes on Lake Angelus does not inhibit in a proscribed fashion that which is preempted by federal law--the free transit of the navigable airspace--but instead restricts local water use, which is not preempted by federal law.

[7] In several cases, the FAA has indicated that within the federal aviation framework, it does not concern itself with land or water use zoning issues. In *Blue Sky Entertainment, Inc. v. Town of Gardiner*, 711 F.Supp. 678, 683 (N.D.N.Y.1989), the FAA challenged portions of a local ordinance which attempted to regulate parachute jumping, aircraft operations, and aircraft noise, but the FAA specifically stated:

To the extent the ordinance regulates land use in the Town of Gardiner, it is not preempted by federal regulation of aviation.

In another case, *Dallas/Fort Worth Int'l Airport Bd. v. City of Irving*, 854 S.W.2d 161, 169 (Texas Ct.App.), *vacated by*, 868 S.W.2d 750 (Tex.1993), the FAA stated, "whether the airport is required to obtain a local permit [for an expansion project] is a matter of local law and is not relevant to the approval of the federal project." (FN6) In *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C.Cir.), *cert. denied*, 502 U.S. 994, 112 S.Ct. 616, 116 L.Ed.2d 638 (1991), the court upheld the municipal regulation of a heliport, pointing out that the FAA in an Environmental Impact Statement had written:

In the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator. Rather, the FAA facilitates airport development by providing Federal financial assistance, and reviews and approves or disapproves revisions to Airport Layout Plans at Federally funded airports.

The FAA has, thus, made clear that although FAA regulations preempt local law in regard to aircraft safety, the navigable airspace, and noise control, the FAA does not believe Congress expressly or impliedly meant to preempt regulation of local land or water use in regard to the location of airports or plane landing sites--whether for airplanes, helicopters or seaplanes. As a reviewing court, we must give great deference to the views of a federal agency with regard to the scope of its authority. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). (FN7)

***787** [8] This limitation on the preemptive impact of the FAA is also found in the Supreme Court's opinion in *Burbank*. As Justice Rehnquist stated:

A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility.

411 U.S. at 653, 93 S.Ct. at 1869 (Rehnquist, J., dissenting). Justice Rehnquist pointed out that "while Congress clearly intended to pre-empt the states from regulating *aircraft in flight*, the author of the bill, Senator Monroney, specifically stated that the FAA would not have control '*over the ground space of airports.*'" *Id.* at 644, 93 S.Ct. at 1865 (emphasis added). The majority in *Burbank* did not disagree with this conclusion and indicated that its holding was limited to regulation of aircraft noise. By analogy, we believe that if a local governing body may use its traditional police power to prevent the establishment of a new airport and control the ground space of airports, it may also prevent the landing of aircraft on specified bodies of water within its jurisdiction through its zoning authority, as the City of Lake Angelus has done in the present case. (FN8) A prohibition against landing on a body of water falls in the category of "control over ground space," which the legislative history of the Act indicates is a matter of local control, rather than in the category of the regulation of aircraft in flight, which is a matter of preemptive federal control. In reviewing an issue of preemption, this court must "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless there [is a] clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). We find no purpose manifested in the Federal Aviation Act to preempt local law concerning the designation of landing sites for aircraft, including seaplanes. For this reason, we believe the district court erred in finding that *Burbank* was dispositive of the present case, which does not involve regulation of aircraft noise, but instead involves control of ground space, which has traditionally been the province of local governments. *See Wright v. County of Winnebago*, 73 Ill.App.3d 337, 29 Ill.Dec. 347, 391 N.E.2d 772 (1979) (in absence of any evidence of pervasive federal regulation, FAA does not preempt local government's power to restrict location of plane landing areas).

The district court also relied on *Command Helicopters, Inc. v. City of Chicago*, 691 F.Supp. 1148 (N.D.Ill.1988), in finding that the City's ordinances are preempted by federal law. In *Command Helicopters*, the court determined that because the FAA had prescribed a regulation governing external-load lifting operation of helicopters, a local ordinance involving a more stringent specification was preempted. We do not believe *Command Helicopters* is on point. The local ordinance in *Command* conflicted with an existing federal regulation, and the court found that a uniform and exclusive system of federal regulation governing helicopter external-load lifting operations was necessary for the congressional objectives of the FAA to be fulfilled. In contrast, in the present case, there is no federal regulation preventing seaplanes from landing on lakes with which the ***788** City's ordinances conflict, nor is there a need for nationwide uniformity in order for the objectives of the FAA to be fulfilled.

We believe the present case is analogous to *Faux-Burhans v. County Commissioners of Frederick County*, 674 F.Supp. 1172 (D.Md.1987), *aff'd*, 859 F.2d 149 (4th Cir.1988), *cert. denied*, 488 U.S. 1042, 109 S.Ct. 869, 102 L.Ed.2d 992 (1989), in which the owner of an airplane landing strip, who wanted to create a private airport, brought suit, challenging the county's zoning restrictions on airfield operations. The district court in *Faux-Burhans* found that the county zoning restrictions were not preempted by federal law and the Court of Appeals for the Fourth Circuit affirmed. The district court in *Faux-Burhans* examined the Supreme Court's opinion in *Burbank* and found it distinguishable. The court found that whereas the local noise regulations in question in *Burbank* clearly infringed

upon federally preempted regulation of the navigable airspace, the plaintiff, Faux-Burhans, could point to no federal statute or regulation explicitly or implicitly preempting regulation of the size or scope of operations at a private airport (an airport not "otherwise open to air travel in general"). *Id.* at 1174. The court stated, "Certainly, these are all areas of valid local regulatory concern, none of which is federally preempted, and none of which inhibits in a proscribed fashion the free transit of navigable airspace. And just as certainly, no federal law gives a citizen the right to operate an airport free of local zoning control." *Id.*

We believe a similar rationale applies in the present case. *Faux-Burhans* involved use restrictions imposed on the creation of a private airport by local zoning ordinances. If a municipality, by zoning ordinances, may impose use restrictions on the creation of a private airport, we believe it may also impose use restrictions on a body of water within the municipality and prohibit the landing of seaplanes without being preempted by federal law. Just as the owner of an airplane does not have the authority to land wherever he chooses on land and must comply with local zoning ordinances, the owner of a seaplane does not have the authority to land a seaplane wherever he chooses.

Another case which is directly on point is *Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 390 A.2d 1177 (1978). The plaintiff, a company seeking to establish and operate a landing area for helicopters, argued that the municipal ordinance prohibiting the creation and operation of a helistop was preempted by federal law. The court in *Garden State Farms* held that federal legislation has not preempted state and local jurisdiction with respect to the placement of private helistops. *Id.* at 446, 390 A.2d 1177. The court stated that the local regulation of small, relatively isolated, privately owned helistops did not present a situation where "preemption may be predicated upon a felt need for a monolithic system of regulation." *Id.* at 446-47, 390 A.2d 1177. The court explained:

[A]s a policy matter, if federal preemption were found, ... state and local governments, which are the only bodies that currently license privately operated helistops and heliports, would be shorn of this regulatory responsibility. Congress could not have intended to create a governmental vacuum with respect to privately operated helistops.

Id. at 449, 390 A.2d 1177.

Similar policy concerns are at issue in the present case. It is not feasible for Congress to determine how local land or bodies of water within a municipality are to be used in regard to the location of aircraft landing sites. The needs of a state such as Alaska, in which seaplanes play a vital commercial role, and Michigan, in which seaplanes are used primarily for recreation, are different, and this difference requires local, not national, regulation. The federal government, rather than "preempting the field," has not entered the field and exerts no control over the location of seaplane landing sites. If the federal government intended to preempt, we believe there would be a mass of regulations concerning seaplane landing sites, which simply do not exist. No federal statute or regulation addresses the action prohibited by the City of Lake Angelus ordinances or delineates the boundaries of local control in regard to seaplane landing sites. We find this absence of federal regulation significant. The Supreme Court, in *Pacific Gas & Electric *789 Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), stated that the Court must focus on whether the matter on which the local government asserts the right to act is in any way regulated by the federal Act and found that the only reasonable inference to be drawn from silence is that Congress intended local governments to continue to regulate. *Id.* at 208, 103 S.Ct. at 1724. If federal preemption were found in the present case, a "governmental vacuum" would occur because the federal government does not regulate the location of seaplane landing sites, and state and local governments would be shorn of their regulatory authority. See *Garden State Farms*, 77 N.J. at 449, 390 A.2d 1177. The result would be entirely impracticable, and every lake in the United States would become a potential airport for seaplanes. In regard to the location of commercial airports, the FAA has indicated that it will not adopt regulations controlling local land use, because the needs of each locality are unique and different. See 14 C.F.R. § 157.7. Courts have recognized that federal aviation law does not preempt local regulation of the location of airports or heliports, which must comply with local zoning ordinances. Just as Congress did not intend to create a regulatory vacuum with respect to the location of commercial or privately operated airports and heliports on land, we believe Congress did not intend to create a vacuum with respect to the location of seaplane landing sites on water, but left the matter to local control.

Finally, our conclusion that the Supreme Court's decision in *Burbank* does not preempt all state and local zoning power with respect to aircraft landing sites is supported by ample case law. See *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir.1990) (city's zoning ordinance prohibiting initial siting of heliport not preempted by federal law); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir.1981) (local governments' noise abatement plans that do not impinge on aircraft operations not preempted), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F.Supp. 742 (N.D. Ohio 1995) (the FAA does not possess zoning authority merely by virtue of its broad mandate to regulate matters relating to aviation; state or local zoning or land use laws are not preempted); *Wood v. City of Huntsville*, 384 So.2d 1081 (Ala.1980) (although Congress has extensively and exclusively regulated use of the navigable airspace of the United States, state and local governments retain substantial control over ground usage); *Bethman v. City of Ukiah*, 216 Cal.App.3d 1395, 265 Cal.Rptr. 539 (1989) (no federal preemption of state or municipal regulation of the location and environmental impact of airports); *Wright v. County of Winnebago*, 73 Ill.App.3d at 344, 29 Ill.Dec. 347, 391 N.E.2d 772 (FAA does not preempt local zoning authority from determining appropriate use of land; the right not to have an airport in the first place is local); *Harrison v. Schwartz*, 319 Md. 360, 572 A.2d 528 (1990) (a zoning ordinance that does not regulate aircraft noise emissions or the actual conduct of flight operations may withstand a preemption argument), *cert. denied*, 498 U.S. 851, 111 S.Ct. 143, 112 L.Ed.2d 110 (1990); *People v. Altman*, 61 Misc.2d 4, 304 N.Y.S.2d 534, (N.Y. Dist. Ct. 1969) (town ordinance prohibiting seaplanes from taking off or landing upon any portion of town's channel system except in an emergency is in harmony with federal law on the subject and is not preempted).

[9] [10] To conclude, there is a distinction between the regulation of the navigable airspace and the regulation of ground space to be used for aircraft landing sites. Although the regulation of the airspace of the United States has been preempted by Congress, we find Congress did not intend to preempt the regulation of water use in regard to aircraft landing sites as indicated by an examination of the Federal Aviation Act, the attendant regulations, the legislative history of the Act, and by statements made by the FAA itself. As the court in *City of Cleveland* stated:

The Aviation Act grants to the FAA authority to regulate the use of airspace, but this does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use regulations may *790 have some tangential impact on the use of airspace.

893 F.Supp. at 751. Because the City of Lake Angelus could lawfully prohibit airplane and helicopter landings on city land under established case law, it logically follows that the City may also prohibit seaplane landings on Lake Angelus under its zoning authority. Federal preemption of the airspace under the Act does not limit the right of local governments to designate and regulate aircraft landing areas, including seaplane landings on lakes. Therefore, the Federal Aviation Act does not preempt City of Lake Angelus ordinances 25(J) and 66(E), which prohibit seaplanes from landing or operating on the surface of Lake Angelus. The district court is reversed on this issue. (FN9)

III.

On cross-appeal, plaintiff alleges that as a riparian property owner and airman qualified to safely operate seaplanes, the ordinances at issue have deprived him of due process and equal protection in violation of the Fourteenth Amendment, and that the ordinances are exclusionary, arbitrary, capricious and not reasonably related to a legitimate government interest.

[11] Under Michigan law, a party alleging exclusionary zoning must be prepared to establish both that the exclusion exists throughout the municipality and that there is a demonstrated need for the use he proposes. *Fremont Tp. v. Greenfield*, 132 Mich.App. 199, 204, 347 N.W.2d 204 (1984). The City of Lake Angelus is Michigan's smallest city by population and is an entirely residential community. The City argues that although plaintiff Gustafson wants to land seaplanes on Lake Angelus, he has not articulated any public need for such lake usage. The City also contends that a local legislative body's determination of the public interest and adoption of regulations which are rationally related to it must be deferred to. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir.1992).

[12] [13] We agree with the City. As this court stated in *Stupak--Thrall v. United States*, 70 F.3d 881 (6th Cir.1995):

The Michigan Supreme Court has explicitly held that local governments may regulate their citizens' riparian rights pursuant to their inherent police powers. In *Miller v. Fabius Township Board*, 366 Mich. 250, 114 N.W.2d 205 (1962), the court allowed time restrictions on waterskiing. In *Square Lake Hills Condo. Assn. v. Bloomfield Township*, 437 Mich. 310, 471 N.W.2d 321 (1991), the court allowed regulation of boat docking and launching. In *Square Lake Hills*, especially, the court made it clear that plaintiffs' recreational riparian rights were subject to regulation for the protection of "health, safety, and welfare" of the general public. *Id.*, 471 N.W.2d at 322.

Id. at 889. See also *Hess v. West Bloomfield Twp.*, 439 Mich. 550, 486 N.W.2d 628 (1992) (a township has the authority to regulate riparian rights as part of its zoning power). Thus, Michigan law makes it clear that riparian rights are not absolute, but are subject to reasonable regulation, and municipalities can restrict boat usage by riparian owners. It follows by analogy that seaplane usage by riparian owners can also be restricted. The riparian rights asserted by plaintiff Gustafson are not absolutely protected by the Fourteenth Amendment, but instead are subject to reasonable regulation.

[14] [15] [16] The test under Michigan law for determining whether an ordinance is reasonable requires an assessment of the existence of a rational relationship between the exercise of police power and the public health, safety, morals, or general welfare in a particular manner in a given case. *Square Lake *791 Hills Condo. Ass'n v. Bloomfield Township*, 437 Mich. 310, 317, 471 N.W.2d 321 (1991). Moreover, as this court has stated in *Pearson*, where zoning legislation is subject to substantive due process attack, the scope of review by the federal court is even more deferential than for review of state administrative action. 961 F.2d at 1223. Although when reviewing administrative action, the federal court must make an extremely limited review of the evidence, when reviewing legislative acts, such as zoning ordinances, this is not permitted. The only permissible inquiry is whether the legislative action is rationally related to legitimate land use concerns. *Id.*

[17] In the present case, we find that the City's concern with "noise, (FN10) danger, apprehension of danger, ... destruction of property values, and interference with other lawful uses of the lake enjoyed by the great majority of citizens, including boating, sailing, fishing, swimming, and other recreational uses" fulfills the requirements of this test. In *Georgia Power Company v. Baker*, 830 F.2d 163 (11th Cir.1987), the court upheld the right of a federally licensed power company to prohibit seaplanes from using its reservoirs, even though its license, issued by the Federal Energy Regulatory Commission, required that it permit the use of the reservoirs "for the purpose of full public utilization of such lands and water for navigation and for outdoor recreational purposes, including fishing and hunting." *Id.* at 164. The court noted that "Georgia Power's primary concern in prohibiting seaplanes was the safety of the boating public," *id.*, and "[m]ore importantly, the company decided that seaplane operation on its reservoirs would present significant hazards both to the boating public and to seaplane pilots. Take-off and landing constitute a danger in themselves; and the exposed propeller of seaplanes poses an additional hazard to people on the lake as well as around docking facilities and boat ramps." *Id.* at 167. The court ruled that Georgia Power's prohibition of seaplanes on its reservoirs was a reasonable limitation. We find that for similar reasons, the City of Lake Angelus ordinances are reasonable limitations on the use of Lake Angelus and are rationally related to a legitimate government interest in safety.

In *Appeal of Green and White Copter, Inc.*, 25 Pa.Cmwlt. 445, 360 A.2d 283 (1976), the court found that the township's total exclusion of heliports from residential areas was designed to protect the public interest. The court stated:

The potential safety problems and disturbances to the tranquility of the area are obvious. While air travel facilities are not nuisances per se, they may become nuisances in fact in a particular situation. Necessarily, the proposed use in this case would impinge upon the rights of neighboring landowners in the use and enjoyment of their property. If any further evidence of the potential for interference with adjoining property is required, it is provided by the fact that air flights over property have been found to constitute a taking of land near airports. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962).

Id., 360 A.2d at 285.

[18] We believe that similar legitimate concerns about the dangers inherent in the landing and taking off of seaplanes and the adverse effect on the "tranquility of the area" by low-level air traffic are found in the present case. The record does not disclose a basis on which to find that the City's prohibition against seaplane landings on Lake Angelus is arbitrary or unreasonable. Moreover, plaintiff has not been denied equal protection of the law, because all similarly situated persons, including all Lake Angelus residents, watercraft owners, and seaplane pilots are similarly regulated. See *City of Shreveport v. Conrad*, 212 La. 737, 744, 33 So.2d 503 (1947). The district court's denial of plaintiff's *792 42 U.S.C. § 1983 claim that the ordinances deprived him of his due process and equal protection rights under the Fourteenth Amendment is therefore affirmed.

[19] In regard to attorneys fees, a claim premised on a violation of the Supremacy Clause through preemption is not cognizable under 42 U.S.C. § 1983. *J. & J. Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476-77 (10th Cir.1985). Since plaintiff's alleged violations of due process and equal protection are unmeritorious, the ordinances have not violated any civil right that is redressable under 42 U.S.C. § 1983, and the district court properly denied attorneys fees pursuant to 42 U.S.C. § 1988.

IV.

To conclude, the district court is affirmed in part and reversed in part. The district court's grant of summary judgment to defendants in regard to plaintiff's 42 U.S.C. §§ 1983 and 1988 claims is AFFIRMED. The district court's decision in favor of plaintiff that ordinances 66(E) and 25(J) are preempted by federal law is REVERSED, and the case is remanded to the district court for proceedings consistent with this opinion. The Federal Aviation Act does not occupy the field of water use regulations in such a way as to preempt the City of Lake Angelus ordinances.

NATHANIEL R. JONES, Circuit Judge, concurring.

After numerous attempts at drafting a principled dissent to the majority opinion, I have come to the conclusion that while it is legally unassailable, the case nevertheless has an unsettling aspect. Due to the solid conclusion reached by Judge Contie for the majority, I concur in the judgment on both the preemption and section 1983 claims.

I write separately, however, to express a concern, even as I agree with the judgment. This case, I fear, may reinforce, as an unintended consequence, the moves to neutralize the appropriate exercise of federal power whenever state and local regulations are at play. History should remind us of the reasons why a strong central government has been deemed essential in our system of federalism.

I am simply not convinced that in this case the regulations cited by Gustafson demonstrate Congressional intent to preempt the local power to designate aircraft landing sites. To the contrary, zoning is one of the few spheres of control the Federal Aviation Act ("FAA") explicitly leaves to local governments. My concern is that some states and localities will use this ruling as a rallying point in their efforts to undermine particular areas of federal control. Far from that, this case must be read narrowly and as acknowledging that Congress excepted only limited areas from federal control when it enacted the FAA. As history has taught us, certain areas of regulation in our country must be left to the control of the national government. The very nature of some subjects implicate federal control. Air traffic must be regulated at the national level. Without uniform equipment specifications, takeoff and landing rules, and safety standards, it would be impossible to operate a national air transportation system.

City of Burbank v. Lockheed Air Terminal provides a telling example of a locality's attempt to undermine the reach of the Federal Aviation Act. In *Burbank*, one locality's curfew on jet aircraft landings threatened to disrupt flying schedules and jeopardize air safety throughout the entire nation. As the Court noted:

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the

concomitant decrease in safety would be compounded.

Burbank, 411 U.S. at 639, 93 S.Ct. at 1862. I reiterate the Court's concern with local governments' ability to interfere with comprehensive federal regulatory programs. The line between permissible local regulation, such as the zoning regulation in this case, and impermissible encroachments on federal power in the name of zoning or other traditional state police power functions, such as *793. protecting citizens health and welfare, is a thin line. Many localities are already eager to test the boundaries, and the courts must be ever mindful of their attempts to do so.

A recent federalism summit held in Cincinnati serves to remind us of those who wish to see power wrenched from the hands of the federal government. At the summit, state legislators, delegates, and observers from thirty-nine states and five nation-wide organizations convened to discuss proposals for "strengthening the states' hands in dealing with the federal government." See Dan Balz, *Power Is on States' Agenda; Coalition Seeks to Fight Federal Encroachment on Sovereignty*, Wash. Post, Oct. 25, 1995, at A17; Lawrence J. Goodrich, *States Seek to Grab Even More Power from Washington*, Christian Sci. Monitor, Oct. 25, 1995, at 1. Along with devising strategies to transfer certain areas under federal control to the states, conferees at this recent summit suggested proposals for interjecting state lawmakers into national rulemaking processes. *Id.* As this movement gains fervor, I grow more concerned that its proponents are overlooking this country's continued need for a strong national government.

In their charge to shift power from the national government to local governments, so-called states and local rights proponents cannot ignore the advancements in this country that could only have come about through the leadership of our national government. Besides creating an effective and intricate interstate travel system consisting of air, rail, water, and highway travel, our strong national government has shaped this country into a place where all citizens enjoy protections in the areas of voting rights, education, employment discrimination, labor, securities, and environmental protection. A collection of fifty separate governments could never have assured such protections throughout our fifty states.

Although a legal local seaplane landing prohibition may not seem much of a threat to the integrity of our national government, the possibility remains that the next local regulation may not be rooted in an appropriate exercise of local power. I caution that local governments ought to take care in regulating in areas that are subject to broad national control and to consider the advantages of our national government before attempting to undermine its authority.

BATCHELDER, Circuit Judge, concurring.

I write separately only to observe that Judge Jones's separate concurrence serves to remind us how very far we have strayed from the government described by its founders during this nation's birth.

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 238 (James Madison) (G.W. Carey & J. McClellan eds., 1990).

If those who meet in the name of federalism seek, as Judge Jones puts it, "to see power wrenched from the hands of the federal government," to devise "strategies to transfer certain areas under federal control to the states," and "suggest[] proposals for interjecting state lawmakers into national rulemaking processes," they do so because the national government has usurped that power from the states and the people, to whom it was originally reserved. Compare U.S. CONST. art. I, § 8 with U.S. CONST. amend X.

FN1. The City of Lake Angelus's brief is supported on appeal by *amici curiae*, National Institute of Municipal Law Officers and Michigan Municipal League. Robert Gustafson's brief is supported on appeal by *amicus curiae*, Seaplane Pilots Association.

- FN2. When the suit was filed, ordinance 66 included an altitude regulation which prohibited flying over the City at altitudes less than 500 feet. Although the altitude regulation had never been enforced against plaintiff or anyone else, plaintiff Gustafson also challenged its validity. The City acknowledged that this provision was federally preempted and did not argue in support of its validity. The altitude regulation was subsequently deleted from ordinance 66 by amendment and is not at issue in this appeal.
- FN3. On July 5, 1994, Congress restated the laws related to transportation in one comprehensive title. The former Code sections are provided in brackets.
- FN4. Anyone proposing to establish a new airport is required to notify the Department of Transportation before any consideration or use begins. 14 C.F.R. § 157.3. In its review of an airport proposal, the FAA considers the following: the effects the proposed action would have on existing or contemplated traffic patterns of neighboring airports; the effects the proposed action would have on the existing airspace structure and projected programs of the FAA; and the effects that existing or proposed manmade objects (on file with the FAA) and natural objects within the affected area would have on the airport proposal. 14 C.F.R. § 157.7(a).
- *793_ FN5. The definition of airport includes a "seaplane base." 14 C.F.R. § 157.2.
- FN6. Even though this case was vacated and remanded for reconsideration in light of a change in state law, the position the FAA took is instructive.
- FN7. We believe these cases contradict the statement of the court in *Price v. Charter Township of Fenton*, 909 F.Supp. 498 (E.D.Mich.1995), indicating that federal courts have found land use restrictions and zoning laws regarding prohibitions on the location of plane landing sites as violative of the Supremacy Clause. *Id.* at 502-04. We find *Price* distinguishable from the present case because the regulation at issue in *Price* concerned the frequency of flight operations at the plaintiff's airport, not whether an airport could be established in the first place. We do not believe the ordinances in the present case can be fairly construed as regulations of flight operation, because the FAA does not interpret the designation of the location of plane landing sites as such. As the court in *Price* indicated, if Fenton Township wanted "to prevent the construction of an airport that it felt would be disruptive to the surrounding area, it most likely could do so." *Id.*
- FN8. We believe it is appropriate to find that the landing of a seaplane on a lake, not officially designated as a landing area, is tantamount to, and can be reasonably construed as, the creation of an airport. Under FAA regulations, the broad definition of airport includes seaplane bases. 14 C.F.R. § 157.2.
- FN9. Plaintiff also argues that the ordinances are preempted by state law, relying on Mich.Comp.Laws Ann. § 281.1017 and the Michigan Aeronautics Code, Mich.Comp.Laws Ann. § 259.1 *et seq.* We disagree. There is nothing in these provisions to indicate the legislature's intent to take over a municipalities' responsibilities in the area of land or water use, development, or the location of aeronautical landing sites. See *Garden State Farms, Inc.*, 77 N.J. at 445, 390 A.2d 1177 (although state aviation act embraced a comprehensive scheme of state regulation to promote safety and aeronautical progress, it did not preclude municipalities from determining whether or not aeronautical facilities should be constructed within their boundaries).
- FN10. Plaintiff's argument that the ordinances are preempted because one of the rationales provided by the City for their enactment was the prevention of aircraft noise has no merit. As the court in *Wright v. County of Winnebago*, 73 Ill.App.3d at 344, 29 Ill.Dec. 347, 391 N.E.2d 772, pointed out, once an airport is operating, it may be that only the FAA can regulate the resulting noise problem, but the right to choose not to have an airport in the first place on the basis of aircraft noise is local and is not preempted.

U.S. Code

49 U.S.C. § 47501. Definitions

In this subchapter -

(1) "airport" means a public-use airport as defined in section 47102 of this title.

(2) "airport operator" means -

(A) for an airport serving air carriers that have certificates from the Secretary of Transportation, any person holding an airport operating certificate issued under section 44706 of this title; and

(B) for any other airport, the person operating the airport.

(Pub. L. 103-272, Sec. 1(e), July 5, 1994, 108 Stat. 1284.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
≤47501≥(1)	49 App.:2101(1).	Feb. 18, 1980, Pub. L. 96-193, Sec. 101(1), 94 Stat. 50; restated Sept. 3, 1982, Pub. L. 97-248, Sec. 524(b)(1), 96 Stat. 696; Dec. 30, 1987, Pub. L. 100-223, Sec. 103(f), 101 Stat. 1489.
	49 App.:2101(3).	Feb. 18, 1980, Pub. L. 96-193, Sec. 101(3), 94 Stat. 50.
≤47501≥(2)	49 App.:2101(2).	Feb. 18, 1980, Pub. L. 96-193, Sec. 101(2), 94 Stat. 50; restated Sept. 3, 1982, Pub. L. 97-248, Sec. 524(b)(2), 96 Stat. 696.
	49 App.:1551(b)(1)(E).	Aug. 23, 1958, Pub. L. 85-726, 72 Stat. 731, Sec. 1601(b)(1)(E); added Oct. 4, 1984, Pub. L. 98-443, Sec. 3(e), 98 Stat. 1704.

In this section, the words "the term" are omitted as surplus.

In clause (1), the text of 49 App.:2101(3) is omitted as surplus because the complete name of the Secretary of Transportation is used the first time the term appears in a section.

In clause (2), the word "valid" is omitted as surplus.

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U.S. Code

49 U.S.C. § 47101. Policies

- (a) General. - It is the policy of the United States -
- (1) that the safe operation of the airport and airway system is the highest aviation priority;
 - (2) that aviation facilities be constructed and operated to minimize current and projected noise impact on nearby communities;
 - (3) to give special emphasis to developing reliever airports;
 - (4) that appropriate provisions should be made to make the development and enhancement of cargo hub airports easier;
 - (5) to encourage the development of transportation systems that use various modes of transportation in a way that will serve the States and local communities efficiently and effectively;
 - (6) that airport development projects under this subchapter provide for the protection and enhancement of natural resources and the quality of the environment of the United States;
 - (7) that airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease;
 - (8) to ensure that nonaviation usage of the navigable airspace be accommodated but not allowed to decrease the safety and capacity of the airspace and airport system;
 - (9) that artificial restrictions on airport capacity -
 - (A) are not in the public interest;
 - (B) should be imposed to alleviate air traffic delays only after other reasonably available and less burdensome alternatives have been tried; and
 - (C) should not discriminate unjustly between categories and classes of aircraft;
 - (10) that special emphasis should be placed on converting appropriate former military air bases to civil use and identifying and improving additional joint-use facilities;
 - (11) that the airport improvement program should be administered to encourage projects that employ innovative technology, concepts, and approaches that will promote safety, capacity, and efficiency improvements in the construction of airports and in the air transportation system (including the development and use of innovative concrete and other materials in the construction of airport facilities to minimize initial laydown costs, minimize time out of service, and maximize lifecycle durability) and to encourage and solicit innovative technology proposals and activities in the expenditure of funding pursuant to this subchapter;
 - (12) that airport fees, rates, and charges must be reasonable and may only be used for purposes not prohibited by this subchapter; and

(13) that airports should be as self-sustaining as possible under the circumstances existing at each particular airport and in establishing new fees, rates, and charges, and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes for which airport revenues may be spent under section 47107(b)(1) of this title, including reasonable reserves and other funds to facilitate financing and cover contingencies.

(b) National Transportation Policy. - (1) It is a goal of the United States to develop a national intermodal transportation system that transports passengers and property in an efficient manner. The future economic direction of the United States depends on its ability to confront directly the enormous challenges of the global economy, declining productivity growth, energy vulnerability, air pollution, and the need to rebuild the infrastructure of the United States.

(2) United States leadership in the world economy, the expanding wealth of the United States, the competitiveness of the industry of the United States, the standard of living, and the quality of life are at stake.

(3) A national intermodal transportation system is a coordinated, flexible network of diverse but complementary forms of transportation that transports passengers and property in the most efficient manner. By reducing transportation costs, these intermodal systems will enhance the ability of the industry of the United States to compete in the global marketplace.

(4) All forms of transportation, including aviation and other transportation systems of the future, will be full partners in the effort to reduce energy consumption and air pollution while promoting economic development.

(5) An intermodal transportation system consists of transportation hubs that connect different forms of appropriate transportation and provides users with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States, as well as providing links to other forms of transportation and to intercity connections.

(6) Intermodality and flexibility are paramount issues in the process of developing an integrated system that will obtain the optimum yield of United States resources.

(7) The United States transportation infrastructure must be reshaped to provide the economic underpinnings for the United States to compete in the 21st century global economy. The United States can no longer rely on the sheer size of its economy to dominate international economic rivals and must recognize fully that its economy is no longer a separate entity but is part of the global marketplace. The future economic prosperity of the United States depends on its ability to compete in an international marketplace that is teeming with competitors but in which a full one-quarter of the economic activity of the United States takes place.

(8) The United States must make a national commitment to rebuild its infrastructure through development of a national intermodal transportation system. The United States must provide the foundation for its industries to improve productivity and their ability to compete in the global economy with a system that will

ability to compete in the global economy with a system that will transport passengers and property in an efficient manner.

(c) Capacity Expansion and Noise Abatement. - It is in the public interest to recognize the effects of airport capacity expansion projects on aircraft noise. Efforts to increase capacity through any means can have an impact on surrounding communities. Noncompatible land uses around airports must be reduced and efforts to mitigate noise must be given a high priority.

(d) Consistency With Air Commerce and Safety Policies. - Each airport and airway program should be carried out consistently with section 40101(a), (b), (d), and (f) of this title to foster competition, prevent unfair methods of competition in air transportation, maintain essential air transportation, and prevent unjust and discriminatory practices, including as the practices may be applied between categories and classes of aircraft.

(e) Adequacy of Navigation Aids and Airport Facilities. - This subchapter should be carried out to provide adequate navigation aids and airport facilities for places at which scheduled commercial air service is provided. The facilities provided may include -

- (1) reliever airports; and
- (2) heliports designated by the Secretary of Transportation to relieve congestion at commercial service airports by diverting aircraft passengers from fixed-wing aircraft to helicopter carriers.

(f) Maximum Use of Safety Facilities. - This subchapter should be carried out consistently with a comprehensive airspace system plan, giving highest priority to commercial service airports, to maximize the use of safety facilities, including installing, operating, and maintaining, to the extent possible with available money and considering other safety needs -

- (1) electronic or visual vertical guidance on each runway;
- (2) grooving or friction treatment of each primary and secondary runway;
- (3) distance-to-go signs for each primary and secondary runway;
- (4) a precision approach system, a vertical visual guidance system, and a full approach light system for each primary runway;
- (5) a nonprecision instrument approach for each secondary runway;
- (6) runway end identifier lights on each runway that does not have an approach light system;
- (7) a surface movement radar system at each category III airport;
- (8) a taxiway lighting and sign system;
- (9) runway edge lighting and marking; and
- (10) radar approach coverage for each airport terminal area.

(g) Intermodal Planning.--To carry out the policy of subsection (a)(5) of this section, the Secretary of Transportation shall take each of the following actions:

- (1) Coordination in development of airport plans and programs.-- Cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs. The airport plans and programs shall be developed in coordination with other transportation planning and considering comprehensive long-range land-use plans and overall social, economic, environmental, system performance, and energy conservation objectives. The process of developing airport plans and programs shall be continuing, cooperative, and comprehensive to the degree appropriate to the complexity of the transportation problems.

(2) Goals for airport master and system plans.--Encourage airport sponsors and State and local officials to develop airport master plans and airport system plans that--

(A) foster effective coordination between aviation planning and metropolitan planning;

(B) include an evaluation of aviation needs within the context of multimodal planning; and

(C) are integrated with metropolitan plans to ensure that airport development proposals include adequate consideration of land use and ground transportation access.

(3) Representation of airport operators on MPO'S.--Encourage metropolitan planning organizations, particularly in areas with populations greater than 200,000, to establish membership positions for airport operators.

(h) Consultation. - To carry out the policy of subsection (a)(6) of this section, the Secretary of Transportation shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency about any project included in a project grant application involving the location of an airport or runway, or a major runway extension, that may have a significant effect on --

- (1) natural resources, including fish and wildlife;
- (2) natural, scenic, and recreation assets;
- (3) water and air quality; or
- (4) another factor affecting the environment.

(Pub. L. 103-272, Sec. 1(e), July 5, 1994, 108 Stat. 1246; Pub. L. 103-305, title I, Sec. 104, 110, Aug. 23, 1994, 108 Stat. 1571, 1573; Pub. L. 103-429, Sec. 6(62), Oct. 31, 1994, 108 Stat. 4385; Pub. L. 104-264, title I, Sec. 141, Oct. 9, 1996, 110 Stat. 3220.)

Historical and Revision Notes
Pub. L. 103-272

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
<u><47101></u> (a)(1)	49 App.:2201(a)(1), (2).	Sept. 3, 1982, Pub. L. 97-248, Sec. 502(a)(1)-(3), (6), (b), 509(b)(5) (1st sentence, last sentence words before 11th comma), 96 Stat. 671, 672, 684.
	49 App.:2201(a)(9).	Sept. 3, 1982, Pub. L. 97-248, Sec. 502(a)(9), 96 Stat. 672; Dec. 30, 1987, Pub. L. 100-223, Sec. 102(b)(1), (c)(1), 101 Stat. 1487.
	49 App.:2201(a)(10).	Sept. 3, 1982, Pub. L. 97-248, Sec. 502(a)(10), 96 Stat. 672; Dec. 30, 1987, Pub. L. 100-223, Sec. 102(b)(1), (c)(2), 101 Stat.

<u><47101>(a)(2)</u>	49 App.:2201(a)(8).	1487. Sept. 3, 1982, Pub. L. 97-248, Sec. 502(a)(8), 96 Stat. 672; Dec. 30, 1987, Pub. L. 100-223, Sec. 102(b)(1), 101 Stat. 1487.
<u><47101>(a)(3)</u>	49 App.:2201(a)(6).	
<u><47101>(a)(4)</u>	49 App.:2201(a)(7).	Sept. 3, 1982, Pub. L. 97-248, 96 Stat. 324, Sec. 502(a)(7); added Dec. 30, 1987, Pub. L. 100-223, Sec. 102(b)(2), 101 Stat. 1487.
<u><47101>(a)(5)</u>	49 App.:2201(b) (1st sentence).	
<u><47101>(a)(6)</u>	49 App.:2208(b)(5) (1st sentence).	
<u><47101>(a)(7)</u>	49 App.:2201(a)(11).	Sept. 3, 1982, Pub. L. 97-248, 96 Stat. 324, Sec. 502(a)(11); added Dec. 30, 1987, Pub. L. 100-223, Sec. 102(c)(3), 101 Stat. 1488.
<u><47101>(a)(8)</u>	49 App.:2201(a)(12).	Sept. 3, 1982, Pub. L. 97-248, 96 Stat. 324, Sec. 502(a)(12); added Dec. 30, 1987, Pub. L. 100-223, Sec. 102(c)(3), 101 Stat. 1488; Nov. 5, 1990, Pub. L. 101-508, Sec. 9109(a)(1), 104 Stat. 1388-356.
<u><47101>(a)(9)</u>	49 App.:2201(a)(13).	Sept. 3, 1982, Pub. L. 97-248, 96 Stat. 324, Sec. 502(a)(13); added Dec. 30, 1987, Pub. L. 100-223, Sec. 102(c)(3), 101 Stat. 1488; Nov. 5, 1990, Pub. L. 101-508, Sec. 9103(2), 9109(a)(2), 104 Stat. 1388-354, 1388-356.
<u><47101>(a)(10)</u>	49 App.:2201(a)(14).	Sept. 3, 1982, Pub. L. 97-248, 96 Stat. 324, Sec. 502(a)(14); added Nov. 5, 1990, Pub. L. 101-508, Sec. 9109(a)(3), 104 Stat. 1388-356.
<u><47101>(b)</u>	49 App.:2201(c).	Sept. 3, 1982, Pub. L. 97-248, 96 Stat. 324. Sec. 502(c).

		(d); added Oct. 31, 1992, Pub. L. 102-581, Sec. 101, 106 Stat. 4875.
<u><47101>(c)</u>	49 App.:2201(d).	
<u><47101>(d)</u>	49 App.:2201(a)(5).	Sept. 3, 1982, Pub. L. 97-248, Sec. 502(a)(5), 96 Stat. 671; Nov. 5, 1990, Pub. L. 101-508, Sec. 9103(1), 104 Stat. 1388-354.
<u><47101>(e)</u>	49 App.:2201(a)(3). 49 App.:2202(a)(20).	Sept. 3, 1982, Pub. L. 97-248, Sec. 503(a)(20), 96 Stat. 674; Dec. 30, 1987, Pub. L. 100-223, Sec. 103(c)(1), 101 Stat. 1488.
<u><47101>(f)</u>	49 App.:2201(a)(4).	Sept. 3, 1982, Pub. L. 97-248, Sec. 502(a)(4), 96 Stat. 671; Dec. 30, 1987, Pub. L. 100-223, Sec. 102(a), 101 Stat. 1487.
<u><47101>(g)</u>	49 App.:2201(b) (2d, last sentences).	
<u><47101>(h)</u>	49 App.:2208(b)(5) (last sentence words before 11th comma).	

In subsection (a), before clause (1), the text of 49 App.:2201(a)(2), (9), and (10) is omitted as executed. The words "It is the policy of the United States" are substituted for "The Congress hereby . . . declares" in 49 App.:2201(a) (words before cl. (1)), "it is in the national interest" in 49 App.:2201(a)(12), "are not in the public interest and" in 49 App.:2201(a)(13), "It is declared to be in the national interest to" in 49 App.:2201(b), and "It is declared to be national policy that" in 49 App.:2208(b)(5) for consistency in the revised title and with other titles of the United States Code. In clause (1), the word "is" is substituted for "will continue to be" to eliminate unnecessary words. In clause (2), the words "with due regard" are omitted as surplus. In clause (3), the words "reliever airports make an important contribution to the efficient operation of the airport and airway system" are omitted as executed. In clause (4), the words "cargo hub airports play a critical role in the movement of commerce through the airport and airway system" are omitted as executed. In clause (5), the words "and promote" are omitted as surplus.

In subsection (d), the word "to" is substituted for "with due regard for the goals expressed therein of" to eliminate unnecessary words.

In subsection (e), before clause (1), the words "The facilities provided may include" are substituted for "including" because of the restatement. Clause (2) is substituted for "reliever heliports" to incorporate the definition of that term from 49 App.:2202(a)(19) into this subsection.

In subsection (f), before clause (1), the words "the goal of" are omitted as surplus.

In subsection (g), the words "formulated" and "due" are omitted as surplus. The words "process of developing airport

omitted as surplus. The words "process of developing airport plans and programs" are substituted for "process" for clarity.

PUB. L. 103-429

This amends 49:47101(a)(12) to translate a cross-reference to the Airport and Airway Improvement Act of 1982 (Public Law 97-248, 96 Stat. 671) to the corresponding cross-reference of title 49, United States Code.

AMENDMENTS

1996 - Subsec. (g). Pub. L. 104-264 designated existing provisions as introductory provisions and par. (1), and added pars. (2) and (3).

1994 - Subsec. (a)(11). Pub. L. 103-305, Sec. 104, added par. (11). Subsec. (a)(12). Pub. L. 103-429 substituted "subchapter" for "Act".

Pub. L. 103-305, Sec. 110, added par. (12).

Subsec. (a)(13). Pub. L. 103-305, Sec. 110, added par. (13).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-429 effective July 5, 1994, see section 9 of Pub. L. 103-429, set out as a note under section 321 of this title.

APPLICABILITY OF PUB. L. 104-264

Except as otherwise specifically provided, Pub. L. 104-264 and the amendments made by Pub. L. 104-264 applicable only to fiscal years beginning after Sept. 30, 1996, and not to be construed as affecting funds made available for a fiscal year ending before Oct. 1, 1996, see section 3 of Pub. L. 104-264, set out as a note under [49 U.S.C. § 106](#).

INNOVATIVE FINANCING TECHNIQUES

Section 148 of Pub. L. 104-264 provided that:

"(a) In general.--The Secretary of Transportation is authorized to carry out a demonstration program under which the Secretary may approve applications under subchapter I of chapter 471 of title 49, United States Code [this subchapter], for not more than 10 projects for which grants received under such subchapter may be used to implement innovative financing techniques.

"(b) Purpose.--The purpose of the demonstration program shall be to provide information on the use of innovative financing techniques for airport development projects to Congress and the National Civil Aviation Review Commission.

"(c) Limitation.--In no case shall the implementation of an innovative financing technique under the demonstration program result in a direct or indirect guarantee of any airport debt instrument by the Federal Government.

"(d) Innovative financing technique defined.--In this section, the term 'innovative financing technique' shall be limited to the following:

"(1) Payment of interest.

"(2) Commercial bond insurance and other credit enhancement associated with airport bonds for eligible airport development.

"(3) Flexible non-Federal matching requirements.

"(e) Expiration of Authority.--The authority of the Secretary to carry out the demonstration program shall expire on September 30, 1998."

AUTHORITY TO CLOSE AIRPORT LOCATED NEAR CLOSED OR REALIGNED MILITARY BASE

Section 1203 of Pub. L. 104-264 provided that: "Notwithstanding any other provision of a law, rule, or grant assurance, an airport that is

not a commercial service airport may be closed by its sponsor without any obligation to repay grants made under chapter 471 of title 49, United States Code, the Airport and Airway Improvement Act of 1982 [title V of Pub. L. 97-248, Sept. 3, 1982, 96 Stat. 671, which was classified principally to chapter 31 (section 2201 et seq.) of former Title 49, Transportation and which was substantially repealed by Pub. L. 103-272, Sec. 7(b), July 5, 1994, 108 Stat. 1379], or any other law if the airport is located within 2 miles of a United States Army depot which has been closed or realigned; except that in the case of disposal of the land associated with the airport, the part of the proceeds from the disposal that is proportional to the Government's share of the cost of acquiring the land shall be paid to the Secretary of Transportation for deposit in the Airport and Airway Trust Fund established under section 9502 of the Internal Revenue Code of 1986 ([26 U.S.C. § 9502](#)).

STUDY ON INNOVATIVE FINANCING

Section 520 of Pub. L. 103-305 provided that:

"(a) Study. - The Secretary shall conduct a study on innovative approaches for using Federal funds to finance airport development as a means of supplementing financing available under the Airport Improvement Program.

"(b) Matters To Be Considered. - In conducting the study under subsection (a), the Secretary shall consider, at a minimum, the following:

"(1) Mechanisms that will produce greater investments in airport development per dollar of Federal expenditure.

"(2) Approaches that would permit entering into agreements with non-Federal entities, such as airport sponsors, for the loan of Federal funds, guarantee of loan repayment, or purchase of insurance or other forms of enhancement for borrower debt, including the use of unobligated Airport Improvement Program contract authority and unobligated balances in the Airport and Airway Trust Fund.

"(3) Means to lower the cost of financing airport development.

"(c) Consultation. - In considering innovative financing pursuant to this section, the Secretary may consult with airport owners and operators and public and private sector experts.

"(d) Report to Congress. - Not later than 12 months after the date of the enactment of this Act (Aug. 23, 1994), the Secretary shall transmit to Congress a report on the results of the study conducted under subsection (a)."

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U.S. Code

49 U.S.C. § [47521](#)>. Findings

Congress finds that -

(1) aviation noise management is crucial to the continued increase in airport capacity;

(2) community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system;

(3) a noise policy must be carried out at the national level;

(4) local interest in aviation noise management shall be considered in determining the national interest;

(5) community concerns can be alleviated through the use of new technology aircraft and the use of revenues, including those available from passenger facility fees, for noise management;

(6) revenues controlled by the United States Government can help resolve noise problems and carry with them a responsibility to the national airport system;

(7) revenues derived from a passenger facility fee may be applied to noise management and increased airport capacity; and

(8) a precondition to the establishment and collection of a passenger facility fee is the prescribing by the Secretary of Transportation of a regulation establishing procedures for reviewing airport noise and access restrictions on operations of stage 2 and stage 3 aircraft.

(Pub. L. 103-272, Sec. 1(e), July 5, 1994, 108 Stat. 1287.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
≤47521>	49 App.:2151.	Nov. 5, 1990, Pub. L. 101-508, Sec. 9302, 104 Stat. 1388-378.

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HOW HELICOPTER NOISE IS REGULATED

How Noise is Measured

The FAA relies almost exclusively on a single noise measuring unit (or "metric") for all of its noise measurement, mitigation, and land-use compatibility efforts in and around airports. This metric averages all the noise in a 24-hour period, adding an extra 10-decibel penalty for nighttime noise events to account for the additional impacts of noise that occurs between 10 p.m. and 7 a.m. Called the "day-night sound level" (abbreviated as DNL or, in mathematical equations, as L_{dn}), it is a cumulative measurement whose noise-averaging method masks the effect of each single noise event, often resulting in an underestimation of the impact of aircraft noise on the surrounding communities.²⁹

While the FAA relies almost exclusively on the DNL metric for airport compatibility evaluation and planning, it uses various sets of metrics for other aircraft and helicopter noise measurement. The FAA uses a different set of metrics for determining certification noise levels. It uses a complex metric known as Effective Perceived Noise Level (EPNL) to certify jets and large helicopters, while it uses the simpler measurement of sound exposure levels (SEL) to certify small helicopters (these and other technical terms are defined in Appendix A). Consequently, it is difficult to directly compare the certification noise levels of small and large helicopters. In order to compare EPNL and SEL results, one needs to apply a series of correlations or conversion factors, and also know the distance at which the measurements were made and during what kind of operation. A further

hindrance to comparison is that jet certification tests include a sideline noise measurement, while helicopter certification tests use a flyover measurement.

None of these metrics takes low frequency sounds into account in any significant way. Also, as the metrics were not developed for helicopters, some experts believe that they do not adequately account for the directionality, overall duration, tonal and impulsive qualities of certain helicopter noise events. Thus, they do not adequately measure the most important aspects of helicopters' unique noise.³⁰

The FAA's Three Stages For Classifying Aircraft Noise Levels

Since 1977, the FAA has provided for three "stages" for classifying aircraft noise levels, each with specified limits.³¹ Stage 1 levels (represented now primarily by the oldest aircraft) are the loudest. Stage 2 levels are somewhat quieter, and Stage 3, quieter yet. The thrust of the regulations over the years has been to require new aircraft to comply with progressively quieter Stage 3 noise limits. For commercial jet aircraft fleets, the phase-out of Stage 2 engines to somewhat quieter Stage 3 noise certification levels is to be completed by the year 2000. (See discussion under ANCA in Regulatory Section.) Stage 3 aircraft are generally about 10dB quieter than those designated Stage 2.³² But this is by no means always the case. Stage 3 aircraft are not equally quiet and a Stage 3 aircraft is not necessarily quieter on landing, for example.³³

Most helicopters in use today fall into the noisiest Stage 1 and 2 categories, and thus are louder on approach than several Stage 3 jet aircraft listed below.

How Loud Are They?

Most helicopters in use today fall into the noisiest Stage 1 and 2 categories, and thus are louder on approach than several Stage 3 jet aircraft listed below. Helicopters are getting quieter, in relative terms, but nearly all helicopters built since 1988 are rated Stage 2 although some—several of the Sikorsky S-76 series and the Bell Heli Textron 412 SP, for example—meet even more stringent noise levels. However, the fact that helicopter approach noise levels are even close to those of a large Boeing

737 jet airliner makes clear that the helicopter industry has a long way to go toward bringing down the noise generated by its uniquely useful and uniquely noisy flying machines.

Table 1

Comparison of Helicopter and Jet Aircraft Approach Noise Levels

Helicopter Approach Levels	
Sikorsky S-76 series (several models)	95, 96 and 97.7 EPNdB
Bell Heli Textron 412 SP	95.6 EPNdB

Several Stage 3 Jet Aircraft Approach Levels	
Boeing 727-200 (hushkitted)	97.2 EPNdB
Boeing 737-200	95.8 EPNdB
Lockheed 1011-1	96 EPNdB
Fokker F-100	93 EPNdB

dB =Decibel - the logarithmic unit used to measure sound as perceived by the human ear; because it is a logarithmic scale, a 10-decibel increase is perceived as a doubling of loudness.

EPN= Effective Perceived Noise, a term used by the FAA in determining the approximated human annoyance response to a given noise. The EPN Level is the metric used to measure noise certification levels for large aircraft, including large helicopters. EPNL noise measurements are measured in EPNdB.

Noise limits for the various stages are prescribed separately for the takeoff, flyover, and approach tests. The limits also depend on the maximum certificated weight of the aircraft or helicopter. The heaviest craft are allowed the maximum noise levels or standards, and the levels are reduced for each halving of the maximum weight by a given number of EPNdBs, down to a minimum weight and noise level, which aircraft weighing below the minimum must also meet. (See box on pg. 15)

Because the FAA began helicopter noise-testing in 1988, helicopters built before that date have not been noise-tested by the FAA, unless the helicopter company changed the type design of the helicopter. These untested helicopters are considered to be Stage 1 noise level, even though most are actually in the Stage 2 range.³⁴ (No information was available on the numbers of Stage 1 helicopters still flying.)

Nearly all helicopters built since 1988 are rated Stage 2, although, as previously mentioned, some meet more stringent noise levels. However, there is no Stage 3 standard for helicopters, as there is for fixed-wing aircraft and no new domestic regulations are immediately planned. At the international level, discussions are currently under way with the International Civil Aviation Organization (ICAO) concerning Stage 3 limits that would apply to U.S. helicopters.³⁵ NRDC believes that Stage 3 limits for helicopters should be established now and at levels that will lessen future helicopter noise impacts.

Helicopter Noise Standards and Tested Noise Levels

The FAA's aircraft and helicopter noise levels are found in various areas of Part 36 of FAA regulations. Helicopter noise standards are presented in Appendices H and J to Part 36; the actual tested noise levels of aircraft and helicopter models are presented in Appendices I through 11 in FAA Advisory Circular (AC) No. 36-1G.

The noise levels of larger helicopters (and jet aircraft) are measured using the EPNdB unit. Noise levels of the smaller helicopters, listed in Appendix 11 in the AC, are measured in terms of the SEL metric for the flyover operation only. Noise levels for smaller helicopters (6,000 pounds and under) during flyover, range from a low of about 79 SEL to 85.2 SEL.³⁶ The EPNdB flyover noise levels for helicopters over 6,000 pounds (listed in Appendix 10) range from about 86 on the low end to a high of about 93 EPNdB.³⁷ With the lack of a direct conversion between the SEL metric and the EPNdB, noise comparisons are difficult and, apparently, almost nonexistent.

The comparison of helicopter and airplane noise standards in the box below illustrates the need for Stage 3 helicopter noise standards. Note, for example, that a Stage 3 airplane weighting 77,200 pounds or less, regardless of number of engines,

has a noise limit on approach of 98 EPNdB, while a Stage 2 helicopter of 44,000 pounds has a flyover noise limit of 102 EPNdB.

Stage 2 Noise Levels for Larger Helicopters

For flyover, the Stage 2 maximum allowable helicopter noise levels is 108 EPNdB for the maximum weight of 176,370 pounds or more. (No U.S. civil helicopter currently weighs more than 50,000 pounds.) This maximum noise limit is reduced by 3.01 EPNdB per halving of the maximum weight down to 88 EPNdB for maximum weights of 1,764 pounds or less. This means that a helicopter weighing 44,092 pounds (two halvings of the maximum weight) has a Stage 2 *flyover* noise limit of about 102 EPNdB (or 6 EPNdB less than the 108 EPNdB maximum).

For takeoff calculated limits, using the same maximum and minimum helicopter weights and the same reductions per halving of the helicopter weight as for *flyover*, the limits are 109 EPNdB down to 89 EPNdB.

For approach calculated limits, using the same maximum and minimum weights and reductions, limits are 110 EPNdB down to 90 EPNdB.³⁸

Stage 2 and 3 Levels for Transport Category and Turbojet Powered Airplanes

Stage 2: *For takeoff*, 108 EPNdB for maximum weights of 600,000 pounds or more, reduced by 5 EPNdB per halving of the 600,000 maximum weight down to 93 EPNdB for maximum weights of 75,000 pounds and less.

For sideline and approach, 108 EPNdB for the same maximum weight reduced by 2 EPNdB per halving of the maximum down to 102 EPNdB for maximum weights of 75,000 pounds and less.³⁹

Stage 3: *For Takeoff* - limits differ depending on the number of engines.

For airplanes with more than three engines, 106 EPNdB for maximum weights of 850,000 pounds or more, reduced by 4 EPNdB per halving of the maximum weight down to 89 EPNdB for maximum weight of 44,673 pounds or less;

For airplanes with three engines, 104 EPNdB for the same maximum weights, reduced by 4 EPNdB per halving of the weight down to 89 EPNdB for maximum weights of 63,177 pounds and less;

For airplanes with fewer than three engines, 101 EPNdB for the same maximum weights, reduced by 4 EPNdB per halving down to 89 EPNdB for maximum weights of 106,250 pounds and less.

For sideline, regardless of the number of engines, 103 EPNdB for maximum weights or 882,000 or more, reduced by 2.56 EPNdB per halving of the maximum weight down to 94 EPNdB for maximum weights of 77,200 pounds or less.

For approach, regardless of the number of engines, 105 EPNdB for maximum weights of 617,300 pounds or more, reduced by 2.33 EPNdB per halving of the maximum weight down to 98 EPNdB for weights of 77,200 pounds or less.⁴⁰

A series of federal statutes expressly preempts control over air space, flight routes, safety, aircraft airworthiness certification, and control of engine air and noise emissions.

HOW FEDERAL PREEMPTION LIMITS LOCAL HELICOPTER RESTRICTIONS

Federal law “preempts” state law, under the Supremacy Clause of the U.S. Constitution,⁴¹ when Congress expressly or impliedly indicates its intention to displace state law, or when state law actually conflicts with federal law.⁴² State and local law can be invalidated or voided by the courts, if it is found to “interfere with” or be “contrary to” federal law.⁴³

In the interest of developing and maintaining a fair and efficient air transportation system and preventing interference with interstate commerce, Congress long ago largely preempted state and local control of the aviation industry and air travel by placing them under federal law.⁴⁴ In the air transportation field, a series of federal statutes expressly preempts control over air space, flight routes, safety, aircraft airworthiness certification, and control of engine air and noise emissions (at the source) and airline rates, to name some areas.⁴⁵ These statutes give federal control to the FAA. (Some of these statutes are discussed in the “Legislative Components” section below.)

Courts may also find that Congress has preempted an area of regulation where Congress has enacted a sufficiently comprehensive scheme of federal regulation or where the federal interest is so dominant as to preclude state legislation in the same area.⁴⁶ (See discussion of the *Burbank* case below.)

Federal Preemption and the Proprietor Exception

While regulation of aircraft as a noise “source” has been preempted by the aircraft-engine-noise certification levels prescribed in Part 136 under the Federal Aviation Act Amendment of 1968, the boundaries of federal preemption of the larger area of airport noise control are not as clearly defined. Congress has carved out a limited “proprietor exception” to federal control of airport noise that allows a state or local

government, when acting as the proprietor of an airport, to exercise certain regulatory powers in the area of airport noise.⁴⁷

The proprietor exception was created to protect the airport owner from liability for damage suits by airport neighbors. The airport owner wanted protection from neighbors who were suing under nuisance, trespass, and negligence theories, or claims that their property had lost its value and been “taken” by overflights and excessive aircraft noise. In a seminal case, *United States v. Caushy*, the Supreme Court held that aircraft noise and low overflights were so damaging to the farmer’s property that the farm had been “taken” without just compensation under the Fifth Amendment.⁴⁸

As several recent courts have explained, the proprietor exception recognizes the responsibility of the airport owner to obtain air easements from airport neighbors, as well as the airport’s liability for noise abatement, compensation, assuring compatibility in land use and, in some instances, relocation of neighboring property owners.⁴⁹

Takings and Inverse Condemnation

Claims of a “taking” brought by property owners adjacent to an airport have frequently been upheld by the courts. If the court finds that a governmental airport owner has taken the owner’s property (or has taken an easement over the owner’s property), the court can grant a judgment for the value of the property destroyed, or for the diminution in value of the property.⁵⁰

Courts have also upheld “inverse condemnation” suits to recover the value of property that has in fact been taken by a governmental defendant, although no formal condemnation proceeding has been attempted by the taking agency.⁵¹ Sometimes, when a diminution in property values could not be shown, nuisance cases have also been successfully brought against airports, as have cases of negligence and trespass.

Relevant Case Law on the Preemption Doctrine

The key Supreme Court case in the area of federal preemption of aircraft noise control is *City of Burbank v. Lockheed Air Terminal*, decided in 1973.⁵² In a five-to-four decision, the Court overturned an attempt by the City of Burbank to increase the curfew hours at the privately owned Hollywood/Burbank Airport. The Court found that there had been implied federal preemption of the control of aircraft noise because of the pervasiveness of federal regulation in the aviation area.⁵³

Because the City of Burbank was not the airport proprietor and had attempted to use its police powers to extend the curfew, the Court did not consider here what limits, if any, applied to an airport proprietor in enacting a curfew. In a much cited "footnote 14," the Court cited a letter from the U.S. Secretary of Transportation stating that the proposed legislation at issue in *Burbank* (the Noise Control Act of 1972) would not affect the rights of a state or local public agency, "*as the proprietor of an airport* [italics in original] from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport."⁵⁴ In footnote 14, the Court noted that the municipality here was not the proprietor and that the "authority that a municipality may have as a landlord is not necessarily congruent with its police power." Here, the City of Burbank attempted to impose the curfew using its police powers and the Court held such noise regulation to be preempted.

The courts continue to affirm Congress' traditional policy of not preempting the airport operators' or proprietors' limited authority to establish permissible levels of noise, as long as the airport noise rules are fair, reasonable, and nondiscriminatory.⁵⁵ The courts' support of airport proprietors' limited role in noise regulation continues despite a series of federal statutes giving increased responsibility for aircraft noise to the FAA.⁵⁶

The following paragraphs provide a guide summary of some of the most relevant appellate court decisions in the area of federal preemption. Because this is an

The courts continue to affirm Congress' traditional policy of not preempting the airport operators' or proprietors' limited authority to establish permissible levels of noise, as long as the airport noise rules are fair, reasonable, and nondiscriminatory.

extremely complicated and evolving area of law, they are meant as an introduction only, i.e., as the start of any advocate's exploration of the issue. NRDC strongly urges the reader to go straight to the sources—read the cases, review the related citations, explore relevant law review and other articles, and consult legal counsel—before proceeding with any legal strategy in this area.

National Helicopter Corp. Case

In 1998, the U. S. Court of Appeals for the Second Circuit, in *National Helicopter Corp. v. City of New York*, citing a long line of federal case law, upheld New York City's right, as a proprietor, to place restrictions at the 34th Street Heliport.⁵⁷ The appellate court noted that National Helicopter Corporation "does not dispute the viability of the proprietor exception."⁵⁸ National Helicopter argued that the city was not acting in its proprietary capacity, but under its police powers. The appellate court disagreed and upheld four of the seven New York City regulations as not preempted and as reasonable regulations to control the permissible levels of heliport noise. The permissible regulations included weekday and weekend curfews, elimination of sight-seeing helicopter operations on the weekends, and a 47 percent reduction in operations. The appellate court did not uphold the City's ban on a particular, noisy helicopter (the S-58T), finding the ban to be discriminatory; nor local regulation of sightseeing routes, finding routes to be a preempted area; nor changes in the marking of helicopters for the purpose of monitoring their use of the proposed routes.⁵⁹ The Court found a "cooperative scheme" existed between federal and local control.⁶⁰

Other Cases on the Proprietor Exception

- *British Airways Board v. Port Authority of New York and New Jersey (Concorde I)*.⁶¹

This case was occasioned by proposed flights to the U.S. of the new British/French supersonic transport, the Concorde. In 1976, the U.S. Secretary of Transportation ordered a 16 month operational test of the Concorde at both John F. Kennedy (JFK) and Dulles International Airport in Washington. In response to local political opposition to the Concorde flights, the Port Authority at its JFK airport imposed a temporary ban on the flights. The Port Authority believed the Concorde could not meet JFK's existing noise limit for takeoffs and landings, that the Concorde's low frequency noise characteristics would not be adequately addressed by its rule, and that the Concorde's noise and vibration impacts needed additional evaluation.

The Port Authority wanted more evidence of the Concorde's noise characteristics and impact from its operations at Dulles, Paris and London, while it conducted its own research. The airlines challenged the Port Authority's ban and the lower court upheld the challenge. The Court of Appeals for the Second Circuit, however, reversed the lower court and sent the case back for further evidentiary hearings on the reasonableness of the three-month ban on flights. The appellate court reasoned that federal policy authorized the local airport owner (when acting as the airport proprietor) to refuse landing rights for noise abatement purposes. Therefore, the appellate court held that the Secretary's order to accept the Concorde operational tests did not preempt the Port Authority's temporary ban of the Concorde. During the ban, the Port Authority was ordered to develop reasonable, nonarbitrary, nondiscriminatory regulations that established acceptable noise levels for the airport and its immediate neighbors.⁶²

- *British Airways v. Port Authority of New York and New Jersey (Concorde II)*.⁶³

Only months after the *Concorde I* decision, the lower court again entered an injunction to end the Port Authority's ban on the Concorde flights; Port Authority appealed the decision again, and this time the appellate court ruled the ban should be ended (*Concorde II*).

In the interim between *Concorde I* and *Concorde II*, the U. S. Secretary of Transportation concluded that vibrations produced by the low frequency noise of the Concorde did not present any danger of structural damage to homes and little possibility of annoyance. While the Port Authority's consultant had devised a means of relating household vibration to the Concorde's absolute noise levels, it had not been able to correlate this figure with the amount of irritation experienced by an individual at a given level of noise and vibration.⁶⁴ Further research needed to establish this correlation had not been authorized by the Port Authority. Meanwhile the airlines had refined their data to prove that the Concorde could meet JFK's existing noise standard. The appellate court concluded that Port Authority had not come up with new regulations quickly enough, that the ban had already been in effect for 18 months, and that further delay was unwarranted.

- *City and County of San Francisco v. FAA*⁶⁵

This case stemmed from a San Francisco Airports Commission resolution prohibiting certain retrofitted (i.e., quieted for noise abatement purposes) aircraft from using San Francisco International Airport (SFO) after a certain date. Only retrofitted Stage 2 certified aircraft certified before January 1985 were allowed. Any retrofitted cargo carrier that had not received the FAA certification by that date was denied access. The carrier appealed to the FAA, which found this rule to be unjustly discriminatory—i.e., that it violated the airport's assurance of nondiscrimination in public use availability of the airport. The FAA then denied SFO's applications for airport improvement grants from the Airport and Airway Trust Fund.

This suit arose when the City and County of San Francisco petitioned for court review of the FAA decision to deny them airport grants because of their local rule. The appellate court reaffirmed that, although the federal government regulates aircraft and airspace pervasively, Congress had reserved a limited role for airport proprietors in regulating noise at their airports.⁶⁶ But the Court stressed that this power is limited to regulations that are not unjustly discriminatory. Finding that other aircraft permitted to operate at San Francisco were in fact equally noisy or noisier than the banned aircraft, it found the rule to be unjustly discriminatory.⁶⁷ The Court noted that neither it nor the FAA had considered whether the Airport Noise and Capacity Act of 1990 had altered the division of responsibility between federal government and the airport proprietor, since the Act was passed after the administrative proceedings in this case were completed.⁶⁸

- *Global International Airways Corp. v. Port Authority of New York and New Jersey*⁶⁹

Global International Airways, a charter carrier, and several international carriers sought to enjoin enforcement of some noise abatement regulations (an "Interim Rule" and "Nighttime Rule") at Port Authority-run airports. The lower court found that the Nighttime Rule was a permissible exercise of the airport proprietor's noise abatement powers, but that the "Interim Rule" was preempted by the federal government. The appellate court disagreed, finding that the Interim Rule, aimed at encouraging international carriers to use mostly noise compliant aircraft ahead of the FAA's schedule for these planes, was not preempted. The appellate court held that an airport proprietor's rule could be aimed at reducing cumulative noise levels rather than only barring aircraft that exceeded minimum decibel levels. But the appellate court again noted that aircraft could only be denied use of an airport "on the basis of non-discriminatory noise criteria".⁷⁰

With the passage of the Aircraft Noise and Capacity Act in 1990, Congress tilted the traditional local/federal balance of control of airport noise levels further toward federal control. In ANCA, Congress mandated a phase-out of airlines' noisier Stage 2 air carriers by the year 2000. At the same time, it also enacted burdensome new procedural requirements and standards that an airport must meet in order to enact new local noise or access restrictions on Stage 2 and particularly on Stage 3 aircraft.

ANCA has not had a major court challenge since its enactment, (though it was discussed in *Millard Refrigerated Services v. FAA*)⁷¹; consequently, no court has explicitly considered how ANCA may have effectively altered the traditional division of responsibility between the FAA and the airport proprietor. But it appears that the onerous new burden of proof required by the ANCA regulations has discouraged airports from attempting to enact new local controls, such as curfews, even where noise impacts are extreme. As of this writing, no airport or heliport has enacted a Part 161 restriction under ANCA. ANCA is further discussed below.

LEGISLATIVE COMPONENTS, INCLUDING THE AIRCRAFT NOISE AND CAPACITY ACT OF 1990 (ANCA) AND OTHER MAJOR AIRCRAFT NOISE STATUTES

The following paragraphs provide a quick summary of some of the most important laws related to the issue of helicopter and other aircraft noise. They are meant as an introduction only, i.e., as the start of any advocate's exploration of legal avenues. NRDC strongly urges the reader to go straight to the sources—read the statutes, and review the underlying regulations, and consult legal counsel—before proceeding with any legal strategy referred below.

- Federal Aviation Act of 1958 (Pub. L. 85-726, 72 Stat. 731), now codified in various sections of 49 U.S.C., the FAA's statutory charter.

This law established the legal basis for the Federal Aviation Regulations (FAR), codified under 14 Code of Federal Regulations (14 CFR), which includes those regulations relating to helicopters. Section 611 of the Act mandated the FAA's noise abatement authority (directed at abating aircraft noise "at the source", i.e., the aircraft engine).

- Aircraft Noise Abatement Act of 1968 (Pub. L. 90-411; 82 Stat. 395) amended the Federal Aviation Act of 1958.

This act established a new Part 36 of the federal regulations governing aircraft noise levels. It prohibited further escalation of aircraft noise levels in subsonic civil turbojet and transport category airplanes and required new ones to be quieter. The act established "stages" of noise levels and has been amended numerous times. By 1977, the FAA determined that the technology was available to make aircraft quieter and required that such technology be used in all new designs.⁷² In 1988, by amendment to Part 36, noise standards for helicopters were finally added, in part to provide uniformity with helicopter standards that had been enacted by ICAO.⁷³

- Noise Control Act of 1972 (Pub. L. 92-574, 86 Stat. 1234)

Codified at 42 U.S.C. § § 4901- 4918, this act directed EPA to publish scientific information about the effects of noise including sound levels that would protect the public health and welfare with an adequate margin of safety.

- Aviation Safety and Noise Abatement Act (ASNA) of 1979 (Pub. L. 96-193, 94 Stat. 50)

Codified at 49 U.S.C. § 47501 *et seq.* (1994), the act established the Part 150 voluntary noise-compatibility programs that allow airports to apply for federal funds to implement noise-mitigation measures. ASNA was aimed at addressing growing conflicts over airport noise between the airports and surrounding communities and

helping to protect the airports from potential liability from damages they might incur from noise suits.

In this law, Congress directed the FAA to establish a single system for measuring noise; to develop noise exposure maps around airports, and to modify land uses (and/or acquire land) in accordance with the maps to mitigate airport noise impacts. "Compatibility" (of uses with an airport) was defined in terms of interstate commerce concerns and local land use compatibility, not in terms of the health-and-welfare-based threshold of noise exposure developed by EPA only five years before.⁷⁴ Part 150 designates a decibel level of 65 dB DNL as compatible with residences -- a level twice as loud as the 55 dB DNL threshold earlier identified by EPA as protective of human health and welfare.⁷⁵

- Airport and Airway Improvement Act of 1982 (Pub. L. 97-248, 96 Stat. 671), codified at 49 U.S.C. § 47101 et seq.

This act includes federal policies on airport construction and improvement projects. One policy is that aviation facilities are to be constructed and operated to minimize current and projected noise impacts on nearby communities.⁷⁶

- Airline Deregulation Act of 1994 (Pub. L. 103-305, 108 Stat. 1569), codified at sections of 49 U.S.C. including § 71713.

Section 47509 of this law added research programs on quiet aircraft technology including rotorcraft. This act also explicitly preempts regulations related to "price, route, and service of an air carrier."⁷⁷ But Congress specifically states in the next subsection that the preemptive effect of this section does not limit state and local agencies in the course of carrying out their proprietary powers and rights.⁷⁸

- Airport Noise and Capacity Act of 1990 (ANCA) (Pub. L. 101-508, 104 Stat. 1388), codified at 49 U.S.C. §§ 47521 et seq.

ANCA's regulations are at 14 C.F.R. Part 161 and Part 91. ANCA directs the FAA to establish a national program to review noise and access restrictions imposed by airport proprietors on aircraft operations (§ 47524). (Access restrictions are any limitations on the time or manner of aircraft access to an airport.) ANCA also requires quieter engine technology for air carriers above 75,000 pounds by requiring airlines to convert their fleets from aircraft meeting Stage 2 noise certification levels to quieter Stage 3 levels by December 31, 1999 (§ 47528).

It can be argued that ANCA was not intended to change the substance of the law concerning when it is permissible for an airport to impose noise restrictions on Stage 2 aircraft. (See § 47533 - relationship to other laws.)⁷⁹ But onerous procedural hurdles have been added.

ANCA Further Restricts Local Noise Control Powers

In the Airport Noise and Capacity Act of 1990 (ANCA), Congress expressly attempted to balance the local needs for airport noise abatement against the needs of the national air transportation industry.

Outside of the FAA and the aviation industry, few observers would argue that the balance was adequately reached. ANCA sets forth criteria and standards - these are intended to ensure that an airport cannot upset this balance by imposing a local restriction whose negative effect on the national air transportation system outweighs any local benefits which a restriction is designed to produce.⁸⁰ Some highlights follow:

- ANCA criteria for local restrictions on Stage 2 aircraft are more straight forward than for Stage 3 aircraft and do not require FAA approval.

The procedural hurdles that are preconditions to valid Stage 2 restrictions are set forth in the statute. The most important, and most difficult, requirement involves doing a cost-benefit analysis of the restriction and of alternative measures to the proposed restriction (§ 47524 (b)(4)). Since Part 161 provides no guidance and there

is no accepted standard for comparing noise-abatement benefits with financial cost, this comparison is always subjective and results in an under-weighting of benefits and an over-weighting of costs.

- Both ANCA and its regulations impose substantial hurdles on any Stage 3 aircraft local restrictions.

Any local restrictions on Stage 3 aircraft must be approved by the FAA and can only be submitted by an airport proprietor. Neither local governments nor community organizations can submit local Stage 3 restrictions for approval (14 C.F. R. 161.301(c)). This FAA approval gives the agency much more leverage over local Stage 3 restrictions than over Stage 2 restrictions. The stringency and subjective nature of the Stage 3 requirements⁸¹ have effectively eliminated the ability of the local proprietor to address serious noise problems in the way that the proprietor exemption has envisioned over the years.

Even when there is a voluntarily negotiated agreement among airlines and airport proprietors, any Stage 3 restriction must allow new entrants to object to the agreement, and it must be published in the Federal Register (14 C.F.R. § 61.103).

Enforcement of ANCA is based on the financial disincentives to violating the Act or its regulations. If an airport is found to have violated ANCA, it could lose its eligibility for federal airport grant funds (under the Airport and Airway Improvement Act) and its authority to collect passenger facility charges (§ 47526). However, nine years after its passage, no airport has been found to violate ANCA, so the act's enforcement provisions are untested.

ANCA's phase-out of Stage 2 aircraft applies only to those weighing more than 75,000 pounds—primarily to large aircraft owned by air carriers. All domestic helicopters are currently below the 75,000 pound weight threshold, so that it might appear that ANCA does not apply to helicopters. However, the FAA has included helicopters in the Part 161 regulations implementing ANCA and asserts that ANCA procedures apply to restrictions on Stage 2 helicopters at heliports.⁸²

The stringency and subjective nature of the Stage 3 requirements have effectively eliminated the ability of the local proprietor to address serious noise problems in the way that the proprietor exemption has envisioned over the years.

Selected Helicopter Regulations in the Federal Aviation Regulations (FAR)

- **14 C.F.R. Part 1 - Definitions and Abbreviations**

Provides the definitions used throughout the Code, including: rotorcraft—a heavier-than-air aircraft that depends principally for its support in flight on the lift generated by one or more rotors; and helicopter—a rotorcraft that depends on engine-driven rotors for its horizontal movement.

- **14 C.F.R. Part 34 - Emission Requirements for Turbine Engine-powered Airplanes**

Contains emission standards for fixed-wing aircraft engines, but not for helicopter engines.

- **14 C.F.R. Part 36 - Noise Standards**

Provides noise standards for various types of fixed-wing aircraft, including transport category large and turbojet airplanes, subsonic and supersonic airplanes, and small propeller-driven airplanes. Certification, noise limits, and noise-measurement procedures are provided in this Part. Part 36 originally applied only to “airplanes,” but this definition was changed to “aircraft” and helicopter noise standards were added in 1988. The helicopter noise standards are in Appendix H and Appendix J to this Part. Noise limits for Stage 2 helicopters are in § H36.305; the Stage 2 limit for helicopters under 6,000 pounds tested under Appendix J is given in § J 36.305.

- **14 C.F.R. Part 91 - Flight Rules**

Defines operating and flight rules for all aircraft. Helicopters may be operated at less than the minimum altitudes prescribed for other aircraft, if the operation is conducted without hazard to persons or property on the surface. However, helicopters must comply with any routes or altitudes specifically prescribed for helicopters by the FAA Administrator (§ 191.110 (d)) (Part 91 also contains the regulations for ANCA’s phase-out of Stage 2 aircraft in Subpart I §§ 91.801-875).

- **14 C.F.R. Part 135 - Operating Requirements: Commuter and On-demand Operations**

No person may operate a commercial helicopter over a congested area at an altitude of less than 300 feet above the surface, except when necessary for takeoff and landing (§ 135.203).

- **14 C.F.R. Part 150 - Airport Noise Compatibility Planning**

This Part defines the requirements and methodology for airport noise compatibility studies. It defines the Yearly Day-Night average sound level (Ldn) as the standard for measurement of cumulative noise exposure for all such noise studies. (Also see discussion above regarding ASNA in the “Major Statutes” section.)

FAA Advisory Circulars

Unlike the federal aviation regulations, directives in the advisory circulars are not binding; rather, they provide approved guidelines for implementing the regulations and criteria that are often regarded as standards for the industry.

- Advisory Circular No. 36-1G - Noise Levels for U.S. Certificated and Foreign Aircraft

Provides noise data on helicopters certified to fly in the U.S. and includes noise levels at takeoff, landing and overflight. Appendix 10 gives noise data for the heavier helicopters (over 6,000 pounds) and shows that their noise levels (for take off, flyover, and approach) range between 85 to 99 EPNdB—highly problematic noise levels if close to residences or working environments. Appendix 11 has data for the smaller helicopters, measured in SEL, and shows their noise range during flyover to be mostly between 79 to 85 SEL.

- Advisory Circular 91-66 - Noise Abatement for Helicopters

Provides guidelines to assist pilots, operators, and others to achieve noise reduction when operating helicopters.

For all the regulations just cited, there are currently no Federal—or City or State—noise regulations that directly limit heliport noise impacts.

HOW LOCAL AUTHORITIES CAN CONTROL HELICOPTER OPERATIONS AND MITIGATE THEIR IMPACTS

First and foremost, local authorities can prohibit heliports in their zoning code⁸³ or require a special permit (as is the case in New York City). If a heliport is established, but the locality would like to keep control of the facility, it should not accept federal money for any construction project. Avoiding federal funds can be a

First and foremost, local authorities can prohibit heliports in the zoning code; or require a special permit (as is the case in New York City).

costly step to reduce federal control, but it seems to work. Accepting federal money establishes a contractual relationship that allows the FAA to impose federal conditions on what the local jurisdiction may do at the heliport at least during the life of the improvement or grant project. The New York City heliport case appears to suggest that it can work.

The following paragraphs provide quick summary answers to some often-asked questions asked by local authorities that are interested in mitigating helicopter noise impacts. They are meant as an introduction only, i.e., as the start of answering these questions. NRDC strongly urges the reader to consult with legal counsel before proceeding further with any local noise mitigation strategies.

Can Local Noise Ordinances Help in Setting Noise Limits?

Local jurisdictions may not use their police powers to try to control aircraft and airport noise without risk of federal preemption.⁸⁴ That may mean that such local codes as applied to airports and heliports can be preempted. The NYC Noise Code, for example, sets ambient noise limits, but the city does not believe it can be used to control heliport noise. One reason given is that transportation facilities are exempt.

Can Flight Paths Be Controlled?

No. Flight paths are clearly a preempted area, and cannot be controlled. However, the FAA says it will work with the local communities, if sufficient pressure is brought to bear on it, in setting new routes to reduce noise, as it did regarding some changes to helicopter sightseeing routes over New York City. However, the FAA's track record is mixed, for route changes that reduce noise in one community result in increased noise elsewhere.

Can Minimum Altitudes Be Set?

No. Only the FAA can set minimum altitudes, and it has been resistant to enacting minimum altitudes for helicopters, even when they are clearly needed. However, Congress has gotten involved in the issue (because of public pressure for restoration of quiet in the parks) by passing the 1987 National Parks Overflight Act (Pub. L. 100-91). This Act requires the FAA, among other provisions, to control helicopter flights over the Grand Canyon.

NRDC believes that both the FAA and Congress should be pressured on this issue to bring relief not only to national parks, but to localities impacted with heavy volumes of helicopter traffic, such as the NYC region.

Can A Curfew Survive A Legal Challenge?

This is yet another unclear area of the law of federal preemption. Yes, a curfew can survive a challenge, as New York City's has. The curfew must be instituted by the proprietor, however. It is still not entirely clear, but that the FAA might attempt to challenge under ANCA such curfews and regulations, as improper restrictions affecting flights.

Can A Municipality Ban Certain Helicopter Operations Altogether?

It is not clear whether such a ban could withstand a federal preemption challenge. NYC closed its 60th Street Heliport and imposed a weekend curfew at East 34th Street that was upheld. But, having taken federal money for the Downtown Manhattan Heliport, the City cannot discriminate against the types of helicopters using the site. To our knowledge, the question has not been tested by any court.

Who Can Enforce and How?

As mentioned above, localities can refuse to zone for heliports. Communities have also successfully placed flight restrictions on hospital helipads or prohibited them. At least in the Second Circuit, a proprietor has the authority to add conditions to a

special permit for a heliport (as NYC did at its 34th St. Heliport) or it can rescind a special permit for heliport operations (as the City did on the use of the Pan Am building heliport after an accident in 1977).

WHAT ROLES DO OTHER FEDERAL AND STATE AGENCIES PLAY?

While the FAA has primary responsibility in helicopter matters, several other agencies and groups play important roles. Some, such as the Environmental Protection Agency, should play larger roles than they do.

EPA needs to play a stronger role in the environmental impacts of helicopters (and aircraft generally).

Environmental Protection Agency (EPA)

During the 1970s, EPA was extensively involved in noise issues and research. This research culminated in a report, mandated by Congress in the Noise Control Act, that addressed the noise levels the agency deemed necessary to protect the public health and welfare.⁸⁵ However, despite its important work on the public health implications of noise, EPA's Office of Noise Abatement and Control (ONAC) was denied funding in 1981 and basically eliminated. Since the dissolution of ONAC, EPA's involvement in aircraft noise issues has been largely limited to environmental review of federal projects in accordance with the National Environmental Policy Act (NEPA) and comments filed under Section 309 of the Clean Air Act.

Under NEPA and Section 309, EPA's administrator reviews and comments on proposed major federal actions that significantly affect the quality of the human environment. In addition, EPA is authorized, under the Noise Control Act of 1972 and Quiet Communities Act of 1978, to develop and submit recommendations to the FAA regarding noise produced by aircraft and aircraft-related activities.

EPA has prescribed air emission standards for certification of aircraft engines, but has not prescribed such standards for helicopter engines. Toxic air pollutants in emissions from aircraft are currently unregulated under the Clean Air Act.

EPA needs to play a stronger role in the environmental impacts of helicopters (and aircraft generally). As we enter the next century with numbers of aircraft and helicopters continuing to grow—thus offsetting much of the technological noise and air-emissions reductions already achieved—reducing the environmental and public health impacts of air travel and airports and heliports is essential.

National Aeronautics and Space Administration (NASA)

NASA plays a crucial governmental research role in aeronautical technology that currently includes a major aircraft noise and air emission reduction program. In what is often joint research with the FAA, the Department of Defense, and industry, NASA is pursuing innovative engine technology aimed at producing cleaner-burning and quieter engines.⁸⁶ The ultimate objective of the noise program is to achieve a 10 EPNdB reduction in aircraft noise by the end of the century compared to 1992 technology and 20 EPNdB within 20 years.⁸⁷ NASA is also conducting noise research applicable to helicopters.⁸⁸ This NASA research program, including rotorcraft research, is urgently needed and should be supported and funded.

Approval of the state in New York, or a license by the state in Connecticut and New Jersey, is required for heliports.

State Agencies: The Tri-State Area

Approval of the state in New York, or a license by the state in Connecticut and New Jersey is required for heliports.⁸⁹ A NYS heliport must have municipal approval; in addition, under New York General Business Law § 249, before a municipality can approve a private heliport, the NYS Department of Transportation (NYSDOT) must determine that the heliport complies with certain standards. These standards are twofold: that the heliport does not impact public transportation corridors or public buildings; and that the volume, character, and direction of traffic at the heliport will not constitute a menace to safety of operations at other airports in the vicinity. Air space approval must be granted by the FAA, and NYSDOT relies on the FAA for the safety analysis of the heliport.⁹⁰

In 1990, NYS DOT in conjunction with the Port Authority of New York and New Jersey produced a *Downstate New York Helicopter System Plan* (hereafter *Downstate Plan*). The *Downstate Plan* includes a survey of heliports throughout the New York downstate region, an origin and destination survey, and forecasts of heliport system needs.⁹¹ At that time, DOT reported 108 airports and helicopter facilities in the downstate area, only eight of which were true public heliports. Six of these eight were in the New York City area.⁹² Since that time, several of the heliports in the survey have closed. NYS DOT has not done any follow up to this report⁹³ and current origin and destination data for the New York metropolitan area apparently do not exist. Even the NYC *Helicopter Master Plan*, discussed in Chapter 3, does not fill this particular data gap.