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Aircraft Overflights as a Fifth Amendment Taking: The Extension of Damages for the Loss of Potential Future Uses to Avigation Easements.

Brown v. United States[1]

by Scott P. Keifer

I. INTRODUCTION

As the United States entered the Twentieth century, the rights of a holder of real property were well settled and best stated by the latin phrase cujus est solum, ejus est usque ad coelum or "he who owns the soil, owns it to the heavens."[2] This theory of airspace property ownership was originally a product of Roman law before being later accepted into English common law and eventually carried across the Atlantic and adopted in the United States.[3] At the turn of the century, this maxim had withstood the test of time and was the uncontested rule on airspace property rights.[4] This well reasoned theory was about to collapse.

On December 17, 1903, near Kitty Hawk, North Carolina, a successful experiment by the Wright Brothers ushered in the era of powered flight.[5] That first flight, although lasting only twelve seconds and travelling 120 feet,[6] signaled the beginning of the age of avigation, and the end for the traditional concepts of property ownership.

Soon, for the first time in history, people all over the country were witnessing pilots, from barnstormers to air mail carriers, traverse the sky. With the aid of the airplane, people could now travel across cities, counties, and even states without touching the ground below. While many looked up to the sky and watched in awe, some property owners did not react with such admiration. For them, the pilots were travelling over private property. These flights, sometimes at near treetop level, created loud, disturbing noise which affected their families and farm animals. Suddenly, one of the sticks in their bundle of property rights, "the right of ownership to the heavens,"[7] had been snatched away.

In 1926, Congress passed the Air Commerce Act[8] in an attempt to put at rest the issues of ownership of the airspace.[9] In the Act, Congress claimed exclusive sovereignty in the airspace over the country.[10] The first U.S. Supreme Court case to address the issue involved Thomas Causby, a property owner with land abutting a small airport outside Greensboro, North Carolina.[11] In 1942, the United States government, pursuant to the national emergency of World War II, leased the airport adjacent to Causby and began flying various aircraft including transports, bombers, and fighters from the airfield.[12] The aircraft flew at heights of less than 100 feet above Causby's property, frequently coming within 67 feet of the house and 18 feet of the trees.[13] The flights, both day and night, caused significant disruption of the Causby's peace and livelihood, including the destruction of the property's use as a commercial chicken farm as a result of a drastic reduction in chicken production and over 150 chickens killed from fright and disorientation from the nearby aircraft.[14] Causby filed an inverse condemnation[15] lawsuit against the federal government.[16] His complaint alleged the taking of an easement over his property in violation of the Fifth Amendment of the United States Constitution's prohibition against the taking of private property for public use without just compensation.[17]

In 1946, the case made it to the United States Supreme Court.[18] In a landmark decision, the Court found that

[1] 73 F.3d 1100 (Fed. Cir. 1996).

[2] 8 Am. Jur.2d 618, 2 Blackstone Commentaries 18 (1836). *See also*, United States v. Causby, 328 U.S. 256, 260-261 (1946), citing 1 Coke, Institutes, 19th Ed. 1832, ch. 1, §1(4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621.

[3] Colin Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157, 162-163 (1990).

[4] *Id.* at 163.

[5] THE WORLD ALMANAC & BOOK OF FACTS 502 (1997).

[6] *Id.*

[7] *See supra* note 2 and accompanying text.

[8] 49 U.S.C §171 et seq (repealed 1958).

[9] *See infra* notes 81 - 89 and accompanying text.

[10] *See infra* note 83 and accompanying text.

[11] United States v. Causby, 328 U.S. 256 (1946).

[12] *Id.* at 258-259.

[13] *Id.*

[14] *Id.* at 259.

[15] BLACK'S LAW DICTIONARY 825 (6th ed. 1990) defines "inverse condemnation" as an action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain.

[16] *Causby*, 328 U.S. at 258.

[17] *See* U.S. CONST. amend. V., which states the following: "[N]or shall private property be taken for public use without just compensation."

[18] *Causby*, 328 U.S. 256.

a taking had occurred and compensation was due.[19] The Court held that a taking of an "avigation easement"[20] occurs where the flights over private land are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[21] Through the next fifty years, the Supreme Court and Court of Claims elaborated and expanded upon the holding of *Causby*.[22]

In 1996, the Court of Claims heard *Brown v. United States*[23], and considered the issue of whether the overflights must cause an impairment of the immediate use of the property, such as the chicken farming in *Causby*, or whether the landowner can claim a loss from potential future uses precluded by the presence of the overflights.[24] The court held that the landowner need not suffer a diminishment of the present, actual use of the property, but can claim a loss of fair market value of other uses to which the land could readily be converted.[25] This decision expanded the concept of avigation easement by allowing a landowner without any current damages to seek restitution for losses from the inability to pursue land uses which have been precluded by the aircraft overflights.

This casenote will explore the evolution of the concept of property ownership and avigation easements from the original common law theory, through *Causby* and its progeny, to *Brown v. United States*. In addition, this casenote will provide a detailed analysis of the impact of the *Brown* decision.

II. FACTS AND HOLDING

The Browns own a 6,858 acre ranch in West Texas.[26] They built a second home there, and use the ranch for recreation and cattle ranching.[27] Additionally, the Browns charge guests a fee to hunt on their property.[28] The Browns have indicated an intent to further improve their land for recreational use and eventually sell it in a high priced market for recreational properties.[29]

Beginning in January, 1991, the Air Force began using a small airfield, Wizard Auxiliary Airfield, to train its pilots.[30] Wizard is located on property which is adjacent to the Browns' property.[31] Flights out of Laughlin Air Force Base, about 25 miles northwest of Wizard, conduct "touch and go" exercises on the Wizard airstrip.[32] In a touch and go exercise, a plane approaches the landing strip as if to land, touches the ground, and takes off again without coming to a stop.[33] Such exercises require the planes to fly very low, producing a great deal of noise on the ground.[34] On take off from Wizard's airstrip, planes fly less than 500 feet above ground level (AGL) over at least 100 acres of the Brown's property.[35] The touch and go maneuvers at Wizard are conducted primarily on weekdays during daylight hours.[36]

When the government purchased the land on which the airstrip was built, they also purchased an easement over the land immediately surrounding the airfield.[37] The Browns' property abuts land over which the Air Force owns an easement.[38] In December, 1989, while Wizard was being built, the Air Force solicited the sale of an easement from the Browns.[39] The Browns refused the offer, but the Air Force never initiated condemnation proceedings.[40]

On February 7, 1992, the

[19] *Id.*

[20] The *Causby* decision actually phrased the taking as an "easement of flight". 328 U.S. at 261. The concept later became known as an "avigation easement." The phrase "avigation easement" is found throughout court opinions and legal writing that discuss the issue of the taking of airspace by aviation overflights. The phrase distinguishes an easement as being through airspace and for aviation traffic, as opposed to an airspace easement for buildings or a navigation easement through water. *See* Cahoon, *supra* note 3, 173 & n.95.

[21] *Causby*, 328 U.S. at 266.

[22] *See* Cahoon, *supra* note 3, at 167-191. For a list of cases in various jurisdictions, *see* Jay M. Zitter, Annotation, *Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property*, 22 A.L.R. 4th 863 (1983). *See also* Persyn v. United States, 34 Fed. Cl. 187, 195-196 (1995).

[23] 73 F.3d 1100.

[24] *Id.*

[25] *Id.* at 1105.

[26] *Id.* at 1101.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Brown v. United States, 30 Fed.Cl. 23, 25 (1993).

[37] Brown v. United States, 73 F.3d at 1101.

[38] *Id.*

[39] *Id.* at 1102.

[40] *Id.*

Browns filed their complaint in the Court of Federal Claims, alleging a taking in violation of the Fifth Amendment.[41] The Browns alleged that noise from low overflights by Air Force planes constituted a taking of their property, and that just compensation was due.[42] The Browns sought $1,500,000 in damages.[43]

The Government moved for summary judgment arguing that as a matter of law the Browns could not recover.[44] In addition to opposing the Government's motion for summary judgment, the Browns argued that undisputed evidence showed that the Government had taken their property and therefore the only issue was how much the property taken was worth.[45] The Browns accordingly moved for partial summary judgment in their favor.[46]

The Court of Federal Claims granted the Government's motion for summary judgment and consequently denied the Browns' motion for partial summary judgment.[47] The court held that the Browns could not recover as a matter of law, because although the occurrence of frequent and low overflights was undisputed, the Browns had not shown substantial interference with their present enjoyment and use of the overflown surface property.[48] The Browns appealed.[49]

The Court of Appeals reversed and remanded.[50] Stating that a party may have a cause of action where overflights substantially interfered with the owners' enjoyment and use of the property, the court remanded for a determination of whether the Browns' property had been taken, and if so, how much compensation is due.[51] The court directed the trial court to consider potential future uses of the land now precluded by the overflights.[52] The court stated that to the extent that frequent and low overflights, through noise, vibrations, and fumes, have directly and substantially impaired the Browns' use of their property for recreational ranching or other uses "to which the land could readily be converted," there has been substantial interference with their enjoyment and compensation is due.[53]

III. LEGAL BACKGROUND

A. Fifth Amendment Taking

The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without just compensation.[54] The Supreme Court has long held that *any* permanent physical occupation is a taking.[55] Even if the government invades only an easement in property, the invasion nonetheless amounts to a taking and compensation must be paid.[56] Regardless of the extent of the intrusion, the Court has "uniformly... found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[57]

The Fifth Amendment requires "just compensation" when a private property holder's land is the object of a taking.[58] The Constitution and statutes do not define this term.[59] The Supreme Court has recognized "just compensation" as the value of the interest taken, stating that the value "is not the value to the owner for his particular purposes or the condemnor for some special use but a so-called 'market value.'"[60] Under this standard, the owner is entitled to receive "what a

[41] *Id.* at 1101.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1102.
[45] *Id.* at 1101.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1102.
[50] *Id.* at 1106.
[51] *Id.*
[52] *Id.* at 1104-1105.
[53] *Id.*
[54] *See supra* note 17.
[55] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982). As early as 1872, the Court has invariably found a taking anytime a claimant raised a constitutional challenge to a permanent physical occupation. *Id.* at 427. *See also* Pumpelly v. Green Bay Co., 80 U.S. 166 (1872).
[56] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).
[57] *Loretto*, 458 U.S. at 434-435.
[58] *See supra* note 17 and accompanying text. In addition, every state considers compensation a mandatory accompaniment to condemnation actions. The United States Supreme Court, Griggs v. Allegheny County, 369 U.S. 84, 90 (1962), has read a compensation requirement into the due process clause of the fourteenth amendment. Lynda J. Oswald, *Goodwill and Going Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 297 (1991).
[59] United States v. Petty Motor Co., 327 U.S. 372, 377 (1946).
[60] *Id.* Although market value is the method chosen to "strike a balance between the public's need and the claimant's loss" upon condemnation of property for a public purpose, the Supreme Court has refused to designate market value as the sole measure of just

willing buyer would pay in cash to a willing seller" at the time of the taking.[61]

The purpose of the "just compensation" requirement is to make the owner of the taken property whole by putting him in the same pecuniary position as he would have been had his property not been taken.[62] While the Fifth Amendment does not guarantee a return on investment,[63] the owner of the taken property has long been permitted to claim a property valuation at a value for the "highest and best use"[64] of the condemned property.[65] In *Olson v. United States*,[66] the Supreme Court stated:

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.[67]

In an effort to avoid gross speculation as to the highest and best use of the property, the *Olson* Court directs that the offered "use" requires a showing of reasonable probability that the land is both physically adaptable for such use and that there is a need or demand for such use in the reasonably near future.[68]

Not all losses suffered by the property owner are subject to compensation under the Fifth Amendment.[69] "[T]he Sovereign must pay only for what it takes, not for the opportunities the owner may lose."[70] Consequential losses such as loss of projected future profits, damage to good-will, or the expense of relocation are not permitted in federal condemnation proceedings.[71] In *General Motors*,[72] the Supreme Court conceded that failing to take these factors into consideration results in inadequate compensation.[73] Justice Roberts wrote: "No doubt... if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should be properly considered."[74] The Court, however, refused to depart from the traditional rule.[75]

B. Federal Avigation Easements

In the area of aircraft overflights, a fundamental issue is how much of the airspace actually constitutes private property.[76] Traditionally, common law held that ownership extended to the periphery of the universe.[77] Early this century, landowners invoked this theory to maintain actions for a variety of property

compensation. There are situations where market value is inappropriate, such as when it is too difficult to find, or when its application would result in manifest injustice to the property owner or public. If an award of market value would diverge so substantially from the indemnity principle, a violation of the Fifth Amendment could result. United States v. 564.54 Acres of Land, 441 U.S. 506, 512-513 (1979).

[61] *564.54 Acres of Land*, 441 U.S. at 511.

[62] *See Id.* at 510-511; United States v. General Motors Corp., 323 U.S. 373, 379 (1945).

[63] United States v. 1735 N. Lynn St., 676 F. Supp. 693, 701 (D.C. Va., 1987).

[64] *See* Olson v. United States, 292 U.S. 246, 255-256 (1934).

[65] The trial judge is granted authority to determine the highest and best use issue. In *United States v. Reynolds*, 397 U.S. 14, 19 (1970), the Supreme Court established that a "scope-of-the-project" issue was a decision for the trial judge and not the jury, stating that Rule 71A(h) "provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented." *See 341.45 Acres of Land*, 633 F.2d at 108.

[66] 292 U.S. 246 (1934).

[67] *Id.* at 255.

[68] *341.45 Acres of Land*, 633 F.2d at 111. The *Olson* Court cautioned: "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value - a thing to be condemned in business transactions as well as in judicial ascertainment of truth. *Olson*, 292 U.S. at 257 (citations omitted).

[69] United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 281-282 (1943).

[70] *Id.*

[71] *Petty Motor Co.*, 327 U.S. at 377-378. "Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage." *General Motors*, 323 U.S. at 380.

[72] 323 U.S. at 379.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 380

[76] For a detailed discussion of Fifth Amendment "property," *see* Lynda J. Oswald, *Goodwill and Going-Concern Value*, 32 B.C. L. Rev. 283.

[77] *See supra* note 2 and accompanying text.

interests in the unoccupied air space above.[78] *Swetland v. Curtiss Airports Corporation*,[79] noted that "[i]n every case in which [the Latin maxim] is to be found it was used in connection with occurrences common to the era, such as overhanging branches or eaves."[80] Nonetheless, as the twentieth century began, landowners attempted to use this theory of property ownership in an attempt to assert their property rights against overflights by private individuals and the government.

To address the developing air transportation industry and the problems connected with the ownership of the air above the land, the United States passed the Air Commerce Act in 1926[81] and amended it in 1938.[82] Under these statutes the United States claimed "complete and exclusive national sovereignty in the air space" over this country.[83] The Acts grant any citizen of the United States "a public right of freedom of transit in air commerce[84] through the navigable air space of the United States."[85] "Navigable air space" was defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority."[86]

In enacting the 1926 Act, Congress intended to apply existing principles of the law of water transportation to air transportation.[87] Congress' regulatory power over aviation and the public right of freedom of travel in the navigable airspace of the United States is analogous to, stems from, and is subject to the same constitutional limitations as Congress' regulatory power over, and the public's right to travel in the "navigable waters" of the United States.[88] It was upon this premise that Congress declared the "navigable airspace" to be a "public highway" in the Air Commerce Act of 1926.[89]

In *Branning*,[90] the Court of Claims stated that while the Federal Government's plenary power to regulate navigable airspace is unquestionable, the Fifth Amendment concerns are still overriding.[91] Just as the aquatic navigational servitude does not afford a blanket exemption from the Taking Clause of the Fifth Amendment whenever Congress exercises its Commerce Clause authority to regulate navigation,[92] the avigational servitude does not preclude application of the Taking Clause when Congress, in acting to regulate aviation, exceeds its reasonable power to regulate.[93]

The landmark case to deal with the concept of an avigation easement under the Fifth Amendment and the competing interests of the Civil Air Commerce Act was *United States v. Causby*.[94] In *Causby*, the Court was called upon to weigh the conflicting interests (1) of the Government (and, by implication, of others) in connection with the need to use the air for the passage of aircraft, and (2) of the owners of subadjacent lands in connection with the need for reasonable tranquility in the airspace overhead so that they may use and enjoy their property.[95] On one hand, the Court stated:

The air is a public highway, as

[78]Cory v. Physical Culture Hotel, Inc., 14 F.Supp. 977, 981-982 (W.D.N.Y. 1936), *aff'd* 88 F.2d 411, 413 (C.C.A. 1987).
[79]55 F.2d 201, 203 (6th Cir. 1932).
[80]*Id.* at 203.
[81]49 U.S.C. §171 et seq. (repealed 1958).
[82]49 U.S.C. §401 et seq. (repealed 1958). For discussion of the Air Commerce Act and the Amendments, *see* Capt. Charles W. Gittins USMC, *Branning v. United States: The Sound of Freedom or Inverse Condemnation*, 36 NAVAL L. REV. 109, 113 (1986).
[83]*Causby*, 328 U.S. at 260, *citing* 49 U.S.C. §176(a).
[84]"Air Commerce" is defined as including "any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." 49 U.S.C. §401(3).
[85]49 U.S.C. §403 (repealed 1958).
[86]*Causby*, 328 U.S. at 260, *citing* 49 U.S.C. §180. The minimum prescribed by the regulations is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§61.7400-.7401, Code Fed. Reg. Cum. Supp., Tit. 14, Ch. 1) and from 300 to 1000 feet for other aircraft depending on the type of plane and the character of the terrain. *(Id.* Pt. 60, §§60.350-.3505). *Causby*, at 263-264.
[87]Branning v. United States, 654 F.2d 88, 97-98 (Ct. Cl. 1981). The House report accompanying the bill stated:

> The provisions of the bill are not unique or unprecedented. In practically every case each provision has a precedent in an existing provision of law, and is modeled upon and often paraphrased from it. Usually these existing provisions are those of the marine navigation laws. This is natural for the reason that air space, with its absence of fixed roads and tracks and aircraft with their ease of maneuver, present as to transportation practical and legal problems similar to those presented by transportation by vessels upon the high seas. The declaration of what constitutes navigable air space is an exercise of the same source of power, the intestate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or nonnavigable waters. The public right of flight in the navigable air space owes its source to the same constitutional basis which, under the decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subadjacent soil. H.R.Rep. No. 572, 69th cong., 1st Sess. 9-10 (1926).

[88]*Branning*, 654 F.2d at 97.
[89]*Id.*
[90]*Id.* at 98.
[91]*Id.*
[92]*Id., citing* Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979).
[93]*Id.*
[94]328 U.S. 256 (1946). *See supra* notes 11 - 22 and accompanying text.
[95]Lacey v. United States, 595 F.2d 614, 615 (Ct. Cl. 1979).

> Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.[96]

On the other hand the Court said:

> [A] landowner must have exclusive control of the immediate reaches of the enveloping atmosphere if he is to have full enjoyment of his land and, accordingly, that a landowner is protected against intrusions in the airspace so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.[97]

Attempting to balance both competing policies, *Causby* established the rule that flights by Government-owned aircraft over private land are a Fifth Amendment taking of an easement in the overhead airspace if such flights are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land.[98] The Court indicated in *Causby* that the dividing line between the portion of the airspace in the public domain and the portion protected as an incident of land ownership against invasions by aircraft was the line delineated by the Civil Aeronautics Authority (now the Federal Aviation Administration) as the minimum safe altitude of flight.[99]

It is important to note that the land in *Causby* was adjacent to the airport.[100] The overflying airplanes were descending toward the runway and passed over the Causby property at a height of approximately 83 feet, well below the "minimum safe altitude of flight" as prescribed by the Civil Aeronautics Authority.[101] At the time of *Causby* the existing laws and regulations did not include in "navigable airspace" the airspace required for landing and taking off.[102] Congress had defined navigable airspace only in terms of the minimum safe altitudes of flight.[103] Since the flights in *Causby* were well below the limits set by Congress, the Court did not have to deal with drawing a dividing line between the "public highway" and the imposition of a taking, stating, "[w]e need not determine at this time what those precise limits are."[104]

Subsequent to the decision in *Causby*, as part of the Federal Aviation Act of 1958,[105] Congress redefined "navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by regulations... and shall include airspace needed to insure safety in takeoff and landing of aircraft."[106]

In dicta, *Matson v. United States*[107] discussed the Causby decision. The court stated that it would appear from *Causby* that flights within the public airspace, above the 500-foot regulated ceiling, are beyond the reach of the landowner's objection to interference with his property rights.[108] As to such use, the landowner is in the position of abutting owners along public highways or railroad rights-of-way[109]. The normal immunity to private actions, "based upon those incidental inconveniences that are unavoidably attendant" upon operations, applies to air routes allowable.[110]

The Supreme Court first found a taking where the flights were within the navigable airspace in *Griggs v. County of Allegheny, Pennsylvania.*[111] In *Griggs*, a property owner sued the county for an appropriation of his property resulting from take-off and landing of aircraft at the county airport.[112] The Supreme Court was faced with a situation where flights along a glide path above the plaintiff's land, while below 500 feet, were nevertheless

[96] *Causby*, 328 U.S. at 261.
[97] *Lacey*, 595 F.2d at 615, paraphrasing *Causby*, 328 U.S. at 264-265.
[98] *Id.*
[99] *Id.* at 616. *See supra* note 86.
[100] *Causby*, 328 U.S. at 258.
[101] *Id.*
[102] *Branning*, 654 F.2d at 92.
[103] *Causby*, 328 U.S. at 264.
[104] *Id.* at 266.
[105] 49 U.S.C. §1301(26). This act repealed the 1926 Act and the 1938 Amendments. *See supra* notes 81 - 89.
[106] *Branning*, 654 F.2d at 98-99, *citing* 49 U.S.C. §1301(26).
[107] 171 F. Supp 283 (Ct. Cl. 1959).
[108] *Id.* at 286.
[109] *Id.*
[110] *Id.*
[111] 369 U.S. 84, 90 (1962).
[112] *Id.*

within the navigable airspace as declared by Congress in the 1958 Act.[113] The Court held that a taking had occurred despite the fact that the landing planes were within the corridor Congress had declared as navigable airspace of the United States.[114] The Court reasoned: "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?"[115]

In 1963, the Court of Claims retained the strict 500 feet public airspace / private property demarcation line while hinting that future cases might arise where flights above 500 feet could constitute a taking.[116] The court found that owners of property over which planes flew at an elevation of less than 500 feet were entitled to compensation, but they were not entitled to compensation for flights above 500 feet although they may have been "inconvenienced to some extent by these flights".[117] In language that served as a predecessor of cases to come, the court noted some possible flexibility. This is not to say that a case could not arise where the unavoidable damage to a person's property occasioned by travel in the navigable air space would be so severe as to amount to a practical destruction or a substantial impairment of it. When such a case arises we would then have to consider whether the relevant statutes and regulations violated the property owners' constitutional rights.[118] In 1981, the Court of Claims found a taking where the overflights occurred at a height above 500 feet.[119] The plaintiff, Branning, owned land above which United States Marine Corps aircraft conducted operations and training.[120] The training consisted of the aircraft flying directly above Branning's property in a "racetrack pattern" at an altitude of 600 feet above the ground.[121] The exercise resulted in a squadron of airplanes flying "virtually nose to tail at 25 to 30 second intervals".[122] The training was conducted over a period of several days each month.[123] The defendant, the United States, contended the operations over Branning's property did not constitute a taking since the flights were above 500 feet and thus within the public airspace.[124] Although the flights were within the "public highway" as established by Congress, the court held that a taking occurred because the use was particularly burdensome to the landowner.[125] The court stated an exception to this rule that there can be no recovery for a taking based upon flights within navigable airspace.[126] "There is a very limited exception to the rule when the Air Force consciously selects and imposes an egregious burden on a plaintiff's land."[127] The court described the effects of the overflights as being so severe as to amount to a practical destruction of the land[128]. "Since the subjacent property owner has suffered a diminution of the value of the property in this case, there has been a taking of an easement over and through the airspace superjacent to the property of the plaintiff."[129]

The landowner in *Bodine v. United States*[130] attempted to assert his rights to the airspace substantially above his land.[131] Unlike previous taking claims, Bodine alleged a taking of airspace vastly above the limits of private property set by Congress.[132]

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[113]*Branning*, 654 F.2d at 98.

[114]*Id.*

[115]*Griggs*, 369 U.S. at 89-90. In most avigation easement cases, the 5th Amendment is at issue. However, *Griggs* invoked the 14th Amendment because the suit was against the local government and not the federal government.

[116]Aaron v. United States, 311 F.2d 798, 801 (Ct. Cl. 1963).

[117]*Id.* In explaining, the court stated:

> It is true that the inconvenience and annoyance experienced from the passage of a plane at 501 feet above a person's property is hardly distinguishable from that experienced from the passage of a plane at, say, 490 feet, but the extent of a right-of-way, whether on the ground or on water or in the air has to be definitely fixed. Acts that are permissible within the limits of the right-of-way are forbidden beyond its limits, and vice versa. Congress has fixed 500 feet as the lower limit of navigable air space; hence, what may be permissible above 500 feet is forbidden below it, unless compensation is paid therefor.

[118]*Id.*

[119]*Branning*, 654 F.2d at 90.

[120]*Id.*

[121]*Id.*

[122]*Id.*

[123]*Id.*

[124]*Id.* at 92.

[125]*Id.* at 90.

[126]Persyn v. United States, 34 Fed.Cl. 187, 195 (1995) (discussing the holding of *Branning*).

[127]*Id.*

[128]*Branning*, 654 F.2d at 102.

[129]*Id.*

[130]538 F.2d 348 (Ct. Cl. 1976).

[131]*Id.*

[132]*Id.*

Bodine began preparations for a sky-diving or sport parachute center from an abandoned airstrip on a piece of property 12.5 miles from a major Navy airfield.[133] Bodine proposed to fly sky-jumpers up to altitudes of 12,500 feet. He sued for the taking of an avigation easement contending that the Navy's continuing use of the airspace above his property constitutes the taking of an interest in his property.[134] The court found for the United States stating that the plaintiff was attempting to impose an easement not on the land, but upon the air itself.[135] Since there was no adverse effect on the land, the court found the plaintiff had not suffered a compensable taking.[136]

In *Batten v. United States*,[137] the Court of Appeals considered the issue of whether a taking could occur where the operation of jets by the government affected the use and enjoyment of private homes where the aircraft did not operate directly over the plaintiff's property.[138] The court held that they could not locate any decisions holding the United States liable for noise, vibration, or smoke without a physical invasion.[139] "Absent such physical invasion recovery has been uniformly denied."[140] The court noted that there was a distinction between a taking and consequential damages.[141] The court cited in *Transportation Company v. Chicago*,[142] where the Supreme Court held that governmental activities which do not directly encroach on private property are not a taking within the meaning of the Fifth Amendment even though the consequences of such acts may impair the use of the property.[143] The *Batten* court stated that to permit recovery for sound and shock waves without a direct invasion of the property owner's domain would obliterate the carefully preserved distinction between "damage" and "taking".[144]

The Court of Claims addressed when the taking of an avigation easement begins in *Adaman Mutual Water Co. v. United States*.[145] The court held that the taking of an avigation easement by the government occurs when the government begins to operate aircraft regularly and frequently over a parcel of land at low altitudes, with the intention of continuing such flights indefinitely.[146]

The Court of Claims considered the issue of whether a subsequent taking occurred when new larger and noisier aircraft were introduced into airspace previously utilized by other aircraft in *Avery v. United States*[147] and *Hodges v. United States*.[148] The court determined in both cases that a new taking had occurred. In *Avery*, the court outlined factors to aid in determining when a further taking has occurred.[149] Such factors include, increased operations or the introduction of new aircraft, either or both of which results in greater noise, greater inconvenience and a further reduction of land values.[150]

In *Jensen v. United States*[151] the Court of Claims heard the case of a property owner alleging a taking when the Air Force entered a nearby municipal airport and began flying larger and noisier airplanes than had been previously flown there.[152] The court considered two principal issues.[153] First, when the taking initially occurred, and second, the valuation of the taken land.[154]

The *Jensen* court determined that there is no simple litmus test for discovering when an avigation easement is first taken by overflights.[155] Citing *Causby*, the court stated that some annoyance must be borne without compensation.[156] The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on property values; the

[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] 306 F.2d 580 (10th Cir. 1962), *cert denied*, 371 U.S. 955 (1963).
[138] *Id.*
[139] *Id.* at 584.
[140] *Id.*
[141] *Id.* at 583.
[142] 99 U.S. 635 (1878).
[143] *Batten*, 306 F.2d at 583, *citing Transportation Co.*, 99 U.S. at 642.
[144] *Id.* at 584.
[145] 181 F.Supp 658 (Ct. Cl. 1958).
[146] *Id.*
[147] 330 F.2d 640 (Ct. Cl. 1964).
[148] 355 F.2d 592 (Ct. Cl. 1966).
[149] 330 F.2d at 643.
[150] *Id.*
[151] 305 F.2d 444 (Ct. Cl. 1962).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 447.
[156] *Id.* (citing *Causby*, 328 U.S. at 266).

reasonable reactions of the humans below; and the impact upon animals and vegetable life.[157]

The second issue the *Jensen* court considered was the value the landowners were entitled to for the taking.[158] The measure of damages for the taking of an easement by the government is the difference between the fair market value of the land just before the easement was taken and the fair market value of the land just after the easement was taken.[159] The plaintiffs argued that were it not for the most recent overflights, which caused the taking, their property would have been ripe for residential development, and therefore was worth considerably more than agricultural land, its current use.[160] The defendant maintained that because of the long-standing existence of the nearby airport, regardless of the most recent overflights which constituted the taking, the highest and best use of the land was agricultural, not residential.[161] The Commissioner adopted the defendant's view, conducting a fact intensive investigation and accepting evidence from the defendant's appraiser.[162] The Court of Claims adopted the Commissioner's valuation.[163] The court stated that the earlier diminution-in-value or check on further development and growth, linked to the existence of the airport and its manifold activities (which included previous overflights which did not impose a servitude), cannot be attributed to the later taking.[164] Although the land's use was now effectively economically limited to agricultural use, the court refused to give the damages the plaintiffs had asked for by allowing a valuation of the property as if the landowners would have developed it.[165] The court instead chose to value the easement at the difference in value of its actual use for the period immediately before and immediately after the taking.[166]

C. State Law Approach

Avigation easement and inverse condemnation cases arise in state court forums when suits are brought alleging a taking under a state's constitutional provision prohibiting a taking without compensation.[167] While the states have generally followed the direction of the federal courts, the most significant deviation from the federal standards is the rejection of the overflight requirement by a number of states.[168] The direct overflight, or "invasion" requirement pronounced in *Causby* and frequently applied in early avigation easement cases, remains significant in the states whose constitutions are similar to the federal constitution and allow compensation only where there has been a "taking of property."[169] Other states'[170] constitutions require compensation not only for a "taking" of property, but also where property is "damaged."[171] Where this is the case, the result frequently is the absence of the physical invasion requirement in inverse condemnation claims.

The Missouri Constitution provides "[T]hat private property shall not be taken or damaged for public use without just compensation."[172] Missouri lacks case law directly addressing the adoption or rejection of the physical invasion requirement. In *Drybread v. St. Louis*[173] the Missouri Court of Appeals permitted landowners, whose property lay directly beneath the flight path of aircraft ascending from and descending to Lambert - St. Louis International Airport, to continue pursuing a suit for inverse condemnation while dismissing the counts for recovery under theories of trespass and nuisance.[174] The court

[157] *Id.*
[158] *Id.* at 448.
[159] Federal Real Estate and Storage Co. v. United States, 79 Ct. Cl. 667, 682 (1934).
[160] *Jensen*, 305 F.2d at 448.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *See* Pamela B. Stein, *The Price of Success: Mitigation and Litigation in Airport Growth*, 57 J. AIR L. & COM. 513, 529-36 (1991).
[168] *See* Zitter, *supra*, note 22. Jurisdictions which do not require direct physical invasion (overflights) of property include: California - Aaron v. Los Angeles, 40 Cal. App. 3d 471 (Cal. App. 1974); Florida - Jacksonville v. Schumann 167 So.2d 95 (Fla. Dist. Ct. App. 1964), Jacksonville v. Schumann, 199 So.2d 727 (Fla. Dist. Ct. App. 1967); Oklahoma - Henthorn v. Oklahoma City, 453 P.2d 1013 (Okla. 1969); Oregon - Thronburg v. Port of Portland, 376 P.2d 100 (Or. 1962), Thornburg v. Port of Portland, 415 P.2d 750 (Or. 1966); Pennsylvania - Philadelphia v. Keyser, 407 A.2d 55 (Pa. Commw. Ct. 1979); Tennessee - Johnson v. Greenville, 435 S.W.2d 476 (Tenn. 1968), Jackson v. Metropolitan Knoxville Airport Authority, 922 S.W.2d 860 (Tenn. 1996); Washington - Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964).
[169] Stein, *supra* note 167, at 530.
[170] *Id.* at 533. Includes: Washington, California and Missouri.
[171] *Id.*
[172] MO. CONST. art. I, § 10.
[173] 634 S.W.2d 519 (Mo. App. Ct. 1982).
[174] *Id.*

cited *Causby* and stated that "relief, if any, for the permanent nuisance lies in their inverse condemnation count."[175]

The Oregon Supreme Court's decisions in the *Thornburg*[176] cases are the leading state deviations from federal law in the area of airport inverse condemnation.[177] The facts of *Thornburg* were similar to the Tenth Circuit case of *Batten v. United States*,[178] in that the plaintiff's lived near an airport, but not directly under the flight path of the airplanes. While the Tenth Circuit did not find a taking in *Batten* because of lack of direct overflight, the Oregon Supreme Court in *Thornburg* found a taking under the Oregon constitution. The court began by accepting that noise can be a legal nuisance which, if loud enough or continuous enough, can ripen into an easement.[179] The court continued by reasoning that "[a] nuisance can be such an invasion of the rights of the possessor as to amount to a taking, in theory at least, any time a possessor is in fact ousted from the enjoyment of his land."[180]

Thornburg became the first case to hold that a compensable trespassory taking could involve noise interference from beside a property rather than only directly above it.[181] The court stated that "[t]he real question was not one of perpendicular extension of surface boundaries into the airspace, but a question of reasonableness based upon nuisance theories."[182]

The *Thornburg* decisions were the first deviation by a state from the taking theory put forth in *Causby*.[183] The result of the *Thornburg* decisions was shift of "the focus of the judicial inquiry from the location of the source of the interference to the actual damage caused by the interference."[184] A number of state courts have since followed the rationale of *Thornburg*.[185]

IV. INSTANT DECISION

The court began its analysis of *Brown v. United States*[186] by stating the general proposition that if the government physically occupies privately owned land over the owner's objections, the government is liable.[187] The court stated that regardless of the extent of intrusion, and no matter how weighty the public purpose, compensation is required.[188] Because of this, the court noted that the extent of occupation is only relevant to compensation, not liability.[189]

The Court of Appeals next stated that under common law, the owner of real property was considered to own from the center of the earth to the top of the sky.[190] Historically, anytime the government occupied privately owned land for public use over the owner's objection, a taking had arisen under the Fifth Amendment which required compensation.[191] Because of the necessity of modern aviation an invasion of the airspace above surface land does not per se constitute a taking.[192] However, under *Causby* and its progeny, once the surface owner proves that low-level overflights result in direct, immediate, and substantial interference with the enjoyment and use of the property, the owner establishes a taking for which the Constitution mandates just compensation.[193]

Next, the court discussed the trial court's finding that because the Browns current use of the affected property for cattle ranching and recreation, and their income from these activities, have not diminished, the Browns cannot have suffered a substantial interference with their enjoyment and use of their land under *Causby*.[194] The government argued that *Causby* does not protect against a decrease in market value when that

[175]*Id.* at 521.
[176]The first case was *Thornburg v. Port of Portland*, 376 P.2d 100 (Or. 1962). Following a remand, the Supreme Court of Oregon heard another appeal of the same case, *Thornburg v. Port of Portland*, 415 P.2d 750 (Or. 1966).
[177]Richard Kahn, *Inverse Condemnation and the Highway Cases: Compensation for Abutting Landowners*, 22 B.C. ENVTL. AFF. L. REV. 563 (1995).
[178]*See supra* note 137 and accompanying text.
[179]Kahn, *supra* note 177, at 578-579, *citing Thornburg*, 376 P.2d at 102.
[180]*Thornburg*, 376 P.2d at 105.
[181]Stein, *supra* note 167 at 532.
[182]*Thornburg, 376 P.2d at 107.*
[183]Kahn, *supra* note 177, at 580, *citing* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 209 (1967).
[184]*Id.*
[185]Stein, *supra* note 167, at 532. The states include Washington, Florida and most recently a 1996 Tennessee Supreme Court decision, *Jackson v. Metropolitan Knoxville Airport Authority*, 922 S.W.2d 860 (Tenn. 1996), adopted the *Thornburg* reasoning.
[186]73 F.3d 1100.
[187]*Id.* at 1103.
[188]*Id.*
[189]*Id.*
[190]*Id.*
[191]*Id.* at 1103.
[192]*Id.* at 1104.
[193]*Id.*
[194]*Id.*

decrease is not accompanied by diminishment of present, actual use of the property.[195] The instant court reversed the trial court stating, that the government's view that interference with "enjoyment and use"[196] means interference with present use as an indispensable requisite for a successful takings claim based on noise from overflights, deprives the term "enjoyment" of its classical meaning in property law, and makes the phrase "enjoyment and use" redundant.[197] Further, the court stated that property owners clearly enjoy not only the right to put their land to a particular present use, but also to hold the land for investment and appreciation, and to lease or convey the land to others, gratuitously or for profit.[198]

The court focused on the issue of present use vs. future development. Declaring that an important element in a property owner's bundle of rights is the right to economically exploit the land, or the right to sell the land for the best price available in the market, based not only on its current use but on potential other uses for which the market is prepared to pay.[199] Therefore, the court concluded that to the extent that frequent and low overflights, through noise, vibrations, fumes, and so forth, have directly and substantially impaired the use of the Brown's property for recreational ranching or other uses "to which the land could readily be converted," there has been a substantial interference with the enjoyment of the property.[200] Significant and immediate decline in market price which is directly attributable to overflights, would suggest such an interference.[201]

The court criticized the government's view that compensation should be paid only if the overflights interfere with the land's current use[202]. The court voiced its concern by explaining that under the government's view, the government would be able to make uncompensated use of private property if that use did not immediately interfere with the landowner's current use.[203] This reasoning would preclude takings on land held for investment purposes or for future use.[204] The government, the court explained, could effectively preclude future lawful uses of the property without compensation to the owner, simply by making such uses undesirable or unprofitable.[205] "The Fifth Amendment does not permit the Government to destroy individual rights in that manner."[206]

Finally, the court concluded its analysis by stating that the affidavits submitted by the Browns are sufficient to raise a genuine issue of material fact concerning the issue of damages from the overflights.[207] The court remanded the issue of damages to the trial court.[208] In remanding, the court directed the trial court to consider the following factors: (1) the existence of the market for the proposed future use the plaintiff advocates, (2) the inclusion of this property in that market, (3) the amount of noise created by the overflights, and (4) how the noise decreases the market value of this property within that market.[209]

V. COMMENT

The decision in *Brown* is important because it is the first case in the realm of avigation easements to define the term "enjoyment and use" to include damages resulting from a decrease in fair market value of the land for other uses to which the land could readily be converted.[210] The implications of this decision are far-reaching. Other decisions have stated that future uses of land are a consideration,[211] yet none have gone so far as to hold that mere ideas or concepts of desired future uses for the land are a consideration when analyzing the taking claim.[212] After *Brown*, aircraft overflights do not have to cause immediate diminishment of present, actual use of the property.[213] Hereafter,

[195] *Id.*

[196] The term "enjoyment and use" is from *Causby*, where to constitute a taking, the overflights must cause direct, immediate, and substantial interference with the *enjoyment and use* of the property. *Causby*, 328 U.S. at 266. *See infra* note 21 and accompanying text.

[197] *Brown*, 73 F.3d at 1104.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 1104-1105.

[201] *Id.* at 1105.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *See supra* notes 198 - 206 and accompanying text.

[211] *Causby*, 328 U.S. at 261. In *Causby*, the court stated that the normal measure of recovery, "may reflect the use to which the land could readily be converted, as well as the existing use."

[212] *Id.* at 262. The court defined the property owner's beneficial ownership of the land as the owner's right to possess and exploit the land. In *Mid-States Fats and Oils Corp. v. United States* 159 Ct. Cl. 301 (1962), the Court of Claims found a taking by overflight when low, frequent and noisy overflights interfered with property that the owner was in the process of preparing for future use as a soybean processing plant.

[213] *See supra* note 200 and accompanying text.

low and frequent over-flights which impair uses to which the land could be readily converted are sufficient to find a Fifth Amendment taking.[214]

Brown's contribution to the status of avigation easements is significant to avoid property holders from being caught in a catch-22 between an absence of diminishment of present, actual use of the property and the six year statute of limitations. If the court would have decided for the government, finding that there must be an impairment of present, actual use of the property, the property holder who is not immediately suffering from the overflights would not have an action for taking until he changes the nature of the property such that the flights are actually impairing the use of the property. The six year statute of limitations for avigation easement claims begins tolling from either the time of the first flights which cause the taking, or from the time of substantially increased use such that a new taking arises.[215] If the landowner does not suffer an actual loss within this six year period, he is forever precluded by the statute of limitations from seeking compensation for the taking.

For instance, in *Brown*, the first flights which caused the avigation easement arose in January, 1991.[216] The statute of limitations began tolling then, such that any cause of action for taking would have to be brought by January, 1997. The Browns, however, were able to continue using their land for raising cattle and hunting and did not suffer any decrease in revenue because of the overflights.[217] If the *Brown* court would have held otherwise, and would have allowed a taking only where the plaintiffs had shown substantial interference with their present enjoyment and use, the Browns would have immediately been without a cause of action for taking since there was no interference with their present enjoyment and use, yet the statute of limitations for an action would still run. The Browns would have needed to develop their land into an endeavor only to have the value of which be diminished before the deadline of January, 1997, if they were ever to have a cause of action not barred by the statute of limitations.

While the Court of Claim's holding in *Brown* is breaking new ground in the area of avigation easements, it is actually little more than the logical extension of the traditional compensation theory for Fifth Amendment Takings.[218] The Supreme Court has long held that in takings cases, land is to be valued at the highest and best use.[219] In fact, the first Supreme Court case to discuss avigation easements, *Causby*, set the basis for *Brown* in noting that in determining the value of the taking, the value "may reflect the use to which the land could readily be converted, as well as the existing use."[220]

In an effort to prevent speculation and conjecture of what actually entails the highest and best use, the Court has historically directed that the proposed use must be reasonably probable, the property must be adaptable for these uses, and there is actually a demand, currently, or in the near future, for the proposed uses.[221] In a similar fashion, in remanding the case for consideration, the *Brown* court directed the trial court to consider, among other things, the existence of a market for the proposed use of the Brown's ranch, and the inclusion of the ranch in that market.[222] Just as the traditional restrictions serve to ensure a fair and adequate valuation of the highest and best use, the considerations directed by the *Brown* court serve the same purpose.

One criticism of the *Brown* decision is that in accepting a market value compensation method which includes potential future uses, the court has opened the proverbial pandora's box for future trial courts. Critics claim situations similar to the Brown's will develop where the landowner will file suit even though the income from the property will remain unchanged and current uses are unaffected. The emphasis on market value will lead to a costly and confusing battle of expert witnesses, as each side presents numerous real estate appraisals and market studies to demonstrate the impact of aircraft noise on property values.[223]

This concern, although possibly somewhat exaggerated, may be well-founded. Nonetheless, identical concerns are present in regard to market valuation of other inverse condemnation cases. The law in this area is solidly established in traditional inverse condemnation cases. Extension of this valuation method to avigation easement cases will not alter the concept. The concern, although with merit, is absent any legal foundation in light of the great weight of authority holding otherwise.

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[214] *Id.*
[215] *See supra* notes 148 - 150 and accompanying text.
[216] *See supra* note 30 and accompanying text.
[217] *See supra* note 48 and accompanying text.
[218] *See supra* notes 54 - 75 and accompanying text.
[219] *See supra* notes 65 - 67 and accompanying text.
[220] *Causby*, 328 U.S. at 261.
[221] *See supra* note 68 and accompanying text.
[222] *Brown*, 73 F.3d at 1105. *See supra* note 209 and accompanying text.
[223] *See* Stein, *supra* note 167, at 541.

VI. CONCLUSION

The Supreme Court's finding of a taking in *Causby* was the first extension of inverse condemnation principles to the airspace through an avigation easement.[224] Over the past fifty years, the courts have looked to traditional inverse condemnation principles for direction on how to proceed with issues. The Court of Claim's approach in *Brown* is no different. The decision of the court to allow a property holder to assert damages as to the impact on the market value is simply a logical extension from traditional inverse condemnation law. The policy behind the takings clause is to prevent the imposition of an inordinate burden upon a few for the public benefit.[225] By requiring just compensation, the owner is to be made whole by putting him in the same pecuniary position as if his property had not been taken.[226] By permitting those burdened with an avigation easement to seek damages for potential future uses, the court's actions are consistent with this policy.

[224]*See supra* notes 94 - 104 and accompanying text.
[225]*See* Stein, *supra* note 167, at 529.
[226]*See supra* note 62 and accompanying text.