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INTRODUCTION

For over 15 years, jet travel has been a welcomed fact of life—except to those who are daily buffeted by the roar of aircraft operating in close proximity to their homes and families. For these people, the law has been slow in developing remedies, in part because the law has historically not recognized a specific property right or interest which was injured by such intangibles as noise originating from outside the landowner's boundaries. This comment will analyze existing law in Montana, compare recent developments in other jurisdictions, and show how, reasoning by analogy from recognized and related property interests, the Montana Supreme Court may reach an adequate remedy which is consistent with the pattern and development of Montana law.

CONDEMNATION BY NUISANCE

Prior to 1946, the legal remedies for invasion of the use and enjoyment of land rested on one of numerous theories: 1) the landowner owned all of the airspace "from the heavens to the depths of the earth,"[1] 2) the landowner owned all of the airspace, subject to a public easement for flight, 3) the landowner owned that amount of airspace as established by statute, 4) the landowner owned airspace to the extent that he could effectively possess it, and 5) the landowner owned all the airspace that he could actually occupy.[2]

However, in 1946, the legal theory changed with the decision of *United States v. Causby*,[3] when the United States Supreme Court established the "overflight requirement":

> [S]uperadjacent airspace . . . is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface. . . . the flight of airplanes, which skim the surface but do not touch it, is as much an appropri-

1. Klien, *"Cujus Est Solum Ejus Est. . .Quousque Tandem?,"* 26 J. AIR L. & COMM. 237 (1959).

2. Anderson, *Some Aspects of Airspace Trespass,"* 27 J. AIR L. & COMM. 341 (1960). *See also* Russell, *"Recent Developments in Inverse Condemnation of Airspace,"* 39 J. AIR L. & COMM. 81 (1973).

3. United States v. Causby, 328 U.S. 256 (1946).

ation of the use of the land as a more conventional entry upon it. . . .[4]

In the early 1960's, a few state supreme courts chose to eliminate the overflight requirement set forth in *United States v Causby*. In *Martin v Port of Seattle*,[5] where the plaintiff sought compensation for aircraft noise originating outside the boundaries of his land, the Washington supreme court permitted recovery. The court stated, "We are unable to accept the premise that recovery for interference with the use of land should depend on anything as irrelevant as whether the wing tip of an aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land."[6] The elimination of this overflight requirement means that aircraft noise, which interferes with the use and enjoyment of the surface of land and originates outside the boundaries of land, is compensable as a taking or damaging under the eminent domain provision.

The cause of action used in *Causby* and *Martin* is a type of inverse condemnation, which is a general cause of action "against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact but with no formal exercise of the power."[7] An action seeking compensation for aircraft noise is a peculiar combination of the law of nuisance and property law. The action is more aptly decribed as condemnation by nuisance, which is an activity constituting a nuisance under the application of tort law, by an entity having the power of eminent domain, that is a taking or damaging of property for public use.[8]

In examining whether aircraft noise originating outside the boundaries of land is compensable, a comparison of Montana law with Washington law will be made, since both states' eminent domain provisions contain the language "taking or damaging."[9] The analysis will be made by examining the definition of "property" in the context of the eminent domain provision and then the definition of "taking or damaging."

DEFINITION OF "PROPERTY"

A. *Use and Enjoyment of Land*

As stated in Moris Cohen's article *Property and Sovereignty*, "Anyone who frees himself from the crudest materialism readily

4. *Id.* at 264-65.
5. Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540 (1964).
6. *Id.* at 545.
7. *Id.* at 542 n.1.
8. Stoebuck, *"Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect,"* 71 DICKINSON L. R. 207, 209 (1966).
9. WASH. CONST. art. I, §16; MONT. CONST. art. II, §29.

recognizes that as a legal term property denotes not material things but certain rights."[10] The United States Supreme Court has also adopted a similar definition of property. In *United States v General Motors Corp.*,[11] the Court noted that property is a group of rights inhering in the citizen's relation to the physical thing, such as the right to possess, use, and dispose of the physical thing.

Washington's recognition that certain rights or interests are property appears in many cases. As early as 1901 in *State ex rel Smith v Superior Court of King County*, the court recognized that ownership of land as applied in the eminent domain provision encompasses the right of use and enjoyment of the land.[12]

When the court was confronted with *Ackerman v Port of Seattle*,[13] which involved frequent flights over the land of the plaintiff, it turned to the *Smith* definition of property. Later in *Martin*, the court relied upon the owner's right to be free from interference with the use and enjoyment of his land.[14]

The United States Supreme Court has also recognized similar intangible interests as property: The case of *Richards v Washington Terminal Co.*[15] came very close to recognizing that enjoyable use of land free from any nuisance is an intangible interest. There the court held that the blast of smoke and dust from a railroad tunnel amounted to the condemnation of an interest in enjoyment. This interest, couched in terms of nuisance, allowed the landowner to be free from "special and peculiar damage" of a kind not suffered generally by those affected by the railroad.[16]

Montana has hinted at a similar definition in *Root v Butte, Anaconda and Pacific Ry Co.*.[17] The defendant railroad constructed its tracks near the home of the plaintiff, who complained that the noise of passing trains had greatly damaged the value of his property. The court stated, "[I]f plaintiff's property has been lessened in value by the running of trains,. . . on account of the construction and operation of appellant railroad,. . .and such damage is in excess of that sustained by the community at large, he has sustained special damages and a recovery may be had."[18] The court's language is important:

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10. Cohen, "*Property and Sovereignty*," 13 CORNELL L. Q. 8, 11 (1927).
11. United States v. General Motors Corp., 323 U.S. 373 (1945).
12. State ex rel. Smith v. Superior Court of King County, 26 Wash. 278, 66 P. 385 (1901).
13. Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1960).
14. Martin v. Port of Seattle, *supra* note 5.
15. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).
16. *Id.* at 557.
17. Root v. Butte, Anaconda, and Pacific Ry. Co., 20 Mont. 354, 51 P. 155 (1897).
18. *Id.* at 156.

> If the road is well constructed and skillfully operated. . . vibration, to any particular extent, would not naturally or necessarily follow;. . . nor would the ringing of bells or blowing of whistles naturally and necessarily injure the owner's *enjoyment* of the property, or its value, to any greater extent than do the running of a railroad and such incidents as are mentioned above, connected with the running of trains, injure the general public, but which could not be taken into consideration in estimating plaintiff's damages.[19] (emphasis supplied)

And if the damages are special, then the plaintiff can recover from the governmental entity. By this language, the court seems to have defined the owner's enjoyment of his land as property.

B. Riparian Rights

The intangible interests that a landowner possesses appear in other Washington property cases. In the *Petition of Clinton Water District of Island County*,[20] the court recognized that the riparian right of an owner of land adjacent to a lake is an interest capable of being condemned. Riparian rights attached and appurtenant to land are vested property rights and are entitled to the protection under the Washington eminent domain provision.

At a much earlier date, the United States Supreme Court, in *United States v. Cress*,[21] held that the right of a riparian owner to the stream flowing past his land is condemnable. There the government had constructed a dam, which backed up water into a tributary, on which the plaintiff's mill was located. Consequently, the flowage in the river was reduced so that the mill wheel would not turn. The Court held that the government's action was a taking of the right of flowage.[22]

Another area of riparian rights is the polluting of streams by a governmental entity. In *Snavely v City of Goldendale*, [23] the Washington court, which did not clearly state the nature of the interest involved, noted that while polluting a stream is generally held to be tortious, it can result in a taking or damaging of property. It is suggested that the court was referring generally to the intangible riparian interest.

Later, in *City of Walla Walla v Conkey*,[24] the court of appeals

19. *Id.* at 156.
20. Petition of Clinton Water District of Island County, 36 Wash.2d 284, 218 P.2d 309 (1950).
21. United States v. Cress, 243 U.S. 316 (1917).
22. *U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945) limits the *Cress* case but did not overrule it.
23. Snavely v. City of Goldendale, 10 Wash.2d 453, 117 P.2d 221 (1941).
24. City of Walla Walla v. Conkey, 6 Wash.App. 43, 492 P.2d 589 (1971).

stated that "pollution of a stream by a municipality. . .constitutes a constitutional taking, where the disposal results in pollution of the stream on such a scale as to create a public nuisance." The court relied upon the *Snavely* case. Other states have reached a similar result.[25]

Montana has also recognized that an owner of land, appurtenant to a stream or ditch, has an interest capable of being condemned. In *Mettler v Ames Realty Co.*, the court stated that under the common law doctrine, "[T]he right to the use and flow of the waters of a stream is an inherent right incident to the ownership of riparian lands, a right annexed to the soil, not as an easement or appurtenance, but as part and parcel of the land itself. . . ."[26] The court's statement must be taken with the warning that *Mettler* involved the doctrine of appropriation and not eminent domain.

A view of Montana cases concerning ditch rights provides that a riparian right or ditch right is an intangible interest in the context of the eminent domain provision. In *Hughes v King*,[27] the court, relying on REVISED CODES OF MONTANA, §67-601(11) (1947),[28] stated that a ditch right is an easement. Later in *City of Missoula v Mix*, the court noted: "An easement is a property right protected by constitutional guaranties against the taking of private property without just compensation."[29]

Citing *Hughes* and *Mix*, the court in *Colarchik v. Watkins* stated:

> That a ditch right is an easement is well settled in Montana law, and an easement is property in the sense that it can not be taken for public use without just compensation being paid to the owner. . . .[30]

C. *Easements*

An easement is also considered as property that is condemnable. In 1971, the court in *State v Kodama*[31] observed that the appropriation of a private easement, which is a property right, may only occur under the exercise of eminent domain. The court found no distinction between an easement of access from abutting property

25. Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Sheriff v. Easley, 178 S.C. 504, 183 S.E. 311 (1936).

26. Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702, 703 (1921).

27. Hughes v. King, 142 Mont. 227, 383 P.2d 816, 817 (1963).

28. REVISED CODES OF MONTANA, §67-601(11) (1947) defines the right of having water flow without diminution or disturbance of any kind as an easement.

29. City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212, 215 (1950).

30. Colarchik v. Watkins, 144 Mont. 17, 393 P.2d 786, 789 (1964).

31. State v. Kodama, 4 Wash.App. 676, 483 P.2d 857 (1971).

to a roadway, and a private easement which provides access via a corridor from the owner's property.[32] Washington has recognized that the right of reasonable egress and ingress attaches to the land and is a property right as complete as ownership of the land itself.[33] Consequently, where there has been physical impairment of access by reduction of the street grade in front of the owner's land,[34] or on a trestle and elevated railway built in front of the owner's land,[35] then the abutting landowner is entitled to just compensation.

The United States Supreme Court case of *United States v Welch*[36] is the leading example that an easement can be taken by condemnation. The plaintiff owned a parcel of land to which there was an easement of passage across a servient tenement. The government flooded the servient tenement and the passageway, cutting off the plaintiff's egress and ingress. Although there was no physical touching of the plaintiff's land, the court allowed recovery for the plaintiff.

In Montana, as noted in *Mix*, an easement is property that is condemnable. In reaching this decision, the court cited *United States v Welch*.[37]

Montana also recognizes that the landowner has the right of egress and ingress, which is attached to his land and is property. It has been stated that "[T]he right of access. . . is the right of reasonable ingress and egress from the abutting highway."[38]

An important Montana case, similarly related to the right of egress and ingress, is *Less v City of Butte*.[39] There the plaintiff built a home and made improvements on it relying on the grade of the street as it then existed. Later, the city excavated the street to a depth of seven feet, which left the plaintiff with no access to his home. The court held that the plaintiff was entitled to compensation because of the change of the grade. The court stated:

> The owner of a city lot has a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access to the street. These easements are property, protected by the constitution from being taken or damaged without just compensation.[40]

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32. *Id.* at 859.
33. Walker v. State, 48 Wash.2d 587, 295 P.2d 328, 330 (1956).
34. Brown v. City of Seattle, 5 Wash. 35, 31 P. 313 (1892).
35. State ex rel. Smith v. Superior Court, *supra* note 12.
36. United States v. Welch, 217 U.S. 333 (1910).
37. City of Missoula v. Mix, *supra* note 29 at 215.
38. State Highway Comm'n v. Keneally, 142 Mont. 256, 384 P.2d 770, 775 (1963).
39. Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903).
40. *Id.* at 141.

D. *Summary*

The Washington Supreme Court and the United States Supreme Court have consistently recognized that property as used in the eminent domain provision is not only the material things but is also certain rights in and appurtenant to those things. An overview of Montana's approach to the definition of property in the eminent domain provision provides a pattern similar to that developed by the Washington and the United States Supreme Courts. While Montana has not had many cases or definitive rulings, the court has recognized that certain intangible, non-physical rights inhering in the landowner are property.

DEFINITION OF TAKING OR DAMAGING

A. *Elimination of the Physical Invasion Requirement*

Until 1870, all state constitutions contained only the word "taking." In that year, Illinois added the word "damaging" to its constitution,[41] and now this addition appears in the constitutions of 26 states.[42] Originally, courts required the physical invasion of land before a "taking" occurred.[43] This requirement has almost completely disappeared as an examination of the following cases will show.[44]

In the Washington riparian right cases, a physical invasion or touching of land is no longer necessary.[45] The elimination of the requirement is also seen in the stream pollution cases where the polluting resulted in a serious impairment of the riparian rights of the landowner.[46] Also, where there has been destruction of an easement, no physical invasion is required.[47]

In *Ackerman*,[48] where the plaintiff's land was directly under the flightpath of jet aircraft, there was no physical invasion of the owner's land. In this regard, *Causby*[49] can be viewed as a straying away from the old requirement of a physical invasion.

Under the *Root* decision, the Montana Supreme Court specifically stated that a physical invasion of an individual's land is not necessary.[50] Whether the noise, which involves no physical touching

41. Stoebuck, *supra* note 9 at 223.
42. 2 NICHOLS, EMINENT DOMAIN §6.1(3) at 6-19 (3rd ed. 1974).
43. Callender v. Marsh, 18 Mass. 418, 430 (1823).
44. Nichols agress. 2 NICHOLS, EMINENT DOMAIN §6.1(1) at 6-12 (3rd ed. 1974).
45. Petition of Clinton Water District of Island County, *supra* note 20.
46. Snavely v. City of Goldendale, *supra* note 23.
47. State v. Kodama, *supra* note 31.
48. Ackerman v. Port of Seattle, *supra* note 13.
49. United States v. Causby, *supra* note 3.
50. Root v. Butte, Anaconda, and Pacific Ry. Co., *supra* note 17 at 156.

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of land, emanates from directly above or from the side is not important, just as long as the resulting damages are special. *Root* did not draw vertical lines from the owner's land as was done in *Causby*, but recognized that noise from *anywhere* could amount to a damaging.

The elimination of this requirement can be seen in other Montana cases, discussed in conjunction with the meaning of the word "property." The taking or damaging of ditch rights[51] or easements[52] or the deprivation of access[53] do not require the physical invasion or actual touching of the owner's land.

B. The Effect of the Word "Damage"

In some cases, where a non-physical property interest was involved, courts have stated in dictum that the addition of the word "damage" would permit compensation.[54] But the exact importance of this additional word is still not clear. It would seem that a state supreme court, which has the word "damage" in its constitution, could more easily allow compensation for interference with the rights that a landowner possesses, than a court with a provision containing only the word "taking." But in Oregon, where the eminent domain provision does not contain the word "damage",[55] the court had no trouble in allowing compensation to the owner, who was substantially deprived of the useful possession and enjoyment of his land as the result of jet noise originating outside his boundaries.[56]

The exact importance of the word "damage" is further muddled by the Supreme Court of Washington, whose eminent domain provision contains both "taking" and "damaging."[57] In *Martin*, the court refused to distinguish between "taking" and "damaging."[58]

In Montana, the distinction is clearer. In *Less*, the court, noting that no physical invasion is necessary,[59] used that statement to explain the effect of the word "damage." The court stated that under the constitutions which provide "that property shall not be taken *or* damaged, it is universally held that no physical invasion is necessary."[60] (emphasis supplied)

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51. Colarchik v. Watkins, *supra* note 30.
52. City of Missoula v. Mix, *supra* note 29.
53. State Highway Comm'n v. Keneally, *supra* note 38.
54. Randall v. City of Milwaukee, 212 Wis. 374, 249 N.W. 73 (1933); Seldon v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891).
55. ORE. CONST. art I, §18.
56. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).
57. WASH. CONST. art. I, §16.
58. Martin v. Port of Seattle, *supra* note 5 at 545.
59. Root v. Butte, Anaconda, and Pacific Ry. Co., *supra* note 17 at 156.
60. Less v. City of Butte, *supra* note 39 at 141.

CONCLUSION

With the recognition that the use and enjoyment of land is property, and that this interest can be taken or damaged without any physical invasion, then the Washington decision in *Martin* is understandable and logical. An interference with this interest by aircraft noise, which certainly involves no physical invasion, results in the taking or damaging of property, for which there must be compensation.

Montana has basically the same definitions of "property" and "taking or damaging" as Washington. Consequently, a decision by the supreme court of Montana allowing compensation to landowners for aircraft noise originating outside the boundaries of land would be the logical result in view of the definitions the court has given to these words in our eminent domain provision.