DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO 1777 6th Street Boulder, Colorado 80302 (303) 441-3750	DATE FILED March 28, 2025 5:06 PM CASE NUMBER: 2024CV30221
Plaintiff: TOWN OF SUPERIOR, a municipal corporation of the State of Colorado, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, COLORADO, a County government in the State of Colorado, v. **Defendants:** THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, COLORADO, as successors in interest to the Jefferson County Airport Authority, and ERICK DAHL in his official capacity as Airport Director of the Rocky Mountain Metropolitan Airport.	**▲COURT USE ONLY▲** Case No.: 2024CV30221 Division: 2

ORDER RE: MOTION TO DISMISS

This matter is before the court for consideration of defendants' motion to dismiss. The court has considered the parties' submissions and finds and orders as follows:

1. This is an action in which plaintiffs seek an injunction requiring defendants to abate a public nuisance caused by piston-engine aircraft performing "touch and go" operations on two runways at Rocky Mountain Metropolitan Airport ("Airport").
2. The complaint alleges that the touch and go operations at the Airport constitute a public nuisance because the operations deposit unsafe levels of lead, expose residents to repeated and excessive noise and create unreasonable health and safety hazards.
3. Defendant's motion to dismiss argues that federal law preempts any state or local regulation of aircraft operations or the use of leaded aviation fuel so that the court cannot grant the requested relief.

4. The motion to dismiss does not address whether the allegations, if proven, would establish a public nuisance.[1] Instead, defendants argue that plaintiffs' claims are barred because federal laws concerning airport operations leave no room for local control, citing *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). The *Burbank* case held that a city ordinance prohibiting flights between 11:00 p.m. and 7:00 a.m. was invalid because the Federal Aviation Act and Noise Control Act in effect at the time, preempted any state or local control over management of the navigable airspace.

5. The parties have cited many cases dealing with the preemption issue. Many of the cases deal with the authority of a local or state government to pass laws impacting the operation of an airfield. The claim in this case is postured differently than many of those cases in that the plaintiffs assert the touch and go operations constitute a public nuisance that can be enjoined. They seek an order directing defendants, as the airport operators, to restrict touch and go operations for noise and pollution reasons. They also ask the court to order defendants to seek approval of the FAA to restrict touch and go operations for both noise and safety reasons.

6. 49 U.S.C.A. § 40103(a)(1) provides: "The United States Government has exclusive sovereignty of airspace of the United States." Subsection (b)(1) then goes on to state: "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." Subsection (b)(2)

[1] The parties' submissions include arguments about whether any claim related to the use of lead-based fuel is preempted by federal law. The issue before the court is whether plaintiffs' claim to enjoin the use of the airport for touch and go operations should be dismissed due to federal preemption. The issue can be resolved without addressing whether the impacts of the use of lead-based fuel can be a basis for a public nuisance claim.

directs the Administrator to prescribe regulations on the aircraft flights for reasons including protecting individuals and property on the ground.

7. The case of *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, 85 Cal. Rptr. 2d 28 (Cal. App. 1999), held that a statute requiring city approval of an airport expansion plan did not intrude into areas of exclusive federal regulation. The court reasoned that federal preemption precluded local regulation of the use of air space or direct control of emissions but that land use regulations not affecting flight safety were within the city's inherent police power and could be regulated. In *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), the local port district sought to enjoin a flight curfew. The 9th Circuit held that local governments can control land use to deal with noise concerns but cannot impact flight operations or the source of noise from aircraft. These cases appear to state a general rule recognized by many courts although the application of the rule is often disputed.
8. In *Arapahoe County Public Airport Authority v. F.A.A.*, 242 F.3d 1213 (10th Cir, 2001), the FAA concluded that a local airport authority's ban on scheduled air carrier service violated the authority's grant assurances and federal law. The 10th Circuit referenced the Airline Deregulation Act of 1978 ("ADA") The ADA may not be directly applicable to this case because it does not involve an air carrier. However, the 10th Circuit noted in its decision that the issue was whether the airport authority complied with conditions imposed by federal law and its agreements with the FAA and that in the arena of aviation regulation federal concerns are preeminent. The Court concluded that the ban was preempted by federal statute and the Supremacy Clause.
9. In *City of Santa Monica v. F.A.A.*, 631 F. 3d 550 (D.C. Cir. 2011), the City of Santa Monica,

as owner and operator of a regional airport, appealed a final agency decision by the FAA concluding that an ordinance limiting the types of planes that could use the airport violated the grant assurances which Santa Monica had given for operation of the airport and that the ordinance was preempted by federal law. The Circuit Court found that the FAA had not acted arbitrarily in concluding that the ordinance breached the grant assurances. As a result, the Circuit Court did not reach the preemption issue.

10. In 1982 Congress passed the Airport and Airway Improvement Act ("AAIA"). It appears to be undisputed that under the AAIA, the touch and go operations which plaintiffs seek to enjoin are aeronautical activities that cannot be limited unless the FAA finds there is an adequate justification for concluding that the activity should not be accommodated at a particular airport.

11. *Krueger v. Mitchell*, 332 N.W. 2d 733 (Wis. 1983), held that a property owner adjacent to a private airport could bring a suit for damages against the airport's owner on the basis that the airport was a nuisance but that any claim for injunctive relief relating to aviation noise was preempted by the Federal Aviation Act. The Court stated that state and local government cannot regulate noise levels by regulating the flight of aircraft which could completely disrupt the flow of air commerce. However, the court concluded that Congress did not intend to preempt airport proprietors' control of facilities to control noise in light of the needs of the community. Therefore, proprietors may be required to compensate injured parties who bring nuisance actions for unreasonable noise levels as a cost of doing business.

12. *Northeast Phoenix Homeowners' Assn v. Scottsdale Municipal Airport,* 130 Ariz. 487, 636 P.2d 1269 (1981) is a case strikingly like the present case. Homeowners living near the

Scottsdale airport sued alleging that low-flying aircraft created excessive and unreasonable noise, dust and vibration resulting in physical danger and discomfort and disruption of peaceable enjoyment of their properties. Plaintiffs sought an injunction against airport operations, including non-standard turns, and brought alternative claims for damages. The trial court granted a motion to dismiss the claims for injunctive relief and the homeowners appealed. The Arizona Court of Appeals, relying on the *Burbank* case, ruled that federal preemption precluded any injunction concerning the operation of flights, the methods of landing or takeoff of aircraft or any other aspect of actual aircraft operation technique or scheduling. The homeowners argued that airport proprietors retain some power to adopt noise-related regulations and that the judiciary can use its injunctive power to prescribe rules and regulations relative to airport operations under the "proprietary regulation" exemption from federal preemption. The court noted that the rationale for the limited residual power of airport proprietors to adopt noise-related regulations regarding their airport operations arose in part from the potential liability of airport proprietors for damages resulting from aircraft noise. The Court rejected the homeowners' argument, concluding that rules mandated by a court through its injunctive powers would not be coming from the airport proprietor and that the Burbank preemption holding applies to judicially made rules and regulations governing airport operations.[2]

13. In *Village of Bensenville v. City of Chicago,* 389 Ill. App. 3d 446 (2009) several

[2] As authority for it holding the Arizona Court of Appeals cited *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975). In 1988, the *Luedtke* case was overruled by *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cire. 1988). Specifically, the *Bieneman* case overruled the holding that federal preemption of aviation operations eliminated all state remedies citing §1106 of the Federal Aviation Act. However, the *Bieneman* holding allowing certain state remedies was limited to saying that "the state may employ damages remedies only to enforce federal requirements … or to regulate aspects of airport operation over which the state has discretionary authority. 864 F.2d at 473.

municipalities sued to enjoin the expansion of airport facilities at O'Hare Airport due to intensive noise and air pollution. The Illinois Court of Appeals affirmed the dismissal of the suit on the basis that the federal government had preempted the regulation of aircraft noise and air pollution, noting that the municipalities had the right to take appropriate action before the EPA and FAA and that property owners may have claims for inverse condemnation.

14. Plaintiffs argue that, other than *Krueger*, the foregoing cases and other cases cited by defendants are distinguishable, for various reasons. However, the cases cited by defendants establish the general rule that federal law preempts any limitation on aircraft flight operations, including noise or pollution, by any local or state government or individual. The touch and go operations which plaintiffs seek to enjoin are such flight operations notwithstanding plaintiffs' assertion to the contrary.

15. Defendants cite the 1990 Airport Noise and Capacity Act ("ANCA") as prohibiting local noise and access restrictions for certain aircraft. Plaintiffs argue that ANCA does not apply to the aircraft they are seeking to enjoin from touch and go operations and that ANCA made it clear that proprietors can impose noise restrictions on non-stage-rated aircraft. However, the ability of this court to issue an injunction is a different issue than whether a proprietor can choose to limit noise or pollution. As stated above, a court order directing an airport proprietor to conduct flight operations in a particular way would constitute local regulation of operations that the federal government has preempted and would not fall under the proprietor exception to preemption. See *Northeast Phoenix Homeowners' Assn., supra*. The *Arapahoe County Airport Authority* and *Bensenville* cases also support this conclusion.

16. Plaintiffs argue that the exclusion of "non-stage" aircraft from the provisions of ANCA reflects congress' intent that federal law does not preempt local regulation of non-stage aircraft. It is true that 49 U.S.C § 47523 establishes a national aviation noise policy which, under 49 U.S.C § 47524, provides a program for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft. However, the congressional findings in 49 U.S.C. 47521 are not limited to stage 2 and stage 3 aircraft. Those findings include that "community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system" and that "a noise policy must be carried out at the national level," Contrary to plaintiffs' position, ANCA supports federal preemption of aircraft operation noise restrictions such as the injunction sought by plaintiffs. Furthermore, 49 U.S.C. § 47533, addressing the relationship of ANCA to other laws, makes clear that local noise or access restrictions in effect or proposed after 1990 are preempted.
17. Plaintiffs cite several cases as establishing that an airport interference with the use and enjoyment of adjacent property can constitute a nuisance. The issue before the court is not whether defendants' operation of the airport constitutes a nuisance. The issue is whether the court can enter an injunction limiting airport operations if the airport operations do constitute a nuisance. The cases cited by plaintiffs are distinguishable as dealing with claims for damages, whether a zoning ordinance (land use) was preempted, an individual operating a helicopter from his residence, etc.
18. Plaintiffs reference several provisions of the "Airport Compliance Manual" that authorize airport proprietors to implement noise restrictions. They acknowledge that after noise

restrictions are imposed, the FAA can evaluate whether the restrictions place an undue burden on commerce or affect the proprietor's ability to meet its federal obligations. They argue that touch and go operations are entirely local so any restriction would not burden interstate commerce and that the federal obligations would be satisfied because the restriction would apply to all similarly situated airport users.

19. In essence, plaintiffs argue that defendants can impose noise restrictions, and that the FAA would likely approve the restrictions. However, as noted above, the fact that the defendants could impose noise restrictions does not mean that the court can order them to do so. Again, any such order would constitute local regulation of an area preempted by the federal government.

20. Plaintiffs also assert that defendants can implement restrictions based on safety if the FAA approves the restriction as justified. The defendants can propose regulations for safety reasons but cannot implement them without FAA approval. Again, any injunctive order by this court would be unenforceable as a local government attempt to regulate operations that have been preempted by the federal government.

21. The requirement that the FAA approve any restriction proposed by a proprietor to address noise or safety concerns emphasizes that the federal government ultimately controls any such regulation. The FAA is not a party to this action and the court is in no position to determine what restrictions the FAA would or would not approve.[3]

[3] The FAA appears to be a necessary party to this action because complete relief cannot be afforded to the parties without including the FAA. For example, in *Arapahoe County Airport Authority, supra,* the Airport Authority obtained a state court injunction banning scheduled passenger service. The injunction was affirmed by the Colorado Supreme Court, concluding that federal law did not preempt the ban. The FAA was not a party to the state court action. The FAA then suspended the Airport Authority's eligibility for federal grants. The 10th Circuit ruled in favor

22. Plaintiffs argue that the FAA Act savings clause expressly preserves state law remedies including plaintiffs' claim for injunctive relief. Initially, the language of the savings clause does not address preemption. There are multiple cases holding that the savings clause simply preserves state law remedies that are not preempted by pervasive federal regulation. See, e.g., *Barnett v. Cass*, 522 F.Supp.3d 780 (D. Hawaii 2021) (plaintiffs' state law claims arising out of a helicopter crash were preempted be federal law as to the standard of care but whether the standard of care was breached and what remedies might be appropriate are to be determined under state law); *Abdullah v. American Airlines*, 181 F. 3d 363 (3d Cir. 1999) (federal law preempts the field of aviation safety from state or local regulation but state law remedies continue to exist for actions seeking damages for violation of the federal standards).

23. Plaintiffs cite *Aviation Cadet Museum, Inc. v. Hammer*, 373 Ark. 202, 203 (2008) in support of their claim that injunctive relief is not preempted by the FAA Act. The *Hammer* case does enjoin as a nuisance a property owner's use of his property as a private airport. The case involved a dispute between adjoining landowners. The *Hammer* court referenced an FAA letter granting permission to build an airport, and noted in a footnote that, "although the Federal Aviation Act gives the federal government exclusive sovereignty over United States airspace, the area of land-use regulation is still within the purview of state government." However, the opinion contains no discussion about the issue of preemption and it is not clear that the issue of preemption was raised or considered. It may be that Hammer can be distinguished as a dispute between property owners that did not involve federal grant assurances (the opinion refers to donations, not grants). In any event, the court finds more

---

of the FAA, finding that the state court injunction was preempted by federal law notwithstanding the prior state court decision to the contrary. However, nonjoinder of a necessary party is not grounds for dismissal. C.R.CD.P. 21.

persuasive the cases holding that federal law preempts any injunction limiting flight activity at the defendant's airport.

24. Plaintiffs cite a second Arkansas case, *Emerald Development Co. v. McNeill*, 82 Ark. App. 193 (2003) which affirmed an injunction against operation of an airport that was under construction. The court held that the federal government has exclusive sovereignty over air space, but that operation of the airport could be enjoined as a land use decision. That is a different issue than what is currently before the court. In *McNeill*, the evidence established that the plaintiff seeking the injunction operated a nearby private airport, that neither airport had a tower or ground control of any kind and that the FAA objected to the construction of the airport. The case is easily distinguished as a land use decision given that the airport was not yet operating, unlike the aviation operation at issue here. In addition, there were no FAA grant assurances involved and FAA opposed the construction of the airport.

25. Other cases cited by plaintiffs are also easily distinguished. The *Abdullah* case cited above, *Ellsworth v Beech Aircraft Corp*., 37 Cal. 3d. 540 (1984), and *Carter v. Central Reg'l West Virginia Airport Auth*, (S.D. W. Virginia 2016) (not published in F. Supp.) all involve claims for damages, not injunctions. The first two cases involved tort claims under state law based on alleged violations of the federal standard of care for aircraft. The *Carter* case found that a state law damages claim was improperly removed from state court and should be remanded for lack of an exclusive federal cause of action.

26. In summary, this court concludes that the injunction sought by plaintiffs would involve local regulation of aircraft operations, an issue preempted by the federal government. For the reasons set forth above, the court concludes that defendants' motion to dismiss should be,

and it hereby is, granted.[4]

DATED: March 28, 2025.

BY THE COURT:

Senior District Court Judge

[4] This ruling does not affect plaintiffs' right to pursue relief in an administrative proceeding with the FAA as suggested in the *Bensenville* case.