

**IN THE CIRCUIT COURT OF CARROLL COUNTY, ARKANSAS
CIVIL-GENERAL DIVISION
WESTERN DISTRICT**

CARROLL COUNTY, ARKANSAS
WESTERN DISTRICT

2011 FEB -4 AM 10:47

FILED FOR RECORD
RANOMA WILSON
CIRCUIT CLERK

**TOM HAMMER AND SUE HAMMER, INDIVIDUALLY
AND AS TRUSTEES OF THE TOM HAMMER
REVOCABLE LIVING TRUST U/D MARCH 19, 2001
AND CO-TRUSTEES OF THE SUE HAMMER
REVOCABLE TRUST U/D MARCH 19, 2001**

PLAINTIFFS

VS.

NO. CV 2005-125

AVIATION CADET MUSEUM, INC.

DEFENDANT

**DAVID ARNETT AND JANET ARNETT, HUSBAND
AND WIFE; JAMES RUPPEL AND NANCY RUPPEL,
HUSBAND AND WIFE; BRENDA POWELL,
TRUSTEE OF THE BRENDA POWELL TRUST;
MARK STERLING; AND DAVID POWELL**

INTERVENORS

ORDER

**On this 9th, 10th and 11th day of November, 2010, this cause
comes on for trial; the Petitioner (ACM) appearing by its
President, Errol Severe and by its attorney, James E. Goldie; and
Respondents (Hammers) and Intervenors appearing in person and
by their attorney, Glenn E. Kelley; whereupon the Court, after
considering the evidence offered and adduced, arguments of the
respective attorneys, and proposed findings of fact and**

conclusions of law offered by the attorneys, from all of which finds and concludes:

1. On April 16, 2007, this Court entered its Order enjoining ACM from using its airport for landing and departing airplanes until such time as it could demonstrate that its operation would not constitute a nuisance to the Hammers. ACM appealed and on April 17, 2008, the Arkansas Supreme Court affirmed the decision. See Aviation Cadet Museum, Inc. v. Hammer, 373 Ark. 202, 283 S.W.3d 198 (2008).

2. ACM now asks this Court to modify its Injunction Order and allow airplanes to land and depart exclusively from the north end of its airfield. It alleges that its proposed plan of aircraft operations from the north end of the airfield will avoid the Hammer property and will not result in a trespass, a nuisance or other violation of Arkansas law.

3. Hammers deny the allegations set out in the Petition. Interveners own property that lies generally north of the airfield and allege that ACM's proposed plan will result in the same violations of law that were the basis for the Injunction Order.

4. The facts underlying the original lawsuit were summarized by the Arkansas Supreme Court as follows:

Appellant Aviation Cadet Museum, Inc. (ACM) operates a privately-held, public-access airport on its lands, and appellees Tom and Sue Hammer use a portion of their property for purposes of flying gas-powered remote-controlled or RC airplanes. Aircraft landing and taking off from ACM's airport pass directly through airspace above the Hammer property. Carroll County Road 207, which is approximately twenty-five feet wide, lies between the two parcels of land. . . .

The record reveals the following facts. The Hammers own 291 acres, twenty-three of which was purchased May 17, 1995, and on which they constructed their current residence. An additional 185 acres was purchased March 28, 1996, and the remaining eighty-three acres was bought May 22, 2000. The Hammers occupy the property and use it for residential purposes.

Tom Hammer, a licensed, instrument-rated pilot, has participated in building and flying RC planes since 1982. RC planes generally weigh up to fifty-five pounds, with wingspans up to ten feet, and fly at altitudes of 50 to 400 feet at speeds up to eighty miles per hour.

After purchasing the Carroll County property, Mr. Hammer commenced flying RC planes there with a flying club. Initially, the RC planes were flown in an area immediately north of the Hammer home. Because of space limitations, some flights crossed County Road 207. In 1997, Mr. Hammer considered the road crossing to pose some danger, so he moved the flight area a few hundred feet north to its current location.

In 2000, Mr. Hammer built two RC runways and a pavilion. RC planes typically fly on the Hammer property four to five days per week, weather permitting. In addition, Mr. Hammer hosts two annual weekend flying events that attracts fifty to seventy-five pilots with multiple RC planes and approximately 250 participants and spectators.

Errol Severe, a commercial pilot who is retired from Delta Airlines, incorporated ACM as a nonprofit corporation to build a

museum commemorating military aviators. On June 28, 2001, ACM purchased approximately seventy-three acres of property and constructed the museum. Currently, there are several buildings and fighter aircraft on site. Five hundred to one thousand people visit the museum each year, and it receives \$50,000 to \$60,000 per year in donations.

Mr. Severe was aware of the RC plane activity on the Hammer property when he made the ACM purchase. Nevertheless, he contacted the Federal Aviation Administration, seeking on behalf of ACM to build an airport on the ACM property. By letter dated July 13, 2001, the FAA informed Mr. Severe, among other things:

The Federal Aviation Administration (FAA) has completed an Airspace Utilization Study No. 01-ASW-1031-NRA for the activation of a privately owned public-use airport, Silver Wings Field, near Eureka Springs, Arkansas. We have no objection to the proposal from airspace utilization standpoint.

This determination should not be construed to mean FAA approval of the physical development involved in the proposal nor as approval of its effect on the environment. It is only a determination with respect to the safe and efficient use of airspace by aircraft. In making this determination, the FAA has considered matters such as:

- 1. The effect the proposal would have on existing or contemplated traffic patterns of neighboring airports.**
- 2. The effect it would have on existing airspace structure and projected programs of the FAA, and**
- 3. The effect that existing or proposed manmade objects (on file with the FAA) and known manmade objects within the affected area would have on the airport proposal.**

This determination in no way preempts or waives any ordinance, laws or regulations of any other governmental body or agency. . . . Additionally, we wish to advise that the FAA cannot prevent the construction of any other structure near the airport. Protection of the airport environs can be accomplished only through such means as local airport zoning ordinances and acquisitions of property rights.

ACM began constructing a grass airfield in April 2002 and landed the first plane in September 2002. The runway is approximately 1900 feet long and runs generally in a north and south direction with a flight path through the Hammer RC area. The south edge is approximately ten feet from County Road 207 and approximately thirty-five feet from the Hammer property. There is no fence between the airfield and County Road 207. The ACM airfield is said to have a 212 foot displacement threshold; however, the threshold is not marked. The altitude of the ACM airfield is approximately 1570 feet above sea level. The altitude of the Hammer property is approximately 1585 feet above sea level at the lowest point in the RC flying area and rises to approximately 1600 feet above sea level at its highest point.

The south end of ACM's runway is approximately 500 feet from the north edge of the Hammer flying area for RC planes. The ACM airfield has no landing lights delineating the field and has no navigation system. The airfield does not have a fixed base operator. There are no operating planes permanently based or located at ACM airfield. Approximately twenty-four visiting aircraft use the runway each year. In addition, ACM has a yearly fly-in, in which military helicopters and fighter aircraft fly by over the property at lower altitudes without landing.

The southerly approach to the ACM airfield requires planes to fly at extremely low altitudes in the airspace over the Hammer property. Planes taking off to the south likewise enter the Hammer property at low altitudes.

4. ACM now proposes to operate as a privately-held airfield

with private access by invitation only to pilots with small light aircraft who are experienced in landings on 1900 feet grass runways. Both takeoff and landing patterns will be to and from the north end of the airfield, a pattern customarily called one-way in and one-way out. Only pilots with at least 1,000 hours of flight time will be permitted to land at the airfield and those pilots must contact ACM and gain permission to land. ACM will keep a log of contacts about landings and operations to and from the airfield and will require pilots to have general liability insurance before giving permission to land their aircrafts. ACM also proposes to issue a NOTAM (notice to airmen) and place it in public and private publications and on ACM's website, containing the following information:

Silver Wings Field (Private), Eureka Springs, Carroll County, Arkansas, call 1-479-253-5008 for permission to use Silver Wings Field and for briefing on local restrictions. Due to Local restrictions the only allowed operations at Silver Wings Field (5A5) are: Right hand traffic, landings to the south on runway 16, and takeoffs to the north on runway 34 (1880 feet). Be advised that there is the possibility of landing or taking off with a tail wind component. Remember that there is no absolute need to either land or takeoff if your aircraft is unable to do so safely. Waiting for less wind conditions that are normally prevalent early morning and late afternoon may be a wise decision. Pilots

are mandated to check the operating manual performance charts for their aircraft to insure that their aircraft will have sufficient capabilities for this type of operation. Wind direction and velocity are available from AWOS at ROG (Rogers, AR) is: 134.375 and HRO (Harrison, AR) is 121.125. Be advised that the information from these stations may differ from local conditions. Check the wind socks on both ends of the field and the flag at mid field. The wind socks are indicating 15 kts. or more when fully extended. Interpolate for lesser sock extensions. After takeoff on runway 34 make a westerly turn as soon as practicable and climb at best angle. Any violations of these restrictions will be reported to the FAA.

5. Respondents object to ACM's proposed plan citing safety concerns, possible overflights, excessive noise, inability to monitor or enforce restrictions, close proximity of alternative airfield, reduction of land values, and little demand for use as their reasons.

SAFETY

Several experienced commercial pilots testified on behalf of ACM. Jan Olsen, a licensed commercial pilot since 1967, with over 2400 flight hours and who has served as an Airspace Evaluation Specialist with the FAA and as an air traffic controller developing flight procedure, testified that the ACM airfield was sufficient in length for light, small aircraft to land

and takeoff; that the grade was proper; that the grass runway would not cause significant problems; and that a pattern of one-way in from the north and one-way out from the south is not uncommon and does not create a safety problem.

William Smith, a licensed commercial pilot since 1956 with multiple plane ratings including land and sea planes, testified that Silver Wings Field was safe for small plane landings and takeoffs and that pilots would have no difficulty in following a right hand landing pattern. He stated that a "pilot wouldn't have a license if he was not skilled enough to land there".

Maurice Way, a licensed pilot since 1971 with over 34,000 flight hours in over 100 different types of aircraft, who has served as a flight instructor, an aviation safety inspector for the FAA and as a former Director of Aviation Science at College of the Ozarks in Branson, Missouri, (among other things) testified that Silver Wings Field was safe for one-way in and one-way out takeoffs and landings. He landed there himself before the airfield was closed and said the airfield is much safer than the Huntsville and Carroll County, Arkansas, airfields because there

are no slopes or obstructions to deal with. He also stated that he only used about 40% of the airfield for takeoff and landing and that right hand traffic patterns do not present a safety problem. He says he "makes those all the time".

Randy Baumann, a licensed commercial pilot since 1986 with over 10 years experience training missionaries to fly airplanes in the bush (some with 800 foot grass airstrips) and rugged terrain areas in Central America, testified that ACM airfield was safe for landing any single or multi-engine aircraft with a gross weight no greater than 6,000 pounds. He says that weight generally includes planes carrying six passengers or less. He further stated that many airports have right turn patterns for landing and that such patterns present no problem at all because pilots are trained to handle airport landing requirements.

Errol Severe, the President of ACM, a pilot since 1961 with experience flying all types of aircraft, testified at length regarding his proposed changes in the takeoff and landing pattern at the airfield as well as many other restrictions he proposed in order to minimize the complaints of Respondents. He

proposes making the changes set out in his Petition. His proposed landing pattern will place an airplane traveling in a northwesterly direction at or above 1,000 feet as it crosses the Hammer property; descending to 850 feet as it crosses ACM owned lands; turning northeast after exiting ACM lands and descending to 500 feet over the western edge of Intervenor Ruppel's private land; then turning south to land at the north end of the airfield. There is no evidence that flights over Intervenor's land will be so low as to interfere with a now existing use to which the land is put. Severe, like the other licensed pilots who testified, stated that the ACM airfield was safe for light plane landings and the proposed air pattern would not be a problem for licensed pilots.

Dr. Michael Hayes, a former licensed pilot who is President of Hynes Aviation Services and has 50 years experience in aviation, testified as an expert for Respondents. He was being paid an hourly rate for his testimony and had accumulated a fee of approximately \$4,500.00 as he testified. On direct examination, he found fault with almost everything ACM

proposed including his belief that ordinary pilots could not safely make right turns, that a 1900 foot landing strip was too short for most pilots to conquer, and that because pilots ordinarily sit in a seat on the left side of an airplane, a right turn pattern would be unsafe because the pilot probably would not be able to see wind socks and flags on airfields. On cross examination, however he acknowledged that his supporting calculations involved airfields with 50 foot barriers at the end of runways; that the rules and regulations he was citing applied almost entirely to public airports; and that the manual published by an aircraft company he cited which supported his position, clearly stated on the cover page: "Not to be used for flight planning purposes. Data may be inaccurate or out of date. Not an actual Pilot's Operating Handbook or Airplane Flight Manual". Dr. Hayes ultimately acknowledged that a one-way in and one-way out traffic pattern, standing alone is safe. He also acknowledged that if he looked solely to the layout of ACM airfield, he could not say it was unsafe.

Respondents' primary safety concern involves a fear of substantial harm that could result because of pilot error, or aircraft failure or because of a failure to strictly enforce the rules. Those same fears hold true around any airport or landing field because the majority of plane crashes occur during takeoff or landings. A mere fear of danger however, is not enough to continue to enjoin ACM from the otherwise legal use of its property. As Chief Justice Hannah writing for the Supreme Court when this case was previously before it said:

Equity will enjoin conduct that culminates in a private or public nuisance where the resulting injury to the nearby property and residence, or to the public, is certain, substantial, and beyond speculation and conjecture. *See id.* The general rule is that, in order to constitute a nuisance, the intrusion must result in physical harm, which must be proven to be certain, substantial, and beyond speculation and conjecture. *See Southeast Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993). A mere fear or apprehension of danger, without more, is not sufficient to warrant injunctive relief for the abatement of a nuisance. *See Mulligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987).

Here the proof is convincing that the manner in which ACM proposes to operate its airfield is safe and there will be no

resulting harm caused by its operating procedure so long as the
purposed rules are followed.

POSSIBLE OVERFLIGHTS

Respondents say that because general aviation principals
referred to as "pilot in command" authorize a pilot to take
necessary steps to control an airplane in an emergency, there is
a possibility that a pilot may miss a landing and fly over the
Hammer property. As a result, they say the proposed plan
creates an inherent conflict between the pilot's ability to safely
control the aircraft in a landing from north to south and the
danger of crossing County Road 207 or the Hammer property at a
low altitude.

To support a continued injunction for this reason, the Court
would have to find that there was a substantial likelihood that
pilots would miss landings and fly over the Hammer property at a
low altitude. The evidence does not support such likelihood. In
fact, pilot Randy Baumann stated he had been required to pull up
and go around only one time in more than 20 years of flying,
including flying in the bush.

Respondents also contend that the proposed plan will allow aircraft to fly at extremely low altitudes over lands owned by the Interveners. Federal Aviation Regulations, Sec. 91.119

(Petitioner's exhibit 4), provides, in part:

**MINIMUM SAFE ALTITUDES:
GENERAL.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

- (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.**
- (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.**
- (c) Over other than congested areas. An altitude of 500 feet above the surface,**

Ark. Code Ann., Sec. 27-116-102(c) provides:

- (c) Flight in aircraft over the lands and waters of this state is lawful, unless at an altitude low enough to interfere with the then-existing use of which the land or water, or space over the land or water, is put by the owner, or unless so conducted as to be dangerous or damaging to persons or property lawfully on the land or water beneath.**

Looking at ACM's proposal under the federal law, it clearly complies with federal regulations because planes will not pass over the land of others at an altitude below 500 feet except on

landing. State law, however recognizes that even lawful flights can become a nuisance if flying at an altitude low enough to interfere with the then-existing "use of which the land . . . is put by the owner"

Petitioner's exhibit 10 reflects the ground and diagonal distance at 90 degrees to the approach path that an aircraft will be from its northeastern neighbors' homes when making a final approach to runway 16 at Silver Wings Field:

<u>Name</u>	<u>ground distance</u>	<u>diagonal distance</u>
Crenshaw	394.33 feet	179 x 433 feet
Ruppel	543.61 feet	259 x 601.6 feet
Arnett	899.42 feet	181 x 917.45 feet
Powell	967.32 feet	241 x 969.9 feet
Sterling	1216.07 feet	223 x 1236.4 feet
Cash	4068.57 feet	355.95 x 4084.92, feet

Hammers' home is located approximately 3,589.96 feet from the aircraft end of flight pattern.

A landowner acquires no independent right of flight over property of an adjoining property simply by being an adjoining

property owner. Thus a landowner acquires no interest in the airspace above adjoining land other than that shared by the public in general. United Power Ass'n. v. Heley, 277 N.W.2d 262, (N.D. 1979). An airport should not be established at a place where its normal operation will deprive the neighboring property owners of the use and enjoyment of their property. Swetland v. Curtiss Airports Corp. 55 F.2d 201, 203 (6th Cir. 1932).

While ACM previously operated its airfield, planes were flying at extremely low altitudes in the Hammer RC flight area and over County Road 207. There was substantial, credible evidence that such activity created the possibility of serious resulting accidents putting lives at risk. By eliminating takeoffs and landings over County Road 207 and the Hammer property, that obstacle has been removed.

The evidence in the instant hearing does not reflect that a county road will be in the low level flight pattern or that landing levels will interfere with any now-existing use to which intervenors are utilizing their property. Overflights, if conducted

pursuant to the proposed plan should not pose a danger to intervenors.

EXCESSIVE NOISE

Respondents contend that the proposed flight pattern will result in unreasonable loud noises, polluting their quiet and peaceful neighborhood. Some of their witnesses described the sound of an airplane taking-off and landing as being similar to an unmuffled motorcycle.

Darren Novotny, an expert in acoustics testified on behalf of ACM that the noise level of an average light plane on a runway measures approximately 120 decibels (dB). Using the inverse square law to determine the level of dB's at the various surrounding neighbors' locations, he projected a range varying from a high of 87 dB's to a low of 80 dB's. That range of dB's, he says, is equivalent to average street traffic or that of a vacuum cleaner.

Attempting to classify this neighborhood as an ordinary peaceful, quiet, country neighborhood is not accurate. For a number of years Hammers' have utilized their property for the

flight of RC planes. Such flights are conducted four or five days per week, weather permitting. They also host two annual weekend flying events a year that attracts 50 to 75 pilots with multiple RC planes and up to 500 spectators. One witness testified that the noise from the RC planes on the Hammer property was worse than the noise from a plane visiting ACM because the RC noise was continuous. He concluded however, that he could easily tolerate both.

ACM operates a Museum commemorating military aviators. There are several buildings and fighter aircraft on site. Up to 1,000 tourist visit the museum each year.

There was also evidence that military aircraft regularly fly over the area at low altitudes, that helicopters fly over the area at low altitudes, that noises from loud trucks and motorcycles traveling on a nearby highway can be heard, and that one of the intervenors operates a generator that produces a loud noise.

After considering the activity taking place in the neighborhood and the fact that ACM will have an average of only 24 flight operations per year, the Court concludes that the noise

level created by utilizing the proposed flight plan will not constitute a nuisance. Noise from landings should be minimal because power is generally cut during that operation. The loudest noise in takeoffs should occur on or directly over the airfield, although it can be heard briefly for miles.

INABILITY TO MONITOR OR ENFORCE RESTRICTIONS

While Respondents contend that there is little or no method to enforce or monitor ACM's compliance with the proposed plan, the Court is aware that Hammers have monitored and vigorously and rightfully pursued their remedies to correct any wrong which they felt was committed by ACM in the past.

REDUCTION IN LAND VALUES

Respondents testified that they believe their land values will substantially decrease if ACM is permitted to operate its airport again. Intervenor Crenshaw is an experienced real estate agent whose opinion carries more weight than an ordinary landowner. But for the entire group to urge that two flights a day during daylight hours will radically change the entire composition of the neighborhood is quite a stretch.

Walter Gray, a real estate agent from Siloam Springs, testified that property values near the airfield will decrease by 25 to 50% if planes are allowed to fly in and out. But he has not sold real estate in the area for seven or eight years and gave no convincing basis for his conclusion.

Joe Zickmund, a Eureka Springs realtor, testified that in his opinion a small airfield with limited flights and daytime use only will make no difference in real property values for the surrounding neighbors. He cited Carroll County property tax assessment records in support of his opinion.

Tax records reveal that land values in the area have steadily increased since 1999. That included the years ACM operated its airfield. It is noteworthy that none of the Respondents indicated that they sought a decrease in their property tax assessments during the years planes were flying in and out of the ACM's airstrip.

There is no indication that property values in the area have decreased as a result of Hammers' utilizing their airfields for RC plane operations. Likewise, the proof does not preponderate in

favor of a reduction in property values if a limited number of planes commence flying in and out of the ACM airfield.

CLOSE PROXIMITY OF ALTERNATE AIRFIELD

Since the Carroll County Airport is approximately 12 miles by road from ACM's airfield, Respondents contend that there is no need for ACM to operate its airfield. That issue was resolved in 2001 when the FAA gave its permission to ACM to build the existing airfield after finding from an airspace utilization standpoint, that it would be a safe and efficient use of airspace by aircraft.

LITTLE DEMAND FOR USE

Even though there is little demand for the ACM airfield, ACM, like everyone else is entitled to utilize its property in any lawful manner it chooses.

CONCLUSION

The Injunction Order entered by this Court on April 26, 2007, should be, and hereby is modified to allow ACM to operate its airfield subject to the following conditions and requirements:

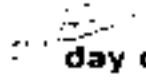
- 1. Operate as a privately-held airfield with access by invitation only to pilots with small, light aircraft who have experience in landings on grass runways no longer than 1900 feet;**
- 2. Both takeoff and landing patterns shall be to and from the north end of the airfield, a pattern customarily called one-way in and one-way out;**
- 3. Only pilots with at least 1,000 hours of flight time shall be permitted to land at the airfield and those pilots must contact ACM and gain permission to land;**
- 4. ACM shall keep a log of contacts inquiring about landings at the airfield;**
- 5. ACM shall require pilots to affirmatively state or produce evidence that they have general liability insurance before giving permission to land their aircraft;**
- 6. ACM shall issue a NOTAM and place it in public and private publications and on ACM's website, containing the following information:**

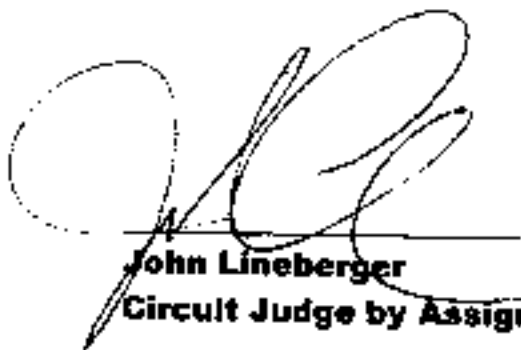
Silver Wings Field (Private), Eureka Springs, Carroll County, Arkansas, call 1-479-253-5008 for permission

to use Silver Wings Field and for briefing on local restrictions. Due to local restrictions the only allowed operations at Silver Wings Field (5A5) are: Right hand traffic, landings to the south on runway 16, and takeoffs to the north on runway 34 (1880 feet). Be advised that there is the possibility of landing and taking off with a tail wind component. Remember that there is no absolute need to either land or takeoff if your aircraft is unable to do so safely. Waiting for less wind conditions that are normally prevalent early morning and late afternoon may be a wise decision. Pilots are mandated to check the operating manual performance charts for their aircraft to insure their aircraft will have sufficient capabilities for this type operation. Wind direction and velocity are available from AWOS at ROG (Rogers, AR) at 134.375 and HRO (Harrison, AR) at 121.125. Be advised that the information from these stations may differ from local conditions. Check the wind socks on both ends of the field and the flag at mid field. The wind socks are indicating 15 kts. or more when fully extended. Interpolate for lesser sock extensions. After takeoff on runway 34 make a westerly turn as soon as practicable and climb at best angle. Any violations of these restrictions will be reported to the FAA.

7. ACM shall report any pilot who violates (except in an emergency) any provision of these requirements to the proper authorities.

All other provisions of the April 26, 2007 Injunction Order, not in conflict herein shall remain in full force and effect.

IT IS SO ORDERED this  day of January, 2011.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a cursive 'L' and 'E' that loops back under the 'L'. The signature is written over a horizontal line.

John Lineberger
Circuit Judge by Assignment