# A Case Study in How the FAA and NTSB View Low Balloon Flying

by Tom Hamilton

Editor, Balloon Life

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Between June 1995 and May 1996 *Balloon Life* published five articles that followed one case where a pilot was cited by the Federal Aviation Administration for flying to low over a city and landing in an inappropriate place. The case was heard by an Administrative Law Judge and then appealed by both parties to the National Transportation Safety Board.

The links below are to the five stories. In the final story, "Choose Your Landing Site Carefully," the NTSB clearly lays out its feeling about low flying and a balloon pilot's choice of a landing site.

This case study is presented to provide insight into the thinking by the NTSB. Pilot's may wish to consider these thoughts in their own flight planning, landing site selection, and to the thought process used by the FAA Adminstrator and field representatives.

This article looks at the original case, Adminstrator vs. Prior, as heard by the ALJ. The judge vacates most of the penalty sought by the FAA against the defendant. *Minimum Safe Altitude Rewritten?*, June 1995

Christine Kalakuka's editorial in her *Freeflight* column regarding the initial hearing in Adminstrator vs. Prior mentioned above. *Who's Making The Rules?*, February 1996

Introduction to a petition made to the FAA in 1996 requesting that the minimum altitude for balloons as contained in FAR 91.119 be lowered.*How Low Can You Go?*, May 1996

Why the FAA denied a petition to lower the minimum safe altitudes in 1991. *Petition Denied*, May 1996

The NTSB in its strongest wording to date reiterates its position on minimum safe altitudes and inappropriate landing sites.*Choose Your Landing Site Carefully*, May 1996

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# Minimum Safe Altitude Rewritten?

by Art Prior

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*On April 27, 1995 in San Diego, California Administrative Law Judge William R. Mullins heard a case pertaining to ballooning. The Federal Aviation Administration had ordered the suspension for one year of a balloon pilot's certificate for violation of Federal Aviation Regulations Part 91.119(a) & (b) (minimum safe altitudes) and Part 91.13 (careless and reckless).*

*Art Prior, the pilot, had appealed the order of suspension to the National Transportation Safety Board. Judge Mullins was assigned to hear the case. As an Administration Law Judge he determines what rules and law apply at a trial. The judge acts as the finder of fact; no jury trial is allowed. It is important to note that it is not required to follow standard rules of evidence. Hearsay testimony is allowed. The final finding of fact, and a decision is made, after hearing all the witnesses and evidence.*

*This case is significant for its far-reaching conclusions regarding the application of FAR 91.119 to balloons. The Judge's final ruling has been appealed to the five member NTSB sitting as an appellate court by both the pilot and the FAA. The pilot has appealed the 40-day suspension given by the judge for landing in the city of Escondido, California. The FAA has appealed dismissal of FAR violations.*

*If the NTSB upholds the judge's ruling regarding FAR 91.119 it will have far-reaching implication for balloon flight operations. In future articles Balloon Life will examine the effects of this case.*

*This case is also important for the way in which defense information was presented. Although not a first, the use of video documentation of balloon flight helped to sway the judge in making his ruling.*

*The article below was written by Art Prior and edited by Balloon Life. Christine Kalakuka contributed to this story.*

In a landmark case, an Administrative Law Judge has set aside the Federal Aviation Administration's order of suspension of a pilot certificate for violation of FAR Part 91.119 (a) & (b) and Part 91.13. The case was heard before Judge Mullins in San Diego, California on April 27, 1995.

The FAA had issued an order of suspension of Art Prior balloon pilot certificate for a period of one year. Prior made a flight on February 28, 1993 landing his hot air balloon in the city limits of Escondido, California. Escondido has an ordinance against aircraft landing in the city limits without permission from the chief of police. The city of Escondido filed a formal complaint with the FAA. The FAA conducted an investigation and issued its order.

The violations that the pilot were charged with:

1. FAR 91.119(a) operating an aircraft below an altitude that, if a power unit failed, would not have allowed an emergency landing without undue hazard to persons or property on the surface;
2. FAR 91.119(b) operating an aircraft over a congested area of a city below an altitude less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft;
3. FAR 91.13(a) operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Upon rendering his decision Judge Mullins suggested that the ballooning community be alerted to the judge's findings on the applicability of these statues to hot air balloons. In this way balloonists might be better able to understand the application of these regulations to balloon flight.

The case involved a balloon flight over Escondido, California with the balloon flying over an area of the city that the FAA deemed to be a congested area, descending and landing in the alleged congested area to change passengers and then taking-off again to an altitude above 1,000 feet in level flight towards the next landing site. The pilot did three flights (hops) of passengers and landed twice in the alleged congested area to exchange passengers. His final landing was accomplished in a rural area.

The position of the FAA was that each time a landing occurred the pilot violated section 91.119(b). The FAA acknowledged the exclusion paragraph "except when necessary for takeoff and landing" but argued that these hops were done as a commercial venture only and the pilot could have chosen to cancel the flight as soon as he approached the congested area of the city. Instead the pilot chose to continue the flight by landing the balloon in a congested area, exchanging passengers and continuing his flight further into the congested area.

The pilot argued that many airports are located in congested areas. He pointed out that fixed-wing commercial flights landing at Lindbergh Field in San Diego also fly low over a congested area on their final approaches to landings. He then argued that often times these flights also change passengers and then take off again over a congested area of the city. He claimed that balloons are aircraft and that the FAA made no distinction between a balloon and fixed-wing aircraft in the application of this regulation. Therefore, he argued, a balloon should have the same protection as a fixed-wing aircraft in the application of the regulation. He further quoted Administrator vs. Johnson, 2 NTSB 1598 (1975), that included pilots doing touch-and-goes as being under the protective umbrella of "as necessary for takeoffs and landings".

After hearing all arguments the judge ruled that the balloon pilot on each landing and takeoff was protected under the "as necessary for takeoff and landings" provision. He further noted that if a fixed-wing pilot wanted to stop off for a cup of coffee at an airport restaurant, that, to him, is a necessary landing and subsequent takeoff. The judge noted that the key here was whether the pilot was flying over a congested area at a sustained level flight altitude that was lower than 1,000 feet. It was determined that the balloon pilot was not, so the pilot was, therefore, not in violation of FAR ¤91.119(b) on this flight.

The FAA also charged the pilot with violation of FAR ¤91.119(a). The FAA argued that should a power-unit have failed in the balloon that altitude was safety. It gave the pilot more time to restart the airborne heater which would possibly prevent a hazard to persons or property on the surface.

The balloon pilot argued that ¤91.119(a) was written for fixed-wing aircraft to enable the pilot with a loss of a power unit to glide toward a landing area. He further argued that a balloon with loss of power at a high altitude would present a much greater hazard to persons or property on the surface than would a balloon descending from a low altitude. He further argued that the regulation was written for an aircraft experiencing an emergency landing all the way to ground level and was not written for the possibility of restarting a power-unit in flight.

The judge agreed with the balloon pilot, stating that this regulation was written for fixed-wing aircraft to allow them to be high enough to glide toward an airport with a power-unit failure. The judge noted that even a helicopter has a glide capability and, since a balloon with a power-unit failure would present more of a hazard to people or property on the surface from a high altitude descent, this section of the FARs was not applicable to balloons.

The FAA, in its final charge, indicated that the pilot was in violation of FAR ¤91.13(a) in that he operated an aircraft in a careless or reckless manner so as to endanger the life or property of another. This, the FAA pointed out, was because the aircraft was operating and landing within 50 feet of powerlines and utility poles and within 15 feet of trees and an office building. It further was noted that the small parking lot where the pilot chose to land was considered to be in a congested area.

The balloon pilot showed excerpts from the Official Video of the Kodak Albuquerque International Balloon Fiesta. In this video, he pointed out that balloons normally operate in close proximity to people, structures and powerlines. He pointed out that this normally posed no problem because of the slow rate of speed that balloons normally fly and the fact that there were no propellers or jet engines that could possibly injure a person. He pointed out that on one of the landings in the video, the balloon was landing in a vacant commercial parking lot similar to one of the landing sites to which his local FAA office objected. He further argued that the balloon pilot had often seen teams of FAA personnel from different regional offices that were sent to the Kodak Albuquerque International Balloon Fiesta to learn about ballooning. He said they often times witnessed his landing and others in similar conditions. He felt that, since the FAA did not consider him to be in violation of FAR ¤91.13(a) at Albuquerque, the FAA should not object to similar landings in the San Diego area.

He argued that one of the goals of the FAA is to have equal application of regulations throughout all geographical areas of its jurisdiction. The pilot further argued that balloon pilots do not have the luxury of fixed-wing aircraft where their landing and launch sites are chosen for them. The pilot must have the decentralized authority to decide for himself what is a good landing and launch site because only the pilot understands the full scope of conditions that exist at the exact moment the landing spot is chosen. He further argued that a pilot of a hot air balloon must consider not only the safety of the passengers and the aircraft but also the safety of the ground crew and spectators who routinely flock to the landing site

of a balloon. He argued that a commercial building parking lot might be congested at noon on Monday but that on a Sunday morning at 8:00 a.m. it could be desolate and clear of all cars. He argued that the FAA should allow the pilot the decentralized authority to make these decisions if they are going to hold him responsible for the result of the landing.

The judge agreed with the pilot, ruling that since at the time of the landings the ground winds were calm to one knot, a pilot with 3,000 balloon landings could land safely in close proximity to obstacles. The judge said that the FAA failed to prove that this was an unsafe landing in spite of the fact that it was in close proximity to powerlines, trees, buildings and street lights.

The judge further indicated that the sites selected by the pilot at the time of day that the landings took place did not seem to be congested for a balloon landing.

The judge further indicated that in the future FAR ¤91.13(a) would be used to prosecute balloonists for poor judgments in choosing a landing site or other violations and that the ballooning community should be aware of this.

Judge Mullins then spoke off the record. He indicated that, in all his years as an aviation judge, this was one of his most interesting cases, primarily because of the unusual flight characteristics of the aircraft in question.

This case should show the ballooning community that the NTSB can truly be a friend to ballooning when the FAA attempts what the pilot may feel is an excessively harsh application of the FARs. This decision should also indicate to the ballooning community that if the FAA is not willing to recognize that balloons have special flight characteristics that should be recognized, that the NTSB, will take these into account when applying the aviation regulations to ballooning. This case could make ballooning safer by allowing a greater choice in selecting landing sites and make it possible to relaunch a balloon after landing in a congested area when necessary. It also gives the balloon pilot a greater degree of flexibility in using winds at different altitudes going in different directions when coming in for a landing. It also establishes a more reasonable approach to holding a pilot responsible for the results of the landings, rather than allowing the FAA to armchair the possible dangers that might affect a landing but never occur.

*Editor's note: The conclusions drawn in the previous paragraph are those of Prior.*

*In 1993 the pilot was cited by the city of Escondido in a criminal misdemeanor complaint based on this flight. The pilot pleaded guilty and was fined $25.*

*As stated previously, both the FAA and Prior are appealing the Administrative Law Judge's decision to the 5-member NTSB Board. Appealing parties must file a Notice of Appeal within 10 days of the oral decision; they then have 50 days to file their appeal brief with the NTSB Board. Each party then has 30 days from receipt of the other party's appeal brief to respond to the Board. The NTSB Board has no time*

*constraints and it is not uncommon for them to take more than a year to issue a final ruling.*

*This involves issues that go beyond the scope of Federal Aviation Regulations. Balloon Life will continue to follow the case and report on the implications resulting from the judge's ruling.*

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