



DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Finds Airline Immune from Defamation Claim of Pilot Reported as Potential Security Threat

On January 27, 2014, the Supreme Court in Air Wisconsin Airlines Corp. v. Hoepfer, 134 S. Ct. 852 (2014), reversed a decision of the Supreme Court of Colorado that had affirmed a \$1.4 million defamation verdict against petitioner, Air Wisconsin Airlines. The lower courts had found that an Air Wisconsin report to TSA that one of its pilots, respondent William Hoepfer, represented a possible security threat, was defamatory, despite a provision of federal law that immunizes airlines from such liability in certain circumstances. The United States filed an amicus brief in the case supporting reversal of the Colorado Supreme Court.

Hoepfer was in Virginia in December 2004 to take a certifying test for a new aircraft, his fourth test attempt after three previous failures. Hoepfer understood that he would lose his job if he failed this fourth test, but during the test Hoepfer experienced difficulty and became angry, believing that the test administrators were engineering the test to fail him. Hoepfer ended the test prematurely and left the facility, stating his intent to contact his union's legal representative. One of the test administrators reported the events to a manager overseeing Hoepfer's testing. The manager instructed another Air Wisconsin employee to drive Hoepfer to Dulles Airport and booked Hoepfer on a flight back to Denver, his home base, later that day.

Meanwhile, the manager reported the events to his supervisors, and they scheduled a

meeting that same day to discuss the incident. During the meeting, the participants discussed Hoepfer's displays of anger; his knowledge that he would likely be fired; his status as a Federal Flight Deck Officer (FFDO), which authorized him to carry a TSA-owned and issued firearm onboard a commercial aircraft; and two previous incidents where disgruntled FFDO employees had boarded aircraft with firearms, one of which resulted in a crash, killing all aboard, and the second that nearly caused a crash. After this meeting, the manager called TSA to report Hoepfer as a possible security threat and made the following two statements, as determined by the jury:

(1) [Hoepfer] was an FFDO who may be armed. He was traveling from IAD-DEN [*i.e.*, Dulles International Airport to Denver International Airport] later that day and we were concerned about his mental stability and the whereabouts of his firearm.

(2) Unstable pilot in FFDO program was terminated today.

On the basis of these statements, TSA officers at Dulles removed Hoepfer from his plane after he had already boarded, questioned him, and ultimately released him, allowing him to fly back to Denver that evening.

Hoepfer brought suit in Colorado state court, asserting, among others, a defamation claim against Air Wisconsin. The trial court twice denied Air Wisconsin's assertion of immunity under the Aviation and Transportation Security Act (ATSA). The jury then found in favor of Hoepfer on his defamation claim, awarding approximately \$1.4 million in damages. The Colorado

Court of Appeals affirmed the jury verdict, ruling that ATSA immunity was a jury question and that the jury's denial of immunity was supported by clear and convincing evidence. The Colorado Supreme Court affirmed the verdict, though it reversed the appellate court and held that, as a matter of Colorado law, ATSA immunity is a question of law for the court. However, the court held that this error was harmless because it concluded, on its own review of the evidence, that Air Wisconsin was not entitled to ATSA immunity.

In its amicus brief, the United States argued that the Supreme Court of Colorado erred in concluding that ATSA leaves air carriers exposed to civil liability when they report materially true information about potential air-security threats to the proper authorities. The brief highlighted that through the immunity provision of the ATSA, Congress intended to "encourage airline employees to report suspicious activities." The brief then pointed out that the only exception provided by Congress to that blanket immunity is when the carrier makes the report with "actual knowledge that the disclosure was false, inaccurate, or misleading" or with "reckless disregard as to the truth or falsity of that disclosure."

The United States argued that Congress crafted the Act's text against the backdrop of the Supreme Court's first Amendment "actual malice" decisions and that the linguistic congruence between the statutory and constitutional standards was intentional. The court's "actual malice" standard under the first amendment immunizes certain speech from defamation liability unless the speech was made "with knowledge that it was false or with reckless disregard of whether it was false or not." The government's brief explained that the material falsity of the communication should

be evaluated from the perspective of the presumed recipient of the communication, in this case, a reasonable air-safety official. As a result, the United States argued that the decision by the Supreme Court of Colorado should be vacated and the case remanded.

The U.S. Supreme Court held that ATSA immunity may not be denied to materially true statements, and in so doing largely adopted Air Wisconsin's arguments on appeal, as well as the views of the United States as amicus in urging the Court to reverse the decision below. The Court explained that the ATSA immunity exception requires material falsity and did not mean to deny ATSA immunity to true statements made recklessly. Denying immunity for substantially true reports, on the theory that the person making the report had not yet gathered enough information to be certain of its truth, would defeat the purpose of ATSA immunity: to ensure that air carriers and their employees do not hesitate to provide the TSA with needed information. The Court noted that the Supreme Court of Colorado did not perform the requisite analysis of material falsity in finding the record sufficient to support the defamation verdict and that a court's deferential review of jury findings cannot substitute for its own analysis of the record.

The Court further held that under the correct material falsity analysis, Air Wisconsin is entitled to immunity as a matter of law. The Court articulated the following standard for determining material falsity in the ATSA immunity context: a falsehood cannot be material absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat. Viewing the evidence in the light most favorable to Hoeper, the Court concluded as a matter of law that any falsehoods in Air Wisconsin's statement to

the TSA were not material. Moreover, a statement that would otherwise qualify for ATSA immunity cannot lose that immunity because of some minor imprecision, so long as “the gist” of the statement is accurate.

Justice Sotomayor wrote the court’s opinion, which was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito. Justices Scalia, Thomas, and Kagan concurred in part, but dissented with respect to the Court’s application of the material falsity standard, opining that the Court should have remanded the case to allow the lower courts to apply the standard to the facts of this case.

The Court’s opinion is available at: <http://www.supremecourt.gov/opinions/slipopinions.aspx>.

The U.S. amicus brief is available at: <http://www.justice.gov/osg/briefs/2013/3mer/1ami/2012-0315.mer.ami.pdf>.

Supreme Court Holds that United States Does Not Retain Interest in Railroad Rights-of-Way

On March 10, 2014, the Supreme Court issued its decision in Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014). In the 8-1 decision, the Court ruled in favor of petitioners and found that the United States does not retain a reversionary interest in rights-of-way granted under the General Railroad Right-of-Way Act of 1875 (1875 Act).

The case involves a stretch of railroad right-of-way in southern Wyoming granted under the 1875 Act to the Laramie, Hahn’s Peak and Pacific Railroad Company in 1908. The right-of-way crosses an 83-acre parcel that was patented to Brandt’s predecessor in

interest in 1976. In 2004, the right-of-way was abandoned pursuant to approval from the Surface Transportation Board. Two years later, the United States sought to quiet title to a stretch of the right-of-way in order to extend a pre-existing recreational trail. With the exception of Brandt, all of the other landowners entered into non-monetary settlements with the United States or failed to appear and had default judgments entered against them. Brandt filed several counterclaims, including a claim to quiet title to the right-of-way in favor of itself.

The district court declared the right-of-way abandoned and quieted title in the United States. United States v. Marvin M. Brandt Revocable Trust, 2008 WL 7185272 (D. Wyo. Apr. 8, 2008). The court based its conclusion on Tenth Circuit precedent, which found that “the United States retains a reversionary interest in all 1875 Act [rights-of-way].” The court further held that upon the court’s declaration of abandonment pursuant to 43 U.S.C. § 912, the right-of-way reverted to the United States by operation of 16 U.S.C. § 1248(c). Brandt appealed, and the Tenth Circuit affirmed the district court’s holding, concluding that the case was controlled by its precedent in Marshall v. Chicago & Nw. Transp. Co., 31 F.3d 1028 (10th Cir. 1994). In Marshall, the Tenth Circuit relied on a historical analysis of over 100 years of case law under various statutes pertaining to federally granted rights-of-way to conclude that Congress intended for the government to retain rights in the rights-of-way granted under the 1875 Act. Brandt’s petition for certiorari was granted on October 1, 2013, and oral argument was heard on January 14, 2014.

The Court reversed the decision of the Tenth Circuit based on its decision in Great Northern Railroad Co. v. United States, 315 U.S. 262 (1942). That case involved a

dispute between a railroad, which had been granted a right-of-way under the 1875 Act, and the United States about whether the interest granted to the railroad included rights to the oil and minerals underlying the railroad's right-of-way. In that case, the government argued that the 1875 Act granted an easement, and accordingly, the railroad could claim no interest in the sub-surface minerals. The Court adopted the government's position and held that "the 1875 Act 'clearly grants only an easement, and not a fee.'"

Relying primarily on Great Northern, Brandt claimed that the land it was granted in the 1976 land patent was burdened by an easement, in which the United States did not retain an implied reversionary interest. Thus, when the railroad abandoned the right-of-way, the easement was extinguished, and Brandt's land became unburdened. The government attempted to distinguish Great Northern by arguing that when read in the context of other Supreme Court precedent, legislative history, and subsequent Acts of Congress, Great Northern did not control this case nor did it preclude the conclusion that the 1875 Act preserved a reversionary interest for the United States in forfeited or abandoned rights-of-way.

In the majority opinion filed by Chief Justice Roberts, the Court agreed with Brandt and stated that because the Court was persuaded by the government when it argued, more than 70 years ago, that a right-of-way granted under the 1875 Act was a simple easement, it was now declining "to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'" Justice Sotomayor filed a dissent, arguing that the majority did not give prior Supreme Court cases, which

the government cited in its favor, adequate consideration. In addition, the dissent disagreed with the majority's reliance on "basic common law principles," without recognizing that courts have long treated railroad rights of way as sui generis property rights not governed by the ordinary common-law regime."

The Court's opinion is available at http://www.supremecourt.gov/opinions/13pdf/12-1173_nlio.pdf.

The government's brief is available at <http://www.justice.gov/osg/briefs/2013/3mer/2mer/2012-1173.mer.aa.pdf>.

Supreme Court Denies Review of Decision Upholding Mexico Long Haul Trucking Pilot Program

On January 13, 2014, the Supreme Court denied a petition for writ of certiorari filed by the Owner-Operator Independent Drivers Association (OOIDA) seeking review of the U.S. Court of Appeals for the District of Columbia Circuit's April 19, 2013, consolidated decision, Owner-Operator Independent Drivers Association v. USDOT, et al., 724 F.3d 206 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 922 (2014), on the single issue of whether Mexico-domiciled drivers are statutorily prohibited from operating on U.S. roads without a commercial driver's license issued by a U.S. state.

Petitioners in a related case, International Brotherhood of Teamsters, et al. v. USDOT, did not seek Supreme Court review on any of the multiple issues raised in that case. In its April 19 decision, the D.C. Circuit dismissed both petitions for review challenging the U.S.-Mexico Cross-Border Long-Haul Trucking Pilot Program, which commenced on October 2011 as part of the

Agency's efforts to implement the North American Free Trade Agreement.

On July 26, 2013, the D.C. Circuit denied requests for rehearing en banc filed by petitioners OOIDA, the Teamsters, and Sierra Club, but amended and reissued the April 19 opinion to correct a misstatement concerning the basis for the court's decision that the Mexican trucks were not required to display a decal certifying compliance with U.S. manufacturing standards under 49 U.S.C. §§ 30112 and 30115. On October 24, 2013, OOIDA filed its petition for writ of certiorari to the Supreme Court on the single issue raised in its rehearing petition concerning whether U.S. recognition of the Mexican commercial driver's license per a reciprocity agreement between the United States and Mexico is barred by statutory language indicating that all commercial drivers operating in the United States must have commercial driver's licenses issued by a U.S. state. The Solicitor General waived response to the certiorari petition.

United States Seeks Supreme Court Review of D.C. Circuit's Decision to Strike Down Metrics and Standards Statute as Unconstitutional

On March 10, 2014, the United States filed a Petition for a Writ of Certiorari requesting the Supreme Court to review the D.C. Circuit's decision striking down Section 207 of The Passenger Railroad Investment and Improvement Act of 2008. Section 207 required FRA and Amtrak to jointly develop metrics and standards to evaluate the performance and service quality of Amtrak's intercity passenger trains. The Association of American Railroads (AAR) filed suit alleging that Section 207 violated the Constitution's Due Process Clause and non-delegation doctrine. The U.S. District Court

for the District of Columbia upheld Section 207, Ass'n of Amer. Railroads v. USDOT, 865 F. Supp. 2d 22 (D.D.C. 2012), but the U.S. Court of Appeals for the District of Columbia Circuit reversed, striking down Section 207 as unconstitutional, Ass'n of Amer. Railroads v. USDOT, 721 F.3d 666 (D.C. Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3533 (U.S. Mar 10, 2014) (No. 13-1080).

The D.C. Circuit was not persuaded that Section 207 gave FRA sufficient control over the development of the metrics and standards to pass constitutional muster, noting that had FRA and Amtrak been unable to agree on the metrics and standards, the statute authorized a mediator who could have been a private, non-governmental individual to resolve the conflict. The court then held that notwithstanding a degree of government control over it, Amtrak is a private entity with respect to Congress's power to delegate regulatory authority and that thus Section 207 constitutes an unconstitutional delegation of regulatory power.

In its petition, the United States argued that Supreme Court review is warranted because the D.C. Circuit conceded that there is no direct precedent for its decision and because its decision is not supported by Supreme Court precedent. Furthermore, the United States noted that the Court has not invalidated a federal statute on the basis of the non-delegation doctrine in nearly 80 years. Finally, the United States noted that the D.C. Circuit erroneously treated Amtrak as a private entity for purposes of the non-delegation doctrine. Pursuant to the Supreme Court's holding in Lebron v. Amtrak, 513 U.S. 374 (1995), Amtrak is a not an ordinary private party, but is to be considered a governmental actor for at least certain constitutional purposes.

United States Seeks Supreme Court Review in Federal Tort Claims Act Case

On March 7, 2014, the United States sought Supreme Court review of a decision of the U.S. Court of Appeals for the Ninth Circuit, June v. United States, 2013 WL 6773664 (9th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3541 (U.S. Mar 7, 2014) (No. 13-1075). Based on a recent Ninth Circuit en banc decision in Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), the court held that the two-year limitations period of the Federal Tort Claims Act (FTCA) is not jurisdictional and is subject to equitable tolling. The United States is also seeking Supreme Court review of Wong.

June involves an administrative FTCA claim that was untimely filed with FHWA. On February 19, 2005, Andrew Booth was killed in a car accident on an interstate highway in Arizona when the vehicle in which he was traveling as a passenger crossed a cable median barrier and crashed into oncoming traffic. More than five years later, a conservator acting for decedent's minor son presented a claim under FTCA to FHWA. The claim was denied as untimely pursuant to 28 U.S.C. § 2401(b), which requires that claims be presented to the appropriate federal agency within two years of the claim's accrual.

The conservator then filed suit in the U.S. District Court for the District of Arizona against the United States under the FTCA. The government moved to dismiss for lack of jurisdiction, arguing that plaintiff failed to file a claim with FHWA within two years of accrual and that, therefore, the suit was barred. The government also argued that the FTCA's two-year limitations period is not subject to equitable tolling. The district

court granted the government's motion and dismissed the case, explaining that "[a] tort action against the United States accrues 'when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" Further, the district court rejected the plaintiff's request for equitable tolling, finding that because the FTCA's timing requirements are jurisdictional, they are not subject to equitable tolling.

On appeal to the Ninth Circuit, the court was scheduled to hear oral argument in October 2013 when it issued an en banc decision in Wong, which held that the FTCA's other timing requirement (six month deadline for filing an action in court after the agency has denied a claim) is not jurisdictional and is subject to equitable tolling. The court deferred oral argument in June and requested supplemental briefing from the parties on the effect of the Wong decision in the June case. In December 2013, in an unpublished memorandum decision, the court reversed the district court's decision and remanded. The court drew no distinction between the two FTCA timing requirements in holding that in light of Wong, the FTCA's two-year limitations period is not jurisdictional and is subject to equitable tolling.

In its petition for certiorari, the government argues that the Ninth Circuit's holding that the FTCA two-year limitations period is non-jurisdictional cannot be squared with the FTCA statute's text, structure, history, and purpose. Further, it does not follow the Supreme Court's precedents. The government simultaneously filed a petition for certiorari in the Wong case raising the same question about the FTCA's six-month deadline for filing a civil action in court.

The government's petitions for certiorari can be found here:

<http://www.justice.gov/osg/briefs/2013/2pet/7pet/2013-1075.pet.aa.pdf> and
<http://www.justice.gov/osg/briefs/2013/2pet/7pet/2013-1074.pet.aa.pdf>.

United States Seeks Supreme Court Review of Federal Circuit Decision Permitting Disclosure of Sensitive Security Information under Whistleblower Statute

On January 27, 2014, the United States sought Supreme Court review of the decision of the U.S. Court of Appeals for the Federal Circuit in *DHS v. MacLean*, 714 F.3d 1301 (Fed. Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3470 (U.S. Jan. 27, 2014) (No. 13-894). This case arose after Robert MacLean, a federal air marshal, received notice from TSA that for a particular period of time, it would not deploy federal air marshals on overnight flights from Las Vegas. MacLean informed his supervisor and the DHS Office of Inspector General that he did not personally think this decision was in the best interest of public safety. MacLean was not satisfied with the responses that he received and then revealed the TSA deployment plans to the news media in an effort to “create a controversy” that would force TSA to change the plans. TSA eventually learned that MacLean was the source of the media report and removed him from his position as a federal air marshal for disclosing SSI (sensitive security information) without authorization.

MacLean challenged his removal before the MSPB, alleging that TSA violated 5 U.S.C. § 2308(b)(8)(A). That section prohibits an agency from taking a personnel action against an employee for disclosing certain types of information when the employee “reasonably believe[d] that the information showed a violation of any law, rule, or

regulation” or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” However, that section does not apply if the employee’s disclosure was “specifically prohibited by law.” The MSPB rejected MacLean’s argument, reasoning that because he had “disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA,” the “disclosure was ‘specifically prohibited by law’” for purposes of section 2302(b)(8)(A).

MacLean sought Federal Circuit review of the MSPB decision. On April 26, 2013, the Federal Circuit vacated the MSPB decision and remanded the case to the MSPB for further proceedings. The Federal Circuit reached this decision because it concluded that the disclosure was “not specifically prohibited by law.” The Federal Circuit looked to the law, not the regulations, because it found that “in order to fall under the ‘specifically prohibited by law’ proviso,” a “disclosure must be prohibited by statute rather than by regulation.”

The United States filed a petition for writ of certiorari because the Federal Circuit decision undermines the effectiveness of the congressionally mandated SSI regime and invites individual federal employees to make disclosures that will threaten public safety. The petition directs the Court’s attention to 49 U.S.C. § 114(r)(1)(C), which states that TSA “shall prescribe regulations” prohibiting disclosures that would, in the expert judgment of TSA “be detrimental to the security of transportation. Through federal regulations, TSA expressly foreclosed federal air marshals from sharing “information concerning specific numbers of federal Air Marshals, deployments or missions, and the methods involved in such

operations” with unauthorized persons. 49 C.F.R. § 1520.7(j); 49 C.F.R. § 1520.5(a).

The United States’ petition then argues that disclosure of SSI is “prohibited by law” within the meaning of 5 U.S.C. § 2302(b)(8)(A), and therefore, the whistleblower protections do not apply to MacLean. The prohibition against MacLean’s disclosure was a prohibition “by law” whether it appeared directly in the statute or instead in the regulations that the statute required TSA to promulgate. The petition argues that the TSA regulations prohibiting this disclosure are a “prohibition by law” because a statute expressly required TSA to promulgate those regulations. The petition also argues that the statute, 49 U.S.C. § 114(r), specifically prohibits disclosure of SSI to the public. Finally, the petition addresses the concerns about protecting whistleblowers raised by the Federal Circuit by pointing to other sections of the law that allow a federal employee to raise concerns to either the Inspector General or to the Special Counsel.

The United States petition then explains why immediate review of the Federal Circuit decision is necessary. The petition explains that the appeals’ decision will embolden employees to disclose SSI, which will present a threat to the security of the nation’s transportation network and put lives at risk. The petition explains that there is no circuit split on this issue in part because the Federal Circuit has outsized influence as the court where MSPB appeals are generally heard. The petition also suggests that the current decision will deter federal officials from disciplining employees who disclose SSI because violation of the whistleblower protections can result in personal sanctions against an agency official.

The petition for writ of certiorari, including the Federal Circuit opinion and the MSPB opinion, is available at <http://www.justice.gov/osg/briefs/2013/2pet/7pet/2013-0894.pet.aa.pdf>.

Supreme Court Seeks U.S. Views in Alabama’s Appeal of 4-R Act Decision

On January 27, 2014, the Supreme Court requested the views of the United States regarding the State of Alabama’s request for Court review of a decision of the U.S. Court of Appeals for the Eleventh Circuit holding an Alabama sales and use tax scheme improperly discriminates against railroads. CSX Transportation, Inc. v. Alabama Department of Revenue, 720 F.3d 863 (11th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3286 (U.S. Oct. 30, 2013) (No. 13-553). The Court first considered this tax scheme in CSX Transportation Inc. v. Alabama Department of Revenue, 131 S. Ct. 1101 (2011), ruling that a railroad may challenge a state’s non-property tax as discriminatory under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) even if the discriminatory element arises from an exemption from the otherwise generally applicable tax rather than from the tax itself. The case arose out of the 4-R Act’s catch-all provision, which forbids a State from imposing “another tax that discriminates against a rail carrier.” 49 U.S.C. § 11501(b)(4). CSX challenged Alabama’s tax scheme, which exempted railroad competitors, but not railroads, from a generally applicable sales and use tax on its purchase of diesel fuel. Consistent with the position taken by the United States in its amicus brief, the Court found that a state non-property tax “that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4)

as a ‘tax that discriminates against a rail carrier,’” but the Court’s decision was limited and did not address whether Alabama’s taxes actually discriminated against CSX or other railroads. The Court remanded the case for the lower courts to decide the case on the merits.

On remand, the district court upheld the tax. CSX Transp., Inc. v. Ala. Dep’t of Revenue, 892 F. Supp. 2d 1300 (N.D. Ala. 2012). The district court looked beyond the sales and use tax and noted that motor carriers pay a motor fuels tax on their purchases of diesel fuel. When comparing the sales and use tax and the motor fuels tax, the district court found that rail carriers and motor carriers pay essentially the same amount of tax. The Eleventh Circuit reversed and found that Alabama’s tax was discriminatory. The court arrived at this decision by comparing the railroads to their competitors and found that Alabama had not justified the exemptions for the railroads’ competitors. Furthermore, the Eleventh Circuit refused to consider whether Alabama’s motor fuels tax justified the exemption because it would be too difficult and expensive for the court to evaluate Alabama’s broader tax scheme.

Alabama has now filed a petition for certiorari requesting the Supreme Court to essentially answer the questions that it did not address in the first case. In Alabama Department of Revenue v. CSX Transportation Inc. (13-553), Alabama requests the Supreme Court to determine what is the proper comparison class under subsection (b)(4) of the 4-R Act: whether a railroad should be compared to its competitors or to a larger “commercial and industrial class.”

The briefs associated with the case are available at

<http://www.scotusblog.com/case-files/cases/alabama-department-of-revenue-v-csx-transportation-inc/>.

OOIDA Seeks Supreme Court Review of D.C. Circuit Decision Denying Challenge to the National Certified Medical Examiner Final Rule after Circuit Denies En Banc Review

On March 17, 2014, the Owner-Operator Independent Drivers Association (OOIDA) sought Supreme Court review of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Owner-Operator Independent Drivers Association v. USDOT, et al., 724 F.3d 230 (D.C. Cir. 2013), *petition for cert. filed* (U.S. Mar. 17, 2014) (No. 13-1126), in which OOIDA challenged FMCSA’s decision in its final rule on medical examiners not to require commercial motor vehicle operators employed by Mexico-domiciled motor carriers to hold a medical certificate from a certified examiner listed on the National Registry of Certified Medical Examiners.

The D.C. Circuit’s July 26, 2013, decision rejected all of petitioner’s arguments and upheld that portion of the final rule specifying that the national registry requirements do not apply to the medical certification of properly licensed Canadian and Mexican drivers. Those licenses are recognized as valid for operations in the United States per agreements between the United States and the two countries. The court stated that “absent some clear and overt indication from Congress,” it will not construe a statute to abrogate existing international agreements even when the statute’s text is not itself ambiguous. One judge on the panel dissented from the decision.

On September 9, OOIDA filed a petition for rehearing en banc. OOIDA asserted that the deciding panel's decision was contrary to both U.S. Supreme Court and D.C. Circuit precedent, arguing that consideration by the full court was necessary to secure and maintain uniformity of decisions in the D.C. Circuit. On October 4, the court stayed the case and ordered USDOT to respond to the petition. The Department of Justice filed the

response on November 8, and the court denied the petition on December 17.

In its petition for certiorari, OOIDA again argues that the basis for the D.C. Circuit's decision conflicts with Supreme Court and D.C. Circuit precedent and contends that the decision undercuts an important safety regulatory regime.

Departmental Litigation in Other Federal Courts

Fourth Circuit Upholds Funding Mechanism for Silver Line Metro

On January 21, 2014, the U.S. Court of Appeals for the Fourth Circuit upheld the Metropolitan Washington Airport Authority's (MWAA) use of toll road revenues to fund the Silver Line Metrorail expansion in Corr v. Metropolitan Washington Airports Authority, 740 F.3d 295 (4th Cir. 2014).

Petitioners in this case originally brought suit against MWAA in the U.S. District Court for the Eastern District of Virginia, asserting that MWAA's plan to fund construction of the Metrorail Project through toll increases on the Dulles Toll Road was illegal. Plaintiffs asserted three claims. First, they alleged that the increased tolls were an illegal exaction under color of federal law, in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, arguing that the use of Dulles Toll Road funds for the Metrorail Project amounted to a tax that required legislative authority to institute and that Congress could not have delegated such authority to MWAA. Plaintiffs' second claim, illegal exaction under color of state law, in violation of 42 U.S.C. § 1983, asserted

essentially the same argument as applied to Virginia: that the Virginia legislature lacked the authority to grant MWAA taxing power through the interstate compact that became the Washington Airports Act. Finally, plaintiffs' third claim cited to several provisions of the U.S. and Virginia Constitutions, arguing that the Metrorail Project funding plan denied plaintiffs the right to vote for the representatives (*i.e.*, the MWAA Board of Directors) who were implementing this tax.

MWAA subsequently filed a motion to dismiss for lack of standing and failure to state a claim. The district court ruled in favor of MWAA, dismissing the case with prejudice on standing grounds, but also addressing the merits of the complaint. Corr v. Metropolitan Washington Airports Auth., 800 F. Supp. 2d 743 (E.D. Va. 2011). The court held that plaintiffs had demonstrated Article III standing but lacked prudential standing because they raised a generalized grievance that was centrally a policy question best left to other branches of government. The court continued to address the plaintiffs' multiple overlapping merits arguments, but determined that the plaintiffs' claims must fail because the Dulles Toll Road tolls are fees, not taxes.

Plaintiffs originally appealed the case to the U.S. Court of Appeals for the Federal Circuit, and the Federal Circuit transferred the case to the Fourth Circuit. The United States filed an amicus brief in support of MWAA, arguing that the compact between Virginia and D.C., ratified by the Airports Act, preempts any other applicable state or local law and that the Airports Act text authorizes the use of Dulles Toll Road tolls to fund the Silver Line. The United States also participated in oral argument. Ultimately, the Fourth Circuit affirmed the district court's decision upon state law grounds.

While the Fourth Circuit overturned the district court's holding with regard to standing, the Fourth Circuit agreed with the district court in that the tolls charged on the Dulles Toll Road are user fees, not taxes, and thus are permissible. The Fourth Circuit reached this conclusion by relying upon a recent Virginia Supreme Court decision, Elizabeth River Crossing OpCo, LLC v. Meeks, 749 S.E.2d 176 (Va. 2013), which looked to whether tolls are paid in exchange for a particularized benefit not shared by the public, whether drivers are compelled to pay the tolls or accept the benefits of the project, and whether the tolls are collected solely to fund the Project as opposed to general revenues. In this case, the court found that toll road users receive a benefit of using the toll road and also will benefit from the Silver Line Metro Project, as it will relieve traffic congestion on the Dulles Toll Road. Furthermore, the court noted that the toll is voluntarily paid and the benefits of use of the toll road are voluntarily received. Finally, the court upheld Virginia's and MWAA's assertion that the Metrorail expansion and the Dulles Toll Road are part of a single project. Thus, the "tolls charged on the Dulles Toll Road are

not transformed into taxes merely by being used to fund the Metrorail expansion."

Ninth Circuit Rules for FTA in Lawsuit Challenging Honolulu Rail Transit Project

On February 18, 2014, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment in favor of FTA and the City of Honolulu on claims under NEPA and Section 4(f) of the Department of Transportation Act in Honolulutraffic.com, et al. v. FTA, et al., 742 F.3d 1222 (9th Cir. 2014). The Honolulu Rail Transit Project (Project) is a 20-mile, elevated, rapid rail system running between downtown Honolulu and the western suburb of Kapolei. The court of appeals found that it had appellate jurisdiction notwithstanding the district court's remand of three specific 4(f) claims to the FTA to correct certain deficiencies, at the same time that it rejected all other claims. Taking a "practical" approach to finality, the court reasoned that since defendants did not appeal the remand order and plaintiffs were not aggrieved by it, there was no reason not to review the dismissed claims, since the dismissal was unquestionably final. The court also found that the judgment could be reviewed as the denial of an injunction under 28 U.S.C. § 1292(a)(1), because the "underlying nature" of the action was one to stop the rail project. On the merits, the court first rejected plaintiffs' claim that the Environmental Impact Statement (EIS) had used an unduly restrictive statement of the project's purpose and need that allegedly precluded any alternative that did not rely on a rapid rail system. The court found that the purpose and need was reasonably framed as a need to "provide faster, more reliable public transportation service . . . than can be achieved with buses operating in congested

mixed-flow traffic” when viewed in light of the results of an extensive local planning process and the policy of federal statutes.

The court next found that the EIS did not need to analyze in detail non-rail alternatives that had been rejected as not meeting project purposes by the City after a process carried out with full public participation and with guidance from FTA. The court rejected other challenges to the EIS’s consideration of alternatives on grounds that the district court properly relied on the findings of the City’s planners regarding the excessive costs of these alternatives. Turning to Section 4(f), the court rejected claims that certain alternatives to the proposed project were “reasonable and prudent” noting in particular that FTA was entitled to rely on the opinions of its own experts that these alternatives did not accomplish project purposes. The court rejected claims that Section 4(f) required FTA to specifically find that the drawbacks of these alternatives substantially outweighed the importance of preserving particular Section 4(f) properties. Finally, the court upheld defendants’ approach to identifying and protecting Native Hawaiian burials, which delayed some burial surveys until after project design was complete in order to avoid unnecessary disturbance that might be caused by more broad-ranging surveys.

District Court Rules on Cross-Motions for Summary Judgment in Honolulu Rail Transit Project Lawsuit

On February 18, 2014, the U.S. District Court for the District of Hawaii ruled in DOT’s favor in Honolulutraffic.com, et al. v. FTA, et al., 2014 WL 692891 (D. Haw. No. 11-00307), a lawsuit challenging the Record of Decision (ROD) the FTA issued

for the Honolulu Rail Transit Project (Project), a 20-mile, elevated, rapid rail running between downtown Honolulu and the western suburb of Kapolei. The decision, in conjunction with the Ninth Circuit decision reported above, effectively ended all litigation relating to the Project. Before the court was plaintiff’s Objection to Notice of Compliance. The court granted summary judgment to defendants on all claims subject to the court’s remand and terminated the injunction against the Project’s Phase 4 activities.

Previously, on November 1, 2012, the district court issued its Order on Cross-Motions for Summary Judgment (SJ Order). In the SJ Order, the court ruled in favor of FTA and the City and County of Honolulu (City), the Project sponsor, on the vast majority of plaintiffs’ claims. The court denied all of plaintiffs’ challenges to the Project pursuant to NEPA and the National Historic Preservation Act. The court held, however, that FTA and the City violated Section 4(f) of the Department of Transportation Act (Section 4(f)) in the following three ways: (1) failing to make adequate efforts to identify all above-ground traditional cultural properties (TCP) before issuing the ROD; (2) making a “no use” determination without adequately addressing why claimed alterations to Mother Waldron Park’s historic setting did not amount to a constructive use; and (3) failing to include an analysis in the Final Environmental Impact Statement of whether the Beretania Tunnel alternative was prudent and feasible.

After issuing the SJ Order, the district court on December 27, 2012, issued a Judgment and Partial Injunction as a remedy for its earlier finding. The Judgment and Partial Injunction remanded the matter to the FTA to comply with the SJ Order, but without vacating the ROD. The Judgment and

Partial Injunction also enjoined defendants from construction and real estate acquisition activities in the last phase of the Project while the additional NEPA work was completed, but did not enjoin activities in the other phases of the Project. On October 8, 2013, defendants filed a Notice of Compliance containing a Final SEIS and Amended ROD. Plaintiffs filed an objection to the Notice of Compliance, which only challenged the Section 4(f) determination that the tunnel alternative is not a feasible and prudent avoidance alternative. The objection was treated as a challenge to a final agency action under the APA. The court found that defendants did not act arbitrarily and capriciously by concluding that the tunnel's cost, severe impact to Section 4(f) properties, and harm to non-Section 4(f) resources weigh in favor of the Project.

Suit over Denial of Loan Guarantee Refinance Application is Settled

On January 30, 2014, a settlement was reached in American Petroleum Tankers Parent, LLC v. United States, et al. (D.D.C. No. 12-11650), and the parties filed a stipulation for dismissal with prejudice. Plaintiff American Petroleum Tankers Parent, LLC, (APT) had sought APA review and emergency relief in the nature of mandamus in connection with APT's application for a loan guarantee under the Federal Ship Financing Program. APT's application requested a \$470 million loan guarantee, which would cover the cost of refinancing five vessels already owned by APT. APT intended to use the loan guarantees to refinance its existing debt, which it had incurred to construct these same five vessels. MARAD denied APT's application because, among other things, the application was economically unsound and would exhaust available program resources.

APT's complaint alleged that MARAD's decision was arbitrary, capricious, or an abuse of discretion and that the Secretary's and the DOT Credit Council's involvement in the application process was contrary to law. On May 6, 2013, the U.S. District Court for the District of Columbia had partially granted and partially denied the federal defendant's motion to dismiss, 2013 WL 1859311 (D.D.C. May 6, 2013). The court granted the dismissal of the cause of action that requested recusal of the Maritime Administrator as the loan application decision-maker. The court denied dismissal of claims alleging that defendants' actions were arbitrary, capricious, and otherwise unlawful under the APA and that the Secretary of Transportation unlawfully interfered with the Maritime Administrator's responsibilities regarding Title XI applications.

Appellate Briefing Completed in Challenge to PHMSA's Oversight of California Pipeline Safety Program

On December 19, 2013, the United States filed its response brief in City and County of San Francisco v. USDOT (9th Cir. No. 13-15855), the appeal of a district court decision that dismissed appellants' lawsuit against DOT and PHMSA alleging violations of the Pipeline Safety Act (PSA) and the APA. 2013 WL 772652 (N.D. Cal. Feb. 28, 2013). The lawsuit, initially filed in February 2012, relates to the September 2010 rupture of a natural gas pipeline in San Bruno, California. The ensuing explosion resulted in eight fatalities, multiple injuries, and the destruction of 38 homes. The ruptured pipeline was operated by Pacific Gas & Electric and is regulated by the California Public Utilities Commission (CPUC) under delegated authority from

PHMSA through a state certification process.

In the original complaint, framed as a “citizen suit” under the PSA, the City and County of San Francisco (City) had alleged that the federal defendants violated the PSA by (1) failing to ensure that certified state authorities, including the CPUC, are satisfactorily enforcing compliance with the minimum federal pipeline safety standards, (2) failing to take appropriate action to achieve adequate enforcement of federal standards to the extent state authorities are not, and (3) disbursing federal funds to the CPUC without determining whether it is effectively carrying out its pipeline safety program. The City sought declaratory judgment and injunctive relief.

The district court granted the federal defendants’ motion to dismiss the complaint, agreeing that an action for injunctive relief against the government for failing to properly administer the PSA, known as a mandamus claim, is not authorized by the citizen suit provision of the PSA. The court, however, granted the City leave to amend in order to make a claim under the APA. The City filed an amended complaint, alleging the same conduct by DOT and PHMSA violated the APA.

On February 28, 2013, the district court dismissed the amended complaint, without leave to amend, and entered judgment for DOT and PHMSA. The court agreed that the APA does not provide a vehicle for the City to challenge the general adequacy of the defendants’ action. In this case, the City was unable to allege DOT or PHMSA had failed to take a discrete, non-discretionary action required by statute. Furthermore, the court found the City’s attempt to recast the same facts into a theory that defendants had acted arbitrarily and capriciously under the

APA added nothing of substance and must also be dismissed.

In its opening brief on appeal, the City reasserts its earlier claims. A nonprofit pipeline safety organization filed an amicus brief in support of the appellant. In its response brief, the government again argues that the APA does not provide for judicial review of the City’s programmatic challenge to PHMSA’s state oversight because the City has not identified a discrete and mandatory agency action that PHMSA has failed to take and has challenged only agency actions committed to PHMSA’s discretion by law. Additionally, the government argues that the PSA’s citizen-suit provision does not provide for judicial review of PHMSA’s state certification and funding program.

United States Files Amicus Briefs in Cases Addressing Preemptive Scope of Federal Motor Carrier Deregulation

On February 18, 2014, upon invitation of the U.S. Court of Appeals for the Ninth Circuit, the United States filed a brief as amicus curiae in two related cases posing important questions about the scope of the federal law that deregulated the motor carrier industry. At issue in both Dilts v. Penske Logistics (9th Cir. No. 12-55705) and Campbell v. Vitran Express (9th No. 12-56250) is the validity of California’s law governing employee meal and rest breaks under the preemption provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA or the Act), 49 U.S.C. § 14501(c).

The cases were filed as class actions in state court by motor carrier employees who alleged that their employers failed to comply

with California's meal and rest break requirements. Under generally applicable California law, which includes companies employing commercial motor vehicle operators, employees must be given a meal break of thirty minutes or longer after five hours on duty and must be given a second meal break after working for more than ten hours. Furthermore, employees must be given ten minutes of rest for every four hours on duty. Rest breaks are supposed to be provided during the middle of the work period to the extent practicable. Employers who fail to provide the requisite breaks are liable for civil penalties and must also provide an hour's worth of compensation to the employee for any meal or rest break that is not provided.

Plaintiffs in Dilts are appliance delivery drivers and installers who work in California for Penske. They typically moved appliances from regional distribution centers by truck to local distribution centers or to customers, all within California. They alleged that they had not received the legally required meal and rest breaks and were consequently entitled to monetary and other relief under California law. Plaintiffs in Campbell are city and local drivers for Vitran Express, who deliver cargo for Vitran's clients. They similarly alleged that they were not permitted to take meal and rest breaks and sought relief through a class action lawsuit. The defendants removed both cases to federal district court.

The district courts ruled in favor of the defendant carriers in both cases, concluding that the state meal and rest break requirements were preempted by the FAAAA. In Dilts, the district court granted summary judgment to Penske. The court noted the relevant portion of the FAAAA:

(c) Motor Carriers of Property.—

(1) General rule.— Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section [41713\(b\)\(4\)](#)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c). As the Supreme Court has held in various cases, particularly in Rowe v. New Hampshire Motor Transport Association, 552 U.S. 364 (2008), this preemption provision sweeps broadly and preempts state laws that have even an indirect, if significant, effect on motor carrier prices, routes, or services. The statute was intended to prevent states from re-regulating in an area that Congress intended to leave to the operation of competitive forces in the marketplace.

Applying these principles, the district court in Dilts concluded that the California break requirements would have an impermissible effect upon carrier routes, limiting carriers to routes that would have sufficient stopping places for a large truck. The court also concluded that the break requirements would reduce the amount of available on-duty time for drivers and lessened the carriers' flexibility, making it more difficult to schedule appliance installation work within narrow windows of time. The district court in Campbell relied upon the Dilts decision to rule in the carriers' favor as a matter of law, holding that the California break requirements have an impermissible

impact upon the scheduling of delivery services.

On appeal, plaintiffs in both cases contend that the district courts erred in ruling that the California break requirements are preempted. Plaintiffs argue that the defendant trucking companies have failed to meet their burden to demonstrate that Congress intended to preempt these longstanding state laws. According to plaintiffs, the state laws do not “relate” to motor carrier prices, routes or services within the meaning of the FAAAA, but rather, have merely an incidental effect upon prices, routes or services. To the extent that the state laws increase the cost of trucking services, that does not suffice for preemption; furthermore, the state laws do not impermissibly bind the carriers to any particular routes or have any seriously detrimental effect on motor carrier operations. In contrast, defendants contend that the state laws apply rigidly and offer little flexibility as to when and where breaks can be offered and would therefore force carriers to re-route trucks and to reduce their delivery services to customers. According to the carriers, the state law would force trucks to drive off roads in unsafe circumstances to accommodate break times (e.g., along highway routes), and California has taken no account of the difficulty of ensuring that there are sufficient parking spaces available for trucks during the mandated break times.

In its amicus brief, the government argues that the California law is not preempted for several reasons. First, the court should apply the traditional presumption against the preemption of state law, especially where, as here, the state laws are of general applicability and existed well before Congress passed the FAAAA. Second, there is no indication that the break requirements

would impede Congress’s intent to deregulate the industry. Third, the carriers had failed to meet their burden to show an impermissible impact upon rates, routes, or services, since there appeared to be ample opportunities for these short-haul delivery drivers to take breaks along their routes, presumably before or after a scheduled stop. Fourth, FMCSA has adhered to its 2008 decision in which it declined to preempt the California break laws under the agency’s authority, pursuant to 49 U.S.C. § 31141(c)(4), to declare unenforceable state laws on commercial motor vehicle safety that are incompatible with federal safety regulations. In that case, the agency determined that the state laws are not commercial motor vehicle safety regulations, and are thus outside of the preemptive reach of section 31141. Fifth, FMCSA, as the agency with specialized expertise on motor carrier operations and regulation, is entitled to substantial deference in its views on these issues. In making these arguments, the government’s brief pointed out that the result might be different in other cases, particularly under the parallel provisions of the Airline Deregulation Act, since the California break requirements may be more disruptive to airline rates, routes, or services.

The court held oral argument in these cases on March 3 and has granted a request to receive supplemental briefing from the parties in April.

Motion to Dismiss and for Partial Summary Judgment Filed in Challenge to New Detroit River Bridge

The parties have completed briefing defendants’ motions to dismiss and plaintiffs’ motion for partial summary

judgment in Detroit International Bridge Company, et al. v. U.S. Department of State, et al. (D.D.C. No. 10-476), a challenge to various federal agency actions related to the construction of the proposed New International Trade Crossing bridge (NITC) connecting Detroit, Michigan, and Windsor, Canada. Plaintiffs are the owners of the Ambassador Bridge, the only bridge connecting the Detroit area to Canada, and have sought Coast Guard approval for their own new bridge (the New Span) to be built adjacent to the Ambassador Bridge. FHWA, the State Department, and the Coast Guard are among the federal defendants. The Government of Canada is also a co-defendant.

Plaintiffs seek declaratory and injunctive relief against the defendants for violating their alleged franchise rights to construct a new bridge across the Detroit River by proposing the NITC. Plaintiffs claim that they have the exclusive franchise to construct a bridge in the area pursuant to the Boundary Waters Treaty of 1909 and the 1921 act that authorized the American Transit Company, plaintiffs' alleged predecessor in interest, to build the Ambassador Bridge (ATC Act). Plaintiffs also argue that the defendants have violated their right to build a new span by delaying the Coast Guard approval needed to build the New Span. The plaintiffs further allege that the defendants have violated the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment by favoring the NITC over the New Span and doing so without just compensation. Finally, plaintiffs allege that the State Department improperly issued a Presidential Permit for the NITC and that Congress, in the International Bridge Act of 1972 (IBA), improperly delegated its constitutional authority to approve the Crossing

Agreement between the State of Michigan and Canada.

In their motion to dismiss, federal defendants address plaintiffs' claims as follows: (1) the IBA by its terms does not delegate Congress' power to approve state agreements with foreign powers such as the Crossing Agreement and that even if the non-delegation doctrine was applicable, delegation here was permissible because Congress supplied an intelligible principle to guide the State Department's actions; (2) neither the Boundary Waters Treaty nor the ATC Act confer a private right of action and, in any event, neither the Act nor the treaty include an exclusive franchise right, express or implied; (3) the takings claim must be dismissed because it can only be brought in the Court of Federal Claims under the Tucker Act; (4) plaintiffs failed to establish standing to assert their APA claim against the State Department's issuance of a Presidential Permit for the NITC and its approval of the Crossing Agreement, actions that are, in any event, non-reviewable; and (5) plaintiffs failed to sufficiently plead their equal protection argument because they cannot allege that they are similarly situated to the NITC proponents or that they have been subject to differential treatment and, even if they could establish differential treatment, they cannot show the absence of a rational basis. (Plaintiffs' claims against the Coast Guard for unreasonable delay in the processing of a navigation permit for the New Span were addressed separately in cross-motions for summary judgment filed in May 2013.)

In their motion for partial summary judgment, plaintiffs argue that they are entitled to summary judgment on their claims that (1) the State Department acted contrary to law and arbitrarily in approving the Crossing Agreement, (2) the State

Department's IBA approvals violated the IBA and plaintiffs' franchise rights, (3), plaintiffs have a statutory right to build the New Span and are entitled to an injunction barring defendants from violating that right by building the NITC, and (4) the State Department's approval of the Crossing Agreement must be set aside because the IBA unconstitutionally delegates Congress's power to approve agreements between states and foreign countries.

Airport Kiosk Accessibility Rule Challenged

On January 22, 2014, National Federation of the Blind and two individuals filed a complaint in the U.S. District Court for the District of Columbia challenging a final rule

addressing the accessibility of automated kiosks at U.S. airports. Plaintiffs in National Federation of the Blind, et al. v. USDOT, et al. (D.D.C. 14-00085) raise four allegations: (1) that DOT does not have the statutory authority to regulate automated kiosks at airports; (2) that DOT improperly relied upon how much it would cost the airlines to install accessible automated kiosks; (3) that if DOT included the cost to install accessible automated kiosks as part of its analysis, it should have also considered other factors that are relevant to an "undue burden" analysis; and (4) that DOT improperly relied upon research conducted by DOT's contractor because the information was not disclosed to the public during the comment period.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Federal Circuit Vacates \$50 Million Decision Challenging Scope of FAA's Personnel Reform Authority

On March 21, 2014, almost seven years after nearly 8,000 FAA air traffic controllers filed a Fair Labor Standards Act (FLSA) overtime lawsuit in the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit vacated a \$50 million judgment awarded to the plaintiffs and remanded part of the case back to the trial court. Apart from the monetary ramifications, the decision in Abbey, et al v. United States, 2014 WL 1099571 (Fed. Cir. 2014) is significant because although the lawsuit was

brought as an overtime lawsuit, it represented a challenge to FAA's unique Personnel Management System (FAA PMS), and it was on that basis that the Federal Circuit ruled in FAA's favor.

Plaintiffs' challenge stems from the intersection of the title 5 compensatory time and credit hour exceptions to the FLSA and the adoption of those exceptions into the FAA PMS. The FAA PMS was created in 1996 after Congress passed the Department of Transportation and Related Agencies Appropriations Act (Pub. L. 104-50) and Air Traffic Management Systems Performance Improvement Act of 1996 (Pub. L. 104-264). Among other things, those laws (collectively referred to as the Personnel Reform legislation) required FAA to create a "personnel management system for the

Administration that addresses the unique demands on the agency's workforce." The new system was to "provide greater flexibility in the hiring, training, compensation, and location of personnel." Further, in developing the personnel management system, Congress legislated that the "provisions of title 5 shall not apply to the new personnel management system."

Despite the clear purpose of the Personnel Reform legislation, the trial court held in 2008 that FAA's compensatory time and credit hour policies violated the FLSA because the Personnel Reform legislation took FAA out of the title 5 regime. In other words, after Personnel Reform, the statutory exceptions to paying FLSA nonexempt employees time and a half for overtime work was no longer available to FAA. After resolving the remaining traditional "suffered and permitted" FLSA claims in the lawsuit and conducting a trial on damages, the government appealed the compensatory time and credit hours decision to the Federal Circuit in the fall of 2012.

In its appeal, the government argued, among other things, that even if the Personnel Reform legislation was ambiguous with respect to FAA's authority to grant paid leave in lieu of FLSA overtime, the trial court erred by not considering whether FAA's interpretation was reasonable under Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In so arguing, FAA noted that in interpreting the Personnel Reform legislation as permitting FAA to incorporate credit hour and compensatory time policies into the FAA PMS, FAA is interpreting its own authorizing statute (title 49) and, under Chevron, is entitled to deference to its reasonable interpretation of its statute.

Relying on prior judicial interpretations of the Personnel Reform legislation, the government also argued that FAA's interpretation of the legislation is consistent with the Federal Circuit's decision in another FAA case, Brodowy v. United States, 482 F.3d 1370 (Fed. Cir. 2007). In Brodowy, the Federal Circuit recognized that even though the Appropriations Act excepted FAA from most of title 5, FAA's subsequent adoption of the title 5 GS pay system was authorized by statute. In Abbey, the government argued that just as FAA's adoption of the GS pay system was proper subsequent to the Personnel Reform legislation, so too was FAA's adoption of compensatory time and credit hours policies which were similarly derived from title 5.

In addition to the Personnel Reform arguments, the government also challenged the Court of Federal Claims' jurisdiction over the case after the Supreme Court issued a decision in a Fair Credit Reporting Act (FCRA) case regarding Tucker Act jurisdiction. In United States v. Bormes, 133 S. Ct. 12 (2012), the Court agreed with the government and held that because the FCRA enables plaintiffs to pursue monetary relief against the government without resorting to the Tucker Act, jurisdiction in the Federal Circuit was improper. Based on the Court's analysis in Bormes, the government argued that Abbey was analogous to Bormes in that Abbey was brought under the Tucker Act and also concerned an underlying law that contained its own detailed remedial scheme - the FLSA.

The Federal Circuit agreed with the government's arguments regarding Personnel Reform and vacated the Court of Federal Claims decision (and \$50 million judgment) to the contrary. It upheld the jurisdiction of the Court of Federal Claims and remanded to it the issue of whether

FAA's policies are consistent with the title 5 exceptions to the FLSA on which FAA is authorized to rely.

D.C. Circuit Denies Petition for Review of No Hazard Determination for Nantucket Sound Wind Turbines

On January 22, 2014, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision denying the petition for review in Town of Barnstable v. FAA, 740 F.3d 681 (D.C. Cir. 2014). This is the second time a petition for review has been filed in connection with FAA's "no hazard" determination concerning the planned construction of more than 100 wind turbines in the waters of Nantucket Sound. In a previous challenge to the FAA's no hazard determination for the same project, the court granted the petition for review, holding that the FAA had not followed its own guidance in making its determination when it failed to conduct an analysis of the impact of the project on aircraft flying under visual flight rules (VFR). Town of Barnstable, Mass. v. FAA, 659 F.3d 28 (D.C. Cir. 2011) (Barnstable I). In Barnstable I, the court concluded that a broader aeronautical study was required because the project would have an electromagnetic effect on air navigation facilities—one of two threshold, or triggering, conditions requiring a more thorough analysis. The Barnstable I court rejected FAA's argument that its internal guidance only required further analysis if the structures were over 500 feet high, which was not the case for these wind turbines.

By the time FAA issued its new no hazard determination following Barnstable I, the circumstances had changed. Enhancements to FAA's radar facilities had eliminated the determination that the wind turbines would

have an electromagnetic effect; thus, the threshold criteria requiring a broad aeronautical study was no longer met. Nevertheless, given the Barnstable I court's concern about the impact on VFR traffic, FAA analyzed that issue during the course of its second review of the project. In its most recent decision, the D.C. Circuit rejected the petitioner's argument that the threshold established in FAA's guidance was contrary to the statute, holding that it was reasonable for the agency to establish a threshold finding before requiring an analysis of adverse effects. The court also credited the agency's factual conclusions regarding the lack of electromagnetic interference with air navigation radar systems. Finally, the court held that NEPA does not apply to FAA's no hazard determinations, given that such determinations are not "legally binding" because FAA has no power either to authorize or to bar the construction of a structure.

District Court Dismisses Santa Monica's Quiet Title Action

On October 31, 2013, the City of Santa Monica sued FAA over the City's obligation to continue to operate the Santa Monica Municipal Airport (SMO). The City, in City of Santa Monica v. United States (C.D. Cal. 13-8046), asserted a claim under the Quiet Title Act and also raised constitutional claims of unlawful takings, violations of due process, and violations of the 10th Amendment. Among other claims for relief, the City sought a ruling that the Surplus Property Act (SPA) restrictions that apply to SMO, including the key restriction that the City maintain the land as an airport for public use, are no longer in effect.

On February 13, 2014, the court granted the United States' motion to dismiss all of the

City's claims. The court held that the City's quiet title action was barred by the statute of limitations and dismissed the claim with prejudice. The court dismissed the City's constitutional claim without prejudice.

On the quiet title issue, the court concluded that "the record unquestionably demonstrates that the City knew, or should have known, that the United States claimed an interest in the Airport Property as early as 1948." The SPA restrictions that the City challenged are contained in an Instrument of Transfer dated 1948. About 20% of the runway is on land that was not included in the 1948 transfer, but rather was quit claimed by the United States to the City in 1949. The 1949 deed did not contain the standard SPA deed restrictions (the case only addressed the 1948 deed). The Instrument of Transfer expressly provides that, in the event the Airport Property is used "for other than airport purposes without the written consent of the Civil Aeronautics Administrator," "the title, right of possession and all other rights transferred by this instrument to the [City], or any portion thereof, shall at the option of [the United States] revert to the [United States]"

The court noted that even if the Instrument of Transfer did not provide notice that the United States claimed an interest in the title to the land, it certainly put the City on notice that the United States claimed a substantial property interest in the land sufficient to create a cloud on title.

In addition, the court discussed how the City's statements and conduct since agreeing to the terms of the Instrument of Transfer demonstrated the City's awareness that the United States had a continuing and substantial interest in the Airport Property and supported the court's conclusion that the statute of limitations accrued more than

twelve years ago. For example, the City requested on three occasions -- in 1952, 1956, and 1984 -- that the United States release parcels of land from the restrictions in the 1948 Instrument of Transfer. Moreover, in 1962, in response to a question posed by the City Council about SMO's future operations, the City Attorney issued a legal opinion that concluded, based in part on the Instrument of Transfer, that "the City cannot legally, unilaterally, on its own motion, abandon the use of the Santa Monica Municipal Airport as an airport." Thus, the court was able to conclude that the United States had not abandoned its claimed interest in the Airport Property. Because the City knew or should have known that the United States claimed a reversionary interest in the title to the Airport Property as early as 1948 and certainly more than twelve years ago, the statute of limitations has expired, and the City's claim under the Quiet Title Act was time-barred.

Because the City admitted in its complaint that it has not yet decided, or declared its intention, to cease operating SMO as an airport in 2015 (the City had not passed any additional resolutions, since its resolution in June 1981, declaring its intention to close the airport), the court was able to conclude that the City had not made any recommendation or taken a position as to whether it should cease operating SMO as an airport in 2015. Accordingly, the court found that the City's constitutional claims rested upon contingent future events that may not occur as anticipated, or indeed may not occur at all.

The court noted at the conclusion of its opinion that a "decision would be helpful to the City in evaluating the future of SMO," but that it could not reach the merits of the City's claims because it "would be constitutionally impermissible to do so."

Citing the Ninth Circuit, the court stated: "Practical usefulness to litigants or not, the Constitution confines the power of federal courts to issue declaratory judgments to disputes that are sufficiently immediate and real. This dispute has not yet reached that stage."

If the City had prevailed on these arguments, then the City would arguably be free to close SMO at the later of the expiration of its grant assurances or the expiration of its obligations under a settlement agreement that it entered into with FAA in 1984. Both parties agree that the settlement agreement expires in 2015. The expiration date of the grant assurances is disputed, however. FAA maintains they expire in 2023, the City in 2014. The court did not rule on the expiration date.

Court Finds No Private Right of Action for Landowners Under the Uniform Relocation Assistance Act

On March 7, 2014, the U.S. District Court for the Northern District of California dismissed claims brought against FAA in a complaint filed by the Pacific Shores Property Owners Association (PSPOA), an association of private owners of parcels in a subdivision in Del Norte County, California, alleging violation of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (Uniform Relocation Assistance Act or URA). Pacific Shores Property Owners Association, et al. v FAA, 2014 WL 985960 (N.D. Cal. 2014). The subdivision was approved and recorded in 1963, with approximately 1,500 lots on approximately 1,500 acres. In preparation for future development a 26 mile road system and

flood control improvements were constructed within the subdivision.

In June 2000, the FAA completed an evaluation of the runway safety areas at Del Norte Regional Airport and concluded that they did not meet applicable FAA design standards. As part of the 2005 appropriations bill for DOT, Congress required all commercial airports to come into compliance with FAA design standards for runway safety areas to the extent practicable by the end of 2015. In July 2009, the airport sponsor, the Border Coast Regional Airport Authority, initiated environmental review of the runway safety area improvement projects under the California Environmental Quality Act (CEQA). In 2010, as part of that review, the Authority drafted a plan that discussed the possibility of purchasing lots from Pacific Shores Subdivision landowners to use as mitigation for the wetlands that would be lost because of the runway safety area project. This plan included the removal of roads in the subdivision. In 2011 the Authority's Board of Commissioners approved the project under CEQA.

PSPOA sued the Authority, raising a host of claims against the Authority and a claim against the FAA and the Authority for violation of the URA, 42 U.S.C. § 4655. FAA sought an order dismissing the URA claim for, among other reasons, lack of subject matter jurisdiction because there is no private right of action under the statute. In granting FAA's motion, the court held the URA was created "in order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many federal programs, and to promote public confidence in federal land acquisition practices" 42 U.S.C. § 4651.

Specifically, section 4602 provides that section 4651 "create[s] no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation." 42 U.S.C. § 4602. Therefore, the court ruled that the URA itself plainly indicates that section 4651 does not create a private right of action on the part of landowners.

FAA Settles Challenge to Categorical Exclusions at Paulding Northwest Atlanta Airport

On November 18, 2013, six residents of Paulding County, Georgia, filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging categorical exclusions issued by FAA and Georgia Department of Transportation for runway safety area expansion and taxiway widening and lighting projects at Paulding Northwest Atlanta Airport. Petitioners in Louie, et al. v. Huerta, et al. (D.C. Cir. 13-1285 & 13-1286) alleged that these projects were precursors to and in support of the airport's effort to introduce first time scheduled commercial turbojet service and represented improper segmentation. Several days before filing the petitions for review these same individuals requested an administrative stay of the decisions approving the projects. In late December, the parties entered into a settlement agreement under which the FAA agreed to prepare, at a minimum, an Environmental Assessment on Paulding's request for a Part 139 Certificate and all connected projects. In return, petitioners agreed to dismiss their petitions for review, with prejudice. The petitions were dismissed by order of the court dated December 24, 2013.

Flight Attendants Challenge FAA PED Guidance

On December 30, 2013, the Association of Flight Attendants (AFA) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging FAA's "final rule" expanding the use of personal electronic devices (PED) on commercial flights. AFA alleges in Association of Flight Attendants v. Huerta (D.C. Cir. No. 13-1316) that FAA's Notice 8900.240, which provides guidance for commercial operators under parts 91, 121, 125, and 135 that wish to expand the use of PEDs "fundamentally changes the longstanding rule and practice of stowage of [PEDs] on an aircraft. . . ." Further, AFA contends that "[w]hen an agency proposes a controversial change in a rule that affects public safety, it must be made through the proper rule-making process, with the opportunity for public notice and comment. In this instance, [the FAA] circumvented the rule-making process and in doing so, failed to provide clear policy or guidance for securing and stowing PEDs and failed to provide a study showing that PEDs held in hand or held in a seat back pocket would remain secure."

Water District Brings Quiet Title Action Against San Bernardino International Airport and United States

On January 22, 2014, the East Valley Water District brought a quiet title action against San Bernardino International Airport (SBIAA), a joint powers airport authority, and the United States. The complaint in East Valley Water District v. San Bernardino International Airport Authority, et al. (C.D. Cal. No. 14-00138) alleges that SBIAA's 2006 construction of objects

within a runway protection zone area (RPZ) resulted in the abandonment of aviation easements conveyed by the United States' December 17, 1999, quit claim deed to the airport authority.

The Water District owns approximately 22,500 acres of vacant land, a portion of which is subject to aviation easements created in July 1951 to protect navigable airspace for Norton Air Force Base. Norton was identified in the 1988 Base Realignment and Closure and closed in March 1994. By quitclaim deed, recorded December 17, 1999, the United States granted certain real property, formerly part of the Base, to the airport authority. In the event the airport authority or any subsequent transferee failed to meet, comply, or observe any term, condition, reservation or restrictions, the United States retained a reversionary interest in the title, right of possession, and any other rights transferred by the deed.

Plaintiff alleges the airport authority engaged in "substantial Federally-funded construction" in 2006 and cites to the FAA's Advisory Circular (AC) for the definition of the RPZ. Plaintiff also contends the airport authority abandoned the aviation easements on May 15, 2012, when it approved the 2012 Airport Layout Plan (ALP), which depicts the new structures at the end of Runway 3. Finally, plaintiff asserts that "FAA's official approval of the 2012 ALP on June 27, 2012" constituted the United States' affirmative approval to abandon the aviation easements, as well as the United States' abandonment of its reversionary interest in the aviation easements.

FAA Sued for Payment under War Risk Insurance Policy

On October 1, 2013, a complaint was filed in the U.S. Court of Federal Claims seeking

payment under a "war risk" insurance policy issued by the United States, through the Secretary of Transportation and FAA. The complaint in National Air Cargo Group, Inc. d/b/a National Airlines, et al. v. United States (Fed. Cl. No. 13-754), which also lists Commerce and Industry Insurance Company (Commerce) as a plaintiff, arises out of an aircraft accident on April 29, 2013 at Bagram Air Base in Afghanistan, when a Boeing 747 operated by National Airlines under contract to the Department of Defense (DOD) crashed on takeoff. The crew was fatally injured and the aircraft was destroyed. Following the accident, National Airlines submitted a claim to FAA, for coverage under the war risk insurance policy issued by FAA, as the administrator of the aviation war risk program. FAA denied coverage, advising National Airlines that the particular DOD contract covering the flight was not part of the insurance coverage and that the accident did not arise out of a covered risk. National Airlines sued for the \$40 million value of the aircraft and Commerce sued under a theory of subrogation to recover the \$42 million it purportedly paid National Airlines for the hull of the accident aircraft.

On January 31, 2014, the Department of Justice (DOJ) filed an answer to the complaint with respect to the claims raised by National Airlines and filed a separate motion to dismiss the claims of Commerce for lack of jurisdiction. In its motion, DOJ argued that neither 49 U.S.C. § 44309(a) nor 28 U.S.C. § 2201 – nor any combination of the two – confers jurisdiction to entertain the claim brought by Commerce. The limited jurisdiction of the Court of Federal Claims "depends upon the extent to which the United States has waived its sovereign immunity." Hall v. United States, 91 Fed. Cl. 762, 770 (2010). "A waiver of sovereign immunity 'cannot be implied but must be

unequivocally expressed” by Congress. Id. (quoting United States v. King, 395 U.S. 1, 4 (1969)). No statute provides the requisite waiver of sovereign immunity with respect to Commerce’s claim. In its opposition, Commerce disputes the government’s statutory analysis, arguing that Congress could not have intended to bar an action by a proper subrogee.

Tulsa Airport Sues FAA for Noise Abatement Program Costs

On November 14, 2013, the Tulsa Airports Improvement Trust (TAIT), manager and operator of the Tulsa International Airport, for and on behalf of Cinnabar Service Company, filed suit against FAA in the U.S. Court of Claims seeking a reversal of FAA’s decision on eligible airport development costs, a determination that certain payments are eligible for reimbursement under FAA’s grant program, the Airport Improvement Program (AIP), and attorney fees. Tulsa Airports Improvement Trust v. United States (Fed. Cl. No. 13-906) involves a claim by TAIT alleging that FAA failed to reimburse TAIT for alleged eligible claims under the AIP. TAIT asserts it made payments for actual costs incurred as part of its Noise Abatement Program and should be reimbursed for these payments in the sum of \$705,913, plus interest as applicable.

TAIT undertook a noise abatement project partially funded with AIP funds pursuant to 49 U.S.C. § 47504, the “Noise compatibility program,” and its implementing regulations, 14 C.F.R. part 150. From about 2000 to 2002, FAA granted funds to TAIT and the City of Tulsa, as co-sponsors, for this noise program. In December 2002, the contractor (Cinnabar) performing the work advised TAIT that billings exceeded grant funding. TAIT and the contractor agreed that the contractor would complete work already

under construction; the other work would be put on hold pending approval of future grants by FAA. On July 28, 2003, TAIT and the City, as co-sponsors, accepted \$6,298,000 under Grant Agreement No. 3-40-0099-050-2004 for airport development and noise program implementation. On October 1, 2003, the contractor resumed work. On April 27, 2004, TAIT and the City of Tulsa, as co-sponsors, accepted \$6,000,000 under Grant Agreement No. 3-40-0099-047-2003 for airport development and noise program implementation.

In 2010, TAIT contacted FAA to claim reimbursement for certain costs it incurred for its noise abatement project. FAA reviewed the request and did reimburse TAIT for some additional project costs. In 2012, TAIT again asked FAA to reopen the grants to seek reimbursement. FAA was unable to determine in 2012 that there were any remaining eligible costs that had not been previously reimbursed. In a letter dated December 31, 2012, FAA’s Associate Administrator for Airports explained to TAIT’s Airport Director that its 2012 request for reimbursement did not include a delineation of costs that TAIT was claiming were not previously reimbursed. The Associate Administrator advised that if there was additional information that TAIT believed had not been considered, it was invited to resubmit that information. No subsequent information was submitted. TAIT admits that these claimed standby costs were accrued during a period in which noise abatement work had been suspended. Costs continued to accrue, not because of any airport improvement work, but because of a standby that TAIT and Cinnabar ordered while awaiting approval of an additional FAA grant. In short, TAIT attempts to hold the United States responsible for standby costs that were a

direct result of a decision TAIT and Cinnabar made.

On February 21, 2014, FAA filed a motion to dismiss. FAA asserted in the motion that the complaint should be dismissed for lack of jurisdiction pursuant to 49 U.S.C. § 46110, which vests exclusive jurisdiction over the dispute in the United States Courts of Appeals. Specifically, FAA argued that pursuant to 49 U.S.C. § 46110, the only courts with jurisdiction over disputes arising out of FAA orders relating to the Airport Development and Noise provisions (Part B) of Title 49 of the United States Code are the United States Courts of Appeals. FAA claimed that TAIT's allegations demonstrate that the courts of appeals have jurisdiction over this suit since TAIT repeatedly noted that it sought AIP grant funds for its noise abatement program. Accordingly, because the legal basis of TAIT's claim arises out of Part B of Title 49, the jurisdictional limitation of 49 U.S.C. § 46110 applies.

FAA noted in a footnote that 49 U.S.C. § 46110 states that petitions for review of FAA orders "must be filed not later than 60 days after the order is issued" unless the petitioner is able to establish "reasonable grounds" for not filing by that time. Therefore, should the case be dismissed, and were TAIT to file its petition in a court of appeals, TAIT will have the burden of establishing the timeliness of its petition.

FAA also argued in the motion that even if section 46110 does not apply to TAIT's claims, the Court of Claims lacks jurisdiction to entertain TAIT's complaint because TAIT's claim is time-barred because it was not filed within six years after the claim first accrued per 28 U.S.C. § 2501. However, the brief acknowledged that the complaint was ambiguous as to whether there might be an alternative accrual date on

TAIT's purported cause of action. FAA asserted that the ambiguity merits an order from the court requiring TAIT to provide a more definite statement of when its cause of action accrued.

Federal Highway Administration

Fourth Circuit Rules for FHWA in Uniform Act Appeal

In a published opinion dated February 21, 2014, the U.S. Court of Appeals for the Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia's dismissal of the plaintiffs' complaint in Clear Sky Car Wash LLC, et al. v. City of Chesapeake, Va., et al., 2014 WL 661222 (4th Cir. 2014). The lawsuit was originally filed on April 11, 2012, by Clear Sky Car Wash, LLC against the USDOT, the Virginia Department of Transportation, the City of Chesapeake, and Greenhorne & O'Mara (Consulting Engineers) and its employees. The suit alleged violations of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), 42 U.S.C. § 1983, and various provisions of the U.S. Constitution. The district court dismissed the complaint on December 18, 2012.

The City of Chesapeake acquired by eminent domain property formerly owned by Clear Sky Car Wash in March 2012 as part of the U.S. Route 17/Dominion Boulevard Improvement Project. The City's numerous attempts to reach an agreement on just compensation were unsuccessful. The suit alleges that the appraisals and appraisal review process were improper and that the sum of \$2.15 million paid for the parcel is not just compensation. In addition, the suit

alleged that relocation benefits were not provided to the plaintiffs.

The Court of Appeals agreed with the district court that subchapter III of the Uniform Act (acquisition policies) does not provide a private right of action. In addition, the Court of Appeals held that the plaintiffs' complaint did not properly allege that the defendants violated subchapter II of the Act (relocation assistance). The court also rejected the plaintiffs' claims brought under 42 U.S.C. § 1983 and explained that because subchapter III of the Uniform Act confers no individual rights enforceable by the plaintiffs, subchapter III is also unenforceable under section 1983. Lastly, the Court of Appeals rejected the plaintiffs' APA claim that FHWA failed to enforce the policies of subchapter III. The court found that the plaintiffs, again, did not assert an APA claim in the complaint and that the complaint failed to allege a final agency action by FHWA sufficient to justify judicial review under the APA. The court explained, "[O]ngoing oversight does not amount to final agency action" under the APA.

Favorable Decision for FHWA in the White Buffalo Contract Case

On November 1, 2013, the U.S. Court of Appeals for the Federal Circuit issued a decision affirming-in-part and vacating-in-part the U.S. Court of Federal Claims' decision in White Buffalo Construction, Inc. v. United States, 2013 WL 5859688 (Fed Cir. 2013). The case is a challenge to a termination for default of a construction contract awarded in August 1998 to White Buffalo Construction, Inc. (White Buffalo). FHWA later converted the termination for default to a termination for convenience. However, in October 2007, White Buffalo filed a complaint in the U.S. Court of Federal Claims claiming that FHWA

breached its duty of good faith and fair dealing, and sought costs, lost profits, and attorney's fees. The lower court found that FHWA did not act in bad faith when it terminated White Buffalo's contract and agreed with the government's position related to costs associated with pre-termination work that White Buffalo had completed. White Buffalo Construction, Inc. v. United States, 101 Fed. Cl. 1 (2011).

The Federal Circuit affirmed the U.S. Court of Federal Claims on five of the seven grounds, remanded to the Court on one ground in the Government's favor, and vacated-in-part with remand to the Court on a final ground related to a potential mathematical error in the original judgment. Most notably, the Federal Circuit upheld the Court of Federal Claims' finding that the Government did not act in bad faith in the original termination of the contract.

Court Denies Challenges to Reevaluations Issued by Caltrans in NEPA Assignment Case

On December 19, 2013, the U.S. District Court for the Northern District of California denied plaintiffs' motion for summary judgment and granted defendants' cross-motions for summary judgment in Center for Biological Diversity, et al., v. California Department of Transportation, et al., 2013 WL 6698740 (N.D. Cal. 2013). Plaintiffs alleged that FHWA, Caltrans, and the U.S. Army Corps of Engineers (Corps) violated NEPA, the Clean Water Act (CWA), and the APA by granting approvals for the Willits Bypass. As its name implies, the Willits Bypass would reconfigure the mainline of U.S. 101 so that it bypasses downtown Willits, one of the more congested stretches of that highway in northern California.

FHWA signed the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the Willits Bypass Project in 2006. Under NEPA Assignment, Caltrans issued re-evaluations of the FEIS in both 2011 and 2012. The Corps issued a CWA 404 Permit (404 Permit) for the project in February 2012. On September 11, 2012, the court granted FHWA's Motion to Dismiss, finding the challenge to FHWA's ROD time-barred under 23 U.S.C. § 139(1) and that all subsequent NEPA work was the responsibility of Caltrans.

In its latest decision, the court upheld re-evaluations issued in 2011 and 2012 by Caltrans holding plaintiffs had failed to demonstrate that Caltrans' decision not to undertake a Supplemental Environmental Impact Statement (SEIS) was arbitrary or capricious. The court also upheld the Corps CWA Section 404 permit for the project. The court found that plaintiffs had failed to "point[] to any evidence in the record that would contradict [Caltrans'] conclusions or render them implausible." Slip. op. at 13. The court made a similar finding regarding plaintiffs' Section 404 claims. The court cited to the July 2, 2013, Order denying a preliminary injunction in the Native Songbird litigation in finding that "whether the Re-Evaluations are final agency actions or whether the Court must review those documents to determine if Caltrans unlawfully withheld the preparation of a supplemental EIS, the Court applies the standard set forth [in] Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376 (1989)"— essentially, the arbitrary and capricious standard. Id. at 10-11.

District Court Denies Plaintiff's Motion for Preliminary Injunction on Highway Project in Alabama

On January 17, 2014, the U.S. District Court for the Middle District of Alabama issued an order denying plaintiff Black Warrior Riverkeeper's request for a preliminary injunction against the U.S. Army Corps of Engineers (USACE) and the Alabama Department of Transportation (ALDOT). Black Warrior RiverKeeper, Inc., v. Alabama Dept. of Transp., et al., 2014 WL 200578 (M.D. Ala. 2014). The requested injunction was sought to stop the construction on the first phase of the Birmingham Northern Beltline (BNB), a 1.86 mile segment between State Route 79 (SR 79) and State Route 75 (SR 75). The USACE had previously issued a Section 404 permit for the first phase. The injunction motion asserted that the defendants failed to follow requirements of the Clean Water Act and NEPA. The Clean Water Act 404 permit had been issued by the USACE in September 2013. Previously, FHWA had issued a number of NEPA documents that the USACE relied upon in issuing its Environmental Assessment (EA) and FONSI.

The BNB Project was conceptualized in the 1960s and proposes the construction of a new 52-mile controlled-access highway from the Interstate 59/20 intersection west of Birmingham to Interstate 59 northeast of Birmingham. FHWA's Final Environmental Impact Statement (FEIS) was issued on June 12, 1997, and the Record of Decision (ROD) was signed on August 24, 1999. ALDOT has been planning to complete this project in phases, with the first section of construction to be between SR 79 and SR 75. FHWA completed two Reevaluations of this segment, one in August 2006 and the latest

one in March 2012. In issuing the Section 404 Permit, the USACE relied upon and adopted FHWA's environmental documentation. Based on the issuance of the 404 Permit and the 2012 Reevaluation approval, construction was authorized by FHWA. ALDOT's initial construction activities were slated to start in February 2014.

Two lawsuits were filed by plaintiff over this project. In the first suit, filed in April 2011, plaintiff sought to require FHWA and ALDOT to complete a Supplemental Environmental Impact Study (SEIS) for the entire project. In October 2013, plaintiff filed a second suit claiming the USACE did not follow the Clean Water Act and NEPA when the agency issued a 404 permit for the first segment. These two cases were then consolidated.

In its motion for preliminary injunction, plaintiff, represented by the Southern Environmental Law Center, alleged that the BNB Project would have widespread impacts on rivers, streams and wetlands throughout northern and western parts of Jefferson County, and that in issuing its 404 permit the USACE had relied upon FHWA's insufficient 1999 FEIS and 2012 Reevaluation. Plaintiff also argued that the phasing of the BNB project was improper segmentation, so that the full extent of the impacts, to the area's wetlands and waterways, was unknown. Thus, plaintiff argued that the USACE and FHWA should have completed an SEIS for the entire 52-mile BNB project instead of only a FHWA reevaluation and USACE EA.

In its order, the court found that plaintiff had not shown a substantial likelihood that it would prevail on the merits. In addressing the segmentation issue, the court found the 1997 EIS and subsequent reevaluations of

the entire BNB were sufficient to conclude that the phasing was not being done to avoid analysis under NEPA. FHWA NEPA regulations require that the project "connect logical termini," "have independent utility," and not "restrict considerations of alternatives for other reasonably foreseeable transportation improvements." 23 C.F.R. § 771.111(f). The court further noted that the 1.86-mile segment, connecting SR 79 and SR 75, increased the utility of the existing roadway network while relieving traffic through nodes placed at appropriate termini. Also, as the entire project is estimated to take 30 years to complete and the disputed permit only covers a small segment of the Beltline, this segment's construction did not foreclose other alternatives for the Beltline as a whole. Moreover, the court found that requiring the USACE to prepare an EIS for each 404 permit would likely result in the project never being started at all and would be useless and redundant. In concluding, the court also stated that there was no persuasive argument from plaintiff, nor was there a clear showing that would support a finding of inadequacy of the EIS that was "twice reevaluated."

In examining the additional factors required for the issuance of preliminary injunction, the court noted that plaintiff only cited possible harms to the environment and not any actual, imminent, and irreparable harm that will result from the issuance of the 404 permit for this segment. Additionally, the court found that the public also has an interest in development that will promote job growth and economic stability and that plaintiff did not establish a factual weight of harm to override the public interest in development. Finally, the court found that consideration had to be given to the fact that substantial funds have already been expended to begin construction on the first phase. Delaying construction would have

created significant financial impacts on defendants and the public treasury, especially if ALDOT's bid process had to be repeated.

In concluding, the court found that plaintiff had failed to establish, by a clear showing of substantial evidence, that it was entitled to a preliminary injunction.

Court Rules in Favor of FHWA in Bhandari Case

On January 17, 2014, the U.S. District Court for the Western District of Wisconsin granted summary judgment in favor of the federal and state defendants in Bhandari v. USDOT, et al., 2014 WL 204195 (W.D. Wis. 2014).

The complaint, originally filed on March 29, 2013, alleged that the defendants violated provisions of the Federal-Aid Highway Act (FAHA), 23 U.S.C. § 101 *et seq.*, by refusing to install on and off-ramps near plaintiffs' properties as part of the U.S. Highway 51 Overpass Project in Merrill, Wisconsin. Plaintiffs' principle arguments were that the defendants failed to meet the FAHA hearing requirements because the hearing was held in an "open house" format rather than a "town hall" format, and that the defendants failed to provide a transcript for the hearing that was held. The court noted that the record demonstrated that plaintiffs both attended the hearing and were able to voice their concerns about the project. Further, the court noted that the plaintiffs were allowed to attend and speak at an intergovernmental meeting that was not open to the public. As such, the court believed that defendants substantially complied with the public hearing requirement. Moreover, the court ruled that even if those two gatherings fell short of substantial compliance with the public

hearing requirements under 23 U.S.C. § 128(b), plaintiffs could not demonstrate that they were prejudiced, nor that a "do-over" would be anything except an empty victory.

Defendants acknowledged that they failed to record and transcribe the public hearing as required by section 128(b). Defendants contended, however, that plaintiffs were not prejudiced by the lack of a transcript. While the court stated that it was troubled by defendants' failure to comply with the transcript requirements, it agreed that plaintiffs failed to offer any credible evidence of prejudice on summary judgment. The court was persuaded by the fact that the officials responsible for certifying that the hearing requirement was met attended the public hearing and were well aware of the opposition to the project. The court also noted that plaintiffs' own briefs and factual submissions were replete with examples of opposition from officials and others from the Town of Merrill.

Plaintiffs also raised a NEPA challenge to the project. However, because the complaint did not allege a specific NEPA violation, the court refused to allow that claim to proceed. The court referred to those arguments as "throw-aways." This is a significant decision regarding the structure of public hearings. Prior to this decision, the U.S. District Court for the Eastern District of Wisconsin ruled that the open house format did not comply with the requirements of the FAHA. See Highway J Citizens Grp., U.A. v. U.S. Dep't of Trans., 656 F. Supp. 2d 868 (E.D. Wis. 2009).

Plaintiffs Dismiss MBTA Case in California

On February 27, 2014, nearly three months after a mediation session and six weeks after plaintiffs and defendant California

Department of Transportation (Caltrans) signed a comprehensive settlement agreement, federal defendants and plaintiffs stipulated to a dismissal of the subject case Native Songbird Care & Conservation, et al. v. Anthony Foxx, et al. (N.D. Cal. No. 13-2265). This case, brought by a coalition of environmental groups and one individual, challenged the Marin-Sonoma Narrows High Occupancy Vehicle Widening Project (MSN Project) on U.S. Route 101 in northern California. The MSN Project involves widening a particularly congested portion of U.S. Route 101 north of San Francisco. FHWA issued its ROD in October 2009.

Plaintiffs' complaint alleged that federal and state defendants violated both NEPA and the Migratory Bird Treaty Act (MBTA) due to Caltrans' use of "exclusionary netting" to inhibit birds (largely cliff swallows) from nesting under bridges set to undergo replacement or modification as a result of the MSN Project. Specifically, the Complaint alleged: 1) FHWA's 2009 Final Environmental Impact Statement and Record of Decision failed to take a "hard look" at potential impacts to cliff swallow colonies as a result of the project; 2) FHWA failed to issue a SEIS once impacts to migratory birds became clear; and 3) that the deaths of migratory birds as a result of the netting violated the MBTA.

In late March 2013, Caltrans had discovered that improperly installed "exclusionary netting" had resulted in the deaths of approximately 65 cliff swallows, a listed species under the MBTA. Caltrans immediately informed the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife of the situation. Working with the federal and state agencies, Caltrans made modifications to the netting, and no cliff swallow mortalities

were reported at either bridge after mid-April. According to regular reports sent by Caltrans to the FHWA California Division Office, a total of 75 migratory birds died due to the netting.

The Court denied Plaintiff's Motion for a Preliminary Injunction (PI) in May 2013. The court concluded that plaintiffs failed to meet any of the four factors required for a PI. The Court held that, "at best," plaintiffs had demonstrated "serious questions" as to the merits of one of their claims, that FHWA should have prepared a Supplemental Environmental Impact Statement (SEIS) to analyze the impacts associated with the deaths of cliff swallows.

The parties met for a Court-ordered mediation session on December 5, 2013. Plaintiffs had wanted the United States to join in the settlement with Caltrans, which resulted in a delay while the Department of Justice reviewed the agreement. After agreeing to dismiss Caltrans and further discussion among the parties, however, plaintiffs eventually agreed to dismiss the case against the Federal defendants.

Under the settlement between plaintiffs and Caltrans, the State will use alternative techniques for excluding birds from nesting on certain bridges as well as refrain from demolition activities at those bridge sites during nesting season. The State also agreed to use specific measures to remove nest starts from the bridges, consult with plaintiffs at various points during the nesting season, and provide modest financial assistance for community outreach and education. Under the terms of both the settlement agreement and the Joint Stipulation, the parties have agreed to bear their own fees and costs; therefore, there will be no direct cost to the federal government, though some of Caltrans'

agreed-to work will likely be eligible for reimbursement from federal-aid highway funds.

FHWA issued a NEPA Reevaluation regarding the cliff swallows mortalities on December 6, 2013, which concluded that no SEIS was required. A Section 139(I) Statute of Limitations Notice for the Reevaluation was published in the *Federal Register* on December 20, 2013, which will expire on May 19, 2014.

Court Denies FHWA's Motion for a Stay of Proceedings in Buy America Case

On March 25, 2014, the U.S. District Court for the District of Columbia denied FHWA's Motion for a Stay of Proceedings in United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, et al., v. FHWA, et al. (D.D.C. No. 13-1301). In this suit, plaintiffs, a coalition of businesses and associations, challenge a December 21, 2012, FHWA memorandum that clarified the scope of a long-standing general waiver for manufactured products under the FHWA's Buy America requirement, 23 U.S.C. § 313. Plaintiffs contend that FHWA impermissibly broadened the scope of the manufactured products waiver.

The United States filed a motion for a stay of proceedings on January 28, 2014, indicating that FHWA had initiated rulemaking on the Buy America waivers and therefore, a stay was warranted to conserve judicial resources and based upon prudential mootness grounds. On February 4, plaintiffs filed a memorandum of opposition to FHWA's motion to stay. The United States filed its reply on February 11. As part of its

motion, FHWA submitted a declaration to the court stating that the agency had initiated a rulemaking that will address various Buy America issues, including the Buy America waivers. Even so, the District Court denied the stay. The court noted that FHWA did not provide sufficient information regarding the scope of the rulemaking and whether the new rule will replace the 2012 memorandum. Furthermore, the court noted that FHWA's rulemaking process was in the early stages and would most likely take nine to twelve months before FHWA issues a final rule. Finally, the court noted that the 2012 Memorandum would remain in effect during the rulemaking process. Thus, FHWA's prudential mootness argument fails because a favorable judgment for the plaintiffs could provide redress through vacatur of the 2012 Memorandum or an injunction prohibiting FHWA from applying the provisions in the 2012 Memorandum.

Challenge to River Valley Intermodal Project in Arkansas

On February 19, 2014, the City of Dardanelle, Arkansas and the Yell County Wildlife Federation filed suit against the Department, FHWA, the Arkansas State Highway and Transportation Department (ASHTD), the River Valley Regional Intermodal Authority (Authority), and the U.S. Army Corps of Engineers (Corps). City of Dardanelle, Arkansas, et al. v. USDOT, et al. (E.D. Ark. No. 14-98). Plaintiffs seek preliminary and permanent injunctive relief prohibiting further actions toward proceeding with the construction of the River Valley Intermodal Project (Project) along the Arkansas River in Pope County, Arkansas.

The proposed intermodal facilities are intended to foster the area's economic development by providing access to the

McClellan-Kerr Arkansas River Navigation System (MKARNS) via a slack water harbor on the Arkansas River. It essentially would serve as a regional distribution point for goods to be shipped throughout the United States by river, rail and by interstate.

The Corps prepared an Environmental Assessment (EA) in November 1999, and issued a Finding of No Significant Impact (FONSI) on January 26, 2000, for the proposed intermodal facility, with the preferred alternative being the 882-acre tract located at Arkansas River Mile (ARM) 203 along the left descending bank of the Arkansas River in Pope County, Arkansas. This site, across the river from the City of Dardanelle, is referred to as Green Site. However the scope of the slack water harbor EA did not include the proposed intermodal facilities. In 2002, an EA was prepared, with FHWA involvement, for the intermodal facilities. It was determined that this intermodal facility EA was insufficient in light of projected impacts. A broader scope document was required, which would study not only the slack water harbor but all of the required infrastructure improvements and the potential impacts of the intermodal facilities. An Environmental Impact Statement (EIS) was then initiated with a notice of intent being published by FHWA in November 2004. The Draft EIS was published in March 2006. A Supplemental Draft EIS was issued in August 2010. The Final EIS (FEIS) was then approved on March 18, 2013. The Record of Decision (ROD) was signed and issued by FHWA on November 13, 2013.

Plaintiffs' complaint alleges that in approving the FEIS and issuing the ROD, defendants failed to comply with the procedures for gathering information, public participation, and decision-making set forth in NEPA. Specifically, plaintiffs assert that

the defendants failed to comply with the requirements of NEPA and its implementing regulations regarding the analysis of alternatives, direct, indirect and cumulative impacts, and potential mitigating measures. Further, plaintiffs allege violations of Section 4(f), the Clean Water Act and its implementing regulations, and the regulations of the Federal Emergency Management Agency and the Corps. The complaint alleges that the construction of the Project at the selected site would create flooding and water quality issues for the City.

Prior to the current action, the City of Dardanelle had sued the Corps over its FONSI issued in 2000. This 2003 lawsuit was administratively closed in August 2004 after the court's issuance of a permanent injunction enjoining the Corps from entering into or issuing a Project Cooperation Agreement or any other agreements or contracts for the construction of the slack water harbor, pending the completion of an EIS.

FHWA Sued by Construction Contractor for Oregon Project

On August 22, 2013, a construction contractor filed a complaint against FHWA in Tidewater Contractors, Inc. v. USDOT (Fed. Cl. No. 13-600). The contract at issue arises out of the Beavercreek Road project in Central Oregon. Plaintiff was the contractor on the project. The dispute centers on pavement compaction. The government's testing of cores rendered values that placed the pavement in reject status under the contractual pay system. Plaintiff's tests showed results that were acceptable. Because the government's tests did not verify plaintiff's tests, the contracting officer withheld \$377,174 in payments pursuant to the contract. Plaintiff

alleges that the government tests were inaccurate because they were conducted too long after the cores were taken and because the cores had been damaged before the government tested them. The contracting officer's decision of December 12, 2012, carefully considered plaintiff's allegations and rejected them.

This is the third challenge that plaintiff has brought against the government on this project. The first was an appeal to the Civilian Board of Contract Appeals on a matter not related to the present case, which the parties settled. The second was a case in the Court of Federal Claims on the issue that is the subject of this new case. That second case was dismissed because it was filed before the contracting officer had issued her decision and therefore was missing a jurisdictional prerequisite.

Motion for Preliminary Injunction Denied, Motion to Dismiss Filed in Challenge to Single Point Urban Interchange Project

On October 4, 2013, FHWA filed a Motion to Dismiss in RB Jai Alai, LLC v. Florida Department of Transportation, et al. (M.D. Fla. No. 13-1167), a NEPA challenge to a proposed single point urban interchange (SPUI) in Seminole County, Florida. Additionally, on October 16, the court denied without prejudice plaintiff's motion for a preliminary injunction. Plaintiff claims to own property and a business in the area affected by the project.

The proposed project involves the intersection of SR 15/600 (US 17/92) at SR 436 located in the southwest region of Seminole County, FL. The SPUI will elevate 4 lanes of SR 15/600 (US 17/92) and SR 436. The SPUI includes an elevated

overpass over SR 436 as well as the addition of bike lanes, sidewalks and drainage improvements. A Categorical Exclusion (CE) was done in 2004 and a Reevaluation was completed in 2012.

Plaintiff asserts that defendants' actions in advancing the project have been contrary to law, arbitrary and capricious, and an abuse of discretion under NEPA and the APA. It claims the CE and Preliminary Design and Engineering study conducted for the project are based on old and flawed traffic data. Plaintiff commissioned its own traffic study dated May 9, 2012, which produced different results indicating the flyover or elevated overpass is not needed. Plaintiff prefers an at grade intersection improvement referred to as the "Boulevard Plan." Plaintiff also asserts that the 2012 Reevaluation is flawed and inadequate due to relying on dated information.

In its Motion to Dismiss, FHWA argued that plaintiff did not have standing to sue because it did not point to an environmental injury. FHWA argued that financial injury was not an injury within NEPA's zone of interest. In its response in opposition to FHWA's motion, Plaintiff argued that the project would result in blight and blight was a cognizable injury under NEPA.

Federal Motor Carrier Safety Administration

D.C. Circuit Agrees that Sometimes a Letter is Just a Letter

On January 22, 2014, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the petition for review filed by the Owner-Operator Independent Drivers Association (OOIDA), Owner-Operator

Independent Drivers v. Ferro, 2014 WL 590380 (D.C. Cir. 2014), challenging an October 23, 2012, letter from the FMCSA Administrator, arguing that the letter was a “new rule or new interpretation of an existing rule, established without notice and comment, that materially changes Agency policy” on fatigued drivers under 49 C.F.R. § 392.3. The court had previously declined to rule on a motion to dismiss filed by the government and referred the matter to the merits panel for briefing. On January 8, 2014, however, the court notified the parties that it would issue a decision on the briefs and papers and cancelled the oral argument scheduled for January 14. On January 22, the D.C. Circuit issued an order dismissing the petition for review based on lack of subject-matter jurisdiction. Citing from the government’s brief, the court stated that “FMCSA is therefore correct when it notes that ‘sometimes a letter is just a letter.’ That is the case here.”

D.C. Circuit Transfers OOIDA DataQs and PSP Challenge to the District Court

On February 28, 2014, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision finding that the court lacked Hobbs Act jurisdiction over a petition for review filed by the Owner-Operator Independent Drivers Association (OOIDA) and an individual driver in Weaver, et al. v. FMCSA, et al., 2014 WL 775466 (D.C. Cir. 2014). The court issued an order transferring the case to the U.S. District Court for the District of Columbia for resolution of the challenged FMCSA action. On May 10, 2013, OOIDA filed the petition for review on Fred Weaver’s behalf challenging Montana’s denial of a request to remove a record of violation pertaining to Weaver from the Motor Carrier

Management Information System (MCMIS) based on a state court’s dismissal of a citation written for the violation constitutes FMCSA final action. The issues are identical to those raised by OOIDA in related district court litigation, Owner-Operator Independent Drivers v. USDOT, et al. (D.D.C. No. 12-1158), where OOIDA challenges the FMCSA Administrator’s refusal to grant a written request that the agency overturn state decisions declining to remove violations that were the subject of dismissed citations. OOIDA asserts that violations in a roadside inspection that are the subject of a dismissed citation should not be included in a driver’s Pre-employment Screening Program (PSP) report and that the Agency exceeds the authority of 49 U.S.C. § 31150, the PSP authorizing statute, when it includes such “non-serious” violations in the PSP report. OOIDA also alleges that the agency violates the Privacy Act and the Fair Credit Reporting Act in refusing to take the requested action.

In its briefs and at the December 5, 2013, oral argument, OOIDA argued that the D.C. Circuit lacks jurisdiction because the agency’s improper delegation of authority to the states renders both Montana’s action and the agency’s action, or failure to act, as final agency action that is properly heard by the district court under the APA.

In its February 28 opinion, the D.C. Circuit found that while the appellate court lacked Hobbs Act jurisdiction, the agency action was properly heard in the district court, and the court ordered the case transferred to the U.S. District Court for the District of Columbia. Both OOIDA and FMCSA had argued that the court lacked Hobbs Act jurisdiction to review the Montana State denial of Mr. Weaver’s DataQs request. The court, however, rejected FMCSA’s argument that the petition for review should

be dismissed because it was an untimely Hobbs Act challenge to the PSP program and an “as-applied” challenge could only occur in response to an agency enforcement action. The court adopted OOIDA’s argument that FMCSA’s failure to correct the data, while not qualifying as a rule, regulation, or final order that would trigger Hobbs Act jurisdiction, was agency action reviewable under the APA in federal district court, labeling it as part of a “residue” of agency action that was beyond the Hobbs Act’s reach.

While the Court declined to resolve the exact status of the FMCSA activity, it noted that it was confident in assigning that task to the district court. The court examined OOIDA’s theories of the case that FMCSA violated a statutory duty by failing to correct information in an FMCSA database, noting that “[i]naction, of course, can qualify as a form of agency action.”

The court also opined that initial review in the district court was needed to compile a record suitable for judicial review at the appellate level, noting that “while district courts generally cannot conduct de novo review of agency action . . . there is a narrow exception where ‘the record is so bare that it prevents effective judicial review . . .’ a circumstance that might well prove true here.”

AIPBA Dismisses Broker Bond Case and Refiles in Eleventh Circuit

On November 14, 2013, the Association of Independent Property Brokers and Agents, Inc. (AIPBA) filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit, challenging FMCSA’s October 1, 2013, Final Rule implementing MAP-21’s

\$75,000 financial security requirement for FMCSA-regulated property brokers. The petitioner in Association of Independent Property Brokers and Agents, Inc. v. Foxx, et al. (11th Cir. No. 13-15238) is an independent, not-for-profit trade group comprised of small and mid-size independent property brokers. FMCSA’s rule requires FMCSA-regulated brokers and freight forwarders to have a \$75,000 surety bond or trust fund. FMCSA broker and freight forwarder operating authority is contingent on the requisite bond or trust fund being in effect. AIPBA alleged that FMCSA violated the APA by issuing the regulations without notice and comment. FMCSA had issued the regulations pursuant to 5 U.S.C. § 553(b)(3)(B), which provides an exception from notice and comment rulemaking where notice and comment is “impracticable, unnecessary, or contrary to the public interest.” AIPBA filed the Eleventh Circuit action after voluntarily dismissing an earlier district court challenge in Association of Independent Property Brokers and Agents, Inc. v. Foxx, et al. (M.D. Fla. 13-342).

On November 21, 2013, AIPBA filed a “Time Sensitive Motion for Interlocutory Injunction or Temporary Stay,” asking the court to stay enforcement of FMCSA’s final rule by the December 1, effective date so the Court could rule on its petition for review. On or after December 1, FMCSA would start revoking broker licenses under its final rule. Petitioner argued in its motion that (1) it had a substantial likelihood of prevailing on the merits because FMCSA violated the APA through improper rulemaking, (2) it faced irreparable harm absent a stay because enforcement of the rule would result in the revocation of broker licenses, (3) AIPBA faced greater harm from enforcement of the final rule than a stay would cause

respondents, and (4) granting the stay would serve the public interest.

On November 22, FMCSA opposed AIPBA's motion, arguing that AIPBA had not shown a substantial likelihood of success on the merits and that the balance of harms counseled against a stay. On November 26, the court denied AIPBA's injunction request and indicated that "[a]ny motion for reconsideration of this Order shall be treated as a non-emergency matter." AIPBA has not sought reconsideration of the court's Order.

On February 10, 2014, AIPBA filed a Consent Motion to Stay Briefing Schedule pending FMCSA's decision on a petition for exemption that it filed under 49 U.S.C. § 13541 in a separate agency proceeding. In the Section 13541 proceeding, AIPBA seeks an exemption from MAP-21's \$75,000 financial responsibility requirement for all brokers and freight forwarders. In its motion to stay, AIPBA indicated that if FMCSA granted an exemption, its petition for review would be moot. The court did not rule on AIPBA's motion. Accordingly, on February 24, AIPBA filed its initial merits brief pursuant to the court's briefing schedule.

AIPBA argues that FMCSA violated the APA by issuing its final rule without notice and comment. AIPBA asserts that notice and comment rulemaking was not "impracticable, unnecessary, or contrary to the public interest," arguing that this APA statutory exemption must be read narrowly and that the agency has the burden of showing that it is applicable. Second, AIPBA argues that the final rule does not fall within the statutory exemption because the agency misread 49 U.S.C. § 13906.

United States Asserts that FMCSA Civil Penalty is Not Dischargeable in Bankruptcy

On October 21, 2013, the United States filed an adversary complaint on behalf of FMCSA in a Chapter 7 bankruptcy filed by Derrick Jones doing business as (dba) Destiny Tours, a private motor carrier. United States v. Derrick L. Jones dba Destiny Tours, (Bankr. N.D. Ohio, No. 13-03152). Jones had defaulted on a \$27,000 Notice of Claim that the agency issued based on his exceeding the scope of its private motor carrier operating authority by conducting interstate for-hire transportation of passengers.

Jones operated Destiny Tours with a single 1993 motorcoach that he had purchased in 2012 for \$33,000. As a private motor carrier, Jones did not have authority to conduct for-hire interstate operations. FMCSA investigators discovered that Jones was advertising for-hire transportation to sports games and other events and observed him accepting payments from passengers for transportation to out-of-state sporting events.

On June 19, 2013, Jones dba Destiny Tours filed for Chapter 7 bankruptcy and listed among his debts the FMCSA \$27,000 civil penalty. Jones failed to list the 1993 motorcoach as one of his assets.

In its adversary complaint, the United States seeks a determination that the FMCSA penalty issued against Jones is non-dischargeable under 11 U.S.C. § 523(a)(7) as a non-pecuniary penalty owed to the federal government. The United States filed a motion for summary judgment on February 28, 2013. The motion submits that the civil penalty imposed in FMCSA's final

order satisfies the requirements of 11 U.S.C. § 523(a)(7) for a debt excepted from discharge “to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty.” The penalty meets the three criteria that must be satisfied for a debt to be deemed excepted from discharge under this section: (1) it must be for a fine, penalty, or forfeiture; (2) it must be payable to and for the benefit of a governmental unit; and (3) it must not be compensation for actual pecuniary loss. Section 523(a)(7) applies to both civil and criminal penalties, and the United States argues that it should be applied to this civil penalty.

TransAm Trucking Challenges Agency’s Compliance with Settlement Agreement

On January 17, 2014, TransAm Trucking, Inc. (TransAm) filed parallel actions in the U.S. Court of Appeals for the Tenth Circuit, TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 14-9503), and the U.S. District Court for the District of Kansas, TransAm Trucking, Inc. v. FMCSA (D. Kan. No. 14-02015), alleging that FMCSA failed to comply with a settlement agreement. TransAm and FMCSA executed a settlement agreement on October 17, 2013, settling TransAm’s previous petition for review with the Tenth Circuit, TransAm Trucking, Inc. v. FMCSA (10th Cir. No. 13-9572). TransAm’s previous petition for review challenged FMCSA’s citation of a violation of 49 C.F.R. § 395.8(k)(1) and the resulting proposed “conditional” safety rating. Pursuant to the settlement agreement, FMCSA agreed to issue TransAm an amended compliance review that did not contain any reference to the violation or the proposed “conditional” safety rating.

FMCSA removed the “conditional” rating from the compliance review, leaving the document as an unrated review. Because the initial investigation of TransAm had been a focused investigation rather than a comprehensive compliance review consistent with the full safety rating methodology procedures in Appendix B to 49 C.F.R. Part 385, the investigation could not have resulted in a “satisfactory” safety rating. Therefore, the amended compliance review issued pursuant to the settlement agreement did not include any safety rating. TransAm has a current “satisfactory” safety rating, however, due to corrective action taken pursuant to 49 C.F.R. § 385.17.

TransAm claims in both of its actions that a “Compliance Review” by regulatory definition must contain a safety rating and that FMCSA’s failure to issue TransAm an amended compliance review that contains a “satisfactory” safety rating violates the settlement agreement. In its Tenth Circuit petition for review, TransAm asserts its claim as an appeal under the Administrative Procedure Act and alleges that an email from FMCSA’s counsel at the Department of Justice to TransAm’s litigation attorney stating that FMCSA had complied fully with the settlement agreement constitutes a “final order” within the meaning of the Hobbs Act, 28 U.S.C. § 2342. In its district court action, TransAm asserts jurisdiction under 28 U.S.C. § 1346(a)(2) (the “Little Tucker Act”) or in the alternative 28 U.S.C. § 1331. The complaint asserts two counts: (1) breach of contract, for which TransAm seeks \$10,000 damages; and (2) a violation of due process, in which TransAm seeks a declaratory judgment that the settlement agreement requires FMCSA to issue a compliance review with a “satisfactory” safety rating. On February 20, the parties submitted briefs to the Tenth Circuit addressing the court’s appellate jurisdiction.

TransAm also submitted a motion for transfer to the district court pursuant to 28 U.S.C. § 2347(b). Briefing on the merits in the Tenth Circuit is suspended pending further order of the court.

Federal Railroad Administration

Ninth Circuit Hears Oral Argument in Challenge to FRA's Interpretation of the "Designated Terminal" Provision of the Hours of Service Laws

On December 3, 2013, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in United Transportation Union v. LaHood, et al. (9th Cir. No. 11-73258), in which the United Transportation Union (UTU) challenged FRA's application of the "designated terminal" provision of the hours of service laws (HSL).

In a May 18, 2012, letter to FRA, UTU claimed that the Union Pacific Railroad's (UP) establishment of a designated terminal at Big Rock/Wash, California would violate the existing collective bargaining agreement (CBA) with UP and sought an order from FRA to prevent the establishment of the proposed designated terminal. When FRA investigated UTU's claims, UP responded that the proposed designated terminal is to accommodate new service and that the CBA permits such a designated terminal to be established on a trial basis while negotiations continue or the matter is submitted to arbitration. In FRA's September 30 response letter to UTU, the agency agreed with UTU that the HSL require that the location of designated terminals be determined by reference to

CBAs applicable to a particular crew assignment, but FRA pointed out that the agency lacks the statutory authority to make that determination. FRA's letter further stated that only a body duly constituted under the Railway Labor Act is authorized to render such a determination. On October 28, 2012, UTU filed a petition for review challenging FRA's decision.

UTU argues that FRA's conclusion that it did not have the authority to review and interpret CBAs is arbitrary and capricious because (1) FRA has the sole authority to enforce the HSL to ensure that railroads comply with its designated terminal provisions and (2) the duty to interpret CBAs is ministerial. UTU further argues that even if the Ninth Circuit determined that FRA does not have the authority to review CBAs, UP cannot unilaterally create a designated terminal. Furthermore, UP has the burden of proving that an agreement had been reached with UTU regarding the establishment of such a designated terminal.

In response, FRA argues that it was not arbitrary and capricious in concluding that it does not have the statutory authority to interpret CBAs because (1) only a body duly constituted under the Railway Labor Act is authorized to interpret CBAs, (2) FRA has historically maintained this position, and (3) analyzing CBAs is not a ministerial duty, but a substantive one, which falls outside of FRA's authority and expertise. Additionally, FRA argues that the resolution of whether UP unilaterally created a designated terminal ultimately depends on the substance of the CBA and requires an interpretation of the CBA, which is beyond FRA's statutory authority.

At oral argument, the panel's questions to both parties focused primarily on whether FRA has the authority to review CBAs and

whether such a review is ministerial in nature.

Federal Transit Administration

Court Holds Summary Judgment Hearing in Lawsuits Challenging the Regional Connector Light Rail Project in Los Angeles

On February 24, 2014, the U.S. District Court for the Central District of California in the Regional Connector litigation held a hearing on cross motions for summary judgment (MSJ). At the start of the hearing, the Judge issued a tentative ruling. He indicated that he planned to grant in part and deny in part each of the motions. He asked for additional briefing on standing from plaintiff Flowers Associates.

Previously, plaintiffs filed an MSJ challenging FTA's Record of Decision (ROD) for the Regional Connector Light Rail Project in Los Angeles. Today's IV, Inc. v. FTA, et al. (C.D. Cal. No. 13-00378) (Today's IV); Japanese Village, LLC v. FTA, et al. (C.D. Cal. No. 13-00396) (Japanese Village); 515/555 Flower Associates, LLC v. FTA, et al. (C.D. Cal. 13-00453) (Flower Associates). The Regional Connector Project is a 1.9-mile light rail project connecting the existing Metro Blue, Gold, and Exposition lines through downtown Los Angeles. The Today's IV and Flower Associates lawsuits and plaintiffs' MSJ in those lawsuits primarily allege that FTA and the Los Angeles County Metropolitan Transportation Authority (LACMTA), the project sponsor, violated NEPA by failing to adequately consider alternatives to and impacts from cut-and-cover construction along Flower Street. The Japanese Village

lawsuit and plaintiff's MSJ in that lawsuit alleges that FTA and LACMTA violated NEPA by failing to review impacts related to construction and operating an underground light rail line under the Japanese Village Plaza. FTA and LACMTA filed cross motions for summary judgment in opposition.

Maritime Administration

Court of Federal Claims Contract Decision Appealed by Government and Cross-Appealed by Contractor

The United States has appealed one aspect of the otherwise favorable Court of Federal Claims decision in United States v. Veridyne (Fed. Cir. No. 13-5011). On July 6, 2012, the lower court in Veridyne, Inc., v. United States, 107 Fed. Cl. 762 (Fed. Cl. 2012) imposed penalties of \$1,397,000 under the False Claims Act (FCA), imposed a \$568,802 penalty under the anti-fraud provisions of the Contract Disputes Act (CDA) equal to the fraudulent amounts invoiced, and found Veridyne's claim was subject to forfeiture under the Special Plea in Fraud provision of 28 U.S.C. § 2514. Notwithstanding these findings, the court granted Veridyne \$1,068,636 in quantum meruit, the amount of funding that remained on the task orders for the services that had been rendered and accepted.

The government appeals the decision to allow Veridyne to recover in quantum meruit amounts that the court had held were subject to forfeiture under the Special Plea in Fraud, 28 U.S.C. § 2514. The government argues that allowing such a recovery is contrary to the purpose of the Special Plea in Fraud statute. In its filings, Veridyne argued that the court did not err in

allowing such a recovery, citing FCA cases where the Court allowed quantum meruit recovery while ignoring the fact that in those cases the special circumstances necessary for forfeiture under the Special Plea in Fraud were not found. The government argues that those cases are distinguishable because here, the court found the requisite elements for forfeiture and that a subsequent award under quantum meruit thus improperly negates the purpose of the Special Plea in Fraud statute.

In its cross-appeal, Veridyne argues that the court erred in finding Veridyne's proposal, which resulted in contract modification, constituted an FCA violation, alleging that there were no false statements in the proposal and no fraudulent conduct. Veridyne also argues that since the proposal was clear, and MARAD officials were well aware of what Veridyne was proposing, there was no falsity and no FCA violation. With regard to the FCA penalties imposed, Veridyne argues that assuming its proposal for the contract extension was false, that was only one act and, therefore, only one penalty should be imposed. Veridyne's brief does not to refute the extensive case law relied upon by the court to impose a penalty for each of the 127 invoices submitted under the fraudulently obtained contract. Veridyne also argues that the court erred in finding that a portion of Veridyne's CDA claim violated the CDA's anti-fraud provision. Veridyne argues that there was no CDA fraud because it relied upon advice of counsel, an argument the government refutes by citing to the court's rejection of the advice of counsel defense because of Veridyne's failure to present any evidence in support of this contention other than self-serving statements of its President. The court found his credibility questionable and his statements "a study in evasiveness."

Anchorage Sues MARAD over Port Expansion Project

On February 28, 2014, the Municipality of Anchorage filed suit against the Maritime Administration in the U.S. Court of Federal Claims. The Municipality in Anchorage v. United States (Fed. Cl. No. 14-166) seeks unspecified damages for breach of contract in connection with the Port of Anchorage Intermodal Expansion Project (the Project).

Pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), all funds for the Project (whether Federal or non-federal) were transferred to MARAD to be administered by the Administrator. In 2003, MARAD and Anchorage entered into a Memorandum of Understanding (MOU) establishing a relationship for the purpose of expanding the Port of Anchorage.

Under the MOU, MARAD administered the funding by contracting with Integrated Concepts and Research Corporation (ICRC) as the primary contractor responsible for undertaking the project. Construction began in 2008, but the contractors encountered significant difficulties. Subsequent studies showed that the Project design was unsuitable for the location, which resulted in the significant construction difficulties encountered.

In 2011, multiple subcontractors filed claims against ICRC for equitable adjustment resulting from the difficult conditions. ICRC, in turn, filed a claim against MARAD asserting the subcontractor's claims and other claims. After several months of negotiation, MARAD settled all contractor claims.

In 2013, Anchorage sued ICRC and several subcontractors in Alaska state court (subsequently removed to federal court) for negligence and breach of contract, asserting rights as a third-party beneficiary to the MARAD-ICRC contract.

Anchorage's complaint against MARAD seeks unspecified compensation for the damage it has suffered resulting from the project suspension and MARAD's subsequent settlement with the contractor. Specifically, Anchorage alleges three causes of action: (1) MARAD breached its contractual obligations under the MARAD-Anchorage MOU; (2) MARAD breached its implied duty of good faith and fair dealing under the MOU by settling the contractor claims without Anchorage's consent; and (3) MARAD breached its duty to Anchorage as a third-party beneficiary to the MARAD-ICRC contract by failing to enforce its contract rights in response to ICRC's deficient work.

National Highway Transportation Safety Administration

Federal Circuit Upholds Dismissal of Complaint Claiming that Vehicle Standard Denied Plaintiff His Intellectual Property Rights

On February 18, 2014, the U.S. Court of Appeals for the Federal Circuit issued its decision in Michelotti v. United States, 2014 WL 593558 (Fed. Cir. 2014) affirming the decision of the U.S. Court of Federal Claims denying patentee's motion to amend to add a patent infringement case and dismissing the claim for lack of subject matter jurisdiction.

Michelotti holds a patent for a system that automatically activates an automobile's hazard-warning lights when the system detects rapid deceleration indicative of sudden braking. This system is prohibited in the United States under Federal Motor Vehicle Safety Standard (FMVSS) No. 108. Michelotti sued the United States, alleging that NHTSA exceeded its authority under the Highway Safety Act of 1970 by prohibiting enhanced brake light systems and alleging that he had been denied "the rights and benefits of intellectual property ownership."

The panel first addressed the denial of Michelotti's motion for leave to amend his complaint. The court agreed with the Court of Federal Claims that the allegations in Michelotti's amended complaint do not make out a claim of patent infringement against the United States under 28 U.S.C. § 1498(a) because even if the brake lighting system installed in certain Mercedes-Benz vehicles infringed Michelotti's patent, NHTSA's grant of an exemption from FMVSS No. 108 to Mercedes "does not equate to use or manufacture of Michelotti's invention 'by or for the United States,' as is required to state a claim under 28 U.S.C. § 1498(a)."

The panel then reviewed the dismissal for lack of subject matter jurisdiction de novo. The court held that none of Michelotti's claims against NHTSA provided a basis for Tucker Act jurisdiction in the Court of Federal Claims. To satisfy the jurisdictional requirements of the Tucker Act, there must be a separate source of law that creates a substantive right to recover money damages from the United States.

First, Michelotti had argued that NHTSA has "den[ied] a potentially life-saving automobile safety system to the American

People,” which he contended implicates a constitutional “right to life and protection from injury.” The court found that to the extent this invoked due process rights, it was insufficient as the Due Process Clause of the Fifth Amendment is not money-mandating. The court also held that the Due Process Clause of the Fourteenth Amendment does not apply to the federal government and also is not money-mandating.

The court also found that to the extent that plaintiff’s allegation that NHTSA denied him the rights and benefits of intellectual property ownership was intended to make out a claim under the Takings Clause of the Fifth Amendment, he would have had to allege “that the government, by some specific action, took a private property interest for a public use without just compensation.” The court found that the United States has not taken any property interest belonging to Michelotti. A patent does not provide a property right against independent statutory or regulatory safety-based prohibitions on making, using, or selling the invention. Therefore, NHTSA’s promulgation of FMVSS No. 108, which bars automobiles in the United States from using a system like that claimed in the patent, does not take Michelotti’s patent rights.

Finally, to the extent that Michelotti is alleging a violation of the APA, the APA also does not authorize an award of money damages and therefore does not provide a basis for Tucker Act jurisdiction.

The court found that there was no other basis for jurisdiction and that transfer to another court was not appropriate under 28 U.S.C. § 1631.

Court Enters Judgment and Decree of Forfeiture for Several Motor Vehicles

On January 14, 2014, the U.S. District Court for the Southern District of Ohio entered a decree of forfeiture for defendant merchandise, including motorcycles, in United States v. Thirty-Six (36) 300cc on Road Scooters, Model WF300-SP, et al., 2013 WL 6710893 (S.D. Ohio No. 2014). The United States had previously filed a verified complaint, which included an affidavit by one of NHTSA’s Safety Compliance Engineers discussing how various motor vehicles and motor vehicle equipment imported by Wildfire Motors failed to comply with applicable Federal Motor Vehicle Safety Standards. Wildfire Motors withdrew its claim to the defendant merchandise in December 2013. The district court found that the verified complaint stated a claim and that there was probable cause for the seizure of the merchandise under 19 U.S.C. §§1595a(c)(2), 1603 and 1604. In light of its findings, the court decreed that the defendant merchandise was attempted to be imported into the United States in violation of the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, and the regulations promulgated thereunder and/or in violation of the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. Ch. 301 and the regulations promulgated thereunder. The court ordered the defendant merchandise forfeited to the United States.

DOT Files Opposition to Rear Visibility Standard Mandamus Petition

On December 20, 2013, DOT filed its brief in opposition to a Petition for Writ of Mandamus pending in the U.S. Court of Appeals for the Second Circuit in

Gulbransen v. Foxx (2d Cir. 13-3645), relating to the issuance of motor vehicle rear visibility standards. The petition was filed in September 2013 by Greg Gulbransen, a pediatrician who struck and killed his son in a backover accident in 2002; Susan Auriemma, a parent who backed over her child in a non-fatal accident several years ago; and three consumer and safety advocacy groups (Consumers Union; Advocates for Highway and Auto Safety; Kids and Cars, Inc.). The statute requiring DOT's rear visibility rulemaking is named for Gulbransen's son, Cameron. The petitioners asked the court to order DOT to issue a rear visibility standard within 90 days, contending that the governing statute obligated DOT to issue a final rule on rear visibility within three years of the law's enactment, *i.e.*, by February 28, 2011. Though the law permits DOT to extend the deadline if it "cannot be met," petitioners contend that DOT has delayed the issuance of the rule long beyond what Congress intended, and has failed to offer sufficient justification for the delay.

In its brief in response to the petition, DOT contended that the extraordinary remedy of mandamus is inappropriate, because DOT has not failed to meet an unequivocal statutory command. The statute explicitly provides the Secretary of Transportation with the authority to extend the statutory deadline upon notice to Congress, and such consultations between the political branches are outside of the court's purview. Furthermore, DOT argued, the Secretary acted rationally and within his discretion in deciding to consider additional real-world evidence about the performance of rearview video systems before issuing a final rule.

The petitioners filed a reply brief on January 10, 2014, noting that DOT had provided a draft final rule to the Office of Management

and Budget after the filing of a brief opposing mandamus in this case and contending that this step demonstrated that a rule could be finalized expeditiously.

The court has scheduled a hearing on the mandamus petition for April 1.

Pipeline and Hazardous Materials Safety Administration

D.C. Circuit Remands Butane Fuel Cell Cartridge Rule

On January 31, 2014, the U.S. Court of Appeals for the District of Columbia Circuit in Lilliputian Systems, Inc. v. PHMSA, 741 F.3d 1309 (D.C. Cir. 2014), remanded without vacating a PHMSA rule concerning the carriage of butane fuel cell cartridges on aircraft. Petitioner Lilliputian Systems, Inc. (Lilliputian) manufactures butane fuel cell cartridges that are used to power electronic devices, like cellphones. PHMSA's rule addressed an amendment to the International Civil Aviation Organization (ICAO) Technical Instructions that allowed two fuel cell cartridges to be carried in checked baggage. PHMSA issued a final rule addressing harmonization of its standard with the ICAO standard in January, 2011. In the final rule, based upon FAA's concerns, PHMSA declined to harmonize its standard with ICAO's international regulations and prohibited butane fuel cell cartridges in checked baggage, but allowed two (2) butane fuel cell cartridges in carry-on baggage.

In its petition for review, Lilliputian challenged the prohibition in a final rule against airline passengers and crew carrying butane fuel cell cartridges in their checked

baggage as arbitrary and capricious. Specifically, Lilliputian contended that the prohibition on flammable-gas fuel cell cartridges in checked airline baggage is arbitrary and capricious because PHMSA failed to provide any explanation of its risk assessment methodology, thereby “making it impossible . . . to counter the . . . unstated rationale.” Further, Lilliputian contended, it failed to provide a reasoned explanation for its prohibition, including failing to explain why it declined to follow the presumption that federal hazardous materials regulations be harmonized with international standards, how and why it disagreed with the safety analyses considered sufficient by international regulators, why it disagreed with FAA test results regarding fuel cell cartridge safety, and why it prohibited butane fuel cell cartridges when it permits other, less stringently tested items containing butane in checked baggage.

The court found that the only hint that PHMSA considered the disparate treatment was a statement about cumulative risk of additional passenger authorizations: “We [PHMSA] believe that when new passenger authorizations are granted consideration must be given to the cumulative risk of the new authorization combined with existing authorizations.” The court stated that the most that can be gleaned from this statement is that PHMSA “considered” the “cumulative risk” of permitting flammable-gas fuel cell cartridges in checked baggage alongside medicinal and toiletry articles containing flammable gas. It says nothing about how it evaluated the cumulative risk or why its evaluation led to the prohibition of one category of similarly situated articles and not the other. More significantly, the “cumulative risk” statement does not respond to Lilliputian’s comments pointing out that medicinal and toiletry articles containing flammable gas are less safe in

airline luggage than fuel cell cartridges containing flammable gas, implying that if only one of the two kinds of products were to be permitted in checked baggage due to concerns about “cumulative risk,” it should be the latter. Thus, the court held that PHMSA failed to provide the required “reasoned explanation and substantial evidence” for this disparate treatment. However, because it is “plausible” that PHMSA “can redress its failure of explanation on remand while reaching the same result,” and because PHMSA states without contradiction that vacating the prohibition would “cause unnecessary disruption for third parties who own or manufacture” other types of fuel cell cartridges that are permitted in checked baggage, the court remanded the final rule to PHMSA without vacating it to allow the agency to provide further explanation for the prohibition.

Court Denies Preliminary Injunction in Challenge to New Enbridge Oil Pipeline

On November 13, 2013, the U.S. District Court for the District of Columbia denied plaintiffs’ motion for preliminary injunction in Sierra Club, et al. v. Bostick, et al., 2013 WL 6009919 (D.D.C. 2013), a challenge to government actions related to Enbridge, Inc.’s Flanagan South tar-sands crude oil pipeline (Flanagan South) by the U.S. Army Corps of Engineers (Corps), the Bureau of Indian Affairs (BIA), and other federal agencies, including PHMSA. Flanagan South would transport tar-sands crude from Illinois to Oklahoma through environmentally sensitive areas, including federal wildlife refuges. Plaintiffs allege that the agencies approved construction of the new pipeline without any environmental

review or public notice, as required by NEPA.

In denying plaintiffs' motion for a preliminary injunction, the court stated that on the record before it, plaintiffs "significantly overstated the breadth of federal involvement in the pipeline project" and "failed to establish sufficiently that applicable federal statutes and regulations would require the extensive environmental review process that Plaintiffs seek." The court also found that plaintiffs fell short of "demonstrating that irreparable harm will result if the current construction proceeds" and that "the balance of harms and public interest factors weigh in plaintiffs' favor."

The case is now before the court on the government's motion to partially dismiss plaintiff's complaint. The government argues that because no federal agency may authorize construction or siting of the

pipeline, compliance with NEPA is limited to the specific areas of discretionary federal control, such as water crossing that the Corps approves and crossings of Indian lands that BIA must approve. With respect to PHMSA, Sierra Club argues that PHMSA's consideration and ultimate approval of an oil spill response plan (OSRP) that is required prior to the start-up of a pipeline is a federal action subject to NEPA. Consistent with Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), PHMSA argues that because of the language set out in 33 U.S.C. § 1321(j)(5) and 49 C.F.R. Part 194, which require PHMSA to approve an OSRP if it meets specific criteria, its review of OSRPs is a non-discretionary action and therefore not subject to NEPA. However, because Enbridge has not yet submitted a proposed plan, PHMSA has also argued that this claim by plaintiffs is not yet ripe.

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