10TH ANNIVERSARY EDITION

DOT LITIGATION NEWS

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Happy Anniversary

With this issue of the *DOT Litigation News*, the Office of the General Counsel marks the publication's tenth anniversary. The first issue, dated May 23, 2001, ran fourteen pages and reported sixteen cases. Among the highlights of that first issue were Supreme Court cases involving such issues as the constitutionality of DOT's Disadvantaged Business Enterprises programs, "English only" drivers license regulations, and warrantless arrests for seat belt law violations. The issue also covered a range of other cases such as environmental challenges to highway projects, a challenge to an airworthiness directive, a FOIA matter, a False Claims Act case, and a challenge to Coast Guard inspection regulations.

Today, we no longer report Coast Guard matters, but in all other respects, the number and diversity of the cases reported in *DOT Litigation News* has grown. That diversity reflects the wide range of issues that are the subject of DOT litigation, as well as the diversity of talent and expertise of the Department's litigators that can mean the difference between winning and losing a case. And the growth in the number of cases reported is testament to the importance of communicating and sharing our knowledge among one another.

Without the timely contributions of case discussions provided twice a year by each legal office within the Department, this publication would not be possible. We therefore dedicate the Tenth Anniversary Edition of the *DOT Litigation News* to all of those who have made those contributions through the years. We hope that the *DOT Litigation News* will continue to be an instructive guide to DOT litigation and a useful tool for our readers. We welcome your comments and suggestions as we begin our second decade.

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Supreme Court Litigation

Supreme Court Hears Carmack Amendment Case

On March 24, 2010, the Court heard oral argument in Kawasaki Kisen Kaisha Ltd., et al. v. Regal-Beloit Corp., et al. (Nos. 08-1553 & 08-1554), in which the Court will resolve a split in the circuits regarding the application of the Carmack Amendment to the Interstate Commerce Act with regard to the inland leg of international intermodal shipments covered by a single "through" bill of lading. On December 30, 2009, the United States filed an amicus brief in support of the petitioner ocean and rail carriers.

In this case, an ocean carrier, Kawasaki Kisen Kaisha Ltd. (K-Line) issued a through bill of lading covering the entire transportation of containerized freight from China to points in the U.S. Midwest. The ocean carrier contracted with Union Pacific railroad to transport the cargo from Long Beach, California to its ultimate destinations. The train on which the freight was carried derailed, and the shippers sought to recover for damages. The dispute in this case centers on the applicable law, which will determine the validity of provisions in the bill of lading and railroad contract that limit the liability of the carriers for loss or damage and that select a particular forum for bringing damage claims.

In addition to the Carmack Amendment (Carmack), the statutes relevant here are the Carriage of Goods by Sea Act (COGSA) and provisions of the Interstate Commerce Act (ICA) governing exemptions and railroad contracts. Carmack imposes a regime of strict liability on rail carriers for damage to freight in the course of certain rail transportation. Shippers and railroads may agree to different liability terms, but only if the carrier has first offered a rate that provides full coverage for loss or damage. Carmack also prescribes the venues in which actions to recover damages may be brought. COGSA governs international ocean carriage and may be extended by shippers and carriers to inland transportation. It also allows parties to agree on forum selection and on liability limits above a certain minimum. Finally, traffic (like containerized freight) that has been exempted from the ICA is still subject to Carmack, but traffic that is transported according to the terms of a contract with a railroad is not subject to any part of the ICA, including Carmack.

In the decision below, the Ninth Circuit held that K-Line was a "rail carrier" within the meaning of the ICA and that Carmack applied to the traffic at issue, thereby negating the parties' selection of a foreign forum (Tokyo), which did not comport with Carmack's prescriptions. The court also concluded that the provision of the ICA that allows rail contracts to set *all* the parties' rights and obligations is not applicable to exempt traffic like that at issue, which must therefore still comply with Carmack. The appeals court remanded for the district court to determine whether the shippers had been offered full liability coverage in compliance with Carmack prior to agreeing to the limited liability contained in the bill of lading.

The U.S. amicus brief argues that the terms of Carmack restricted its application to rail transportation that was

either wholly interstate within the United States or to "adjacent foreign countries" (Canada and Mexico). Carmack placed liability in these circumstances on railroads that receive freight from shippers, not on rail carriers that deal with and obtain freight from ocean carriers for inbound international movements and that never have any contact with shippers themselves. The government also contended that the Ninth Circuit had erred in deeming K-Line a rail carrier within the meaning of the ICA.

The U.S. brief asserted in the alternative that if the Court nonetheless concluded that Carmack applied in this case, the Ninth Circuit correctly held that a railroad transporting exempt traffic cannot relieve itself of Carmack's obligations by executing a contract because the exemption encompassed the provision of the ICA that authorizes such contracts so that it no longer applied. Finally, if Carmack did apply, the government considered that the rail carrier in this case had complied by offering full liability coverage to the ocean carrier from which it had received the freight.

The Ninth Circuit opinion is available at: http://www.ca9.uscourts.gov/datastore/opinions/2009/02/23/0656831.pdf.

Certiorari Denied in FAA Air-traffic Controller Employment Law Case

On November 2, 2009, the Supreme Court denied certiorari in Filebark v. DOT (Cert. Pet. No. 08-1415). The United States had agreed with petitioners that the case should be heard by the Court. The original complaint in this case was filed by bargaining unit employees of the Albuquerque Air Route Traffic Control Center (ARTCC) in 2003 seeking an upgrade of the facility. Petitioners had claimed that the Albuquerque ARTCC was misclassified and sought to contest FAA's facility level classification through use of the Administrative Procedure Act (APA) and the Civil Service Reform Act (CSRA). The complaint was amended in October 2004 to include supervisory employees of the facility.

The U.S. District Court for the District of Columbia dismissed the claims of the bargaining unit controllers in 2006, holding that the CSRA precluded bargaining unit employees from filing suit with regard to any matter that could be the basis of a grievance under an applicable collective bargaining agreement. In 2008, the District Court dismissed the claims of the non-bargaining unit controllers on the basis that the CSRA precluded any civil action related to federal employment, except those forms of judicial review expressly authorized by the CSRA. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's ruling, essentially finding that the CSRA precluded judicial appeal of the petitioners' claims.

This case implicated two broad issues in federal employment law: first, whether the CSRA establishes a right to seek a judicial remedy for grievances covered by the negotiated grievance procedure in a collective bargaining agreement, and second, whether the CSRA precludes federal employees from using the APA

as a basis for employment related relief. The Supreme Court's decision to deny certiorari leaves in place a split in the circuits over the availability of separate, statutory-based review of employee grievances.

The D.C. Circuit decision is available at: http://pacer.cadc.uscourts.gov/docs/common/opinions/200902/08-5163-1164927.pdf.

Certiorari Denied in Challenge to the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign

On January 19, 2010, the Supreme Court in County of Delaware v. FAA (Cert. Pet. No. 09-603) and County of Rockland v. FAA (Cert. Pet. No. 09-607) denied petitions for certiorari seeking review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit that dismissed in part and denied in part claims against the FAA's Record of Decision (ROD) for the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign Project. In County of Rockland v. FAA, 2009 WL 1791345 (D.C. Cir. 2009), the D.C. Circuit held that the ROD complied with NEPA, section 4(f) of the DOT Act, and the Clean Air Act (CAA). The court held that FAA's environmental impact statement (EIS) was "procedurally sound and substantively reasonable." The court declined to issue an opinion on many of petitioners' arguments, indicating that it had "considered and found no merit in the petitioners' other arguments." Petitioners filed three requests for rehearing or rehearing en banc of the court's decision, which the court denied without opinion. In November 2009, petitioners filed two Petitions for Writ of Certiorari. The Solicitor General waived the United States' right to respond to these petitions.

Supreme Court Invites Views of the United States in Railroad Revitalization and Regulatory Reform Act Case

On February 22, 2010, the Supreme Court entered an order in CSX Transportation, Inc. v. Alabama Department of Revenue (Cert. Pet. No. 09-10772) inviting the Solicitor General to file a brief expressing the views of the United States. The petition seeks review of a decision by the U.S. Court of Appeals for the Eleventh Circuit holding that Alabama's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is not subject to challenge under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).

Congress enacted the 4-R Act to help restore the financial stability of the railway system of the United States by placing railroads on an equal playing field with other state taxpayers. Thus, the 4-R Act prohibits States from using certain tax schemes to discriminate against railroads. Subsections (b)(1) to (3) forbid the imposition of higher assessment ratios or tax rates upon rail transportation property than upon "other commercial and industrial property." 49 U.S.C. § 1150(b)(1)-(3). Subsection (b)(4) is a catchall provision, which prohibits States from imposing "another

tax that discriminates against a rail carrier providing transportation." *Id.* at (b)(4). Furthermore, the 4-R Act creates a cause of action, which allows a railroad to challenge a State's alleged action of discrimination before a district court of the United States.

In this case, CSX argued below that an Alabama sales and use tax is discriminatory and thus prohibited by subsection (b)(4) of the 4-R Act. The State of Alabama and counties and municipalities within Alabama currently impose a general sales and use tax, which applies to a railroad's purchase, consumption, or use of diesel fuel. While the sales and use tax is generally applicable, the Alabama tax code expressly exempts motor carriers and water carriers. However, railroads are subject to the tax. Thus, based upon these exemptions, CSX argued below that the Alabama tax scheme is discriminatory. The Eleventh Circuit, relying on Circuit precedent involving the same Alabama tax in a case brought by another railroad, rejected CSX's argument, holding that Congress did not intend tax exemptions to be considered as part of a subsection (b)(4) analysis. In so ruling, the court applied in the non-property tax context the Supreme Court's analysis of allegedly discriminatory property tax exemptions in Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994).

While the Court in ACF Industries thoroughly analyzed subsection (b)(4), the Court's analysis in ACF Industries was based upon a property tax scheme. Thus, the Court did not reach the issue of whether its analysis also applies to non-property tax schemes. The Eighth Circuit, the Minnesota Supreme Court, and the Iowa Supreme Court refused to apply the Court's holding in ACF Industries to non-property tax schemes and have held that non-property tax exemptions are subject to challenge under subsection (b)(4). See Union Pac. R.R. v. Minn. Dep't of Revenue, 507 F.3d 693 (8th Cir. 2007); Burlington Nw., Santa Fe Ry. v. Lohman, 193 F.3d 984 (8th Cir. 1999); Burlington N. R.R. v. Comm'r of Revenue, 606 N.W.2d 54 (Minn. 2000); Atchison, Topeka & Santa Fe Ry. v. Bair, 338 N.W. 2d 338 (Iowa 1983). In contrast, the Ninth and Eleventh Circuits extended the Supreme Court's holding in ACF Industries to generally applicable non-property taxes and thus held that generally applicable non-property tax exemptions are not subject to challenge under the 4-R Act. See Norfolk S. Ry. v. Ala. Dep't of Revenue, 550 F.3d 1306 (11th Cir. 2008); Atchison, Topeka & Santa Fe Ry. v. Arizona, 78 F.3d 438 (9th Cir. 1996).

Departmental Litigation in Other Federal Courts

Second Circuit Invites Views of the United States in Case Involving Preemption of New York City Taxi Regulations

On December 17, 2009, the U.S. Court of Appeals for the Second Circuit entered an order in Metropolitan Taxicab Board of Trade v. City of New York (2d Cir. No. 09-2901) inviting the Solicitor General to file a brief expressing the views of the United States.

In this dispute, the U.S. District Court for the Southern District of New York enjoined New York City taxicab regulations on the grounds that they are preempted by two federal statutes: the Energy Policy and Conservation Act (EPCA), 49 U.S.C. § 32901 et seq., and the Clean Air Act (CAA). Under EPCA, the National Highway Traffic Safety Administration (NHTSA) administers the Corporate Average Fuel Economy (CAFE) program. The New York City Taxicab & Limousine Commission (TLC) had promulgated regulations to promote the purchase of hybrid and clean diesel taxicabs by taxicab owners by reducing the rates at which the taxicab owners may lease conventional taxicabs to drivers. On January 15, 2010, the United States filed an amicus brief in support of reversing the district court on the ground that the TLC regulations are not preempted. On January 22, the Second Circuit heard oral argument, at which the United States participated.

The taxicab owners, who prevailed in the district court, contend that the TLC regulations are preempted by EPCA because a "State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a) (emphasis added). The taxicab owners argue that the TLC regulations are "related to" federal fuel economy standards because, in their view, the regulations are a de facto mandate to taxicab owners to purchase fuel-efficient and low emission vehicles. The taxicab owners made similar arguments as to CAA preemption.

In contrast, New York City contends that the TLC regulations are not preempted by EPCA because they are not "related to" fuel economy standards. New York City contends that, under applicable law, the TLC regulations do not have the purpose or effect of regulating fuel economy. Instead, the TLC regulations are a permissible "incentive" to encourage taxicab owners to purchase and use hybrid or clean diesel taxicabs, not a mandate to taxicab owners dictating their purchasing decisions, or giving them no choice but to purchase hybrid or clean diesel vehicles.

In its brief, the United States argues that the Second Circuit does not need to determine whether the TLC regulations are "related to" fuel economy standards within the meaning of EPCA or the CAA. Instead, the government contends that the issue is the antecedent question of whether the City of New York has

adopted or enforced regulations of the type that Congress sought to preempt under EPCA or the CAA. The government states that while "Congressional intent cannot be determined with certainty, . . . it is plain that Congress did not intend – by establishing regulation of average fuel economy standards and new motor vehicle emission standards – to assert general federal control over the regulation of taxi services, an area that had been the subject of pervasive local regulation for decades prior to passage of the Clean Air Act and EPCA in the 1960s and 1970s."

The district court's decision in Metropolitan Taxicab Board of Trade v. City of New York is reported at 633 F.Supp.2d 83 (S.D.N.Y. 2009).

DOT Opposes Application of State Liquor Laws to Air Carrier

On February 10, 2010, the Justice Department filed an amicus brief on behalf of DOT in US Airways v. O'Donnell (10th Cir. 09-2271), an appeal of a district court decision holding that New Mexico could subject US Airways to State alcoholic beverage regulations if the airline serves alcoholic beverages on flights into and out of the State. Such regulations include a training regime for flight attendants serving alcoholic beverages on board. New Mexico's attempt to regulate the airline came after a US Airways passenger, who was served alcohol on a flight to New Mexico, caused a car accident with multiple deaths a few hours after landing. In its brief, the government argues that New Mexico's regulations as applied to an airline are preempted by the Airline Deregulation Act (ADA), which bars State and local regulations related to airline "prices, routes, and services." The brief also argues that the New Mexico regulations are preempted because on board alcohol service and flight attendant training is within the field of aviation safety reserved exclusively to the FAA, which has its own alcohol service and training requirements. The government also argues that the Twenty-first Amendment's grant of power to the states to regulate alcohol, if implicated at all, does not save New Mexico law because, under the circumstances of this case, the federal interest in airline competition and uniformity of safety regulation outweighs the State's interest. Ten former Secretaries of Transportation also filed an amicus brief supporting US Airways and arguing that New Mexico's attempted regulation was preempted by the ADA and FAA's safety regulatory regime. Oral argument in the case has not yet been scheduled.

Ninth Circuit Holds that Port of Los Angeles May Impose Certain Requirements on Motor Carriers

On February 24, 2010, the U.S. Court of Appeals for the Ninth Circuit in American Trucking Associations, Inc. v. City of Los Angeles, et al., 2010 WL 625055 (9th Cir. 2010) upheld a district court decision permitting the Port of Los Angeles to impose certain safety and security requirements on motor carriers operating at the Port through a mandatory concession agreement. The

concession agreements were intended to implement the Clean Trucks Program, impose requirements on motor carriers relating to port safety and security, and phase out the hiring of independent contractor carriers.

This is the Ninth Circuit's second decision in this case, in which the American Trucking Associations (ATA) seeks an injunction against the Los Angeles agreement, arguing that it violates the preemption provision of the Federal Aviation Administration Authorization Act (FAAAA), which preempts state and local regulation "related to a price, route, or service of any motor carrier." (ATA has not argued that implementation of the Clean Trucks Program is preempted.) DOT filed an amicus brief supporting ATA in the first appeal, in which the Ninth Circuit held in March 2009 that some of the provisions of the concession agreements were likely preempted by the FAAAA. Subsequently, a district court enjoined provisions of the agreement that involved economic regulation, such as the ban on independent contractors, but did not enjoin safety and security requirements that duplicated existing federal requirements or the Port's authority to bar carriers that do not comply with those requirements. ATA appealed again, and the Ninth Circuit agreed with the district court that the safety and security provisions fell under an exception to the preemption provision the permits state and local safety regulation. The appeals court also upheld the Port's authority to bar non-compliant carriers, though it stated that this issue might be reconsidered in further proceedings. Those proceedings include the ongoing district court case in which ATA seeks to broaden the preliminary injunction and make it permanent. That case is scheduled to go to trial on April 20. The Natural Resources Defense Council has intervened in the case in support of the Port of Los Angeles.

The Ninth Circuit's February 24 opinion is available at: http://www.ca9.uscourts.gov/datastore/opinions/2010/02/23/09-55749.pdf.

The Ninth Circuit's March 2009 opinion is available at: http://www.ca9.uscourts.gov/datastore/opinions/2009/03/20/0856503.pdf.

Air Charter Broker Challenges DOT's Interpretation of Aviation Consumer Protection Requirements

On December 14, 2009, CSI Aviation Services, Inc. (CSI) filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit to challenge a letter issued to the charter broker by DOT's Office of Aviation Enforcement and Proceedings warning it to cease and desist from further activity that would result in it engaging in indirect air transportation. CSI Aviation Services, Inc. v. DOT, et al. (D.C. Cir. No. 09-1307).

DOT had initiated an investigation into CSI in March, 2009 to determine whether the charter broker violated 49 U.S.C. §§ 41101 and 41712 and 14 C.F.R. part 399 by engaging in indirect air transportation without holding either economic authority from the Department or a certificate of public convenience

and necessity as required by statute. The records produced by CSI to DOT during the investigation revealed that CSI, through the GSA schedule, had acted as a principal and appeared to be entering into contracts with U.S. government agency charterers, and then also as a principal, entering into separate contracts with direct air carriers to operate the actual charter flights. Such indirect air transportation without proper economic authority or certification is unlawful and also violates aviation consumer protection statutes, which prohibit unfair and deceptive trade practices.

CSI denies that its actions are unlawful and has filed with DOT an application for exemption that seeks exemption from the statutory requirements that prohibit air charter brokers' contracts with U.S. government agencies. In its exemption application, CSI argues that it provides a vital service and that the need for consumer protections pertaining to charter brokers who deal with the public at large is not necessary for its contracts with U.S. government agencies that have unique safeguards in place not available to the travelling public.

CSI's opening brief is due on April 12, and DOT's responsive brief is due on May 12. Oral argument is not yet scheduled.

Commercial Motor Vehicle Operators Hours of Service Case Held in Abeyance

On March 3, 2010, the U.S. Court of Appeals for the D.C. Circuit granted the parties' joint motion to hold in abeyance further litigation in Public Citizen v. FMCSA (D.C. Cir. No. 09-1094). The parties filed the motion on October 26, 2009, after executing a settlement agreement pursuant to which FMCSA agreed to undertake a new rulemaking on hours of service (HOS) for commercial motor vehicle (CMV) operators. The agreement, which is silent on the content of any new rule, provides that FMCSA will forward to OMB a notice of proposed rulemaking within 9 months and publish a final rule within 21 months of the date of the settlement agreement, October 26, 2009.

Following notice and comment, FMCSA published its final HOS rules November 19, 2008 (73 Fed. Reg. 69,567). Public Citizen, Advocates for Auto and Highway Safety, Truck Safety Coalition, and the International Brotherhood of Teamsters filed a petition for review on March 9, 2009. The rules generally require that CMV drivers not drive more than 11 hours without taking 10 hours off-duty and not drive after 14 hours after coming on duty. The rules also allow a "restart" of the weekly on-duty limits if the driver is off duty for 34 consecutive hours. These provisions had been the subject of previous court challenge.

Since filing the motion to hold the case in abeyance, FMCSA has held four public listening sessions, tasked the Motor Carrier Safety Advisory Committee with examining HOS issues, and initiated work on the NPRM through a rulemaking team.

Hearing Held in Challenge to the Washington Metrorail Extension to Dulles

On February 26, 2010, the U.S. District Court for the Eastern District of Virginia heard arguments on defendants' motions to dismiss a challenge to the extension of the Washington metropolitan heavy rail system to Dulles Airport. The defendants in Parkridge 6 LLC et al. v. U.S. Department of Transportation et al. (E.D. Va. 09-1312) are DOT, FTA, FHWA, the Virginia Department of Transportation, and the Metropolitan Washington Airports Authority (MWAA).

The case, which was transferred from U.S. District Court for the District of Columbia, concerns 15 separate alleged violations of the FTA, FHWA, and FAA authorization statutes, the Virginia constitution, the Virginia Public-Private Partnership Act, and the terms of MWAA's lease of the Dulles access right-of-way from DOT. The primary reason for the hearing, as stated by the judge, was to provide a chance for plaintiffs to provide argument on why they have standing. The judge described the 131-page complaint as being "all over the waterfront" and stated that she would issue an opinion deciding the motions to dismiss soon.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Ninth Circuit Holds that Non-Pecuniary Damages May Be Awarded under Privacy Act

On February 22, 2010, the U.S. Court of Appeals for the Ninth Circuit in Cooper v. FAA, et al., 2010 WL 597486 (9th Cir. 2010) reversed the district court and held that "actual damages" under the Privacy Act is not limited to pecuniary damages. This case arises out of "Operation Safe Pilot," where the DOT Inspector General and the Social Security Administration Inspector General (SSA) examined data on pilots in northern California to determine whether any of them had reported medical issues to the SSA that had not been disclosed to the FAA on the pilot's medical application. The data revealed that Cooper had claimed disability from SSA based on his HIV status, but had failed to report that condition to the FAA. Thus, Cooper had falsified his pilot medical application on several occasions. Following his indictment, he pled guilty to a misdemeanor. He then sued FAA, DOT, and SSA for the improper disclosure of information under the Privacy Act. The district court held that the exchange and disclosure of Cooper's information was a breach of the Privacy Act, but that Cooper had no "actual damages" because he could not be compensated for pure "mental anguish" under the Privacy Act. Without addressing the other elements of a cause of action under the Privacy Act, the district court dismissed the complaint.

The Ninth Circuit disagreed. Although it noted a split in the circuits on the issue, the court concluded that the intent of Congress in enacting the Privacy Act was "to extend recovery beyond pure economic loss." The court came to this conclusion after considering the text of other sections of the Privacy Act, the purposes of the Act, and decisions interpreting the words "actual damages" under the Fair Credit Reporting Act, which Congress passed in a contemporaneous timeframe. The Ninth Circuit also rejected the argument that the government's waiver of sovereign immunity through the Privacy Act should be narrowly construed, with damages limited to economic loss. The court remanded the case to the district court for further proceedings. The government is currently considering whether to seek further review of the decision.

The Ninth Circuit opinion is available at: http://www.ca9.uscourts.gov/datastore/opinions/2010/02/22/08-17074.pdf.

Briefing Begins on the Sufficiency of Environmental Review for Runway Expansion at Fort Lauderdale Airport

On February 24, 2010, petitioners in City of Dania Beach, et al. v. FAA (D.C. Cir. Nos. 09-1064 & 09-1067) filed their opening brief. Petitioners, the Cities of Dania Beach and Hollywood, Florida and two Dania Beach residents, challenge FAA's Record of Decision (ROD) that approved the extension of Fort Lauderdale Airport's runway 9R/27L and other associated airport

projects. The ROD was based on FAA's Final Environmental Impact Statement (EIS) prepared pursuant to NEPA. Petitioners argue that FAA's decision to allow for expansion of the Fort Lauderdale Airport is legally flawed under NEPA, the DOT Act, Executive Order 11,990, DOT Order 5660.1A, and the Airport and Airway Improvement Act.

Following the filing of the administrative record, petitioners filed a Motion to Complete the Administrative Record, which FAA opposed. On January 8, 2010, the court referred the motion to the merits panel and has requested that copies of the proposed record items be supplied to the court for consideration. FAA's response brief is due April 23, 2010.

Briefing Scheduled in Challenge to FAA Decision Invalidating City of Santa Monica's Jet Ban

The U.S. Court of Appeals for the District of Columbia Circuit has issued the briefing schedule in City of Santa Monica v. FAA (D.C. Cir. No. 09-1233). This case arises from the City of Santa Monica's ordinance adopted on March 25, 2008, banning Category C and D aircraft operations from the Santa Monica Municipal Airport. After a lengthy administrative proceeding, FAA had invalidated the City's ordinance. The Aircraft Owners and Pilots Association and the National Business Aviation Association are participating as amici in support of FAA. The City of Santa Monica's brief is due April 5, 2010; FAA's brief is due June 4, 2010; amicus briefs are due June 21, 2010; petitioner's reply brief is due August 3, 2010.

FBO Challenges FAA Decision that Westchester Airport Did Not Discriminate in Authorizing Sale of Jet Fuel

In a petition for review filed on November 24, 2009, 41 North 73 West (Avitat) v. Westchester County (2d Cir. No. 09-48103), petitioner Avitat challenges an FAA's final decision under 14 C.F.R. part 16 finding that Westchester County is in compliance with its federal grant obligations regarding economic discrimination and exclusive rights. Avitat is a larger-class fixed-based operator (FBO) at the Westchester County Airport servicing larger general aviation aircraft (*i.e.*, with a maximum gross takeoff weight of over 50,000 lbs.). Westair and Panorama are limited FBOs that service smaller aircraft (50,000 lbs. or less). Avitat has a lease enabling it to dispense and sell jet fuel to any sized jet aircraft. The Westair and Panorama leases included the right to sell jet fuel to smaller aircraft under certain conditions if approved by the County.

The County eventually granted the smaller FBOs the right to dispense and sell jet fuel to smaller aircraft. In its initial complaint to FAA, Avitat argued that by providing Westair and Panorama with the right to dispense and sell jet fuel to smaller aircraft, and subsidizing their rent, the County was in violation of its federal grant obligations regarding grant assurances relating to economic nondiscrimination, exclusive rights, and fee and rental structure. Under the grant

assurances, the County must make its airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. Also, each FBO at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other FBOs making the same or similar uses of such airport and utilizing the same or similar facilities. In the decision under review, FAA found that the County was in compliance with its grant assurances and did not provide more favorable treatment to the smaller FBOs. On February 18, 2010, the court held a pre-argument conference. Petitioner's brief is due on April 22, 2010.

Court Agrees with U.S. that State Environmental Laws Not Preempted

On January 12, 2010, the U.S. District Court for the District of Connecticut issued its opinion in Goodspeed Airport, LLC v. East Haddam Inland Wetlands and Watercourses Commission, 2010 WL 148453 (D. Conn. 2010), rejecting the arguments of plaintiff, privately owned and operated Goodspeed Airport, that Connecticut Inland Wetlands and Watercourses Act (IWWA) and Connecticut Environmental Protection Act (CEPA) were completely preempted by federal aviation law. At the court's invitation, the United States filed a Statement of Interest on November 30, 2009, that denied any preemption in the circumstances of this case.

Goodspeed Airport is a privately owned airport that is open to the public but receives no federal funding. It is situated in a wetlands area subject to state environmental law that, inter alia, requires a permit to cut or trim trees. The airport wished to remove trees on airport property that extend into the navigable airspace and that allegedly pose a risk to continued safe operations. The airport declined to apply for a permit and brought suit seeking a declaratory judgment that federal law preempted the state law provisions at issue.

The airport advanced both express and implied preemption arguments. First, Goodspeed contended that pursuant to the Federal Aviation Act, FAA occupied the entire field of aviation safety and airspace management. The presence of the trees in navigable airspace necessarily placed Connecticut law in that field and required its preemption. Second, the airport claimed that the state statutory and regulatory provisions impermissibly affected the "prices, routes, and services" of air carriers at Goodspeed and were therefore preempted by the Airline Deregulation Act (ADA).

In its Statement of Interest, the government first asserted that the Federal Aviation Act did indeed reserve the field of aviation safety and airspace management exclusively for the FAA, but that Connecticut's environmental laws of general application do not by their terms intrude onto that field nor do they necessarily have any impact, and thus cannot be preempted in a purely facial challenge. The location of the trees on airport property and their

presence in the navigable airspace did not, by themselves, thereby place State law within the preempted field. The United States acknowledged that it was conceivable for even facially neutral state laws to be applied in an impermissible fashion, but because here no permit had been sought there was no occasion to determine whether any as applied challenge would succeed.

Second, the ADA preempts state law that relates to the "prices, routes, and services" of "air carriers" so as to prevent regulation of their economic or commercial decisions. Goodspeed contended that unless the trees were removed, commercial air carriers would have to alter their flights, their prices, and even their routes. The government countered that even if one or more air carriers operated at Goodspeed, the claimed impacts were not supported by evidence, and in this facial challenge those impacts were likely too remote and tenuous to warrant preemption. The government again acknowledged that it was conceivable for facially neutral statutory and regulatory provisions to be applied so as to have the "forbidden significant effect" on air carriers, but since there had been no application of Connecticut law here, there was no basis to judge such a challenge.

Finally, the United States explained that FAA regulations on obstructions and hazards in the navigable airspace (14 CFR part 77), which provide FAA with information allowing it to identify natural or manmade objects in the navigable airspace that might pose safety risks, do not themselves endow FAA or airports with any authority they do not otherwise have to remove such objects. (If federally funded airports do have such authority, however, the FAA may order them to exercise it to remove airspace hazards.) The identification of such hazards may have real world consequences, such as the denial of insurance coverage, but it has no binding legal effect of its own. The FAA must simply notify pilots and others of the existence of such hazards and rely upon them to take appropriate precautions.

The court held that the federal government had occupied the entire field of aviation safety and airspace management, but found that the Connecticut statutes on their face neither made any reference to airspace or air safety nor had any necessary impact thereon. They did not forbid removal of obstructions in the navigable airspace but simply imposed a process that might or might not entail conditions relevant to aviation; as such they could not be preempted on the basis of a facial challenge. Similarly, the Court concluded that there was no evidence that application of this state law to Goodspeed would have any effect on air carriers, much less the required significant adverse effect. In the absence of a concrete application of the law, there could be only speculative impacts that were far too tenuous to invoke preemption. Finally, the Court accepted the government's explanation of the uses and limits of Part 77.

Court Grants Summary Judgment for FAA in Reverse FOIA Case

On February 26, 2010, the U.S. District Court for the District of Columbia

granted the FAA's motion for summary judgment and dismissed National Business Aviation Association, Inc. v. FAA, 2010 WL 675529 (D.D.C. 2010), a "reverse" FOIA suit in which the National Business Aviation Association (NBAA) sought to enjoin the FAA from releasing a certain list of aircraft registration numbers that the NBAA had previously provided to the agency.

For various purposes, FAA uses a "Traffic Situation Display" (TSD), which provides to FAA analysts a real-time display of all airborne IFR aircraft receiving radar services within the National Airspace System. In 1997, the FAA agreed to make most of this information available to industry via what is known as the Aircraft Situation Display to Industry (ASDI) feed. The ASDI feed uses the TSD data, but filters out those aircraft that are operated in service to the military and other sensitive government operations. The ASDI provides near real-time information as to the location of the displayed aircraft.

Sometime after the FAA established the ASDI feed, NBAA asked the FAA if it would filter from that feed the information pertaining to those aircraft whose owners did not want this tracking information to be available to the public. The professed rationale was to protect the security of corporate executives on private aircraft and the potentially sensitive corporate activities that might be deduced by tracking those aircraft movements. FAA agreed, and NBAA then began providing FAA with a monthly "block list" of aircraft whose registration numbers were to be filtered from the ASDI feed.

In seeking to enjoin the FAA from releasing the "block list" under the FOIA, NBAA argued that the list contained confidential commercial information and was thus exempt from disclosure under FOIA Exemption 4. The district court declined to address the issue as to whether the list contained "confidential" information, concluding that the "block list" did not satisfy the threshold requirement of being "commercial" information because (1) the list was merely a compilation of aircraft registration numbers, unaccompanied by any narrative from which the identity of the occupants or purpose of the flight could be ascertained; (2) the list did not provide the requestor with any real-time or near real-time data regarding aircraft location; (3) the information from which ownership of aircraft through their registration numbers, as well as the destinations of those aircraft on IFR flights, is already discoverable under the FOIA from other sources; and (4) the speculative concerns that such historical information might be used for insight into a company's business dealings simply did not convert the aircraft registration numbers themselves into "commercial" information.

FAA Employee Not Acting within Scope of Employment when Driving from FAA Training Site to Temporary Residence

On December 14, 2009, the U.S. District Court for the Western District of Oklahoma in Wilhite v. Mach (W.D. Okla. No. 09-508) affirmed the refusal of the Department of Justice (DOJ) to

certify scope of employment under the Federal Tort Claims Act (FTCA) for an FAA employee involved in an automobile accident while attending a training course at the FAA's Mike Monroney Aeronautical Center. In October 2007, an FAA controller, assigned to an FAA facility in Minneapolis, was attending the second of two consecutive training courses at the Aeronautical Center when she collided with the rear end of another vehicle while she was driving her own car directly back to her temporary apartment at the end of the day. Following the accident, the occupants of the other car filed suit against the FAA employee in Oklahoma state court. The answer to the state court complaint raised the defense that the employee was within the scope of her employment at the time of the accident and that the only remedy was under the FTCA. When the DOJ refused to certify scope of employment, the defendant filed a petition in state court challenging that determination. The DOJ then removed the action to federal court to decide the issue of scope certification.

The employee argued that she was within the scope of employment because she was on official travel and was driving from her temporary duty station at the Aeronautical Center to her temporary dwelling because the FAA had assigned her duty in Oklahoma, thus the trip was reasonably incidental to her assignment. The court flatly rejected the employee's analysis and held that "[s]imply because an employee has been called to duty on a date and at a place not normally assigned is not sufficient to trigger an exception to the going and coming rule [which holds that an employee is not acting within the scope of employment while commuting to or from work]." The court also rejected the argument that the trip benefited the employer, writing that "[the employee's] daily commute to and from the [Aeronautical Center] provided no additional benefit to the FAA than any other employee's commute." On January 13, 2010, the employee appealed the district court's decision to the U.S. Court of Appeals for the Tenth Circuit.

Court Finds FAA not Liable in Charter Jet Crash Litigation

On January 12, 2010, the U.S. District Court for the Southern District of Texas issued a decision in United States Aviation Underwriters v. United States, 2010 WL 173553 (S.D. Tex. 2010), in favor of the United States in a case arising out of the crash of a Gulfstream charter jet inbound to Houston Hobby Airport to pick up ex-President George H. W. Bush for an international trip. The crew set the navigation radios to a VOR frequency instead of to the instrument landing system (ILS) for which they had been cleared. Upon discovering the error late in the landing sequence, the crew elected to continue the approach, even though their instruments showed a full scale deflection for both vertical and horizontal guidance—a condition that mandates an immediate go-around. The plaintiffs' theory against the FAA was that, while the pilots were admittedly negligent, the controllers should have noticed that the aircraft was tracking the centerline of the VOR radial, not the nearby, parallel ILS and, thus, should

have warned the pilot of the error. The court rejected the plaintiff's argument and found that the sole proximate cause of the accident was the pilot's negligence. Significantly, the court held (a) that the controllers had no duty to warn a pilot of a condition of which he would ordinarily know or of which he should be aware based on his training, experience, and personal observations; and (b) that controllers were not required to foresee or anticipate the unlawful, negligent, or grossly negligent acts of pilots.

Court Holds that State Medevac Helicopter Services are Exempt from FAA Certification Requirements

On February 26, 2010, the U.S. District Court for the Northern District of New York in Mercy Flight Central, Inc., et al. v. State of New York Division of State Police, et al. (N.D.N.Y. No. 08-1041) dismissed a complaint that alleged that the New York State Police were violating federal law by providing helicopter emergency medical services without being properly certificated by the FAA. The complaint was brought by entities engaged in commercial medical transportation pursuant to certificates issued by the FAA. Defendants asserted that their operations were as "public aircraft," which are exempt from the FAA's certification requirements. The district court held that medevac services are a "governmental function" under the Federal Aviation Act and that both patients and medical personnel are "qualified non-crewmembers" because their presence is required to perform, and is associated with, a "governmental function." The court held that this "is the only reasonable interpretation of the law."

Mediation Scheduled in Challenge to Airport Decision on Relocation Expenses under Uniform Relocation Act

On January 20, 2010, the U.S. District Court for the Western District of New York suspended the briefing schedule and ordered an April mediation conference in Ferry, et al. vs. DOT, et al. (W.D.N.Y. 09-0147), in which plaintiffs seek $25,026 in damages plus interest and attorney fees for claims arising under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the Relocation Act). This case concerns the purchase of plaintiffs' property by Lancaster Airport, Inc., the sponsor of Lancaster Airport, a federally funded airport. Plaintiffs are seeking additional relocation costs as well as moving costs and related expenses associated with the purchase of their property under the theory that the purchase of the property did not qualify as a "voluntary transaction" within the meaning of 49 C.F.R. § 24.101 because they were not informed about their eminent domain rights. A motion to dismiss for lack of jurisdiction and failure to state a claim filed on behalf of FAA in June 2009 remains pending before the court.

Court Stays Pretrial Proceedings Pending Summary Judgment Ruling in Case Addressing Conflicts between Contractual and Federal Grant Conditions

On March 9, 2010, the U.S. District Court for the Southern District of California granted a joint motion to stay pretrial proceedings in City of Oceanside v. AELD. LLC and FAA (S.D. Cal. 08-2180) until the court issues its summary judgment ruling. The court heard argument on November 23, 2009, on the parties' cross-motions for partial summary judgment on various issues, including plaintiff's federal preemption claims and defendant AELD's breach of contract claims. Plaintiff, the City of Oceanside, California (Oceanside), seeks declaratory and injunctive relief against AELD, LLC and FAA permitting it to proceed under a settlement agreement with the sale of land. The complaint stems from conflicting contractual and grant-related conditions associated with a small parcel of land Oceanside acquired for airport purposes. The Oceanside Municipal Airport (Airport) acquired the land from an adjacent property owner, AELD's predecessor, using FAA airport improvement funds. The parcel was needed to help bring the Airport into compliance with FAA design standards to ensure airport safety. In exchange for the federal funding, the Airport entered into a grant agreement that imposed conditions on Oceanside's ownership, development, and use of the14.7-acre parcel. In particular, the grant assurances prohibit Oceanside's sale of the 14.7 acres without FAA's consent.

In direct conflict with the Grant Agreement and Assurances, Oceanside and AELD's predecessor entered into a settlement. The agreement, now assigned to AELD, provides AELD with an option to repurchase the 14.7-acre parcel if certain airport-related development does not occur on the property within a five-year period. If enforced, the agreement would limit FAA's ability to establish the terms and conditions for the necessary development of the land. It also would deprive FAA of its right to prevent Oceanside's sale of the property without FAA's consent.

Federal Highway Administration

Ninth Circuit Hears Oral Argument in Challenge to Sonoma Project

On March 11, 2010, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in Rohnert Park Citizens to Enforce California Environmental Quality Act (RPCEC) v. DOT (9th Cir. No. 09-15750). This is an appeal of a decision of the U.S. District Court for the Northern District of California granting summary judgment in favor of FHWA in a challenge to FHWA's November 2006 approval with a FONSI of the Wilfred Avenue Interchange Project on US Route 101 in Rohnert Park, Sonoma County, California. As framed by RPCEC, the issue on appeal concerns whether the FONSI properly took into account the cumulative impacts of the interchange project combined with

a proposed casino/hotel project. The District Court had found that FHWA had properly considered the impacts of the casino, especially given the speculative nature of the latter project.

Court Dismisses Appeal of Challenge to U.S. Route 220 Project

On January 25, 2010, U.S. Court of Appeals for the Fourth Circuit dismissed an appeal of a decision of the U.S. District Court for the Western District of Virginia granting summary judgment to FHWA in plaintiffs' challenge to proposed improvements to U.S. Route 220 within the I-83 project in Virginia. The appeal in Virginians for Appropriate Roads v. Capka (4th Cir. No. 09-2175) was dismissed pursuant to a settlement agreement between the parties. Plaintiffs had alleged that FHWA violated NEPA by refusing to evaluate alternatives and by approving the project prematurely and without proper consideration of both air and noise impacts. Plaintiffs also alleged that FHWA violated the Federal-Aid Highway Act by failing to make a determination that the project is in the best overall public interest.

FHWA Wins Partial Summary Judgment Motion in Kansas Environmental Challenge

On November 18, 2009, the U.S. District Court for the District of Kansas in Prairie Band Pottawatomie Nation v. FHWA, 2009 WL 4016106 (D. Kan. 2010), granted FHWA's Motion for Partial Judgment and dismissed plaintiffs' Clean Water Act and American Indian Religious Freedom Act claims from the case. Plaintiffs are challenging FHWA's decision to approve the South Lawrence Trafficway, a southern bypass around Lawrence, Kansas. The preferred alignment would cross Haskell Agricultural Farm Property, a property eligible for the National Register of Historic Places. The property is eligible for historic status due to its association with Haskell Institute, which provided agricultural training to Native Americans. Plaintiff's complaint alleged that FHWA had violated NEPA, section 4(f) of the DOT Act, the American Indian Religious Freedom Act, Section 106 of the National Historic Preservation Act, and the Clean Water Act. In granting FHWA's Motion for Partial Judgment, the court held that because FHWA has no authority to review permit applications or issue permits under section 404(b) of the Clean Water Act, plaintiffs' Clean Water Act claims failed to a state a claim against FHWA. The court also held that the American Indian Religious Freedom Act does not create any enforceable individual right to sue.

Minnesota Court Upholds FHWA Environmental Approval of St. Croix River Crossing

On March 11, 2010, the U.S. District Court for the District of Minnesota in Sierra Club North Star Chapter v. DOT, 2010 WL 890984 (D. Minn. 2010), granted summary judgment upholding FHWA's environmental approval of a new National Highway System crossing of the St. Croix River. The project involves the crossing of the St. Croix

Rivers as a federally designated Wild and Scenic River dividing Minnesota and Wisconsin.

Originally filed on June 5, 2007, the Sierra Club's complaint challenged FHWA's decision as a violation of NEPA and section 4(f) of the DOT Act. The complaint also challenged the decision made by the National Park Service on the same project. In granting summary judgment for the government, the court held that FHWA had analyzed a sufficient range of alternatives in the SFEIS and had properly analyzed the project's indirect effects and cumulative impacts. The court also held that FHWA's section 4(f) evaluation met legal requirements.

The court ruled against the other defendant in the case, the National Park Service. The court concluded that the National Park Service's 2005 Section 7 Evaluation was arbitrary and capricious because the document failed to mention and address the National Park Service's previous 1996 Section 7 Evaluation. The court vacated the National Park Service's 2005 Section 7 Evaluation and enjoined the Department of Interior and the National Park Service from authorizing, funding, or otherwise assisting in the construction of the proposed bridge until they issue a new Section 7 Evaluation.

FHWA Wins Environmental Challenge to Washington Road Widening Project

On March 8, 2010, the U.S. District Court for the Eastern District of Washington granted federal defendants' Motion for Summary Judgment in Hamilton v. DOT, 2010 WL 889964 (E.D. Wash. 2010). The court upheld FHWA's Environmental Assessment (EA), Finding of No Significant Impact (FONSI), and section 4(f) determination on use of a school sports field.

The case involves a proposed 8.6-mile safety improvement project for Bigelow Gulch Road and Forker Road in Spokane County, WA. The proposed project would widen the existing two-lane road to four lanes with shoulders, and straighten dangerous curves along the alignment.

The court rejected plaintiff's argument that the length of the EA and agency criticism in the record on the EA were evidence of agency admissions that an Environmental Impact Statement (EIS) was required. The court supported the need for agency counsel to critique the EA drafts in the record to improve the final product in a transparent way that enhanced the final EA.

The court found that FHWA regulations do not automatically require an EIS for a new four-lane highway at a new location. Since 71% of the project is on existing alignment, and it does not clearly fall into any of the three categories requiring a specific type of environmental document in FHWA's regulations, the court found that FHWA's initial determination to conduct an EA was within the agency's discretion.

The court also found that defendants took the requisite "hard look" at the project's environmental impacts, including wetlands, noise, community,

visual, and cumulative impacts. The court found that the mere fact that the EA acknowledged that additional wetlands analysis would occur in the future did not mean that the present EA does not include substantive wetland analysis. The court found reasonable the FHWA finding that no significant impacts would result from the project causing increased noise impacts for one of the 20 homes considered. The court found that FHWA's responses to plaintiffs' comments amounted to reasonable consideration of issues such as visual impacts, cumulative impacts, and alternatives.

Finally, the court upheld the agency's section 4(f) determination, finding the evaluation to have correctly defined "feasible and prudent" alternatives with a more than sufficient analysis of section 4(f) factors.

Partial Win on Motion to Dismiss Challenge to Oregon Highway Widening Project

On January 27, 2010, the district court adopted a magistrate's findings and recommendations in Hereditary Chief Wilbur Slockish v. FHWA, 2010 WL 373995 (D. Or. 2010) on federal defendants' motion to dismiss plaintiffs' amended complaint based on mootness, standing, failure to cite a waiver of sovereign immunity in relation to plaintiffs' monetary claim, and failure to state a claim. Plaintiffs' amended complaint sought declaratory and injunctive relief on a highway U.S. 26 widening project on Oregon's Mt. Hood. The district court adopted the magistrate's recommendations, affirming the lack of standing of the Indian Chiefs and their Tribes and dismissing without prejudice claims related to the public trust doctrine, fiduciary duty and due process. NEPA, section 4(f), and National Historic Preservation Act Claims remain.

Plaintiffs intend to seek leave to amend their complaint again, and briefing on whether the court should permit such amendment is scheduled to occur this spring. Once this issue has been resolved, federal defendants will file an answer and administrative record.

Plaintiffs request declaratory relief, preliminary injunctive relief, permanent injunctive relief, and compensatory and punitive damages and attorney's fees based on the allegations stated above. Plaintiffs raised no objection during the environmental review process and did not seek to enjoin construction, which was substantially complete at the time their original complaint was filed. The project was subsequently completed during the 2009 summer construction season.

Court Grants FHWA Motion to Dismiss in Michigan FOIA Case

On February 17, 2010, the U.S. District Court for the Eastern District of Michigan granted the defendant's Motion to Dismiss plaintiff's complaint in Detroit International Bridge Company v. FHWA (E.D. Mich. No. 09-13805).

On September 25, 2009, the Detroit International Bridge Company (DIBC) filed a complaint seeking to enjoin FHWA and its Michigan Administrator,

James Steele, from disclosing a 2007 inspection report regarding the Ambassador Bridge. On October 13, the court denied DIBC's emergency motion for a temporary restraining order. Detroit Int'l Bridge Co. v. FHWA, 666 F.Supp.2d 740 (E.D. Mich. 2010). DIBC amended its complaint twice and sought contract reformation and declaratory relief.

In the February 17 dismissal, the court ruled that DIBC's second amended complaint failed to state a plausible claim for relief in the form of contract reformation. The contract that DIBC sought to have reformed was between DIBC and the Michigan DOT (MDOT), not FHWA. DIBC argued that FHWA was an undisclosed principal of MDOT due to the need to satisfy conditions for federal funding. The court concluded that DIBC's allegations against FHWA seeking contract relief lacked credibility because FHWA was not a party to the contract.

DIBC's arguments for declaratory relief were also tied to its theory that FHWA and MDOT acted pursuant to an agency relationship. The court concluded that because DIBC's agency allegations failed to support a claim upon which relief can be granted, DIBC's requests for declaratory relief were also subject to dismissal. Therefore, DIBC's second amended complaint was dismissed in its entirety.

D.C. Court Transfers Environmental Suit to Halt New Detroit-Windsor Bridge

On November 30, 2009, the U.S. District Court for the District of Columbia granted the government's motion to transfer to the U.S. District Court for the Eastern District of Michigan a challenge to the Detroit River International Crossing (DRIC), a new highway bridge connecting Detroit and Windsor, Ontario. In Latin Americans for Social and Economic Development v. FHWA (D.D.C. No. 09-897), the court agreed with the government's arguments that the case should be transferred because the issues raised therein are primarily local, Detroit-area issues only tenuously connected to the District of Columbia. Plaintiffs had vigorously opposed transfer and sought reconsideration of the District of Columbia court's decision, which the court denied on December 14.

The suit was filed by six Detroit-area community groups and the Detroit International Bridge Company (DIBC) and alleges that the agency violated NEPA and the APA, section 4(f) of the DOT Act, and the National Historic Preservation Act (NHPA) in its environmental review supporting the DRIC. DIBC owns and operates the Ambassador Bridge, the only existing bridge linking the Detroit area to Canada.

The complaint alleges, among other things, that the project's Final EIS relied upon erroneous traffic data and is otherwise not supported by the record, lacked a reasonable range of alternatives

and did not adequately compare the preferred alternative to others, improperly segmented DRIC from a nearby transportation project and otherwise inadequately addressed effects of other projects in the area, inadequately addressed environmental justice issues related to low-income and minority populations of Detroit's Delray neighborhood, and inadequately addressed air quality impacts on Delray and Southwest Detroit.

The 4(f) claim is based on the allegation that DRIC construction would be on protected parkland, recreational areas, and historic sites, despite the existence of feasible and prudent alternatives, and that FHWA failed to engage in all possible planning to minimize harm, including the consideration of less harmful alternatives. The NHPA claim is based on FHWA's alleged failure to fully document DRIC's impact on sites eligible for listing in the National Register of Historic Places and to consider alternatives that would have minimized or eliminated such impacts.

Plaintiffs seek to enjoin any action taken in reliance on the DRIC ROD and seek to disqualify FHWA and the Department from acting as the lead agency on the DRIC EIS based on the allegation that FHWA, and specifically the FHWA Michigan Division Administrator, co-defendant James Steele, have impermissibly acted as advocates for DRIC.

Detroit International Bridge Company Sues to Permit Construction of Its New Detroit-Windsor Bridge, Stop Construction of Bridge Approved by FHWA

On March 22, 2010, the Detroit International Bridge Company (DIBC) and its Canadian affiliate, owners and operators of the only bridge connecting Detroit to Windsor, Canada, brought suit in the U.S. District Court for the District of Columbia against the Departments of Transportation and Homeland Security, FHWA, the Coast Guard, and the Government of Canada, alleging that various actions taken by the defendants had deprived DIBC of its right to build a new bridge adjacent to its exiting span, in violation of DIBC's rights under the U.S. Constitution, the Boundary Waters Treaty, and various statutes. The relief requested in the suit, Detroit International Bridge Company, et al. v. The Government of Canada, et al. (D.D.C. 10-00476), includes declaratory judgments regarding DIBC's right to build its new bridge and an injunction against the construction the Detroit River International Crossing (DRIC), a planned new bridge between Detroit and Windsor downriver from DIBC's bridge. FHWA has issued the environmental approval for the DRIC, and DIBC is a plaintiff in a separate suit, also reported in this issue, challenging that approval and seeking to stop the DRIC's construction.

United States Files Cross-Claim and Seeks Summary Judgment in Detroit Bridge Takings Case

On February 5, 2010, the United States filed a motion in Commodities Export Co. v. City of Detroit, et al. (E.D. Mich. 09-11060) seeking summary judgment on the issue of whether the Detroit International Bridge Company (DIBC) is a "federal instrumentality" for the purposes of adjudicating takings claims associated with construction at DIBC's Ambassador Bridge linking Detroit and Windsor, Ontario. The United States maintains that DIBC, a co-defendant in the case, is not a federal instrumentality for any purpose, while DIBC maintains that it is for takings purposes, relying in part on a 2008 Michigan Supreme Court decision that so held. The United States also brought a cross-claim against DIBC on the federal instrumentality issue. The underlying takings claim is being brought by a Detroit business that claims DIBC's construction of new bridge facilities has diminished the value of its property.

FHWA Files Motion to Dismiss Challenge to Charleston Marine Terminal and Interstate Project

On December 23, 2009, FHWA filed a motion to dismiss in South Carolina Coastal Conservation League v. Army Corps of Engineers, Charleston District, et al. (D.S.C. No. 07-3802). On November 17, 2009, the court joined FHWA as a defendant, in response to the plaintiff's second amended complaint filed in July, 2009. Plaintiff had filed the second amended complaint after previous attempts to join FHWA to the lawsuit had failed. Plaintiff challenges the decision by FHWA and the Army Corps of Engineers to approve construction of a new $1.2 billion marine container terminal and access highway linking the terminal to I-26, Charleston, SC (Charleston Terminal Project). The complaint alleges that FHWA and Corps violated NEPA and the APA in connection with the proposed construction of the Charleston Terminal Project.

As reported in the prior edition of the litigation news, the plaintiff challenges the Corps' decision to limit the scope of the project's EIS to two segments of the overall project, although analysis of traffic impacts revealed that construction of those components could not proceed as planned unless the project included the widening of portions of I-26. Further, the complaint alleges that FHWA has delayed issuance of a final decision on 1-26 and interchange components and is, therefore, a necessary party due to its responsibility as a cooperating agency in the participation of the EIS and its jurisdiction over the interchange modification and I-26 widening components of the overall project.

Summary Judgment Motion Filed In NEPA Challenge to Texas Toll Road

On January 20, 2010, FHWA filed for Summary Judgment in Sierra Club v. FHWA (S.D. Tex. No. 09-0692). The Sierra Club seeks an injunction based on alleged violations of NEPA in the Record of Decision (ROD) for the construction of a segment of the Grand

Parkway toll project near Houston, Texas. The plaintiff claims that the EIS on the project was insufficient in addressing environmental impacts on the Katy Prairie and that FHWA was arbitrary and capricious in issuing the ROD.

The Grand Parkway, officially known as State Highway 99 (SH 99), is a proposed 180+ mile circumferential scenic highway traversing seven counties and encircling the Greater Houston region. Segment E of SH 99 is a proposed 15.2-mile, four-lane, controlled access toll road with intermittent frontage roads through Harris County. The EIS was approved in November 2007. The Texas Division issued a ROD approving the project on June 24, 2008.

Plaintiffs' complaint sets out six NEPA allegations: 1) Inadequate and unlawful alternatives analysis; 2) Failure to properly assess impacts on hydrology, drainage, floodways and floodplains; 3) Failing to disclose significant impacts and indirect effects on wetlands; 4) Failing to disclose significant air impacts and safety risks; 5) Failing to properly disclose noise impacts; and 6) Failing to consider indirect, secondary and cumulative impacts. The complaint seeks a Supplemental EIS plus attorney's fees and costs.

FHWA Challenged on Caltrans NEPA Decision and FHWA CAA Decision in California Port Case

On November 4, 2009, the Natural Resources Defense Council (NRDC) and other organizations filed a challenge against the environmental decision of the California Department of Transportation (Caltrans) to approve the Schuyler-Heim Bridge Replacement Project. The complaint in NRDC, et al. v. DOT, et al. (C.D. Cal. No. 09-8055) concerns the Schuyler-Heim Bridge Replacement Project (Bridge Project) and the State Road 47 Expressway Project (SR-47 Project), projects designed to rebuild the bridge and improve the road connecting to the bridge in the ports of LA and Long Beach. The lawsuit was filed in the U.S. District Court for the Central District of California against DOT, FHWA, and Caltrans. Responsibility for the project's environmental process was assigned to the Caltrans under the Surface Transportation Project Delivery Pilot Program, SAFETEA-LU § 6005, 23 U.S.C. § 327. Caltrans issued a Record of Decision for the project in September 2009.

The complaint alleges one count of a violation of the Clean Air Act (CAA) and three counts of violations of National Environmental Policy Act (NEPA). The CAA count alleges that the environmental decision improperly determined conformity for the projects by failing to use quantitative methods to meet regulatory hot spot criteria and by failing to follow regulations regarding the transportation plans for the area. The three NEPA counts allege failure to adequately address CAA National Ambient Air Quality Standards and health impacts, failure to consider reasonable alternatives, and failure to adequately address greenhouse gas emissions and climate change. Pursuant to SAFETEA-LU, Caltrans appears to be solely responsible for the defense of the NEPA counts, while FHWA appears to

be responsible for the CAA count. On February 8, 2010, FHWA filed an answer in the case.

On March 10, 2010, the court approved a stipulation of the parties regarding some of the claims. The stipulation states that the plaintiffs will not challenge the Bridge Project and the defendants will stay the effectiveness of the environmental decision regarding the SR-47 Project and not seek funds to build the SR-47 Project. The stipulation also agrees to stay the CAA challenge under count one of the complaint until a decision is reached in another CAA case in the U.S. Court of Appeals for the Ninth Circuit litigating similar issues. Defense of the environmental decision in the SR-47 Project continues.

Court Denies Motion to Compel Expert Testimony of FHWA Employee in Suit between Private Litigants

On December 23, 2009, the United States District Court for the District of New Jersey denied plaintiffs' motion to compel expert deposition testimony of an FHWA employee. In Merco v. FHWA, 2009 WL 5204981 (D.N.J. 2010), the court reasoned that this was a private matter between private litigants where FHWA employee testimony was prohibited by DOT's employee testimony regulations (49 C.F.R. part 9). This matter came before the court upon plaintiffs' objections to the July 27, 2009 report and recommendation of a U.S. Magistrate Judge to deny plaintiffs' demand for a deposition of an FHWA employee. Plaintiff's counsel was soliciting expert testimony through the FHWA employee to ascertain whether the private defendant engineering firm was negligent in its professional practice of engineering or breached a design services contract.

Federal Railroad Administration

D.C. Circuit Dismisses Engineer's Challenge to FRA Certification Decision

On January 26, 2010, the D.C. Circuit granted petitioner's unopposed motion to dismiss in Hensley v. FRA (D.C. Cir. No. 08-1143), in which petitioner sought review of FRA's denial of his appeal from a decision by an FRA administrative hearing officer (AHO) upholding a temporary change in the status of his locomotive engineer certification from a Class 1 locomotive engineer certification to a Class 3 student engineer certification under FRA's locomotive engineer qualification regulations.

The case has been held in abeyance pending an FRA rulemaking that the agency believed could result in the resolution of the litigation in a manner satisfactory to the parties. On December 31, 2008, the Federal Register published the FRA notice of proposed rulemaking (NPRM) anticipated by the parties when they agreed to hold the case in abeyance. The NPRM proposed revisions to the FRA regulations governing the qualification and certification of locomotive engineers. The NPRM (1) addressed the unanticipated

consequences arising from the practice of reclassifying a person's locomotive engineer certificate, (2) clarified the grounds upon which a railroad may revoke a locomotive engineer's certification, and (3) proposed certain certification program updates. On December 23, 2009, the Federal Register published FRA's Final Rule regarding the Qualification and Certification of Locomotive Engineers; Miscellaneous Revisions. See 74 Fed. Reg. 68,173. The Final Rule (1) prohibits a railroad from reclassifying a person's locomotive engineer certificate to that of a more restrictive class during the period in which the certificate is otherwise valid while permitting the railroad to place restrictions on the locomotive engineer, if appropriate; (2) clarifies that revocation of an engineer's certificate may only occur for the reasons specified in the regulation; and (3) requires certain updates to each railroad's certification program.

Petitioner determined that FRA's Final Rule resolved the relevant issues set forth in his petition for review. As a result, on January 22, 2010, Petitioner filed an unopposed motion to dismiss, requesting that the DC Circuit dismiss the case.

FRA Sued for Indemnity regarding Northeast Corridor Improvement Project

On November 19, 2009, U.S. Court of Federal Claims denied the government's motion for summary judgment in Parsons Transportation Group, Inc. v. United States, 2009 WL 4249555 (Fed. Cl. 2009). Parsons Transportation Group (Parsons) sued FRA in February 2008 under an indemnity clause contained in the Parsons-FRA contract for design work in connection with the original Northeast Corridor Improvement Project, much of the work for which took place in the 1980s. The indemnity made the Government responsible for certain claims (under certain conditions) above a $1 million deductible, up to $100 million. Parsons has had to pay damages in connection with various lawsuits in which it has been a defendant, and in its amended complaint, now seeks damages from FRA in the amount of $666,068.71, plus any future damages (unknown) that Parsons might have to pay in the remaining lawsuits to which it is still a party, plus interest on the amount claimed. In denying the government's motion for summary judgment, the court held that a broad release in favor of the government of one of the subsidiary claims did not prevent Parsons from including that claim as part of the deductible amount, thus supporting other claims it has above $1 million. The parties are in the early stages of settlement discussions.

Federal Transit Administration

D.C. Circuit Affirms Decision Upholding Charter Waiver

On December 9, 2010, the U.S. Court of Appeals for the District of Columbia Circuit granted FTA's motion for summary affirmance in United Motorcoach Association v. Rogoff (D.C.

Cir. No. 09-5211), a challenge to FTA's decision to grant a waiver to King County Metro in Seattle, Washington under the FTA charter service regulations (49 CFR part 604), thereby allowing the grantee to provide charter service to the Seattle Mariners' baseball games throughout the 2008 season. The plaintiff contended that the decision was arbitrary, capricious, and an abuse of the Administrator's discretion. Previously, the U.S. District Court for the District of Columbia dismissed the complaint on mootness grounds.

Two TROs Denied in Challenges to Denver Union Station Intermodal Center

In an ongoing case, two separate motions for temporary restraining orders (TRO) were denied in the U.S. District Court for the District of Colorado. Plaintiff in Colorado Rail Passenger Association v. FTA (D. Colo., No. 09-1135) challenges the Denver Union Station (DUS) Project's environmental approval process under NEPA. A Record of Decision (ROD) for the DUS project had previously been signed on October 17, 2008. The Project is for modifications to the historic Denver Union Station to turn it into a multimodal transportation center for the Denver Metro Region. Included in the Project is the construction of two light rail transit tracks near the consolidated mainline track, an eight at-grade passenger rail tracks, and a regional bus facility.

The initial filing was for Declaratory and Injunctive Relief and a Petition for Review of Agency Action and stated seven causes of action, including the following allegations: the Grantee's contractor had a conflict of interest that compromised the integrity of the NEPA process; improper segmentation; flaws with the Final EIS related to private development; the DUS EIS failed to evaluate a reasonable range of alternatives and the environmental impacts of those alternatives; the DUS EIS's selection of the preferred alternative was arbitrary and capricious; the FEIS failed to adequately assess the consistency of DUS with other transportation plans and failed to ensure that DUS would not restrict alternatives for other reasonably foreseeable transportation improvements; and the FEIS failed to comply with section 4(f) of the DOT Act. The initial case was almost completely briefed when the plaintiff filed for a TRO to halt construction and funding under the TIFIA and RRIF loan programs. On February 26, 2010, Judge Kane denied the TRO for lack of jurisdiction. Neither the Regional Transportation Authority (RTD) nor the appropriate federal entities were parties to the case. RTD, the City and County of Denver, and Colorado DOT have all filed *amicus* briefs in the case.

On March 1, 2010, plaintiff filed a new case against RTD and the Denver Union Station Project Authority (DUSPA). DUSPA is the entity applying for the TIFIA and RRIF loans. Plaintiff also filed for a TRO and a motion to consolidate the new case, Colorado Rail Passenger Association v. RTD and DUSPA (D. Colo. No. 10-00462), with the FTA case. On March 2, 2010, the motion to consolidate was granted by Judge Kane without allowing any of the

defendants to answer, and the case was transferred from Judge Kane to Judge Robert Blackburn. On March 3, 2010, Judge Blackburn denied the TRO on substantive and procedural grounds. The denial of the TRO is reported at 2010 WL 749790.

Environmental Justice Group Sues FTA and DOT Over Central Corridor LRT

On January 19, 2010, an environmental justice group challenging the Federal Transit Administration's issuance of a Record of Decision (ROD) for the Central Corridor Light Rail Transit (CCLRT) project in Minneapolis-St. Paul, Minnesota, under the National Environmental Policy Act (NEPA). In The St. Paul Branch of the NAACP, et al. v. DOT, FTA. et al. (D. Minn. No. 10-00147), plaintiffs contend that the decision was erroneous and arbitrary and capricious. The CCLRT project will connect Minneapolis and St. Paul and originally included 20 stations – 15 new stations and 5 shared stations with the Hiawatha Light Transit Rail line. In response to community comments, the project sponsors have added three infill stations along the alignment. The environmental review under NEPA was completed for the infill stations, and a Finding of No Significant Impact (FONSI) was issued by FTA on February 26, 2010. The University of Minnesota and Minnesota Public Radio have filed separate state court lawsuits against the project sponsors alleging claims regarding the scope of the mitigation measures that should be provided. FTA is not a party to either of the state court actions.

NEPA Suit Filed Against FTA on Second Avenue Subway Project

On January 21, 2010, a residents' group, the 233 East 69th Street Owners Corporation, filed a suit challenging the Metropolitan Transportation Authority's (MTA) Second Avenue Subway Project. The Second Avenue Subway Project is an undertaking by the New York MTA and the New York City Transit Authority (NYCTA) to construct an approximately 8.5 mile two-track rail line extending the length of Manhattan's East Side Corridor. The suit challenges work along Phase 1, which extends from 105th Street to 62nd Street and is currently under construction.

The complaint in 233 East 69th Street Owners Corporation v. DOT, FTA et al. (S.D.N.Y. No. 10-00491) is a NEPA challenge alleging that design modifications to an ancillary facility for subway ventilation located near 69th Street and 2nd Avenue have not been properly considered. FTA issued an Environmental Impact Statement and Record of Decision on the Second Avenue Subway Project in 2004. The NEPA allegations include charges that a supplemental environmental impact statement is required if these design changes are going forward. FTA is currently awaiting analysis from the NYCTA to determine if further environmental review is necessary.

Maritime Administration

Court Rejects Discretionary Function Defense in Admiralty for Ship Manager Employee Actions

In Drapela v. United States (E.D. Tex. No. 08-00044), plaintiff sued the United States under the Suits in Admiralty Act for personal injuries, alleging negligence under the Jones Act and unseaworthiness of the vessel. Plaintiff was the bosun in the crew of the M/V CAPE VICTORY located in Beaumont, Texas. He sustained stress injuries while performing maintenance work to the "D-rings" on the deck of the vessel.

The court found the United States not liable for negligence, but the United States was held liable for unseaworthiness of the vessel. This conclusion was based primarily on a finding that the United States failed to properly maintain the D-rings.

The court rejected the United States' claim of a discretionary function defense with respect to the maintenance of the D-rings, finding that this defense did not apply where the discretionary decisions were made by the employees of MARAD's ship manager. The court intimated that the defense would have applied if the decisions in question had been directly made by government employees.

In an amended final judgment issued on March 11, 2010, the court awarded plaintiff $782,166 in compensatory damages covering losses from the date of the accident to the date of the trial, his future medical expenses, his net future loss of earnings, and his physical pain and mental anguish. The government is evaluating an appeal of this decision.

Settlement Near in Suisun Bay Reserve Fleet Environmental Law Case

The National Resources Defense Council (NRDC) and two other environmental plaintiffs sued DOT under NEPA, the Resource Conservation and Recovery Act, and the Clean Water Act (CWA) with respect to the operation of the Suisun Bay Reserve Fleet (SBRF) - 57 non-retention vessels moored at the National Defense Reserve Fleet site in Suisun Bay, California - in Arc Ecology California Regional Water Quality Control Board, SF Region v. DOT (E.D. Cal. No. 07-2320). Subsequently, the California Regional Water Quality Control Board intervened in the case, asserting CWA claims against MARAD. On January 21, 2010, the court entered an order concerning the government's liability for MARAD's management of the SBRF. MARAD has formally committed to work with the San Francisco Bay Regional Water Quality Control Board to obtain a permit under the CWA. MARAD has also formally committed to manage exfoliated paint onboard the vessels in a manner that is consistent with hazardous waste laws (subtitle C of the Resource Conservation and Recovery Act). The court's order essentially memorializes these commitments made by MARAD. The substance of the court's order was not unexpected and is wholly consistent with MARAD's commitments and admission of liability on these two legal issues.

The only remaining contested issue before the court was whether the SBRF constituted an "open dump." The Resource Conservation and Recovery Act prohibits open dumps. On this issue, the government argued that NRDC and the two other private plaintiffs were not legally authorized to file this type of claim. On this contested point, the court ruled in favor of the government – the court held that the private plaintiffs relied on an improper interpretation of the law regarding open dumping.

The trial in this matter is scheduled for June 2010. However, DOT, MARAD, and DOJ attorneys have been engaged in settlement negotiations with the plaintiffs and a tentative agreement has been reached in the form of a Consent Decree and Storm Water Pollution Prevention Plan (SWPPP). (The SWPPP is an essential component in obtaining a CWA discharge permit from the State of California for the SBRF.) The Office of the Secretary of Transportation, MARAD, and the Justice Department have approved the Consent Decree and the SWPPP. The signing of the Decree by all parties is scheduled for March 31, 2010.

Post-litigation Implementation of Cargo Preference Act Proceeds

In Maersk Line, Ltd. v. Vilsack (E.D. Va. No. 09-747), an ocean carrier operating U.S.-flagged vessels filed suit under the APA and the Declaratory Judgment Act contending that MARAD, USDA, and USAID were not complying with the cargo preference laws with respect to the proper allocation of cargoes to U.S.-flag liner vessels. The Act requires that specified percentages of U.S. government cargo, such as food commodities, shipped to foreign countries be transported in various types of U.S.-flagged vessels. A material disagreement existed between USAID and MARAD as to the interpretation of the cargo preference laws and their application. In order to provide time for the government to resolve this interagency dispute, an interim settlement was reached wherein Maersk agreed to dismiss its suit without prejudice and USAID agreed to abide by MARAD'S classification of vessels as liners, dry bulk carriers, and tankers from July 10, 2009 until the government resolved the interagency disagreement. The settlement agreement was then challenged in Liberty Shipping Group LLC v. United States (E.D.N.Y. No. 09-3161), in which plaintiff alleged that USAID and MARAD were unlawfully excluding Liberty's vessels from pending and future tenders for ocean transportation of bagged U.S. food cargo. The court granted plaintiff's TRO request, which allowed it to bid on an August tender. That case and a companion case, Sealift Inc. v. United States (E.D.N.Y. No. 09-3441), were voluntarily dismissed without prejudice.

On September 4, MARAD, USDA, and USAID signed a memorandum of understanding (MOU) that addressed how they will administer and comply with the Cargo Preference Act. The MOU was published in the Federal Register on September 15 together with implementing procedures that became effective on October 1, 2009.

Under the administrative procedures, ship operators were given an opportunity to file applications with MARAD to self-designate the classification of their vessels for cargo preference purposes. These self-designations continued in effect unless and until MARAD made a different decision concerning the designations of the vessels. On November 3, 2009, MARAD issued decisions with respect to five vessels finding that those vessels are properly determined to be bulker as opposed to "liners." Liberty Shipping Co. appealed this decision to the Acting Maritime Administrator, but this decision was affirmed on November 13, 2009.

The Acting Maritime Administrator's decision has not since been challenged. However, further litigation is possible.

Discovery Ordered in FOIA Suit

Potomac Navigation filed suit against MARAD and the EPA under the Freedom of Information Act (FOIA) for failing to provide documents in response to a request regarding the removal of PCBs from the Liberty Ship ARTHUR M. HUDDELL in Potomac Navigation v. MARAD (D. Md. No. 09-217). MARAD provided its response to the FOIA request and filed a motion to dismiss the matter as moot. On December 15, 2009, the court ordered both MARAD and the EPA to submit to discovery and depositions regarding the adequacy of the search for documents.

Bankruptcy Court Denies Trustee's Final Accounting and MARAD Pursues Recovery of Cash Collateral from Trustee

MARAD is proceeding against the trustee in bankruptcy for recovery of cash collateral that is presently unaccounted for in C. Michael Chiasson, Trustee v. Phoenix Searex Associates, LP, as collateral agency for Phoenix Enterprises, LLC, and United States of America, Department of Transportation, Maritime Administration (U.S. Bankruptcy Court, E.D. La. No. 07-01149). On January 18, 2000, Searex Energy Services, Inc., and Searex, Inc., filed for chapter 11 protection. On October 31, 2000, the cases were converted to chapter 7, and C. Michael Chiasson was appointed trustee.

Searex, Inc., received $77,269,000 in Title XI loan guarantees from MARAD. MARAD paid out on its guarantee and is owed in excess of $50 million. The last item remaining in the estate is the issue of MARAD's cash collateral in the amount of $164,000. In the process of winding down the estate, the Trustee filed his first and final accounting of the estate, which contained less than $70,000. MARAD objected.

A July 21, 2009, ruling by the Bankruptcy Court denied the Trustee's final accounting and ordered the Trustee to recalculate the accounting to "somehow account for and pay to MARAD $163,950.29." Instead of producing a revised accounting, the Trustee filed a complaint to surcharge MARAD.

On December 23, 2009, the Trustee filed a second amended complaint clarifying the three causes of action against the United States and added a co-defendant. On January 27, 2010, MARAD filed its answer.

Federal Motor Carrier Safety Administration

Court hears Oral Argument in Challenge to Application of Safety Regulations to Mobile Cranes

On January 14, 2010, the U.S. Court of Appeals for the Tenth Circuit heard oral argument in Midwest Crane & Rigging v. FMCSA (10th Cir. No. 09-9520). The judges asked several questions - particularly of the motor carrier appellant's counsel - relating to Chevron deference, and they also focused on the agency's interpretation of "property."

The central issue in this appeal is whether self-propelled mobile cranes operated on a highway are "commercial motor vehicles" within the meaning of FMCSA's safety jurisdictional statutes, one element of which is the transportation of "passengers or property," 49 U.S.C. 31132(1), and thus whether owners and operators of such vehicles are subject to the Federal Motor Carrier Safety Regulations. The final FMCSA administrative decision under review held that the crane apparatus mounted to appellant's vehicles constituted "property" and that permanently mounting a crane upon a truck bed did not change its character. In its opening brief, Midwest Crane argued that the crane apparatus and truck constitute a single unitized object, with the result that mobile crane trucks carry no "property" and are therefore outside FMCSA's regulatory authority.

Petition for Mandamus on HOS Supporting Documents Rulemaking

On January 15, 2010, the American Trucking Associations (ATA) filed a Petition for a Writ of Mandamus in the U.S. Court of Appeals for the District of Columbia Circuit. In American Trucking Associations, Inc. v. LaHood (D.C. Cir. No. 10-1009), ATA seeks an order directing FMCSA to issue a Notice of Proposed Rulemaking (NPRM) within sixty days after the issuance of the writ, and a final rule no later than six months after the issuance of the NPRM, for regulations on the supporting documents that motor carriers and commercial truck drivers are required to maintain to establish compliance with the hours-of-service regulations. ATA contends it is entitled to relief under the Administrative Procedure Act for "agency action unlawfully withheld" based upon FMCSA's failure to promulgate a final rule specifying the requirements for the supporting documents. See 5 U.S.C. §706(1). Accordingly, ATA argues that under traditional mandamus factors and the criteria in Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (TRAC), ATA is entitled to an order compelling FMCSA to promulgate hours-of-service supporting document regulations.

Section 113 of the Hazardous Materials Transportation Act of 1994 (HMTA), Pub. L. No. 103-211, § 113, 108 Stat. 1673, 1676, directed the Secretary of Transportation to promulgate regulations on supporting documents within 18 months of the date of enactment of the HMTA. At that time, the Secretary's authority was delegated to FHWA. In 1998, FHWA issued an NPRM for the supporting documents regulation (63 Fed. Reg. 19,457). In 2004, after the Secretary's authority was transferred to FMCSA, FMCSA issued a supplemental notice of proposed rulemaking (SNPRM) for the supporting documents rule. (69 Fed. Reg. 63,997). After discovering that the original Paperwork Reduction Act analysis relied upon in the 1998 NPRM was deficient, FMCSA withdrew the SNPRM in October 2007. (72 Fed. Reg. 60,614). FMCSA has yet to publish a final rule.

ATA argues that under traditional mandamus factors relief is appropriate because FMCSA had a clear duty to promulgate regulations as set forth in the HMTA, the agency failed to promulgate regulations, and there are no formal means by which ATA may challenge FMCSA's failure to initiate a rulemaking.

ATA argues it meets the TRAC criteria because (1) Congress has supplied a timetable for issuance of the supporting documents regulations, and FMCSA failed to meet the Congressional deadline; (2) the hours-of-service regulations, including the supporting documents regulations, are primarily safety regulations, and ongoing economic harm continues "in the sphere of…human health and welfare"; (3) ATA is not aware of any other FMCSA initiative of a higher or competing priority that would be substantially hindered by the issuance of the writ; (4) the interests of motor carriers and drivers continue to be prejudiced by the delay in rulemaking as they are uncertain about the supporting documents requirements; and (5) seven years have passed since the D.C. Circuit in Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120 (D.C. Cir. 2002), described as "inexplicable" FMCSA's failure to act with respect to the supporting documents rulemaking.

On February 16, 2010, the court issued an order requiring FMCSA to file a response to the mandamus petition by March 18. On March 10, however, the parties jointly moved the court for a thirty-day extension of that date, which the court granted on March 12.

FMCSA Obtains Court Order Shutting Down Illegal Bus Company after Fatal Accident

On Saturday, March 6, 2010, the U.S. District Court for the Central District of California in LaHood v. Tierra Santa, Inc. (C.D. Cal. No. 10-01659) ordered Tierra Santa, Inc., an illegal bus company involved in a March 5, 2010, fatal crash near Phoenix, Arizona, as well as the company's owner, Cayetano Martinez, to immediately cease all interstate and international passenger service. The order was the culmination of work by FMCSA investigators, other FMCSA Field and Enforcement personnel, and the FMCSA Chief Counsel's Office, working closely with the Office of the General Counsel and

the U.S. Attorney's Office in Los Angeles.

The bus involved in the crash began its trip in Mexico, crossed into the United States at El Paso, Texas, and was en route to Los Angeles. FMCSA investigators at the company's headquarters in Van Nuys, California, gathered information from the president/owner of the company throughout the day on Friday and, with the assistance of an Assistant U.S. Attorney who joined them at the headquarters, were able to secure the president's agreement to a consent decree shutting down his company Friday evening. Under the terms of the decree, the owner and company immediately suspended all the company's interstate and international transportation operations.

Mr. Martinez also indicated that, in light of the prohibition on Tierra Santa, Inc. operations, the company might shift scheduled passengers to other bus companies. FMCSA learned, however, that these other carriers also may not have had necessary operating authority. The consent decree therefore prohibits Martinez, Tierra Santa, Inc., or any affiliated company, "from contracting with or arranging for additional transportation of passengers unless the contracted motor carrier possesses valid operating authority registration from FMCSA." Investigation into Tierra Santa's affiliated companies and their ownership and operating authority is ongoing.

A U.S. District Court judge signed the order on the consent decree on Saturday, making the decree subject to the court's contempt powers and associated criminal and civil penalties. The complaint, consent decree, and court order were filed with the court on March 8.

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