CLUE Case Law Database

NEPA Case Law for Highway, Transit and Rail Projects
2017 Year in Review

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Preface

This paper summarizes federal court decisions issued in 2017 in cases involving environmental reviews for highway, transit, passenger rail, and airport projects.

This paper accompanies the case law summaries posted on the Case Law Update (CLUE) website of the AASHTO Center for Environmental Excellence. On CLUE, each case is summarized separately. This paper provides a brief summary of each case, followed by summaries of key holdings on a topic-by-topic basis.

Please note a few caveats:

- This paper is intended for a general audience, and therefore it does not fully capture the legal analysis in the court decisions.

- Each case involves a unique set of factual circumstances; the outcome in one case cannot necessarily be used to predict what a court would decide in a similar case.

- This paper includes only a sub-set of the issues addressed in the court decisions. For more detailed summaries and copies of the decisions themselves, refer to the CLUE website.

- Many of the cases covered in this paper remain in litigation. Outcomes reported in this paper could be changed during future appeals and/or future proceedings in the district court.

- Issues related to litigation procedure – e.g., whether a legal claim is ripe for review, or whether a party has standing to bring a claim – are covered only briefly in this report.

- This paper and the summaries on the CLUE website do not constitute legal advice. Practitioners seeking legal advice regarding a specific project should consult their legal counsel.

For a list of acronyms and other commonly used terms, refer to Appendix A.

This paper was prepared by Perkins Coie LLP on behalf of the AASHTO Center for Environmental Excellence.
Highlights of 2017 Case Law

In 2017, courts issued more than two dozen rulings in cases involving environmental reviews for federal highway, transit, or rail projects. Notable issues include:

**Purpose and Need/Alternative**

- Reliance on planning decisions to support a project’s purpose and need and/or limit the range of alternatives. (South Mountain Freeway; West Eugene Emerald Express)

- Reliance on screening criteria and/or scoring and ranking as the basis for eliminating alternatives without detailed study. (South Mountain Freeway; U.S. 95)

- Focusing the Final EIS for a transit project solely on the locally preferred alternative and the no-build alternative. (Purple Line)

**Impact Assessment and Mitigation**

- Need to document the rationale for selecting the methodologies used (and not used) in a noise impacts analysis for a highway project. (C-470 Project)

- Selection of alternative with greater wetland impacts over other alternatives with lower impacts. (U.S. 95)

- Reliance on an air quality conformity determination as the basis for concluding that a children’s health impact analysis was not needed. (South Mountain Freeway)

- Use of qualitative rather than quantitative analysis to project indirect effects associated with induced land use changes. (Purple Line)

- Use of the same land use (population and employment) growth assumptions in the no-build and build alternatives. (South Mountain Freeway)

**Supplementation**

- Determination that modifying a mitigation commitment after completion of the NEPA process does not require a supplemental EIS. (Purple Line)

- Determination that passage of time - three years since completion of NEPA process - does not require a supplemental EIS to be prepared. (Longmeadow Parkway)

**Scope of NEPA**

- Justification for treating three highway projects in the same corridor as separate actions with independent utility. (MoPacSouth/SH45)
Section 4(f)

- Determination of no “constructive use” of parkland. (MoPacSouth/SH45)
- Determination that avoidance alternatives for a highway bridge project are not “prudent” based on a combination of factors, such as lower ability to meet purpose and need, impacts to other environmental resources, and greater social impacts. (South Mountain Freeway; Crosstown Parkway Extension)
- Determination that the selected alternative meets the “least overall harm” test under the Section 4(f) regulations and includes all possible planning to minimize harm. (South Mountain Freeway; Crosstown Parkway Extension)

Section 106

- Adequacy of consultation with local officials in the Section 106 process. (Phoenix Sky Harbor Airport).
- Enforceability of commitments in Section 106 Programmatic Agreement for a highway project. (Providence Viaduct Bridge)
- FHWA’s obligation to reassume responsibilities for government-to-government consultation with Indian tribes, when FHWA has assigned its NEPA and Section 106 responsibilities to a State under an assignment MOU. (Willits Bypass)

Litigation

- Whether an administrative record needs to include draft documents leading up to an agreement that was included in the record. (Bonner Bridge/NC12)
- Applicability of statutes of limitations, including circumstances under which a claim can be filed after the limitations period has expired. (Longmeadow Parkway; Phoenix Sky Harbor; Bonner Bridge/NC12)
- What constitutes “irreparable harm” sufficient to support issuance of a preliminary injunction halting construction of a project while litigation is pending. (Longmeadow Parkway; Westside Subway Extension; C-470; Purple Line)
- What types of alleged harms are sufficient to demonstrate standing to bring environmental claims against a project (I-70 Project; Bonner Bridge/NC12).
- Whether failure to raise issues in the NEPA process precludes a plaintiff from raising those issues in court as part of a challenge to the agency’s decision. (Bonner Bridge/NC12; Mid County Parkway).
- Whether plaintiffs are entitled to attorneys’ fees under the Equal Access to Justice Act (U.S. 101 Project; Illiana Corridor).
Key Cases

Bonner Bridge and NC 12 (NC).¹ This case arose from plans to replace the Bonner Bridge, which carries North Carolina Highway 12 in the Outer Banks. Beginning in the early 1990s, FHWA and North Carolina DOT studied options to replace the Bonner Bridge and make other improvements to NC 12. After issuing a Final EIS that covered the entire project, FHWA issued a series of RODs approving construction of phases of the project. This case involved the Phase IIb ROD, which approved construction of a 2-mile bridge within the existing NC 12 right-of-way in the Pea Island National Wildlife Refuge. After environmental groups challenged that ROD, FHWA and NCDOT entered into a settlement agreement that required NCDOT to seek approval for a different alignment involving a “jug-handle” bridge in Pamlico Sound. The jug-handle bridge would bypass the southern two miles of the refuge, and the existing roadway for those 2 miles would be removed. FHWA issued a revised Phase IIb ROD approving the jug-handle in December 2016. A different group dedicated to protecting the sound then challenged the ROD. The agencies moved to dismiss the case, but the court found that the plaintiffs had standing and therefore allowed the case to proceed. The plaintiffs also sought an order requiring FHWA to include non-privileged documents from the settlement agreement negotiations in the administrative record. The court denied the plaintiffs’ request.

Brightline Rail (FL).² Brightline is a privately owned and operated express passenger rail service proposed to connect Miami and Orlando, Florida, over an existing railway corridor. The project was undertaken by All Aboard Florida, which proposed to construct the project in two phases. AAF applied for a $1.6 billion loan from FRA to fund Phase II and requested that USDOT allocate $1.75 billion in Private Activity Bonds for both phases. The USDOT approved the PAB allocation prior to completion of FRA’s NEPA process. Two counties along the corridor for Phase II filed lawsuits alleging that USDOT violated NEPA, Section 106, and Section 4(f) by authorizing the PABs prior to completing the NEPA process for Phase II. In a prior decision in August 2016, the court ruled USDOT's 2014 PAB authorization was a major federal action that required compliance with NEPA, Section 106, and Section 4(f). In response to that decision, USDOT withdrew the 2014 PAB authorization and granted AAF a new PAB allocation of $600 million for Phase I only. USDOT then moved to dismiss the cases on the grounds that they were moot, because the counties’ claims only involved Phase II. The court agreed with USDOT that the cases were moot and granted its motion to dismiss.

C-470 Project (CO).³ The project involved a 13.75-mile expansion of Colorado State Highway C-470 near Highlands Ranch. The Colorado DOT an EA for the project. Comments on the EA argued that CDOT should have collected long-term (24-hour) noise measurements to validate the traffic noise model, in addition to short-term (1-hour) measurements. In response, CDOT collected long-term noise measurements at two locations and used this data to determine that its noise analysis remained valid. FHWA then issued a FONSI for the project. After the plaintiff filed a motion for preliminary

injunction, CDOT collected additional long-term noise measurement data, but informed the court that it did not intend to analyze or provide an opportunity for public comment on the additional data. In this lawsuit, the plaintiff alleged that the agencies violated NEPA by failing to properly validate the traffic noise model and by failing to provide an opportunity for public comment on the long-term noise data collected after the FONSI was issued. The plaintiffs also sought a preliminary injunction to prevent construction from beginning. The court denied the motion for a preliminary injunction, finding that allowing construction to begin would not cause “irreparable harm” to the plaintiffs because mitigation measures (i.e., noise barriers) could be installed after construction of the road. In a subsequent decision, the court held that although CDOT was not required to use long-term measurements to validate the traffic noise model, it violated NEPA by failing to adequately explain its decision not to use long-term measurements. The court also held that CDOT was within its discretion to not circulate the additional noise data for public comment.

**Crosstown Parkway Extension (FL).** The project involved a new bridge across the North Fork St. Lucie River in St. Lucie, Florida. The project was intended to relieve traffic congestion on the two other bridges across the river. After the City of Port St. Lucie prepared reports evaluating potential corridors for the project, FHWA prepared an EIS that studied six build alternatives and issued a ROD approving the City’s locally preferred alternative (Alternative 1C). The ROD concluded that there was no feasible and prudent alternative to using Section 4(f) resources because each build alternative would use some 4(f) resources, and found that Alternative 1C resulted in the “least overall harm.” The plaintiffs claimed that Section 4(f) required FHWA to select Alternative 6A, their favored alternative. In 2015, federal district court upheld FHWA’s selection of Alternative 1C. In this decision, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court’s decision.

**I-70 (CO).** The project involved replacing a 1.2-mile viaduct that carries a portion I-70 through Denver with a below-grade roadway. The project was carried out by Colorado DOT with funding from FHWA. Concurrently with this project, local governments (with funding from CDOT) proposed to construct a stormwater management project to control runoff and prevent flooding in two neighborhoods near the I-70 project. CDOT coordinated with the local governments on the stormwater project and designed the highway project to be compatible with it, but for NEPA purposes, FHWA and CDOT treated the highway project as a separate action with independent utility. The plaintiffs sued FHWA and CDOT, alleging that FHWA had violated NEPA and Section 4(f) by treating the stormwater project as a separate action and by failing to analyze cumulative impacts of the stormwater project. The agencies filed motions to dismiss this claim, arguing that the plaintiffs lacked standing because even if they prevailed on their challenge to the I-70 project, the local governments would still move forward with the stormwater project. The court agreed and dismissed the plaintiffs’ claims.

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4 *Conservation Alliance of St. Lucie County v. USDOT,* 847 F.3d 1309 (9th Cir. 2017).
Illiana Corridor (IL/IN). The case involved the proposed construction of the Illiana Corridor, which would connect I-65 in Indiana to I-55 in Illinois. FHWA, with Illinois DOT and Indiana DOT, prepared a Tier 1 EIS for the project in 2013. The Tier 1 EIS considered a range of alternative corridors for the project. The Tier 1 ROD selected a project corridor, which the agencies studied in more detail in a Tier 2 EIS. In this lawsuit, the plaintiffs alleged that the Tier 2 EIS violated NEPA. Before the court reached the merits of the case, though, a different judge ruled in a different lawsuit that the Tier 1 EIS violated NEPA. The court then dismissed this lawsuit challenging the Tier 2 EIS, finding that it had become moot when the Tier 1 ROD was invalidated by the decision in the previous case. The plaintiffs filed a motion for attorneys’ fees under the Equal Access to Justice Act. The court denied the plaintiffs’ motion for attorneys’ fees because it concluded that the plaintiffs were not a “prevailing party” in the Tier 2 lawsuit.

Longmeadow Parkway (IL). The Longmeadow Parkway is a new 5.6-mile four-lane highway that would include a new bridge over the Fox River in Illinois. The project was undertaken by a local government with funding from the Illinois DOT and FHWA. FHWA issued a ROD approving the project in 2002. After the local government proposed turning the project into a tollway, FHWA and IDOT prepared a reevaluation of the EIS, and FHWA determined in 2009 that a supplemental EIS was not necessary. After this lawsuit was filed in May 2016, the agencies prepared another reevaluation of the EIS, and FHWA issued a FONSI in November 2016, documenting the agency’s determination that a supplemental EIS was not required. The plaintiff alleged violations of NEPA, Section 4(f), and Section 6(f), and filed a motion for preliminary injunction to prevent construction from beginning. The court denied the preliminary injunction motion, finding that the plaintiff did not meet its burden of showing that irreparable harm would occur if construction continued. The agencies then filed motions to dismiss the case for various reasons, which the court granted.

Mid County Parkway (CA). The Mid County Parkway is a proposed six-lane freeway in Riverside County, California. FHWA, Caltrans, and a local government prepared a Draft EIS that studied two no-build alternatives and five build alternatives for a 32-mile freeway. After receiving comments on the Draft EIS, the agencies decided to shorten the project to 16 miles. The agencies then issued a Supplemental Draft EIS, which studied two no-build alternatives and three modified build alternatives for the 16-mile portion. The agencies then issued a Final EIS, and FHWA issued a ROD approving the project. The plaintiffs alleged that the agencies violated NEPA and Section 4(f) by inadequately describing the project, using improper baselines to compare alternatives, and failing to analyze a reasonable range of alternatives. The court first held that it could not consider some of the plaintiffs’ claims because the plaintiffs had not raised those issues before filing the lawsuit. On the merits, the court held that the project description in the EIS was sufficiently detailed and that the alternatives analysis in the EIS met NEPA’s requirements. Accordingly, the

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court granted summary judgment for the agencies. As of March 2018, the case was on appeal to the U.S. Court of Appeals for the Ninth Circuit.

MoPac South and SH 45 (TX).9 This case involved a series of highway projects carried out by the Texas DOT and the Central Texas Regional Mobility Authority to expand Texas State Highway 1 Loop (“MoPac South”) and State Highway 45 West. The projects included: (1) the Intersections Project, which involved adding overpasses across MoPac South; (2) the Express Lanes Project, which involved adding toll lanes on MoPac South; and (3) the SH 45SW Project, which involved constructing a new tolled freeway. The Intersections Project and the Express Lanes project were federally funded and therefore required NEPA review. Acting in the capacity of FHWA under a NEPA assignment program, TxDOT issued a Final EA for the Intersections Project. In this lawsuit, the plaintiffs claimed that the agencies violated NEPA by improperly segmenting the projects and also raised various challenges to the adequacy of the environmental analysis for the Intersections Project. The court ruled in favor of the agencies on all issues. As of March 2018, an appeal was pending in the U.S. Court of Appeals for the Fifth Circuit.

New Orleans Streetcar System (LA).10 This case involved the removal of four Civil War monuments located in proximity to various lines of the streetcar system in New Orleans. As part of a challenge to the city’s decision to remove the four monuments, the plaintiffs alleged that FTA violated Section 106 and Section 4(f) by failing to study the effects of the entire streetcar network on the monuments, and by failing to carry out additional Section 106 and Section 4(f) reviews for the streetcar system prior to removal of the monuments. The court granted FTA’s motion to dismiss all of the plaintiffs’ claims. The court held that removal of the monuments was not subject to Section 4(f) or Section 106 because the streetcar projects would not affect the monuments and removal of the monuments was not federally funded.

Phoenix Sky Harbor Flight Paths (AZ).11 The case involved new flight routes at Phoenix Sky Harbor International Airport, which the FAA approved with a CE. In making that determination, the FAA consulted with a “low-level” official in the City of Phoenix's aviation department and with the SHPO, and the SHPO concurred that noise levels would not have no adverse effect on historic neighborhoods. After the new flight routes went into effect, the FAA received numerous complaints regarding the new flight routes. In response, the FAA reconvened a working group to evaluate alternative routes, but ultimately did not reinstate the original flight routes. The City of Phoenix filed suit challenging the FAA’s decision to approve the new flight routes. The court held that, while the lawsuits were filed after the statute of limitations period, there were reasonable grounds to excuse their delay, so the court allowed the case to move forward. On the merits, the court ruled in favor of the plaintiffs on their NEPA, Section 106, and Section 4(f) claims, and granted their petitions to vacate FAA’s order implementing the new flight routes.

Providence Viaduct Bridge (RI). The project involved replacing a viaduct for I-95 in downtown Providence, Rhode Island. The project was carried out by the Rhode Island DOT with funding from FHWA. The Narragansett Indian Tribe, FHWA, RIDOT, and the Rhode Island SHPO entered into a Section 106 Programmatic Agreement. One stipulation in the PA required RIDOT to acquire certain historic properties and transfer ownership to the State of Rhode Island for and on behalf of the tribe. RIDOT acquired all of the historic properties but refused to transfer one of the properties unless the tribe waived its sovereign immunity with respect to the deed covenants and consented to acquire the property subject to Rhode Island’s jurisdiction and laws. The tribe refused those conditions and filed this lawsuit asserting breach of contract claims and seeking to compel RIDOT to transfer the property without the conditions. The court dismissed the claims directed at FHWA and the ACHP because they were barred by federal sovereign immunity. The court also dismissed the claims against RIDOT, finding that the NHPA does not provide a private right of action against a state agency. As of March 2018, an appeal was pending in the U.S. Court of Appeals for the First Circuit.

Purple Line (MD). The Purple Line is a 16.2-mile light rail transit project in the Maryland suburbs of Washington, D.C. The project follows an east-west alignment, connecting to four radial lines of the region’s existing Metrorail subway system. The FTA and Maryland Transit Administration (MTA) issued a Draft EIS that examined a range of bus rapid transit and light-rail alternatives for the Purple Line. After the state identified light rail as its “locally preferred alternative.” FTA and MTA issued a Final EIS that compared the light rail alternative and the no-build alternative, while summarizing previous alternatives analyses; FTA then issued a ROD approving the light rail alternative. The plaintiffs challenged the ROD under NEPA and other laws, and also claimed that a supplemental EIS was required based on various design changes to the project and other new information, including the potential for declining ridership on Metrorail (a separate system) to affect the Purple Line ridership forecasts. In August 2016, the district court ruled that FTA should have prepared a supplemental EIS on the Metrorail ridership issue and vacated the ROD. With the court’s permission, MTA and FTA submitted an additional analysis that examined five hypothetical scenarios involving varying degrees of Metrorail ridership decline. The agencies found that under any of those scenarios, the basis for selecting light rail for the Purple Line remained valid. After reviewing that analysis, the district court again held that a supplemental EIS was required on the Metrorail ridership issue, but rejected all of the plaintiffs’ other claims. On appeal, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of FTA and MTA on all issues, finding that a supplemental EIS was not required.

While the appeal in the first Purple Line case was pending, the same plaintiffs filed a new lawsuit claiming that FTA had improperly approved the full-funding grant agreement for the Purple Line by inadequately making the findings required under the New Starts grant program. Upon filing the new complaint, the plaintiffs sought a preliminary injunction in

that case to halt tree-clearing and other construction activities. After a hearing, the court denied the motion for a preliminary injunction. As of March 2018, this case remains pending in the district court.

**Route 23 (WI).** The project involved the widening of a 19-mile segment of Wisconsin State Highway 23. FHWA and Wisconsin DOT prepared a Final EIS in June 2010, and FHWA issued a ROD in September 2010. After the lawsuit was filed, the agencies prepared a limited-scope supplemental EIS to address new traffic impacts, and issued a Final Supplemental EIS and ROD. The federal district court then ruled that the analysis of traffic forecasts was flawed and vacated the ROD. In response to that decision, the agencies prepared a technical memorandum with additional details about how traffic estimates had been generated. The district court ruled that the revised technical memorandum was inadequate and denied the agencies’ request to reinstate the ROD. Wisconsin DOT, but not FHWA, then appealed that order to the U.S. Court of Appeals for the Seventh Circuit. The appeals court held that WisDOT lacked standing to appeal the district court’s order because FHWA had chosen not to appeal.

**South Mountain Freeway (AZ).** The project is a proposed eight-lane, 22-mile highway, which is intended to alleviate current and future traffic problems resulting from economic and population growth in the Phoenix area. The highway would run adjacent to the boundary of an Indian tribe’s reservation and would cut through three acres of Phoenix South Mountain Park Preserve. The park preserve and its surrounding areas contain cultural resources and are used by the tribe’s religious practitioners. FHWA prepared an EIS and issued a ROD approving the project. The tribe sued FHWA and Arizona DOT, challenging the project under NEPA and Section 4(f). In 2016, the district court ruled for the agencies on all claims. In this appeal, the U.S. Court of Appeals for the 9th Circuit upheld the district court’s order in all respects.

**U.S. 95 (ID).** The project involved improvements to a segment of US-95 in Idaho. The existing two-lane undivided highway would be replaced by a four-lane highway with a combination of a 34-foot median and a center turn lane. The Idaho Transportation Department and FHWA prepared an EIS for the project, and FHWA issued a ROD in March 2016. During the scoping process, the agencies identified ten build alternatives in three possible corridors. The agencies screened the alternatives based on 23 criteria, and selected one alternative in each of the three corridors for detailed study in the EIS. The EIS identified Alternative E-2 as the preferred alternative. Of the four alternatives studied in the EIS (three build alternatives and the no-build alternative), Alternative E-2 would be located closest to Paradise Ridge, a privately owned area that contained remnants of the Palouse Prairie ecosystem. The plaintiff alleged that the EIS was inadequate on various grounds. The plaintiff also claimed that FHWA followed an improper process for approving the EIS and that the agencies had a predetermined outcome. The district court ruled in

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15 1000 Friends of Wisconsin v. USDOT, 860 F.3d 480 (7th Cir. 2017).
16 Protecting Arizona’s Resources and Children v. FHWA, 2017 WL 6146939 (9th Cir. 2017).
favor of the agencies on all claims. As of March 2018, an appeal was pending in the U.S. Court of Appeals for the Ninth Circuit.

**U.S. 101 (CA).** This case arose from a challenge to the proposed widening of U.S. Highway 101 through Richardson Grove State Park in California. The park contains a forest of old-growth redwood trees. Caltrans prepared the NEPA document under a NEPA assignment MOU with FHWA, which allows Caltrans to carry out the NEPA process in lieu of FHWA. In a previous case, a federal district court held that Caltrans had not complied with NEPA and required additional environmental review for the project. Several years later, the plaintiffs filed a new lawsuit alleging that Caltrans had not complied with the prior order. The parties stipulated to dismiss the case without prejudice. Three months later, the plaintiffs filed a motion for attorneys’ fees. The district court denied that motion. The U.S. Court of Appeals for the Ninth Circuit upheld that decision based on the untimeliness of the plaintiffs’ motion.

**West Eugene Emerald Express (OR).** This case involved the proposed West Eugene Emerald Express, a Bus Rapid Transit project that was intended to link two existing BRT routes in Eugene, Oregon. The local transit agency prepared an alternatives analysis that studied more than 50 alternatives. The transit agency and FTA then prepared an EA that evaluated only the no-build alternative and the locally preferred alternative. After a public comment period, FTA issued a FONSI approving the project. In 2014, a federal district court rejected the plaintiffs’ NEPA challenge and upheld FTA’s EA and FONSI. In this decision, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s decision. The appellate court rejected the plaintiffs’ arguments that the EA should have considered additional alternatives and that FTA should have prepared an EIS based on the significance of environmental impacts.

**Westside Subway Extension (CA).** The West Side Subway Extension, undertaken by the Los Angeles County Metropolitan Transportation Authority (Metro), would extend the Los Angeles subway’s Purple Line nine miles and add seven new stations. The Beverly Hills school district opposed the project because it involved a tunnel under the historic Beverly Hills high school, and filed suit challenging FTA’s EIS and ROD under NEPA and Section 4(f). In 2016, a federal district court ruled in favor of the plaintiffs on several issues and remanded to the agencies to prepare a supplemental EIS. While the agencies were still preparing a supplemental EIS, FTA and Metro executed a full funding grant agreement for the project, and Metro announced its intention to execute a design/build contract for one section of the project. The school district filed a motion for a preliminary injunction to nullify the grant agreement and enjoin Metro from executing the design-build contract. The court denied the school district’s motion for a preliminary injunction, holding that the school district had not satisfied the necessary elements for a preliminary injunction. On appeal, the U.S. Court of Appeals for the Ninth Circuit ruled that the district court lacked

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19 *Our Money Our Transit v. FTA*, 689 Fed. App’x 504 (9th Cir. 2017).
jurisdiction even to consider the plaintiff’s motion because the grant agreement and design/build contract were not final agency actions that could be challenged.

**Willits Bypass (CA).** The project involved a proposed highway bypass around the community of Willits, California. Caltrans prepared an EIS under a NEPA assignment MOU with FHWA, which allows Caltrans to carry out the NEPA process in lieu of FHWA. The assignment MOU (as required by statute) specified that Caltrans would not assume FHWA’s responsibilities for government-to-government consultation with Indian tribes under Section 106. The MOU also specified that if an issue was raised in a government-to-government consultation with an Indian tribe, and either the Indian tribe or FHWA determined that the issue would not be satisfactorily resolved by Caltrans, then FHWA “shall” reassume all or part of the responsibilities for processing the project. The plaintiffs filed suit against both Caltrans and FHWA, raising various claims under NEPA and Section 106. FHWA and Caltrans filed motions to dismiss. The court dismissed many of the claims, but allowed the plaintiffs to proceed with their claim that FHWA had violated its obligation to reassume its responsibilities for government-to-government consultation with Indian tribes.

**Topical Summaries**

I. **NEPA**

A. **Applicability of NEPA**

In the *MoPac South/SH45* case, the plaintiffs claimed that a State-funded project was subject to NEPA because the project sponsor entered into an agreement with two counties under which the sponsor committed to consult with the U.S. Fish and Wildlife Service to ensure that the development of the project would not cause one of the counties to violate the Endangered Species Act. The plaintiffs contended that this agreement legally bound the Authority to obtain the Service’s approval, thereby making the project a federal action requiring NEPA compliance. The court disagreed, holding that the project was not subject to NEPA because it did not receive any federal funding or approvals. The court explained that NEPA applies to state and local actions that are potentially subject to federal control and responsibility, and found that “[c]onsultation with a federal agency on compliance with federal law does not amount to ‘Federal control and responsibility.’”

B. **Purpose and Need**

In the *South Mountain Freeway* case, the plaintiffs alleged that the purpose and need discussion in the EIS was unreasonably narrow because it was based on goals established in the area’s metropolitan long-range transportation plan. The court noted that the purpose and need statement “examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies” and that these metrics were used to determine whether the previously proposed freeway was still necessary. The court ruled that the purpose and need statement complied with NEPA,

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explaining that agencies have “considerable discretion” when defining the purpose and need of a project.

C. Alternatives

Methodologies for Screening Alternatives

In the South Mountain Freeway case, the plaintiffs argued that the range of alternatives was inadequate because the agencies had dismissed without detailed study each of the alternatives that the plaintiffs had submitted for consideration during scoping. The court noted that the agencies had used a “multivariable” screening process to evaluate proposed alternatives, and had concluded that non-freeway alternatives would not address an adequate percentage of the transportation capacity need. Based on that explanation, the court concluded that the agencies had a sufficient basis for eliminating non-freeway alternatives from detailed study in the EIS.

In the U.S. 95 case, the plaintiff alleged that the agencies had arbitrarily selected the three alternatives that were studied in the EIS. During the scoping process, the agencies identified ten build alternatives in three possible corridors. The agencies gave numerical scores to each alternative based on 23 criteria, and selected the highest-ranked alternative in each corridor to be studied in detail in the EIS. The plaintiff argued that the agencies should have selected the highest-ranked alternatives overall, rather than the highest-ranked alternative for each corridor. The court held that it was permissible for the agencies to carry forward the highest-ranked alternative in each corridor, even though this meant that some of the eliminated alternatives were higher-ranked than some of the alternatives carried forward.

Change in Project Termini

In the Mid County Parkway case, the plaintiffs argued that the agencies did not consider a reasonable range of alternatives because the environmental documents (including the Final EIS) were based on alternatives for the 32-mile project that was originally planned, rather than the 16-mile project that FHWA actually approved. The plaintiffs also argued that the agencies should have considered alternatives that incorporated HOV lanes, road upgrades, and transit. The court rejected both arguments. First, the court explained that shortening the project did not render it an entirely new project nor require the agencies to consider an entirely new set of alternatives, especially because the purposes of the 32-mile project and the 16-mile project were similar. Second, the court held that the agencies had sufficiently considered and explained why they rejected additional alternatives with HOV lanes, transit, and roadway upgrades.

Reliance on Planning Documents to Limit Range of Alternatives

In the West Eugene Emerald Express case, the plaintiffs argued that the EA should have analyzed another alternative for the BRT line in addition to the locally preferred alternative and the no-build alternative. The court held that FTA was not required to analyze the additional route in the EA because that route was already examined in the project.
sponsor’s alternatives analysis (prior to NEPA) and was rejected following consultation with local stakeholders. The court relied on a prior Ninth Circuit case, *Honolulutraffic.com v. FTA*, 742 F.3d 1222 (9th Cir. 2014), which held that “[a]n agency does not violate NEPA by refusing to discuss alternatives already rejected in prior state studies.”

**Range of Alternatives in Final EIS**

In the **Purple Line** case, the plaintiffs claimed that the range of alternatives in the Final EIS was too narrow because the only alternatives considered in detail in that document were the state’s locally preferred alternative - the light rail transit project - and the No Action alternative. They claimed that the Final EIS should have fully reexamined all eight of the alternatives that had been studied in detail in the Draft EIS, rather than summarizing that analysis and incorporating it by reference. The court noted that, under FTA’s New Starts process, it was the state’s responsibility to select a locally preferred alternative, and once it had done so, that choice “narrowed FTA’s role” to deciding whether to approve that alternative. Given that statutory scheme, the court found it was permissible for the Final EIS to focus on comparing the state’s preferred alternative and the no-build alternative.

**D. Impacts Analysis**

**Methodologies for Noise Impacts Analysis**

In the **C-470** case, the plaintiff claimed that CDOT violated NEPA by validating its traffic noise model using only short-term (1-hour) measurements, arguing that CDOT’s Traffic Noise Model User’s Guide required collecting both short-term and long-term (24-hour) noise measurements for large corridor projects. The court agreed with the plaintiffs, rejecting each of CDOT’s arguments on this issue:

- CDOT first argued that it did not need to follow the User’s Guide because it was simply an appendix to the agency’s Noise Abatement and Analysis Guidelines. The court found that all appendices were part of the Guidelines and must be read as a single document, and therefore the User’s Guide was applicable.

- CDOT also argued that the User’s Guide, even if applicable, simply provided options for CDOT to consider. The court agreed that CDOT had discretion in terms of which data to collect to validate its noise models - but held that CDOT had erred by failing to document the rationale for its decision: “Defendants have pointed to nothing in the record to show or support any deliberate or reasoned decision - or how such decision constitutes an application of the guidelines ‘uniformly and consistently’ statewide.”

- Finally, CDOT argued that it was not required to take long-term measurements because the approach it had used was actually a more conservative approach. The court noted, first, that it should not consider this explanation because it was only provided by CDOT’s counsel during litigation; it was not documented in the record. The court also held that, even if it were considered, the explanation provided by
CDOT’s counsel was contrary to the agency’s Guidelines and would have been found arbitrary and capricious.

**Wetlands Impacts & Compliance with E.O. 11990**

In the **U.S. 95** case, the plaintiff challenged the selection of an alternative with greater wetland impacts over other alternatives with lower wetland impacts. (The selected alternative would impact 3.61 acres of wetlands, while two others would impact 1.85 and 0.99 acres.) The plaintiff relied on Executive Order 11990, which directs agencies to avoid new construction in wetlands unless there is no practicable avoidance alternative and impacts to wetlands are minimized. The court explained that an agency is not required by Executive Order 11990 to select the alternative with the least impact to wetlands, and noted that FHWA’s decision was based on a balancing of multiple factors, including travel time and effects on other environmental resources. The court concluded that this balancing analysis complied with NEPA and Executive Order 11990. (Note: The court did not address compliance with Section 404 of the Clean Air Act, which requires selection of the “practicable” alternative with the least impact to the aquatic ecosystem.)

**Safety Impacts - Wildlife Collisions**

In the **U.S. 95** case, the plaintiff argued that the EIS did not adequately address the safety risks from wildlife collisions. The EIS projected that the selected alternative would result in the most wildlife collisions of the three build alternatives, and that the risk of wildlife collisions would decrease with all three build alternatives. The court concluded that the agencies sufficiently evaluated the environmental impacts of potential wildlife collisions. The court noted that the ROD explained that wildlife collisions had been considered, and the ROD included mitigation measures to reduce the risk of wildlife collisions. Even though the agencies did not factor the risk of wildlife collisions into their vehicle crash projections, the court held that the ROD’s analysis was sufficient because the risk of wildlife collisions would be low.

**Risk of Hazardous Material Spills**

In the **South Mountain Freeway** case, the plaintiffs challenged the agencies’ decision not to analyze the potential impact of hazardous material spills. The agencies had determined that the probability of a hazardous material spill was low because of existing regulations. The EIS also discussed the extent to which hazardous material spills could be avoided or mitigated, and noted that the State DOT would coordinate with emergency service responders and was evaluating hazardous material restrictions. The court explained that “an EIS need not discuss the potential environmental consequences of adverse effects that are remote or highly speculative” and concluded that the agencies’ evaluation of hazardous materials spills was sufficient.

**Children’s Health Impacts**

In the **South Mountain Freeway** case, the plaintiffs claimed that the EIS did not adequately consider impacts on children’s health. The agencies did not separately analyze the
project’s impacts on children’s health. However, as part of the air quality conformity analysis, the agencies determined that the project would not cause any violations or delay in attainment of the NAAQS. The agencies concluded that the project would not disproportionately affect children’s health because it complied with the NAAQS, which are set at levels to protect sensitive populations. The court upheld the agencies’ conclusion, noting that agencies are entitled to deference when undertaking technical scientific analyses.

**Air Quality Impacts - MSATs**

In the South Mountain Freeway case, the plaintiffs argued that the agencies did not adequately consider the impacts of Mobile Source Air Toxic emissions. The EIS estimated MSAT emissions in the broader study area but did not analyze near-roadway emissions because it was not possible with the model that the agencies used. The court noted that the agencies used EPA’s latest model to project MSAT emissions in the study area and provided sufficient reasoning for determining that an analysis of near-roadway emissions was not necessary. Therefore, the court ruled that the MSAT emissions analysis complied with NEPA.

**Indirect Effects**

In the Purple Line case, the plaintiffs claimed that FTA and MTA had not adequately examined the potential indirect effects resulting from induced growth, particularly around transit stations; they claimed that additional development could increase stormwater run-off and adversely affect low-income and minority populations. The court noted that the indirect effects analysis required by NEPA is “limited to what is reasonably foreseeable, with reasonable being the operative word.” By contrast to cases requiring a quantitative analysis of GHG emissions as indirect effects, the court found in this case the “[l]ocal land use planning documents are inherently less concrete than numerical estimates” of the GHG emissions from an oil pipeline. Given these factual distinctions, the court concluded that it was sufficient for FTA and MTA to address induced growth qualitatively rather than quantitatively.

**E. Transportation Forecasts**

**Population Forecasts for No Action Scenario**

In the South Mountain Freeway case, the plaintiffs claimed that the analysis of the no-build alternative in the EIS was flawed because the agencies assumed the same employment and population growth would occur with or without the project. This assumption was based on a transportation planning report previously issued by the region’s MPO, which had assumed some future expansion of highways. The plaintiffs argued that the agencies should have used a different model of projected growth for evaluating the impacts of the no-build alternative. The court noted that “agencies may rely on state assessments in drafting an EIS to generate growth predictions.” The court concluded that the agencies sufficiently explained the basis for their decision for using the
growth projections, and held that the analysis of the no-action alternative complied with NEPA.

**Safety Forecasts**

In the **U.S. 95** case, the plaintiff argued that the agencies’ vehicle crash projections were unreliable. The agencies predicted vehicle crashes for each alternative using the AASHTO Highway Safety Manual. The plaintiffs argued that the agencies inappropriately compared the alternatives based on crash rates predicted by the model, without giving a “confidence interval” (i.e., margin of error) for the data. The court agreed that the agencies had considered the modeled values, but noted the agencies also had used engineering judgment by considering factors that contribute to differences in safety such as access points, at-grade intersections, approaches, overall length, and number of lanes. The court concluded that the analysis in the ROD was not arbitrary and capricious: “A fair reading of the ROD shows that it relied on engineering judgment and the trends in crash projections, rather than relying on a rank comparison of projected crash numbers.”

**F. Mitigation**

**Change in Mitigation After ROD**

In the **Purple Line** case, the plaintiffs claimed that a Supplemental EIS was required because MTA had decided, after completing the NEPA process, to allow the project developer the flexibility to determine appropriate stormwater mitigation through the state’s permitting process, rather than specifically requiring the contractor to use “green track”—a vegetated track-bed that would help to limit stormwater run-off. The court rejected this claim, finding that “although breaking a promise to use green track mitigation may present a political issue, the [plaintiffs] fail to show the change is legally significant enough to require preparation of an SEIS.” In reaching this conclusion, the court relied on a technical report prepared by MTA, which showed that the same state stormwater management regulations would apply regardless of whether green track or another stormwater mitigation measure is used, such that the elimination of green track would not change the project’s effects on stormwater.

**Level of Detail in Mitigation Plan**

In the **U.S. 95** case, the plaintiff argued that the EIS and ROD improperly relied on invasive weed mitigation plans that had not been finalized. The court explained that NEPA does not require a fully developed mitigation plan, but “requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.” The court concluded that the EIS contained a “lengthy evaluation” of mitigation measures, and that the ROD required incorporation of mitigation measures. Therefore, the court held that the invasive weed mitigation plans did not violate NEPA.

In the **South Mountain Freeway** case, the plaintiffs argued that the agencies did not conduct detailed enough project design to allow them to adequately develop and analyze mitigation measures. The court found that the EIS contained sufficiently detailed
discussion of mitigation measures to address environmental impacts from the project. The
court explained that “NEPA does not require a fully developed plan that will mitigate all
environmental harm before an agency can act; NEPA requires only that mitigation be
discussed in sufficient detail to ensure that environmental consequences have been fully
evaluated.”

G.  Supplementation

Whether a Supplemental EIS is Needed to Assess Potential Changes in Need for Project

In the Purple Line case, the plaintiffs claimed that FTA, in deciding not to prepare a
supplemental EIS, had incorrectly assumed that a Supplemental EIS is only required when
new information changes the environmental impacts of the project. Their claim was that a
supplemental EIS also can be required when there is new information that calls into
question the project’s ability to meet its purpose and need or the agency’s justification for
selecting one alternative over another. The court found that FTA had, in fact considered
whether the new information about Metrorail ridership would alter the Purple Line’s
ability to meet its purpose and need and/or the basis for selecting light rail. In addition, the
court rejected plaintiffs’ attempt to rely on differences in wording between the CEQ
regulations and FTA’s own regulations regarding the standard for preparing a
supplemental EIS. The court held that, regardless of which regulations are applied, a
supplemental EIS is required only if the new information presents a “seriously different
picture of the environmental landscape.” Lastly, the court also rejected the plaintiffs’
argument that FTA and MTA had not responded sufficiently to criticisms of the agencies’
ridership forecasts, holding that “[a]gencies are not always required to give ‘point-by-point
responses’ to every objection raised.”

Supplemental EIS - Passage of Time

In the Longmeadow Parkway case, the plaintiff argued that FHWA was required to
supplement the EIS because it had been more than three years since FHWA’s determination
that no supplemental EIS was necessary. The plaintiff cited an FHWA regulation (23 C.F.R.
§ 771.129(b)) that requires an EIS to be updated if major steps advancing the proposed
action are not taken within three years of the last EIS. The court explained that the
regulation does not automatically require an EIS to be updated every three years in all
circumstances. The court held, moreover, that the FHWA regulation did not require
reevaluation in this case because FHWA and the state and local agencies had taken major
steps to advance the project since preparing the EIS. Therefore, the court dismissed the
claim.

H.  Segmentation

In the MoPac South/SH45 case, the court considered the segmentation criteria that FHWA
must apply. The court concluded that FHWA can rely on the criteria in its own regulations
and was not required to conduct a separate segmentation analysis using criteria in CEQ’s
regulations. The court explained that the U.S. Court of Appeals for the Fifth Circuit “has
consistently relied on the factors in the FHWA regulations in segmentation analyses of highway projects.” Moreover, other courts to consider the same issue had concluded that only FHWA regulations apply to segmentation analyses of highway projects. Therefore, the court held it was proper for FHWA to apply only the segmentation criteria in its regulations without conducting a separate analysis under the segmentation criteria in the CEQ regulations.

In the **MoPac South/SH45** case, the court also concluded that FHWA did not improperly segment its environmental analysis of the Intersections Project and other projects. The court considered FHWA’s analysis under each of the three criteria specified in FHWA’s regulations:

- The court found that the Intersections Project had independent utility because it “would increase safety and traffic efficiency at the affected intersections” even if the other projects were not implemented, and noted that “[t]he court does not find it difficult to recognize the utility of raising a roadway to avoid having a signalized intersection with traffic on a four-lane highway.”

- The court found that the Intersections Project had logical termini because “[t]he termini of the Intersections project allow for the objectives of the project to be met without involving portions of road that are not incidental to the improvement of the Slaughter Lane and La Crosse Avenue intersections.”

- The court concluded that the termini of the Intersections Project did not restrict consideration of alternatives because the construction of that project “does not dictate that any other segment must be built, nor does it dictate the size or features of any other project.”

**I. Predetermination/Bias**

In the **U.S. 95** case, the plaintiff alleged that the State DOT had predetermined its selection of Alternative E-2 as the preferred alternative and pointed to various statements in the record as indicating a preference for that alternative. The court observed that the State’s “clear preference for the E-2 alternative nearly tipped over to a predetermination,” but concluded that it could not find evidence that the result was predetermined. The court noted that FHWA (not the State DOT) “was the final decision-maker, and plaintiffs have pointed to no evidence that FHWA’s decision was predetermined.”

**J. Prior Concurrence**

In the **U.S. 95** case, the plaintiff argued that FHWA followed improper procedures in approving the EIS because FHWA’s Division Office did not submit the decision to FHWA headquarters for prior concurrence. The court noted that FHWA guidance requires prior concurrence in certain circumstances, such as when another federal agency indicates opposition to a project on environmental grounds. For this project, EPA had reviewed the Draft EIS and expressed “serious concerns” regarding Alternative E-2. Nonetheless, the
court ruled that prior concurrence by FHWA headquarters was not required. The court explained that EPA had objected only to Alternative E-2, not to the project as a whole. The court also noted that although EPA’s objection “could reasonably be interpreted” as meeting the characteristics in FHWA’s guidance, “the Guidance does not mandate concurrence in that event (but only notes that concurrence should be ‘considered’), and the entire tenor of the agency’s regulation is to give District offices broad discretion in deciding whether to seek concurrence.” The court concluded that “the deference due to the agency tips the scale and directs a finding that the FHWA accurately interpreted its own regulations to not require prior concurrence in this instance.”

K. Public Involvement

In the C-470 case, the plaintiff argued that FHWA violated NEPA by not providing an opportunity for public comment on additional noise measurements collected after the EA but before the FONSI, as well as additional noise measurements collected after the litigation began. The court explained that agencies have considerable discretion to determine the extent to which public involvement in preparing an EA is appropriate. The court held that the plaintiff did not cite any source that required the agencies to provide an opportunity for further public comment on the additional data that was gathered after they published the EA, or after they issued the FONSI. The court further held that even if the agencies were required to provide an opportunity for public comment on the additional noise measurements, the plaintiff did not show that it suffered any prejudice as a result of such violation.

L. Readability

In the Mid County Parkway case, the plaintiffs argued that the maps in the environmental documents were not detailed enough to show the precise route of the project. The court noted that the Final EIS included an appendix with maps of the proposed route and a list of addresses for each parcel that would be affected for the project. The court held that this information regarding the route was sufficiently detailed to satisfy NEPA’s requirements, and that its placement in an appendix was appropriate.

II. Section 4(f)

A. Applicability of Section 4(f)

In the New Orleans streetcar case, the plaintiffs argued that FTA improperly failed to conduct a Section 4(f) analysis before removing Civil War monuments. The plaintiffs attempted to show that a Section 4(f) analysis was needed for the city’s streetcar network as a whole, and argued that such an analysis should have included removal of the monuments. The court held that Section 4(f) did not apply to removal of the monuments because the removal was locally funded and did require any federal approval. In addition, the court held that while Section 4(f) did apply to the three federally funded streetcar lines in the city, FTA had met its obligations under Section 4(f) by finding that each of those projects would have a de minimis impact on historic properties. The court concluded that
the plaintiffs could not demonstrate any Section 4(f) violations, and dismissed their Section 4(f) claims with prejudice.

B. “Use” Determinations

In the MoPac South/SH45 case, the plaintiffs alleged that the traffic noise and visual impacts of the Intersections Project would constructively use the Lady Bird Johnson Wildflower Center, a Section 4(f) resource. TxDOT’s traffic noise technical memorandum for the Intersections Project determined that traffic noise in three locations in the park would exceed the noise threshold in FHWA regulations. TxDOT also determined that a noise barrier would reduce noise levels to below the applicable noise threshold. The plaintiffs argued that TxDOT did not use proper methodology to measure and project noise levels and that TxDOT did not validate or calibrate its noise modeling. The plaintiffs also argued that TxDOT did not analyze whether the project’s impacts on aesthetics, access, and ecological integrity constituted constructive use of the park. Citing FHWA regulations, the court explained that TxDOT was “not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property.” The court also found that the plaintiffs did not provide specific facts to support their Section 4(f) arguments, and, therefore, they did not meet their burden of alleging facts to show that the project would constructively use the park.

C. Avoidance Alternatives

In the South Mountain Freeway case, the plaintiffs claimed that the agencies failed to consider prudent and feasible alternatives that would avoid using the South Mountain Park Preserve, a Section 4(f) resource. The EIS discussed avoidance alternatives and determined that none of them were prudent or feasible. In particular, the EIS determined that (1) shifting the alignment to the north of the park preserve would adversely impact other highways, would cause extensive residential and business displacement, and would not meet the purpose and need; (2) an alternative south of the park preserve that would cut through a tribe’s reservation was neither feasible nor prudent because the tribe would not allow development on its land; (3) shifting the alignment to the south of the reservation would not meet the purpose and need because the freeway would be too far from downtown Phoenix; and (4) the no-action alternative would not meet the purpose and need. The court explained that “an alternative is not prudent if, among other things it compromises the project’s ability to address the purpose and need to an unreasonable degree.” The court ruled that the agencies had permissibly determined that there was no feasible and prudent alternative to avoid the park preserve.

In the Crosstown Parkway Extension case, the plaintiffs challenged FHWA’s determination that the alternative preferred by the plaintiffs - known as Alternative 6A - was not a prudent and feasible avoidance alternative for a Section 4(f) resource. First, FHWA determined that Alternative 6A was not actually an “avoidance” alternative because it would require building piers in 0.01 acres of an aquatic preserve that was also protected by Section 4(f). Moreover, FHWA determined that Alternative 6A was imprudent because its split-beam construction method would use substantially more wetlands than
alternatives that used pile-bent construction (0.5 acre vs. 0.01 acre), and it would have severe social impacts, including the highest percentage of minority household relocations and substantial visual impacts. The court also rejected the plaintiffs’ argument that FHWA’s conclusion was flawed because FHWA did not use the terms “extraordinary magnitude” or “unique problems” when finding an alternative to be imprudent; the court held that FHWA’s decision not lacking simply because it did not include those terms.

D. Minimization of Harm

In the Crosstown Parkway Extension case, the plaintiffs’ challenged the least-harm analysis in FHWA’s Section 4(f) evaluation. FHWA had determined that the selected alternative caused the “least overall harm” under the criteria provided in FHWA’ Section 4(f) regulations, even though the selected alternative actually had greater impacts on Section 4(f) resources (2.16 acres) than another alternative (0.01 acre). FHWA’s determination was based on its finding that the other alternative would have more severe social impacts because it would bisect an established residential area and it was the only alternative that would affect a higher-than-average number of minority households; FHWA also found that selected alternative would meet the Purpose and Need more effectively than the other alternative. The court concluded that “The FHWA’s least-harm analysis was sufficient, its rationale was clearly explained, and its conclusions were reasonable, rather than arbitrary or capricious.” The court also found that FHWA was justified in rejecting a construction method that would have used less Section 4(f) land, because that method would have required greater impacts on wetland habitats.

In the South Mountain Freeway case, the plaintiffs argued that FHWA did not adequately plan to minimize harm to the South Mountain Park Preserve, tribal cultural resources, and tribal groundwater wells. The court noted that the EIS described measures to minimize harm to the park preserve and tribal cultural resources. The court also noted that FHWA and the State DOT entered into a programmatic agreement under Section 106 that contained binding commitments regarding the treatment and management of cultural resources. In addition, the court noted that the State DOT included in the design and construction contract a requirement for the contractor to avoid and preserve tribal well sites and associated infrastructure. The court concluded that the agencies conducted all possible planning to minimize harm, in compliance with Section 4(f).

E. Agency Coordination

In the Phoenix Sky Harbor case, the City of Phoenix alleged that FAA violated Section 4(f) by not consulting with proper city officials about the proposed flight routes. The court explained that although FAA had consulted low-level employees in the city’s aviation department, those employees lacked authority to speak on behalf of the city regarding the proposed flight routes, nor did they represent all local officials with jurisdiction over Section 4(f) resources. The court also noted that FAA did not cite any evidence that it had consulted with city officials specifically regarding historic sites and public parks protected by Section 4(f). Therefore, the court concluded that FAA did not satisfy its Section 4(f) consultation requirements.
III. Section 106 of the National Historic Preservation Act

A. Applicability of Section 106

In the New Orleans streetcar case, the plaintiffs argued that FTA violated Section 106 by failing to consider whether the city's streetcar network would have adverse effects on adjacent historic properties, including the Civil War monuments at issue in the case. The court held that Section 106 did not apply to removal of the Civil War monuments because they would not be displaced by streetcar tracks and because the removal of the monuments was locally funded. The court concluded that the plaintiffs could not demonstrate any Section 106 violations, denied the plaintiffs' request to conduct discovery, and dismissed their Section 106 claims with prejudice.

B. Section 106 Consultation Process

In the Phoenix Sky Harbor case, the court ruled that FAA did not fulfill its obligation to consult with the City of Phoenix. The court explained that FAA had consulted "only low-level employees in the City’s Aviation Department, whom the City had never designated as its representatives." The court explained that the Section 106 regulations required FAA to ask local governments who their authorized representatives are, which FAA did not do. Moreover, the court found that FAA did not provide the City with notice and documentation of its finding of no adverse impact, which "denied the City its right to participate in the process and object to the FAA's findings." The court also faulted FAA for not providing the public with information about the undertaking or allowing an opportunity for public comment.

C. Enforceability of Section 106 Agreement

In the Providence Viaduct Bridge case, an Indian tribe filed suit against FHWA, the ACHP, the State DOT, and the SHPO seeking to enforce compliance with Section 106 programmatic agreement in which the State DOT had committed to transfer certain properties to the tribe. The court dismissed the claims, holding that the tribe did not have a legal right to bring a lawsuit directly challenging parties' compliance with the PA.

D. FHWA Responsibility for Tribal Consultation under Assignment MOU

In the Willits Bypass case, an Indian tribe challenged a NEPA document approved by Caltrans pursuant an assignment MOU under which FHWA had assigned its responsibilities under NEPA and related laws to Caltrans. As part of that lawsuit, the tribe also sued FHWA, claiming that FHWA had violated its obligation under the assignment MOU to reassume responsibility for tribal consultation if a tribe raised a project-related concern about the State’s actions and "either the Indian tribe or FHWA" determined that “the issue will not be satisfactorily resolved" by the Caltrans. The court held, in essence, that FHWA can be sued for failure to reassume tribal consultation responsibilities under an assignment MOU; it did not rule on the merits of the specific claims raised in this lawsuit.
IV. Litigation Procedure

A. Administrative Records

In the Bonner Bridge/NC12 case, the plaintiffs claimed that the NEPA process was biased by the terms of a settlement agreement (in a previous case) in which FHWA and the State DOT committed to seek approval of a specific alignment for improvements to NC12. FHWA’s administrative record in this case included the settlement agreement itself, but the plaintiffs argued that the record also should have included draft documents generated in the negotiations leading up to the settlement agreement. The court rejected this argument because it found no evidence that FHWA had considered those draft documents in reaching the decision challenged in this case. The court also rejected the plaintiff’s argument that such draft documents might have been considered, stating that such arguments rest on speculation. Therefore, the court held FHWA had no obligation to include draft documents from the settlement negotiations in the administrative record.

B. Statutes of Limitations

In the Longmeadow Parkway case, the plaintiff claimed that FHWA violated NEPA by failing to adequately address environmental impacts and failing to examine a reasonable range of alternatives. The plaintiff also challenged FHWA’s decision not to supplement the EIS. The court held that these claims were barred by the applicable statute of limitations, because the plaintiff’s lawsuit was filed more than six years after the ROD and more than six years after the determination that a supplemental EIS was not necessary. Therefore, the court dismissed these claims as untimely. (The six-year statute of limitations applied in this case because FHWA did not issue a Federal Register notice triggering a 150-day statute of limitations.)

In the Phoenix Sky Harbor case, the plaintiff challenged FAA’s approval of new flight paths at the Phoenix airport. Under the statute governing FAA’s actions, there is a 60-day period to file a petition for review of an FAA order unless there are “reasonable grounds” for not filing within 60 days. It was undisputed that the plaintiffs filed their lawsuit beyond the 60-day period. The court held, however, that there were reasonable grounds for not filing the lawsuit within 60 days because after FAA published the flight routes, FAA had repeatedly communicated (in meetings and letters) that it was open to addressing concerns regarding noise: “We do not punish the petitioners for treating litigation as a last rather than first resort when an agency behaves as the FAA did here. While we rarely find a reasonable-grounds exception, this is such a rare case.”

In the Bonner Bridge/NC12 case, the plaintiffs challenged a ROD issued by FHWA in 2016 authorizing construction of a portion of a larger project that had originally been approved in a 2008 ROD. A motion was filed to dismiss the plaintiffs’ claim to the extent they asserted a direct challenge to the 2008 ROD, because such a challenge would be barred by the statute of limitations. The court denied the motion, finding that the complaint only challenged 2016 ROD, so it did not need to decide whether a challenge to the 2008 ROD would have been timely.
C. Preliminary Injunctions

To prevail on a motion for preliminary injunction, a party must establish (1) a likelihood of success on the merits, (2) irreparable harm unless an injunction is issued, (3) the threatened injury outweighs harm that the injunction may cause to the opposing parties, and (4) the injunction would not harm the public interest.

In the Longmeadow Parkway case, the court denied the plaintiff’s preliminary injunction motion because the plaintiff did not demonstrate that irreparable harm would occur if construction continued. The plaintiff relied on a U.S. Fish and Wildlife Service map that showed high potential habitat zones for the rusty patched bumble bee near the project. The plaintiff presented an expert affidavit, which stated that the rusty patched bumble bee was “likely found in significant numbers” outside areas designated as high potential habitat zones for the bee on the Service’s map. The plaintiff’s expert also stated that construction of the project “is likely to negatively and irreparably affect” the bee. FHWA, meanwhile, presented an affidavit from the environmental programs engineer for the project, who stated that the project section currently under construction was outside the high potential habitat zones for the bee. The court concluded that the plaintiff did not meet its burden to show that irreparable harm would occur.

In the Westside Subway Extension case, the plaintiff argued that a preliminary injunction was necessary because to prevent execution of a full-funding grant agreement and a design/build contract prior to completion of a court-ordered supplemental EIS. The district court denied the motion, holding that executing the grant agreement and design/build contract would not necessarily bind Metro to a specific alignment before the agencies completed the supplemental EIS. The court explained that both agreements could be changed in the future. The court also cautioned the agencies that “[h]aving represented to the Court that those agreements may be changed, the FTA (and/or Metro) will not be heard at a later date to claim that they may not, or that doing so would be too costly as a basis for asserting that the alignment cannot be changed.”

In the C-470 case, the plaintiffs sought a preliminary injunction to prevent construction from beginning while the litigation was pending. The plaintiff asserted that irreparable harm would occur because it would be difficult for the agencies to change course after beginning construction, thus defeating the value of any additional environmental analysis required by NEPA. The court rejected the plaintiff’s so-called “bureaucratic steamroller” argument, holding that the plaintiff's desired relief—additional noise analysis and mitigation—would not be impaired by construction of the project. The court further explained that the plaintiff’s assertion of irreparable harm was speculative because it was unknown if a different noise model would result in additional noise mitigation measures.

In the second Purple Line case, where the plaintiffs challenged FTA’s approval of the full-funding grant agreement, the district court held that the plaintiffs were not entitled to a preliminary injunction for two reasons. First, the court found a “mismatch between their legal claims and the injunctive relief they seek.” The court explained that the plaintiffs
challenged the grant agreement, but an order setting aside the grant agreement would not necessarily prevent the State from continuing construction with other sources of funds. Second, the court found that the plaintiffs were unlikely to succeed on the merits of their challenge to the grant agreement. In particular, the court stated it was “unconvinced” that the FTA had failed to make the required financial determinations supporting its approval of the grant agreement.

D. Ripeness and Mootness

In the Westside Subway Extension case, the plaintiff argued that FTA and Metro violated NEPA by executing a full-funding grant agreement and design-build contract before completing a court-ordered supplemental EIS, because the agreements would lead to a predetermined outcome. The district court denied the plaintiffs’ request for a preliminary injunction, finding that execution of the agreements would not cause irreparable harm to the plaintiffs. The plaintiffs appealed the district court’s decision. On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the agreements were not final agency actions - and therefore were not ripe for judicial review - because they did not represent an “irreversible and irretrievable commitment of resources” to the project. The court noted that FTA had represented that the agreements would not prevent it from making changes to the planned alignment in the future after completing the supplemental EIS. The appeals court concluded that, in the absence of any final agency action, the district court lacked jurisdiction and the lawsuit must be dismissed.

In the Longmeadow Parkway case, the plaintiff filed his complaint alleging that FHWA had violated Section 4(f) by improperly approving the use of a public park known as Brunner Farm. But the plaintiff filed the complaint in August 2016, and FHWA did not issue its FONSI until November 2016. Because the lawsuit was filed before the FONSI was issued, the court dismissed the Section 4(f) claim as unripe. The court explained that a “challenge to agency conduct is ripe only if it is filed after the final agency action.”

In the Longmeadow Parkway case, the plaintiff alleged that the National Park Service violated Section 6(f) of the Land and Water Conservation Fund Act by improperly approving a partial conversion of a park that had been acquired with support from the federal Land and Water Conservation Fund. The National Park Service had approved the transfer, but later rescinded its approval of the transfer. Because the approval had been rescinded, the court held that the plaintiff’s challenge to that approval was moot and dismissed the claim.

In the Brightline case, the USDOT argued that the cases were moot because it had withdrawn the challenged authorization of Private Activity Bonds. The plaintiffs opposed dismissal, arguing that the USDOT’s unlawful conduct could recur. The court concluded that there was no reasonable expectation that USDOT’s allegedly unlawful activity would recur. The court also explained that it could not grant meaningful relief because the requested relief - a declaration that USDOT violated NEPA and an injunction against the issuance of PABs - would not accomplish anything, given that USDOT had withdrawn the challenged PAB authorization.
E. Standing

In the I-70 case, the plaintiffs sought to establish standing to challenge FHWA’s approval of the I-70 project by alleging that they would be harmed by a local stormwater project that was being implemented in tandem with the I-70 project. After holding an evidentiary hearing, the court determined that the local governments would continue implementing the stormwater project regardless of the outcome in the I-70 case. The court therefore concluded that even if the plaintiffs were to prevail in their challenge to the I-70 project, they would not obtain the relief they sought - namely, stopping the stormwater project. Therefore, the plaintiffs lacked standing to challenge the I-70 project.

In the Bonner Bridge/NC12 case, the plaintiffs sought to establish standing to challenge FHWA’s Section 4(f) determinations for the project by alleging that they used and enjoyed natural resources that would be harmed by the project that FHWA had approved. In particular, they claimed that construction of the project would disturb their future use and enjoyment of a wildlife refuge. The court held that these allegations were sufficient to establish standing to bring the Section 4(f) claim.

F. Waiver and Exhaustion

In the Bonner Bridge/NC12 case, the State DOT moved to dismiss one of the plaintiffs on the ground that the plaintiff did not submit comments during the NEPA process. For this argument, State DOT relied on a new statute, enacted as part of the FAST Act, that prohibited plaintiffs from raising issues in court if the concerns had not been raised in comments during the NEPA process. This FAST Act provision applied to certain “covered projects.” The court noted that federal-aid highway projects were excluded from the definition of “covered projects” in the FAST Act. Therefore, the court concluded that the FAST Act provision did not apply, and allowed the plaintiffs to proceed with claims that they had not raised in comments submitted during the NEPA process.

In the Mid County Parkway case, the State DOT moved to dismiss certain claims based on the plaintiffs’ failure to raise those issues in the NEPA process. The court found that the plaintiffs had adequately raised some issues before the agencies during the NEPA process, but had failed to properly raise other issues.

- The court found that the plaintiffs had adequately raised their arguments concerning the adequacy of the project’s route description, because the administrative record contained a number questions and concerns from residents regarding the impact of the project on their specific properties - demonstrating an awareness of the route location. The court therefore allowed these claims to move forward.

- The court concluded that the plaintiffs had not adequately raised their concerns regarding the description of the project’s width. The court found that the only statements in the record on this issue were “so generally-stated as to be effectively useless to FHWA in attempting to address any perceived concerns.”
held that the plaintiffs had not adequately raised their concerns regarding the “environmental baselines” used in the NEPA analysis, nor their concerns regarding the agencies’ Section 4(f) analysis. The court therefore dismissed all of these claims.

G. Attorneys’ Fees

In the U.S. 101 case, the plaintiffs’ filed a request for attorneys’ fees under the Equal Access to Justice Act, a federal law that allows a party that prevails in litigation against the United States to be awarded attorneys’ fees. A request for attorneys’ fees under the Equal Access to Justice Act must be filed within 30 days of final judgment, but the plaintiffs filed their motion for attorneys’ fees three months after the district court’s order dismissing the case. The plaintiffs argued that the district court’s order was not a final judgment because FHWA had the right to intervene and appeal. The U.S. Court of Appeals for the Ninth Circuit held that the order was a final judgment because it was final and appealable. The appeals court also rejected the plaintiffs’ argument that the deadline should have been “tolled” (i.e., extended for reasons of fairness) because the plaintiffs had shown “due diligence” nor had they identified any “extraordinary circumstance” that prevented a timely request for attorneys’ fees. Because the appeals court held that the plaintiffs had missed the deadline for filing their attorneys’ fee request, it did not decide whether a plaintiff can obtain attorneys’ fees under EAJA against a state that has been assigned FHWA’s responsibilities under 23 U.S.C. § 327.

In the challenge to the Tier 2 EIS for the Illiana Corridor, the plaintiffs filed a request for attorneys’ fees under the Equal Access to Justice Act based on a decision in their favor in a previous case involving a challenge to the Tier 1 EIS for the same project. To receive attorneys’ fees under EAJA, the must be the “prevailing party” in the lawsuit. The plaintiffs argued that they were the prevailing party because they achieved their goal of stopping the project. The court explained that merely obtaining their sought-after goal, without obtaining any judicially sanctioned relief, was not enough to be a prevailing party entitled to attorneys’ fees or costs. The court held that the plaintiffs were not a prevailing party because it had dismissed the case as moot without granting any of the relief that the plaintiffs had requested.
# Appendix A: Commonly Used Terms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Defined Term</th>
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</thead>
<tbody>
<tr>
<td><strong>Assignment</strong></td>
<td>Assignment of USDOT environmental review responsibilities to a State under 23 U.S.C. §§ 326 or 327</td>
</tr>
<tr>
<td><strong>BRT</strong></td>
<td>Bus Rapid Transit</td>
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<tr>
<td><strong>DOT</strong></td>
<td>Department of Transportation</td>
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<tr>
<td><strong>EA</strong></td>
<td>Environmental Assessment</td>
</tr>
<tr>
<td><strong>EAJA</strong></td>
<td>Equal Access to Justice Act</td>
</tr>
<tr>
<td><strong>EIS</strong></td>
<td>Environmental Impact Statement</td>
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<tr>
<td><strong>EPA</strong></td>
<td>Environmental Protection Agency</td>
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<tr>
<td><strong>ESA</strong></td>
<td>Endangered Species Act</td>
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<tr>
<td><strong>FAA</strong></td>
<td>Federal Aviation Administration</td>
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<tr>
<td><strong>FHWA</strong></td>
<td>Federal Highway Administration</td>
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<tr>
<td><strong>FONSI</strong></td>
<td>Finding of no Significant Impact</td>
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<tr>
<td><strong>FRA</strong></td>
<td>Federal Railroad Administration</td>
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<tr>
<td><strong>FTA</strong></td>
<td>Federal Transit Administration</td>
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<tr>
<td><strong>MOA</strong></td>
<td>Memorandum of Agreement</td>
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<tr>
<td><strong>MOU</strong></td>
<td>Memorandum of Understanding</td>
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<tr>
<td><strong>MPO</strong></td>
<td>Metropolitan Planning Organization</td>
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<tr>
<td><strong>MSAT</strong></td>
<td>Mobile Source Air Toxics</td>
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<tr>
<td><strong>NAAQS</strong></td>
<td>National Ambient Air Quality Standards</td>
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<tr>
<td><strong>NEPA</strong></td>
<td>National Environmental Policy Act</td>
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<tr>
<td><strong>NHPA</strong></td>
<td>National Historic Preservation Act</td>
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<tr>
<td><strong>PA</strong></td>
<td>Programmatic Agreement</td>
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<tr>
<td><strong>PAB</strong></td>
<td>Private Activity Bond</td>
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<tr>
<td><strong>ROD</strong></td>
<td>Record of Decision</td>
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<tr>
<td><strong>Section 106</strong></td>
<td>Section 106 of the NHPA</td>
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<tr>
<td><strong>Section 4(f)</strong></td>
<td>Section 4(f) of the Department of Transportation Act</td>
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<tr>
<td><strong>Section 6(f)</strong></td>
<td>Section 6(f) of the Land and Water Conservation Act</td>
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<tr>
<td><strong>SHPO</strong></td>
<td>State Historic Preservation Officer</td>
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<tr>
<td><strong>USDOT</strong></td>
<td>U.S. Department of Transportation</td>
</tr>
<tr>
<td><strong>USFWS</strong></td>
<td>U.S. Fish and Wildlife Service</td>
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