TRANSPORTATION RESEARCH BOARD

COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (AL050)

THE NATURAL LAWYER

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FHWA/FTA ISSUE NPRM FOR REVISED NEPA RULES

On July 23, 2007 both FHWA and FTA signed a Notice of Proposed Rulemaking containing amendments to their joint NEPA rules. The Notice was published in the August 7, 2007 *Federal Register* at pages 44038-44050. The amendments are intended to carry out the changes in NEPA procedures mandated by SAFETEA-LU. Some of these changes include additions to the list of categorical exclusions for ITS projects, acquisition of pre-existing railroad right of way, and advance acquisitions of right of way for hardship and protective parcels. The comment deadline is currently set to expire on October 9, 2007.

TAKING OF CHURCH CEMETERY FOR EXPANSION OF O'HARE AIRPORT DOES NOT VIOLATE RELGIOUS FREEDOM LAWS

In order to expedite the reconstruction of O'Hare airport and overturn some troublesome Illinois court decisions, the Illinois General Assembly passed the O'Hare Modernization Act (OMA). OMA took away practically any obstacle or argument that could be made to stop or delay this project. The City of Chicago's condemnation powers for the project were expanded by, *inter alia,* specific authority to take any property used for cemetery purposes without the consent of the cemetery's owner. OMA also amended the Illinois Religious Freedom

Restoration Act (IRFRA), a law which was passed to reinstate the "compelling interest" standard in cases challenging government action that interferes with religious practice, by inserting language which said that nothing in IFRFA limited the authority of the City to relocate cemeteries or graves. When the expansion was finally approved by FAA, there was one cemetery owned by a local church affiliated with the United Church of Christ that had to go.

The local church contended that the remains of those buried in the cemetery must not be disturbed until Jesus Christ raises them on the day of Resurrection. The Court accepted this premise but held that OMA was a neutral law of general applicability. OMA was passed to clear the land for the expansion, not to interfere with any religious practice. As such OMA did not discriminate against any religion. The Court went on to hold that it was significant that the case involved intrusion on a religious site and not the curtailment or prohibition of a religious practice. The Court also held that OMA did not violate the equal protection clause because there was no showing that the law was passed to interfere with religion and it was rationally related to a legitimate government purpose.

The local church also contended that taking the cemetery was a "land use regulation" that was prohibited by the federal Religious Land Use and Institutionalized Persons Act. This law also requires the government to show a compelling interest before it can burden religious practices through zoning. The Court held that OMA was not a zoning law.

The dissent held that when OMA amended IRFRA, it offended the Free Exercise Clause of the First Amendment by penalizing the local church members by denying them an equal share of the rights, benefits and privileges enjoyed by other citizens. The fact that OMA did not choose to burden the beliefs of the United Church of Christ throughout Illinois did not take away from the effect of the law on each church member's free exercise of religion. The dissent would have held the City to the strict scrutiny test and would not have dismissed the complaint

St. John's United Church of Christ, et al. v. City of Chicago, et al., 7th Circuit Nos. 05-4418,4450&4451, September 13, 2007

CHALLENGE TO TENNDOT'S DECISION TO REBURY NATIVE AMERICAN REMAINS IN HIGHWAY DECLARED TO BE MOOT

In previous litigation, Tenn DOT discovered Native American remains during a highway reconstruction project and filed a petition in the local chancery court to relocate the three graves and reinter the remains. A number of individuals and groups objected to the relocation. Eventually Tenn DOT decided to dismiss the litigation and encapsulate the remains in reinforced concrete and leave them in the highway. Tenn DOT went on and finished the highway improvement. Since

the litigation was based on a request for an injunction to stop Tenn DOT from relocating the graves, the trial and appellate courts ruled the claim was moot. Tenn DOT assured the courts in the previous litigation that they would not dismiss the proceedings in chancery if a similar situation arose in the future.

In new litigation, the same objectors asked for a declaratory ruling that would require Tenn DOT to institute proceedings in chancery court. The trial and appellate courts ruled that the court was bound by *res judicata* and that the request for relief was still moot.

In Re: Order to Encapsulate Native American Indian Gravesites in Concrete and Pave Over with Asphalt, Court of Appeals at Nashville No. M2006-01749-COA-R3-CV, August 23, 2007.

EIS/ROD FOR I-93 ADD LANES IN NH MOSTLY UPHELD; SEIS ORDERED FOR UPDATED TRAFFIC FORECAST

After FHWA and New Hampshire DOT published a FEIS and ROD to add two lanes in each direction for 20 miles of I-93, the Conservation Law Foundation filed suit. The suit challenged practically every facet of the decision to build the improvement. CLF argued that rail should have been given impartial and more thorough consideration. NHDOT's dismissal of commuter rail as an alternative was upheld based on an adequately documented administrative record. The analysis of mobile source air toxics was upheld because it followed the guidance in place at the time the DEIS was published. The Court endorsed using the conformity analysis for analyzing the effects of the project on air quality. The Court declined to use a NEPA lawsuit as a basis to order specific project limitations based on water quality violations for chloride. The Court also declined to find bad faith when an internal state agency draft letter on wildlife impacts was modified before it was sent out in final form. The Court did not see sufficient evidence that anyone was coerced to adopt the final comment letter.

When future population with and without the project was challenged, NHDOT employed the use of a Delphi panel of local experts. The Delphi process gets its name from the place in ancient Greece where oracles issued prophecies. The Delphi panel decided that the updated population forecast from the State agency charged with making forecasts was too low. NHDOT did not rerun the traffic model with either the updated forecast or the Delphi panel numbers. Since NHDOT's decision was not explained, the Court sent the matter back for a Supplemental EIS.

Conservation Law Foundation v. Federal Highway Administration and New Hampshire Department of Transportation, Case No. 06-cv-45-PB, Opinion No. 2007 DNH 106, August 30, 2007.

TENNDOT DENIAL OF SIGN PERMITS BASED ON SPOT ZONING UPHELD

The owner of two parcels of land, one on each side of I-40, obtained rezoning of the parcels so that billboards could be erected. He then erected billboards without the necessary permits. An inspector from Tenn DOT looked at the sites and concluded that the only possible commercial use was for outdoor advertising. One parcel contained a large pond, or "marl pit," and bushes and trees while the other was an overgrown piece of former farmland. Both were landlocked and had no utilities nearby. The only access possible would be from a State highway up a steep embankment. The Court took note that Tenn DOT followed the State and Federal regulations that require that local zoning decisions not be taken at face value in situations like this. The Court affirmed Tenn DOT's decision to deny the permits and order the signs be removed.

Rick Phillips, et al. v. Tennessee Dept. of Transportation, Court of Appeals at Nashville No. M2006-00912-COA-R3-CV, April 26, 2007

NEW SIGN THAT REPLACES THREE STORM DAMAGED SIGNS IN TENNESSEE MUST COME DOWN

Lamar Outdoor Advertising maintained three old wooden legal nonconforming signs along I-40. After a storm, instead of replacing each sign the way it was originally built the way the rules are written, Lamar built one larger and higher steel sign. The new sign was not the same size and height and was less than the required distance, 1000 feet, from the next sign down the road. The Commissioner of Tenn DOT and the reviewing courts held that the new sign must come down. All previous permits were determined to be abandoned so no new sign could be built.

Lamar Outdoor Advertising Co. et al. v. Tennessee Dept. of Transportation, Court of Appeals at Nashville No. M2006-00915-COA-R3-CV, August 14, 2007

NAVIGATION PROJECT BETWEEN INDIA AND SRI LANKA STALLED OVER RELIGIOUS/CULTURAL ISSUES

Ships traveling to and from the southeastern coast of India must travel around Sri Lanka, adding 30 hours to each voyage. The extra travel is due to the presence of a land bridge, sometimes submerged and sometimes not, that stretches 30 miles across limestone shoals. The government of India has proposed a multi-billion dollar canal that would cut through the shoals.

This project has sparked controversy on environmental and religious grounds. Some of the opponents contend that the bridge was built by an ancient king who needed to cross the water to rescue his abducted wife. Others contend Adam crossed the bridge to reach Adam's peak in Sri Lanka where he stood in

repentance for 1000 years. Environmental opposition centers on impacts to marine life and coral reefs. The government attempted to prove that the bridge was not man-made by filing reports in the Supreme Court where a restraining order has been issued against further dredging. In the midst of the political firestorm, the reports have been withdrawn. The case is apparently still pending in the Supreme Court.

For further background, the following are recommended:
Goering, "A Bridge that Divides," *Chicago Tribune,* Section 1, page 9, 10/1/07
Subramanian, "A Bridge Too Far,"
www.flonnet.com/fl2419/stories/20071005502002500.htm 10/3/2007
Ramachandran, "Myth vs. Science,"
www.flonnet.com/fl2419/stories/20071005500500400.htm 10/3/2007
"Ram's Bridge Controversy: Religious Claim vs. Scientific Evidence," *Science and Religion News,* September 16, 2007,
sciencereligionnews.blogspot.com/2007/09/rams-bridge-cont... 10/2/07
"Lord Ram's Bridge,"
scribalterror.blogs.com/scribal_terror/2007/09/lord-rams-brid...

NOTES FROM THE CHAIR

Submitted by Peggy Strand
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With this October issue, *The Natural Lawyer* is on pace for four issues per year, as anticipated. May thanks are due to the contributors and our editor, Rich Christopher.

Now it is time to hear from you. *The Natural Lawyer* relies on volunteers and their willingness to keep colleagues informed of developments in transportation and environmental law. In this electronic age, where we have both too much and too little information, we'd like to know how this newsletter fits into your practice needs. Feel free to contact me or Rich with your thoughts.

The 2008 TRB Annual Meeting is January 13-17, 2008 in Washington, D.C. Registration information will be available on line at the end of September. As usual, we will have a Committee meeting during the Annual Meeting, and I will provide more information as the date gets closer.

NEXT DEADLINE FOR SUBMISSIONS IS DECEMBER 14, 2007

Anyone who would like to submit a case summary or other news for the January, 2008 edition of this newsletter should send the material to the Editor at Richard.Christopher@hdrinc.com or at chrislagra@sbcglobal.net and should use Microsoft Word. Submissions are due by the close of business on December 14, 2007.