



# 56<sup>th</sup> ANNUAL WORKSHOP ON TRANSPORTATION LAW

*Sunday, July 30 - Wednesday, August 2, 2017*  
*Sheraton Salt Lake City Hotel*  
*Salt Lake City, UT*

**Organized by**  
**Transportation Research Board**

**Sponsored by**  
**Legal Resources Group**

# 56<sup>TH</sup> ANNUAL WORKSHOP ON TRANSPORTATION LAW

*Legal Resources Group Chair, Robert J. Shea*  
*TRB Representative, Stephen Maher*  
*Committee on Transportation Law, Chair, Marcelle Jones*  
*Committee on Transit & Intermodal Transportation Law, Chair, Robin Reitzes*  
*Committee on Contract Law, Chair, Nancy Smith*  
*Committee on Emerging Technology Law, Chair, Bryant Walker Smith*  
*Committee on Environmental Issues in Transportation Law, Chair, Fred Wagner*  
*Committee on Eminent Domain & Land Use, Chair, William E. James*  
*Committee on Tort Liability & Risk Management, Chair, Jeanne Scherer*

## **Transportation Research Board Staff**

Ann Brach, Director, Technical Activities  
Stephen F. Maher, Associate Director, Technical Activities  
Joanice L. Johnson, Associate Program Officer

***The workshop has in the past been approved for continuing legal education (CLE) credits in states requiring such credits. Rules vary from state to state. Inquiries about such matters should be made to Joanice (Jo) Johnson at 202-334-2287 or by email [jojohnson@nas.edu](mailto:jojohnson@nas.edu).***

The registration fee covers all sessions of the workshop program and papers distributed at or following the workshop, plus the Sunday evening reception (July 30), Tuesday evening social event (August 1), Monday through Wednesday continental breakfasts, and morning and afternoon coffee breaks. Additional tickets for the Tuesday social event may be purchased on-site; subject to availability

The **Transportation Research Board** is one of seven major programs of the National Academies of Sciences, Engineering, and Medicine. The mission of the Transportation Research Board is to increase the benefits that transportation contributes to society by providing leadership in transportation innovation and progress through research and information exchange, conducted within a setting that is objective, interdisciplinary, and multimodal. The Board's varied committees, task forces, and panels annually engage about 7,000 engineers, scientists, and other transportation researchers and practitioners from the public and private sectors and academia, all of whom contribute their expertise in the public interest. The program is supported by state transportation departments, federal agencies including the component administrations of the U.S. Department of Transportation, and other organizations and individuals interested in the development of transportation.

[www.TRB.org](http://www.TRB.org)

**Cover Photo:** Skyline of Salt Lake City with the Wasatch Mountains in Utah. Retrieved from [http://www.nationsonline.org/oneworld/map/google\\_map\\_Salt\\_Lake\\_City.htm](http://www.nationsonline.org/oneworld/map/google_map_Salt_Lake_City.htm)

## TENTATIVE AGENDA AT A GLANCE

<b>Sunday, July 30, 2017</b>		
3:30 p.m. – 6:00 p.m.	Registration	
6:30 p.m. – 8:00 p.m.	Welcome Reception	
<b>Monday, July 31, 2017</b>		
7:30 a.m. – 5:00 p.m.	Registration	
7:30 a.m.– 8:00 a.m.	Continental Breakfast	
8:00 a.m. – 8:30 a.m.	Welcome	
8:30 a.m. – 10:00 a.m.	Opening Plenary Session	
10:00 a.m.– 10:30 a.m.	Break	
10:30 a.m. – Noon	Concurrent Sessions	
	Session 2: States and New Transportation Technologies: The Deployment and Regulation of Unmanned Aircraft	Session 3: The Disadvantaged Business Enterprise Program
Noon – 1:30 pm	Committee Meetings	
1:30 p.m. – 3:00 p.m.	Concurrent Sessions	
	Session 4: Litigation Strategy: How & When to Utilize 3d Visualization and Simulation	Session 5: Eminent Domain Basics: What Every Agency Lawyer Should Know
3:00 p.m. – 3:30 p.m.	Break	
3:30 p.m. – 5:00 p.m.	Concurrent Sessions	
	Session 6: Lessons Learned from Procurement Protests	Session 7: Busting the Budget: The Trend Toward Awarding Damages for Temporary or Permanent Loss of Direct Access
<b>Tuesday, August 1, 2017</b>		
7:30 a.m. – 3:00 p.m.	Registration	
7:30 a.m.– 8:00 a.m.	Continental Breakfast	

8:00 a.m.– 9:30 a.m.	Concurrent Sessions	
	Session 8: Legal Issues for Airport P3s and Designing Dispute Systems for Alternative Project Delivery	Session 9: FAST Act and Beyond: Developments in Project Delivery
9:30 a.m. – 10:00 a.m.	Break	
10:00 a.m. – 11:30 am	Concurrent Sessions	
	Session 10: Recent Developments in Eminent Domain	Session 11: Tribal-State Project Opportunities Under 23 USC 202 (a)(9)
11:30 am – 1:00 p.m.	Committee Meetings	
1:00 p.m. – 2:30 p.m.	Concurrent Sessions	
	Session 12: Intellectual Property Considerations in Public Contracts	Session 13: Rail Session
2:30 p.m. – 3:00 p.m.	Break	
3:00 p.m. -4:30 p.m.	Concurrent Sessions	
	Session 14: Transit Referenda	Session 15: Play by the Rules
6:30 p.m. – 9:00 p.m.	Dinner	
<b>Wednesday, August 2, 2017</b>		
7:00 a.m. – 8:00 a.m.	Breakfast	
8:00 a.m.– 9:30 a.m.	Concurrent Sessions	
	Session 16: Buy America: Navigating the Present and Contemplating the Future	Session 17: Endangered Species and Transportation Project Development
9:30 a.m. – 9:45 a.m.	Break	
9:45 a.m. – 11:15 a.m.	Session 18 Ethics Session: A Distinguished Lecture, Some Duties You Owe Your Public Client, And An Ethics Free For All	
11:15 a.m. – 11:45 a.m.	Closing Remarks & Adjournment	
11:45 a.m. – 2:00 p.m.	Group Council Meeting ( <b><i>Closed Meeting</i></b> )	

## WORKSHOP AGENDA

**ALL SPEAKERS ARE “INVITED”**

### Sunday, July 30

3:30 p.m. – 6:00 p.m.

**REGISTRATION**

6:30 p.m. – 8:00 p.m.

**WELCOME RECEPTION**

### Monday, July 31

7:30 a.m. – 5:00 p.m.

**REGISTRATION**

7:30 a.m. – 8:00 a.m.

**CONTINENTAL BREAKFAST**

8:00 a.m. - 8:30 a.m.

**WELCOME**

Robert J. Shea, Chair, Legal Resources Group

Ann Brach, Director, Technical Activities Division, Transportation Research Board

8:30 a.m. – 10:00 a.m.

**OPENING PLENARY SESSION: FHWA, FTA AND FRA CHIEF COUNSELS’ UPDATES**

Nicolle M. Fleury, Deputy Chief Counsel, Federal Highway Administration (FHWA)

Dana Nifosi, Acting Chief Counsel, Federal Transit Administration (FTA)

Sarah Inderbitzin, Acting Chief Counsel, Federal Railroad Administration (FRA)

The Chief Counsels of the Federal Highway Administration (FHWA); the Federal Transit Administration (FTA); and the Federal Railroad Administration (FRA) will update attendees on current regulations that were issued by the United States Department of Transportation (UTSDOT) and its entities. This information is very relevant to the practice of transportation law.

10:00 a.m. – 10:30 a.m.

**BREAK**

10:30 a.m. – Noon, Concurrent Sessions

**SESSION 2: STATES AND NEW TRANSPORTATION TECHNOLOGIES: THE DEPLOYMENT AND REGULATION OF UNMANNED AIRCRAFT**

Bryant Walker Smith, University of South Carolina, *moderator*

*Sponsored by: Emerging Technology Law Committee (AL040)*

This panel will explore state, local, and private perspectives on new transportation technologies, with an emphasis on the deployment and regulation of aerial drones in the United States. Technical and legal experts on these unmanned aerial systems (UAS) will address current developments through presentations and extended audience discussion.

**Panel Discussion**

Thomas DeCesar, K&L Gates LLP; Dave Teggin, Salt Lake Airport; Nancy Ford, Security 101; and Bryant Walker Smith, University of South Carolina

**SESSION 3: THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

Joanne L. Lubart, Pennsylvania Department of Transportation, *moderator*

*Cosponsored by: Transit and intermodal Transportation Law Committee (AL020) and Transportation Law Committee (AL010), with participation of members of the TRB Disadvantaged Business Enterprise Committee (AFH80)*

**Applying DBE in Design Build and Other Alternative Procurement Methods**

Martha Kenley, Federal Highway Administration (FHWA)

The DBE regulations were primarily tailored around the design-bid-build model in which a contract is awarded to the lowest responsible bidder. This topic covers how the DBE program can be administered effectively in the context of innovative procurement methods such as design-build and CMGC.

**A Case Study—DBE Disparity Study and Waiver Process**

Robin M. Reitzes, San Francisco City Attorney's Office

As part of the 1999 overhaul of the DBE program, the United States Department of Transportation (USDOT) added a provision to its new DBE regulation allowing recipients to apply for a program waiver if they wish to implement their DBE programs in a manner not prescribed in the rule. Waivers generally apply to matters involving goals -overall and contract goals and administration. They do not apply to DBE eligibility standards and procedures. The speaker will discuss a disparity study performed for her agency, why a waiver was required, and how the agency obtained the waiver.

## Legal Update

Colette Holt, Colette Holt & Associates

The speaker will provide an update on recent legal trends and cases, as well as a perspective from the DBE community.

Noon – 1:30 pm

### COMMITTEE MEETINGS

**Contract Law Committee (AL030)**

**Emerging Technology Committee (AL040)**

**Eminent Domain and Land Use Committee (AL060)**

**Tort Liability and Risk Management Committee (AL070)**

1:30 pm – 3:00 pm, Concurrent Sessions

### SESSION 4: LITIGATION STRATEGY: HOW & WHEN TO UTILIZE 3D VISUALIZATION AND SIMULATION

Chris Brehmer, Kittelson & Associates, Inc., *moderator*

*Sponsored by: Tort Liability and Risk Management Committee (AL070)*

We've all heard the saying "a picture is worth a thousand words," but how does this really play out in tort cases? This presentation and panel discussion will focus on how visuals can be used by or against DOTs in litigation. Through a series of case-studies, panelists will demonstrate:

1. The value of visual tools in understanding technical and complex issues.
2. When it is appropriate / cost-effective to begin work on these materials.
3. How to deal with admissibility issues that you are likely to face.

#### Panel Discussion

Deborah Cumba, California Department of Transportation (CALTRANS); and Joshua Cohen, Fat Pencil Studio

### SESSION 5: EMINENT DOMAIN BASICS: WHAT EVERY AGENCY LAWYER SHOULD KNOW

Christopher W. Kramer, Gust Rosenfeld, PLC, *moderator*

*Sponsored by: Eminent Domain and Land Use Committee (AL060)*

Over three hundred years ago, Alexander Pope wrote: "A little learning is a dangerous thing." Timely assistance of eminent domain specialists should be a critical part of the advice crafted to advance the client agency's goals, particularly with respect to project delivery. Many agency attorneys have at least some exposure to eminent domain concepts and procedures. However, knowing when and why to seek special assistance may not be clear, or may not appear to be justified until matters reach a critical stage when options are limited. Advice based on familiarity with general concepts can lead to



unfortunate or even disastrous consequences when dealing with specific situations. This panel will provide a refresher to attorneys generally familiar with eminent domain and a primer for those new to it. It will focus on the critical importance of timely expert advice to avoid unnecessary problems and resultant expense, and use real world examples to reveal the dangers of relying on general knowledge.

**Panel Discussion**

Christopher W. Kramer, and Laura Curry, Gust Rosenfeld, PLC; and Bernadette M. Duran-Brown, Nossaman, LLP

3:00 p.m. – 3:30 p.m.

**BREAK**

3:30 pm – 5:00 pm, Concurrent Sessions

**SESSION 6: LESSONS LEARNED FROM PROCUREMENT PROTESTS**

Francine Steelman, Miami-Dade Expressway Authority, *moderator*  
*Sponsored by: Contract Law Committee (AL030)*

This session will address organizational conflicts of interest and other situations likely to give rise to protests, measures that can be adopted to forestall protests, different options available to respond to protests (cancellation of procurement, amended solicitation, denial of protest), and relevant court decisions

**Panel Discussion**

Ellen McCormack, Chicago Transit Authority; Christine Ryan, Nossaman LLP; and Carmen Bakarich, Kansas Department of Transportation

**SESSION 7: BUSTING THE BUDGET: THE TREND TOWARD AWARDED DAMAGES FOR TEMPORARY OR PERMANENT LOSS OF DIRECT ACCESS**

Christopher W. Kramer, Gust Rosenfeld, PLC, *moderator*  
*Sponsored by: Eminent Domain and Land Use Committee (AL060)*

Recent court decisions have allowed property owners to recover damages for loss of direct access to a roadway where there is no taking and alternative access is provided. Other courts are recognizing a property owner's right to recover where there is a temporary loss of direct access due to construction activities. These cases reverse decades of public policy-driven decisions disallowing recovery for such damages. This trend has important implications for public projects which must account for and effectively manage costs associated with changes of access during and after construction, and balance those costs against public safety. The panel will discuss these cases and explore options for coping with the challenges they pose.



### Panel Discussion

Christopher W. Kramer, Gust Rosenfeld, PLC; Stuart Samberg, Rummel, Klepper and Kahl, LLP; and William E. James, Tennessee Attorney General's Office

## Tuesday, August 1

7:30 a.m. – 3:00 p.m.

### REGISTRATION

7:30 a.m. – 8:00 a.m.

### CONTINENTAL BREAKFAST

8:00 am – 9:30 am, Concurrent Sessions

### SESSION 8: LEGAL ISSUES FOR AIRPORT P3S AND DESIGNING DISPUTE SYSTEMS FOR ALTERNATIVE PROJECT DELIVERY

Nancy C. Smith, Nossaman LLP, *moderator*

*Sponsored by: Contract Law Committee (AL030)*

Session Description: This session will discuss legal issues relating to use of P3s for development and operation of airport projects, focusing on the ongoing P3 procurements being undertaken by the City of Los Angeles for the Landside Access Modernization Program at LAX. The panelists will also discuss dispute system design for alternative delivery projects

### Panel Discussion

Brian Ostler, Los Angeles City Attorney's Office; Brandon J. Davis, Nossman LLP; Sidney Scott, III, Hill International, Inc.; and Kurt Dettman, Dispute Resolution Board Foundation

### SESSION 9: FAST ACT AND BEYOND: DEVELOPMENTS IN PROJECT DELIVERY

Eric Beightel, WSP, *moderator*

*Sponsored by: Environmental Issues in Transportation Law Committee (AL050)*

Session Description: The FAST Act built on many environmental streamlining and project delivery provisions from MAP-21 and prior reauthorization statutes. The USDOT has issued guidance and other policy initiatives to implement Congress' desire to further expedite the environmental approval and permitting process. This panel will explore actions that have been taken to date, as well as developments in agency policies impacting project delivery. The panel will also explore potential regulatory actions and legislative proposals in the new Administration.

### Panel Discussion

Ronald Jackson and Gerald Solomon, U.S. Department of Transportation (USDOT); Brandon Weston, Utah Department of Transportation; and Karen A. Hanley, Federal Permitting Improvement Steering Council (FPISC)

9:30 a.m. – 10:00 a.m.

### BREAK

10:00 a.m. – 11:30 am, Concurrent Sessions

#### **SESSION 10: RECENT DEVELOPMENTS IN EMINENT DOMAIN**

Christopher W. Kramer, Gust Rosenfeld, PLC, *moderator*

*Sponsored by: Eminent Domain and Land Use Committee (AL060)*

Session Description: This session will review recent appellate court decisions from around the country involving takings claims, regulatory takings, damages, right to take, and just compensation. An expert panel will provide commentary discussing the implications of these decisions for public agencies, policy makers, and the public.

### Panel Discussion

Christopher W. Kramer, Gust Rosenfeld, PLC; Robert H. Thomas, Damon Key Leong Kupchak Hastert; Bernadette M. Duran-Brown, Nossaman, LLP; William James, Tennessee Attorney General's Office; and Rita S. Looney, Arkansas Department of Transportation

#### **SESSION 11: TRIBAL-STATE PROJECT OPPORTUNITIES UNDER 23 USC 202(a)(9)**

Vivian Philbin, Federal Highway Administration (FHWA); and Andrew Caulum, U.S. Department of the Interior, *moderators*

*Sponsored by: Transportation Law Committee (AL010)*

Session Description: This provision enacted under MAP-21 has allowed Federal-aid apportioned funds to move to Tribes either through the FHWA or through the BIA with the State relieved of stewardship and oversight responsibilities.

### Panel Discussion

Vivian Philbin, Federal Highway Administration (FHWA); and Andrew Caulum, U.S. Department of the Interior

11:30 a.m. – 1:00 p.m.

#### **COMMITTEE MEETINGS (lunch provided)**

**Transportation Law Committee (AL010)**

**Transit and Intermodal Transportation Law (AL020)**

**Environmental Issues in Transportation Law Committee (AL050)**

1:00 p.m. – 2:30 p.m., Concurrent Sessions

**SESSION 12: INTELLECTUAL PROPERTY CONSIDERATIONS IN PUBLIC CONTRACTS**

Donna L. Brady, Nossaman, LLP, *moderator*

*Sponsored by: Contract Law Committee (AL030)*

Session Description: This session will provide information regarding intellectual property (IP) issues relevant for public contracts, including the pros and cons of obtaining title to or a license to use IP, technology transfer, commercialization, how source code escrows agreements work, and the importance of updating intellectual property provisions in contract documents to reflect changes in technology and court rulings.

**Panel Discussion**

April Greenhouse, Metropolitan Transit Authority of Harris County, TX; William Estes, West Group Law PLLC; and Thomas Dover, Nossaman LLP

**SESSION 13: RAIL SESSION**

Charles A. Spitulnik, Kaplan Kirsch Rockwell, *moderator*

*Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)*

**Rail Regulatory Policy in the New Administration: The View from STB, FRA and Amtrak**

Craig M. Keats, Surface Transportation Board; Sarah Inderbitzin, Federal Railroad Administration; and Jared Roberts, Amtrak

2:30 p.m. – 3:00 p.m.

**BREAK**

3:00 p.m. – 4:30 p.m., Concurrent Session

**SESSION 14: TRANSIT REFERENDA**

Jayne Blakesley, Utah Transit Authority, *moderator*

*Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)*

**Panel Discussion**

Desmond Brown, Sound Transit; and Andrew Gruber, Wasatch Front Regional Council

**SESSION 15: PLAY BY THE RULES**

Bryce Little, WSP, *moderator*

*Sponsored by: Transportation Law Committee (AL010)*

Session Description: This session will discuss the legal and regulatory requirements of FHWA and FTA of which governmental entities should be aware in order to secure and retain federal funding. We will discuss some of the operational and potential financial impacts, such as record-keeping, auditing, mandatory contract clauses, procurement, performance measures, as well as conflicts that may arise among the myriad of federal, state and local requirements.

**Panel Discussion**

Bryce Little, WSP; Donna L. Brady, Nossaman; Kristina Assouri, California Transportation Commission; and Tim Mengle, Los Angeles County Metropolitan Transit Authority (LA METRO)

6:30 p.m. – 9:00 p.m.

**DINNER, *Arches Ballroom***

**Guest Speaker: Carlos Braceras, Director Utah Department of Transportation**

**Wednesday, August 2**

7:30 a.m. – 8:00 a.m.

**CONTINENTAL BREAKFAST**

8:00 a.m. – 9:30 a.m., Concurrent Sessions

**SESSION 16: BUY AMERICA: NAVIGATING THE PRESENT AND CONTEMPLATING THE FUTURE**

Gregory Rodriguez, Best, Best & Krieger, *moderator*

*Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)*

Session Description: The panel will address Buy America legal issues on current transportation projects being implemented or under construction, and also consider Buy America on the potential future of transportation, including convergence with emerging technologies, including high speed rail and automated vehicles. With “Buy American” a strong focus of the new administration, understanding, planning for and meeting Buy America requirements will continue to be an important part of legal considerations around new transportation projects.

**Panel Discussion**

Gregory Rodriguez, Best, Best & Krieger; Laura Goldin Ames, Federal Transit Administration (FTA); John Johnson, Federal Railroad Administration (FRA); Janette Hunter, Global Innovations; and Brandi Lisle, Stacy and Witbeck



**Mobile Phone Manners**

As a courtesy to other attendees, please observe good mobile phone manners. When attending meetings and in the public areas adjacent to these activities, please turn off your cell phones and other wireless communication devices or use the silent notification options. Thank you for your cooperation

## **SESSION 17: ENDANGERED SPECIES AND TRANSPORTATION PROJECT DEVELOPMENT**

Fred Wagner, Venable LLP, *moderator*

*Sponsored by: Environmental Issues in Transportation Law Committee (AL050)*

Session Description: Compliance with the Endangered Species Act, the Migratory Bird Treaty Act, and other species conservation laws continues to present a major challenge for transportation project development across the country. Important current actions include the creation of programmatic agreements designed to promote species and habitat preservation together with more predictable infrastructure approval. The listing or proposed listing of certain species has led to efforts to negotiate complicated Habitat Conservation Plans as well as the use of species conservation banks. Litigation challenges to federal agency enforcement of the ESA are still extremely common. This panel will review recent trends and best practices in species conservation law impacting transportation planning and development.

### **Panel Discussion**

Naomi Kisen, Utah Department of Transportation; Brooke Wahlberg, Nossaman LLP; and William M. Sloan, Venable LLP

9:30 a.m. – 9:45 a.m.

### **BREAK**

9:45 a.m. – 11:15 a.m.

### **ETHIC SESSION**

## **SESSION 18: A DISTINGUISHED LECTURE, SOME DUTIES YOU OWE YOUR PUBLIC CLIENT, AND AN ETHICS FREE FOR ALL**

Edward Kussy, Nossaman LLP, *moderator*

*Sponsored by: Legal Resources Group (AL000)*



Session Description: This is a three part program, each raising important ethics issues. First, Mr. Bruce Smith was the distinguished lecturer at the 2017 annual meeting of the TRB. Mr. Smith has graciously agreed to repeat the lecture, a sweeping look at ethics issues. Mr. Fleeter will cover a burning issue of our time, looking at the loyalty and confidentiality public lawyers owe their agencies. Finally we will spend about 30 minutes discussing any ethics topic that audience members are troubled by.

### **Panel Discussion**

Adam Sleeter, Federal Highway Administration (FHWA); Edward Kussy, Nossaman LLP; and Bruce Smith, Apperson Crump & Maxwell, PLC

11:15 a.m. – 11:45 a.m.

**CLOSING REMARKS & ADJOURNMENT**

11:45 a.m. – 2:00 p.m.

**GROUP COUNCIL MEETING (CLOSED MEETING)**

*Deer Valley*

**MARK YOUR CALENDARS!!**

## **2018 TRB Annual Meeting**



**T**he Transportation Research Board (TRB) 97th Annual Meeting will be held January 7–11, 2018, at the Walter E. Washington Convention Center, in Washington, D.C. The information-packed program is expected to attract more than 12,000 transportation professionals from around the world.

The meeting program will cover all transportation modes, with more than 5,000 presentations in over 800 sessions and workshops, addressing topics of interest to policy makers, administrators, practitioners, researchers, and representatives of government, industry, and academic institutions. A number of sessions and workshops will focus on the spotlight theme for the 2018 meeting: *Transportation: Moving the Economy of the Future*

Visit the TRB Annual Meeting website at:  
<http://www.trb.org/AnnualMeeting/AnnualMeeting.aspx>





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