**TRANSPORTATION RESEARCH BOARD COMMITTEE
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ILLINOIS UNIT RULE APPLIES TO BILLBOARD VALUATION

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This Illinois appellate court opinion is the result of an appeal by the Illinois Department of Transportation (IDOT) from a trial court denial of a motion *in limine* before trial of an eminent domain valuation case. At issue was the methodology in the valuation of a billboard – in this case, an off-premise outdoor advertising sign.

IDOT filed an eminent domain action in August of 2002 to acquire part of East Side Development's property in the City of East Peoria. East Side was the second owner after a prior owner had leased part of the property to Adams Outdoor in 1999 to erect a billboard on the property for an annual rent of $3,200. That written lease expired on December 31, 2001 but the billboard remained on the property with the oral consent of the owner just prior to East Side. IDOT obtained title to the property and improvements in October 2002 pursuant to a court order. IDOT offered Adams Outdoor $10,410 for relocation and $20,770 for reproduction costs. The City would not allow Adams Outdoor to relocate the billboard as it was larger than what was allowed by ordinance (which had been amended after the sign had been constructed) although a new board could be erected. Adams Outdoor rejected the IDOT offer. Not stated in the opinion or

concurrence is the fact that the billboard company did not make an effort to prove that it could not relocate the billboard in the "market area" which was larger than the city limits.

IDOT had the property it was acquiring appraised to determine just compensation. The IDOT and East Side appraisers valued the property as a whole agreeing that it was farmland with a highest and best use as commercial. The IDOT appraiser found that the whole parcel was worth $789,000 while the portion of property acquired was $22,000. He considered the billboard but found no value to the land from the billboard lease and considered the billboard to be personal property and not a part of the take. The East Side appraiser believed that lost rental income from the billboard was a measure of damages to the remainder of the property. The Adams Outdoor appraiser did not value the whole parcel or the portion to be acquired. Rather, he valued only the billboard at $126,800, using mostly the comparative sales approach. He gave no weight to the cost approach and found the bonus value of the billboard agreement – that is, the amount of the market value over the rent stated in the contract – was zero.

IDOT's motion *in limine* sought to bar the testimony of the Adams Outdoor appraiser because he did not value the owner's parcel as a whole first (the "unit rule"). While the trial court denied the motion, the court also found that the bonus value was not a permitted valuation method to determine the value of the billboard leasehold interest. The court certified the questions allowing IDOT to appeal.

As a matter of eminent domain law, it should be pointed out that, whenever a part of someone's land is to be taken, the value of the entire parcel typically (and at common law) is to be determined first at its highest and best use and then the part taken can be valued. This unit rule states that the fair market value of property with improvements is the value of the property as a whole rather than the sum of the value of the improvements. Once the whole property and the part taken are valued, it must then be determined what severance damages have been caused to the owner's remaining property as a result of the taking of the part. When a billboard is involved, depending on state law, it must be determined (as with many types of leases) what if any value the leasehold interest has which is being terminated.

On appeal, Adams Outdoor argued that a 1993 change in state law provided for separate compensation to owners of lawfully-erected billboards and that this was an exception to the unit rule. The appellate court rejected this argument finding that the 1993 amendment simply stated that a billboard owner has a compensable interest under the eminent domain statutes and the law did not require a "second taking" of the billboard. The unit rule could be applied consistently. The court distinguished a 2002 appellate opinion which also simply said that billboard owners have a right to just compensation for any condemned sign. In that case, the unit rule was not discussed, the landowner was not a party

to the proceedings (probably meaning the value of the whole was not determined in the proceedings) and, as IDOT argued, the only compensable interest of the billboard company was the leasehold as IDOT did not condemn the personal property billboard itself.

The second issue on appeal was whether "bonus value" is the proper measure of compensation to a billboard owner as contended by IDOT. Again, Adams Outdoor argued that the previous appellate opinion rejected this method and that bonus value does not satisfy just compensation as it does not take into account the value of the billboard and the "leasehold site's inherent value for producing rental income." The court held that the previous opinion only held that bonus value was not the only method of valuation and that it has long been held that the measure of compensation for a leasehold interest is the value of the interest, subject to the contract rent to be paid. If the value of the interest is greater than the contract rent (bonus value), the leaseholder is entitled to the excess, but if it does not exceed the contract rent, the leaseholder is not entitled to any compensation. Moreover, the unit rule must still be followed requiring the determination of the value for the entire property and, then, what part of that value is the fair rental value of the leasehold. Finally, the court cited a 1918 Illinois Supreme Court case for the proposition that evidence of business profits derived from condemned property is not admissible and is not a basis for fixing compensation.

Now for the rest of the story. The concurring opinion pointed out that, although the written lease for the billboard had expired when IDOT obtained the property, the lease had provided that Adams Outdoor would remove the billboard at its expense if the land was no longer available for billboard use and a suitable replacement site could not be agreed upon. This demonstrated that the owner of the property (including IDOT when it took over) did not acquire ownership of the billboard. Also, Adams Outdoor did not have a long-term leasehold interest before IDOT began condemnation and had only made a payment for one year in January of 2002. Adams Outdoor obtained the benefit of that payment when IDOT did not require removal of the board until August of 2003. This also showed that IDOT took nothing from Adams Outdoor.

NINTH CIRCUIT REJECTS PHASED COMPLIANCE WITH SECTION 4F IN IDAHO HIGHWAY PROJECT

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On October 6, the Ninth Circuit issued a decision in *North Idaho Community Action Network v. USDOT*, 2008 U.S. App. LEXIS 21002 (9th. Cir. 2008). The court ruled that FHWA had violated Section 4(f) by issuing a ROD approving a highway project involving four construction phases, because FHWA's Section 4(f) evaluation addressed only the initial phase. The court upheld FHWA's compliance with NEPA, rejecting the plaintiff's challenge to (1) the range of alternatives, (2) the analysis of dredging impacts, (3) the scope of alternatives analysis in a reevaluation that focused on potential design changes; (4) the NEPA analysis of historic properties; and (5) the decision not to prepare an SEIS.

This case involved improvements to existing U.S. 95, near the city of Sandpoint, Idaho. The Idaho Transportation Department (ITD) proposed to implement the project in four phases. Three of the phases (Phases 1, 2, and 4) involved widening the existing road from two lanes to four lanes. One of the phases (Phase 3) involved constructing a new road – the Sand Creek Byway – that would re-route U.S. 95 east of Sandpoint and thereby remove through-traffic from the town.

The EIS for the project covered all four phases. For the Sand Creek Byway, FHWA conducted full Section 106 consultation and included a Section 4(f) evaluation in the EIS. For the other three sections, FHWA included what the court described as a "broad overview" of historic resources in the EIS, but did not engage in Section 106 consultation with the State Historic Preservation Officer and did not conduct a Section 4(f) evaluation. Relying on the D.C. Circuit's decision in *Corridor H Alternatives, Inc. v. Slater*, the Ninth Circuit held that FHWA's approach violated Section 4(f).

> "The Agencies concede that they have taken a phased approach and have conducted a detailed § 106 identification process and § 4(f) evaluation only with respect to the Sand Creek Byway phase of the Project, and have not done so with respect to the remaining three phases of the Project. Further, the Agencies correctly point out that the regulations governing the § 106 process allow a phased approach to identifying historic properties in some circumstances. See 36 C.F.R. § 800.4(b)(2); 36 C.F.R. § 800.8(a)(1).
>
> However, § 4(f) and its regulations require that the § 4(f) evaluation be completed before an agency issues its ROD. See 23 C.F.R. § 771.135(b) …. And because the § 4(f) evaluation cannot occur

> until after the § 106 identification process has been completed, the § 106 process necessarily must be complete by the time the ROD is issued….
>
> The District of Columbia Circuit reached the same conclusion in a markedly similar case, *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999). In Corridor H, the agency approved a plan for building a lengthy highway corridor, which was divided into fourteen segments. Id. at 371. The EIS selected an alternative that required the agency to identify historic properties in each segment in sequence and provided that no work would proceed where the treatment of historic properties had not been finalized. Id. The ROD, approving the selected alternative, recognized that the § 4(f) evaluation could not be conducted until the § 106 identification process was completed. Id. at 371-72.
>
> The District of Columbia Circuit held that the agency was required to complete the § 4(f) process for the entire corridor project before issuing the ROD. See id. at 372-74 …
>
> We hold, consistently with the District of Columbia Circuit's decision in *Corridor H*, that an agency is required to complete the § 4(f) evaluation for the entire Project prior to issuing its ROD.
>
> The Agencies concede that they have taken a phase-by-phase approach, that they have not completed the § 4(f) evaluation for the entire Project, and that they already have issued the ROD. The Agencies have accordingly violated § 4(f). We therefore reverse the district court's grant of summary judgment on this issue." (Slip Op. at 18-20)

In reaching this decision, the Ninth Circuit considered the D.C. Circuit's decision in *City of Alexandria v. Slater*, which was issued after the *Corridor H* case and upheld a study in which some Section 106 consultation was deferred until after the ROD was issued. The Ninth Circuit found the *City of Alexandria* case to be factually distinguishable, because in that case only a relatively small amount of Section 106 work remained to be done after the ROD:

> "The Agencies' reliance on *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999), is misplaced. In *Slater*, the agency identified historic properties along the entire project corridor, and documented its findings in a Memorandum of Agreement and a § 4(f) evaluation; the agency deferred only the determination of whether some ancillary construction activities might also impact § 4(f) properties. *Id.* at 873. In contrast, here the Agencies concede that they have conducted the § 106 identification process and § 4(f) evaluation only as to the Sand Creek Byway phase of the project,

> and have not conducted the necessary identification and evaluation for the other phases of the Project" (Slip Op. at 19, fn.8).

Having found a violation of Section 4(f), the Ninth Circuit enjoined the three sections for which Section 4(f) evaluations had not been done, but allowed construction to proceed on the Sand Creek Byway, because it had "independent viability" and the plaintiffs had not questioned the adequacy of the 4(f) compliance for that section.

The Ninth Circuit's decision in this case underscores the need to complete Section 106 consultation and Section 4(f) evaluation, at least in some manner, for the entire project that is approved in a ROD. This case is particularly significant for any projects that are being studied in a single EIS but will be implemented in phases. To conform to this court's ruling, the ROD would need to include (or be preceded by) a Section 4(f) evaluation for all project phases.

The Ninth Circuit's decision also included a potentially significant statement regarding the analysis of impacts to historic properties under NEPA. The plaintiffs had argued that FHWA's "broad overview" of historic properties violated NEPA, in addition to violating Section 4(f). Rather than concluding that NEPA simply set a different standard of adequacy, the Ninth Circuit questioned the need for any analysis of impacts to historic properties under NEPA:

> "NEPA requires federal agencies to consider the *environmental impact* of major federal action. [emphasis in original] See *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005); see also *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 223-25 (5th Cir. 2006). NEPA has no independent requirement that an agency examine, separate and apart from any environmental impacts, the impact that a federal action will have on historic properties. NICAN's reliance on NEPA regulations requiring consideration of environmental impacts to support its historic-property-impact argument is therefore misplaced.
>
> Moreover, although an EIS is required to include 'discussions' of 'historic and cultural resources,' *see* 40 C.F.R. § 1502.16(g), the Agencies' 1999 EIS complied with this requirement. The 1999 EIS considered the impacts the Project is anticipated to have on historic properties, primarily focusing on the impacts of the Sand Creek Byway alternative versus a through-town couplet alternative." (Slip Op. at 13-14

In the context of this project, the Ninth Circuit's NEPA holding regarding historic properties was relatively inconsequential, given the court's holding on the Section 4(f) issue. However, this ruling may have significant implications for future cases

involving NEPA and historic resources, especially in cases involving agencies that are not subject to Section 4(f). *North Idaho Community Action Network v. USDOT,* 9th Circuit No. 08-35283, October 6, 2008

NINTH CIRCUIT AMENDS DECISION IN CAFE STANDARDS CLIMATE CHANGE CASE

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A panel of the Ninth Circuit Court of Appeals has issued an order amending its November 15, 2007, opinion in a challenge to the National Highway Traffic Safety Administration's (NHTSA) recent rulemaking to set corporate average fuel economy (CAFE) standards. *Center for Biological Diversity et al. v. National Highway Traffic Safety Administration et al.,* --- F.3d ----, 2008 WL 3822966 (9th Cir. 2008). Various environmental organizations and states had challenged both NHTSA's rulemaking and the NEPA evaluation of that rulemaking, the former as arbitrary, capricious, and contrary to law for not setting CAFE standards at stringent enough levels and the latter, which was processed by way of an environmental assessment, as not sufficiently addressing the effect on global climate change. The Ninth Circuit panel generally sided with plaintiffs and remanded to NHTSA for the promulgation of new standards and preparation of an environmental impact statement.

Soon after the ruling, NHTSA petitioned for a rehearing, with a suggestion for a rehearing *en banc*, based on the agency's objection to the panel's direction on remand that the agency must prepare an environmental impact statement for the rulemaking. While waiting for the court to respond to that petition, NHTSA issued its draft environmental impact statement.

On August 18, 2008, rather than granting NHTSA's petition, the panel issued an order that amended its original opinion. The revised opinion now states that NHTSA may choose to prepare a new environmental assessment, rather than a full environmental impact statement. Despite providing for that flexibility, the court was extremely dismissive of the possibility that NHTSA could possibly issue a Finding of No Significant Impact based on an environmental assessment. See, *e.g., Center for Biological Diversity*, 2008 WL 3822966, at *2 ("How NHTSA can, on remand, prepare an EA that takes proper account of [Petitioners'] evidence and still conclude that the 2006 Final Rule has no significant environmental impact is questionable."). By that same order, the court dismissed NHTSA's petition for a rehearing as moot. *Center for Biological Diversity et al. v. National Highway Traffic Safety Administration et al.,* --- F.3d ----, 2008 WL 3822966 (9th Cir. 2008).

CASE SUMMARIES

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1. **Ninth Circuit orders EPA to issue Clean Water Act effluent guidelines and new source performance standards for construction activity**

On September 18, 2008 the Ninth Circuit Court of Appeals affirmed a district court ruling on stormwater pollution from construction activity. The Court held that once EPA listed construction as one of the point source categories that required formal effluent limitation guidelines and new source performance standards, it was required to promulgate the standards. EPA's decision to delist the construction category was therefore, invalid. *Natural Resources Defense Council v. USEPA,* Ninth Circuit No. 07-55183, 07-55261; September 18, 2008

2. **No SEIS required for construction of taxiway at Logan International Airport**

FAA approved an EIS and ROD for a program of improvements at Logan International Airport in Boston, MA. Later FAA reevaluated the EIS and concluded that its data and conclusions on noise and air pollution were still accurate. The Court found no clear error in the reevaluation of noise data and the failure to reopen the NEPA process because of the new ambient air quality standard for PM 2.5. *Town of Winthrop v. FAA,* 1st Circuit No. 07-1953, July 23, 2008.

3. **Exemption from CWA for discharges from marine engines, "graywater" and ballast water overturned**

EPA issued a rulemaking exempting the above discharges from marine vessels from the NPDES requirements. Although the exemption had been in place for many years, the Court ruled that Congress had never authorized the exemption. *Northwest Environmental Advocates v. USEPA,* 9th Circuit No. 03-74795, July 23, 2008

NOTES FROM THE CHAIR

Submitted by Peggy Strand
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I hope your summers have gone well. We are gearing up for the 2009 TRB Annual Meeting, January 11-15, 2009 in Washington, D.C. It should be a very

exciting meeting, with a Spotlight Theme right in our field: Transportation, Energy and Climate Change.

1. Mark your calendars for some great "wake up" programs during the January 2009 TRB Annual Meeting.

-- Our Committee's program on "Climate Change Law 101" is scheduled for Monday, January 12, 2009 at 8:00 AM, at the Hilton
-- The meeting of the Committee on Environmental Issues in Transportation Law is scheduled for Tuesday, January 13, 2009 at 8:00 AM at the Marriott Park Tower Suite 8222.

2. There will be workshops on Sunday January 11, 2009 at the Hilton that we are cosponsoring, addressing **"Conduct of Transportation Environmental Research: What You Should Know About Getting It Done--Will Detailing the Process Yield Future Progress?"**

3. You can customize your Annual Meeting Schedule to keep track of environmental events, legal events or other topics of interest. Registration is open at www.trb.org.

4. Please remember to stay in touch with Rich Christopher as he continues his stellar work in editing The Natural Lawyer. Many thanks to the volunteers to provide short articles for that terrific newsletter.

NEXT DEADLINE FOR SUBMISSIONS IS DECEMBER 15, 2008

Anyone who would like to submit a case summary or other news for the January, 2009 edition of this newsletter should send the material to the Editor at Richard.Christopher@hdrinc.com and should use Microsoft Word. Submissions are due by the close of business on December 15, 2008.