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Legal Issues Associated with Intermodalism

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THE PROBLEM AND ITS SOLUTION

In reauthorizing federal assistance for surface transportation programs through the 1990s, the Intermodal Surface Transportation Efficiency Act calls for the adaptation of new concepts and techniques in planning, funding, constructing, and operating these programs. These changes will affect the institutional framework--laws and administrative processes--as well as engineering and operational elements of these programs. The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limitedscope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and highways, and in some instances, waterways. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they share common interests (and responsibilities) with highway and water transport agencies in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;

- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Title V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) includes a goal of encouraging "intermodal transportation." In response to concerns expressed at that time, ISTEA also created a National Commission on Intermodalism to study, among other things, legal issues that could impede the development of intermodal transportation.

While the report of the National Commission on Intermodalism analyzes the statutory, regulatory, and policy issues impeding intermodalism, this report examines transportation planning and legal issues from the prospective of those responsible for implementing these projects. It is, therefore, targeted to help administrators, planners, financial officers, and attorneys for transit agencies, ports, airports, and transportation departments.

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Legal Issues Associated with Intermodalism

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A. BACKGROUND AND PURPOSE OF THE STUDY

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) was enacted in December of that year. The stated goal of Title V of the Act, titled "Intermodal Transportation," is to "encourage and promote development of a national intermodal transportation system in the United States to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources."¹ Given the broad sweep and diverse goals of the Act, it is no wonder that it has been called "not an evolution, but a revolution"² and "the most complex piece of legislation in the history of the United States."³

Perhaps some of the ambivalence among commentators springs from the Act itself. For example, despite its stated purpose--promoting an intermodal transportation system--the term "intermodal" is defined nowhere in the Act. Although proposed federal rulemaking includes a description of intermodalism, it is important to know what intermodal means to the people implementing intermodal projects. To address intermodalism issues, some consensus must exist as to a practical definition of intermodalism. Until such a consensus exists, the goal of achieving intermodalism in the design and provision of transportation services will remain elusive.

Another reason commentators may see ISTEA as a complex piece of legislation is the widespread perception among transportation professionals that substantial legal requirements impede the development of intermodalism or of intermodal transportation systems. Indeed, Congress considered legal requirements as possible impediments to efficient intermodal transportation. In Title V of ISTEA, Congress established the National Commission on Intermodal Transportation (49 U.S.C. 301 § 5005, note), which was specifically directed to identify legal impediments to efficient intermodal transportation. A survey of individuals engaged in various segments of the transportation industry found those impediments ranged from restrictions imposed by federal funding statutes and regulations to requirements of labor laws and local zoning ordinances. With regard to funding issues, there appears to be a problem with how intermodal systems or facilities are defined by those proposing them and by those funding them.

This report aims to (1) develop a working definition of "intermodalism" that will facilitate discussion of issues surrounding ISTEA, (2) explore whether there are legal barriers that impede the development of a national intermodal system, and (3) discuss identified legal impediments. By developing a working definition and identifying where impediments exist, it is hoped that this report can either verify or effect a change in the widespread perception that there are significant legal impediments to intermodalism.

A brief overview of the structure of Title I of the Act will put the discussion in context. Title I, "Surface Transportation," embodies many of the Act's goals. It

includes three major new funding programs: the National Highway System,⁴ the Surface Transportation Program,⁵ and the Congestion Mitigation and Air Quality Improvement Program.⁶ The Interstate Construction, Maintenance,⁷ and Substitute Programs were all retained, but with some modifications.

The National Highway System (NHS) program is the heart of ISTEA's funding programs and is designed to administer funding for "an interconnected system of principal arterial routes which serve major population centers, international border crossings, ports, airports, public transportation facilities and other intermodal transportation facilities and other major travel destinations."⁸ This encompasses some 155,000 miles of the nation's most important highways, and about 110,000 miles of secondary roads leading to 104 ports, 143 airports, 191 rail-truck terminals, and 321 Amtrak stations.⁹ In addition to primary roadway projects, NHS funding can be used for highway and transit projects in the same corridor as a full access-controlled highway designated part of the NHS; for projects such as fringe and corridor parking facilities, carpools, and vanpools; and for bicycle transportation and pedestrian walkway projects.¹⁰ The NHS is not a new construction program; 98 percent of the NHS roadways already carry traffic, and the other 2 percent are under construction or in the planning stages.¹¹

A state may transfer up to 100 percent of its NHS funds to the Surface Transportation Program (STP).¹² STP provides funding for highway projects on all but local streets. Projects eligible for STP funding include construction and rehabilitation of highways and bridges, transit and capital projects eligible under the Federal Transit Act Amendments of 1991, and carpool, fringe and corridor parking, bicycle transportation, and pedestrian walkway programs.¹³ States may not transfer STP funds to other programs.

The Congestion Mitigation and Air Quality Improvement Program (CMAQ) ties funding of transportation projects to air quality improvement. In states with areas in nonattainment with air quality levels set in the Clean Air Act, CMAQ funds may be used on projects "likely to contribute to the attainment of a national ambient air quality standard."¹⁴ The retained Interstate Construction, Substitute, and Maintenance Programs provide funding for the reconstruction of bridges, interchanges, and crossings along existing routes. These funds are not to be used to construct new roadways, except for the construction of high-occupancy-vehicle lanes or auxiliary lanes.

Title I also requires state departments of transportation (DOTs) and metropolitan planning organizations (MPOs) to develop and implement management systems designed to help allocate and manage federal funding in six areas: (1) pavement on federal-aid highways, (2) bridges on and off federal-aid highways, (3) highway safety, (4) traffic congestion, (5) public transportation facilities and equipment, and (6) intermodal transportation facilities and systems.¹⁵ The Act's multiple goals are encapsulated in its description of the purpose of the intermodal management system, which is to "provide for improvement and integration of all of a State's transportation systems and [including] methods of achieving the optimum yield from such systems, methods for increasing productivity in the State, methods for increasing use of advanced technologies, and methods to encourage the use of innovative marketing techniques...."¹⁶

Title I also provides for greater MPO involvement in regional transportation planning. Section 134 provides that all transportation planning for urbanized areas will have to be based on the "continuing and comprehensive transportation planning process carried out by the metropolitan planning organization in cooperation with the State and transit operators."¹⁷ The coordination of state and regional

plans and the increased emphasis on MPO participation are designed to increase local participation in the planning process.

The Act's goals are myriad, and its methods of achieving these goals are equally diverse. This report will attempt to make those methods more understandable, with the ultimate goal of developing a practical understanding of intermodalism, exploring whether there are true legal impediments to the implementation of intermodalism, and discussing perceived legal impediments.

B. HOW THE STUDY WAS CONDUCTED

To develop a working definition of intermodalism and to identify those factors perceived within the transportation community as impediments to the creation of intermodal systems, the authors distributed a survey to individuals engaged in all aspects of the transportation industry.

One of the primary difficulties in identifying and contacting potential survey respondents is the diversity of possible survey subjects. Planners and providers involved in rail transport, water port and airport administration, and urban mass transit each have their own set of concerns. The difficulty is in identifying individuals working in those areas at which these concerns converge. For example, there are over 500 railroads in the United States operating 175,000 miles of rail line. Rail yards and rights of way for the vast majority of these lines are owned by the largest private rail line owner-operators.¹⁸ Marine terminals, on the other hand, are typically owned by public or quasi-public entities that provide the land and infrastructure for port operations. The actual operation of the port is typically contracted out to marine terminal operators, who lease the land and provide cargo handling services. In addition, some state port authorities own and operate their own terminals.¹⁹ Traditionally, the most tangible link between ports and rail yards was the local drayage operators who handled the transfer of cargo between marine and rail terminals.²⁰

Competition and pressure to increase efficiency in the movement of goods has, however, mandated a closer link among rail terminals, marine terminals, and longhaul trucking services. Moreover, as urban transit providers look for ways to maximize their transportation investments, they are increasingly looking to corridorsharing arrangements with owner-operators of railways used primarily for moving freight.²¹

Given the complex tapestry of private and public concerns encompassing all modes of transportation, no single survey could be geared, with any specificity, to the many and varied transportation providers; planners; facility operators; and local, state, and federal officials involved in transportation issues. To determine legal impediments perceived by the transportation community at large, the survey was geared toward transportation officials who run facilities, so that the responses would be based on practical experience. Because of the possibility of individual respondent's modal biases, the survey was distributed to rail officials, airport administrators, transit administrators, water port administrators, state and regional port authority administrators, and directors of state and municipal DOTs. The authors attempted to compensate for possible modal biases by forwarding the survey to clusters of transportation providers in particular cities, in hopes of gaining a multi-dimensional view of a particular city's or region's concerns.

More than 400 questionnaires were sent out, and 72 responses were received. Although this survey is non-scientific, responses to the questionnaires provide useful information about intermodalism and perceived legal impediments.

Table 1 lists the affiliations of the survey respondents.

TABLE 1. SURVEY RESPONDENTS

AFFILIATION	NUMBER
Intermodal System	26
Intracity Bus/Transit	21
Airport	11
Water Port	8
Other	6
Total	72

The job descriptions and titles of the individuals surveyed vary widely and include managers and directors of operations, traffic, and intermodal services; planners; and general counsels. The largest number of respondents represent intermodal systems, which usually consist of an intracity transit system in combination with either a railroad (Amtrak, for example) or an intercity bus service (such as Greyhound). Some intermodal systems also include an airport or other transportation facility, such as a water port. Almost as many respondents represent intracity bus/ transit; most respondents in this group either (1) are considering or attempting to develop an intermodal system, or (2) do not believe their communities would support the expense of an intermodal system.

As a follow-up, and in an effort to round out the profile of a particular city or region, the authors contacted federal, state, and local planning officials involved in local transportation issues to gain additional perspective on the intermodal workings of a particular area's transportation system. The results of these contacts are not reflected in the survey results, but are discussed throughout this report.

The survey was designed to elicit information corresponding to the dual aspects of the study. Respondents were first asked to provide information about the transportation entity they represent, including the type of facility and number of passengers or amount of freight carried, and to identify transit links (to other modes of transportation) available to users of the facility. In separate parts of the survey, respondents were asked (1) to propose a definition for "intermodalism" and to describe how this definition applies to the respondent's site, and (2) to choose, from a checklist, elements perceived to impede the development of intermodalism and to describe how each element inhibited intermodalism. A sample of the survey is attached in Appendix B.

Based on the survey results and an examination of the literature and case law, this study has two products. The first is the results of the survey, including a practical definition of intermodalism that may be said to be a composite of the opinions of transportation professionals nationwide. The second product is a clear understanding of the legal issues associated with intermodalism and a discussion of how those issues may impact the development of intermodal transportation systems.

Before discussing the survey results and the respondents' suggested definition of intermodalism, it would be helpful to look at the federal concept of intermodalism. Although there is no federal definition of intermodalism, the U.S. DOT has addressed the concept of intermodal transportation systems in federal rulemaking.

"Intermodalism is a major theme of the ISTEA," according to the DOT's "Advanced Notice of Proposed Rulemaking" for the regulations on the Act's management systems.²² The declaration of policy of the Act is then quoted as follows:

The National Intermodal Transportation System shall consist of all forms of transportation in a unified, interconnected manner, including the transportation systems of the

future, to reduce energy consumption and air pollution while promoting economic development and supporting the Nation's preeminent position in international commerce.²³

Such declaration of policy is not, of course, intended by the drafters of the Act to serve as a definition of an intermodal transportation system; however, it clarifies that an intermodal system was intended to include *all* forms of transportation, in an *interconnected* manner. The regulations promulgated under ISTEA expanded the concept. The Advanced Notice states that "an intermodal facility is a transportation hub that interconnects different modes of transportation. An intermodal system provides a means for moving people and goods using various combinations of transportation modes."²⁴ The regulations define "intermodal system" as "a transportation network consisting of public and private infrastructure for moving people and goods using various combinations of transportation modes."²⁵ Thus, under federal regulation, the concept of intermodalism (although not specifically defined) seems to encompass both the hub, or facility, and the network of interconnecting modes of transportation, and it includes movement of people and goods and private and public infrastructure.

C. SURVEY RESULTS

1. Survey Respondents' Definition of Intermodalism

The definitions proposed for intermodalism by the survey respondents incorporate many of the concepts suggested by federal law and regulations. For example, both the links and the interfaces or hubs were suggested by the respondents. Other concepts suggested by the respondents are inclusion of both the private and public infrastructure, the idea of efficient use of facilities, and a "unified, interconnected manner" (respondents referred to this as "seamlessness").

When asked to define the word intermodalism, respondents voiced a few common themes.²⁶ For example, the notion of a "seamless" multimodal trip appeared in several responses. The differences among the various responses, however, were also striking. A planning manager for an airport in the Pacific Northwest defined intermodalism as "[c]onnections between different modes of transportation to provide seamless and efficient transportation." Another airport planner defined the term simply as "user opportunity to interface with desired modes of transportation," and still another focused on the modes of transportation involved, defining the term as the "use of two or more transfer modes to deliver cargo." In each of the three responses, the emphasis is on links in the intermodal chain—the connection between modes, the point at which the user interfaces with different modes, or the modes of transit themselves.

Other respondents adopted a somewhat expansive definition, focusing more on the network of options, rather than the links within the system. A transportation manager for a seaport in the Pacific Northwest defined the term as "the seamless transfer of goods and/or passengers between transportation modes for intrastate, national and international destinations, including the availability of systems and facilities that support such modal transfers." The reference to systems and facilities thus encompasses both points of interface and the connections between points of interface.

The two types of responses discussed above correspond roughly to the two primary, and differing, definitions of intermodalism that have emerged: (1) the intermodal system includes both the points of connection (e.g., ports, transit terminals, airports, and warehousing centers) and the links in between (e.g., a freeway

connecting a port with an inland city) or (2) the intermodal system includes only the points of connection.²⁷ Clearly, the definition offered depends the perspective of the individual asked. The challenge is in devising a definition that encompasses the full sweep of ISTEA and addresses the issues important to all transportation providers.

a. *Seamlessness*

The concept of the seamless trip comes from private-sector freight operators.²⁸ In that context, seamlessness implies a unified, portal-to-portal movement, often by one mode of transit, such as trucking. In the intermodal context, seamlessness implies the uninterrupted movement of goods over space and with the use of multiple modes. This concept can be applied equally to passenger transit. For example, seamlessness should include not simply the movement of goods or passengers, but the movement of both goods *and* passengers. Thus, seamless passenger transit necessarily includes not only the efficient flow of people through points of interface—airports, for example—but also the efficient movement of their luggage.

b. *Inclusion of Links and Interfaces*

Respondents said the term intermodal often evoked images of the hubs that support such a system. Commuter terminals in the realm of public transit and intermodal yards in the context of commercial freight movement are two examples. However, viewed from the perspective of the total trip, intermodalism must include both transfer points and the links that connect the transfer points. Thus, rather than a series of independently operating hubs, a truly intermodal system should be thought of as a network of hubs, with every possible mode of transit linking the hubs to one another.

c. *Economic Efficiencies*

Intermodalism must encompass not simply the notion of multimodal transit, but also the idea of efficient and cost-effective use of all available modes of transit. The Act states this goal as obtaining "optimum yield" from the nation's transportation resources, and it implies the movement of people and cargo using multiple modes, as well as the highest and best use of each mode.

d. *Environmental Imperatives*

Economic efficiencies and environmental imperatives seldom seem to travel hand-in-hand, but under ISTEA they must. The Act's stated purpose is to promote development of an intermodal system that is both "energy-efficient" and "strengthens" the United States' ability to "compete in the global economy."²⁹ The Act reinforces the requirements of the Clean Air Act by requiring the coordination of transportation planning and clean air attainment programs and plans.

e. *Choice*

The goal of intermodalism is not simply to move people and goods from one point to another using more than one mode of transportation; rather, it is to provide interlinked systems that allow the individual traveler or planner to choose which combination of modes is best suited to the economies, time constraints, and particular needs of a given task. Inherent in a definition of intermodalism, then,

is the concept of choice--the flexibility of a system to deliver goods or people from one point to another in the manner that best suits individual needs.

f. Proposed Definition

Taking into account the multifaceted aims of the Act and the many objectives stated by survey respondents, the authors propose the following definition of intermodalism:

A national transportation network consisting of all modes of transportation, including support facilities, interlinked to provide maximum opportunity for the multimodal movement of people and freight in a seamless, energy-efficient, and cost-effective manner.

The proposed definition incorporates the following concepts: a nationwide system, all modes of transportation, a network (including the linkages), movement of both people and goods, and seamlessness. It also provides for maximization of opportunity (for use in infrastructure), energy conservation, and cost effectiveness. It takes into account the stated policy of ISTEA, as well as the major components of the federal regulatory concept. The proposed definition also incorporates the survey respondents' major ideas.

2. Survey Respondents' Ratings of Some Problems Associated with Intermodalism

In addition to proposing a definition of intermodalism, respondents were asked to identify problems perceived as inhibiting the development of intermodal facilities and systems development. Their responses are summarized in Table 2.

The 72 respondents identified legal impediments only 60 times, although the potential number of times legal impediments could have been identified totaled 288. "Nonlegal" problems, also with a possibility of being identified 288 times, were identified 112 times by the same group of respondents. When the checklists are considered together with written survey comments, it is clear that individuals surveyed think the two major barriers to intermodalism are (1) funding and (2) commuter attitudes.

Of the 33 respondents who checked "Federal Regulations and/or Funding Restrictions" as a primary problem, more than two-thirds indicated that funding restrictions were their concern. Combined with those who checked "Expense of Conversion/Availability of Equipment" (all of whom indicated that the problem

was the expense), 45 out of 72 respondents thought that funding or cost was a primary impediment to the development of intermodal transportation systems.

Among the respondents who perceived funding or cost to be the primary problem, many mentioned the cost of complying with the Americans with Disabilities Act. This cost was especially troublesome to respondents representing transit operators. One respondent wrote: "Our paratransit service costs have almost doubled and the requirement to purchase accessible buses has also increased costs." Other individuals cited the large capital costs of providing intermodal terminals in areas where land costs are high (often in a downtown center). As one respondent pointed out, "Terminal locations should be at the point of maximum congestion to encourage mass transit use; these are difficult and costly to locate." The administrator of a commuter rail line pointed out that the "high costs of infrastructure for railroads precludes the development of off right-of-way sites," and therefore it is only practical for other transportation carriers with "more flexible modes and less fixed overhead to interface with existing railroad facilities." Several respondents noted that federal funding had never been all that was promised when ISTEA was enacted.

Thirty-six respondents indicated that behavior or attitudes of commuters and potential transit users is a primary barrier to developing intermodal transportation systems. A number of respondents linked funding problems with commuter attitudes, pointing out that people in their service communities were unwilling to fund mass transit or pay the large costs of providing intermodal links because they prefer to continue driving privately owned vehicles. Several respondents stated that commuter behavior will not change without strong incentives; one respondent wrote that "once a routine is established by a commuter it becomes difficult to change." The incentives needed to change commuter attitudes were identified as "economic, travel time, number of transfers, and comfort level of a particular mode, as well as availability of options" of transportation. A response often given by individuals from smaller municipalities and areas with low levels of traffic congestion was that people in their service areas were unwilling to give up their cars.

Other frequently cited problems were lack of cooperation among administrative/governmental agencies and lack of cooperation among service providers. In some cases, these two designated entities are the same, such as when a regional public agency runs a commuter rail system, and a publicly owned intracity bus company must interact with the regional agency to form an intermodal system. One respondent wrote that there are four local governments in her service area, and all are "very territorial," making for conflicts rather than cooperation. Several individuals pointed out that there is frequent competition among government agencies for available funds. Often, projects within a single region compete for the same federal dollars, rather than act as components of an integrated plan. For example, in Denver, there has been political pressure to develop a light-rail system to serve rapidly growing Jefferson County, which lies west of the city. One survey participant indicated that planners involved in the study of a heavy-rail extension to the Denver Airport have not yet pursued federal dollars because, in part, they do not want to compete with plans for light rail into Jefferson County.

Surprisingly, six respondents did not indicate any problems at their agencies in developing intermodal transportation systems. However, two of these did not offer any specifics. Of the others, one administrator of a water port in San Francisco indicated that he did not perceive any impediments to intermodalism at his facility, but thought that the interface between modes of transportation could be

TABLE 2. POTENTIAL BARRIERS TO INTERMODALISM

BARRIER	RESPONSES (No.)
<i>Legal</i>	
<i>Federal Regulations and/or Funding Restrictions</i>	33
<i>Zoning Restrictions</i>	11
<i>Noise and Land-Use Restrictions</i>	12
<i>Labor Laws</i>	4
<i>Nonlegal</i>	
<i>Lack of Cooperation Among Administrative/Governmental Agencies</i>	29
<i>Lack of Cooperation Among Service Providers</i>	23
<i>Expense of Conversion/Availability of Equipment</i>	24
<i>Behavior of Commuters/Transit Users</i>	36

improved. The director of a fully intermodal transportation center in Hartford, Connecticut, which includes intercity and local transit, airport limousines, and an atsite railway link, indicated that "none of these restrictions apply" to his site. Another respondent stated that he thought there are no *legal* impediments to developing intermodalism, but "it appears that political issues are the biggest hinderance."

3. Conclusions Based on Survey Responses

In general, when asked to identify significant obstacles to the creation or growth of intermodal systems, most respondents cited nonlegal factors. Almost twice as many of the respondents named nonlegal barriers as named legal barriers. The responses reflect two major and related concerns perceived to be impediments to the creation or growth of intermodal systems: funding *or* cost problems, and commuter behavior or attitudes. These factors are often related, since the large costs of facilities construction that would accompany the development of an intermodal system must generally be paid in part by the users of the system and by local taxpayers who may wish to continue driving their private automobiles. The survey points out the reluctance of commuters to give up the convenience and comfort of their own vehicles, particularly in locations where public transportation is sparse or irregular and where traffic congestion is low.

Another factor often cited as a barrier to the development of intermodal systems is the lack of cooperation among government agencies and among service providers. These are often the same entities, since local and state governments frequently operate one or more modes of an intermodal transportation system. Sometimes this issue is also related to funding because there is competition among agencies for scarce dollars.

There is also some evidence that intermodal development may be impeded by politics, whether it takes the form of competition among government agencies (acting "territorial") or a reluctance to make decisions that may not be popular with taxpayers (voters).

Some legal issues were identified as perceived barriers to intermodalism. These included federal regulations and funding restrictions; local zoning, land use, and noise control regulations; and labor laws. These legal issues are discussed in the next section of this report.

D. LEGAL ISSUES ASSOCIATED WITH INTERMODALISM

The report of the National Commission on Intermodal Transportation, *Toward a National Intermodal System* (September 1994), provides an excellent discussion on the nonlegal impediments to intermodalism, including funding issues, and the federal regulatory/funding scheme. The remaining portion of this report examines the nature and scope of the legal issues and the role laws and regulations play in intermodal projects. Although the survey responses indicate that the perceived major impediments to intermodalism are nonlegal, there are indeed some legal problems associated with intermodalism. Transportation lawyers need to understand these problems, recognize where to expect them, and learn how to deal with them.

1. Funding Issues

ISTEA's ambitious attempt to establish a comprehensive national transportation strategy embodies far more than the funding decisions of the federal highway

programs of the past. The Act authorizes some \$155 billion for highways, transit projects, and congestion mitigation and air quality programs over its 6-year life. Among the Act's many unique features are an increase in funding for planning, the integration of transportation planning with the air quality goals of the Clean Air Act and its amendments, and the encouragement of a bundle of technologies known as intelligent transportation systems.

At the very core of the Act, however, is the concept of flexible funding, the goal of which is to allow transportation planners maximum latitude in using funds for transportation projects involving various modes.

The promise of ISTEA is that it allows state and regional planners unprecedented flexibility in the use of federal transportation funds. Indeed, under ISTEA's innovative funding provisions, money that previously had been designated for other projects can be used for mass transit, and local MPOs are to play a central role in allocating ISTEA money.

In spite of this promise, however, the single most common complaint among transportation industry officials and planners who responded to the survey was lack of funding to develop intermodal transportation systems. Part of the difficulty arises because Congress has not fully funded the programs in ISTEA. Norman Mineta, one of the Act's original sponsors, has complained that the Act has been stymied by underfunding and budget cuts for other transportation programs.³⁰ In fact, Congress underfunded ISTEA by \$3.9 billion in its first 3 years.³¹ Although the lack of federal money is a significant barrier to development of intermodal systems, the manner in which federal dollars are distributed also creates a host of peripheral legal and quasi-legal problems.

a. Modal Funding/Limitations Under the Act

The Act's funding programs carry their own sets of requirements, and it is often difficult to find language in the Act that accommodates projects that would further the development of intermodalism.

For example, a transportation planner for the port of Portland, Oregon, cited problems funding improvements to rail access at a port on public land. It is unclear under what program the port might seek such funding. The planner identified CMAQ as the only available source of funding under the Act, but CMAQ funds are available only to projects or programs "likely to contribute to the attainment of national ambient air quality standards."³² Although improved port access would undoubtedly serve several of the Act's stated purposes (i.e., the movement of goods in an energy-efficient and economically competitive manner), it would nonetheless be difficult to show how such improvements would affect ambient air standards. Such improvements would also be a hard sell to the local MPO charged with improving mass transit, because the most immediate beneficiaries would be private freight carriers.

The survey respondent's experience is not unique. The ports of Philadelphia and Tampa recently applied to their local authorities for federal funds needed to improve access to their cargo terminals and rail yards. In Tampa, the local MPO found that the proposed project was "not a proper use" for federal money available under ISTEA, while the Delaware Valley Regional Planning Commission gave the Port of Philadelphia \$2.4 million of ISTEA money to improve its intermodal yards.³³

In Southern California, the ambitious Los Angeles Alameda Corridor has experienced similar problems. The 25-mile-long joint rail and highway project is designed to coordinate the movement of cargo between the ports of Los Angeles and Long Beach and rail yards in downtown Los Angeles. Once complete, the project

would consolidate three separate rail corridors and improve truck access to adjacent Alameda Street.³⁴ While money from every conceivable source will be needed to complete such a project, the project's Joint Powers Authority found itself "screened out" of funding for an engineering study because the \$2-billion project did not fit squarely into the local MPO's "traffic signalization and management" category.³⁵

These projects represent just a few examples of how a project that serves the ultimate goals of ISTEA may not have ready access to funds under the Act. Despite its reputed flexibility, ISTEA's funding structure and the execution of funding under the Act still present significant problems for intermodal projects. There are several reasons for this apparent bias, including the source of most federal transportation dollars.

Transportation projects are funded by a series of trust funds, such as the Highway Trust Fund, which are in turn funded by user fees, such as fuel taxes and registration fees. Some significant links in the intermodal system, such as railroads, are privately run or do not contribute to the Highway Trust Fund. Planners representing rail interests argue, perhaps rightly, that to realize ISTEA's vision of an integrated transportation system, federal dollars will have to be spent on projects such as port and rail improvements. On the other hand, industries that contribute to trust funds via user fees argue that such funds should not be expended on projects benefiting private carriers. As Thomas Donohue, president of the American Trucking Associations, puts it, "We will build roads to rail terminals and do it with a smile. But we're not using federal highway money to build private rail and intermodal systems unless we're also going to use it to build truck terminals."³⁶

There are a number of problems with respect to such multimodal projects. First, without specific wording allowing alternative projects, like rail/freight projects, to obtain funding, MPOs will have difficulty in ruling that federal money is available for projects such as building or improving intermodal yards.³⁷ Second, MPOs are composed largely of local and state officials whose constituents are seemingly more interested in highway and transit projects that affect them directly. Projects benefiting freight carriers may find it difficult to compete with higher profile mass transit projects. Furthermore, as long as states have the primary responsibility for highway maintenance, it should be expected that they would want to allocate funds to highways.³⁸ It is easy to see why many respondents in the survey indicated, in essence, that legal impediments to intermodalism are overshadowed by political and governmental problems.

In fall 1993, Secretary of Transportation Frederico Pena held a series of regional roundtable meetings to elicit opinions from transportation providers regarding how ISTEA was being implemented.³⁹ One of the themes that emerged from these meetings was that freight movement must be given a higher priority in the planning and funding allocation process under ISTEA. One participant observed that "while bus, transit, passenger rail, bicycle ways and pedestrian facilities have guaranteed funding allocations provided by the ISTEA legislation, there is no similarly designated funding for maintaining or enhancing freight mobility."⁴⁰

Airports face a comparable problem funding off-site projects that improve access. Generally speaking, under the Airport and Airway Improvement Act, airport revenues, such as landing fees, parking fees, and rent from concessionaires, can be used only for the "capital or operating costs of the airport, the local airport system or other local facilities which are owned or operated by the owner or operator of the airport and are directly and substantially related to the actual air

transportation or passengers or property."⁴¹ The Airport and Airway Improvement Act also created the Airport Improvement Program (AIP), under which grants for airport improvements are distributed. However, even in the wake of ISTEA, the 1992 reauthorization of AIP did not change the program's requirements that funds be spent only for very limited purposes.

Similarly, passenger facility charges (PFCs), which are essentially a tax on every airline passenger, are available to airports only if they apply to the Federal Aviation Administration (FAA) and provide notice of the individual project or projects being considered for funding through imposition of the fee.⁴² With limited exceptions, such projects are subject to the same restrictions imposed on projects funded under AIP.⁴³

Limitations on the use of user fees have a profound effect on the types of projects that are considered. For example, a proposed \$2.5-billion rail link between Manhattan and New York City's two airports, La Guardia and Kennedy, has been derided by some as an extravagant expenditure for a single-use project. Some of the project's opponents would prefer to see an extension of the existing subway and commuter rail systems. However, proponents of the project point out that the project would be financed by a \$3 PFC. By law, money collected in the form of PFCs could be applied only to airport-related projects; a general expansion of the existing rail system would not be an acceptable use of such funds.⁴⁴

Thus, despite ISTEA's promised flexibility, project funding within the framework of the various federal trust funds continues to be somewhat modal, making it difficult for planners to obtain funding for projects that create links between modes.

b. Local Funds Restricted to Particular Uses

The problem of modal funding is not only a problem at the federal level; it is also a problem at the state and local level. In the realm of public transport, projects designed to advance intermodalism can often be large infrastructure improvements—projects that can be prohibitively expensive. It has been estimated, for example, that it could cost as much as \$140 million in 1993 dollars to run a 23 mile heavy-rail commuter line from downtown Denver to the new Denver International Airport.⁴⁵

Given the enormous cost of such projects, funding from a single source is simply not an option. This creates a huge snarl. For example, in many *transportation* friendly communities, voters are willing to impose a sales tax to raise revenue for specific projects. These funds, however, are usually dedicated to those specific projects and not to others. Thus, whatever flexibility may exist under the Act for federal funding, local money comes with significant strings attached.

A similar problem exists at the state level. More than one survey respondent observed that many state DOTs have little experience outside the field of road construction. It is understandable, then, that state DOTs may be hesitant to get involved in funding projects with which they are not familiar and are restricted in the use of their funds.⁴⁶

c. Conflicts Between MPOs and State Transportation Agencies or Other Agencies

One of the great tensions created by the Act arises out of the greater prominence given to MPOs in regional transportation planning. The Act requires that all transportation planning for urban areas with populations over 200,000 be based

upon the "continuing and comprehensive transportation planning process" carried out by the MPOs in cooperation with state DOTs. Simply stated, before ISTEA funds can be allocated to new projects in urban areas, MPO approval must be obtained.⁴⁷ Similarly, the Act requires that both state DOTs and MPOs demonstrate that projects included in transportation improvement programs are likely to be funded.⁴⁸ Project selection for projects using federal funds must be carried out by state agencies in cooperation with MPOs and in conformance with transportation improvement programs for the area.⁴⁹

The coordination of state and regional plans and the increased emphasis on MPO participation is designed to increase local participation in the planning process. However, it is equally clear that there exists the possibility for conflicting state, regional, and local interests. For example, as currently organized, the Southeast Michigan Council of Governments--the MPO for the Detroit area--comprises 7 counties and 135 local governments.⁵⁰ This single MPO must thus attempt to reconcile the interests of urban and suburban Detroit, as well as several smaller cities, such as Ann Arbor. Building a consensus for transportation planning within an area with such divergent needs and interests will be no small task.

Given the unwieldy nature of some MPOs, it is not at all surprising that efforts to consolidate MPOs in other parts of the country have met with opposition. In Florida, for example, an effort to consolidate four MPOs in the Tampa-St. Petersburg area--one each for the counties of Hillsborough, Pinellas, Pasco, and Hernando--has met with stiff opposition on the grounds that local autonomy would be subsumed by the larger organization.⁵¹

Similarly, in North Carolina, Chapel Hill Mayor Kenneth Broun recently complained to the House Public Works and Transportation Subcommittee at an oversight hearing on ISTEA that the North Carolina DOT planned to withhold all of the area's funding because local officials objected to one of the state's road-widening projects.⁵² Disputes such as this, which pit local interests against regional, state and federal interests, may ultimately lead to protracted litigation.

Another issue arises regarding the composition of MPOs. Under the Act, MPOs are supposed to include "local elected officials, officials of agencies which administer or operate major modes of transportation in the metropolitan area...and appropriate State officials."⁵³ However, someone is often left outside. Ports in Los Angeles, Philadelphia, San Francisco, Mobile, Tampa, and Canaveral do not have seats on local MPOs,⁵⁴ despite the fact that they all play key roles in the local economies and undoubtedly have an effect on the pollution and traffic congestion in the areas. There may be consequences of this uneven representation. In Philadelphia, for example, freight industry representatives are included as partners at the MPO and state planning levels.⁵⁵ As noted earlier, the Port of Philadelphia has had success in obtaining port access improvements funds where others have failed.

Inconsistent funding decisions are hardly the only consequence of uneven representation. Litigation over representation is also a real possibility. In Florida, in fact, the Port of Canaveral provided the Brevard MPO with legal opinions from state and federal transportation departments arguing that the Port should be made a voting member of the MPO. In rejecting the Port's request, legal counsel for Brevard maintained that the intent of the state legislation setting up the MPO was that only local government officials were appropriate MPO members.⁵⁶

2. Regulations Regarding Freight Carriers

In addition to concerns over inclusion in the planning and funding process, freight carriers have expressed concern over the regulation of their industry as a

potential barrier to the intermodal movement of goods. Taking the example of motor carriers, ISTEA has undoubtedly achieved some regulatory reform benefiting the trucking industry, but substantive regulatory restrictions remain. The Act mandates that all states join both the International Registration Plan and the International Fuel Tax Agreement, programs that distribute registration fees and fuel taxes for motor carriers operating in two or more states.⁵⁷ Similarly, the Act requires the Interstate Commerce Commission to devise a single state registration system, under which carriers would file all fees and proof of insurance with the state that is the base of its operations.⁵⁸ This replaces the onerous "bingo stamp" system in which individual states had their own requirements regarding motor carrier registration and proof of insurance. These programs have generally met with the approval of motor carriers.

More problematic for carriers is the long-combination-vehicle freeze, which limits the operation of longer combination vehicles to the configurations authorized by individual states as of June 1, 1991, and prohibits the expansion of routes or the removal of operating restrictions after that date.⁵⁹ The lack of uniform length and weight rules, both at the state and local level, can create access barriers by limiting access to certain roads, often those leading to ports or rail transfer points.⁶⁰ Although few would argue for unlimited freedom of movement for vehicles not suited for operation in crowded urban settings, addressing such issues at the planning stage would undoubtedly help minimize the existence of such barriers. One roundtable participant observed that "[i]f freight issues are not adequately addressed in the planning process, there is no hope at all for addressing freight issues in the funding process."⁶¹ It might be added that if issues such as access are not addressed at the planning stage, there is little point in considering funding of access-dependent, intermodal projects.

3. Environmental Restrictions

a. Within ISTEA

Although air quality standards already existed, the passage of the Clean Air Act Amendments of 1990 (CAAA) marked the federal government's latest attempt to provide a framework in which clean air goals could be attained. To this end, the CAAA contained several provisions requiring the coordination of transportation planning and state air quality plans. For example, CAAA requires each state to submit a State Implementation Plan (SIP) for air quality improvement to the Environmental Protection Agency (EPA).⁶² The SIP must contain an outline of legislation regulating air pollution sources under state control. States must also demonstrate in their SIPs how nonattainment areas--those areas with especially severe air pollution problems--will attain the air quality standards by the deadlines established in CAAA.

The reporting and planning requirements of CAAA are extremely detailed. For example, for regions identified as ozone nonattainment areas, the Amendments require that states produce plans for a 15 percent reduction in ozone-depleting emissions between 1990 and 1996, and 3 percent thereafter until the prescribed air quality standard is met. Additionally, CAAA imposes a continuing obligation upon states to show that aggregate vehicle miles, emissions, and congestion levels conform with the SIP's projections. Penalties for failure to attain the goals set by the CAAA are significant and include the freezing of federal transportation funds and/or the implementation of a federal plan to achieve what the state plan could not.

ISTEA contains provisions that reinforce the CAAA's planning processes and link the allocation of federal transportation assistance with effective implementation of state transportation plans. For example, ISTEA makes comprehensive planning mandatory by requiring MPOs to develop transportation plans for the state's urban areas, and the governor is required to develop a plan for the state.⁶³ Both urban areas plans and statewide plans must provide for an intermodal transportation system, and the two plans must be consistent with one another.⁶⁴ ISTEA also works to reinforce CAAA's air quality attainment standards. For example, in areas not in compliance with ozone or carbon monoxide standards, ISTEA requires MPOs to "coordinate the development of a long range plan with the process for development of transportation control measures" of the SIP.⁶⁵ In urban areas with populations exceeding 200,000, MPOs are required to prepare a "congestion management system that provides for effective management of new and existing transportation facilities...through the use of travel demand reduction and operational management strategies."⁶⁶

Moreover, ISTEA and CAAA have what has been described as a carrot-and stick relationship,⁶⁷ where CAAA establishes the structure and penalties for attainment of clean air goals, and ISTEA provides the enticement for states to achieve the goals, primarily permitting funds formerly restricted to highway projects to be used for all modes. However, the important thing for those seeking funds for intermodal projects is that to receive federal funding, the proposed project must be included in a transportation improvement plan and approved in the relevant state plan.

The unfortunate reality is that however well-intentioned the coordination and planning procedures prescribed by CAAA and ISTEA, there remain significant problems in execution. One primary problem many regions have experienced is difficulty meeting the CAAA deadlines for these planning requirements. Failure to meet compliance deadlines could spur the filing of private legal actions for noncompliance.⁶⁸

Environmental groups have gone to court to force transportation policy makers to strictly interpret the CAAA and ISTEA requirements. In Connecticut, for example, the Connecticut Fund for the Environment, the Conservation Law Foundation, and the Environmental Defense Fund joined together in a suit against the Greater Bridgeport/Valley Metropolitan Planning Organization, the Housatonic Valley Council of Elected Officials, the Southwestern Regional Planning Agency (all MPOs), and the Federal Highway Administration, challenging the MPOs' development and adoption of transportation improvement programs because the proposed transportation improvement plan allegedly would not have contributed to the annual reductions in emissions required by the Clean Air Act.⁶⁹ Specifically, the environmental groups alleged that the MPOs had improperly taken credit for fleet turnover as a source of emissions reduction. For their part, the MPOs argued that they were simply following federal guidelines, which did not preclude the use of such credits.⁷⁰

The Connecticut MPOs' experience provides just one example of how different interpretations of the Act can spawn litigation. Federal law permits private citizens to sue public agencies and individuals to force compliance with the requirements of the Clean Air Act.⁷¹ To the extent the Clean Air Act and ISTEA mesh in the areas of transportation planning,⁷² private suits might be allowed under federal law. As is the case with other federal statutory schemes permitting citizen suits against government agencies, the Clean Air Act provision permits the recovery of costs, including attorney's fees.⁷³

In another case, which involved proposed construction of the Jamestown Connector (an arterial road across the southern part of the Narragansett Bay) in Rhode Island, environmental groups attempted to enjoin construction by alleging violations of the Clean Air Act, National Environmental Policy Act, ISTEA, Clean Water Act, and Department of Transportation Act. Plaintiffs' Clean Air Act claims were based on the "conformity" requirements (42 U.S.C. § 7506(c)). The federal district court rejected these arguments and was affirmed on appeal.⁷⁴

Another problem posed by the planning and clean air attainment requirements in CAAA and ISTEA results from the designation of nonattainment areas and the determination of which such areas have conformed to the required federal air quality standards. Simply put, air pollution does not respect state borders, and regions adjacent to major urban areas may suffer the consequences of poor air quality without having any power to correct the situation. Two recently reported cases in the Midwest illustrate the problem.

The State of Wisconsin recently filed a lawsuit against EPA, the State of Illinois, and the State of Indiana, seeking abatement of pollutants from those states. As a result of the suit, the Lake Michigan Ozone Study was ordered to examine air circulation patterns for states bordering Lake Michigan and to develop a plan to abate this "migratory" pollution.⁷⁵ The City of Muskegon has joined the fray, disputing its nonattainment designation and attributing its air pollution problems to the Chicago, Illinois, and Gary, Indiana, metropolitan areas.⁷⁶ Muskegon's argument has some force in reason and undoubtedly can be made by many similarly situated cities: If the pollution is coming predominantly from other areas, no amount of local or even regional planning within a single state is going to allow an individual city to meet its attainment goals. Problems such as these point toward the conclusion that in some situations, the difficult conformity of local, regional, and state plans and the hard-won cooperation of various governing bodies within a state may provide only a partial solution to a region's air quality problems, and effective planning will ultimately require cooperation at all levels among several states.

Attorneys and planners assisting on intermodal projects that will seek federal funding should ensure that the project is considered by an MPO, if appropriate, and by the state for inclusion in the statewide transportation improvement plan (STIP). Failure to factor in the time and effort to have the project included in the STIP will surely delay, and possibly preclude, federal funding.

b. Other Environmental Problems

Many intermodal projects can achieve cost efficiencies by making use of existing facilities or infrastructure. For example, more than one city has looked into the possibility of converting an unused or abandoned urban rail yard or terminal into a downtown intermodal commuter facility. The advantages of exploiting existing structures, rail lines, and rights of way are obvious, but such projects are rife with potential environmental problems. For example, commercial rail yards have often been in continuous use for many decades, with little attention paid to disposal of hazardous materials. Moreover, the existing structures can contain hazardous materials, such as asbestos, which require special handling and thus make new construction more expensive.

Thus, if a metropolitan transit agency wishes to acquire such a parcel, it would be prudent to do extensive testing for soil and groundwater contamination and potential indoor air pollution problems. Not only is such testing expensive and an impediment to the acquisition process, but it also can create a sticking point in

acquisition negotiations. Under an ideal scenario, a transit agency acquiring such a parcel can negotiate indemnity agreements with the seller to insulate the agency against potential clean-up costs. But transit agencies can still end up facing extensive environmental problems and potential clean-up headaches when they acquire existing commercial sites.

Related to the generally acknowledged problems of delays from environmental impact reporting and site testing is the threat of legal action by environmental groups. Respondents representing seaports in California, Florida, and Hawaii noted that they have struggled to overcome objections from environmental and local fishing industries to plans to deepen harbors to accommodate large-container vessels. The main obstacle to such plans has been disagreement over where to dump the sediment and mud-known as spoils-that result from dredging.

EPA approval of a dump site for spoils dredged from the port of Oakland took 4 years to obtain. After rejecting the initial proposal to dump the spoils into San Francisco Bay, EPA and local officials came up with a proposal that seemingly offers something for everyone. A portion of the spoils will be dumped at a city-owned golf course; a portion will be dumped at a deep-sea site, which is neither an important fish nursery nor a preferred fishing area; and a portion will be dumped at a shoreline site near the mouth of the Petaluma River to accelerate a wetlands reclamation project.⁷⁷

Although the unlikely coalition of environmentalists and local labor, business, and maritime interests may have reached an uneasy peace, the Oakland project does serve as a model for the manner in which a cooperative and inclusive planning approach might head off future litigation by environmental groups.

4. Zoning, Land-Use, and Noise Restrictions

Traditionally, zoning and land-use regulations have been the province of local or regional governments. Such regulations normally define the uses to which land can be put, the size of buildings permitted on particular parcels, and/or the density of development allowed. Normally, local zoning is valid only if it coincides with a comprehensive land-use plan. Unfortunately, comprehensive planning in the zoning context has traditionally reflected local communities' efforts to stabilize growth or to maintain property values. And while courts have attempted to encourage a less provincial, more regional approach to zoning, few state statutes require such broad-based considerations in local zoning decision making. This has led to the criticism that under a system of local control of land use, "questions of broader public interest have commonly been ignored."⁷⁸ Also unfortunate is the extent to which land-use and zoning regulations have neglected to recognize the extent to which land-use restrictions can affect transportation planning.

Interestingly, zoning, land-use, and noise restrictions were not widely cited by respondents as impediments to the realization of intermodal systems. This is not entirely surprising. The term *intermodalism* is inclusive of various transportation systems: to the extent zoning regulations impede any individual component of an intermodal system, the system itself is impeded. Thus, land-use and zoning hurdles are hardly unique to projects that might be considered intermodal and thus may not have been perceived by the respondents as impediments to intermodal systems.

Nevertheless, zoning, land-use, and noise control regulations cannot be overlooked as potential impediments to the development of intermodal systems. The application of such local laws (to government entities) will vary from one jurisdiction

to another, and the route that must be followed in meeting the requirements of such laws will sometimes involve administrative hearings, judicial hearings, and a quasi-legislative process. A discussion of these various local proceedings is beyond the scope of this report. However, in situations where such local ordinances provide a basis for challenges to the development of transportation systems, common threads run through the application of the laws by the courts.

Noise, smoke and soot, dust, and congestion generated by transportation facilities in the vicinity of residential communities led to early legal attempts to do away with or curtail the facilities. The residents' basis for claims was a theory of nuisance or trespass. For example, in some old cases, public transportation companies, such as railroads, were subjected to nuisance and zoning laws on the grounds that the activity complained of was private in nature. A railroad whose trains generated smoke and soot was found to be liable for nuisance because the operation of its yards and terminal was a private activity, as opposed to the public activity of providing transportation.⁷⁹

More recently, a Virginia Supreme Court decision upheld a "private nuisance" finding against a trucking company (which was in compliance with local zoning law) because of noise and dust from a truck staging operation.⁸⁰

The greatest generator of complaints has always been noise from airplanes, which interferes with the "quiet enjoyment" of residential property. As early as 1946, a North Carolina farmer successfully claimed in a lawsuit that low-flying military aircraft passing over his farm in a glide path to a nearby airport runway made his house uninhabitable and ruined his farming business (when passing over his house, the aircraft were only 83 feet off the ground). He was awarded compensation based on the government's taking of private property for public use, because the Court found that the United States had acquired an easement over the property.⁸¹ A similar result was reached in 1962 in a Pennsylvania case, but the airport, not the aircraft operators, was held liable.⁸² As residential development and airports began to compete for land space, more litigation protesting noise from aircraft was initiated, often filed on behalf of entire communities as class-action law suits. (See, for example, *Alevizos v. Metropolitan Airports Commission of Minneapolis & St. Paul*.⁸³)

The enactment of federal legislation, such as the Federal Aviation Act, the Noise Control Act, and the National Environmental Policy Act (NEPA)⁸⁴ provided new bases for lawsuits seeking to curtail development of transportation facilities, but also provided constitutional bases for defending such suits. The challenges to intermodal development may now recite claims under NEPA, ISTEA, Section 4(f) of the Department of Transportation Act, and other federal laws.⁸⁵ Most lawsuits based on local zoning or noise-control laws will be defended on the grounds of violation of the Supremacy Clause (Article VI) or the Commerce Clause of the U.S. Constitution.

In an example of a NEPA-based challenge to airport noise, the City of Alexandria, Virginia, and Arlington County, Virginia, attempted to halt the institution of a 90-day scatter plan for Washington National Airport on grounds that the FAA had failed to file an environmental impact statement (EIS) under NEPA. The scatter plan, which would have substantially broadened the path of take-offs and landings at the airport, would have distributed the offending noise over much wider areas than were already affected. The Court held that no EIS was required, because the test plan would be of such short duration it did not constitute major federal action.⁸⁶

What are perhaps the most thorough-going and persistent attempts to halt expansion of an airport have resulted in a series of recent cases, in both state and federal courts, involving the Dallas/Fort Worth Airport. The federal court case, which was a petition for review of an FAA decision filed by several municipalities, individuals, and churches, raised challenges under the FAA regulations, NEPA, the Department of Transportation Act, and the National Historic Preservation Act. The proposed federal action that raised the EIS requirement was approval and funding of construction of two new runways. The petitioners argued that, in preparing the EIS, the FAA had failed to consider some elements of the airport layout plan and, more important, had failed to assess "the overall cumulative impact of the proposed action."⁸⁷ The court rejected all of the petitioners' arguments.

The Dallas/Fort Worth state court decisions resulted from the need to have the new airport runways extend onto land owned by the cities of Irving, Euless, and Grapevine, thus subjecting the runways to the zoning ordinances of those cities. The first decision of a Texas Court of Appeals considered the arguments of the Airport Board that under the Supremacy Clause of the U.S. Constitution, state laws were preempted by federal laws regulating aviation, such as the Federal Aviation Act and the Noise Control Act. The court rejected these arguments and found that local zoning laws and laws of eminent domain were not preempted by federal law.⁸⁸ The court ruled that an earlier Supreme Court case and a federal appeals court case, both of which held that federal aviation laws preempted local laws pertaining to airports, were inapplicable.⁸⁹ The Airport Board appealed the decision to the Texas Supreme Court, but, in an excellent example of government agency cooperation during the pendency of the appeal, the Texas State Legislature amended the Texas Municipal Airport Act to exempt the Board from municipal zoning laws. The Texas Supreme Court remanded the case,⁹⁰ and the court of appeals upheld the amendment. The court of appeals found that the municipalities exist by the authority of the state, their sovereignty is dependent on that of the state, and that where state law and local zoning ordinances conflict, state law is superior.⁹¹

In a case involving surface transportation, the town of Plaistow, New Hampshire, attempted through local ordinance to limit a trucking company's access to its terminal.⁹² The court found that the Noise Control Act's policy gives "great latitude to states and municipalities in areas of noise control" and that local noise control laws were not preempted.⁹³ However, the court denied Plaistow's motion to dismiss, because of a possible preemption based on the Surface Transportation Assistance Act⁹⁴ or a violation of the Commerce Clause.

If public land is affected by the development or expansion of transportation facilities, a challenge may be raised under Section 4(f) of the Department of Transportation Act.⁹⁵ Although this may be more likely in the instance of airport development or expansion,⁹⁶ any of these federal laws-NEPA, the Department of Transportation Act, or the National Historic Preservation Act-could be the basis of a case opposing intermodal development, or some element of such development, such as transit or railway construction or expansion.

Another recent case raised the issue of preemption of local zoning laws by federal laws in the context of airport expansion. The City of Cleveland owns the Cleveland Hopkins International Airport, a portion of which is located within the Brook Park city limits. In 1992, Cleveland announced a new airport master plan, which included extension of an existing runway and construction of a new runway that would be in Brook Park. In 1993, Brook Park amended its land-use ordinances by first repealing an ordinance that prohibited construction of new runways

ways in the city and then enacting ordinances establishing procedures for obtaining a special-use permit, one of which required a permit for new airport construction. The city also established noise levels to be used as a planning tool in assessing the impact of new construction. No mandatory noise levels are imposed in any zoning area. There is also a provision for any government entity to apply for immunity from all zoning ordinances.

The City of Cleveland applied for summary judgment in the U.S. District Court, arguing that Brook Park's ordinances were preempted by federal law and were in violation of the Commerce Clause of the U.S. Constitution.⁹⁷ The district court rejected these arguments, narrowly distinguishing other precedent cases. As to *Burbank-Glendale-Pasadena*, in which the Ninth Circuit had held that locally enacted restrictive noise ordinances violated the commerce clause of the U.S. Constitution, the court "declined" to follow the Ninth Circuit's reasoning.⁹⁸ Cleveland has appealed the decision to the Sixth Circuit.

Perhaps one of the reasons that zoning is not perceived by some of the respondents as a major impediment to intermodal development is that regional agencies often are created to develop transportation systems, and these regional authorities are exempted by enabling legislation from local zoning ordinances. Furthermore, in some states, such as New Jersey, the DOT claims sovereign immunity from municipal zoning ordinances. As *Dallas/Fort Worth Airport* so clearly points out, a legislative exemption is worth several lawsuits.

Water port administrators have also long grappled with land-use issues, one aspect of which is the problem of physical access. Most major water ports in the United States are located in close proximity to large urban areas. Access to such ports can become congested because of commercial development along access routes. Development of waterfront land for commercial or tourist-related activity is a trend seen in nearly every city with a major urban port, and this has no doubt contributed to access problems at such ports. Because such access zones are often zoned for multiple uses, commercial development is allowed in industrial zones, but industrial development is not permitted in commercial zones.⁹⁹ Proper land use planning would consider not only the limitation of industrial uses of land, but also the maintenance of areas zoned for industrial use, thus preserving access routes to transportation centers. State and local governments and port authorities must also be willing to take steps to ensure that whatever access corridors do exist are preserved.

Ultimately though, zoning and land-use rules often interact with transportation planning in a circular manner. Regardless of how effective any particular zoning rules may be, the citizens and businesses within an individual community will make myriad decisions that will ultimately affect traffic and development patterns.¹⁰⁰ These decisions will, in turn, affect future zoning and land-use decisions. As one director of a regional MPO in the Northeast observed, land-use and zoning policy is left largely to individual townships, leaving the MPO in the position of reacting to land-use plans from numerous sources, rather than taking an active role in the initial planning phases. Transportation plans are thus adapted to existing patterns rather than made an integral part of the planning that creates such patterns. Even when transportation interests are taken into account by city planners, it is difficult to anticipate how future growth will mesh with transportation plans.¹⁰¹

Conceptually analogous to the problems presented by zoning and land-use ordinances is community resistance to transportation projects, which results in litigation. Grassroots resistance to infrastructure projects and related noise or traffic

problems may significantly impede the development of intermodal systems. Class-action suits for compensation for physical and emotional injury from airport noise or diminution in property value are certainly nothing new, but plaintiffs can be extremely resourceful in combating projects they perceive to be problematic.

For example, in the early 1980s, after having tried and failed at various strategies to decrease the noise created by the San Francisco International Airport, residents of several towns in San Mateo County, site of the airport, embarked on a campaign to bring small claims actions en masse.¹⁰² The neighbors brought 170 claims for \$750 each—the maximum then allowable in small-claims court—alleging that airport noise and pollution constituted a public nuisance.¹⁰³ The court eventually awarded \$650 to 116 of the neighbors, who then resolved to file a new round of small-claims actions every 100 days. After several successive rounds in small-claims court, the neighbors entered into negotiations with the airport, through which some of their concerns were addressed.

This type of grassroots activism is potentially a hinderance to any number of projects that would enhance intermodalism. Ironically, the Bay Area Rapid Transit (BART) system in California has for years generated discussion of the best route and terminal for an extension to the airport, and each new plan has brought a new round of community resistance. The same groups that honed their negotiation skills on the airport's noise problems may find themselves making similar objections to a BART extension. This situation serves to highlight the absolute necessity both of community and multiagency participation at the project planning stage and of responsive community relations once large projects are undertaken.¹⁰⁴

ISTEA attempts to address some of the problems inherent in land-use and transportation planning. For example, the Act provides that a state may purchase rights of way and apply for federal reimbursement if the rights-of-way acquired are subsequently incorporated into transportation projects that are approved for federal funds.¹⁰⁵ The Act charges MPOs with the responsibility of preserving "existing transportation facilities" and "rights-of-way for construction of future transportation projects, including identification of unused rights-of-way which may be needed for future transportation corridors and identification of those corridors for which action is most needed to prevent destruction or loss."¹⁰⁶ Such federal encouragement should help with problems of access corridor acquisition and maintenance.

As for community resistance to transportation projects, ISTEA attempts to coordinate planning and facilitate open discussion of transportation plans by requiring citizen review of projects planned by MPOs.¹⁰⁷ Nevertheless, there is still a great deal of coordination to be done to bring all interested parties, including MPOs, into the land-use and planning process at an early stage.

A recent plan involving San Francisco's Transbay Terminal demonstrates the type of long-range planning and cooperation necessary to achieve ISTEA's goals. The downtown terminal, built in 1939, was originally a rail station for a line connecting San Francisco and Oakland. It was converted to bus and automobile use in 1950, and today it is used primarily as a commuter bus terminal for city and regional lines from around the Bay Area.¹⁰⁸ Planners are currently discussing a redevelopment project that would bring bus/rail commuters to a site near San Francisco's financial district and provide connections to BART and ferries serving Marin and Alameda Counties.

To get the ball rolling on a survey for a refurbished transit center, the San Francisco Board of Supervisors first had to designate the site as a "redevelopment survey area." This initiates a process that will include developer proposals, public hearings on land use, environmental reports, and eventually a final redevelopment plan. The current plan under development would involve the sale of land by the California Department of Transportation to the city, which would then negotiate construction and leases.¹⁰⁹

In developing such a project, zoning and community hearings are simply a few of the many necessary steps. Early involvement of the community, interested city agencies, and the MPO may expedite or at least smooth the zoning process and mitigate community resistance before it builds to an insurmountable level.

5. Labor Laws and Standards

Labor laws or standards were cited as impediments to intermodal systems by only four respondents. This is not to say, however, that they are not potential sources of litigation in the intermodal setting. One federal statute in particular may present problems--Section 13(c) of the Urban Mass Transportation Act of 1964.¹¹⁰

The Act provided financial aid for urban mass transit systems and assumed that states receiving such aid would be increasingly likely to acquire private mass transit systems for operation as public or municipal systems.¹¹¹ Section 13(c) attempted to provide protections for employees of private companies acquired with federal funds by requiring the Secretary of Labor to approve the use of federal funds in such situations only if both the affected employees and the state employers agreed that the new arrangement was "fair and equitable" to the employees. Specifically, Section 13(c) provides that if a state receives transportation funds under the Federal Transit Act, "fair and equitable arrangements" must be made "to protect the interests of employees affected by such assistance."¹¹² The protective arrangements required by Section 13(c) include:

- (1) the preservation of rights, privileges, and benefits...under existing collective bargaining agreements or otherwise;
- (2) the continuation of collective bargaining rights;
- (3) the protection of individual employees against a worsening of their positions with respect to their employment;
- (4) assurances of employment to employees of acquired mass transportation systems priority of reemployment of employees terminated or laid off; and
- (5) paid training or retraining programs.¹¹³

The contract granting federal funds must "specify the terms and conditions of the protective arrangements."¹¹⁴

Transit employees' unions have argued for protection of their interests in various situations. Transportation unions, for example, have expressed the concern that new high-speed rail routes could result in layoffs or wage cuts for workers on conventional rail or bus lines. To this end, they have lobbied for provisions in the High Speed Rail Development Act, which would protect them from such efficiency related workforce reductions.¹¹⁵ Such concerns are hardly unique to rail workers and can be expected from any number of transportation unions as technology changes the way people and freight are moved.

One area in which Section 13(c) problems have been especially common is the coordination and construction of intermodal commuter facilities. Such facilities can provide a center of operations or a terminal for diverse modes of transit, such as inner city and intercity bus lines, inner city light rail or subway, airport shuttle,

and intercity rail. The obvious appeal to such terminals is that they provide a hub for operations of various interlinked services.

However, transportation planners in areas such as Champagne-Urbana, Oklahoma City, and Memphis have all struggled with issues created by Section 13(c) protections. In these cities, local or regional transit organizations have created intermodal commuter facilities that bring under one roof the several modes of transit discussed above. These transit service providers--private and public, local and interstate--all share space within the facility. The problems arise when such providers shift their operations to a new location and not all jobs remain intact. For example, employees whose jobs have been affected when the operations of an existing, privately owned intercity bus line are moved to a new intermodal facility have argued that because the intermodal facility receives federal funds, they are entitled to the protections of Section 13(c). Diverse employee groups, from terminal concessionaires and service providers, such as janitorial staff, to employees actually involved in the provision of transit services, have argued for such protections.

It is simply a fact of life for transit providers that such projects require federal dollars for construction, maintenance, and operating costs. Because Section 13(c) requires certification as a prerequisite to the release of federal funds, the negotiation and certification of Section 13(c) agreements can become a significant part of a project's time line. Transit planners have reported that a complicated Section 13(c) negotiation and certification can take up to 18 months to complete. With regard to intermodal facilities in particular, the possibility exists that each union having any contact with a facility will attempt to negotiate its own Section 13(c) agreement.

In cases where negotiations have proven unsuccessful, legal proceedings can be equally nettlesome and difficult to resolve. Nonetheless, transit providers in Oklahoma City, for example, have had some success resolving Section 13(c) problems through legal proceedings. There, a federal grant of several hundred thousand dollars to make intermodal improvements to an existing inner-city bus station was held up when the Department of Labor notified transit authorities that a group of employees of the terminal's existing management company--workers such as baggage and ticket handlers--had petitioned for Section 13(c) protection. Oklahoma City fought the petition and eventually obtained a ruling from the Department of Labor that the workers in question were not within Section 13(c)'s scope. While it was generally agreed that negotiated agreement would have been preferable to all parties, one planner also voiced a concern that engaging in such negotiations would encourage other groups of workers, perhaps even more tenuously connected to the actual provision of transportation services, to petition for Section 13(c) protections. One transit planner also observed that if Section 13(c) did apply to the group of petitioners, potential expenditures on protective measures for the petitioners could have reached into the millions, a potential cost that was extremely disproportionate to the funds sought.

Whether transit officials choose to negotiate or litigate Section 13(c) issues, the net result is that local transit agencies find their ability to obtain federal funds for existing and planned projects inhibited. Thus, whatever its original intent, Section 13(c) can cause tremendous delays in the coordination of intermodal facilities, and litigation of Section 13(c) issues appears to be an inevitable byproduct of such projects.

Attorneys and planners involved in developing intermodal facilities in which Section 13(c) protections may become an issue should consult the Transportation

Research Board's *Transit Labor Protection-A Guide to Section 13(c) Federal Transit Act* (Transit Cooperative Research Program Legal Research Digest Number 4, June 1995). This publication provides a useful guide through the Section 13(c) maze.

E. CONCLUSION

The results of the survey suggest that many of the perceived impediments to the creation of intermodal systems are not, strictly speaking, legal barriers so much as institutional barriers. Some quasi-legal impediments, such as funding restrictions, may require legislative solutions, and other barriers, such as planning requirements, though onerous to many planners, represent the goal of the Act: long-range transportation planning that takes into account economic, as well as environmental, factors.

On the whole, however, legal issues associated with intermodalism are not new or unique. They are the issues common to the component parts of an intermodal system. Perhaps the most formidable barrier is ingrained in the Act and in the way it is applied. ISTEA, despite its flexibility, still erects a system in which one mode of transportation competes against another for funding. This promotes modal thinking and discourages coordinated, system wide planning. As Michael Hurta, head of U.S. DOT's Office of Intermodalism, has observed, "Because we can't talk about need for transportation in a coordinated, consolidated fashion, we find ourselves debating whether we should invest in one mode versus another--not what is an overall need for the transportation system in general."¹⁶

Moreover, the unfortunate fact remains that while ISTEA gives MPOs the power to make the decisions that are best for an individual region, this does not necessarily make for a streamlined decisionmaking process. Although more players at the table mean more input and potentially greater sensitivity to local issues, such an inclusive approach also has the potential to create additional layers of bureaucracy. With the identification of such specific issues that may impede the development of intermodal systems, planners, administrators, and lawyers may be able to move beyond these difficulties.

ENDNOTES

¹ 49 U.S.C. § 302(e).

² Linda Howe, *Winging It with ISTE*, PLANNING, January 1994, at 1112.

³ Chris Brandt, *A Lemon for Trucking?* Go WEST, October 1993, at 26, 29.

⁴ 23 U.S.C. § 103.

⁵ 23 U.S.C. § 133.

⁶ 23 U.S.C. § 149.

⁷ 23 U.S.C. § 119.

⁸ 23 U.S.C. § 103(b)(1).

⁹ Neal Denno, *ISTEA's Innovative Funding: Something Old, New and Borrowed*, 48 TRANSPORTATION QUARTERLY, Summer 1994, at 275-276, and Patrick Storm, *Intermodal Projects Top Federal Funding List*, INTERMODAL CONTAINER NEWS, January 1994, at 19.

¹⁰ 23 U.S.C. § 103(d).

¹¹ Storm, *supra* note 9 at 19, 21.

¹² 23 U.S.C. § 104(c).

¹³ 23 U.S.C. § 133(b).

¹⁴ 23 U.S.C. § 149(b).

¹⁵ 23 U.S.C. § 303.

¹⁶ 23 U.S.C. § 303(e).

¹⁷ 23 U.S.C. § 134(i)(2).

¹⁸ See generally Kevin M. Sheys, *Strategies to Facilitate Acquisition and Use of Railroad Right of Way by Transit Providers*, TCRP LEGAL RESEARCH DIGEST 1, September 1994.

¹⁹ TRANSPORTATION RESEARCH BOARD, INTERMODAL MARINE CONTAINER TRANSPORTATION: IMPEDIMENTS AND OPPORTUNITIES, SPECIAL REPORT No. 236, p. 45 (1992).

²⁰ *Id.*

²¹ *Supra* note 18.

²² 57 FR 23460, 23465, June 3, 1992.

²³ *Id.*

²⁴ *Id.* at 23466.

²⁵ 23 C.F.R. § 500.703 (1994).

²⁶ Appendix C provides a sample of survey respondents' definitions of "intermodalism."

²⁷ TRANSPORTATION RESEARCH BOARD, ISTE AND INTERMODAL PLANNING: CONCEPT, PRACTICE, VISION, SPECIAL REPORT No. 240, 6 (1993).

²⁸ *Id.* at 2.

²⁹ 49 U.S.C. § 302(e).

³⁰ *Success of 1991 Highway Act Limited by Underfunding, Budget Cuts, Mineta Says*, DAILY REPORT FOR EXECUTIVES, Dec. 3, 1993, at A231.

³¹ Storm, *supra* note 9, at 19, 22.

³² 23 U.S.C. § 149(b)(1)(A).

³³ Patrick Storm, *Freight Lost Out in First Years, But Things Are Changing*, INTERMODAL CONTAINER NEWS, April 1994, at 21.

³⁴ Brad Altman, *California Project for Rail Corridor Now at \$2 Billion*, THE BOND BUYER, Oct. 14, 1994, at 1.

³⁵ Storm, *supra* note 33, at 21, 22.

³⁶ Storm, *supra* note 9, at 19, 20.

³⁷ Storm, *supra* note 33, at 21, 23.

³⁸ Denno, *supra* note 9, at 275, 284.

³⁹ U.S. DEPARTMENT OF TRANSPORTATION, REGIONAL ROUNDTABLE AND ACTION PLAN: A PROGRESS REPORT FROM OUR CUSTOMERS, March 1994, at 17.

⁴⁰ *Id.* at 16.

⁴¹ 49 U.S.C. § 47101 *et seq.* (1995 Suppl.).

⁴² 49 U.S.C. § 40117 (1995 Suppl.).

⁴³ For detailed discussion of airport access problems, see Annalynn Lacombe, *Ground Access to Airports: Prospects for Intermodalism*, 48 TRANSPORTATION QUARTERLY, Autumn 1994, at 381.

⁴⁴ David Firestone, *Airport Rail Link Draws Fire in Queens*, NEW YORK TIMES, July 27, 1994.

⁴⁵ CENTENNIAL ENGINEERING, INC. and COLEY/FORREST, INC., AIR TRAIN AIRPORT CORRIDOR RAIL SERVICE, July 1994. Prepared for City and County of Denver, Department of Public Works.

⁴⁶ It should be noted that modal thinking is hardly restricted to state DOTs. As recently as 1991, a report by the Office of Technology Assessment found that federal DOT agencies "still manage each mode as a separate, independent system, rather than a contributor to an integrated system that has complex intermodal connections in large, metropolitan areas." TRANSPORTATION RESEARCH BOARD, *supra* note 19.

⁴⁷ 23 U.S.C. § 134(i).

⁴⁸ 23 U.S.C. § 134(h).

⁴⁹ 23 U.S.C. § 134(h)(3).

⁵⁰ Kristine M. Williams, *ISTEA. New Directions for Transportation*, in ALI-ABI COURSE OF STUDY, LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN AND COMPENSATION (C851 ALI-ABA 627, 678 (1993)).

⁵¹ *Id.*

⁵² Bureau of National Affairs, Inc., *Infrastructure, Localities Said Having Difficulties Implementing Highway, Transit Act*, THE BUREAU OF NATIONAL AFFAIRS, INC., DAILY REPORT FOR EXECUTIVES, Apr. 21, 1993.

⁵³ 23 U.S.C. § 134(b)(2).

⁵⁴ Storm, *supra* note 33, at 21, 22

⁵⁵ U.S. DOT, *supra* note 39.

⁵⁶ *Id.*

⁵⁷ Intermodal Surface Transportation Efficiency Act, Public Law 102240, § 4008 105 Stat. 2153.

⁵⁸ 49 U.S.C. § 11506.

⁵⁹ See 23 U.S.C. § 127(d) and 49 U.S.C. § 31112 (1995 Suppl.).

⁶⁰ *Intermodalism: An Eno Forum*, 48 TRANSPORTATION QUARTERLY, Autumn 1994, at 343, 347.

⁶¹ *Id.* at 16.

⁶² 42 U.S.C. § 7501 *et seq.*; 40 C.F.R. 93 (1994).

⁶³ 23 U.S.C. §§ 134(a) and 135.

⁶⁴ 23 U.S.C. §§ 134(a) and 135(f).

⁶⁵ 23 U.S.C. § 134(g)(3).

⁶⁶ 23 U.S.C. § 134(i)(3).

⁶⁷ See SURFACE TRANSPORTATION POLICY PROJECT, SURFACE TRANSPORTATION POLICY PROJECT RESOURCE GUIDE, 1992, at 33.

⁶⁸ See, e.g., *Coalition Against Columbus Center v. City of New York*, 967 F.2d 764 (2d Cir. 1992) (citizens' suit could be maintained under Clean Air Act to enforce city's commitment under SIP).

⁶⁹ See 42 U.S.C. § 7506(c).

⁷⁰ Information regarding the legal actions taken by the Conservation Law Foundation (CLF) against the several Connecticut MPOs is drawn from the CLF's Notice of Intent to File Suit Under the Clean Air Act. For a further discussion of the suit, see Howe, *supra* note 2.

⁷¹ See 42 U.S.C. § 7604.

⁷² ISTE and the CAAA overlap in several areas. For example, ISTE mandates that MPOs develop transportation plans for urban areas and transportation improvements plans for the entire state. (See 23 U.S.C. §§ 134 and 135(a)). ISTE further requires that state transportation plans be coordinated and consistent with SIPs under the Clean Air Act. (See 23 U.S.C. §§ 134(g)(3) and 135(f)(2).) ISTE thus effectively reinforces CAAA requirements that planned transportation projects must not contribute to any new violations of air quality standards. (See 42 U.S.C. § 7506(c)(1)(B).)

⁷³ 42 U.S.C. § 7604(d).

⁷⁴ *Conservation Law Foundation v. Federal Highway Administration*, 827 F. Supp. 871 (D.R.I. 1993), *affirmed* 24 F.3d 1465 (1st Cir. 1994).

⁷⁵ R. Michael Brooks, *Transportation and the Clean Air Act Amendments of 1990*, in ALI-ABA, LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN AND COMPENSATION (C851 ALI-ABA 681, 685 (1993).)

⁷⁶ *Id.*

⁷⁷ Steve Rubenstein, *EPA Dredges Up a New Place to Dump Mud*, SAN FRANCISCO CHRONICLE, July 20, 1994, at A18, and Kevin Fagan, *Gore Dredges Up Good Feelings*, SAN FRANCISCO CHRONICLE, July 19, 1994, at A15.

⁷⁸ John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351 at 365 (1993), quoting *Golden v. Planning Board*, 30 N.Y. 2d 359, 374.

⁷⁹ *Southern Railroad Company v. McMenanim*, 73 S.E. 980 (1912); *Richards v. Washington Terminal Company*, 233 U.S. 546 (1914).

⁸⁰ *Bowers v. Westvaco*, 419 S.E.2d 661 (Va., 1992).

⁸¹ *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062 (1946).

⁸² *Griggs v. Allegheny County*, 369 U.S. 83, 82 S.Ct. 531 (1962).

⁸³ 298 Minn. 471, 216 N.W. 2d 651 (1974).

⁸⁴ The Federal Aviation Act, 49 U.S.C. 40101 *et seq.*; the Noise Control Act, 49 U.S.C. 44715 *et seq.*, the

National Environmental Policy Act, 42 U.S.C.A. 4321 *et seq.*

⁸⁵ *See, for example*, Conservation Law Foundation v. Federal Highway Administration, 827 F.Supp. 871 (D.R.I. 1993); *affirmed* 24 F.3d 1465 (1st Cir. 1994).

⁸⁶ City of Alexandria v. Helms, 728 F.2d 643, 646 (4th Cir. 1984).

⁸⁷ City of Grapevine, Texas et al. v. Department of Transportation, 17 F.3d 1502 (D.C. Cir. 1994) (rehear. denied), cert. denied 115 S.Ct 635 (1994).

⁸⁸ Dallas/Fort Worth Airport v. City of Irving, 854 S.W. 2d 161 (Tex. App.-Dallas 1993).

⁸⁹ City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 93 S. Ct. 1854 (1973); Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992).

⁹⁰ Dallas/Fort Worth International Airport Board v. City of Irving, 868 S.W. 2d 750 (Tex. 1993).

⁹¹ City of Irving v. Dallas/Fort Worth International Airport Board, 894 S.W. 2d 456 (Tex. App.-Fort Worth 1995).

⁹² New Hampshire Motor Transport v. Town of Plaistow, 836 F.Supp. 59 (D. N.H. 1993).

⁹³ *Id.*, at 67.

⁹⁴ 49 U.S.C. § 31101 *et seq.*, (1995 Supp.).

⁹⁵ 49 U.S.C. § 303(c).

⁹⁶ *See, e.g.* Citizens Against Burlington Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991).

⁹⁷ City of Cleveland v. City of Brook Park, ___6F.Supp.____, (N.D. Ohio 995) (Case No. 1:94CV0079, U.S. District Court, Northern District, Eastern Division).

⁹⁸ *Id.*, opinion at 16.

⁹⁹ TRANSPORTATION RESEARCH BOARD, LANDSIDE ACCESS TO U.S. PORTS, SPECIAL REPORT No. 238, 71, (1993).

¹⁰⁰ *Id.* at 72.

¹⁰¹ The problematic relationship between transportation planning and unpredictable growth patterns is illustrated by the experience of planners of Galveston, Tex. In an effort to mitigate congestion created by the Port of

Galveston, city planners built an access road designed to serve the port and to keep port-related traffic out of residential areas. The new access road has, however, become a popular commuter route, and congested access routes are again a potential problem. *See id.* at 73.

¹⁰² Unless otherwise indicated, the background of the San Francisco Airport small claims actions are drawn from Andrew Freeman and Juli E. Farris, Grassroots Impact Litigation: Mass Filing of Small Claims, 26 U.S.F. L. REV. 261 (Winter 1992).

¹⁰³ Several factors made this an especially effective tactic. For example, California law does not allow parties to small-claims actions to be represented by counsel. CAL. CIV. PROC. CODE § 116.530 (West Supp. 1996). In the San Francisco small-claims actions, the neighbors represented themselves in court, and the airport was represented by a paralegal.

¹⁰⁴ In siding with the plaintiffs in the first round of small claims actions, Judge Roderic Duncan observed:

Would my result be any different if the Airport were making a reasonable effort to minimize the problem? I have not reached that question because it's clear to me that the Airport is making almost no effort in that direction.(Quoted in 26 U.S.F. L. Rev. at 266)

¹⁰⁵ 23 U.S.C. § 108(d).

¹⁰⁶ 23 U.S.C. § 134(f)(1) and (10).

¹⁰⁷ Under 23 U.S.C. § 134(g), MPOs are required to provide "citizens, affected public agencies, representatives of transportation agency employees, private providers of transportation, and interested parties" with notice of and a reasonable opportunity to comment on long-range transportation plans and transportation improvement programs.

¹⁰⁸ Dan Levy, *S.F. Transit Center Fantasy Moves Toward Reality*, SAN FRANCISCO CHRONICLE, Dec. 2, 1994, at A19.

¹⁰⁹ *Id.*

¹¹⁰ 49 U.S.C.S. App. § 1609(c); Amended by ISTE to be part of the Federal Transit Act, 49 U.S.C. § 5333 (1995 Supp.).

¹¹¹ *See also generally* Amalgamated Transit U.I., AFL-CIO v. Donovan, 767 F.2d 939 (1985). *See also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 856 (1991).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Brian K. Krumm, *High Speed Ground Transportation Systems: A Future Component of American's Intermodal Network?*, 22 TRANSP. L.S., 309, 320 (1994).

¹¹⁶ Storm, *supra* note 9, at 19, 20.

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B. What do you consider to be the primary factors inhibiting the development of an intermodal transportation system? Check all appropriate boxes below:

- Zoning Restrictions Lack of Cooperation Among Service Providers
- Noise and Land Use Restriction Expense of Conversion/Availability of Equipment
- Federal Regulation and/or Funding Restrictions Behavior of Commuters/Transit Users
- Labor Laws Other _____
- Lack of Cooperation Among Administrative/ Governmental Agencies

C. For each box checked in Section B above, please explain how you believe development of an intermodal transportation system has been inhibited. If more space is needed than is provided below, please continue on a separate sheet. If statutes, ordinances, or case law were involved, please cite and attach a copy of the relevant statute, ordinance, or case decision.

COMMENTS

Thank you very much for your help in completing this survey. The results will greatly assist us in evaluating how local, state and federal policies can best work together to develop the most efficient intermodal transportation system.

Please return your completed survey in the enclosed, self-addressed, stamped envelope to:

Russell Leibson, Esq.
 William Penner, Esq.
 Carroll, Burdick & McDonough
 44 Montgomery Street, Suite 400
 San Francisco, CA 94102

APPENDIX C-SELECTED SURVEY RESPONDENTS' DEFINITIONS OF "INTERMODALISM"

SELECTED SURVEY RESPONDENTS' DEFINITIONS OF "INTERMODALISM"

"Connections between different modes of transportation to provide a seamless and efficient transportation system."

Planning Manager (Airport)

"Pinpointing key linkages between various modes of transportation where the use of one node will impact another. More specifically, it is the safe and efficient transfer of people/goods between nodes providing a 'seamless' travel interface between trip origin and ultimate destination by interconnecting various transportation facilities and systems. The intermodal system must be capable of providing these transfers in a cost effective manner that is environmentally sound and improves the overall transportation performance."

Deputy Administrator (Airport)

"Between or including more than one means of transportation..."

Manager at Landside Operations (Airport)

"The process where fare passengers from various modes of transportation can transfer seamlessly from one mode to another..."

Operations Manager (Airport)

"User opportunity to interface with desired modes of transportation - - air, cargo, rail, shuttle, etc."

Planning Manager (Airport)

"Intermodalism is the term which describes the ability of passengers or freight to efficiently travel from origin to destination using a variety of modes as appropriate for a given trip segment, and to easily transfer from one mode to another."

Landside Services Manager (Airport)

"Transportation of goods from origin to destination utilizing more than one mode of transportation..."

Manager of Marketing & Public Affairs (Airport)

"Use of two or more transfer modes (air, rail, truck, ocean) to deliver cargo..."

Director of Market Development (Airport)

"The various forms of transportation linking into one fluid system to move customers and products from point to point."

Public Affairs Representative (Airport)

"Intermodalism refers to an inter-connected transportation network. The term implies that various modes of transportation are linked so as to provide a variety of options for getting from Point A to Point B..."

Aviation Planning & Development Representative
(Airport)

"[T]he facilitation and movement of any and all cargo..."

Foreign Trade Zone Manager (Airport)

"[T]he utilization of transportation resources and connections between modes...[The connection of] all elements into a seamless system that is efficient, safe, flexible and environmentally sound that meets the needs of ... port users and consumers of the region served by [the] port."

Government/Environmental Affairs Representative
(Seaport)

"Intermodalism is the merging of two or more mods of transport into one practically seamless transaction, causing economic and operational benefits to the users over any of the separate modes when used individually."

Traffic Manager (State Port Authority)

"Intermodalism is the movement of people and the goods using various transportation modes. The intermodalism system includes all movements from the point of origin to the final destination of the people and goods..."

Project Engineer (Seaport)

"Intermodalism is transportation cargo by using more than one mode of transportation..."

Supervisor of Traffic/Intermodal Services
(Seaport)

"Intermodalism is the seamless transfer of goods and/or passengers between transportation modes for intrastate, national and international destinations, including the availability of systems and facilities that support such modal transfers."

Senior Transportation Planner (Seaport)

"Intermodalism is the movement of animate or inanimate objects where a combination of transportation modes are used to complete the move. Transportation modes are defined as the use of vehicles or equipment travelling: 1) In the Air 2) On or In the Water 3) Over Roads, or 4) On Constructed Trackage/Rails."

Community Affairs Liaison (Seaport)

"Intermodalism is the movement of freight and people among various modes of transportation."

Public Relations Representative
(State Port Authority)

"Transportation of commodities or passengers which requires: The direct interchange

of such commodities or passengers via more than one mode of transportation. This term applies at this facility through interchange of cargo between steamship vessels and trucks, railcars or pipe lines. Passengers are interchanged between cruise ships and buses, limousines and taxicabs."

Traffic Manager (State Port Authority)

"Movement of freight (or passengers) by more than one transport technology, typically truck (or auto) pickup/delivery plus movement by at least one other long haul mode."

Director - - Strategic Analysis
(Rail Operator)

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