

Court Reports

City of Mukilteo v. U.S. Dep't of Transp., 815 F.3d 632 (9th Cir. 2016) (holding: (1) the scope of the Federal Aviation Administration's (FAA) Environmental Assessment regarding future commercial airline demand was not capricious nor arbitrary; (2) the court recognized that under its enabling Act the FAA is allowed to express preference for a certain outcome; (3) the court denied the petition for review and upheld the FAA's decision allowing commercial services at Paine Field).

In 2012, permission was granted for a small two-gate terminal to be built at Paine Field in order for a few commercial airline carriers to provide their services. This action and the longstanding public debate over the airfield led to this case.

Petitioners challenged the FAA's decision that an Environmental Impact Statement (EIS) was not necessary in order to begin operating commercial passenger services in and out of Paine Field. The FAA made such a decision after drafting an Environmental Assessment (EA). Two and a half years later, the final EA was published and it found no significant environmental impact. Petitioners believed the FAA unreasonably restricted the scope of the EA, that the EA failed to mention connected actions resulting from the commercial use, and that the FAA predetermined the review's outcome.

The court determined that Petitioners' arguments, concerning the scope of the FAA's review, equated to stating that the FAA wrongly failed to analyze what would happen if more airlines were added after the first few over time. Looking towards the administrative record, the court determined the FAA's flight projections were based on demand, unlike Petitioner's figures that were based solely on the airport's maximum capacity and did not accurately reflect demand. Furthermore, Petitioners argued that altering Paine Field's Part 139 Certificate to permit commercial passenger operations meant Paine Field must grant access to any aircraft that requested it. The court found this assertion unsupported because airlines still had to apply for a Part 139 Certificate with the FAA in order to get access. This limited access meant Paine Field did not have to do as the Petitioners claimed.

Next, Petitioners argued that the FAA violated a requirement that agencies consider connected actions, i.e. actions that are made interdependent or automatically triggered by the proposed action. The FAA found no connected actions and the Petitioners failed to offer anything

more than mere speculation that the FAA's actions now would lead to an influx of more aircraft than covered in the EA. Therefore, the court found it was not arbitrary for the FAA to have determined there were no connected actions.

In sum, the court stated that, based upon the record, the FAA's demand-based projections and finding of no connected actions were neither arbitrary nor capricious.

Lastly, the court considered the Petitioners' claims that the FAA predetermined the result of the EA. Petitioners claimed a schedule given with a possible Finding Of No Significant Impact (FONSI) issuance date, in conjunction with favorable statements made by the FAA for bringing commercial aviation to Paine Field, were proof of a predetermined outcome. The court rejected Petitioners' first claim because agencies were not prohibited from having a preference and because the FAA was specifically founded upon the idea of promoting commercial aviation. Next, the court found Petitioners' claim about the FONSI issuance date as proof of predetermination to be lacking in merit because the FAA had the right to issue a FONSI or not to issue one and a tentative schedule did not predetermine the finding's outcome. In sum, the court determined the FAA's FONSI was not predetermined as petitioners claimed.

In closing, the court emphasized that its decision was rooted in the current administrative record. A further evaluation was impractical because new airlines would have to have their Part 139 Certification to utilize the airport, which could potentially trigger another round of EA. Accordingly, the court did not prejudice Petitioners from bringing claims against future FAA actions seeking further expansion. However, in this matter, the FAA's decision to permit commercial airline service at Paine Field was neither capricious nor arbitrary.

Mark Campbell

Tubbs v. Surface Transp. Bd., 812 F.3d 1141 (8th Cir. 2015) (a petition for review of the Board's decision that the ICCTA pre-empts state law claims affecting the design, construction, and maintenance of embankments for a rail line).

BNSF Railroad Company ("BNSF") built a rail line across the Tubbs' farm. Because of flooding issues along the Missouri River BNSF built an embankment to prevent flooding from affecting the rail line. The design of the embankment included drainage conduits to prevent build-up of excess floodwater to form; however over time BNSF increased the height of the embankment without installing more conduits. As a result,