

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,

during the 2011 flooding, when records setting floodwaters approached the farm, the waters went over the embankment and caused a rushing deluge of water to wash away the topsoil at the Tubbs' farm.

The Tubbs brought an action in state court against BNSF. The action was stayed in order for the Surface Transportation Board to determine if the state-law claims were applicable. Ultimately the Board determined that the state claims were pre-empted by the ICCTA because if decided the state law claim would effectively manage rail transportation for which the agency was specifically created to effect. The Board concluded a test of if a state claim created an unreasonable burden or interfered with rail transportation it would be preempted by the ICCTA.

Following this ruling the Tubbs' submitted a petition of review to the US Court of Appeals, 8th Circuit. The Appellate Court first identified that to change the Board's decision it would need to determine whether the Board's test of unreasonable burden or interference test was a permissive construction of the statute. Unfortunately for the Tubbs', they failed to make the argument that the test was not a permissive construction. Instead they argued a different test should apply, that unless there is a federal claim to replace a state-law claim there is a strong presumption against pre-emption. Due to the Tubbs' failure to properly identify the issue that could overturn the Board's decision the Appellate Court upheld the Board's construction of the statute as permissive.

The Appellate Court then reviewed the Board's finding of fact, that the state law claims asserted by the Tubbs were an unreasonable burden and interfered with rail transportation so they would be pre-empted by the ICCTA. The Board found that the state law claims were based on harms caused by the BNSF in the design, construction, and maintenance of the embankment for the rail line. Those factors are an integral part of rail transportation so the state law claims were pre-empted by the ICCTA. Additionally, the Board held that a decision for the Tubbs state law claims would create a standard of care created by the state which would affect the design, construction, and maintenance of embankments of all rail lines in the state. The agency was created in order to provide uniformity in rail lines therefore it falls under its jurisdiction, so the ICCTA would pre-empt the state law claims.

The Court upheld the board's decision as it was supported by substantial evidence in the record.

Tess Wilson