

CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUITCITY OF PHOENIX,
ARIZONA,

Petitioner,

STORY PRESERVATION
ASSOCIATION, INC. et al.

Petitioners,

v.

Case Nos. 15-1158 & 15-1247

MICHAEL HUERTA,
Administrator of the Federal
Aviation Administration, andFEDERAL AVIATION
ADMINISTRATION,

Respondents.

**PETITIONERS' JOINT MOTION REGARDING
THE SCOPE OF THE ADMINISTRATIVE RECORD**

ARGUMENT

Petitioners City of Phoenix, Arizona and Story Preservation Association, Inc. *et al.* (collectively, Petitioners) and Respondent FAA dispute the contents of the administrative record before the Court. The Court should consider as the appropriate administrative record all information indirectly or directly considered by FAA in its decisionmaking process that culminated in its June 1, 2016, letter (June Letter).

However, on December 23, 2015, FAA submitted to the Court a Certified Index of Materials Comprising the Administrative Record (Index) in which FAA characterized documents (1) prior to September 18, 2014 (when FAA first used the flight tracks at issue) as the record documents and (2) following the September 18, 2014, initial implementation of RNAV routes as post-decisional documents and therefore excluded from the record.¹ See Doc No. 1590505. FAA's Index recognized that the Parties dispute whether the "order" under review in this case is the initial implementation of the flight tracks on September 18, 2014, or the June Letter. This issue was the core of the dispute raised by FAA's Motions to Dismiss filed on July 17, 2015 and September 17, 2015, but deferred by the Court for consideration by the merits panel. See Document 1586942. FAA contends that the

¹ The Index has inconsistencies—including FAA's characterizing its November 14, 2014, Errata to the Initial Environmental Review (IER) as a record document "supporting" FAA's Categorical Exclusion (CATEX), despite that the Errata postdates the initial implementation. See Index at 3, Doc. No. B5.

record is restricted to only information considered by FAA in the initial implementation of the RNAV routes. The Petitioners contend that the final order includes the materials in the Index up to and including the June Letter.

In its review of FAA's implementation of the RNAV routes, the Court should consider all of the documents listed in FAA's Index—including documents described as post-decisional—even if the Court accepts FAA's argument that the initial implementation is the only reviewable order. Although judicial review of agency decisions is usually restricted to information before the agency at the time of its decision, the D.C. Circuit recognizes an exception “when the record is so bare that it prevents effective judicial review.” *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (quotations omitted). Consideration of extra-record evidence is also appropriate “where ‘the procedural validity of the agency’s action remains in serious question.’” *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (citation omitted); *see also Esch v. Yeutter*, 876 F.2d 976, 991– (D.C. Cir. 1989) (considering extra-record evidence where “serious questions as to whether the adjudicative officials at any given point considered all relevant factors in reaching their determinations”). Applying those exceptions here is appropriate.

As detailed in Petitioners' opening briefs, FAA violated the mandatory consultation requirements of the National Historic Preservation Act (NHPA) and

Section 4(f). 36 C.F.R. § 800.2(c)(3); FAA Order 1050.1E app. A ¶ 6.2e. FAA neither sought nor had before it any information on the properties protected by the NHPA and Section 4(f) and impacted by the RNAV routes. As a result, FAA's record leading up to the initial implementation is bare and lacks the facts, analysis, and reasoning that would allow the Court to discern whether FAA's environmental review and CATEX were reasonable.

Information obtained by FAA after September 18, 2014 clearly establishes the inadequacy of the pre-September 18 record in two ways. First, that information demonstrates that FAA's initial conclusions lacked any factual support and were based on unsubstantiated assumptions. Second, that information demonstrates FAA's procedural errors in failing to conduct consultation that would have led FAA to discover the relevant information required to make an informed decision. Accordingly, even if September 18 is the date of FAA's decision, consideration of post-decision information is appropriate to evaluate that decision. *Theodore Roosevelt*, 616 F.3d at 514.

Further, FAA made determinations following the initial implementation that directly relate to the validity of the CATEX and involve issues on which the Court must rule in upholding or invalidating the CATEX. First, in November 2014, FAA notified the City that it had made unspecified adjustments to the RNAV routes that it had initially evaluated in the IER and CATEX. Index at 6, Doc. No. H14.

Whether the FAA was arbitrary in failing to subject the modifications to environmental review requires consideration of post-initial implementation documents.

Second, on November 14, 2014, FAA issued an Errata to its CATEX that modified the Errata's findings but did not address whether FAA's initial determination of no significant environmental impacts remained valid in light of the evidence showing significant impacts from the noise of the RNAV routes. *See* Index at 3, Doc. No. B5. The Court's review of FAA's issuance of the Errata, which FAA contends supports the CATEX, requires review of post-initial implementation documents.

Third, FAA ignored and ultimately denied Petitioners' and the State Historic Preservation Officer's requests under 36 C.F.R. § 800.13(b)(1) to reinitiate NHPA consultation based on significant noise impacts from the routes on historic properties that contradicted FAA's findings in the CATEX. *See id.* (requiring reinitiation of consultation if presented with new information that shows adverse effects after the initiation of the federal action). Determining whether FAA satisfied the NHPA's independent requirement of reinitiating consultation—which, in turn, would reopen the CATEX—is by its nature post-decisional. Therefore, regardless of if the Court determines that the September 18, 2014, initial implementation is the only reviewable order, review of that order should include

consideration of the all documents in the Index, including those postdating the initial implementation.

REQUEST FOR RELIEF

Petitioners request the following relief by the Court based on what action the Court deems is FAA's final reviewable order:

1. As a general matter, the administrative record includes all material considered by the agency through the time of its final decision.
2. As stated above, a dispute exists between the parties as to the timing of the final decision. FAA claims to have made a final decision on September 18, 2014. Petitioners contend that FAA's decisionmaking process remained open through June 1, 2015.
3. In evaluating the timing of the final decision, the Court should consider the entire record through June 1, 2015; any other approach would frustrate judicial review.
4. If the Court decides that FAA's final decision occurred on June 1, 2015, the entire record should be considered under the general rule in Paragraph 1.
5. If the Court decides that FAA's final decision occurred on September 18, 2014, it should nonetheless consider the entire Index material under the exceptions to the general rule discussed above.

Respectfully submitted on May 13, 2016.

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CERTIFICATE OF SERVICE

I certify that on this day, May 13, 2016, I electronically filed this Joint Motion Regarding the Scope of the Administrative Record with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered to use that system and, to my knowledge, will receive copies of this document upon its filing.

/s/ John E. Putnam

John E. Putnam