



GEORGETOWN LAW

2010-2011 Annual Report

INSTITUTE
FOR
PUBLIC REPRESENTATION

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IPR is a public interest law firm and clinical education program founded in 1971 by Georgetown University Law Center. IPR attorneys act as counsel for groups and individuals who are unable to obtain effective legal representation on issues of broad public importance. IPR's work currently focuses on first amendment and media law, environmental law and civil rights and public interest law, including employment discrimination and the rights of people with disabilities.

This report summarizes IPR's projects over the last year, illustrating the impact of our work on our clients and their communities. All of the projects also serve a clinical education function. IPR gives students and graduate fellows an opportunity to work on unique, large scale projects raising novel legal issues and requiring extensive research and writing.

These projects involve challenging issues and legal materials. For example, most of our projects require students to develop and master extensive factual records that often relate to technical issues such as interactive television or pollution control. Gathering facts and the creation and use of administrative records is an important part of the experience for many of our students.

We also frequently require students to research regulatory material and administrative law issues. Although students are usually familiar with how to find

and use case law, they often have had little exposure to municipal law and regulations or to such materials as the Federal Register and the Code of Federal Regulations. Similarly, few students have used legislative or administrative history materials in areas such as first amendment and media law or environmental law. With the help of IPR attorneys and the professional staff at the Law Center's library, IPR students explore the uses of these tools.

The students also must consider questions of strategy, client autonomy, and professional responsibility, the need for careful preparation and planning, and how to mesh client goals with the applicable law and facts. Students have the opportunity to learn oral communication skills and to work with community groups, other public interest organizations, and expert witnesses. Like other clinics at Georgetown, students must assume responsibility for the quality of their own work and for the success of their clients' cases. Most of the work at IPR is collaborative, with the graduate fellows and faculty working with the students at each step of the case. Students learn from observing the work of experienced attorneys who are practicing law along with them. The students, therefore, not only have the chance to perform and have their work critiqued, but also to observe and critique the performance of their supervisors.

The day-to-day work on cases is supplemented by weekly seminars and weekly clinic meetings at which we review cases and current issues.

IPR seminars are an integral part of the students' educational experience. The format and subject matter of the seminars vary. Some require students to formulate positions in small groups before meeting together with the other students, while others involve role playing or simulation. Many require that students draw on and share their experiences on their projects. The materials used in the seminars include judicial decisions, pleadings from IPR cases, law review articles, legislative materials, real and hypothetical fact patterns, and excerpts from non-legal literature. In recent terms, seminar topics have included interviewing, complaint drafting, rulemaking, litigation planning, discovery, remedies, appeals, statutory interpretation, working with the press, professional responsibility, and negotiation. Although the focus of the seminars is on public interest practice, the issues we deal with arise for most lawyers, regardless of practice area.

Students at IPR work with three faculty members and five graduate fellows selected from a national pool of several hundred applicants. The fellows are an essential part of the IPR program. They are responsible for the day-to-day supervision of the students and spend much of their time guiding students in conducting legal research, reviewing student drafts, and preparing the students for oral presentations. The fellows also work as members of IPR's legal staff, and represent clients in hearings before federal and state courts and local and federal administrative bodies.

FACULTY

Angela J. Campbell, Co-Director
Hope M. Babcock, Co-Director
Brian Wolfman, Co-Director

GRADUATE FELLOWS

Adrienne Biddings received her J.D., *cum laude*, from the University of Florida College of Law with a joint M.A. degree in Mass Communications. She obtained her undergraduate degree in Communications from the University of Miami. During law school, she was executive research editor for the Florida Entertainment Law Review and a research assistant for the Center for the Study of Race and Race Relations. She also taught Telecommunication Law and Regulation at the University of Florida. In summer 2008, she worked as a law clerk in Comcast's legal & regulatory department in Washington, DC. Prior to attending law school, Adrienne worked as a promotions producer for an ABC affiliate in Miami, FL and technical director for a public access channel in Wilmington, NC.

Leah M. Nicholls received her B.A. in History and Philosophy, *summa cum laude*, and her M.A. in History from Boston University in 2004. She earned a J.D., Order of the Coif, and an LL.M in International and Comparative Law in 2007 from Duke University School of Law, where she was the Editor-in-Chief of the Duke Journal of Comparative and International Law

and the recipient of the David H. Siegel Memorial Scholarship and the Justin Miller Citizenship Award. During law school, Leah worked at civil rights organizations, including Carolina Legal Services, the Arizona Center for Disability Law, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs and worked as a student attorney in Duke's Guantánamo Defense, Children's Education, and Poverty Law clinics. After graduation, Leah clerked for the Honorable Harriet O'Neill of the Supreme Court of Texas. Prior to joining IPR, Leah served as the Supreme Court Assistance Project Fellow at Public Citizen Litigation Group. She is the author of the article "The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law," published in the Duke Journal of Comparative & International Law.

Kelly Davis received her J.D. with honors from the University of Texas School of Law, where she served as president of the Environmental Law Society and Recent Developments Editor of the Texas Environmental Law Journal, and received the Texas Law Fellowships Excellence in Public Interest Award. During law school, Kelly interned at Save Our Springs Alliance and Earthjustice DC, and worked as a clinical intern at UT's Environmental Law Clinic and Housing Clinic. Prior to joining IPR, Kelly clerked at the U.S. District Court for the Western District of Texas for the Honorable William

Wayne Justice, U.S. Senior District Judge, and the Honorable Robert L. Pitman, U.S. Magistrate Judge. Kelly graduated from Warren Wilson College in Asheville, North Carolina with a B.A. in Social and Environmental Justice.

Guilherme Roschke has a B.A. from the University of Pennsylvania and a J.D. from The George Washington University Law School. Following law school, Guilherme was awarded a Skadden Fellowship at the Electronic Privacy Information Center in Washington DC. His fellowship focused on protecting the privacy of victims of domestic violence, and included individual representation, technical assistance and policy work. Following his fellowship, Guilherme was a staff attorney at the American Bar Association Commission on Domestic Violence, where he provided technical advice and developed trainings for lawyers representing victims of domestic violence. Prior to law school, Guilherme was a computer programmer with experience in corporate, non-profit and scientific environments. He often volunteered his technical and organizing skills for media activism projects. Guilherme is a member of the District of Columbia and New York bars.

Margie Sollinger came to IPR after working as a staff attorney at Bread for the City, a social services organization in the District of Columbia where she provided direct representation to low-and no-income tenants. She received her B.A. with

honors in biology and environmental studies from Carleton College and her J.D. with honors from the University of Minnesota Law School, where she was an editor for the Journal of Law and Inequality. Her work experience during school included positions at the Center for Biological Diversity and Pine Tree Legal Assistance. Following law school she clerked for the Honorable Warren M. Silver on the Maine Supreme Court.

LAW STUDENTS

FALL 2010

Civil Rights & Public Interest Law

Myung An
Anjali Chavan
Anne Dechter Howard
Brendan McTaggart
Jessica Pfisterer
Tiffany Wynn

First Amendment & Media Law

Kate Aishton
Todd Hales
Naephil Kwun
Elliot Magruder
Fabian McNally
Kendra Patrick
Matthew Rich

Environmental Law

Mitchell Edwards
Hayley Easton Neal
Ellora Sachter
John Sawyko
Michael Schocket
Rhett Tatum

SPRING 2011

Civil Rights & Public Interest Law

Swathi Bojedla
Dena Feldman
Jenna Gerry
Anna McClure
Thomas McSorley
Kathleen Rupp

First Amendment & Media Law

Khaliah Barnes
Chris Bolyai
Matthew Lijoi
Justin Mercer
Samuel Philipson
Megan Suehiro

Environmental Law

Felicia Barnes
Paul Heberling
Catherine Malina
Heather Murray
Thomas Olsen
R.F. Michael Snodgrass

CIVIL RIGHTS AND PUBLIC INTEREST LAW

A. Employment Discrimination

1. Hairston v. Boarman

IPR represents Kevin Hairston, an African-American who has worked for the Government Printing Office (GPO) for decades but repeatedly has been denied promotions on the basis of race. Mr. Hairston joined GPO in 1987, and, after scoring 3rd out of 134 on GPO's Offset Press Assistant Training Program examination, he was invited to participate in GPO's Press Training Program Apprenticeship. After completing the program, Mr. Hairston continued to work his way up from a Printing Plant Worker to an Offset Pressman, but has not been able to advance any further.

In August 2006, Mr. Hairston applied for a promotion to the position of Second Offset Pressperson. GPO sent him notification that he was qualified, and internal documents obtained during the investigation reveal that the selecting and approving officials chose him for the position. Yet, without explanation, a Production Manager ordered that the selection be canceled, and the position was closed without it being offered to anyone. The position was later re-posted after management claimed that no qualified applicants had applied for the opening the first time. A white man was hired for the position. Mr. Hairston filed a complaint with the Equal Employment Opportunity Office

(EEO Office) at GPO, and he was retaliated against by his supervisors for doing so.

In September 2008, IPR filed suit on Mr. Hairston's behalf. GPO responded with a motion to dismiss, claiming that Mr. Hairston failed to exhaust his administrative remedies prior to initiating the federal lawsuit. IPR opposed this motion, and, in the fall of 2009, the district court denied the motion as to the discrimination claim and granted the motion as to the retaliation claim. In the meantime, Mr. Hairston suffered additional retaliation at GPO, and he filed additional EEO complaints after he was denied overtime and training opportunities. IPR amended his federal complaint to include the denial of training claim in the spring of 2010, and the parties engaged in discovery throughout the summer and fall of 2010.

In spring 2011, GPO filed a motion for summary judgment, arguing that the agency had a non-discriminatory reason for canceling Mr. Hairston's promotion. IPR opposed the motion, arguing that the evidence indicates that GPO's reason was false and pretext for discrimination. Summary judgment briefing was completed in early July 2011, and the parties await a decision.

2. Eley v. Boarman

IPR represents Melvin Eley, an African-American who has worked for the GPO for decades but has repeatedly been denied

promotions on the basis of race and retaliation. After Mr. Eley was denied a promotion in 2001, he filed an EEO complaint, and IPR represented him. GPO settled that matter favorably to Mr. Eley in 2003, but GPO continues to deny Mr. Eley promotions for which he was qualified.

Since the 2003 settlement, Mr. Eley has been denied at least four promotions, one of which was canceled without explanation. Most recently, in 2008, Mr. Eley applied for the Operations Director position, a Senior Level Service (SLS) position in the Information Technology and Systems Department. Mr. Eley was deemed qualified, but a white man was hired instead. At the time, there were no African-American men among the approximately 30 SLS positions at GPO.

Mr. Eley filed a complaint at GPO's EEO Office, and after that process provided Mr. Eley no relief, IPR filed a Title VII complaint on his behalf in district court in November 2009. The parties conducted discovery throughout the summer and fall of 2010.

In spring 2011, GPO filed a motion for summary judgment, arguing that the agency had a non-discriminatory reason for denying Mr. Eley the promotion. IPR opposed the motion, arguing that the evidence indicates that GPO's reason was baseless and pretext for discrimination. Summary judgment briefing was completed in May 2011, and the parties await a decision.

3. Warner v. Boarman

IPR represents Kimberly Warner, an African-American woman employed by GPO. Ms. Warner heads the Digital Print Center (DPC), a department within GPO that prints documents using digital printing equipment. When Ms. Warner was first promoted to head the DPC, she was being paid far less than the male employees she succeeded. Ms. Warner filed a sex-discrimination claim, and IPR represented her in proceedings before the Equal Employment Opportunity Commission. The claim settled favorably to Ms. Warner.

Since her settlement, however, Ms. Warner and the DPC have been subjected to retaliation and discrimination. Ms. Warner has been denied numerous promotions though she was on the "best qualified" list each time. The DPC is chronically understaffed and, according to a complaint filed in GPO's EEO Office filed by a group of DPC employees, the staff is grossly underpaid. Ms. Warner's performance evaluations were downgraded in 2007 and 2008, and her responsibilities have been reduced. Unlike her peers, Ms. Warner has been denied the opportunity to cross-train and denied an office space. She is routinely excluded from the decision-making process for issues that will affect the DPC.

Ms. Warner filed four complaints with GPO's EEO Office. After that process provided Ms. Warner no relief, IPR filed a Title

VII complaint in federal district court in August 2010. The complaint alleges that GPO continues to discriminate against her on the basis of sex and retaliate against her for filing complaints. The parties are currently engaged in discovery, which is scheduled to be completed in fall 2011.

4. Batson v. BB&T

IPR represents DuEwa Batson, a former employee of a BB&T bank branch in Easton, Maryland. Ms. Batson worked as a bank teller, and she was often assigned to work on Saturdays. In November 2008, Ms. Batson converted to the Hebrew Israelite religion, which strictly observes the Sabbath from Friday evening through Saturday evening. In accordance with her religion, Ms. Batson refrains from all work on Saturdays and spends much of the day worshipping at her temple.

After her conversion, Ms. Batson explained to her bank manager and the regional human resources (HR) representative that she would no longer be able to work on Saturdays. They agreed to accommodate Ms. Batson's religious practices. However, in April 2009, the bank's manager was replaced. The new manager and the same regional HR representative informed Ms. Batson that the bank would no longer accommodate her religious observances. Ms. Batson refused to work on Saturdays, and she was fired.

Ms. Batson filed a complaint with the Equal Employment Opportunity Commission, which issued a determination in her favor, but did not prosecute her case. In June 2011, IPR filed a Title VII complaint in federal district court on Ms. Batson's behalf, alleging that the bank discriminated against her on the basis of religion and in failing to accommodate her religious observances.

B. Open Government

1. McBurney v. Young

IPR represents Mark McBurney, a citizen of Rhode Island, Roger Hurlbert, a citizen of California, and Bonnie Stewart, a citizen of West Virginia. Each filed requests for public records under the Virginia Freedom of Information Act (VFOIA), but each request was denied because VFOIA only grants the right to access Virginia public records to citizens of Virginia. Mr. McBurney, who had been a citizen of Virginia for 13 years, sought records from the Virginia Department of Child Support and Enforcement regarding child support for his son. Mr. Hurlbert runs a business that collects and provides real estate information and sought records from the Henrico County Tax Assessors Office. Ms. Stewart, a professor of journalism at West Virginia University, sought information from Virginia public universities as part of a journalism course she teaches.

Mr. McBurney contacted IPR for assistance, knowing that IPR had previously handled a similar case,

Lee v. Minner, against the state of Delaware, which IPR won in the U.S. Court of Appeals for the Third Circuit. Mr. Hurlbert contacted IPR soon after, and, in January 2009, IPR filed a complaint in district court in Virginia against the Virginia Attorney General, the Virginia Department of Child Support and Enforcement, and the Henrico County Tax Assessors Office on behalf of Mr. McBurney and Mr. Hurlbert. In February 2009, Professor Stewart contacted IPR regarding her own experience with the discriminatory provision of Virginia's FOIA, and the complaint was amended to add Professor Stewart's claim.

The complaint alleges that the citizens-only provision of Virginia's FOIA violates the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause of the U.S. Constitution. After a hearing, the district court granted the defendants' motion to dismiss, finding that the Attorney General, the only defendant sued by Professor Stewart, was not a proper party and that Mr. McBurney and Mr. Hurlbert lacked standing to bring their claims and opining that the plaintiffs would have lost on the merits anyway.

IPR appealed the decision to the U.S. Court of Appeals for the Fourth Circuit, and, in July 2010, after oral argument, the Fourth Circuit affirmed the district court's decision to dismiss the Attorney General and Professor Stewart; reversed the decision as to Mr.

McBurney's and Mr. Hurlbert's standing; and remanded Mr. McBurney's and Mr. Hurlbert's claims to the district court.

On remand, the district court found that Mr. McBurney and Mr. Hurlbert have standing to challenge VFOIA's citizens-only provision, but that the law did not violate the constitution. IPR appealed the decision to the Fourth Circuit, and briefing was completed in May 2011. The parties await a decision from the Fourth Circuit.

2. Bloche v. Department of Defense

IPR represents two prominent bioethics experts, M. Gregg Bloche, M.D., a Georgetown law professor, and Jonathan Marks, a bioethics professor at Penn State, in a Freedom of Information Act (FOIA) case against various agencies of the Department of Defense and the Central Intelligence Agency. The plaintiffs seek information concerning the participation of government and civilian medical personnel in the design and implementation of torture techniques.

After filing FOIA requests with the relevant agencies in 2006 and 2007, and receiving no documents in response, IPR filed a FOIA lawsuit on behalf of the experts in November 2007. The Court ordered the government defendants to turn over relevant documents in several stages, the releases concluded in spring 2010. The agencies are still withholding

many documents, citing various FOIA exemptions.

In March 2011, the plaintiffs moved for summary judgment against a key defendant, the U.S. Air Force, arguing that the government's exemption claims are unlawful under FOIA. Because the Air Force appears to have played a key role in developing the policies that the plaintiffs are interested in, the plaintiffs are hopeful that this motion will serve as a bellwether for the litigation as a whole. The government's response to the motion is due in early September 2011. In the meantime, the government has begun to release some of the Air Force documents that it previously claimed were exempt and has agreed to informally review memoranda prepared by IPR detailing legal concerns about withholdings by defendant agencies other than the Air Force.

3. Benavides v. Bureau of Prisons

Eduardo Benavides, a federal prisoner, filed a Freedom of Information Act (FOIA) request with the Bureau of Prisons (BOP) seeking digital audio recordings made by BOP of conversations between him and his attorney. After BOP denied his request, Mr. Benavides filed a *pro se* complaint in federal district court. BOP moved for summary judgment, claiming that the recordings are exempt from disclosure under FOIA Exemption 7(C) because they are law enforcement records and because Mr. Benavides's attorney has a

personal privacy interest in the recordings. IPR agreed to represent Mr. Benavides.

In May 2010, IPR filed an opposition to BOP's motion for summary judgment and a cross-motion for summary judgment. IPR primarily argued that an attorney has no personal privacy interest in attorney-client conversations during which only the client's case was discussed. IPR also argued that the recordings were not law enforcement records. The district court held that the government had not shown that the recordings are law enforcement records and did not reach the attorney privacy issue. However, the district court declined to grant IPR's cross-motion for summary judgment and invited BOP to produce more evidence that the records constituted law enforcement records and to file a second motion for summary judgment. In June 2011, the parties completed briefing their second cross-motions for summary judgment, which involved additional declarations on both sides and new summary judgment briefs. The parties await a decision from the district court.

4. Southern Migrant Legal Services v. Education & Workforce Development Cabinet for the Commonwealth of Kentucky

Southern Migrant Legal Services (SMLS) is a legal services organization that provides free legal services to indigent migrant agricultural workers in six southern

states. To assist it in its advocacy, SMLS frequently files state and federal freedom of information requests seeking documents about the employers of migrant workers. The migrant worker program (the H-2A program) is a heavily regulated joint federal-state program under which employers are required to submit many documents and materials to the government. The federal government regularly releases H-2A documents in response to federal Freedom of Information Act requests.

The Kentucky Education & Workforce Development Cabinet (the Cabinet), which oversees the H-2A program in Kentucky, recently promulgated regulations classifying most H-2A documents as confidential and prohibiting their release under Kentucky's Open Records Act. Kentucky's Open Records Act, however, requires state agencies to release documents that may be released under federal law.

SMLS requested H-2A records under the Open Records Act from the Cabinet several times, and the Cabinet denied each request, citing the new regulations. On behalf of SMLS, IPR filed a complaint in Kentucky state court in March 2010. IPR then filed a motion for summary judgment, arguing that because the federal government has a policy of releasing H-2A records, the Kentucky Open Records Act requires the state to release the same records. After a hearing in Frankfort, Kentucky, the court granted IPR's motion for summary judgment in September 2010, striking down the

Cabinet's regulation that made H-2A records confidential. The Cabinet did not appeal.

5. Southern Migrant Legal Services v. Range

IPR also represents Southern Migrant Legal Services (SMLS) in a similar action involving Mississippi's failure to disclose H-2A records. In 2007, the Mississippi legislature amended its labor laws and classified H-2A documents as confidential, permitting the documents to be withheld under the Mississippi Public Records Act. SMLS has requested H-2A records under the Public Records Act from the Mississippi Department of Employment Security (MDES) several times, and MDES denied each request, citing the new law.

In July 2010, IPR filed a complaint in federal district court in Mississippi on behalf of SMLS. The § 1983 complaint alleged that MDES's withholding of H-2A records violates federal law because a federal regulation requires states to release H-2A documents. MDES filed a motion to dismiss, arguing that SMLS lacked a right of action to challenge the Mississippi Public Records Act. IPR amended its complaint to add a preemption claim under the Supremacy Clause, and MDES filed a second motion to dismiss. IPR then filed a motion for summary judgment on the merits, arguing that the Mississippi statute making H-2A records confidential is preempted by federal law requiring the disclosure of H-2A records. Summary judgment briefing was

completed in February 2011, and the parties await decisions on all pending motions.

6. Belth v. Wood

Joseph Belth is a citizen of Indiana and the editor of *The Insurance Forum*, a monthly periodical that reports on issues affecting the insurance industry. In connection with research for *The Insurance Forum*, Mr. Belth made a request under the Arkansas Freedom of Information Act (AFOIA) to the Arkansas State Auditor. Doug Stevick was a citizen of Tennessee and the managing attorney of Southern Migrant Legal Services (SMLS), a nonprofit legal services organization that provides free legal services to indigent migrant agricultural workers. As part of his SMLS advocacy, Mr. Stevick made an AFOIA request to the Arkansas State Highway and Transportation Department. Mr. Belth's and Mr. Stevick's AFOIA requests were denied because AFOIA grants the right of access to Arkansas documents only to citizens of Arkansas.

In January 2011, on behalf of Mr. Belth and Mr. Stevick, IPR filed a complaint in federal district court in Arkansas, arguing that AFOIA's citizens-only provision violates the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the U.S. Constitution.

In April 2011, the parties settled. The defendants, the Arkansas State Auditor and

Arkansas State Highway and Transportation Department, agreed to produce the documents requested by Mr. Belth and Mr. Stevick. The defendants also agreed to honor all future AFOIA requests from non-Arkansans on an equal basis with requests from Arkansas citizens; not to defend any future litigation on the basis that the requester is not a citizen of Arkansas; to circulate the terms of the agreement to employees handling AFOIA requests; and to post on their public websites a statement that they would process AFOIA requests from non-Arkansans. IPR also recovered attorneys' fees.

7. Belth New York Freedom of Information Law Appeal

Joseph Belth is the editor of *The Insurance Forum*, a monthly periodical that reports on issues affecting the insurance industry. In connection with research for *The Insurance Forum*, Mr. Belth made a request under the New York Freedom of Information Law (FOIL) to the New York Insurance Department for access to an agreement between the Department and an insurance company. At the urging of the insurance company, the Department denied Mr. Belth's request in part, maintaining that most of the agreement (and the entirety of a PowerPoint presentation attached to the agreement) contained confidential commercial information and was therefore exempt from disclosure.

In January 2011, IPR used FOIL to obtain the insurance company's letter to the Department urging the Department not to disclose the agreement to Mr. Belth. Then, on behalf of Mr. Belth, IPR filed an administrative appeal of the denial of his request with the general counsel's office of the Department. IPR argued that the insurance company had failed to show that the letter and its attachment contained confidential commercial information under New York law because the insurance company did not establish that it had any actual competitors or that it would suffer a substantial competitive injury if the information were released, particularly because the insurance company was no longer selling new policies. The Department granted in part and denied in part the appeal, holding that FOIL required a portion of the PowerPoint presentation to be released to Mr. Belth. Mr. Belth decided not to appeal the adverse portion of the decision to court.

8. United Air Lines v. Allen

United Airlines v. Allen was a lawsuit filed in federal district court in Massachusetts in which United sued two of its customers over allegedly improper booking practices. The customers argued, among other things, that United's claims were preempted by the Airline Deregulation Act. At United's urging, the parties had agreed to file many of the key pleadings and briefs under seal, and the court issued a sealing order. Meanwhile, a non-profit organization, Skybridge

Spectrum Foundation, is interested in reviewing the sealed briefs because they relate to preemption arguments in other litigation in which Skybridge has an interest. On Skybridge's behalf, in May 2011, IPR contacted the parties in *United Airlines v. Allen*, asking them to agree to an order unsealing the documents on the ground that the sealing is inconsistent with the common-law and First Amendment rights to access to court records. The plaintiffs have agreed not to oppose an unsealing order, and United is still considering Skybridge's demand. Skybridge may move the district court to unseal the records if United does not agree to an unsealing order.

C. Class Actions

1. Hayden v. Atochem North America

In 1992, residents of Bryan, Texas filed a class action against Atochem in federal district court in Houston, alleging that the chemical manufacturer's local pesticide plant spewed arsenic and other carcinogens, causing widespread medical problems and property damage throughout the area. The case settled favorably to the plaintiffs in 2000. Today, approximately \$1 million remains in unclaimed settlement funds, and the district court sought proposals for distributing the remaining funds. The defendant proposed that the funds be either given back to it or given to specific local charities having nothing to do with the subject matter of the class action.

In March 2010, IPR, on behalf of class member Ralph Klier, submitted a competing proposal, arguing that the law required the court to make an additional *pro rata* distribution of funds to the most seriously injured class members. Alternatively, IPR argued that the funds should be distributed to a charitable cause with a strong nexus to the issues in the class action, such as Texas A&M's School of Rural Public Health, which researches the carcinogenic effects of pesticides on people in Texas.

The court rejected Mr. Klier's position and awarded the money to several local charities unconnected to the subject matter of the class action, such as the Children's Museum of the Brazos Valley. IPR sought a stay of the distribution, which was granted, and appealed the award to the Fifth Circuit. The Fifth Circuit heard argument in June 2011, and the parties await a decision.

2. Briggs v. United States

This nationwide class action was brought by military personnel, veterans, and their families who had held credit cards issued by the U.S. government. The government had collected credit card debts from the plaintiff class after the statute of limitations had expired. The parties settled in December 2009, and the government agreed to repay each class member 100% of the debt it had illegally collected.

Through two extensive memoranda, IPR advised class counsel on the applicable legal principles and possible appropriate charitable recipients in the event a *pro rata* redistribution of remaining funds is not feasible after an extensive search for all class members. In the memo concerning potential charitable recipients, IPR's research focused on locating reputable organizations that provide financial or debt relief assistance to veterans and their families.

After drafting the memoranda, IPR worked on maximizing the distribution to class members. The distribution is expected to be complete in late summer 2011. Once the distribution is completed, IPR will be involved in assuring that any charitable distribution of the remaining funds is appropriate.

D. Other Matters

1. Milan de Vries

Milan de Vries is a scientist who specializes in cancer research and healthcare policy. Mr. de Vries was selected to work closely with the director of the National Institutes of Health (NIH) and became a United States Citizen to be eligible to do so. Mr. de Vries was born in the Netherlands as a Dutch citizen, moved to the United States with his family at age 11, went to college in Israel at 16, and then returned to the United States at 21 to begin graduate school.

Mr. de Vries is unable to begin his position at NIH because he never registered with the Selective Service. Until recently, when Mr. de Vries applied for U.S. citizenship, he was unaware that, as a non-citizen, he was required to register. Mr. de Vries turned 18 while living abroad and went to college abroad, missing the events and rites of passage through which young American men often learn they must register for the draft. Absent a waiver, non-registrants generally may not work for the federal government.

IPR assisted Mr. de Vries in drafting and assembling an application for a waiver of the rule with the Office of Personnel Management. Mr. de Vries has not yet heard whether his waiver has been granted.

2. Elgin v. U.S. Department of the Treasury

Michael Elgin, Aaron Lawson, Henry Tucker, and Christon Colby are all former valued employees of the federal government. Each was terminated solely because the Selective Service has no record that they registered. Each then sought a waiver from the Office of Personnel Management (OPM) that would permit him to work for the federal government, but OPM denied each of their requests and their and their employers' administrative appeals.

Mr. Elgin appealed his termination to the Merit Systems Protection Board (MSPB), arguing that his termination was unconstitutional, and the MSPB

dismissed his appeal for lack of jurisdiction. Mr. Elgin, joined by Mr. Lawson, Mr. Tucker, and Mr. Colby, then filed a complaint in Massachusetts federal district court, arguing that the lifetime ban on federal employment for men who fail to register is a Bill of Attainder prohibited by the Constitution and that it violates their constitutional equal protection rights because the bar on employment only applies to men. The district court held that it had jurisdiction to consider the plaintiffs' claims, but decided against them on the merits. Mr. Elgin, Mr. Lawson, Mr. Tucker, and Mr. Colby appealed, and a majority of the First Circuit panel held that it lacked jurisdiction over their constitutional claims because the Civil Service Reform Act's scheme for addressing the grievances of federal employees impliedly precludes federal district court jurisdiction over employees' constitutional claims.

In July 2011, on behalf of Mr. Elgin, Mr. Lawson, Mr. Tucker, and Mr. Colby, IPR filed a petition for certiorari in the U.S. Supreme Court. IPR argued that certiorari was warranted because there is a deep circuit split on the question whether the Civil Service Reform Act impliedly precludes federal district court jurisdiction over federal employees' equitable constitutional claims. IPR also argued that the First Circuit's ruling on the jurisdictional question was incorrect. IPR is awaiting a response from the Solicitor General.

FIRST AMENDMENT AND MEDIA LAW

IPR's First Amendment and Media Law section recently won a major case in the Third Circuit concerning media ownership. IPR has continued to work on a variety of cases designed to promote a diverse media, ensure that broadcast stations serve local communities, and protect children from unfair and deceptive advertising practices and privacy violations. In addition, IPR successfully represented the National Network to End Domestic Violence in obtaining favorable regulations implementing the Truth in Caller ID Act of 2010. IPR also represented Telecommunications for the Deaf, Inc. in their on-going efforts to ensure that deaf and hard of hearing persons have access to video programming through closed captions.

A. Media Ownership

1. Prometheus Radio Project II

Congress requires that the Federal Communications Commission (FCC) review all of its broadcast ownership limits every four years to determine whether they continue to serve the public interest. In 2003, IPR represented the "Citizen Petitioners," which included IPR clients Office of Communication of the United Church of Christ, Inc. and Media Alliance, in challenging the FCC's relaxation of local ownership rules in its *2002 Biennial Review*. The Court of Appeals agreed that the FCC's

new rules were not justified on the record, remanded for further proceedings, and stayed the rules. *Prometheus Radio Project v. FCC*, 373 F.2d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

The FCC addressed the remand as part of its *2006 Quadrennial Review*. In early 2008, it issued an order relaxing the newspaper-broadcast cross-ownership rule but retaining all of the other ownership limits. Although the 2008 rules represented an improvement over the rules adopted in 2003, IPR's clients were concerned that they included so many exceptions. Thus, IPR again sought judicial review. The media companies who opposed any rules limiting their ownership also sought review.

After much procedural wrangling over which court had jurisdiction, the consolidated cases were transferred to the Third Circuit. IPR, along with co-counsel Media Access Project and Free Press, filed a brief on behalf of the Citizen Petitioners in summer 2010. The brief argued that the FCC violated the Administrative Procedures Act by failing to give sufficient notice and opportunity to comment on proposed changes to the cross-ownership rule. The brief also argued that the FCC had failed to comply with the Court's instruction on remand to consider the impact of any rule changes on opportunities for minorities and women to own broadcast stations. The reply brief supported the FCC's local and radio rules as reasonable and consistent with the First Amendment, opposing

the contrary claims made by media companies.

In early February 2011, the Third Circuit asked for supplemental briefing on the relevance of an FCC order issued in 2009 designed to improve its monitoring of station ownership by minorities and women. The supplemental brief explained that this later order did not cure the FCC's failure to analyze the impact of its existing (and any proposed) ownership limits on minority and female ownership in the *2006 Quadrennial Review*.

The Third Circuit held oral argument in this case on February 24, 2011. Media Access Project's Andrew Jay Schwartzman, and Free Press' Corielle Wright, a former IPR graduate teaching fellow, argued on behalf of the Citizen Petitioners. IPR students helped prepare for oral argument by serving as judges and commenters in several moot courts.

In July, the Third Circuit ruled in favor of the Citizen Petitioners. *Prometheus Radio Project v. FCC*, Nos. 08-3078 *et al.* (July 7, 2011). It vacated the revised cross-ownership rule, agreeing with Citizen Petitioners that the FCC had failed to comply with the Administrative Procedures Act. The court also agreed with Citizen Petitioners that the FCC had not considered the impact of minority and female ownership and directed the FCC to come up with some concrete rules and definitions that will promote minority and female ownership in the broadcast industry.

Finally, the Court rejected the challenges of the media companies that the ownership rules were arbitrary and unconstitutional.

The only issue not decided by the Third Circuit involved challenges to the grant of permanent waivers of the cross-ownership rules in five communities. The Third Circuit transferred these cases to the D.C. Circuit where, after considering supplemental pleadings dismissed them.

2. FCC's 2010 Quadrennial Review

In July 2010, IPR filed comments in response to the Notice of Inquiry in the 2010 Quadrennial Review of the FCC's ownership rules. The comments, filed on behalf of Office of Communication of the United Church of Christ, Inc., Prometheus Radio Project, Media Alliance, National Organization for Women, National Hispanic Media Coalition, and others, argued that the FCC should promote the public interest in diversity, competition, and localism by tightening the current limits. In reviewing the local television rule, the comments argued that the FCC should consider whether allowing duopolies remains justified in light of television stations' ability to digitally multicast, should assess whether the failing station rule is working as intended to promote opportunities for minorities and women to obtain broadcast stations, and investigate whether "shared services arrangements" and "local news services" agreements are being used

to circumvent the local television rule and/or undermine the goal of ensuring diverse and competitive sources of local news. The comments urged the FCC to lower the numerical limits for radio station ownership to create more opportunities for minorities and women to enter the radio business and to close loopholes in the newspaper-broadcast cross-ownership rule. Finally, they called for eliminating the “UHF Discount,” because it was no longer rational and could permit television station owners to expand their audience reach in contravention of Congressional intent.

3. Increasing Broadcast Station Ownership Opportunities for Minorities and Women

Over the past year, IPR has undertaken several projects to promote broadcast station ownership by minorities and women.

I. Form 323 – Improved Data regarding Broadcast Stations Ownership by Minorities and Women

IPR has tried to ensure that the FCC and the public have accurate and complete data about the number and types of broadcast stations owned by minorities and women. As part of the *2006 Quadrennial Review*, the FCC issued an order in May 2009 revising the biennial ownership report Form 323 to improve its tracking of broadcast

station ownership by minorities and women. After many delays, broadcasters finally filed their ownership reports on July 8, 2010. With this information, the public and the FCC should be able to determine the actual state of minority and female ownership and to assess the effectiveness of FCC policies designed to promote ownership by these underrepresented groups.

The ownership report data is supposed to be available to the public through a database that is searchable and that allows data to be aggregated and cross-referenced. However, IPR discovered that the data was not available in this manner. Therefore, IPR drafted a letter to the FCC asking it to analyze the data and to make it publicly available in a meaningful way. Over 25 organizations including the National Organization for Women, Rainbow PUSH, National Hispanic Media Coalition, Office and Free Press, as well as twenty academics signed on to IPR’s letter.

In response, the FCC finally made the broadcast ownership data publicly available. However, the data is available only in a form that is difficult to search and analyze. IPR is working with researchers at UCLA and Howard University to analyze the raw data. In addition, IPR continues to urge the FCC to make the data available in a more useful format.

II. Comments on Proposed Bidding Credits

In February 2011, IPR filed comments regarding a proposal for the FCC to give preferences in auctions for broadcast licenses to individuals who have overcome substantial disadvantages. This proposal was put forth by the FCC's Advisory Committee on Diversity for Communications in the Digital Age.

The FCC already has two other bidding credits designed to encourage robust participation in spectrum auctions by small businesses, including minority- and women-owned businesses. These bidding credits function as a discount on the bid price a qualifying firm will pay to obtain an FCC license. In comments filed on behalf of Office of Communication of the United Church of Christ, Inc., Media Alliance, National Organization for Women, National Hispanic Media Coalition, Free Press, Rainbow PUSH Coalition, and the Benton Foundation, IPR emphasized that more information is needed to assess the impact of the existing preferences as well as any other preference that may ultimately be adopted. To this end, they urged the FCC to collect and analyze data on current spectrum auction participants.

4. Challenge to Unlawful Transfer of Honolulu Television Station

In October 2009, IPR filed a complaint and request for emergency

relief with the FCC on behalf of Media Council Hawai'i. Media Council Hawai'i is a non-profit organization that seeks to improve public access to information, strengthen public support for First Amendment freedoms, broaden public understanding of the media, and promote accurate and fair journalism.

The complaint argued that shared service agreements between three Honolulu television stations amounted to a *de facto* transfer of control in violation of the Communications Act requirement that all license transfers be approved in advance. The complaint also argued that the transaction violated the FCC's local television rule which prohibits common control over three stations serving the same area. Raycom contended that FCC approval was not required because even though it would operate all three stations, another company would hold the FCC license for one of them.

Although the FCC did not stop the transaction from moving forward, it did require the companies to provide copies of the sharing agreements. IPR analyzed the agreements and concluded that they violated FCC rules. In October 2010, the broadcasters amended their agreements in an attempt to come in line with FCC precedent allowing limited sharing among stations in the same market. However, IPR showed that the amended agreement did not change the fact that Raycom retained *de facto* control over the third station. IPR also contended

that it could not effectively analyze these changes without having access to financial data of the broadcast parties' inner workings and monthly profit margins.

In April 2011, the FCC required the broadcasters to provide the financial data we requested along with lists of programs the stations aired in response to community issues. IPR pointed out that the 2010 issues-programs lists showed that all three stations were providing essentially the same issue-responsive programming, thus providing additional support for Media Council Hawai'i's claim that the sharing arrangement had reduced viewpoint diversity. In June, IPR filed an analysis of the financial data confirming that Raycom was exercising *de facto* control. IPR urged the FCC to promptly issue an order directing the parties to show cause why their broadcast licenses should not be revoked. We are currently waiting for the FCC to decide.

B. Children and Media

IPR works with several organizations concerned about the effect of media on the health and well-being of children.

1. Protecting the Privacy of Children and Teen

IPR continued its work at the forefront of child and teen privacy with several filings before the Federal Trade Commission (FTC) and the Department of Commerce (DOC).

I. Comments on FTC's Privacy Framework

The FTC requested comments on a staff report entitled *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*. The report proposed that companies promote privacy throughout their organizations; simplify consumer choice; and increase transparency. The staff particularly supported one method of choice, a persistent setting on a consumer's device, commonly known as "Do Not Track." Importantly, the report proposed that adolescents be termed "sensitive users" that should receive additional protections.

IPR prepared comments for a coalition of child, health and consumer advocates, including the Center for Digital Democracy, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, and the Consumer Federation of America. The comments detailed recent research that shows the unique vulnerabilities that adolescents have to digital marketing and data collection. The comments also described the various data collection techniques on gaming, mobile, social network, and advertising network platforms. The comments supported the "sensitive users" designation, and suggested that teen privacy should be protected by minimizing the amount of data collected from them and prohibiting the use of data to behaviorally profile teens.

The comments also requested that the privacy framework provide enhanced choice for adolescents. Specifically, they argued that privacy notices should be tailored to reach and be understood by teens; that the default setting on teen oriented websites and games should be “Do Not Track,” and that teens should have a convenient and effective way to delete information about themselves. In addition to drafting comments for our clients, IPR reviewed and summarized the numerous comments filed by other parties.

II. Comments on DOC’s Privacy Green Paper

The DOC’s Internet Policy Task force also requested comments on its privacy proposal. The DOC issued a “green paper” entitled *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*. The green paper focused on the commercial concerns with data policy, such as interoperating with the privacy regimes in other countries, and developing voluntary codes of conduct.

IPR presented its teen and child privacy proposals to the DOC on behalf of the same organizations it represented before the FTC. IPR asked the DOC to endorse the reforms to the Children’s Online Privacy Protection Act (COPPA) that IPR had made in comments filed with the FTC in the summer of 2010. IPR also made several teen-focused recommendations. Specifically, we

urged that 1) adolescent data receive protections in line with OECD Fair Information Practices, 2) companies that collect data from teens be required to provide greater controls, transparency, and limits on information collection, and 3) Privacy Impact Assessments disclose what, if any, protections companies are offering adolescents and children.

III. Analysis of Proposed Privacy Legislation

This year saw a flurry of privacy activity in Congress, with bills introduced in the House and Senate. Some took comprehensive approaches, while others narrowly focused on topics such as Do-not-track or teen and child privacy. IPR staff and students helped our client the Center for Digital Democracy to evaluate some of these legislative proposals.

2. Marketing of Unhealthy Food and Beverages to Children and Teens

IPR continued its work with the Food Marketing Working Group, a coalition of advocacy organizations concerned with reducing childhood obesity.

In July 2011, IPR filed comments on behalf of Children Now, the American Academy of Pediatrics and others concerning the recommendations of the Interagency Working Group. This Working Group, which includes representatives from the FTC, Food and Drug Administration, Centers

for Disease Control, and US Department of Agriculture, was tasked by Congress to develop principles for self-regulatory programs on marketing food to children and adolescents.

IPR's comments addressed the proposed definition of advertising and marketing activities targeted to children and adolescents to which the proposed nutritional guidelines would apply. IPR's comments urged that the principles be broad and cover all marketing directed to children and teens. Marketing should be covered when a company intends to target a child or teen audience or when audience measurements or other factors allow a determination that those audiences have been targeted. The comments opposed a proposal to exempt certain media from the principles for teen marketing. IPR pointed out that a large amount of food marketing is targeted to teens, and because much marketing is cross-platform, exempting particular media is unworkable. The comments proposed that instead of exempting certain media, the Working Group issue two sets of principles, one for teens and one for children. The comments also urged the media companies as well as advertisers to implement the Working Group principles via their own self-regulatory schemes.

3. Request for Declaratory Ruling that *Zevo-3* Violates Advertising Limits on Children's Television

IPR has been representing the Campaign for a Commercial-Free Childhood (CCFC) in an effort to get the FCC to issue a declaratory ruling that the children's program *Zevo-3* violates the commercial advertising limits in the Children's Television Act as well as FCC policies on advertising to children. *Zevo-3*, which is shown on Nickelodeon's cable network Nicktoons, is produced by a subsidiary of the Skechers shoe company. The program characters are based on commercial spokescharacters used to sell a line of shoes to children. The spokescharacters have names such as "Z-strap" and "Elastika," which correspond to trademarked lines of children's shoes. The cartoon spokescharacters have appeared in television and other advertising for the shoes.

The Children's Television Act (CTA) limits the amount of commercial time that can air during children's programming. The FCC also has policies against host-selling; requiring a separation between commercials and content; and on product placements. The CCFC requested a declaratory ruling that the entire program was essentially a commercial that violated both the CTA and FCC policies and the FCC sought public comment on this request.

IPR filed a reply comment for CCFC pointing out that the vast majority of the over 1,500 comments from public health organizations, children's media advocates, parents and academics supported CCFC's

request. The reply comments asked the FCC to investigate whether Skechers paid Nicktoons to air *Zevo-3*. If so, the network would clearly violate the advertising limits. But even if Nicktoons was not paid to air the program, *Zevo-3* violated the FCC policies against intermixing commercial and programming matter and took advantage of children's inability to distinguish between programming and advertising. The reply comments supported revisiting the children's television rules to account for changes in the children's television market. We emphasized, however, airing of *Zevo-3* violated existing law and policy, that the FCC's failure to act promptly on the petition open the floodgates to programs based on popular spokescharacters, including many used to promote unhealthy foods.

4. Complaint Regarding Deceptive Marketing of Your Baby Can Read

IPR also filed a complaint on behalf of CCFC at the FTC. This complaint alleges that Your Baby Can, LLC, is making false and misleading claims in marketing a set of baby videos called "Your Baby Can Read." These false claims include that the 1) videos teach babies to read, 2) work during a "short window of opportunity," and 3) deliver lifelong benefits. The complaint alleges that the marketing is designed to take advantage of parents' natural desire to provide every possible advantage for their young children. Consumers are harmed by spending \$200 on a

product that does not perform as claimed. Moreover, the American Academy of Pediatrics and White House Task Force on Childhood Obesity recommended that children under age two should not watch video and research suggested that watching videos at such a young age may negatively affect a child's development. The complaint requests that the FTC halt the deceptive marketing, seek restitution for consumers, and require Your Baby Can to disgorge its ill-gotten gains.

C. FCC's Future of Media Inquiry

In 2010, the FCC launched an inquiry into the future of media and the information needs of communities. Headed by journalist Steven Waldman, this project was charged with assessing the current media landscape, analyzing policy options and making recommendations to the FCC and others.

IPR filed comments in this proceeding on behalf of two different groups of clients. The comments filed on behalf of the Communications Workers of America and Media Council Hawai'i (CWA/MCH) informed the FCC about the increasing use of "shared services agreements" and "local news services" to limit the sources of local news and circumvent the local television ownership limits. The comments filed on behalf of the Public Interest Public Airwaves (PIPA) Coalition, a non-partisan coalition of non-profit organizations

including the Campaign Legal Center, New America Foundation, and US Catholic Bishops, pointed out that many of the questions asked in the *Future of Media Notice* could have been answered if the FCC had implemented the *Enhanced Disclosure Order*. That order, which requires commercial television stations to make their public inspection files available on their websites and replaces the quarterly issues-programs list with a standardized form, has never taken effect because the FCC failed to seek OMB approval. The PIPA comments urged the FCC to promptly implement enhanced disclosure to further the FCC's goals of modernizing the agency in the digital age, increasing transparency, and promoting public participation.

In June 2011, the FCC issued the Report, *The Information Needs of Communities: The Changing Media Landscape in A Broadband Age*. The Report reflected the influence of the comments filed by IPR in several ways. For example, the section describing the current state of local television cited data regarding shared service agreements and quoted the CWAMCH comments for the point that such shared services “reduce the diversity of local voices in a community by replacing independent newscasts with those of the brokering stations and invariably lead to reductions in news personnel.” The report also cited Media Council Hawai'i's complaint against Raycom as an example of how such agreements led to journalists being laid off and a reduction in viewpoint diversity.

The Report recommended that the FCC consider whether shared services agreements and other ownership arrangements contribute to the overall media health of the community. The Report also agreed with the PIPA coalition comments that the FCC should replace the ineffective issue-programs lists with more substantive reports about how stations are serving their communities and that stations should make their public inspection files available online.

D. Truth in Caller ID Act Implementation

IPR represented the Safety Net project of the National Network to End Domestic Violence (NNEDV) on the FCC's rulemaking implementing the Truth in Caller ID Act of 2010. IPR wrote comments and reply comments for NNEDV. The Act generally prohibits falsifying caller ID information with the intent to defraud or cause harm. Third party services provide easy ways for a user to “spoof” their caller ID information, and some domestic violence groups mask their caller ID information to protect the safety of their clients. IPR's comments requested an exemption for victim service providers and requested that the FCC define “harm” to include stalking, harassment and the violation of protection orders. Several spoofing providers tout the use of their service for stalking, and IPR requested that the FCC impose notice requirements on these providers. Further, the comments requested that the FCC require that users “opt-in” before their caller ID

information is unmasked. IPR also warned against requiring that spoofed numbers be verified, or come from a pre-determined list, as this could limit the ability of victims and programs to use spoofing.

The FCC's final order reflected the influence of IPR's comments, and frequently cited our submissions. The FCC agreed with NNEDV's proposed language explaining "harm" in the statute, and also agreed not to impose verification rules on spoofing providers. The FCC also urged the spoofing providers to provide proper notice of illegal uses of spoofing and promised to enforce its rules vigorously.

E. Universal Closed Captioning

In January 2011, IPR took on a new client, Telecommunications for the Deaf and Hard of Hearing, Inc (TDI). TDI is non-profit organization that advocates for deaf and hard of hearing people's access to telecommunications, media and information technology. The Telecommunications Act of 1996 required all television programming produced after 1996 to be captioned. Even though programs were captioned, the quality of the captioning and station or program exemptions prevented many in the deaf and hard of hearing community from having full access to programming. In 2004, TDI filed a petition for rulemaking urging the FCC to adopt closed captioning quality standards. Although the FCC issued a Notice of Proposed

Rulemaking incorporating TDI's proposals in 2005, the rulemaking languished and no standards were adopted. In January 2011, TDI filed another petition for rulemaking asking the Commission to eliminate the numerous closed captioning exemptions, which prevent persons who are deaf or hard of hearing from having access to a multitude of programs.

IPR and TDI and its allies have met with all five FCC Commissioners' offices and the FCC Consumer and Government Affairs Disability Rights Office to urge action on these pending matters.

ENVIRONMENTAL LAW

A. Equal Access to Justice Act

1. Mattaponi Tribe – King William Reservoir

Since 1996, IPR has represented the Mattaponi Indian Tribe in its opposition to the City of Newport News's construction of a large-scale reservoir located near the Tribe's reservation in southeastern Virginia. The reservoir project threatened more than two hundred and fifty Indian archeological sites, many of which are eligible for inclusion in the National Register of Historic Places, and would have resulted in the largest destruction of wetlands in Virginia since the passage of the Clean Water Act. The Tribe's reservation is on the banks of the Mattaponi River, three miles downstream from where water would have been withdrawn to fill

the proposed reservoir. The Mattaponi people subsist on an annual shad harvest from the Mattaponi River, and the proposed intake pipe for the reservoir was located in the middle of prime shad spawning grounds.

The Tribe challenged the reservoir project on many fronts, and in 2009, the Tribe and other reservoir opponents finally defeated the project after a series of legal and political victories. One of these was a successful lawsuit in the U.S. District Court for the District of Columbia challenging the Clean Water Act permit for the project. In late March 2009, the District Court found that the Corps and EPA acted arbitrarily and capriciously in issuing the permit. In October 2009, the City of Newport News passed a resolution to discontinue the reservoir project, and directed the acting City Administrator to terminate work on the project and surrender all previously obtained permits. In support of this decision, the City cited the District Court decision and the government's decision not to appeal.

At the end of 2009, IPR petitioned for attorneys' fees and costs in the district court. The government opposed the petition, and IPR filed a reply brief. In December and January, IPR filed and briefed a supplemental fee petition reflecting the hours spent litigating in support of its original petition. In February 2010, the parties received notice that the fee matter had been assigned to a magistrate judge.

On August 31, 2010, the magistrate judge issued a recommendation that the district court find that the Tribe is entitled to attorneys' fees. In reaching this recommendation, the magistrate found that the Tribe had prevailed in the underlying action and that the government's position was not substantially justified. However, rather than recommend a fee award, the magistrate opted for a tiered resolution, whereby the district court would decide whether to accept or reject the magistrate's fee entitlement recommendation before the magistrate calculated a reasonable fee award.

On September 14, 2010, the government filed an objection to the magistrate's recommendation, arguing that the government's underlying action and its defense of the underlying action were substantially justified. In September 2010, IPR filed an opposition to the government's objection. The government did not file a reply, and the parties are still waiting for the district court to decide whether to accept, reject, or modify the magistrate's recommendation.

B. Open Government

1. McMillan Park Redevelopment

In spring 2009, IPR began assisting the McMillan Park Committee ("MPC") with its efforts to protect the historic resources and open green space of McMillan Park.

The District of Columbia owns the McMillan Park sand filtration site, comprised of 26 acres of open space fenced off from public use and unique brick tower-like structures built in 1906 for the purpose of water filtration. The District plans to transfer the property to a private developer who proposes to remove most of the historic structures and construct apartments, condominiums, and retail facilities, leaving approximately 3–4 acres of contiguous open space for public use. This proposal differs greatly from the District’s earlier proposed redevelopment, which included at least 50% open space, a community center, and other community amenities. Many community members and groups in addition to MPC are concerned about the intensity of the proposed development, lack of usable public space, and failure to protect more of the unique historic resources in McMillan Park.

In February 2009, IPR submitted District of Columbia Freedom of Information Act (“FOIA”) requests to gather information about the new redevelopment proposal and its environmental and historic resource impacts. IPR also sent a letter to the mayor of D.C., urging him to conduct an environmental analysis before transferring the property to the developer. With the exception of the Deputy Mayor’s Office, IPR received adequate responses to the FOIA requests. The Deputy Mayor’s Office refused to disclose an indefinite number of emails between it and the private developer for McMillan Park, citing

the inter/intra-agency exemption under FOIA.

In fall 2009, IPR researched the viability of challenging the non-disclosure, and drafted an administrative appeal and complaint. In spring 2010, IPR filed the administrative appeal. IPR did not receive a response within the statutory period. Accordingly, IPR filed a complaint for declaratory and injunctive relief in D.C. Superior Court. The Deputy Mayor’s Office filed a motion to dismiss the complaint, arguing that it was not a suable entity. IPR amended the complaint to add the District of Columbia as a defendant, and opposed the motion to dismiss, arguing that FOIA expressly provides for suit against government agencies like the Deputy Mayor’s Office. The court agreed with the Deputy Mayor’s Office and dismissed it from the case.

The case continued against the District of Columbia, which answered the complaint on August 1, 2010. The day before the September 24, 2010 scheduling conference, the District filed a Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment, arguing that the case was moot because the District had explained to MPC in a *Vaughn* index why it was withholding hundreds of public records. In fall 2010, IPR filed an opposition to the Motion, explaining that MPC’s challenge to the District’s non-disclosure was within the court’s purview to decide. The District filed its reply on October 15, 2010. IPR filed MPC’s Motion for

Summary Judgment, on December 16, 2010. MPC's Motion argued that the *Vaughn* index was inadequate and that the District had failed to justify withholding responsive records. The District filed its opposition on February 1, 2011, and in spring 2011, IPR filed MPC's reply.

In preparation for the scheduled March 30, 2011 mediation, IPR submitted a confidential settlement statement to the Multi-Door Dispute Resolution Division, detailing the facts and claims in the case and explaining MPC's negotiating position. Because of subsequent motion filings, however, the court rescheduled mediation for January 3, 2012.

On March 15, 2011, the court issued an order denying the District of Columbia's Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment. The court explained that the District failed to provide sufficient information to justify non-disclosure of the withheld records. A week later, on March 22, 2011, the court issued an Order holding in abeyance MPC's Motion for Summary Judgment pending the District's issuance of a revised *Vaughn* index that further describes the withheld documents and specifically addresses the segregability of the withheld information.

The court gave the District until April 15, 2011 to submit a revised index; however, on April 5, 2011, the District filed a Motion for Reconsideration, or, in the

Alternative, for Additional Time to Comply. IPR filed an opposition to the Motion on April 15, 2011. The District did not file a reply. The Motion for Reconsideration is still pending.

C. Climate Change

1. Center for Biological Diversity - Rule-Making Petition

In fall 2010, IPR started working with the Center for Biological Diversity, an environmental non-profit organization dedicated to fighting national and worldwide threats to biodiversity. The Center's climate change work focuses on using existing environmental laws, like the Clean Air Act (CAA), to reduce greenhouse gas pollution and to protect plants and animals threatened by global warming.

Of particular concern is methane, one of several greenhouse gases. Methane is twenty-four times more powerful than carbon dioxide as a greenhouse gas, and a rapid rise in its release into the atmosphere would create a dramatic increase in warming. The resulting warming, in turn, would become part of a positive feedback loop that would accelerate additional methane releases, as rising temperatures release methane that has been embedded in permafrost for millions of years. Given methane's potency, the Center has been involved in a blitzkrieg to regulate sources of methane under the CAA through petitions to the U.S. Environmental Protection

Agency (EPA), including petitions to list and regulate concentrated animal feeding operations and coal mines.

One of the more significant sources of methane emissions that has yet to be regulated are wastewater treatment facilities. Wastewater treatment facilities emit methane when they process effluent under anaerobic conditions and release the biogas produced as a byproduct into the atmosphere. In fall 2010, IPR assessed the merits of petitioning the EPA to list and regulate wastewater treatment facilities under the new source performance standards section of the CAA (Section 111). Among other things, IPR evaluated whether wastewater treatment causes or contributes significantly to air pollution and whether greenhouse gas emissions reduction technology exists for wastewater treatment that satisfies the best adequately demonstrated technology requirement.

In spring 2011, IPR drafted a rule-making petition. The petition asks the EPA to list and regulate wastewater treatment facilities under Section 111. The petition explains that EPA has an obligation to act now to regulate greenhouse gases in all sectors, including wastewater treatment, because climatic changes are already occurring that harm public health and welfare, and the effects will only worsen over time in the absence of regulatory action. The petition argues that because methane has the greatest mitigation potential out

of all the non-carbon dioxide pollutants, regulating wastewater treatment facilities pursuant to Section 111 is an effective way to realize this potential. IPR expects the petition to be submitted to EPA in summer 2011.

D. Anacostia Watershed Restoration

1. Washington Gas Legacy Toxic Site

In fall 2010, IPR revived an old project and is assisting the Anacostia Watershed Society (AWS) and the Anacostia Riverkeeper (ARK) to secure remediation of a legacy toxic site in the Anacostia watershed. Both AWS and ARK are nonprofit organizations committed to restoring the health of the Anacostia River and its watershed.

For nearly a century, Washington Gas operated a gas manufacturing plant located near the Anacostia River at the southeast corner of M and 12th Streets in Southeast Washington, DC. Originally, marshes, wetlands, and mudflats existed between the plant and the river. By 1919, the seawall along the river was complete and the naturally occurring estuarine features had been filled in behind the seawall, creating the site's current topography. In addition to the dredged material from the Anacostia River, Washington Gas placed fill material in the wetlands that contained coal tar mixed with solid wastes from the gas manufacturing plant. As a result, the soil and groundwater on an 18.8-

acre site were contaminated with coal tar and other gas manufacturing waste constituents that contain toxic carcinogens. The section of the Anacostia River adjacent to the contaminated land is also contaminated. Fish in the Anacostia generally have a high cancer rate attributable to high concentrations of polynuclear aromatic hydrocarbons (“PAHs”), among other carcinogens. PAHs are found in the soil on the site and a PAH hot spot exists in the river adjacent to the site.

Under a 1999 record of decision, most of the contaminated land has been remediated. However, approximately 4.5 acres of land, most of which was formerly managed by the National Park Service, remains unremediated, as does the affected nearshore areas of the Anacostia River. In 2008, the District of Columbia acquired ownership of the unremediated land. Currently, the unremediated land hosts multiple uses, including unrestricted public access to the seawall, from which people can fish and launch non-motorized boats. A 2006 record of decision addressing the unremediated land concluded that the soil poses an unacceptable health risk for juveniles recreating on the site and for utility, construction, and landscape workers working on the site.

Despite the documented risks, local and federal agency efforts to reach an agreement with Washington Gas to implement remedial actions for the remaining land and the Anacostia River have

stalled. AWS and ARK sought IPR’s help to jumpstart the process. In mid-December 2010, IPR send a ninety-day notice of intent to sue letter to Washington Gas and the District of Columbia under the Resource Conservation and Recovery Act’s (“RCRA”) imminent and substantial endangerment citizen suit provision..

In spring 2011, IPR submitted Freedom of Information Act requests to local and federal agencies. IPR also attended several meetings at which local and federal representatives outlined the parameters of the potential clean-up plan. Because the proposed plan fell short of the clients’ expectations, IPR sent a letter to the Director of the District Department of the Environment expressing concern about several crucial omissions from the proposed clean-up plan, including the lack of a plan to remediate the contaminated river sediments.

The ninety-day notice to sue matured in March of 2011, allowing AWS and ARK to file a RCRA suit to compel clean-up of the legacy toxic site and the river toxic hotspot.

E. Interstate Air Pollution

1. North Carolina v. Tennessee Valley Authority

IPR has represented the *amicus curiae* interests of the American Thoracic Society (“ATS”) and the American Lung Association (“ALA”) throughout the various

phases of litigation in the *North Carolina v. Tennessee Valley Authority* public nuisance case. ATS is an international educational and scientific organization, which works to prevent and fight respiratory disease around the globe through research, education, patient care, and advocacy. ALA is the nation's oldest voluntary health organization, whose mission is to prevent lung disease and promote lung health through education, advocacy, and research on air pollution and its accompanying threats to lung health.

On January 30, 2006, the State of North Carolina brought a public nuisance action against the Tennessee Valley Authority ("TVA") in the U.S. District Court for the Western District of North Carolina to address emissions from TVA's coal-fired electric generating units located in Tennessee, Alabama, and Kentucky. On January 13, 2009, the district court held that three of TVA's plants in Tennessee and one of TVA's plants in Alabama constituted a nuisance and issued an injunction requiring TVA to install readily available pollution control equipment at all four plants. On July 26, 2010, the U.S. Court of Appeals for the Fourth Circuit reversed the district court and remanded with instructions that the district court dismiss the action.

On February 2, 2011, the State of North Carolina filed a petition for writ of certiorari with the U.S. Supreme Court. On March 7, 2011, IPR filed an amicus brief on behalf of ALA and ATS in support of

North Carolina's cert petition. The brief discussed the adverse health effects of air pollution from coal-fired power plants, the social and economic costs associated with air pollution, and the public health benefits of reducing power plant emissions.

On April 14, 2011, North Carolina reached a settlement with TVA, in which TVA agreed to reduce emissions from all of its coal-fired power plants, among other proffers. The settlement was made available for public comment and finalized in late-June 2011. In July 2011, the Supreme Court petition was voluntarily dismissed.

F. Endangered Species Protection

1. Potomac River Generating Station

Since the fall of 2005, IPR has represented Potomac Riverkeeper and several other groups in their efforts to reduce the environmental impact of the Potomac River Generating Station, a coal-fired power plant in Old Town Alexandria on the shores of the Potomac River. The plant, recently acquired by GenOn Energy from Mirant, has been in operation for more than sixty years and has been a major source of pollution to the river and the city. Although much of IPR's previous work focused on the plant's air emissions, IPR is currently working with Potomac Riverkeeper to mitigate the plant's potential effects on the shortnose sturgeon, a federally listed endangered species.

A 2007 report commissioned by the National Park Service found evidence of shortnose sturgeon living in the Potomac River after a nearly 100-year absence.

In December 2010, IPR learned that the U.S. Environmental Protection Agency (EPA) was preparing to renew the plant's permit under the Clean Water Act. The permit authorizes the plant to cool its boilers by drawing water directly from the Potomac River. This process can harm aquatic wildlife like the sturgeon by trapping adult fish against the screens of the plant's intake structures or drawing larvae and eggs up into the boilers. The plant's permit expired in 2005 and has been administratively extended ever since. An official renewal of the permit will allow the public an opportunity to comment on the plant's environmental impacts and suggest methods for mitigating those impacts.

To prepare for submitting comments, during the spring of 2011, IPR gathered information about the plant's operations and its impacts on aquatic wildlife. IPR also submitted requests for documents under the Freedom of Information Act to the EPA, the National Marine Fisheries Service, and the Department of Energy. Although IPR has received some documents responsive to the requests, IPR continues to work with these agencies to ensure that they have fully complied with IPR's requests under the law.

The continued operation of the plant remains controversial. On July 7, 2011 D.C. Mayor Vincent Gray expressed concern about the high levels of air pollutants emitted from the plant and the potential harmful effects on D.C. residents. Later that month, an independent consulting firm released a report on the plant, concluding that retiring the plant would not affect the power supply to D.C. and would immediately benefit the local environment by reducing air pollution, as electricity from cleaner generating plants replaced output from the plant.

Despite these developments, the EPA continues to express its intent to reissue the plant's Clean Water Act permit. Upon issuance of the draft permit, IPR will draft and submit comments on behalf of Potomac Riverkeeper to ensure that this permit complies with the EPA's and the plant's duties under the Clean Water Act and Endangered Species Act to minimize impacts to shortnose sturgeon.

G. National Environmental Policy Act

1. Marine Fishery Management

I. New Bedford et al .v Locke et al.

In August 2010, IPR began representing Food & Water Watch, Inc. in its efforts to challenge a major amendment to the regulatory regime of the Northeast groundfish fishery. Food & Water Watch is a

national, non-profit public interest consumer-advocacy organization that works to ensure safe food and clean water by advocating for healthy food produced in a humane and sustainable manner, and public rather than private control of water resources. The Food & Water Watch Fish Program promotes safe and sustainable seafood for consumers while helping to protect the environment and supporting the long-term well-being of coastal and fishing communities.

Food & Water Watch opposes the amendment because it contains economic incentives that tend to drive out smaller-scale fishermen and favor large-scale industrial fishing operations. Smaller-scale fishermen contribute to the local economy and make use of less-damaging fishing gear, while the industrial-sized vessels replacing them employ a much more environmentally harmful type of fishing gear known as “bottom trawls.” The National Marine Fisheries Service implemented the amendment without holding the statutorily required democratic vote of local fishermen, and without sufficient consideration of the adverse environmental effects or more environmentally safe and sustainable alternatives.

During the fall of 2010, IPR researched the viability of Food & Water Watch’s potential claims under the Magnuson-Stevens Fishery Conservation and Management Act and the National Environmental Policy Act. IPR sought intervention on Food &

Water Watch’s behalf in a federal lawsuit then pending in the U.S. District Court for the District of Massachusetts against the Department of Commerce, The National Oceanic and Atmospheric Administration and the National Marine Fisheries Service. IPR filed a motion to intervene, supporting memorandum, and a proposed complaint. The federal defendants opposed the motion, and IPR filed a reply. While Food & Water Watch’s intervention was pending, IPR students prepared a proposed motion for summary judgment and supporting memorandum.

On February 4 2011, the district court denied Food & Water Watch’s motion to intervene but granted it *amicus* status. IPR filed an *amicus* brief in support of plaintiffs on February 18, 2011.

On March 21, 2011, IPR noticed its appeal of the denial of intervention. IPR filed an opening brief with the U.S. Court of Appeals for the First Circuit on May 16, 2011. While the appeal was pending, on June 30, 2011, the district court issued an opinion ruling against the plaintiffs on each of their claims. In light of this order and the plaintiffs’ decision to file an appeal on the merits, IPR withdrew its appeal on August 2, 2011. IPR will continue to represent Food & Water Watch by drafting an *amicus* brief in the plaintiffs’ merits appeal in the fall of 2011.

2. Land Use

I. Fort Ritchie

Since the fall of 2008, IPR has represented two individual plaintiffs in a suit against the Secretary of the Army brought in the U.S. District Court for the District of Columbia. The lawsuit concerned the proposed redevelopment of Fort Ritchie, a former Army base in northern Maryland that contains numerous historic properties and expansive green spaces. In preparation for transferring the Fort to the local redevelopment authority, the Army had analyzed in 1997 the environmental impacts of the authority's redevelopment plan. However, the developer chosen to ultimately receive the property created a new redevelopment plan in 2004 that significantly increased the amount of land developed, including construction on the Fort's historic parade grounds.

The Army refused plaintiffs' request to reanalyze the impacts from the amended redevelopment plan. Plaintiffs brought suit, claiming that the Army violated the National Environmental Policy Act by failing to analyze new significant environmental impacts. IPR argued in the summary judgment briefing that the Army must analyze impacts in connection with the greater development intensity, increased impervious surfaces, construction on the historic parade grounds, transfer of the water system to a private entity, and the county's recent failure to meet national air quality standards for particulate matter.

In November 2009, the District Court issued an order enjoining further development on the site and remanding the matter to the Army to analyze the increase in development intensity and the impact of the redevelopment plan on the historic properties. The Army and plaintiffs each appealed, but subsequently voluntarily dismissed their appeals in light of the Army's decision to issue a new draft analysis. Released on August 9, 2010, the draft document responds to the District Court's order, expressly addresses some of plaintiffs' contentions, and analyzes the redevelopment of Fort Ritchie based on a revamped development plan issued in June 2010. Among other things, the 2010 plan proposes to eliminate any building construction on the historic parade grounds and addresses storm water runoff from impervious surfaces by proposing to "daylight" a stream running through Fort Ritchie and creating on-site impoundment. The plan also proposes, however, a significant increase in the amount of buildings on the site, including residential housing that will substantially increase the residential population.

IPR submitted comments on the draft analysis to the Army in September 2010. In December 2010, the Army issued a final document responding to some of these comments. However, IPR noted that the final analysis still contained many deficiencies. In an attempt to avoid going back to court, the Army agreed to issue a supplemental

document addressing plaintiffs' continuing concerns. In the meantime, the Army discovered that Fort Ritchie had been the subject of tactical herbicide testing in the late 1950's and early 1960's.

In June 2011, the Army issued a supplemental document addressing plaintiffs' issues and the presence of tactical herbicides at Fort Ritchie, and concluded that no further environmental analysis was necessary. However, the analysis still fails to account for the significant increase in buildings and residential populations. In July 2011, IPR submitted a letter to the Army identifying these deficiencies and asking that the Army issue a new analysis to avoid further litigation. The Army declined to conduct further analysis, however, and indicated its intent to file a Renewed Motion for Summary Judgment to resolve the case and proceed with development. The parties will brief these issues during the fall of 2011.

3. Historic Preservation

I. Cape Wind

In late spring 2011, IPR began representing the Wampanoag Tribe of Gay Head (Aquinnah) in its opposition to the Cape Wind Energy Project, a proposed offshore wind farm to be located 3.5 miles off the coast of Massachusetts. The Department of the Interior approved the construction and operation of the 130-turbine generator wind farm in a 25-square mile area of Nantucket

Sound, known as Horseshoe Shoal, in April 2011.

The Tribe's reservation is located on the western side of Martha's Vineyard Island, and the Tribe has used Horseshoe Shoal for food, jobs, religion, and livelihood since "time immemorial." Construction of the project will irreparably disturb the seabed under Horseshoe Shoal, which holds cultural and archaeological significance to the Tribe and was recently determined to be eligible for inclusion in the National Register of Historic Places. In addition, operation of the wind farm will disrupt the Tribe's spiritual ceremonies by obstructing the viewshed of the Eastern horizon and will interfere with the Tribe's practice of subsistence fishing in the area.

IPR filed a complaint in the U.S. District Court for the District of Columbia in July 2011 against the Department of the Interior and the Bureau of Ocean Energy, Management, and Regulation (formerly known as the Minerals Management Service). The complaint alleges that the agencies did not adequately consider the project's impacts on the Tribe in violation of the National Environmental Policy Act and the National Historic Preservation Act. The suit has been consolidated with a similar action filed in the same court last June by several citizen groups. The Tribe will file its Motion for Summary Judgment on March 1, 2012.