



GEORGETOWN LAW

2011-2012 Annual Report

INSTITUTE
FOR
PUBLIC REPRESENTATION

IPR	4
FACULTY	5
GRADUATE FELLOWS.....	5
LAW STUDENTS	7
CIVIL RIGHTS AND PUBLIC INTEREST LAW	8
A. Employment Discrimination	8
1. <i>Hairston v. Boarman</i>	8
2. <i>Eley v. Vance-Cooks</i>	8
3. <i>Warner v. Boarman</i>	9
4. <i>Batson v. BB&T</i>	9
B. Open Government	10
1. <i>McBurney v. Young</i>	10
2. <i>Bloche v. Department of Defense</i>	11
3. <i>Benavides v. Bureau of Prisons</i>	12
4. <i>Southern Migrant Legal Services v. Range</i>	13
5. <i>Nicholls v. OPM</i>	13
6. <i>Nicholls Administrative Appeal</i>	14
C. Class Actions	14
1. <i>Hayden v. Atochem North America</i>	14
2. <i>Briggs v. United States</i>	15
4. <i>Day</i>	16
D. Other Matters	16
2. <i>Schoenefeld v. New York</i>	17
3. <i>Minnecci v. Pollard</i>	17
FIRST AMENDMENT AND MEDIA LAW	18
A. Accessibility to Telecommunications by Persons with Disabilities	18
1. Closed Captioning of Internet-Delivered Video and Video Device Accessibility.....	18
2. Closed Captions on Television	19
3. Accessibility and the Digital Millennium Copyright Act.....	19
B. Media and Youth.....	20
1. Amicus Brief in Fox II.....	20
2. Requests for FTC Investigation of Deceptive or Unfair Marketing	20
3. Comments on Revisions to COPPA Rule.....	22
C. Ensuring that Broadcast Stations Serve the Public Interest	23
1. Enhanced Disclosure	23
2. Standardized Reporting Form.....	23
D. Media Ownership	23
1. Media Council Hawai`i Complaint.....	23
2. 2010 Quadrennial Review	24
ENVIRONMENTAL LAW.....	25
A. National Environmental Policy Act	25
1. <i>New Bedford et al. v Locke et al.</i>	25
2. <i>Lemon v. McHugh</i>	25

3.	<i>Cape Wind</i>	27
B.	Clean Water Act.....	28
1.	<i>Save Our Springs Alliance Wastewater Discharge Project</i>	28
C.	Equal Access to Justice Act	29
1.	<i>Alliance to Save the Mattaponi, et al. v. United States Army Corps of Engineers</i>	29
D.	Climate Change: Nitric Acid Plant New Source Performance Standards	30
E.	Open Government.....	30
1.	<i>McMillan Park Committee v. District of Columbia</i>	30
F.	Native American Water Rights.....	32
G.	Strip Mining.....	32
1.	<i>To' Nizhoni Ani, et al. v. Office of Surface Mining Reclamation and Enforcement</i>	32
H.	Toxic Site Cleanup.....	33
1.	<i>Anacostia Watershed Society & Anacostia Riverkeeper v. Washington Gas Light Co.</i>	33

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

Thomas Gremillion received his J.D. from Harvard Law School, where he served as co-chair of the International Law Society and Articles Editor for the Harvard Environmental Law Review. Prior to joining IPR, Thomas served as an associate attorney at the Southern Environmental Law Center in Chapel Hill, NC, where he specialized in transportation and land use issues. He also clerked at the Alaska Supreme Court for Justice Dana Fabe, in Anchorage, Alaska. As a law student, Thomas interned at the Environmental Law Alliance Worldwide (E-LAW), and at the USDOJ's Environment and Natural Resources Division Appellate Section. A native of South Carolina, Thomas graduated magna cum laude from the University of South Carolina with a B.S. in mathematics and later received his M.A. in international relations from La Universidad Andina Simón Bolívar, in Quito, Ecuador.

Anne King received her J.D. with high honors from the University of Chicago in 2008. In law school she participated in the Poverty and Housing Law Clinic, the Housing Initiative Clinic, and the Workshop on Foster Care. She was president of the Public Interest Law Society and a Comments Editor for the University of Chicago Law Review. After law school she clerked for the Honorable Milton I. Shadur of the Northern District of Illinois and worked at Legal Assistance Foundation of Metropolitan Chicago, the National Women's Law Center, and a small civil rights firm in DC. Anne received a BA from the University of Chicago in comparative literature and

after college she served as a Teach for America corps member in Baltimore, MD.

Laura Moy received her J.D. from New York University School of Law in 2011. Before law school, she was the resident expert in mobile phone location data at the Manhattan District Attorney's Office, where she developed new types of trial exhibits, testified in grand jury proceedings and trials, and trained prosecutors and support staff on the usefulness and proper handling of cell site records. While in law school, Laura served as co-chair of the Prisoners' Rights and Education Project and Symposium Editor of the N.Y.U. Review of Law & Social Change. She worked as a clinical advocate at the Brennan Center for Justice, and was active in the Information Law Institute Privacy Research Group and Law Students for Human Rights. As an intern at the Software Freedom Law Center, she co-authored a paper describing legal, privacy, and security problems related to software operating on medical devices. Laura spent her summers working at the Brooklyn Family Defense Project and the Electronic Privacy Information Center. She grew up in the Washington, D.C. area and has a bachelor's degree in government and anthropology from the University of Maryland.

Margot Pollans received her J.D. magna cum laude from the New York University School of Law in 2010. At NYU, she was a Furman Scholar, a Milbank/Lederman Law and Economics Scholar, and an articles editor of the NYU Law Review. She also interned at the NYC Department of Housing Preservation and Development and

participated in the environmental law clinic at the Natural Resources Defense Council. Prior to law school, Margot was a high school history teacher and a track and cross-country coach. She earned her B.A. in history and environmental science from Columbia University in 2004. During college, she spent a semester in an environmental field studies program at the Biosphere 2 in Arizona. Margot recently completed a clerkship for the Honorable David Tatel of the US Court of Appeals for the D.C. Circuit. She lives in Capitol Hill, volunteers for the Common Good City Farm, and coauthors a baking blog.

Blake E. Reid received his B.S. in Computer Science and his J.D., Order of the Coif, from the University of Colorado, where he was the Editor-in-Chief of the Journal on Telecommunications and High Technology Law and the President of the Technology and Intellectual Property Society. During law school, Blake served in the Samuelson-Glushko Technology Law and Policy Clinic, where he represented University of Michigan computer science professor J. Alex Halderman in a successful bid to obtain an exemption from the anti-circumvention provisions of the Digital Millennium Copyright Act. He also worked for the Chilling Effects Clearinghouse, the Silicon Flatirons Center for Law, Technology, and Entrepreneurship, the University of Colorado Technology Transfer Office, and the law firms of Faegre & Benson LLP and Townsend and Townsend and Crew LLP. Prior to joining IPR, Blake clerked for Justice Nancy E. Rice of the Colorado Supreme Court. He is also the author of the essay "Substitution Effects: A Problematic Justification for

the Third-Party Doctrine of the Fourth Amendment," published in the Journal

on Telecommunications and High Technology Law.

LAW STUDENTS

FALL 2011

Civil Rights & Public Interest Law

Christopher Conte
Kellyn Goler
Sul Kim
Tyler Press
Hallie Sears
Nicholas Soares

First Amendment & Media Law

Jeffrey Aris
Daniel Blynn
Jeffrey Camhi
Ariel Gursky
Lucas McFarland
Lauren Wilson

Environmental Law

Lisa Lowry
Matthew Mazgaj
Britni Rillera
Erin Roohan
Jennifer Ryan
Mark Stilp

SPRING 2012

Civil Rights & Public Interest Law

Hammad Ahmed
Andrew Christy
Nathaniel Custer
Anna Driggers
Tara Stearns
Raymond Tolentino

First Amendment & Media Law

Charles Coughlin
Allyn Ginns
Benjamin Jacobs
Yasemin Luebke
Joseph Melanson
Cathie Tong

Environmental Law

Conrad Bolston
Andrew Knudsen
Elizabeth McGurk
Antonio Moriello
Kathleen Shay
Cara Spencer

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 has repeatedly 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 became an Offset Pressperson.

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 Office (EEO) 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 of 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. Vance-Cooks*

IPR represented Melvin Eley, an African-American who had worked for the Government Printing Office (GPO) for decades but had 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 continued 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.

IPR filed a Title VII complaint on Mr. Eley's 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 indicated that GPO's reason was baseless and pretext for discrimination. In March 2012, the district court held a summary judgment hearing and denied summary judgment in a lengthy ruling from the bench, relying in significant part on arguments advanced in our brief. After the decision, the parties participated in mediation, and IPR obtained a favorable settlement for Mr. Eley.

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 and binds 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 retaliated and discriminated against. 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 Equal Opportunity Employment Office (EEO) 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. After completing discovery, GPO filed a motion for summary judgment, and IPR opposed that motion. Summary judgment briefing was completed in June 2012, and the parties are awaiting a decision.

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 religious practice, 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. Following a period of intense discovery, BB&T filed a motion for summary judgment, and IPR opposed. Summary judgment briefing was completed in March 2012, and the parties await a decision.

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, who runs a business that collects and provides real estate information, 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 merits decision to the Fourth Circuit. In February 2012, after oral argument, the Fourth Circuit held that the citizens-only provision did not violate the Privileges & Immunities Clause or the dormant Commerce Clause.

In conjunction with the Gupta Firm, IPR filed a petition for a writ of certiorari in the U.S. Supreme Court in

June 2012, arguing that the Fourth Circuit's decision conflicts with the Third Circuit's decision in *Lee v. Minner*. We expect that the Supreme Court will rule on whether to grant certiorari in late September or early October.

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, and 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 of 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 filed an opposition to the motion and filed a cross motion for summary judgment. The plaintiffs filed an opposition to the government's motion and a reply on its motion. The motion is fully briefed and awaiting a decision. 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.

The plaintiffs have also filed a motion against three other defendants: the Navy and two subunits of the Department of Defense that establish and implement military health policy. That motion will be fully briefed by fall 2012. In the meantime, the government has begun releasing documents put in issue by this motion (particularly some documents held by the Navy). In addition, the U.S. Army has also released documents in response to an informal memorandum the plaintiffs sent to government counsel detailing concerns with the Army's insufficient explanations for its withholdings.

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 the recordings were not 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.

In two additional decisions issued in spring 2012, the court largely ruled in Mr. Benavides' favor, giving BOP the choice of either releasing the records or producing transcripts of the relevant audio recordings. BOP ultimately released the audio recordings sought by Mr. Benavides, and the case was dismissed on its merits. IPR has

moved for an award of attorney's fees, and the parties are trying to settle the fee dispute before submitting it to the court for resolution.

4. *Southern Migrant Legal Services v. Range*

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 in its advocacy, SMLS frequently files state and federal freedom of information requests seeking documents about the employers of migrant workers. The migrant worker visa program (the H-2A program) is a heavily regulated joint federal-state program.

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 the motions.

5. *Nicholls v. OPM*

Federal law prohibits men who fail to register with the Selective Service from working for the federal government unless they can show that their failure to register was not knowing and willful. The Office of Personnel Management (OPM) makes the knowing and willful determination.

In April 2011, suspicious that OPM bases its determinations on factors other than whether the failures to register were knowing and willful, IPR staff attorney Leah Nicholls filed a FOIA request with OPM. She sought documents reflecting the numbers of men not hired or fired for their failure to register as well as documents related to appeals concerning the termination or failure to hire men who failed to register. Over the telephone, OPM indicated to Ms. Nicholls that it lacked documents responsive to her request, but she never received a written response.

In September 2011, IPR filed a complaint on Ms. Nicholls' behalf against OPM in federal district court, alleging that OPM never responded to her request. After failed settlement discussions, the parties filed cross-

motions for summary judgment. OPM argued that it lacked responsive documents. IPR contended that OPM had failed to do a sufficiently thorough search for documents reflecting the numbers of men terminated or not hired and that OPM read the request for knowing and willful appeals too narrowly.

The district court substantially agreed with IPR and granted summary judgment to Ms. Nicholls in a May 2012 order. The court required OPM to search for responsive records possessed by one of its subdivisions and ordered OPM to produce non-exempt records related to appeals from knowing and willful determinations. IPR filed a motion for attorney fees and costs in May 2012, and IPR awaits the government's response.

6. *Nicholls Administrative Appeal*

In December 2011, IPR staff attorney Leah Nicholls made an additional FOIA request from OPM. She sought records concerning the agency's interpretation and implementation of the law prohibiting employment of men who failed to register with the Selective Service. By letter, OPM stated that it had located records responsive to Ms. Nicholls' request, but that the search, review, and copying costs would be more than \$6,000.

On Ms. Nicholls' behalf, IPR administratively appealed the fees, arguing that Ms. Nicholls' request was for non-commercial educational use and therefore qualified for a waiver of the search and review costs. Further, IPR argued that Ms. Nicholls was also

entitled to the public interest fee waiver and was, therefore, exempt from having to pay the copying costs as well. In April 2012, OPM's General Counsel determined that the request qualified for the educational waiver of search and review costs, thereby reducing the costs to approximately \$250, and remanded the public interest fee waiver question. IPR is awaiting OPM action on remand.

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 humans in Texas.

The court decided to use the funds to make *cy pres* awards 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. In September 2011, the Fifth Circuit issued a decision entirely favorable to Mr. Klier and the class of seriously injured class members. *Klier v. Elf Atochem N. Am.*, 658 F.3d 468 (5th Cir. 2011). The court of appeals ruled that because the money practically could be (and, therefore, should be) distributed to the seriously injured class members themselves, a *cy pres* award was inappropriate.

The case is currently on remand before the district court in Houston, and IPR is working with the case claims administrator to see that the remaining funds are distributed as completely and promptly as possible to the seriously injured class members.

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 a part of the U.S. military. The government had collected debts on these credit cards 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 process was long and productive and resulted in nearly all of the funds going to the class members themselves. After the distribution was completed, the remaining funds were distributed to a government-run charity that serves needs military members and their families.

3. *Hecht*

The federal Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in various forms of deceptive and unfair debt collection practices (such as posing as people other than debt collectors and harassing debtors with midnight phone calls). In 2010, the federal district court in New York approved a nationwide FDCPA class action settlement against a debt collector that systematically phoned alleged debtors without providing various disclosures required by the FDCPA. The settlement provided

no monetary relief to the class members, small charitable contributions to charities having nothing to do with the substance of the lawsuit, and a sizeable attorney's fees for the plaintiffs' lawyers. In the meantime, Chana Hecht brought a suit regarding the same conduct in a federal district court in Connecticut. That court threw out the suit on the ground that Ms. Hecht was a member of the class that had settled in New York and that her suit was precluded by the judgment approving the earlier nationwide settlement. IPR took on the briefing and argument of the case in the Second Circuit. IPR argued that giving the New York settlement preclusive effect would violate Ms. Hecht's due process rights because she never was given notice and an opportunity to be heard in the New York case and because the plaintiffs in the New York case did not provide Ms. Hecht constitutionally adequate representation (as evidenced by the no-value settlement in the New York case).

4. *Day*

In this case, opponents of a consumer class action settlement have appealed to the Eleventh Circuit. IPR filed an amicus brief in support of those opponents on behalf of the National Association of Consumer Advocates making several arguments, the most prominent of which is that the settlement's approval below was unconstitutional because it was entered by a magistrate judge, not an Article III district judge. Magistrate judges may, under 28 U.S.C. § 636(c), enter final appealable judgments *with the consent of the parties*. We maintain that the use of the magistrate judge here was impermissible because the absent class

members could not, and did not, consent.

D. Other Matters

1. *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 determination from the Office of Personnel Management (OPM) that his failure to register was not knowing and willful, a determination 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. The Supreme Court granted certiorari and heard oral argument in February 2012. IPR argued that the Civil Service Reform Act did not impliedly preclude district court jurisdiction over federal employees' constitutional claims for equitable relief, and the Solicitor General contended that the Act requires that the employee bring his or her claim in the MSPB.

In June 2012, the Supreme Court held, 6-3, that the Civil Service Reform Act requires federal employees to bring their equitable constitutional claims in the MSPB, even if the MSPB cannot grant the relief sought. In step with arguments made by the Solicitor General, the Court reasoned that the Federal Circuit could decide employees' claims on appeal even if the MSPB could not. Justice Alito, joined by Justices Ginsburg and Kagan, dissented for the reasons outlined in IPR's brief.

2. *Schoenefeld v. New York*

A New York statute requires that non-resident members of the New York bar have an office in New York to practice law in the state. Ekaterina Schoenefeld, a member of the New York bar and a resident of New Jersey, challenged the law in district court,

arguing that it discriminates in favor of state residents in violation of Article IV's Privileges and Immunities Clause. Ms. Schoenefeld prevailed in the district court, which held that the non-resident office requirement was unconstitutional. New York appealed to the Second Circuit.

In the Second Circuit, IPR filed an amicus brief supporting Ms. Schoenefeld on behalf of twenty-two members of the New York bar who are not residents of New York and whose legal practices suffer because of the office requirement. IPR argued that the statute places significant additional burdens on out-of-state attorneys that cannot be justified by any legitimate New York interest. Because those burdens are only placed on non-residents, IPR argued that that the office requirement violates the Privileges and Immunities Clause. The parties await oral argument and a decision from the Second Circuit.

3. *Minneeci v. Pollard*

Some federal prisons are run, under contract with the government, by private prison corporations. In this case, our client (Richard Lee Pollard) was severely injured on account of deliberate mistreatment by guards employed by a private prison corporation under contract to run a federal prison in California. He sued the prison guards for damages under the Supreme Court's *Bivens* doctrine, claiming that the guards had violated his right to be free from cruel and unusual punishment under the Eighth Amendment. The guards argued that although they acted under color of federal law because they were carrying out a government

function, the *Bivens* doctrine does not apply to private actors so long as state law provides an adequate remedy. IPR acted as co-counsel for Mr. Pollard, helping to research the law, write the brief, and prepare for oral argument. In January 2012, the Supreme Court decided in favor of the prison guards, by a vote of 8-1, agreeing with the guards that because California tort law would provide a remedy for Mr. Pollard, a *Bivens* damages remedy would not be implied under the Eighth Amendment.

FIRST AMENDMENT AND MEDIA LAW

A. Accessibility to Telecommunications by Persons with Disabilities

In July 2012, IPR was awarded the prestigious Accessibility Award for Exemplary Commitment to a Barrier Free Internet at the 51st Biennial Conference of the National Association of the Deaf (NAD) in Louisville, Kentucky. IPR received this award because of its work on behalf of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), a non-profit organization that advocates for improved access to telecommunications, media, and information technology for Americans who are deaf or hard of hearing. In addition to representing TDI, IPR works closely with a coalition of deaf and hard of hearing consumer advocacy groups, including the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and the Cerebral Palsy and Deaf Organization (CPADO).

1. Closed Captioning of Internet-Delivered Video and Video Device Accessibility

In October 2010, President Obama signed into law the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), a landmark update to the Americans with Disabilities Act, the Television Decoder Circuitry Act, and the Telecommunications Act of 1996. The CVAA requires substantially improved access for people with disabilities to advanced communications services and video programming content and devices. Among other things, the CVAA requires the FCC to implement regulations requiring closed captions for Internet Protocol (“IP”)-based video programming services and improvements to the captioning capabilities, user interfaces, and other accessibility features of video programming devices.

In the fall 2011, IPR drafted comments and reply comments filed in the FCC’s rulemaking to implement the CVAA’s IP captioning requirements. In addition to filing comments, IPR attorneys joined representatives of TDI and other deaf and hard of hearing consumer groups to hold numerous meetings with FCC staff and industry representatives.

In January of 2012, the FCC released an order adopting rules requiring IP-delivered video to be captioned for the first time and requiring substantial improvements to the captioning capabilities of various video playback and recording devices. The FCC

adopted many of the proposals and interpretations in the deaf and hard of hearing groups' comments.

IPR also drafted a petition for reconsideration of the order seeking broader coverage of captioning for video clips and caption synchronization standards, and drafted an opposition to an industry petition for reconsideration seeking to overturn favorable portions of the order, including captioning capability requirements for DVD and Blu-ray players. IPR also drafted an opposition to two industry petitions for waivers from the rules, and succeeded in persuading the FCC to strike one of them down. Finally, IPR drafted comments submitted to the Office of Management and Budget (OMB) successfully urging approval of key provisions of the FCC's order. IPR continues to assist TDI and other deaf and hard of hearing consumer groups on the FCC's ongoing consideration of accessible user interfaces for video programming devices.

2. Closed Captions on Television

IPR has worked to support TDI's continuing efforts to achieve ubiquitous closed captions on broadcast, cable, satellite, and other television programming. In fall 2011, following years of efforts by deaf and hard of hearing consumer groups, the FCC reversed nearly 300 exemptions to the closed captioning rules that had been improperly granted several years earlier. At the same time, the FCC sought comments on the standard to be used in evaluating exemption requests. IPR drafted comments for TDI and others strongly supporting the Commission's tentative construction of

the term "economically burdensome" as consistent with Congressional intent.

The FCC adopted this standard, and began once again to seek public comment on requests for exemptions. In 2012, IPR filed comments and oppositions regarding more than 30 new petitions for exemptions from the closed captioning rules. IPR also filed comments with the OMB regarding the television exemption petition process.

3. Accessibility and the Digital Millennium Copyright Act

In addition to pursuing closed captioning requirements at the FCC, IPR also advocated at the United States Copyright Office of the Library of Congress to ensure that copyright law does not interfere with the development of closed captioning and other accessibility technology. Under the Digital Millennium Copyright Act (DMCA), the Copyright Office conducts a triennial rulemaking to permit noninfringing users of copyrighted works, like video programs, to circumvent technological protection measures designed to control access to the works.

In fall 2011, IPR drafted a proposal for TDI, filed along with the Participatory Culture Foundation and Gallaudet University, to exempt the addition and improvement of accessibility features like closed captions for IP-delivered and DVD- and Blu-ray-based video from the DMCA's anticircumvention measures. IPR also prepared reply comments and met with staff of the National Telecommunications and Information Administration (NTIA) regarding the

exemption, and IPR staff attorney Blake Reid testified in favor of the exemption along with representatives of deaf and blind consumer groups and an accessibility researcher from Gallaudet University at the Copyright Office in June 2012. The exemption proposal is currently pending.

B. Media and Youth

1. Amicus Brief in Fox II

In *FCC v. Fox Television Stations* (“*Fox I*”), the FCC sought review of a lower court decision finding that its policy against broadcasting indecent material violated the Administrative Procedure Act. IPR filed an amicus brief in that case on behalf of a coalition of children’s advocacy groups, including the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, and other organizations concerned with the well-being of children. In 2009, the Supreme Court reversed the lower court and remanded for further consideration as to whether the FCC’s policy was constitutional. The lower court concluded that the policy violated the First Amendment and the FCC appealed.

IPR filed an amicus brief on behalf of the same coalition in *Fox II*, agreeing that the FCC’s current indecency enforcement regime was unconstitutionally vague and left parents without a clear idea of what their children might see or hear while watching broadcast television. The brief argued, however, that the Court should not go beyond vagueness to resolve the case as some parties had requested. The brief explained that disturbing long standing precedents was unnecessary

and could have negative consequences by, for example, casting doubt on the constitutionality of the Children’s Television Act of 1990 (“CTA”). The brief argued that if the Court nonetheless chose to evaluate the FCC’s indecency regime under a heightened level of scrutiny, it should reject the proposition that the V-Chip and underlying ratings provided an equally effective, less-restrictive alternative to government regulation.

At the oral argument, the Solicitor General referred to the coalition’s brief in responding to questioning from the Court about why the V-Chip was an insufficient alternative to regulation. The Court affirmed the lower court decision on due process grounds without resolving the First Amendment question. The decision, issued in June 2012, cited Professor Campbell’s article, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 65 Fed. Comm. L. J. 195 (2010).

2. Requests for FTC Investigation of Deceptive or Unfair Marketing

IPR worked with client organizations to draft requests for investigation on of unfair or deceptive marketing practices involving children or children’s products.

i. Your Baby Can Read

Your Baby Can Read! (“YBCR”), is a set of DVDs, books, and flashcards that retails for approximately \$200. For the past several years, it has been advertised widely on television and the

internet. In April 2011, IPR filed a Request for Investigation on behalf of Campaign for a Commercial-Free Childhood. We asked the FTC to bring an action against the makers of YBCR because the company's claims that use of this product teaches babies to read and helps children do better in school later on were false and misleading.

The FTC agreed. In August 2012, the FTC filed a complaint seeking an injunction, refunds and other relief against the company, its President, and the creator of YBCR. Two of the defendants settled, and agreed to cease making misrepresentations, including the use of the name "Your Baby Can Read" and to pay a fine.

ii. PepsiCo's Deceptive Marketing of Doritos to Teens

In October 2011, IPR filed a Request for Investigation with the FTC on behalf of the Center for Digital Democracy and other organizations asking the agency to investigate and bring an enforcement action against PepsiCo for deceptive and unfair marketing practices targeting junk food—Doritos—to teens. The Request identified three ways in which PepsiCo's digital marketing tactics are deceptive to teens. First, it disguised its marketing efforts as entertaining videogames, concerts, and other "immersive" experiences, making it more difficult for teens to recognize such content as advertising. Second, it claimed to protect teen privacy while collecting a wide range of personal information, without meaningful notice and consent. Finally, it used viral marketing techniques that violate the

FTC's endorsement guidelines. After the Request was filed, PepsiCo took down some of the marketing that we objected to, including the popular horror-themed advergames Hotel 626 and Asylum 626.

iii. Webkinz

In December 2011, IPR filed a Request for Investigation with the FTC on behalf of the Campaign for a Commercial-Free Childhood. This filing asked the agency to investigate and bring an action against Ganz, which operates a popular children's website called "Webkinz World." We asked the FTC to investigate misrepresentations and omissions in Ganz's Ad Policy and Privacy Policy. Specifically, we showed that that Ganz's Ad Policy claims parents can opt their children out of seeing third-party ads on Webkinz, when in reality, Ganz continues to expose children to third-party advertising even after parents opt out.

We also argued that Ganz violated the Children's Online Privacy Protection Rule (COPPA Rule) by failing to provide a link to its Children's Privacy Policy from the Webkinz.com homepage. The Children's Privacy Policy also violated the COPPA Rule because it was vague, confusing and contradictory. Moreover, Ganz's practice of installing cookies on children's computers to track their activities and serve kids targeted ads without affirmative parental consent constituted an unfair trade practice.

iv. Refer-a-Friend Features on Children's Websites

In August 2012, IPR filed five separate Requests for Investigation on behalf of CDD and sixteen other consumer, media, and youth advocacy organizations. We asked the FTC to investigate and bring enforcement actions against McDonald's Corporation, which operates HappyMeal.com; General Mills, Inc., which operates ReesesPuffs.com and TrixWorld.com; Doctor's Associates, Inc., which operates SubwayKids.com; Viacom, Inc., which operates Nick.com; and Turner Broadcasting Systems, Inc., which operates CartoonNetwork.com, because they are violating the COPPA Rule.

Each of these websites are directed to children and use a marketing tactic known as "refer-a-friend" to induce children to engage in viral marketing to other children. The websites invite children to submit both their own personal information as well as personal information of their friends without obtaining the express and verifiable consent of either sets of parents as required by COPPA.

We also found that at least one website, HappyMeal.com, was collecting children's photographs and storing them in a publicly-accessible directory. Several websites were also placing third-party cookies on the computers of children who visited to play games, including those visiting at the recommendation of a friend. Soon after we filed our complaint, McDonald's discontinued these practices.

3. Comments on Revisions to COPPA Rule

In September 2011, the FTC requested comments on a number of proposed revisions to its rules

implementing COPPA, which had not been updated since they were first promulgated in 1999. IPR filed comments on behalf of seventeen consumer health, privacy, and child advocacy groups endorsing the Commission's proposal to update those rules. Our comments strongly supported proposals to bring the rule up to speed with contemporary data collection and marketing practices. Some of the most important proposals our comments supported were:

- Expanding the definition of "Personal Information" to include such data as screen and user names; persistent identifiers associated with cookies and similar technologies; photographs, videos, and audio files uploaded by users.
- Ensuring COPPA's privacy protections cover the expanding array of digital platforms, including mobile devices, geo-location-based services, and Internet-connected games.
- Revising the "Notice" requirements in order to improve transparency of data collection and marketing and ensure that parents can access user-friendly information about a company's privacy policies in order to make informed decisions about their children's privacy.

In September 2012 we filed a supplemental comments detailing additional updates to address troubling marketing techniques we uncovered in our research on Refer-a-Friend.

C. Ensuring that Broadcast Stations Serve the Public Interest

IPR has been working with organizations known as the Public Interest Public Airwaves Coalition (PIPAC) since 2000 to ensure that television stations are accountable to the communities they serve. In late 2007, the FCC adopted a standardized form for television station to report on their public interest programming and required that these forms be available on a station's website. However, due to overwhelming opposition of station owners, the FCC never took the steps necessary for these requirements to take effect.

In the summer 2011, PIPAC developed a new, streamlined proposal which was presented to the FCC in August. PIPAC recommended that the FCC eliminate paper forms and adopt online reporting requirements. PIPAC also recommended that the FCC limit its information collection to critical information and to place all of the reports in a searchable online database. The FCC sought comment on these proposals in two different dockets.

1. Enhanced Disclosure

In October 2011, the FCC issued a Further Notice in Standardized and Enhanced Disclosure for Television Broadcast Licensee Public Interest Obligations, Docket No. 00-168. The FCC proposed that television stations upload the contents of their existing public files to an online data base hosted by the Commission. PIPAC filed comments generally supporting this proposal. PIPAC addressed objections raised by broadcasters in Reply Comments and ex parte meetings.

In April 2012 the FCC adopted an order implementing the online filing requirement. Significantly, it requires television stations to upload the contents of their political files, which include records of time sold to political candidates and their supporters and opponents. The National Association of Broadcasters sought judicial review and a stay of the FCC's order. On behalf of PIPAC, IPR filed an opposition to the stay motion. The Court denied the stay request thus allowing the rules to take effect on August 2, 2012.

2. Standardized Reporting Form

The Commission sought comment on PIPAC's proposal for a streamlined information collection form to take the place of issue-programs lists in a separate Notice of Inquiry in Docket No. 11-189, Standardizing Program Reporting Requirements for Broadcast Licensees. IPR filed comments and reply comments in support of this proposal on behalf of PIPAC in early 2012.

D. Media Ownership

1. Media Council Hawai'i Complaint

In November 2011, the FCC's Media Bureau denied the complaint and request for emergency relief that IPR had filed on behalf of the Media Council Hawai'i. The complaint had alleged that by means of a series of agreements, one company was controlling three Honolulu television stations (including two top 4 ranked stations) in violation of the FCC's local television rule. IPR filed an

application for review with the FCC, which is still pending.

2. 2010 Quadrennial Review

In July 2011, the Third Circuit reversed and vacated the FCC's decision in the *2006 Quadrennial Review*. It agreed with IPR's clients that the FCC had failed to give adequate public notice of its proposed changes to the newspaper-broadcast cross-ownership rule and failed to address how its proposals affected opportunities for minorities and women to own broadcast stations. The Supreme Court denied review.

In December 2011, the FCC issued a Notice of Proposed Rulemaking in the 2010 Quadrennial Review. It sought comment on the Third Circuit's remand and other matters. One question for comment was whether sharing arrangements, such as the one at issue in the Hawai'i complaint, should be counted as ownership for purposes of the local television rule.

IPR drafted comment on behalf of Office of Communication of the United Church of Christ, National Organization for Women Foundation, Communications Workers of America and others. The comments addressed two main issues – shared services arrangements and ownership by minorities and women.

The comments supported treating sharing arrangements as ownership interests where they are used to exercise substantial influence over the operation of another station in the same market. Our comments proposed a bright line, multifactor test to

determine which sharing arrangements should be attributed.

The comments agreed with the concerns expressed in a letter from the Leadership Conference on Civil and Human Rights that the Commission was repeating the mistakes of the Bush Administration by permitting further media consolidation without taking long-overdue action to promote ownership opportunities for people of color and women. The IPR comments also addressed how most of the proposals made by the Commission would exacerbate the problem of already extremely low levels of ownership by women and minorities. They urged the Commission to assess the effectiveness of race- and gender-neutral policies and to improve its data collection and analysis.

In reply comments, we presented an analysis of data obtained from the FCC on minority ownership of full-power commercial television stations. This analysis showed that the state of minority ownership was even worse than the numbers alone might indicate. Not only was the percentage of minority-owned stations far below the percentage of each group in the population, but most minority stations tended to be located either in small markets or on the fringes of larger markets and only a handful were affiliated with a major network. Moreover, many states and cities with large minority populations had no minority-owned stations. We are still waiting for the Commission to complete the 2010 Quadrennial Review of its broadcast ownership limits.

ENVIRONMENTAL LAW

A. National Environmental Policy Act

1. *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.

In spring 2011, Food & Water Watch filed an *amicus* brief in support of plaintiffs 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. Food & Water Watch argued that the fishery plan amendment violated the Magnuson-Stevens Fishery Conservation and Management Act and the National Environmental Policy Act.

In summer 2011, the district court issued an opinion ruling against the plaintiffs on each of their claims. Plaintiffs filed an appeal in the First Circuit Court of Appeals, and Food & Water Watch sought leave to file an *amicus* brief in support of appellants. During fall 2011, IPR students researched and drafted an *amicus* brief, and IPR filed an *amicus* brief on Food & Water Watch’s behalf on December 29, 2011. The parties have filed response and reply briefs, and the First Circuit will likely hear the case in fall of 2012.

2. *Lemon v. McHugh*

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 analyzed the environmental impacts of the authority's redevelopment plan. The developer chosen to ultimately receive the property, however, created a new redevelopment plan that significantly increased the amount of land developed, including construction on the Fort's historic parade grounds.

The Army refused plaintiffs' request to analyze the impacts of 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. Plaintiffs 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. 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 1950s and early 1960s.

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. The analysis, however, 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. In August 2011, the Army contacted IPR and stated that, in consideration of the issues identified in the July 2011 letter, the Army would prepare a

Supplemental Environmental Impact Statement thoroughly analyzing the 2010 plan's effects. In November 2011, the parties filed a Joint Stipulation of Dismissal, in which IPR agreed to dismiss claims against the Army. In exchange, the Army agreed to prepare a supplemental analysis and prohibit any new construction on the Fort Ritchie site pending completion of the new environmental review. The Court accepted the agreement, and the case was dismissed on November 14, 2011.

Following the termination of the case, IPR sought recovery of its attorneys' fees and litigation costs from the Army under the Equal Access to Justice Act. IPR submitted a petition for fees on December 14, 2011. Simultaneously, IPR sought a stay of the briefing to allow time to reach a settlement with the Army. After successfully reaching a settlement, the parties filed a motion to dismiss the fee petition on February 15, 2012. In July 2012, the Army paid IPR \$33,000 for time spent litigating the case.

3. *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, religion, and livelihood since "time immemorial." Construction of the project will irreparably disturb the seabed, 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.

The Tribe 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 Tribe's case was consolidated with a similar action filed in the same court last June by several citizen groups.

During the fall of 2011, IPR researched the Tribe's claims, reviewed the government's extensive administrative record, and began drafting the Tribe's Motion for Summary Judgment. In November 2011, one IPR fellow and two IPR students travelled to Boston to give a presentation on the case to Boston University law students. IPR also met with Tribal representatives on Martha's Vineyard and toured the Island with the Tribe.

IPR continued working on the Tribe's Motion for Summary Judgment in spring 2012. Although the plaintiff's motions on summary judgment were originally due March 1, the deadline has continually been pushed back in light of continuing controversy about the sufficiency of the government's administrative record and the D.C. Circuit's decision to vacate the Federal Aviation Administration's determination that the wind project would not pose a safety hazard to aviation. IPR attended status hearings in February 2012 and June 2012, in which the parties discussed these issues and attempted to reach agreement on a new schedule to settle administrative record issues and file motions for summary judgment. The Court is currently considering the issue of whether the government unlawfully withheld portions of the administrative record. Following a decision, the Court is expected to set a new briefing schedule.

IPR expects to file a Motion for Summary Judgment in early fall 2012.

B. Clean Water Act

1. *Save Our Springs Alliance Wastewater Discharge Project*

In the spring of 2012, IPR represented Save Our Springs Alliance on a project to address the problem of pollution of the Edwards Aquifer in Texas. Save Our Springs Alliance is an Austin, Texas-based non-profit that works to protect the Edwards Aquifer, as well as its springs and contributing streams, and the natural and cultural

heritage of the Texas Hill Country region and its watersheds.

Save Our Springs Alliance was concerned about groundwater pollution from land-applied municipal wastewater. The Texas Commission on Environmental Quality ("TCEQ") issues permits to wastewater treatment plant operators that allow those operators to spray treated wastewater onto land areas. TCEQ considers these "no discharge" permits because the wastewater is sprayed onto land rather than directly into waters, and therefore they are not regulated under the Clean Water Act. A November 2011 report released by the Greater Edwards Aquifer Alliance and Save Our Springs Alliance found, however, that poorly operated land application systems and a lack of permit standards are putting water resources at risk and causing pollution. Thus, TCEQ's permitting of land disposal of wastewater is failing to protect Texas's ground and surface waters.

IPR researched potential ways to address this problem. In May 2012, IPR submitted an Opinion Letter documenting its research and discussing Save Our Springs Alliance's litigation and non-litigation options under the Clean Water Act and Texas law. In addition, IPR, with the help of a class of first-year law students, reported on the practices of other states implementing wastewater land application programs. Save Our Springs Alliance is very excited to begin implementing IPR's suggestions to tackle this issue.

C. Equal Access to Justice Act

1. *Alliance to Save the Mattaponi, et al. v. United States Army Corps of Engineers*

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 under the National Environmental Policy Act. 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 under the Equal Access to Justice Act. In August 2010, a 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. Rather than recommend a fee award, however, 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.

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, but, in September 2012, the district court affirmed the magistrate judge's conclusion with regard to most of the issues in the case and remanded the case to the magistrate judge to determine the appropriate size of the fee award. The magistrate judge has not yet made this determination.

D. Climate Change: Nitric Acid Plant New Source Performance Standards

The Clean Air Act mandates that the Environmental Protection Agency (“EPA”) revise new source performance standards (“NSPS”) every eight years. NSPS for nitric acid plants, which are listed as a source of nitric oxides, have not been revised since the 1980s. In 2009, the Environmental Integrity Project filed suit against the EPA, seeking to force the agency to revise emissions standards for nitric oxide and to add a standard for nitrous oxide, a greenhouse gas also emitted by nitric acid plants. Nitrous oxide has 310 times the heat retaining ability of carbon dioxide. EPA and the Environmental Integrity Project reached a settlement requiring EPA to update the nitric oxide standard but not addressing nitrous oxide.

In November of 2011, pursuant to that settlement, EPA published a proposed rule creating a more stringent emissions standard for nitric oxide. IPR assisted the Institute of Policy and Integrity, of New York University School of Law, and the Environmental Defense Fund, in drafting comments on the proposed standard. The comments argued that the Clean Air Act required the EPA to set a standard for nitrous oxide as well.

In the spring of 2012, IPR drafted an Opinion Letter for EDF, reviewing the options EDF would have to seek

regulation of greenhouse gas emissions from nitric acid plants should the final rule not incorporate its comments. The final rule, issued in May 2012, but yet to be published in the Federal Register, contains no standard for nitrous oxide.

E. Open Government

1. *McMillan Park Committee v. District of Columbia*

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. Many community members and groups in addition to MPC were 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 (“D.C. FOIA”) requests on behalf of MPC 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 its D.C. FOIA requests. The Deputy Mayor's Office refused to disclose an indefinite number of emails between it and Vision McMillan Partners, the private developer for McMillan Park, citing the inter/intra-agency exemption under D.C. FOIA.

In spring 2010, MPC filed the administrative appeal but received no response within the statutory period. Accordingly, MPC filed a complaint for declaratory and injunctive relief in D.C. Superior Court.

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, MPC 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. MPC then filed a Motion for Summary Judgment arguing that the *Vaughn* index was inadequate and that the District had failed to justify withholding responsive records.

In March 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, 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 District filed a Motion for Reconsideration, or, in the Alternative, for Additional Time to Comply. The court denied the District's Motion for Reconsideration but granted the District's request for additional time. The District filed a revised *Vaughn* Index and two new affidavits on September 26, 2011. The District also filed all the contested documents, suggesting the court might review them *in camera*.

Following the District's submission of a revised *Vaughn* Index and two new affidavits, MPC supplemented its original Motion for Summary Judgment, arguing that the District had still not established the applicability of any of D.C. FOIA's exceptions and that *in camera* review was an inappropriate substitute.

In March 2012, the court issued an Order again holding MPC's Motion for Summary Judgment in abeyance while the court undertakes *in camera* review. That review is still ongoing.

In the interim, development activities at McMillan Park have continued. In March 2012, developer Vision McMillan Partners released revised plans for the site, which call for preservation of more of the existing structures and far more open space than the original plans.

F. Native American Water Rights

On February 14, 2012, United States Senators Jon Kyl and John McCain introduced the Navajo-Hopi Little Colorado River Water Rights Settlement Act, authorizing a proposed agreement between the Navajo Nation, the Hopi Tribe, the federal government, and the State of Arizona settling the tribes' claims to the Little Colorado River and the Gila River. The bill attempted to secure water rights for the tribes by authorizing their governments to waive their first-priority legal claims to the rivers in exchange for federally funded water-delivery projects that will bring potable drinking water to the reservations.

In mid-March 2012, IPR agreed to review and summarize the bill for Diné Citizens Against Ruining Our Environment, a grassroots environmental advocacy group of Navajo Nation members. IPR students reviewed both the proposed bill and the draft settlement agreement on which it was based. In addition to settling Navajo and Hopi claims to the two rivers, the bill also called for the reallocation of 6,411 acre-feet per year of water from the Central Arizona Project to the Navajo Nation. The bill made that reallocation contingent on a number of conditions including continued operation of Peabody Western Coal Company's Kayenta Mine, a coal mine located on the Navajo and Hopi reservations, and the continued operation of the Navajo Generating Station, a coal-fired power plant reliant

on that mine. IPR provided the bill summary for Diné Citizens Against Ruining Our Environment to use in its advocacy work in opposition to the settlement agreement.

In July 2012, the Navajo Nation tribal council voted to reject the agreement. The agreement, in its current form, is, therefore, dead.

G. Strip Mining

1. *To' Nizhoni Ani, et al. v. Office of Surface Mining Reclamation and Enforcement*

IPR represents a coalition of non-profit organizations in an administrative appeal of a coal mine permit renewal. The coalition includes To' Nizhoni Ani, Diné Citizens Against Ruining Our Environment, Black Mesa Water Coalition, Sierra Club, and the Center for Biological Diversity (collectively, "TNA").

The Peabody Western Coal Company ("PWCC") has been mining at Kayenta, in northeastern Arizona, since the 1960s. In 1990, the company received a life-of-mine permit under the Surface Mining Control and Reclamation Act ("SMCRA"), which establishes environmental standards for strip mining and requires that permittees seek a permit renewal every five years.

In 2010, the PWCC sought to renew its permit for the fourth time. In August of 2011, the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), an agency within the

Department of the Interior that has enforcement authority over SMCRA, issued an environmental assessment of the permit renewal. In the fall of 2011, IPR assisted Brad Bartlett, of the Western Energy Justice Project, in drafting comments on the environmental assessment on behalf of TNA. The comments raised concerns, among other things, about the impacts of mining on traditional cultural properties in the mine vicinity and on the hydrologic balance of the Navajo Aquifer, the primary source of water for both the mine and the residential communities in the vicinity of the mine.

OSMRE renewed the permit on January 6, 2012. TNA filed an administrative appeal of the renewal on February 17, 2012, thirty days after PWCC had received written notice of the renewal. The appeal raises claims under SMCRA, the National Historic Preservation Act, the National Environmental Policy Act, and the Administrative Procedure Act. PWCC filed a motion to dismiss arguing that TNA's appeal was filed too late. The administrative law judge denied the motion without briefing, but PWCC sought interlocutory review of the decision from the Interior Board of Land Appeals. PWCC argued that the appeal was barred by SMCRA, which allows appeals to be filed within thirty days of notice to the permittee of the permitting decision. PWCC argued that the thirty days runs from the date that the permittee receives actual notice, which, in this case occurred when the company received a phone call from OSMRE, which occurred several days before PWCC received written notice. TNA argued that the thirty days runs from the date that the permittee receives

written notice. The Interior Board of Land Appeals agreed the case was timely and rejected PWCC's appeal.

In May 2012, PWCC and TNA filed cross motions for summary judgment. PWCC sought summary dismissal of five claims, each involving SMCRA. TNA sought summary judgment on four claims, two related to SMCRA, and two related to the preservation of cultural resources. Both motions are still pending.

In addition, in June 2012, TNA filed a separate administrative challenge to a 2010 permit revision, but it withdrew the challenge after learning it was untimely.

H. Toxic Site Cleanup

1. *Anacostia Watershed Society & Anacostia Riverkeeper v. Washington Gas Light Co.*

IPR represents the Anacostia Watershed Society (AWS) and the Anacostia Riverkeeper (ARK) in their efforts 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. But 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 stalled, in part because of complications arising from the transfer of land from federal to local control. AWS and ARK sought IPR's help to jumpstart the process. In mid-December 2010, IPR sent 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.

In August 2011, AWS and ARK brought suit against the Washington Gas Light Company in Federal District Court for the District of Columbia, alleging violations of RCRA and seeking an injunction requiring Washington Gas to clean up the site. Washington Gas filed a motion to dismiss arguing that because of ongoing federal and local efforts to begin the cleanup process, the court lacked jurisdiction to hear the case. In the alternative, Washington sought a stay pending completion of a

consent decree between the company, the National Park Service and the District of Columbia. That motion is still pending.

In December 2011, the District of Columbia, the federal government, and Washington Gas finally reached an agreement. The two governments filed a complaint against Washington Gas under the Comprehensive Environmental Response Compensation and Liability Act and immediately lodged a consent decree, laying out a plan for cleanup and providing sixty days for public comment. IPR assisted AWS and ARK in drafting comments addressing both the consent decree's technical aspects and its provision for future public participation. After submitting those comments, AWS and ARK moved to intervene in the consent decree proceedings. With the consent of all the parties, AWS and ARK also filed a motion seeking to hold briefing on the intervention motion in abeyance until the parties completed review of public comments on the consent decree.

In a June status update, the parties to the consent decree proceeding explained that they are still considering whether to revise the consent decree in light of public comments and will soon either lodge a revised consent decree or move to enter the original consent decree.