and allows available resources to be allocated to the grade crossing improvement projects yielding the highest safety returns. Simply stated, this will save more lives than if an equal amount of money were spent on upgrading crossings that statistically are not as dangerous.

In other, less frequent situations, a state agency, local governmental body, or state or local legislative body may, outside of the Federal-aid program, fund the upgrading of a warning system at a specific crossing or order a railroad to install or upgrade a warning system at its own expense. These proposed rules are not meant to prevent those governmental authorities from being involved in such activities. Although the selection decision in these situations may not be based on the selection and installation criteria established by FHWA and adopted by the state department of transportation or highway department, presumably the governmental body's selection decision is based on sound public policy and overall safety considerations derived from information available to the state.

Some state laws, generally predating the advent of the Federal Rail-Highway Crossing Program, impose a tort law duty upon railroads to maintain safe crossings. In some cases this duty has been interpreted to include a duty to select and install warning systems at hazardous crossings. While this system may have been appropriate in the past, when there was no systematic and uniform improvement program in existence, today the result is one of misallocation of scarce resources. This ad hoc system of grade crossing improvements, driven by tort law and individual jury awards, runs counter to the goal of a uniform national program based on planning and prioritization. Those ofttimes arbitrary local requirements can result in the installation of grade crossing warning systems, not where research and data indicates they will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed.

Jury verdicts based on common law standards are necessarily ad hoc, caseby-case judgements that are retrospective in nature. The duties now imposed upon railroads ad hoc in this manner are inconsistent with the command of Congress that "[1]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." (49 U.S.C. 20106) These verdicts do not provide an appropriate mechanism for determining whether the crossing is needed in the first place, and if needed, what warning devices are appropriate. Neither do these verdicts provide an appropriate method for determining the order in which crossings would be equipped or upgraded to yield the greatest safety benefits. Moreover, these judgments divert resources from saving lives through investments in grade crossing warning devices to compensating those killed or injured in accidents or their survivors. This is sound public policy only when the railroad has breached a duty to them that it is appropriate for the railroad to have.

In this proposed rule, FRA is defining in a nationally uniform manner the safety duties railroads have in connection with the selection and installation of warning devices at grade crossings. Tort judgments in general certainly exert a salutary deterrent influence on behaviors that rational actors can avoid, but here that deterrent is distorted and diminished by the combination of (i) the lack of adequate funds, public or private, to improve all grade crossings to the desired level of safety, (ii) the focus of tort cases on whether a railroad has satisfied its common law duties at the grade crossing in question without regard to its behavior concerning grade crossings in general, and (iii) large judgments for accidents at grade crossings of low relative hazard. As things now stand, a railroad that is responsibly investing its available funds for the improvement of grade crossings in the order and in the manner specified by the transportation authorities in the states it serves may be subjected to large tort judgments resulting from the relatively random occurrence of accidents at grade crossings of low hazard relative to those improved. The proposed regulations are meant to ensure that the present system is not compromised by state requirements that railroads select and install grade crossing improvements outside of the coordinated and prioritized federal/state system already established.

The Supreme Court, in a recent decision, *CSX Transportation, Inc.* v. *Easterwood,* (113 S. Ct. 1732, (1993)) held that legal duties imposed on railroads by a State's common law of negligence fall within the scope of the preemption provision of 49 U.S.C. 20106, (formerly § 205 of the Federal Railroad Safety Act (45 U.S.C. § 434)). However, the Court held that preemption of such state laws will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

FRA expects the proposed rules will "substantially subsume" the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such will preempt state laws covering the same subject matter, regardless of whether Federal funding of improvements is involved at a particular crossing.

In *Easterwood*, the Court held that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 123 L. Ed. 2d at 401.

The Department believes that the distinction in safety duties drawn in *Easterwood* depending upon whether or not improvements to a particular grade crossing were federally funded results in poor public policy that is likely to misallocate scarce funds for grade crossing improvements because railroads are given a powerful financial incentive either (i) to invest funds in improving crossings on some basis other than the relative hazard rankings established by state highway authorities or (ii), especially in the case of small railroads, to diminish investment in grade crossing improvements because they cannot tell where an adverse verdict may strike next and their net financial results may be better served by using the funds to pay judgments they are unable to avoid. Railroad and highway safety alike are best served by focusing the economic and legal incentives of everyone involved in the process to invest grade crossing improvement funds where the most lives will be saved and the most injuries prevented. The proposed rule is intended to achieve that result.

If, as the Department has recommended in its Highway-Rail Grade Crossing Action Plan, state transportation authorities also begin evaluating the hazards of grade crossings on entire rail corridors, the proposed rule would accommodate improvements focused in that manner. That is simply another way for state transportation authorities to systematically evaluate the relative safety of highway rail grade crossings and to decide which improvements will yield the best safety results.

Moreover, highway rail grade crossing warning systems are devices to control motor vehicle traffic on highways. Government bodies responsible for