

STATUS OF LEGACY HIGHWAY - DAVIS COUNTY, UTAH - December 10, 2002

Prepared by Utahns for Better Transportation - Contact: Roger Borgenicht (801) 355-7085
Sample of comments in favor of UBET et al, plaintiffs

Request for Qualifications issued November 25, 2002 by Utah Department of Transportation for a IEQMC - (Independent Environmental Quality Management Consultant) "to review and correct the deficiencies identified in 10th Circuit Court's ruling on the Legacy Parkway Project." The IEQMC will address: D&RG Railroad; Sequencing and Integration; Wildlife/Wetlands; and, Narrower Right of Way. Phase 1 will include Technical Memorandum Development. Phase 2 will include a Supplemental Draft EIS and Final EIS and a Re-evaluation

District Court Decision - August 11, 2001

"The alternatives chosen for consideration have a rational footing... *even though other alternatives could have reasonably been considered*, and the agencies could have produced a better product."

"*Some of the information currently is just plain wrong...* - such as the figures on mass transit. Other information doesn't add up, such as the EIS estimates on carbon monoxide... the mathematics by definition needs to be consistent."

"It would be *not only refreshing but appropriate* for those who gathered information resulting in the EIS voluntarily to *revisit and update the information and analysis concerning (1) project cost, (2) transit projections, and (3) carbon monoxide estimates* so that public officials and public at large remain accurately informed as to current cost estimates, current transit estimates and current estimates for carbon monoxide using data, projections and analyses which are internally and mathematically consistent."

US 10th Circuit of Appeals Decision - September 16, 2002

Background

"Appellants [UBET, Rocky Anderson, Sierra Club] summarize their argument as urging the court to order the Agencies to prepare new or supplemental EIS and to process a new CWA permit application that adequately addresses the following factors: (1) mass transit alternatives, (2) alternative land use scenarios, (3) land use and growth impacts, (4) impacts on Salt Lake City, (5) wetlands and wildlife impacts, and (6) air quality impacts."

Statutory Overview

"We apply a rule of reason standard(essentially an abuse of discretion standard) in deciding whether claimed deficiencies in a FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decision making and informed public comment."

Analysis

I. NEPA (National Environmental Policy Act)

A. Denver and Rio Grande Alignment

"The COE has no records relating to the estimated cost of the D&RG Regional Alignment or the Legacy Highway project. The Agencies, therefore, failed to follow their own regulations."

"[T]here was no cost methodology applicable to the D&RG contained in the record. It also demonstrates why the FEIS is inadequate to meet the NEPA goals of informed decision making and public comment."

B. Narrower Right of Way

1. Median Width
2. Trail System
3. Berm and Future Utility Corridor

C. "Maximum Transit" Alternative

1. Failure to Respond to Recommendations and Criticism of an FHWA Headquarters' Expert that No Alternative Analysis had been done on Aggressive Transit
2. Unexplained Failure of Agencies to Perform a More Complete Alternative Transit Analysis
3. Use of Erroneous Ridership Projections
4. Use of Outdated Survey Results
5. Failure to Consider both Commuter and Light Rail
6. Failure to Consider Alternative Sequencing of the "Shared Solution"
"The Shared Solution includes: (1) improving and expanding I-15, (2) an extraordinary expansion of the public transit system, and (3) constructing the Legacy Parkway. ... The FEIS contains a detailed discussion of why the Legacy Parkway should be built before I-15 is improved and expanded. However, *no mention is made in the FEIS as to when the "extraordinary expansion of the public transit system" should occur relative to the Legacy and I-15 projects.* Appellants have provided expert opinion and comments submitted to the Agencies on the importance of expanding public transit prior to constructing new roads."

"The Appellees [UDOT, FHWA, COE] respond that the implementation of rail transit is five to fifteen years behind the Legacy Parkway and argue that Utah has not begun to meet the requirements for federal rail funding. They conclude that "[r]egional transit choices that may be made in the future are not reasonable alternatives to off-set [sic] the need for new roadway construction now."

"There are three problems with Appellees' response. First, the expansion of public transit under consideration is *broader than just rail transit*. Second, the regional transit choices that are at issue here are not ones "that may be made in the future," *but are being made*. The FEIS is relying on public transit to meet 12 percent of the 2020 demand and maybe the additional 10 percent of demand that will not be met under the Shared Solution. A WFRC study on the best modes of mass transit was expected to be completed in 2001. *There is no question as to whether a regional transit choice will be made*. Third, while the project may address a "need for new road construction now," the decided focus of the FEIS and its evaluation of alternatives "is to provide a

solution to meet the *2020 transportation needs* of the North Corridor.” The estimated time to construct the Legacy Parkway and reconstruct I-15 is seven years. *Delaying the Legacy Parkway and I-15 project until after all or part of the public transit expansion is in place is an alternative that could be reasonable and one the Agencies did not include in the FEIS, thus rendering it inadequate.*”

“Here, the Agencies were not faced with an unreasonable or speculative alternative; indeed, the Agencies relied upon public transit to meet part of the demand in 2020, *and simply did not take a hard look at whether public transit could alleviate the immediacy of the need for the I-15 expansion or Legacy Parkway construction.*”

7. Failure to Consider Integration of the Legacy Parkway and Transit
“In an argument closely related to an alternative sequencing, the Appellants assert that NEPA was violated by a failure to consider integrating the construction of the Legacy Parkway with the expansion of public transit as a reasonable alternative. As discussed in I.C.6, no mention is made in Appendix G of when public transit should be expanded relative to the Legacy Project. Appellants have cited comments by the FTA and comments submitted to the Agencies discussing the significant savings to be gained by building the Legacy Parkway and expanding public transit simultaneously. “

“Appellees’ only response is to cite to comments in the COE’s ROD, COE, and FHWA comments made after the FEIS, and a January 2001 letter from the COE to the EPA. All of these came after the June 2000 FEIS; *none of them demonstrate that integration was considered*; and none of them explain why integrating the Legacy Parkway with the expansion of public transit is not a reasonable alternative. We, therefore, conclude that omitting integration as a reasonable alternative in the FEIS renders it inadequate.”

8. Failure to Consider Expanding I-15 and Transit First
“Although *[d]ocumentation in the administrative record indicates that I-15 could be expanded without the Legacy Parkway...*it also demonstrates reasonableness of Agencies conclusion that it would be better to build Legacy Parkway prior to reconstructing I-15.”

9. Failure to Give Basis for Financial Constraints Estimates on Transit Expansion

- D. Reducing Travel Demand and Alternative Land Use Scenario Alternative
- E. Cumulative Effects of Six Lanes
- F. Failure to Consider Land Use Impacts
- G. Failure to Consider Impacts to SLC
 1. Consistency with the SLC Transportation Master Plan
 2. Impact Increased Auto Congestion will have on SLC
 3. Social and Economic Impacts that Increased Congestion will have on SLC
- H. Failure to Consider Growth and Land Use Impacts on Areas North of the Legacy Parkway
- I. Impacts to Wetlands
 1. Failed to classify wetlands into subcategories as required by HGM protocols
 2. Failed to make initial field data for developing the functional profile

- 3. Assumed land use changes within 1000 feet predicted the wetlands level of functionality
 - 4. Use of Everglades HGM Regional Guidebook
 - J. Failure to Consider Impacts to Wildlife
 - "... here the FEIS simply is inadequate to address the impact on migratory birds... Given that some two to five million birds use the GSL each year, a large portion of which are migratory birds, *we find that limiting the wildlife impact analysis so that migratory birds are beyond its scope renders the FEIS inadequate.*"
 - K. Air Quality Impacts
 - L. Failure to Disclose Unresolved Issues
 - M. Failure to Insure Accuracy of the FEIS
 - N. Failure to Insure Professional And Scientific Integrity of the FEIS
 - O. Segmentation of Transportation Projects
 - P. Illegal Delegation of NEPA Responsibility and Oversight
 - "we hold that the COE and FHWA erred to the extent they allowed UDOT or contractors hired by UDOT to prepare the FEIS."
- II. Clean Water Act (CWA)**
- A. D&RG Regional Alignment
 - "Issuance of the permit with insufficient information concerning the D&RG Alignment was arbitrary and capricious."
 - B. Narrower Right of Way
 - 1. Median Width
 - 2. Trail
 - 3. Berm and Utility Corridor
 - C. "Mass Transit" Alternative
 - D. Reducing Travel Demand and Alternative Land Use Scenario Alternative
 - E. Cumulative Effects of Six Lanes
 - F. Failure to Consider Land Use Impacts: Failure to Consider Impacts on Salt Lake City; Failure to Consider Growth and Land Use Impacts on Areas North of the Legacy Parkway
 - G. Failure to Consider Impacts to Wetlands
 - H. Failure to Consider Impacts to Wildlife
 - "COE's wildlife impacts analysis, like the FEIS, was limited to consideration of impacts within 1000 feet of the project ... we hold that *the COE acted arbitrarily and capriciously in granting the permit on this basis.*"
 - I. Air Quality Impacts

Conclusion

"We find that the FEIS was inadequate on the following grounds: elimination of the D&RG as an alternative based on inadequate cost estimates; failure to consider alternative sequencing of the Shared Solution; failure to consider integration of the Legacy Parkway and transit; and, failure to consider impacts on wildlife. We conclude that the COE's issuing of the 404(b) permit was arbitrary and capricious on the following grounds: issuing a permit with insufficient information to determine whether the D&RG Regional alignment was a practical alternative; failure to consider whether a narrower median was a practicable alternative; failure to consider whether a ROW without a future utility corridor or berm was a practicable alternative; and, failure to consider the impacts to wildlife."