

# THE NATURAL LAWYER

## TRANSPORTATION RESEARCH BOARD COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (A4006)

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VOLUME 11, NUMBER 2  
JANUARY, 2003

RICHARD CHRISTOPHER, EDITOR  
312/793-4838 PHONE  
312/793-4974 FAX  
E-MAIL [ChristopherRA@nt.dot.state.il.us](mailto:ChristopherRA@nt.dot.state.il.us)

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### **MALL DEVELOPER LACKS STANDING TO CHALLENGE NEW INTERCHANGES**

Submitted by Ron Moses, FHWA  
[Ronald.Moses@fhwa.dot.gov](mailto:Ronald.Moses@fhwa.dot.gov)

This case was decided on November 22, 2002, in favor of the State, City and Federal Defendants. The project(s) in controversy are two new interchanges in close proximity to each other. One is on I-80 and the other on I-35, at the intersection of the two interstates in the city of West Des Moines Iowa. Pursuant to advice from our office, the projects were constructed on a single EA. The plaintiffs were two mall owners, a neighborhood association, and an environmental group. The defendants moved to dismiss the mall owners and the neighborhood group on standing. The malls sought to represent their employees' interests; the court found they did not have standing to do so (neither third party standing nor associational). At the time, this office prepared its first brief on this issue, the *Taubman Realty Group v. Mineta* case had just been decided in the Eastern District of Virginia. The court relied on the facts (and decision) in *Taubman*, which are similar, and as the court pointed out in its decision, the same lead counsel represented the plaintiffs in *Taubman* and this case. The plaintiffs also alleged standing due to the loss in value of their interest in the mall as a result of an "unfair competitive advantage" given to the proposed mall, which would be served by the new interchanges. The court reaffirmed the doctrine that economic interests are not (generally) within the zone of interest protected by NEPA. Thus the malls were dismissed. The neighborhood association asserted that the defendants had failed to assess the environmental justice impact on their community. The court found that the environmental justice order was not judicially enforceable, and that the neighborhood group had failed to show that its injuries fell within the zone of interests that NEPA was designed to protect. Thus they were dismissed on standing. The court went on to find that the project was not segmented, that FHWA did not succumb to any pressure placed on it by any other defendants, nor did FHWA have any preconceived opinion regarding the project.

Finally, of interest, the Plaintiffs alleged that because the development of the new mall was not speculative at the time the EA was issued, the EA should have considered the cumulative impact of the mall. The court disagreed, citing the fact that the interchanges were imminent even without the mall project. Judgment for FHWA, State and City. *Thousand Friends of Iowa, et al. v. Norman Mineta, et al.*, No. 4:02-CV-10168

**LOCAL INDIANA PROJECT CANNOT PROCEED WITHOUT CONSIDERATION OF  
ADJACENT FEDERAL AID PROJECT**

Submitted by Ron Moses  
Ronald.Moses@fhwa.dot.gov

On November 15<sup>th</sup>, 2002, the U.S. District Court for the Southern District of Indiana entered a preliminary injunction against the Federal Highway Administration, the Indiana Department of Transportation, and the City of Goshen, Indiana in the matter of *Old Town Neighborhood v. Kaufman, et al.* This case involved plaintiffs who sought to enjoin the defendants from widening Third Street in Goshen, Indiana, which runs through an historic district. The Court found that the plaintiffs established a substantial likelihood of prevailing on their claim that the Third Street Project was improperly segmented from a larger federal project known as U.S. 33. The Court also found that the defendants failed to comply with Section 106 of the NHPA. In essence, the Court decided that the Third Street Project makes sense only as a part of a larger federal project. While the Third Street Project was about to be constructed, U.S. 33 is only in the scoping stages under NEPA.

Improper Segmentation

In determining whether Third Street was improperly segmented from the federal U.S. 33 project, the Court considered the history of the Third Street project in considerable detail. From the onset of this project in 1992, the City had directed its consultants to comply with State and Federal requirements (presumably to maintain federal eligibility). In 1998, the City requested the State to re-route U.S. 33 on to Third Street, thus changing the routing of U.S. 33 through the city. The State rejected this request in 1999. However, this issue was discussed in various forums by Federal, State, and local officials in 2000. In an e-mail sent in June 2000, an FHWA official stated, "the intent is that upon completion, the existing U.S. 33 route designation may be shifted over to Third Street." Thereafter, in 2001, the City determined to pursue the Third Street project with local funds only. However, the Court reasoned that the State could revisit the redesignation issue in the future, grant the City's request, and thereby evade compliance with environmental laws. The Court found "that more likely than not the defendants have a tacit understanding that, after the City has completed the Third Street Project, the U.S. 33 project is likely to go forward with the widening of Madison Street east of Main, with InDOT shifting U.S. 33 to the newly widened Third Street". Apparently the Court believed that there was a conspiracy among the defendants to evade environmental laws.

The Court also based its findings on comments made at early meetings between the Federal and State defendants. For instance, at a June 28<sup>th</sup>, 2000 meeting, FHWA's Val Strauman stated that the Third Street and U.S. 33 Projects were closely interdependent. FHWA's Larry Heil stated at the same meeting, that if one of the projects were to proceed independently that a case could be made that the "authorities" are making a segmented decision. Such comments appeared to persuade the Court that even FHWA

believed that the Third Street Project was improperly segmented. It should be noted that the Court showed little concern regarding the fact that the Third Street Project was to be built without federal funds. The court did find that the segmentation of Third Street from the U.S. 33 Project would tend to limit FHWA's options for the U.S. 33 project. However, the Court did not address this issue in terms of the federalization of the Third Street project as one might have expected.

### Section 106

Although there were no federal funds involved in the Third Street Project, the Court believed it found sufficient evidence to establish that the Section 106 Process had begun. In fact, at page 42 the Court states, "the evidence shows that the U.S. 33 Project has been a major federal undertaking since 1992, when it was 'programmed' by InDOT." We believe this position to be clearly erroneous. Further, both FHWA and InDOT sent out letters to Goshen residents stating that they were recognized as consulting parties on both the Third Street Project as well as the U.S. 33 Project. After this, any argument by the federal defendants that it lacked control over the actions of the State and local defendants was not persuasive.

The State and City have expressed an interest in appealing this injunction.

*Old Towne Neighborhood Association v. Kaufman, FHWA, et al.*, S.D. Indiana No. 1:02-CV-01505-DFH, 11/15/02

### **DEFERRAL OF OZONE ATTAINMENT DATE FOR ST. LOUIS AREA BEYOND EPA'S AUTHORITY**

The Bi-State area of Illinois and Missouri that comprises the St. Louis area was classified as a moderate non-attainment area for ozone. This meant that the area had to comply with the ozone standard by November, 1996. When the area did not meet the deadline, EPA upgraded the area to serious nonattainment (which would normally have meant more stringent ozone controls); but gave an extension for compliance. The extension was based on a policy that EPA developed which recognized downwind areas which could not comply with the ozone standard based on upwind sources of pollution. In this case, the upwind sources were in Kentucky. The 7<sup>th</sup> Circuit Court of Appeals ruled that EPA had acted outside of its mandate in the Clean Air Act. The Court held that Congress had been very specific in how to handle ozone non-attainment, and that EPA simply did not have the discretion it thought it had. The Court sided with the D.C. Circuit which ruled the same way on a deadline extension granted by EPA for the Washington, D.C. area (see 294 F.3d 155). The decision is apparently not going to cause any great concern because the St. Louis area is probably already in attainment. *Sierra Club and Missouri Coalition for the Environment v. USEPA and Whitman*, Nos. 01-2844, 01-2845, 11/25/02

## **11<sup>TH</sup> CIRCUIT UPHOLDS ATLANTA MPO'S FINDING OF CONFORMITY FOR LONG RANGE PLAN**

Case provided by Jane D. Hayse, AICP, Atlanta Regional Commission  
JHAYSE@ATLANTAREGIONAL.COM

On October 30, 2002 the 11<sup>th</sup> Circuit Court of Appeals affirmed the Northern District of Georgia which had found that the Atlanta Regional Commission's (ARC's) finding of conformity for the long range transportation plan complied with the EPA regulations. The objectors argued that the plan was required to comply with the 1999 motor vehicle emissions budget for ozone precursors in each year of the long range plan. The 1999 budget had been set in the SIP which EPA had approved. The ARC had argued that it was required to show that the 1999 budget would be met in the future analysis years it had selected (2005, 2015, 2025). The Court sided with the ARC's interpretation of the EPA conformity regulation, not because the EPA agreed with the MPO but because the interpretation appeared to be correct. The Court noted that it had not yet decided whether to uphold EPA's extension of the Atlanta area's attainment deadline (see prior case in this newsletter) but that no matter how that litigation turned out, the MPO was going to have to show conformity with either a 2004 or 2005 deadline. The Court noted that the EPA regulation provided a "strange" result and that the objectors' argument had "intuitive appeal," but the Court went along with the ARC's argument. The opinion will not be published. *Sierra Club, et al. v. Atlanta Regional Commission, et al.*, No. 02-11652.

## **ADJACENT PROPERTY OWNERS HAVE NO INTEREST IN RAILROAD LAND CONVEYED TO WISCONSIN COUNTY FOR RECREATIONAL TRAIL**

After a couple bought some property in northern Wisconsin, they erected a five foot high barrier to stop the public from crossing their land. The local county sued to assert its title to the 100 foot strip that ran across the land. The strip of land had originally been part of a Congressional land grant for a railroad. When the railroad abandoned use, the land fell back into the control of Federal law which allowed conveyance to local governments first for a public highway, and later for trails. The adjacent property owners claims that their interest was acquired without the operation of the succession of Federal laws were denied by the 7<sup>th</sup> Circuit Court of Appeals. Since they never owned the strip, they could not claim that their property had been taken without payment of compensation. *Mauler v. Bayfield County*, No. 02-1358, 10/31/02

## **REMAINS OF 9000 YEAR OLD KENNEWICK MAN NOT SUBJECT TO NAGPRA**

Although this case is not about transportation, it is a must read for anyone who labors in the field of cultural resource protection. The Corps of Engineers found human remains on Federal lands along the Columbia River in Washington State in 1996. They initially turned them over to archaeologists pursuant to the Archeological Resources Protection Act (ARPA). Examination of the remains showed they were neither of European nor Native American origin, but they were approximately 9000 years old. Instead of turning the remains over to the Smithsonian, the Corps determined they should be turned over to a coalition of Native Americans who did not want the bones to be studied. In addition, the Corps buried the site so that no one could do research there. Eventually a decision

was reached by the Department of the Interior that the remains were culturally related to the Native Americans who claimed them. On review, the decision was trashed. The Court saw through Interior's decision as political escapism and sided with the scientists who still wanted to study the remains. The Court simply concluded that there was no credible evidence linking the remains to any group of Native Americans. The decision by Interior was reversed, and the remains were protected for further research. *Bonnichsen v. U.S.*, 217 F.Supp.2d 1116 (D. Oregon 2002)

### **SEGMENTATION TEST GETS TWEAKED IN COLUMBUS, OHIO HIGHWAY CASE**

In a case with facts too complex to summarize, a Federal District Court judge made some new law. The Judge was trying to decide whether Ohio and the City of Columbus had to be enjoined from avoiding compliance with Section 4f of the DOT Act and Section 106 of the National Historic Preservation Act. A project was withdrawn from a larger Federal project and a substitute for the withdrawn segment was constructed. The substituted project was constructed without any Federal funds and without compliance with Federal environmental laws. The substitute project also required the demolition of some historic structures. The Court laid down a test for the substituted project to determine whether it was just a ruse to avoid compliance or a really new and unrelated solution to a local traffic problem. Generally the Court held that if the substituted project is a functional replacement for the withdrawn project (it does the same things at the same places) and it performs in the same timeframe, then it is the same as the withdrawn project and Federal environmental compliance is required. *Brewery District Society, et al. v. FHWA*, 211 F. Supp. 2d 902 (S.D.Ohio 2002)

### **EIS/ROD UPHELD FOR NEW WEST VIRGINIA ROAD**

When WVDOT and FHWA signed a Record of Decision to build a four lane road on new alignment, a coalition of environmental groups sued. The groups claimed that a "low build" alternative that upgraded the two lane road would have been adequate. The Court found that the highway agencies had properly dismissed the two lane upgrade as not meeting purpose and need. Since a two lane upgrade did not meet purpose and need, it was not a feasible and prudent alternative under Section 4f. The Court went on to find that no supplement was necessary, secondary and cumulative impacts were properly assessed, and that two of the Plaintiff groups lacked standing because they failed to allege particular injury that their members would suffer from a new highway or how they would be harmed. One Plaintiff failed to allege any connection between its organizational activities and the highway. *Route 9 Opposition Legal Fund, et al. v. Mineta*, 213 F. Supp. 2d 637 (N.D. W. Va. 2002)

### **EIS, BIOLOGICAL OPINION AND MITIGATION PLAN UPHELD FOR OAKLAND, CALIFORNIA PORT DREDGING AND EXPANSION PROJECT**

The Corps of Engineers undertook a dredging project to deepen the Oakland Harbor to 50 feet and issued a 404 permit for construction of new container berths and cargo terminals. A group of conservation organizations sued over the issue of non-native species fouling the harbor ecosystem when ballast water was discharged. The Corps based its analysis of ballast discharges on a relatively simple calculation that showed that the use of larger vessels in the future would result in less ballast discharge than if the project were not built. The project would enable the use of larger vessels that are

more stable and thus use less ballast. This same analysis enabled both the Fish & Wildlife Service to issue a “no jeopardy” opinion for the California least tern and the California brown pelican and a similar finding to be issued by the National Marine Fisheries Service for steelhead and winter run chinook salmon. The Court went along with the analysis because any other approach would have been too speculative. When the Corps was challenged on the lack of a cumulative impacts analysis for similar impacts due to other nearby projects, the Court responded that no such analysis was necessary because it had accepted that the notion that the projects subject to Corps approval were not going to aggravate the non-native species parameter. The Court endorsed the analysis of mitigation which was based on the Port Ordinance which required the discharge of ballast in the open sea. The Court followed other 9<sup>th</sup> Circuit precedent that said that Federal agencies comply with their general obligations under the Endangered Species Act to conduct their programs in a manner consistent with the conservation of endangered species by complying with “no jeopardy” opinions issued for their projects. *San Francisco Baykeeper, et al. v. US Army Corps of Engineers, et al.*, 219 F. Supp. 2d 1001 (N.D.Cal.2002)

### **IOWA RULE PREVENTING TOTAL RECONSTRUCTION OF OLD SIGNS WITHOUT A NEW PERMIT UPHELD**

After an outdoor advertising company bought the assets of another company, it reconstructed an old nonconforming sign which predated the regulation of outdoor advertising. In the process of reconstruction, the new sign wound up bigger, higher off the ground, and with more support posts than the old sign. Another sign got a similar makeover after being damaged by a windstorm. These actions violated Iowa DOT rules which required a permit when a sign gets more than routine maintenance. These signs were in areas where no permits would be issued for new signs. The Supreme Court of Iowa looked at the overall purposes of the State and Federal legislation on outdoor advertising and concluded that “...it would be absurd to conclude that the legislature intended to permit nonconforming signs to continue in perpetuity...” and that these signs were supposed to be “weeded out.” Iowa DOT’s decision to revoke the sign company’s permits at these two locations was upheld. *Meredith Outdoor Advertising, Inc. v. Iowa Dept. of Transportation, Office of Right of Way*, 648 N.W.2d 109 (2002)

### **CHAIR’S CORNER**

Submitted by Helen Mountford  
HelenMountford1@cs.com

The Annual TRB meeting this month promises to be exciting for our committee. We are presenting one session on our own and are jointly sponsoring another. Thanks to Randy Hunter’s hard work, our first session will deal with the legal sufficiency of environmental documents. Unfortunately due to budget constraints, Randy will not be able to attend. I will moderate in his stead. Speakers include Robert B. Rutledge and Richard Christopher. Susan Martin is sending her presentation, but also will be unable to attend because of budget problems. A representative from EPA is also scheduled. Check your program for Session 343 at the Hilton (Military Room) on Monday at 3:45 p.m.

Randy Schick has organized a second session on Insurance Against the Risks Associated with Contaminated Property which will be on Monday at 7:30 p.m. in the

same hotel and room. This session is in cooperation with the Committee on Eminent Domain and Land Use.

Our committee meeting will be Tuesday morning at 8:00 a.m. in the Johnson Room at the Marriott. Our business will include planning for the summer legal workshop in New Orleans. I look forward to seeing the committee there. In the meantime, continued thanks to Rich Christopher for continued publication of this newsletter and keep your stories coming in to him.

**NEXT COPY DEADLINE IS MARCH 14, 2003**

Please get your submissions for the April, 2003 *Natural Lawyer* into the Editor by the close of business on March 14, 2003. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604.