No. 11-3000

THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PRAIRIE BAND POTTAWATOMIE NATION, et al.,
Plaintiffs-Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees

On Appeal From The United States District Court For The District Of Kansas
No. 08-2534-KHV, Judge Vratil

BRIEF FOR FEDERAL APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
App.	Appellants' Appendix
BIA	Bureau of Indian Affairs
Br.	Appellants' Brief
Corps	United States Army Corps of Engineers
dBA	decibels A-weighted
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
HINU	Haskell Indian Nations University
K-10	Kansas Highway 10
KDOT	Kansas Department of Transportation
MPO	Lawrence-Douglas County Metropolitan Planning Organization
NEPA	National Environmental Policy Act
ROD	Record of Decision
SHPO	State Historic Preservation Officer
SLT	South Lawrence Trafficway
Suppl. App.	Appellees' Supplemental Appendix

STATEMENT OF RELATED CASES

There are no prior or related cases.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 5 U.S.C. §§ 702, 706. Appellants' Appendix ("App.") at 12. The district court entered a final judgment dismissing all claims against all defendants on November 8, 2010. App. 408. Plaintiffs timely filed a notice of appeal on January 3, 2011. App. 409; Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Federal Highway Administration ("FHWA") complied with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, by adequately considering alternatives and environmental impacts of the proposed South Lawrence Trafficway.

2. Whether FHWA reasonably determined under Department of Transportation Act Section 4(f) that there is no feasible and prudent alternative to using a portion of a historic property for the selected alternative for the South Lawrence Trafficway.

STATEMENT OF THE CASE

A. Nature of The Case and Course of Proceedings Below

Plaintiffs-Appellants challenge FHWA's Record of Decision ("ROD") approving Alternative 32B for construction of the South Lawrence Trafficway

("SLT"), a multi-lane, limited-access freeway to be built on the south side of Lawrence, Kansas. The alignment for Alternative 32B crosses wetlands on a Section 4(f) historic property – the Haskell Agricultural Farm Property ("Farm Property"), the southern portion of which is known as Baker Wetlands. Consequently, Alternative 32B includes a comprehensive mitigation plan to compensate for, and mitigate adverse impacts to the wetlands and historic property. Mitigation measures include, *inter alia*, creation of 304 acres of wetlands contiguous to the Baker Wetlands, relocation of local roads currently on, or adjacent to, the historic property, and construction of noise walls.

Plaintiffs oppose Alternative 32B and advocate building the SLT farther south in the 42nd Street corridor in order to avoid direct use of the Farm Property. However, pursuant to Section 4(f), FHWA reasonably determined, based on an accumulation of factors that a 42nd Street alignment is not prudent.

On October 24, 2008, Plaintiffs filed an 18-count complaint against FHWA, Kansas Department of Transportation ("KDOT"), and officials within those agencies, alleging that defendants' approval of Alternative 32B violated the National Environmental Protection Act (counts 1-9), the Clean Water Act ("CWA") (counts 10-14), Section 4(f) of the Department of Transportation Act of 1966 (count 15), the Administrative Procedure Act ("APA") (count 16), the

National Historic Preservation Act (count 16), and the American Indian Religious Freedom Act (count 19). App. 40-49.

On November 18, 2009, the district court granted defendants' motions for partial summary judgment on the pleadings pursuant to Fed. R. Civ. P. 12(C) on CWA and American Indian Religious Freedom Act claims. App. 53-60. On the remaining claims, which seek judicial review of federal agency action under the APA, the district court upheld FHWA's ROD for reasons set forth in a thorough memorandum and opinion, dated November 5, 2010. App. 349-407.

Plaintiffs appealed. On appeal, Plaintiffs pursue only NEPA and Section 4(f) claims.

B. Statutory and Regulatory Background

1. National Environmental Policy Act

NEPA requires that before an agency undertakes any major federal action significantly affecting the environment, it must first prepare an environmental impact statement ("EIS"), addressing alternatives to, and environmental effects of, the proposed action. *See* 42 U.S.C. § 4332(2)(C)(I), (iii). NEPA imposes only procedural requirements and does not require agencies to reach a particular outcome or to elevate environmental impacts over other concerns. *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004); *Custer County Action Ass'n*

v. Garvey, 256 F.3d 1024, 1034 (10th Cir. 2001). A federal agency may adopt an EIS prepared by another federal agency, "provided that the statement ... meets the standards for an adequate statement." 40 C.F.R. § 1506.3(a).

2. Section 4(f)

In relevant part, Section 4(f) of the Department of Transportation Act prohibits federal funding of a transportation project requiring the use of land from an historic site of national, State, or local significance unless (1) there is no feasible and prudent alternative to using such land, and (2) the project includes all possible planning to minimize harm to such land resulting from the use. Pub. L. No. 89-670 § 4(f), 80 Stat. 931, currently codified at 49 U.S.C. § 303; *see also* 23 U.S.C. § 138; *Valley Community Preservation v. Mineta*, 373 F.3d 1078, 1084-85 (10th Cir. 2004). FHWA's regulations provide that an alternative is not prudent if

> (I) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
> (ii) It results in unacceptable safety or operational problems;
> (iii) After reasonable mitigation, it still causes:
> (A) Severe social, economic, or environmental impacts;
> (B) Severe disruption to established communities;
> (C) Severe disproportionate impacts to minority or low income populations; or
> (D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
(v) It causes other unique problems or unusual factors; or
(vi) It involves multiple factors in paragraphs (3)(I) through 3(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

23 C.F.R. § 774.17.

STATEMENT OF FACTS

A. Background

Consideration of a bypass around Lawrence, Kansas, to improve the flow of regional traffic and to relieve congestion on Lawrence city streets, has been the subject of discussion, study, and controversy for many decades. App. 54, 505-06, 1210-13. A four-lane southern bypass project, the SLT, was approved by FHWA in 1990. A nine-mile, western section of the project (from Interstate 70 to US-59 Highway), was completed and opened to traffic in 1996. App. 55, 1212. The eastern leg was to have been constructed along 31st Street where it traverses the campus of the Haskell Indian Nations University ("HINU"). The eastern leg was not built, however, following objections from HINU, litigation that enjoined construction pending further NEPA work (*see Ross v. Federal Highway Administration*, 162 F.3d 1046 (10th Cir. 1998)), and unsuccessful attempts by various parties to reach consensus on an alignment. App. 1212-1213.

Ultimately, FHWA issued a ROD in February 2000 selecting a no action alternative for the earlier SLT proposal. *Id*.

B. Purpose of the Project

The current SLT proposal is to construct an approximately seven-mile section of Kansas Highway 10 ("K-10") in south Lawrence as a multi-lane, limited access freeway. K-10 connects Lawrence and southern Johnson County, Kansas, and is an important link in the state highway system for the Topeka, Lawrence, and Johnson County corridor. App. 1210. Currently, K-10's link within Lawrence is located on US-59 and 23d Street and is heavily congested due to high traffic volumes, insufficient capacity, multiple intersections, traffic signals, stop signs, and poor access management, including entrances from parking lots and private driveways. App. 1210, 1214-19. These conditions degrade the safety and efficiency of the regional transportation system and contribute to congestion, pollution, and accidents. App. 508-509, 1210, 1214-16, 1271. The purpose of the proposed project is "to provide a safe, efficient, environmentally sound and cost-effective transportation facility for users of K-10 and the surrounding state highway system, and, to the extent possible, to alleviate congestion on Lawrence city streets." App. 927, 1214, 1271.

C. NEPA Process

Construction of the SLT requires a Clean Water Act Section 404 "dredge and fill" permit from the U.S. Army Corps of Engineers ("Corps"). *See* 33 U.S.C. § 1344. In 2002, KDOT, the project sponsor, submitted a permit application to the Corps. App. 511. In the process of determining whether to grant or deny the permit, the Corps complied with NEPA and other federal environmental statutes, as the lead federal agency, with the assistance of KDOT.

The NEPA process included scoping (a preliminary step in the NEPA process that identifies significant issues and the scope of issues to be addressed in an EIS, *see* 40 C.F.R. §§ 1501.7, 1508.22, 1508.25) and the preparation and solicitation of public comments on a draft EIS, *see* 40 C.F.R. §§ 1502.9(a), 1503.1. App. 513-14, 937-38. In December 2000, the Corps issued and solicited public comments on a final EIS ("FEIS"). App. 514, 937-38.

1. Development and Consideration of Alternatives

KDOT and the Corps undertook a systematic, four-stage, screening process to identify and evaluate alternatives against objective factors. The first stage focused on feasibility of alternatives from a technical and economic standpoint and minimal capability of meeting the purpose and need for the project. This initial screening identified five conceptual corridors and more specific alignments

within most of the corridors (for a total of 12 alternatives) for construction of the SLT; all of these 12 alternatives were discussed to some degree in the FEIS.[1] App. 527-41,1233.

The second screening evaluated build alternatives at the corridor level and balanced collective environmental, social, and cultural impacts against operational characteristics. This screening eliminated alternatives in three corridors from further study. App. 542. After the second screening, the 32nd Street corridor with five alignments and the 42nd Street corridor with two alignments remained for further evaluation. App. 543.

The third screening identified the most feasible and optimal alignments within each of the two remaining corridors, which were 32nd Street, Alignment B ("32B") and 42nd Street, Alignment A ("42A"). App. 543. In the fourth stage, the no action, 32B, and 42A alternatives were intensively evaluated in the FEIS.

KDOT's preferred alternative was 32B. App. 553. The FEIS concluded that Alternative 32B is the environmentally-preferred alternative, in light of its mitigation plan (described *infra* at 13-14) and the foreseeable secondary and

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[1] Several alternatives that did not entail construction of the SLT as a new segment of K-10 were eliminated from further study (including enhanced public transit service, upgrade to existing K-10, far east and south corridors, far south bypass, eastern bypass, and tunnel). App. 523-27.

cumulative impacts associated with the no action and 42A alternatives. App. 553. The FEIS also concluded that 32B best serves the purpose and need for the project and the public interest. App. 553.

After the Corps' issuance of the FEIS, the Prairie Band Pottawatomie Nation proposed an alignment within the 42nd Street corridor, that it called 42C, contending that this alignment would be substantially cheaper than the Alternative 42A because it would shorten the length of bridges crossing the Wakarusa River and floodplain. Both in letters to the Tribe and in its ROD, the Corps explained that the 42C alignment did not warrant further study because the alignment was less safe than 42A, while having similar environmental impacts. *See infra* at 32-33. The Corps also explained that the Tribe had greatly overestimated the cost savings that could be achieved with 42C and that, in any event, cost was not a determinative factor as between 32B and 42A. *Id*.

2. Mitigation Plan for Alternative 32B

In reviewing the permit application, the Corps also complied with National Historic Preservation Act ("NHPA") procedures, 16 U.S.C. § 470f.[2] App. 940-48.

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[2] NHPA is a procedural statute. *See Valley Community Preservation Comm'n*, 373 F.3d at 1085. Regulations promulgated by the Advisory Council on Historic Preservation set forth a process, under which the action agency: (1) determines whether there is a federal undertaking and, if so, identifies appropriate parties to participate in review; (2) identifies historic properties and whether such

During this process, the Farm Property was determined by the National Park Service to be eligible for listing on the National Register of Historic Places under eligibility Criterion A (App. 1328) based on "the essential role of agricultural training in the early history of the Haskell School and the diverse historic uses of the lands to the south of the core campus." App. 1329.[3] The Farm Property encompasses 804 acres of land (including the Baker Wetlands) historically associated with Haskell Institute's agricultural vocational training areas from approximately 1883 to 1934, when the agricultural training program ceased. Haskell Institute, which was originally a boarding institution for Indian elementary or secondary level students, evolved into HINU, a four-year accredited university.

Today, the northern part of the Farm Property (north of 31st Street), an approximately 19-acre area, is an open land portion of the HINU campus used for informal and formal activities. App. 1226. A Medicine Wheel and Sweat Lodges, which are screened by trees, were built in this area by students. App. 1226. These

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properties would be affected by the federal undertaking; (3) assesses potential adverse effects in consultation with the State Historic Preservation Officer ("SHPO") and other consulting parties; and (4) endeavors to resolve adverse effects in consultation with the SHPO and other parties, often through execution of a memorandum of agreement. *See* 36 C.F.R. Part 800.

[3] National Register Criterion A bases eligibility on "association with events that have made a significant contribution to the broad patterns of our history." App. 1210.

structures are not historic due to recent construction. *Id*. A city street, 31st Street, traverses the Farm Property and HINU campus, dividing the northern portion of the Farm Property from the southern portion. App. 1225, 1227.

Today, the southern portion of the Farm Property (south of 31st Street) is known as the Baker Wetlands, designated as a National Natural Landmark for its environmental attributes. App. 1226-27. After Haskell Institute's agricultural training program ended, the southern part of the Farm Property was leased to local farmers for agricultural use and then in the early 1950s, the Bureau of Indian Affairs and Congress declared this area to be surplus and eligible for donation for public benefit. App. 1225. In 1968, Baker University, a local private university, acquired by donation 573 acres in the Farm Property's southern portion and reconstructed wetlands in this area. The Baker Wetlands are bounded on the north by a dike located just south of 31st Street,[4] on the east by Haskell Avenue, on the west by Louisiana Street, and on the south by the Wakarusa River.[5] App. 1216, 1222. Baker University, HINU, and University of Kansas carry out research and

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[4] A small area of land between 31st Street and the dike remains part of the HINU campus. App. 1225.

[5] The Baker Wetlands also include a 20-acre tract owned by the University of Kansas and a 20-acre tract owned by the Kansas Department of Wildlife and Parks, which are managed by Baker University. App. 1222.

educational activities in the Baker Wetlands and Baker University has made the area accessible to the public.[6] App. 1231-32.

The 32B alignment crosses the Farm Property along the northern edge of the Baker Wetlands. The alignment requires direct use of 57.6 acres of wetlands (inside and outside the Baker Wetlands) and 53 overlapping acres of the Farm Property. App. 1243. The Corps thus developed a comprehensive mitigation plan for 32B to meet CWA mitigation requirements [7] and to resolve adverse effects to the Farm Property. Following consultation with the State Historic Preservation Officer ("SHPO") and other interested parties, in June 2003, the Corps, the Advisory Council for Historic Preservation, the State Historic Preservation Officer, Douglas County, Baker University, and KDOT executed a Memorandum of Agreement setting forth a comprehensive mitigation plan for 32B.[8] App. 940-

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[6] Deed provisions required Baker University to use the property for education, research and restoration to native habitat for a period of at least 30 years. App. 1222. Because the 30-year period has expired, these restrictions no longer apply. App. 1222.

[7] Pursuant to the CWA, the Corps may require compensatory mitigation, such as creation of wetlands, as a condition of a CWA permit. *See* 33 C.F.R. §§ 320.4(r), 325.1, 325.4, 332.4.

[8] In October 2007, the Memorandum of Agreement was amended to include FHWA. App. 1472-73.

947. The mitigation plan, which is incorporated into the conditions of the Section 404 permit, includes the following key elements and benefits:

- (1) 31st Street will be removed from its current location crossing the HINU campus and Farm Property, and the right-of-way will be relinquished to HINU for its use. 31st Street will be relocated next to the SLT, outside the campus boundary, and there will thus remain only one transportation corridor across the Farm Property.
- (2) Haskell Avenue and Louisiana Street will be removed and relocated 1,000 feet to the east and 2,500 to the west, respectively, thus distancing the roads from the Farm Property/Baker Wetlands.
- (3) 357 acres will be added to the Baker Wetlands complex, including 304 acres of created wetlands, 37 acres for tallgrass prairie restoration and cultural/wetland education center construction, and 16 acres for riparian area conservation. App. 1449. This element results in a net gain of approximately 259 acres of wetlands that will enhance the functioning of the wetlands complex; and it creates a permanent buffer for the Baker Wetlands, protecting it from adverse impacts associated with adjacent roads and potential development. App. 1278.

- (4) Noise walls along both sides of the SLT where it crosses the Farm Property/Baker Wetlands will be constructed. As a result of the noise walls and road relocations, 32B creates no appreciable increase in noise to Baker Wetlands and HINU over existing conditions; in the future, there would be less noise under 32B than would exist under either the no action or 42A alternatives when foreseeable secondary and cumulative effects associated with those alternatives are taken into account. App. 932.
- (4) A wetlands educational center, trails, camping area, and parking will be constructed to improve public access and use of the Baker Wetlands.
- (5) Funds will be provided for an annuity for Baker University to manage and maintain the wetlands. App. 557.

See generally App. 941-48, 986-90.

3. Corps' Record of Decision

On December 15, 2003, the Corps issued a ROD approving a CWA permit for Alternative 32B. App. 926-1109. In its evaluation, the Corps focused on six key evaluation criteria (safety, efficiency, cost, land use, direct wetland impacts, and cultural and historic property impacts) and compared 32B and 42A under twenty categories of impacts. App. 929-36. The Corps concluded that on balance 32B is the least environmentally damaging practicable alternative and best serves

the overall public interest and purpose and need for the project.[9] App. 929-30, 936, 960. The Corps' conclusion was based, in part, on consideration of future foreseeable secondary and cumulative impacts on the Farm Property/Baker Wetlands associated with the two build alternatives and consideration of the mitigation measures for Alternative 32B.[10] App. 930-936.

D. FHWA's Review and Section 4(f) Determination

In 2005, Congress designated funds for the SLT project in an appropriations act, which resulted in FHWA review of the project because of possible federal-aid highway funding. Suppl. App. 191-192A; App. 1209. In April 2006, FHWA solicited public comments on whether to adopt the Corps' FEIS and in November 2006 it published and solicited public comments on a draft Section 4(f)

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[9] The U.S. Environmental Protection Agency agreed that the reasonably expected future conditions and cumulative effects of multiple planned actions within the project area argue in favor of 32B. App. 951; Suppl. App. 18.

[10] Alternative 42A does not directly use or impact the Farm Property/Baker Wetlands. However, because 42A directly uses 4 acres of wetlands elsewhere, mitigation associated with 42A would include creation of approximately 80 acres of wetlands. App. 937, 1249. The Corps found, however, that mitigation for 42A would not have been of sufficient magnitude to significantly reduce the foreseeable secondary and cumulative impacts associated with the route. App. 1249. Notably, mitigation for secondary impacts is not required and it is against FHWA policy to mitigate for secondary impacts. App. 1263, 1270. While the mitigation plan for 32B reduces secondary impacts, this is a beneficial byproduct of mitigation for direct impacts. App. 1263, 1266.

Evaluation. App. 1149-53. FHWA considered whether new information or developments since the Corps' issuance of the FEIS warranted preparation of a supplemental EIS and concluded they did not. Suppl. App. 238-243. In November 2007, FHWA decided to adopt the Corps' FEIS and issued its Final Section 4(f) evaluation. App. 1205

In pertinent part, FHWA determined that Alternative 42A, which avoids a direct use of the Farm Property, is not a feasible and prudent alternative to 32B "based on an accumulation of factors that collectively, rather than individually, have adverse impacts that present unique problems." App. 144. Those factors, which are more fully discussed in Argument III below, include: (1) Alternative 42A does not meet the purpose and need for the project as well as 32B in the areas of safety and relief for the local road network; (2) Alternative 42A is more costly than 32B; (3) 42A would have greater impact on the Wakarusa floodplain and floodway; (4) 42A would accelerate development south of the Wakarusa River and is inconsistent with current local planning documents; (5) Alternative 42A would have greater adverse indirect and cumulative impacts to the Farm Property than 32B; (6) 42A would impact other historic sites and riparian woodlands; and (7) 32B provides a net benefit to the Section 4(f) property through its mitigation measures. App. 1271-77, 1444-45.

On May 6, 2008, FHWA issued a ROD adopting 32B as the selected alternative for the project. App. 1436-1462. FHWA reiterated that there are no feasible and prudent alternatives to using Farm Property land. App. 1441. FHWA also concluded that because 32B best meets the purpose and need for the project and the mitigation plan will result in net benefits to the Farm Property, 32B "results in the least overall harm in light of Section 4(f)'s preservation purpose." App. 1441-42. FHWA agreed with the Corps' determination that Alternative 32B is the least environmentally damaging and environmentally-preferred build alternative. App. 1236, 1442.

SUMMARY OF ARGUMENT

Selection and approval of Alternative 32B was the culmination of many years of study, debate, and thorough consideration. A central component of selected Alternative 32B is the comprehensive mitigation plan, developed because the selected alternative directly uses wetlands, for which a CWA permit is required, and Section 4(f) historic property. The mitigation plan largely explains the unique situation presented here where the alternative that directly uses wetlands and historic property is environmentally preferable and has less adverse effects on the resources in the long term, when secondary and cumulative impacts

are considered, than would the alternative that avoids use of the 4(f) property, 42A.

The Corps' NEPA analysis, adopted by FHWA, considered an adequate range of reasonable alternatives and provided sufficient reason to reject Alternative 42C. Noise impacts and safety were properly analyzed and adequately discussed under NEPA. The cost estimate in the FEIS for Alternative 32B is correct and includes the costs of wetland mitigation.

FHWA reasonably concluded, based on an accumulation of factors, that 42A is not a prudent alternative that avoids direct use of Section 4(f) property. Foremost among them is that the secondary and cumulative effects associated with 42A, combined with the benefits of the 32B mitigation plan, result in Alternative 32B having less adverse impacts in the long term to the historic property and wetlands than the avoidance alternative, 42A. Under the avoidance alternative, 42A, the adjacent roads remain where they are and over time increased traffic on those roads and foreseeable development in the vicinity is expected to create more noise to the historic property and harm to the wetlands than the selected alternative, 32B, as mitigated. FHWA also appropriately considered and had a rational basis for finding that 42A does not serve the project purposes of safety and alleviating congestion on local roads as well as 32B; 42A has greater

floodplain and floodway impacts; and 42A would accelerate development south of the Wakarusa River and is inconsistent with current land and transportation plans. In addition, Alternative 32B provides net benefits and costs less than 42A.

Plaintiffs fail to carry their burden of demonstrating that FHWA's rationale and determination is arbitrary and capricious. Plaintiffs' disagreements with FHWA's assessment and expert judgment on particular issues do not provide a basis for invalidating FHWA's decision.

ARGUMENT

I. STANDARD OF REVIEW

When, as here, a district court's decision is based on its review of the administrative record, this Court reviews the agency action under the APA "independently, giving 'no particular deference to the district court's review of an agency action.'" *Forest Guardians v. U.S. Fish and Wildlife Service*, 611 F.3d 692, 710-11 (10th Cir. 2010) (quoting *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999). Judicial review of FHWA's compliance with NEPA and Section 4(f) is governed by 5 U.S.C. § 706(2)(A), under which the Court determines whether FHWA's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Judicial review under the arbitrary and capricious standard is narrow and deferential. *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009); *National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). The reviewing court must not set aside an agency's decision unless it "'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). A reviewing court must be especially deferential to the agency when examining technical or scientific matters. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989); *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010).

A court is not to substitute its judgment for that of the agency and should "'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *F.C.C.*, 129 S. Ct. at 1810 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974); *accord Citizens to Preserve Overton Park v. Volpe* ("*Overton Park*"), 401 U.S. 402, 416 (1971).

Moreover, the APA provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706.

An agency's decision is entitled to a presumption of regularity and validity. *See Overton Park*, 401 U.S. at 416; *Morris*, 598 F.3d at 691; *Forest Guardians*, 611 F.3d at 711. The burden of proof rests with the party who challenges the agency action. *Id.*; *Morris*, 598 F.3d at 691.

The role of the court in reviewing compliance with NEPA is simply to ensure that the agency has adequately considered and disclosed the environmental impacts of its action. *Morris*, 598 F.3d at 690. The reviewing court's objective is not to "fly speck" the environmental impact statement, but rather, to make a "pragmatic judgment whether the [environmental impact statement]'s form, content and preparation foster both informed decision-making and informed public participation." *Custer County Action Ass'n*, 256 F.3d at 1035 (quoting *Colorado Envt'l. Coalition*, 185 F.3d at 1172) (internal citations omitted). This Court applies "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 decisionmaking and informed public comment." *Utahans for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002).

This Court has stated that in evaluating FHWA's compliance with Section 4(f), it must (1) "be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems"; (2) "decide whether the Secretary's ultimate decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"; and "determine whether the Secretary's action followed the necessary procedural requirements." *Comm. To Preserve Boomer Lake Park v. Dept. of Transp.* ("*Boomer Lake Park*") , 4 F.3d 1543, 1549 (10th Cir. 1993) (internal quotation marks and citations omitted).

FHWA's NEPA compliance and Section 4(f) determination should be upheld under these standards.

II. FHWA COMPLIED WITH NEPA

Plaintiffs contend that FHWA violated NEPA because it failed to adequately consider noise impacts, Alternative 42C, mitigation costs for 32B, and safety. None of these claims has merit.

A. FHWA Adequately Considered Noise Impacts

Plaintiffs argue (Br. 27) that FHWA violated NEPA because existing noise levels and predicted traffic noise levels from the alternatives allegedly were not determined as required by FHWA regulations pertaining to noise abatement, 23 C.F.R. § 772.5(g) & 772.9(b) (2010). To the contrary, FHWA relied on a supplemental noise analysis that complies with the Part 772 regulations and the FHWA's consideration of noise impacts is adequate under NEPA. Indeed, throughout the Corps' and FHWA's review of the proposed project, noise impacts, especially impacts to the Farm Property/Baker Wetlands, received particular attention, as evidenced by the substantial measures included in the selected alternative to mitigate noise impacts.

1. Part 772 Noise Abatement Regulations.

FHWA's Part 772 regulations, 23 C.F.R. Pt. 772, are not regulations implementing NEPA. Rather, the Part 772 regulations were promulgated pursuant to the Federal-Aid Highway Act of 1970, which requires the Secretary to develop and promulgate standards for highway noise levels compatible with different land uses and provides FHWA may not approve the "plans and specifications" for a federal-aid highway unless the project includes adequate highway traffic noise

abatement measures to implement the appropriate noise level standards. 23 U.S.C. § 109(i); 23 C.F.R. § 772.13(a)(2010).

The purpose of a traffic noise analysis under Part 772 is to determine whether consideration of noise abatement measures may be required. If a "traffic noise impact" is identified, noise abatement measures must be considered, but noise abatement measures are not required unless they are reasonable and feasible. App. 1268. A "traffic noise impact" "occur[s] when the predicted traffic noise levels approach or exceed the noise abatement criteria [set forth in the regulations][11] or substantially exceed the existing noise levels." 23 C.F.R. § 772.5(g), 772.11(c). KDOT's policy for defining a substantial increase in existing noise levels is as follows: an increase of 5dBA (decibels A-weighted) or less has no impact, an increase from 6-10 dBA is minor, an increase from 11-15 dBA is moderate, and an increase over 15 dBA is severe. App. 651, 799.

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[11] The Part 772 regulations set noise abatement criteria ("NAC") for five categories of land and land use activities. 23 C.F.R. Part 772, Table 1. There is no criteria for undeveloped land, excepting land in category A on which serenity and quiet are of extraordinary significance and serve an important public need and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose. *Id.*; App. 1268. The noise abatement criteria do not define a level of acceptable noise. Rather, they can be used to determine when "traffic noise impacts" occur and thus noise abatement measures should be considered, but noise abatement criteria need not be met in every instance.

A traffic noise analysis pursuant to 23 C.F.R. § 772.9 consists of identification of land use on "developed lands and undeveloped lands for which development is planned, designed and programmed"; measurement of existing noise levels, prediction of future design year noise levels, and identification of traffic noise impacts to sensitive receivers adjacent to the project. *Id.*; *see* App. 1267. Noise abatement analysis is generally not required for undeveloped land. App. 1268; 23 C.F.R. § 772.9(b); 23 C.F.R. Pt. 772, Table 1; *supra* at 24 n.11.

2. FHWA's Consideration of Was Adequate Under NEPA

During the Corps' NEPA process, a supplemental traffic noise analysis was performed in accordance with FHWA and KDOT policies. App. 616, 798,1244, 1268. Land use was identified. The majority of the developed land use was in categories B or C of the noise abatement criteria. *See* App. 617, 651, 1244; 23 C.F.R. Pt. 772 Table 1. The southern part of the HINU campus was considered Category A, a category for noise sensitive areas. App. 617, 651, 1244; *see supra* at 24 n.11. Existing noise levels were measured in the field during September 2001 at 13 locations identified as noise sensitive areas or areas having a potential to be impacted by the proposed road. App. 616; *see also* App. 1244. Existing noise levels in the project area ranged from 51.1 to 64.1 dBA. App. 617, 1244. Noise levels for 32B, and 42A and for future conditions under the no action

alternative were determined by modeling. App. 652. The existing and predicted noise level data is included in the supplemental noise analysis, along with computations of the increase or decrease in noise levels at various locations. App. 799-800; App. 806-810. The FEIS and Section 4(f) Evaluation also disclose the areas in which predicted noise levels would exceed 57 dBA, the lowest threshold for consideration of noise abatement under the noise abatement criteria. App. 599-601, 697, 1268-69; 23 C.F.R. pt. 772, Table 1. Noise walls were proposed for 32B along both sides of the SLT where it traverses the Farm Property during the National Historic Preservation Act process as one of measures to resolve adverse effects on the historic property that would occur in the absence of mitigation. App. 562, 1364.

The body of the FEIS and the Section 4(f) Evaluation discuss and summarize noise impacts in non-technical terms, as is appropriate under NEPA. *See* 40 C.F.R. § 1502.7, 1502.8; App. 616-617, 651-52, 1267-69. They explain that noise impacts to Baker Wetlands and the HINU campus are greatest for the no action scenario due to increased traffic on adjacent roadways and foreseeable development. App. 652, 1267-69. Alternative 42A would not have direct noise impacts to the Farm Property; however, in the future, increased traffic on adjacent Haskell Avenue, Louisiana Street, and 31st Street will increase noise levels on the

Farm Property over existing levels. App. 646, 652, 1268. The FEIS states that direct noise impacts to the undeveloped areas traversed by 42A would be significant due to introduction of a highway in an area with little development and minimal traffic noise. App. 652. (As noted above, Part 772 noise abatement generally need not be considered for undeveloped land.) Without noise walls, the 32B alignment would have a potentially significant impact on noise-sensitive adjacent areas, HINU and Baker Wetlands. App. 1268. However, with noise walls and other mitigation measures, this route produces the least noise impact on HINU and Baker Wetlands. App. 563, 652. *See also* App. 932. The noise analysis and discussion in the FEIS and Section 4(f) Evaluation satisfy NEPA.

Ignoring all this, Plaintiffs seize on sentences in the supplemental noise study, stating that "[d]ue to the conceptual nature of this project, the predicted noise levels were not compared to the existing noise levels. However, when an alignment is selected these noise levels will be compared and any additional impacts will be identified." App. 799. To the extent this passage suggests there was no determination of existing and predicted noise levels, it is obviously incorrect because the report elsewhere states that existing and predicted noise levels were determined for various locations, and the report provides the data for

existing and predicted noise levels and quantifies the change, *i.e.*, a type of comparison. App. 798-810.

The supplemental noise study appropriately indicates that additional study and consideration of noise abatement measures will occur following selection of an alignment and definition of a centerline. App. 798, 801. The statute and regulations provide that FHWA may not approve "plans and specifications" unless adequate noise abatement measures are included. Approval of plans and specifications occurs after selection of an alignment and design of the roadway. *See* 23 C.F.R. § 772.11(g); *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 991-92 (D. Tenn. 1981). At the FEIS stage, the project sponsor need only identify "[n]oise abatement measures which are reasonable and feasible and which are likely to be incorporated in the project." 23 C.F.R. § 772.11(e) (2010). Here, the FEIS identifies noise abatement measures, such as noise walls and road relocations for 32B, that will be incorporated in the project. App. 652.

Plaintiffs also rely (Br. 28) on the district court's statement that "[b]y not comparing existing noise levels with the NAC [noise abatement criteria] or with predicted future noise levels for each alternative, FHWA did not comply with the noise study requirements contained in 23 C.F.R. Part 772." App. 384. With all due respect, the district court's conclusion in this regard is incorrect for the

reasons explained above. The district court acknowledged (App. 360, 382) that existing and predicted noise levels and increase-over-existing noise levels were in fact determined and disclosed, but suggests that the record does not evidence that FHWA considered this data. App. 383-84. However, FHWA adopted the FEIS that included the noise data and the Section 4(f) Evaluation states that FHWA's analysis of noise impacts was based on the supplemental noise study which included the data. App. 1269. Furthermore, noise abatement measures were considered and incorporated into the project. This is sufficient evidence that FHWA adequately considered noise impacts under NEPA. App. 1268.

At any rate, the district court held that the deficiency it perceived in compliance with Part 772 noise study requirements was not prejudicial.[12] That is certainly correct. Noise abatement measures for the noise sensitive areas, HINU and Baker Wetlands, were considered and adopted for 32B.[13] And, as the district

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[12] Plaintiffs assume (Br. 29-30) that if the noise analysis does not strictly meet the requirements of Part 772, there is necessarily a NEPA violation and then suggest that a NEPA violation cannot be harmless error. However, the APA states that the reviewing court shall take due account of the rule of prejudicial error and many courts have held that a NEPA deficiency can be harmless error. *See, e.g., Save our Heritage v. FAA*, 269 F.3d 49, 59-62 (1st Cir. 2001); *Laguna Greenbelt v. U.S. DOT*, 42 F.3d 517, 527 (9th Cir. 1994).

[13] Plaintiffs assert (Br. 31) that the noise analysis for 32B is deficient in geographic scope because it focuses on the Farm Property portion of the route. However, in the administrative process, Plaintiffs too focused their attention on

court noted, Plaintiffs did not identify any noise abatement measures for 42A that under Part 772 should have been, but were not, considered. App. 385.

B. Further Study of Alternative 42C Is Not Required

Plaintiffs argue that FHWA violated NEPA and 40 C.F.R. § 1502.14(a) because their proposed Alternative 42C was allegedly eliminated without explanation and because the FEIS failed to evaluate this alternative as a formal alternative in the same detail as Alternatives 32B and 42A. Br. 32. Plaintiffs' argument is without merit.

Under NEPA, consideration need only be given to "reasonable" alternatives. 40 C.F.R. § 1502.14; *see also Custer County Action Ass'n*, 256 F.3d at1039-1040. "'NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or ... impractical or ineffective.'" *Id*. (quoting *Colorado Envt'l. Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999)(quotation marks and citations omitted)). A rule of reason guides the degree to which an alternative should be considered, or whether an alternative should be considered at all. *Custer County Action Ass'n*,

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the Farm Property and they have not demonstrated that they would be prejudiced by noise in other areas traversed by 32B. In any event, land west of the Farm Property is largely undeveloped and thus noise abatement need not be considered. Noise abatement for isolated receivers will be considered in the design phase.

256 F.3d at 1040. Ultimately, "'[w]hat is required is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned.'" *Id.*, at 1039-40 (quoting *Colorado Envt'l. Coalition*, 185 F.3d at 1174).

The regulation on which Plaintiffs rely, 40 C.F.R. § 1502.14(a), requires brief discussion of the reasons for eliminating reasonable alternatives from detailed study in an EIS. The regulation does not, however, require a discussion of alternatives eliminated during the NEPA scoping process, which is a preliminary stage in the NEPA process for the purpose of identifying and narrowing issues and alternatives to be discussed in the draft and then final EIS. *See* 40 C.F.R. § 1501.7. In this case, approximately 27 potential alignments within the five conceptual corridors were considered during the scoping process. Among these was an alignment within the 42nd Street corridor similar to the 42C alignment later proposed by the Tribe. However, this alignment (along with 14 others) was rejected in the scoping process – before issuance of the draft EIS – because other alignments within the 42nd Street corridor were better suited to meet highway design standards.[14] App. 1013. In short, during the scoping process, the

[14] Citing a map in the FEIS titled "Concept Corridors," Plaintiffs suggest (Br. 9) that the 42C alignment was carried through for consideration in the FEIS. However, other maps in the FEIS show the specific alignments that were under

Corps and KDOT determined that an alignment similar to the Tribe's 42C proposal was not a reasonable alternative. Accordingly, there was no requirement to discuss with particularity in the EIS the reasons for eliminating it.

In any event, the Corps provided an explanation for rejecting 42C. Although the Tribe did not propose 42C until after publication of the FEIS, the Corps carefully considered the Tribe's proposal and met with the Tribe's representative. *See* App. 973-982, 995-96, 1005-1009, 1010-11, 1021-1027; Suppl. App. 61-64. The Corps concluded that the EIS provided a reasonable range of alternatives and that a full-blown analysis of Alternative 42C was not warranted for reasons explained in letters to the Tribe (included in the Corps' ROD) and in the response-to-comments section of the Corps' ROD.[15] App. 968-982, 1002-04, 1012-1020. In a July 16, 2003, letter, the Corps stated that the 42C alignment

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consideration. App. 570-591. For the 42nd Street corridor, the alignments were Alternatives 42A and 42B. App. 590-91.

[15] The fact that the Corps' explanation for rejecting 42C appeared in the ROD, and not in the FEIS itself, does not render NEPA analysis inadequate or require supplementation of the EIS. As noted, the Tribe did not propose Alternative 42C until after the FEIS issued. "Forcing the Agency to continually re-draft the final EIS simply to duplicate an explanation that is provided in the ROD 'would render agency decision-making intractable, always awaiting updated information . . . .'" *Friends of Marolt Park v. U.S. Department of Transportation*, 382 F.3d 1088, 1096 (10th Cir. 2004) (quoting *Marsh*, 490 U.S. at 373).

> would increase traffic accident risks due to increased curvature of the road. In addition, construction of a combination of bridges and short earthen fills to accommodate your proposal would further degrade traffic safety due to ramping up and down from the bridges and short fill segments. Such conditions are undesirable and are substantially more dangerous than the 42d Street Alignment A described in the Draft and Final EIS.

App. 1014.

The Corps also explained that there was not a sufficient difference between 42A and 42C with respect to impacts other than cost to warrant a separate in-depth analysis of the 42C alignment. App. 974-75,1014. NEPA does not require an EIS to consider an alternative "unless it is significantly distinguishable from the alternatives already considered." *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 709 (10th Cir. 2009).[16] The Corps remained of the view that Alternative 32B is environmentally preferable and better satisfies the overall public interest. App. 974-75,1014.

Finally, the Corps explained that 42C would not achieve the $19 million cost savings claimed by the Tribe. App. 1013. The Tribe's cost estimate assumed a two-lane roadway with two-lane bridges for 42C. However, the project will ultimately be four-lane roads and bridges and the relevant cost estimates for

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[16] *See also Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990); *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 871 -872 (9th Cir. 2004).

Alternatives 42A and 32B, used in the Tribe's comparison, were for four-lane bridges and roadway. App. 973-982, 1013. The Tribe's proposal and cost estimate were flawed for the further reason that its alignment failed to avoid encroachment onto Lawrence City Park and school land, failed to provide a safe approach to the Wakarusa River flood plain bridges for westbound traffic, and failed to properly align with the K-10/Noria Road interchange. App. 976, 1013. After correcting the alignment and using the same criteria as the other alternatives, KDOT and the Corps estimated that 42C would result in savings of only approximately $5.3 million. App. 1014.

Plaintiffs assert that the Corps found Alternative 42C "is reasonable" and argue that NEPA therefore requires development and analysis of this alternative to a comparable level of detail as Alternatives 32B and 42A. Br. 10-11, citing App. 976; *see also* Br. 33. However, the context of the Corps' comment does not support Plaintiffs' conclusion. In the administrative process, the Tribe complained about KDOT's redrawing of Tribe's proposed alignment, claiming that KDOT had deliberately misdesigned the alignment in order to sabotage its proposal. App. 975, 1023. The Corps responded by explaining why the proposed alignment had to be redrawn and by stating it was "satisfied that the alignment redrawn by KDOT is reasonable and that it reflects appropriate roadway design." App. 976. The

Corps thus found that KDOT's redrawing of the alignment was reasonable, not that in other respects the alternative was a reasonable alternative warranting further study as a separate alternative.

In sum, Alternative 42C was appropriately eliminated and did not warrant further analysis. The no action, 32B, and 42A alternatives provided a range of alternatives with sufficient differences to provide a reasoned choice. NEPA requires no more.

C. The FEIS's Cost Estimate for Alternative 32B Includes Wetland Mitigation Costs

Plaintiffs argue (Br. 12, 34-35) that FHWA violated NEPA because the $18.6 million cost estimate for Alternative 32B's mitigation plan, set forth in FEIS Table 2-18 (*see* App. 551), supposedly omitted roughly $10 million of wetland mitigation costs for (1) acquisition and conversion of 317 acres to tall, grass, wet meadow, or woodlands; (2) removal of 31st Street; (3) construction of a wetland center, trails, parking, camping areas, and street, utility and drain improvements in the Baker Wetlands; and (4) funding for an annuity for Baker University's administration and maintenance of the wetlands. Plaintiffs point to (Br. 12 n.37) a footnote to the Table stating that the $18.6 million estimate "includes relocation of 31st Street, Haskell Avenue and Louisiana Street, as well as noise walls and

additional landscaping." App. 551 n.12. Plaintiffs paraphrase the footnote as saying that the $18.6 million estimate "only" includes these elements, Br. 12 n.37, but the word "only" does not appear in the footnote.

And, in fact, the $18.6 million estimate included costs of wetland mitigation measures that Plaintiffs assert were omitted.[17] The FEIS elsewhere describes all of the mitigation elements for Alternative 32B and states that the "total estimated cost of mitigation" is $18.6 million. App. 663, 665. Spreadsheets included in an appendix to the FEIS indicate that the cost of the road relocations, noise walls, and additional landscaping (*i.e.*, those mitigation measures mentioned in the footnote to Table 2-18) would be approximately $10.1 million – not the $18.6 million that Plaintiffs' argument assumes.[18] Wetland mitigation costs account for the remaining $8.5 million. The FEIS includes a contract between KDOT, Baker University, and Douglas County, Kansas, that obliges KDOT to make payments of

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[17] As explained *infra* at 46-47, FHWA made errors during preparation of the Section 4(f) Evaluation in recalculating the cost of 32B. However, the errors effectively cancelled each other out and thus the $19 million spread between the costs of 32B and 42A in the Section 4(f) Evaluation (AR 1272) was roughly correct.

[18] The cost of bridges for relocated roads is included within a separate cost category for bridges. The bridge cost estimate for 32B ($25.6 million) is for 297,000 square feet, which includes bridges for relocated roads. App. 551, 772; Suppl. App. 174-75.

approximately $5 million for many of the measures that Plaintiffs claim were overlooked, including funds for wetland conversion and habitat establishment, educational facility, maintenance, camping sites, parking facilities, and maintenance. Suppl. App.1-17.

FEIS Table 4-11 and accompanying text further evidence that the $18.6 million estimate for 32B mitigation includes the wetland mitigation elements. App. 663-65. The FEIS sets forth estimated mitigation costs for five potential alternatives within the 32nd Street Corridor. All of these alternatives included the same basic wetland mitigation plan consisting of the key elements which Plaintiffs claim were omitted. App. 663. The total mitigation costs for the alternatives varied, however, depending on their inclusion of additional mitigation measures. For example, Alternative 32E included only the basic wetland mitigation plan and the estimated mitigation cost for this alternative was $8.48 million. Alternative 32C, which was estimated to cost $15 million, included the basic mitigation plan and removal of 31st Street and relocation of both Haskell and Louisiana Streets, but no noise wall. App. 663, 665. Alternative 32B includes all of 32C's elements plus noise walls and additional landscaping. App. 553, 663, 665. The mitigation cost estimate for 32B is correspondingly higher, $18.6 million. App. 551, 663, 665. In this context, the statement in footnote to FEIS

Table 2-16 is properly understood as a clarification that the additional elements, beyond the basic wetland mitigation plan, were reflected in the cost estimate.

The FEIS did not, as Plaintiffs claim, understate by a magnitude of $10 million the mitigation costs of 32B.

D. The Discussion of Safety Is Adequate

The analysis of safety in the FEIS and Section 4(f) Evaluation satisfies NEPA. App. 641-42,1271. The FEIS and Section 4(f) Evaluation explain that the existing K-10 connector streets have high numbers of accidents because there is too much volume of traffic for the capacity of the road and because access is uncontrolled. App. 507-508, 1215. To address these issues, an alternative had to offer a limited access connection capable of handling predicted traffic volumes. App. 1215. In the FEIS, safety improvements were measured in terms of numbers of accidents: Alternative 32B was predicted to result in 120 fewer accidents than existing conditions and 42A would result in 108 fewer accidents by the year 2025. App. 548.

Plaintiffs assert that the FEIS is defective because it does not also disclose an accident rate (number of accidents per vehicle miles) for each alternative. Br. 35. Plaintiffs suggest (Br. 35) this disclosure must be made in the FEIS because the FEIS and Section 4(f) Evaluation state that in order to meet the purpose and

need, an alternative "must yield a predicted collision rate at or below the statewide average for similar facilities." App. 509, 1219. But that criterion does not translate into an obligation to report in the FEIS a specific accident rate for each alternative. It is enough for NEPA purposes that Alternatives 42A and 32B were both found to meet minimally the purpose and need, and to disclose the reduction in number of accidents for each of these alternatives. App. 527, 1233; *see also* App. 483. *Cf. Forest Guardians v. U.S. Forest Service*, 495 F.3d 1162,1172-73 (10th Cir. 2007) (NEPA imposes no obligation to use precise phrasing). The discussion of safety and traffic accidents in the FEIS provides a reasonable, good faith, objective presentation of the topic that fosters both informed decision-making and informed public participation. That is all that NEPA requires. *Id*.

III. FHWA REASONABLY DETERMINED THAT 42A IS NOT A PRUDENT ALTERNATIVE

A. FHWA May Find an Alternative Imprudent Based on an Accumulation of Individually-Minor Factors

Plaintiffs argue that FHWA "violated the *Overton Park* standard of imprudence" because FHWA did not find a "single, solitary unique problem for 42A" and instead relied on "minor variations or normal aspects" of 42A. Br. 38. However, FHWA's regulations provide – and this Court, as well as others, have

held since *Overton Park* – that FHWA may conclude (as it did in this case) that an avoidance alternative is imprudent based on the cumulative weight of minor factors, even though no single factor alone is sufficient justification to find an alternative imprudent. 23 C.F.R. § 774.17; *Boomer Lake Park*, 4 F.3d at 1550; *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 163 (4th Cir. 1990) (combination of small problems may add up to a sufficient reason to use 4(f) lands); *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 804, 805 (7th Cir.1987) (same).

In *Safeguarding the Historic Hansom Area's Irreplaceable Resources, Inc. v. Federal Aviation Administration*, __ F.3d __, 2011 WL 2685748 (July 12, 2011), the First Circuit rejected an attempt, similar to Plaintiffs' attempt here, to convert phrases from *Overton Park*, such as "truly unusual," "extraordinary," and "unique" into a broad, inflexible requirement. The court explained: "Those descriptive terms were never meant to displace the statutory directive that the agency determine whether an alternative is 'prudent.'" *Id*. at *4. Similarly, the Seventh Circuit explained in *Eagle Found., Inc.*, that the mention of "unique" problems in *Overton Park* merely indicated emphasis, not a substitute test for prudent and feasible. 813 F.2d at 804-05. Otherwise, the Supreme Court's

application of the arbitrary and capricious standard – one of the most deferential standards of review of agency action – would be rendered meaningless. *See id.*

Thus, Plaintiffs' word play in labeling drawbacks of 42A as "normal" or "usual" does not wash. Br. 43, 47. It is the reasonableness of the agency's judgment that 42A is not prudent that matters, not magic words. *Cf. Boomer Lake Park*, 4 F.3d 1543, 1550-51 (10th Cir. 1993) ("mechanical use" of the words "feasible and prudent" is not necessary to demonstrate the substantive merit of agency's analysis); *Hickory*, 910 F.2d at 162 (fact that agency did not use the terms "unique" and "extraordinary" did not compel a finding that agency violated 4(f)); *Eagle Found., Inc.*, 813 F.2d at 804-05 (same).

In this case, FHWA reasonably concluded that 42A is not prudent based on "an accumulation of factors that collectively rather than individually have adverse impacts that present unique problems." App. 1279. Plaintiffs attack FHWA's findings for each of seven factors discussed in the FHWA's Section 4(f) Evaluation, but their arguments fall far short of carrying their burden of demonstrating that FHWA's Section 4(f) determination is arbitrary and capricious.

B. FHWA Reasonably Found That 42A Does Not Meet the Purpose and Need for the Project As Well As 32B Does

FHWA determined that 32B better meets the purpose and need of the project because it would divert more traffic from local streets, thereby improving safety and relieving congestion on the local streets, and would result in fewer accidents than 42A. App. 1271-72. Plaintiffs dispute FHWA's factual finding that 32B would divert more city traffic and argue that it was unlawful for the FHWA to consider that there would be a higher number of accidents under 42A. Both arguments are meritless.

Plaintiffs argue that FHWA was wrong, as a factual matter, in concluding that 32B would divert more city traffic than 42A. Br. 39-40. Petitioners' factual claim that 42A would divert more city traffic than 32B is based on self-generated tables (attached to their brief at A-64 and A-66) that were never submitted to FHWA during the administrative process and were created by Plaintiffs for use in this litigation.[19] Plaintiffs' tables manipulate data using an inappropriate methodology that also fails to take into sufficient consideration that a primary project purpose is to facilitate east-west movements. Plaintiffs simply add up data

[19] The table at A-64 was submitted in district court as Exhibit 5. App. 1531-37, 1547-51. The district court treated Exhibit 5 as argument, not evidence, and thus denied the appellees' motion to strike that exhibit. App. 390 n.38. The district court did not address the exhibit at A-66.

predicting the volume of traffic on segments of certain roads. Under their summation methodology, a single vehicle can be counted multiple times. App. 189. For example, one vehicle making a single trip driving down 23d Street and Haskell would be counted as 5 vehicles because it traverses 5 data segments along those routes. App. 189.

Plaintiffs' approach is inappropriate for the further reason that it does not take into sufficient account that a primary project purpose is to help solve east-west movements, for which there is currently a shortage of routes. One of the goals of the SLT is to help solve east-west movements because there is a shortage of east-west routes in Lawrence. While there are numerous north-south routes (6 routes) in the locality that disperse traffic flows in the north-south direction across the local road network, the only arterial that travels east-west through Lawrence is 23d Street (K-10). App. 189-90. This street is at capacity now and will be over capacity in 2025. App. 190, 1214.

Based on an appropriate analysis, FHWA reasonably concluded that Alternative 32B would better serve the project purpose of alleviating congestion on the local traffic network and facilitating east-west movement. The analysis shows, for example, that traffic volumes on 23d Street from Louisiana to Haskell are predicted to be 2,400 less vehicles per day for 32B than for 42A alternative.

This indicates that more local traffic would use 32B (because it is closer to Lawrence) than would use 42A. App. 189-190. The traffic analysis also shows a higher volume of vehicles on Haskell Avenue between 31st Street and the proposed interchange with K-10 under 32B than for 42A. App. 190, 274. This data further evidences that more local traffic would use the SLT under 32B than under 42A. App. 189, 274. Overall traffic volumes are higher for 32B than for 42A because more local traffic would use 32B. App. 189.

Plaintiffs' argument boils down to a disagreement with FHWA's methodology and expert judgment. This is not a sufficient basis on which to invalidate FHWA's Section 4(f) determination. *Boomer Lake Park*, 4 F. 3d at 1553. "Courts are not in a position to decide the propriety of competing methodologies in the transportation analysis context, but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors." *Boomer Lake Park*, 4 F.3d at 1553. This Court has repeatedly recognized that "agencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious." *Colorado Envt'l. Coalition*, 185 F.3d at 1173 n.12; *Custer County Action Ass'n*, 256 F.3d at 1036; *see also Marsh*, 490 U.S. at 378; *City of Bridgeton v. Federal Aviation Admin*., 212 F.3d 448, 459 (8th Cir. 2000).

Plaintiffs next assert that it is "illegal" for FHWA to have considered that Alternative 32B would result in fewer accidents (while carrying more vehicles) than 42A. Br. 43. Plaintiffs contend that 42A would produce more accidents because it is a longer route than 32B and that, as a matter of law, *Overton Park* precludes FHWA from considering a factor that is the result of an avoidance alternative's longer length. Plaintiffs' argument is meritless.

Overton Park does not hold that FHWA may not consider a factor if it bears a relationship to the longer length of an avoidance alternative. The Supreme Court observed that "in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible" and "if Congress intended these factors to be on equal footing with preservation of parkland, there would have been no need" for Section 4(f). The Court continued: "Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary." *Overton Park*, 401 U.S. at 412. Furthermore, in a decision applying *Overton Park*, this Court upheld an imprudency determination based on an accumulation of minor factors, including safety. *Boomer Lake Park*, 4 F.3d at 1550; *see also Eagle Found., Inc.*, 813 F.2d at 804, 810.

Reduction of accidents and fatalities is one of the primary goals of the United States Department of Transportation and FHWA generally, and among the purposes of this project specifically.[20] It is thus entirely appropriate for FHWA to consider this issue.

In sum, FHWA reasonably concluded that 32B better meets the purpose and need of the project.

C. Alternative 42A Costs More Than 32B

As explained *supra* at 35-37, the Corps' cost estimate for Alternative 32B in the FEIS included all of the wetland mitigation elements. The FEIS disclosed that overall 32B would cost approximately $18.3 million less to construct than 42A and 32B will cost less to operate and maintain. App. 551-52; *see also* App. 930.

In the Section 4(f) process, the cost estimates for 32B and 42A were reviewed and updated, primarily by a FHWA consultant. App. 1242. While costs for both alternatives had risen, the difference in cost between 32B and 42A in the Section 4(f) evaluation was found to be approximately $19 million, roughly comparable to the $18.3 million differential in the FEIS. App. 551, 1272. While two key errors were made in calculating the cost of 32B during the FHWA's

[20] *See* www.dot.gov/stratplan2011/dotstrategic plan.pdf at 3.

review, they were essentially a wash, making the cost differential in the Section 4(f) Evaluation substantially correct.

The first error was that the approximately $8.5 million for the wetland mitigation features were omitted from the $22.1 million estimated mitigation costs. App. 1183-85. The second error was that approximately $8 million in bridge costs were double-counted within the total cost for 32B. As explained *supra* at 36 n.18, the Corps' cost estimate for 32B bridges was based on 297,000 square feet, an area that included the bridges associated with road relocations. The bridge cost estimate in the Section 4(f) Evaluation was also based on 297,000 square feet. Suppl. App. 251, 256-57; App. 1272. However, approximately $8 million in bridge costs associated with road relocations were added to the mitigation cost category and no corresponding deduction was made to the bridges cost category. App. 1183-85,1188, 1272; Suppl. App. 227-30, 256-57, 261.

While these computational errors are regrettable, they are not fatal. This Court has held that when "an agency relies on a number of findings, one or more of which are erroneous, we must reverse and remand only when there is a significant chance that but for the errors the agency might have reached a different result." *National Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1533 (10th Cir. 1993); *see also National Petrochemical & Refiners Ass'n v. E.P.A.*, 287

F.3d 1130, 1147 (D.C. Cir. 2002) (assuming the agency had missteps in its calculations, the burden is on the challenger to demonstrate that the agency's ultimate conclusions are unreasonable). Here, there is no significant chance that FHWA might have reached a different decision but for the computation errors because the errors essentially cancel one another, and do not significantly change the total estimated cost of 32B or the differential between the costs of 32B and 42A. Furthermore, cost was not a determinative factor in finding 42A imprudent.

The district court decided that because FHWA's recalculation of mitigation costs was erroneous, it would not consider this factor in determining that FHWA could reasonably conclude that 42A was imprudent. App. 394. The court then correctly held that cost was not the single determining factor in FHWA's Section 4(f) Evaluation and that FHWA's selection of 32B was proper even without considering costs. App. 394, 406.

This Court should affirm the FHWA's consideration of cost because the computational errors did not substantially effect the overall difference in cost between the two alternatives. In the alternative, the Court should affirm the district court's conclusion that selection of 32B is proper without considering cost.

D. Alternative 42A Has Greater Floodway and Floodplain Impacts

FHWA appropriately took into account that although both build alternatives would result in floodplain impacts, 32B will have lesser impacts on the floodplain and floodway than 42A. App. 1272. Alternative 32B is located on the edge of the floodplain and does not cross the floodway (stream channel of the river).[21] The 42A alignment crosses the Wakarusa floodway in three places, requiring bridges at each of these crossings. App. 1272.

Plaintiffs baldly assert that the mere fact that 42A is constructed in, and occupies, the floodway and floodplain does not mean it impacts them and that 42A does not have flooding impacts because there would be bridges. Br. 45. But the record supports FHWA's conclusion that 32B has lesser impacts. Executive Order 11988 directs federal agencies "to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development where there is a practicable alternative." App. 658. Alternative 32B has the least potential to stimulate floodplain development and to impact beneficial floodplain values because that corridor is located along the northern edge of the Wakarusa

[21] The flood plain is the area inundated in a 100-year flood event. The floodway is the area within the floodplain that actually conveys flood water flows, and thus includes the stream channel and immediately adjacent area.

River's floodplain. App. 658-660. Alternative 42A has a higher potential to promote floodplain development and to cause negative impacts to beneficial floodplain values that include floodwater storage, diverse wildlife habitat such as wetlands, forestland and riparian zones, and recreational opportunities. App. 658-660; *see also* App. 668 ("Stream crossings and surface water runoff from construction sites have a high potential to impact water resources in the project area.") . The Corps concluded in its ROD that 42A "will have a significantly greater impact on the [Wakarusa] river and its riparian corridor than 32nd Street." App. 933.

Plaintiffs also suggest (Br. 45) that because 32B entails more construction-related loss of wetlands than 42A (58 acres for 32B compared to 4.45 acres for 42A), Alternative 32B should be the disfavored alternative. However, because of the CWA mitigation requirements, Alternative 32B results in a net increase of approximately 259 acres of wetland, which will expand and enhance the functioning of the Baker Wetlands complex, while 42A would result in a net increase of only 76 acres of wetlands. App. 661-664. Furthermore , the foreseeable cumulative impacts associated with 42A will likely result in the isolation and encapsulation of the Baker Wetlands in an urbanized setting that will translate into degradation of the long-term vitality of the currently-existing

wetland complex, and ultimately to wetland losses. App. 664, 934. The Corps, which is the agency with regulatory authority and expertise related to wetlands, concluded that 32B has the least overall impact on wetland resources when all relevant factors are considered, including construction-related wetland losses, future development-related wetland impacts, and the total increase in wetland acreage. App. 664. Accordingly, FHWA had a sound basis for finding that 32B is preferable with respect to floodplain/floodway and wetland resources.

E. Alternative 42A Would Accelerate Planned and Unplanned Development South of the Wakarusa River

FHWA appropriately considered that 42A would greatly increase the accessibility of the area south of the Wakarusa River and induce and accelerate residential and commercial growth in that area. App. 1248. In turn, this would accelerate infrastructure demand and consequent expense for local government related to development of streets, sewer, water, and other public utilities south of the River. App. 1272-75. Plaintiffs point out that growth effects for 42A would occur within the Lawrence urban growth area and suggest that growth in this direction is normal and expected. Br. 46-47. However, FHWA recognized that growth south of Wakarusa River will most likely occur at some point in the future, and found only that 42A would accelerate growth with attendant problems. App.

1265. Moreover, as FHWA also explained, regardless of when growth south of the Wakarusa River occurs, it will contribute to the secondary impacts of 42A discussed in Section III.E below. App. 1265, 1275.

FHWA also noted that 32B would have limited impact on development and is consistent with local land use and transportation plans,[22] all of which anticipate that the 32B alignment would be constructed. App. 1275. Alternative 42A is not consistent with those documents and major modifications would be required to incorporate 42A into the plans. App. 1275.

Plaintiffs suggest changing plans is no problem because the Lawrence-Douglas County Metropolitan Planning Organization ("MPO") opposed 32B by majority vote. Br. 47; App. 1416. Plaintiffs fail to mention, however, that the MPO proposed a wholly different approach to traffic issues than a 42nd Street alternative for the SLT. It proposed: (1) a bypass east of Lawrence to funnel K-10 traffic to Interstate 70; and (2) an arterial route along 31st Street, connecting it to the existing western leg of the SLT. App. 1416-17. However, as FHWA explained, an eastern bypass does not meet the purpose and need of the project and would require extensive bridging of the large floodplain and floodway of the

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[22] These include *Transportation 2025*, the preliminary *Transportation 2030* study, the amended *Horizon 2020 Plan*, and the *South Lawrence Trafficway Corridor Land Use Plan*. App. 1275.

Kansas River, which means excessive cost and environmental impacts. App. 1265, 1270. And, the other part of the Commission's proposal would place an arterial road on the HINU campus, which the proposed project sought to avoid, and would cross the Farm Property. *See supra* at 5-6.

Plaintiffs also suggest (Br. 47) that FHWA could not reasonably rely on information provided in a letter from the Douglas County Administrator (*see* App. 1429-34) because long-range planning authority rests with the Planning Commission. Regardless of the entity that has long-range planning authority, FHWA reasonably can expect the County Administrator to be knowledgeable about the County's plans and development. The County Administrator provided factual answers to questions posed by FHWA and Plaintiffs fail to demonstrate that this information is incorrect.

Notably, both the County and City Commissions expressed support for the 32nd Street as the most prudent route. App. 1349, 1473, 1477-78, 1498.[23] The

[23] Plaintiffs selectively quote from the record to suggest that the City opposed 32B. Br. 24 (quoting App. 1482). However, the quoted letter was later rescinded by the City Commission and replaced by a letter stating that the Commission "supports the construction and completion of the South Lawrence Trafficway (K-10) along the proposed and planned 32B alignment" and that the Commission believes the proposed 32B alignment project provides adequate environmental and cultural responses. App. 1477.

County is a signatory to the Memorandum of Agreement regarding mitigation for 32B and the City is a signatory to the contract with Baker University implementing the mitigation plan for 32B. App. 1477-78.

Plaintiffs fail to demonstrate that FHWA's consideration of 42A's effect on development south of the River was arbitrary and capricious.

F. Alternative 42A Has Greater Secondary and Cumulative Impacts on the Farm Property

The Corps and FHWA concluded that even though 42A would have no direct impact on the Farm Property, it would cause greater adverse secondary and cumulative effects in the long-term than Alternative 32B. App. 1248. In the long term, Alternative 42A would result in a substantial increase in traffic on the streets contiguous to the Farm Property/Baker Wetlands because 42A would not divert as much local traffic and would induce growth south of the River. Development in the vicinity of the Farm Property is also reasonably foreseeable if 42A were selected. Undeveloped land located immediately west of the Baker Wetlands is platted and may be subject to urban development if Alternative 32B is not constructed. App. 1276. Although some land adjacent to the Baker Wetlands is located within the 100-year floodplain and urban development in the floodplain is not recommended, development in the floodplain may be approved if it complies

with local floodplain regulations. App. 1276. Increased development in the vicinity of the Farm Property in turn would likely generate increases in local traffic on the adjacent streets. App. 1275-76. The traffic increases and development will increase noise, light, urban debris, and visual disturbances to the Bakers Wetlands. App. 1247-49, 1275-77. And, to accommodate traffic increases, it is foreseeable that these roads would be widened in their present locations on, or adjacent to, the Farm Property. App. 1265, 1275-76.

The mitigation plan for 32B eliminates or substantially tempers many of the secondary effects associated with 42A. Alternative 32B relocates Haskell Avenue and Louisiana Street and precludes development of land adjacent to the east and west sides of Baker Wetlands; this land would be converted to wetlands and conserved. Thus, under 32B, the core of the existing Baker Wetlands would be insulated from adverse environmental effects from the contiguous roads and from adjacent development. These measures, combined with the construction of noise walls along the SLT itself, mean that audible noise levels in Bakers Wetlands under Alternative 32B would be less than would occur under 42A or if no project were built. App. 1247-49.

Plaintiffs argue that FHWA "omitted significant direct impacts of 32B and grossly exaggerated the secondary impacts of 42A on the Haskell Farm." Br. 47.

First, Plaintiffs reiterate their contention that the noise study is defective. For reasons explained *supra* at 22-29, that contention is meritless.

Second, Plaintiffs argue that FHWA's analysis is arbitrary and capricious because in Table 6 of the Section 4(f) Evaluation for 32B (App. 1276), FHWA failed to include the number of vehicles on the SLT itself. Br. 48-49. The purpose of that table, however, is to show traffic levels on adjacent local streets as part of the explanation of secondary impacts, that by definition are impacts other than direct impacts from the SLT itself. Contrary to Plaintiffs' suggestion (Br. 48-49), the absence of traffic volume on the SLT in that particular table does not mean that FHWA failed to consider the SLT traffic. Among other things, FHWA explained that without noise walls, there would be a greater impact on noise sensitive areas of the Baker Wetlands and southern part of the HINU campus with Alternative 32B than with the no action or 42nd Street alternatives. However, with construction of noise walls and relocation of Louisiana Street and Haskell Avenue, the total audible disturbance associated with Alternative 32B will be less by the year 2025 than noise disturbances from adjacent roads under Alternative 42A. App. 1276-77.

Plaintiffs reason that when the number of vehicles on the 32B trafficway is added to the number of vehicles on segments of adjacent roads, there would a 49%

increase in number of vehicles on and near the Farm Property compared to the no-action level while 42A the traffic would result in a 11% decrease from the no-action level. Besides the double-counting flaw in Plaintiffs' summation approach (explained *supra* at 42-43), this reasoning fails to consider that under Alternative 32B, Haskell Avenue will be moved 1000 feet and Louisiana Street will be moved 2,500 feet away from the Farm Property. Distance from a noise source can have a large effect on noise levels whereas it takes a substantial change in traffic volumes to make any discernable difference in noise levels. App. 188. Plaintiffs' analysis also ignores the significant noise abatement for the SLT achieved with construction of noise walls.

Third, Plaintiffs argue that FHWA's analysis is fatally flawed because it omitted 38,000 vehicles on Haskell Avenue from Table 6 in the Final Section 4(f) Evaluation on a short segment (approximately 1/4 mile) of Haskell Avenue between 31st Street and the proposed interchange with SLT under the 32B Alternative. Br. 51. The omission in Table 6 of this figure was inadvertent and did not effect the substantive analysis. App. 189, 1197-99. The vehicles for this segment were included in the traffic demand model and noise analysis. App. 189. The district court thus correctly concluded that the inadvertent omission from Table 6 was harmless error. App. 398.

Fourth, Plaintiffs suggest that 32B would put commercial development pressures on land north of the Haskell Avenue/SLT interchange. Br. 51. The 4(f) Evaluation acknowledged the possibility of increased development near the 32B interchanges, but concluded development would have limited impact. App. 1275-76. Notably, some land east of Haskell Avenue is already in industrial and non-residential use and commercial development may simply replace an existing industrial site at the intersection of Haskell Avenue and 31st Street. App. 1275-76.

Fifth, Plaintiffs argue that FHWA ignored that construction of 32B would impact the Farm Property's historic integrity and eligibility for listing on the National Register. Br. 22-24, 51-52. However, FHWA considered this issue and concluded that while 32B uses part of land within the boundaries of the Farm Property, it does not affect any of the remaining physical characteristics that contributed to the eligibility of the property for the National Register. App. 1278-79. The Farm Property has effectively been bisected by 31st Street since the 1970s. App. 966, 1277, 1400. Although the proposed project requires an additional 40 acres (or less than 5%) of the 804-acre Farm property to be used for transportation (53 acres for the new alignment minus the 13 acres vacated by relocation of 31st Street), the project does not create an additional transportation corridor because existing 31st Street will be removed and relocated adjacent to the

SLT. App. 1279, 1400-01; Suppl. App. 183. The SHPO found 32B "avoids all bridges and water control gate structures that contribute to" the integrity of the Farm Property. Suppl. App. 184; *see also* App. 941, 966.[24] The Section 4(f) Evaluation also acknowledges that visual impacts may occur as a result of the noise walls, but concludes that the visual obstruction would be minimal because the walls would be located behind existing trees and, eventually an evergreen tree screen. App. 1277; *see also* App. 941-43.

In sum, Plaintiffs fail to demonstrate that FHWA's consideration and conclusions with respect to direct impacts of 32B and secondary and cumulative impacts associated with 42A was arbitrary and capricious.

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[24] Plaintiffs argue that FHWA arbitrarily ignored the National Park Service's comment that "the creation of any road through the wetlands or upper field would represent a great impact on the historic character of the former agricultural fields, physically and visually, cutting off the fields from the University structures." Br. 52 & 22 (quoting App. 1094). However, as FHWA, the SHPO, and others explained, there is already a road through the Farm Property; the project would not create an additional transportation corridor and the visual impacts are not significant. In any event, FHWA need only consider another federal agency's comments, it need not agree with them. *See Custer County Action Ass'n*, 256 F.3d at 1038. Plaintiffs also rely on the MPO's opposition to 32B, but its view on 32B's effect on historic integrity need not be treated as authoritative, particularly since the SHPO found otherwise.

G. Alternative 42A Has Other Environmental Impacts

FHWA noted in the Section 4(f) Evaluation that (1) 42A would impact 4 more acres of riparian woodlands and 8.6 more acres of uplands woodlands than 32B; (2) 42A would be situated near to the Oregon and California Historic Trail, including Blanton's Crossing, a site that the National Park Service urged be protected due to its importance as a trail resource and the historic importance of this area south of the Wakarusa in the history of western migration and "Bleeding Kansas"; and (3) 42A would use a corner of one property eligible for the National Register, Meair's Farmstead adjacent to the alignment, but adverse effect to the Meair's Farm property would be mitigated by vegetative screening. App. 1262, 1277. As the district court held, these environmental effects may be minimal, but FHWA did not act arbitrarily and capriciously in considering them. App. 401.

Plaintiffs argue that impacts to woodlands are wholly irrelevant. However, woodlands, particularly riparian woodlands, have environmental value and are thus a relevant consideration. Among other things, woodlands provide diversity for wildlife habitat and positively contribute to visual and noise quality. *See* App. 618, 658.

Plaintiffs suggest that there is no basis for consideration of Blanton's Crossing because there is no direct impact to that site and the State Historic

Preservation Officer concluded in 2001 that the Crossing was not eligible for the National Register of Historic Places. However, FHWA did not find there would be a direct impact, and its concern for indirect effects has a rational basis. In a 2006 letter to FHWA, the National Park Service – the agency with statutory responsibility for protection of historic trail resources and interpretation of trails pursuant to the National Trails System Act, 16 U.S.C. § 1241 *et seq*. – stated that the Crossing was located nearest to the 42nd Street alignment and had been identified as a "high potential site" in its Comprehensive Management and Use Plan and urged protection of this "important trail resource[]." App. 1337; *see also* App. 1412; 16 U.S.C. § 1244, 1251(1).

Finally, while 42A's direct use of Meair's Farm was deemed *de minimis* because it could be mitigated with vegetative screening, it is a direct use of a Section 4(f) property. Thus, FHWA appropriately identified that 42A would use this property.

H. Alternative 32B Results in a Net Benefit to the 4(f) Property

Finally, Alternative 32B will provide a net benefit to the wetlands and 4(f) property. Alternative 32B creates a permanent buffer protecting the Baker Wetlands from adverse impacts associated with reasonably foreseeable development and traffic-related impacts on currently-adjacent roads. App. 934,

1278. Mitigation compensates wetland losses at a ratio of approximately 6 acres created for each acre impacted. This compensatory mitigation results in a net increase in 259 acres of wetlands, which will enhance the functioning and characteristics of the wetlands complex. App. 1278.

Alternative 32B's other benefits to the 4(f) property include construction of an educational center, bike and hike trails, campsites, small parking areas to enhance public access, and funds for an annuity to support future maintenance, operation, and administration of the expanded wetlands complex. App. 1278. Baker University otherwise has no certainty of funding and no obligation to retain or to maintain Baker Wetlands. The mitigation wetlands will be transferred to Baker University subject to a conservation easement that will limit its future use to those consistent with the memorandum of agreement. App. 991.

Alternative 32B also provides a benefit to the HINU campus by removing a city street from the open land area on the south side campus (and by conversion of that area to wetlands, if so desired by HINU) and by eliminating the prospect of future widening of 31st Street at its present location on campus. App. 1277-78.

Plaintiffs cannot credibly deny that these are beneficial measures. They disagree, however, with FHWA's judgment that there is a net benefit, with a

reprise of their arguments that 32B adversely affects the Farm Property. These arguments have previously been addressed.

Plaintiffs' preference for a 42nd Street alignment and disagreement with FHWA's conclusions is not a sufficient basis for setting aside FHWA's decision. It is FHWA that "must decide what is 'prudent.' Such an inquiry calls for judgment, for balancing, for the practical settlement of disputes on which reasonable people will disagree. The statutory standard makes deferential review inevitable." *Eagle Foundation, Inc.*, 813 F.2d at 804. FHWA's conclusion that 42A is not a prudent alternative that avoids use of the Section 4(f) property is reasonable and should be upheld under the applicable standard of review.

CONCLUSION

For the foregoing reasons, the district court judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Federal Appellees believes that oral argument would assist the Court in resolving the appeal, particularly because the record is large in this fact-intensive appeal and appellants have raised many issues.

Respectfully submitted,

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August 4, 2011
90-1-4-12710

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for Federal Appellees is printed in proportionately spaced typeface of 14 points. The brief is double-spaced except for headings, quotations and footnotes. The side, top, and bottom margins are one inch. According to the word processing system's tally the word count for the brief is 13,914 (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)).

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the above and foregoing Brief for Federal Appellees were served on the **4th** day of August, 2011, by United States mail, postage prepaid, addressed to the following:

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