

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-3000

PRAIRIE BAND POTTAWATOMIE NATION;
SIERRA CLUB; WETLANDS PRESERVATION ORGANIZATION;
JAYHAWK AUDUBON SOCIETY;
SAVE THE WAKARUSA WETLANDS, INC.;
KANSAS UNIVERSITY ENVIRONS; and ECOJUSTICE
Plaintiffs/Appellants,

vs.

FEDERAL HIGHWAY ADMINISTRATION;
J. MICHAEL BOWER, in his official capacity as
Division Administrator, Federal Highway Administration,
KANSAS DEPARTMENT OF TRANSPORTATION
and DEBRA L. MILLER, in her official capacity as
Secretary of Kansas Department of Transportation,
Defendants/Appellees

APPELLEES' RESPONSE BRIEF

ON APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF KANSAS
Honorable Kathryn H. Vratil
Case No. 08-02534-KHV

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Oral Argument is requested.

July 22, 2011

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PRIOR OR RELATED APPEALS

There are no prior or related appeals regarding this Final Environmental Impact Study.

Eldon J. Shields, on behalf of the Kansas Department of Transportation (hereinafter “KDOT”), defendant-appellee, for its responsive brief, states:

STATEMENT OF ISSUES

The Secretary of Transportation may approve a transportation project requiring the use of publicly owned waterfowl refuge or land of an historic site only if (1) there is no prudent and feasible alternative to using said land, and (2) the program or project includes all possible planning to minimize harm to the site resulting from the use. After reviewing all proposed alternatives, the Secretary found there was no prudent and feasible alternative to the preferred route and the preferred route (32B) minimized harm to the site. Should the Secretary’s decision be reversed as being arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law under the facts of this case?

STATEMENT OF JURISDICTION

The United States district court has jurisdiction over this case under 5 U.S.C. §§ 702.704. Section 706 defines the scope of review.

This court’s jurisdiction derives from 28 U.S.C. § 1291.

STATEMENT OF FACTS

Plaintiffs set out 15 separately numbered paragraphs, with multiple subparts, of alleged facts. KDOT will respond to the alleged facts and then provide additional material facts.

1. Response to ¶ 1: The 32B alternative crosses the northern part of the Baker Wetlands which comprises 573 acres. The traffic corridor is approximately 300 feet south of existing 31st Street and is not the center of the Haskell Farm (4(f) Evaluation, p. 4f-17, Aplt. App. (IV) p. 1225) The balance of the facts in ¶ 1 are undisputed.

2. Response to ¶ 2: Plaintiff's claim that the Haskell Farm is historic property is undefined and inaccurate. The Baker Wetlands is a national natural landmark. The National Park Service indicated that the Baker Wetlands was eligible for inclusion in an expanded Haskell Institute National Historic Landmark boundary. Baker University responded it did not wish to expand that National Historic Landmark to include other property and no response was received from Haskell Indian Nation University or the Bureau of Indian Affairs. (ROD 2003, Aplt. App. (III), p. 948; ROD 2003, Aplt. App.'s (IV), IV, p. 1267; 4f-59, comment 17.) The balance of the facts contained in ¶ 2 are undisputed.

3. Response to ¶ 3:

Response to ¶ 3(a): ¶ 3(a) is misleading and incomplete. It implies that incorrect data was used to support the conclusions in the FEIS. On the contrary, the FEIS states "Subsequently, new models were run for the final EIS that took into account vehicles traveling in both directions. In addition, new noise models were run based on differing noise mitigation measures..." The FEIS also acknowledged that noise models for 2025 were evaluated for the no action, 32 B and 42A and that 32B produced the least impact due to noise mitigation features. (Aplt. App. (II), p. 651-652.)

Response to ¶ 3(b): The FHWA Technical Advisory T 6640.8a provides guidance to the Federal Highway Administration ("FHWA") field offices on the preparation and processing of environmental and Section 4(f) documents. Paragraph 9 on pages 24 and 25 of the Advisory addresses noise impacts. The pertinent portion of the paragraph reads as follows:

"The draft EIS should contain a summary of the noise analysis including the following for each alternative under detailed study:

(b) The extent of the impact (in decibels) at each sensitive area. This includes a comparison of the predicted noise levels with both the

FHWA noise abatement criteria and the existing noise levels. (Traffic noise impacts occur when the predicted traffic noise levels approach or exceed the noise abatement criteria or when they substantially exceed the existing noise levels.) Where there is a substantial increase in noise levels the HA should identify the criterion used for defining “substantial increase.” Use of a table for this comparison is recommended for clarity.”

The FEIS noise study was a “Revised Preliminary South Lawrence Trafficway Traffic Noise Analysis dated November 6, 2002 and although in the Noise Abatement Guidelines Section 2.1, the sentences do appear which state: “Due 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.” A further examination of the report reveals in Attachment A-D charts of the actual sound readings and modeling both currently and for 2025 for the no build, 32nd corridor with no sound abatement, 32nd corridor with sound walls and 42nd alternative corridor. An examination of each chart reflects that the fourth column from the right titled “Existing LAeq1h” are the recorded readings, the column titled “No Barrier LAeq1h calculated” are the model readings for the present date, and the third column from the left titled “With Barrier Calculated LAeq1h” are the modeled noise readings for year 2025. A comparison of the existing readings and the projected future readings is as simple as a review of the two columns. The additional significance of the charts is that virtually no reading exceeds the levels required for categories B, C or D as reflected on the Noise Abatement Criteria chart. (Aplt. App. (III), p. 795-810; Aplt. App. (III), p. 807-810.) FHWA used the FEIS noise studies contour maps in its 2007 Section 4(f) evaluation.

4. Response to ¶ 4:

Response to ¶ 4(a): The record does not support the contentions set forth by plaintiffs. The September 27, 2001 HNTB “Area of Potential Effects” map cited as footnote 13 in plaintiff’s statement of facts describes no alternative routes but only corridors of consideration (4(f) Evaluation, p. 4(f) 25-26; Aplt. App. (IV), p. 1233-1234; FEIS; Aplt. App. (II), p. 569.) A clear reading of the body of the FEIS, dated December 2002, shows the 42A alternative and the 42B alternative as being considered alternatives. The only document on which appellants base their claim the 42C alternative was included in any manner is a corridor concept drawing, not a specific alternative drawing (FEIS, December 2002; Aplt. App. (II), p. 521-24, 539-41, 547, 553-56, 569.) The areas of Potential Effect Map is merely a study area map and does not support the statements citing footnotes 13, 14 or 15.

Response to ¶ 4(b): Undisputed.

Response to ¶ 4(c): It is undisputed that June 2003 was the first time the Prairie Band Pottawatomie Nation (“Prairie Band”) requested the Corps to consider 42C. It is inconsistent for Prairie Band to admit they created 42C in June 2003 but argue the 42C alternative is identified by the corridor map in the FEIS Exhibit II-III, Aplt. App. (II), p. 569, in 2002 and at the same time argue the FEIS does not in any way discuss the alternative. The 42C alternative was fully discussed in the ROD 2003. (June 10, 2003 meeting minutes; Supp. Appendix, p. 61-64; Prager letter June 2003; Aplt. App. (III), p. 995-1009.)

The Corps analyzed the submissions from the engineer retained by Prairie Band. In its letter dated July 16, 2003, the Corps notified Prairie Band its 42C alternative did not align with the eastern interchange of K-10, contrary to all other alternatives considered, and 42C, as submitted, encroached into a Lawrence city park and school land. The Corps also determined that as originally designed,

the 42C alternative was priced with two-lane pavement and two-lane bridges in order to produce the \$19,000,000 reduction in cost. (Corps letter July 16, 2003, Aplt. App. (III), p. 1012-1020.) Properly designed as a four-lane project with four-lane bridges, as were all other alternatives, its price was merely \$5,300,000 less than 42A, but still not less in cost than the 32B alternative. (ROD 2003, Aplt. App. (III), p. 973-80, 982; Corps letter July 16, 2003, p. 2, Aplt. App. (III), p. 1012-1020.) (Pasley e-mail responding to Hellmer Design, September 4, 2003, Aplt. App. (III), p. 978-82, Supp. App. p. 168-172, as reported in the ROD 2003, Aplt. App. (III), p. 978-982.)

Response to ¶ 4(d): Plaintiff misstates the record. Plaintiff's quote is from a letter dated July 16, 2003 which is one of the written responses to plaintiff's June 2003 proposal for a 42C alignment. Enclosure 2 was prepared in the summer of 2003 as part of the Corps' response to Prairie Band's 42C proposal. The balance of the letter makes clear that in the preliminary stages, KDOT and its consultant reviewed 27 different alternative alignments. One of those conceptual alignments was similar to 42C except that the conceptual alignment and 42C increased traffic accident risks due to increased curvature and the construction of the combination of bridges and short earthen fills for 42C further degraded traffic safety due to ramping up and down from the bridges and short fill segments. The Corps determined that such conditions were undesirable and substantially more dangerous than 42A. (Corps letter July 16, 2003, Aplt. App.(III), p. 1012-1016.)

Response to ¶ 4(e): See response to 4(c) & (d). The Prairie Band attorney contended that the design of 42C which appears on enclosure 2 to the July 16 2003 Corps letter was intentionally distorted by HNTB and KDOT. The Corps comments that the design was as "allowed by the American Association of State Highway and Transportation officials criteria" was an explanation that the correction of the Prairie Band design was required. Neither this enclosure nor

any other design issues presented in 2003 relate in any way to the determination in 2001 and 2002 that this particular corridor should be eliminated for safety concerns. (Corps letter July 16, 2003, Aplt. App.(III), p. 1012-1016.)

Response to ¶ 4(f): Disputed. In the 4(f) Evaluation, the Corps fully considered the 42C presentation by Prairie Band in June 2003 and in numerous correspondence and responses which were part of the ROD 2003, the Corps explained its reasons for the rejection of 42C. (Corps letter July 16, 2003; Aplt. App. (III), p. 1012-1016; ROD 2003, Aplt. App. (III), p. 976; KCD response ¶ 3; Corps letter July 6, 2003, Aplt. App.(III) p. 975-982)

Response to ¶ 4(g): Disputed. Exhibit 4(f)(6) is an HNTB “Area of Potential Effects” map and describes no alternative routes but only corridors of consideration. (4(f) Evaluation, p. 4(f)-25 and 26, Aplt. App.(IV), p. 1233-1235) and the alignment is not, in fact, 42C as Prairie Band admits that this corridor map was prepared in 2001 or 2002 and they did not propose alternative 42C until June 2003. (R. Vol. 2, FEIS December 2002; Aplt. App. (II), p. 486, 521-524, 539-541, 547, 553; Area of Potential Effect Map, December 5, 2002, FEIS Ex. I-2, Aplt. App. (II), p. 516.)

5. Response to ¶ 5: Defendant KDOT disputes that FHWA omitted the mitigation plan costs for the 32B alternative. Appellants’ claim (footnote 37 Appellants’ Statement of Facts, p. 12 Appellants’ brief) that the FEIS does not include all mitigation costs but “only” includes relocation of 31st Street, Haskell Avenue, and Louisiana Street, as well as noise walls and landscaping misrepresents the FEIS and the agency record. (FEIS p. 2-32, footnote 12, p. 4-30-4-33, Table 4-11, Aplt. Ap. (II) p. 551, pp. 662-665) Mitigation costs are addressed in the FEIS section 4.13 which clearly describes that all mitigation costs of 32B are included, specifically, the land costs, conversion of additional wetlands, construction of the Wetland and Cultural Educational Center, bike and hiking

trails, maintenance, operation and administration costs for Baker University as well as the road relocation costs which in 2002 totaled \$18,600,000. (FEIS p. 4-30-4-33, Table 4-11, Aplt. Ap. (II), pp. 662-665) The updated mitigation costs are included in the 4(f) Evaluation, Table 5 at p. 4(f)-64. (4(f) Evaluation, p. 4(f)-64, Aplt. App. (IV) p. 1272.) Mitigation costs were estimated at \$22,100,000 and were considered in the evaluation of the 32B alternative in comparison to all other alternatives. Plaintiff contends FHWA omitted the millions of dollars required for the mitigation plan from its costs in the 32B alternative. At the trial court, Appellants cite a single page cost comparison attached to the Corps' July 16, 2003 letter to Mr. Prager, tribal attorney for Prairie Band. This provides no support for plaintiff's contention the mitigation costs have been omitted and ignores the extensive discussion of the issue in the FEIS. This contention was also considered and addressed in the 4(f) Evaluation Response to Written Comments, Comments 10-11. (4(f) Evaluation, p. 4(f)-55-56, Aplt. App. (IV), p. 1263-1264.)

The original cost estimate in the FEIS included all mitigation costs at \$18,600,000 which was revised for the 4(f) Evaluation to 2007 costs of \$22,100,000. (E-mail Jerry Irvine-HNTB with attachments explaining mitigation costs, Supp. App. 195-199, p. 204-222; FEIS p. 4-30-4-33, Table 4-11, Aplt. Ap. (II), pp. 662-665.)

6. Response to ¶ 6: Disputed. Unsupported by the record. Plaintiff contends that an alternate freeway must have a predicted accident rate of 1.34 accidents/million vehicle miles or less. It cites FHWA Technical Advisory T6640.8A which makes no such requirement. (FHWA Technical Advisory T6640.8A, ¶ VD(8), Aplt. App. (II), p. 425.) The FEIS at §§ 1.5.1 through 1.6 appropriately evaluate information provided by KDOT related to accident rates, access control, current and predicted traffic volumes and came to the opinion that the information was reliable and

KCD determined that KDOT's purpose and needs statement is appropriate. (FEIS, p. 1-4 through 1-6, Aplt. App. (II) pp.507-510.)

7. Response to ¶ 7: Plaintiffs' factual contentions do not accurately reflect the record. The quotation in the first sentence is, in essence, phrases from multiple sentences and paragraphs from page 4f-35 of the 4(f) Evaluation. (Section 4(f) Evaluation, p. 4f-35, Aplt. App.(IV), p. 1243.) Plaintiff's contention that 42A would entirely avoid the Haskell Farm is misleading in that the Corps concluded that the 42A alternative would result in greater long-term cumulative impacts to the farm property than the preferred alignment. (4(f) Evaluation, 4f-39, Aplt. App.(IV), p. 1247.)

8. Response to ¶ 8:

Response to ¶ 8(a): Undisputed but irrelevant as it provides no guidance in selecting the alternative.

Response to ¶ 8(b): Undisputed.

Response to ¶ 8(c): Undisputed.

9. Response to ¶ 9:

Response to ¶ 9(a): Undisputed.

Response to ¶ 9(b): Appellant's quotation is an incomplete statement of the purpose and need for the project and an incomplete quote of the sentence in the 4(f) Evaluation. The sentence states:

“Although the preferred alternative and the avoidance alternative meet the purpose and need for the project, the preferred alternative would divert more traffic from local streets, thereby improving safety on the local street network. Safety improvements are measured in terms of reductions in accidents. Based on the measure of accident reduction, the preferred alternative will result in 240 fewer accidents than the avoidance alternative by the year 2025, and will therefore

result in a cost savings of approximately \$6,000,000 more than the avoidance alternative (see Table 3).”

Appellant’s statement that 42A would divert 9,300 more vehicles than 32B was rejected by the agency. The focus of the purpose and need was to primarily reduce the traffic congestion on K-10 Highway and 23rd Street. These are primarily east-west roadways and in order for appellants to claim that 42A diverts 9,300 more vehicles than 32B, they include multiple north-south streets that are irrelevant to the analysis. (Knowles Declaration, Aplt. App. (I), p. 187-200.) This is contrary to the finding by the agency. (Section 4(f) Evaluation, p. 4f-63, Aplt. App.(IV), p. 1271.)

Response to ¶ 9(c): See response to subparagraph (b).

Response to ¶ 9(d): Disputed. Plaintiff’s conclusion is not supported by the record. In factual ¶ 6, plaintiffs claim that neither FEIS nor the Section 4(f) Evaluation determined predicted accident rates for 32B or 42A. Now in ¶ 9(d), plaintiff argues that 42A has accident rates below the state-wide average. The actual text cited as footnote 60 states that 32B diverts more traffic from local streets than 42A, thereby improving safety.

10. Response to ¶ 10:

Response to ¶ 10(a): The chart in this paragraph is plaintiff’s creation and does not include all of the information contained in FHWA Table 6. The proper analysis performed by the agency is to determine the cumulative impact of the traffic produced by each alternative on the Haskell Farm (Baker Wetlands). The agency’s analysis acknowledges that traffic on Haskell Avenue, 31st and Louisiana Streets is going to increase regardless of which alternative is constructed. Traffic on Haskell Avenue will have a substantial increase (4,200 vehicles per day) if the 42A alternative is selected over the 32B. The mitigation by relocating Haskell Avenue, Louisiana and

31st Street as part of the 32B alternative moves this increased traffic a substantial distance from the existing Baker Wetlands and with the addition of the sound walls for 32B, the noise disturbance associated with 32B will be less in the year 2025 than noise disturbances from adjacent roads associated with 42A. (4(f) Evaluation, p. 4f-67-69, Aplt. App.(IV), p. 1275-1277.)

Response to ¶ 10(b): See response to 10(a).

Response to ¶ 10(c): Disputed. Not supported by the record. The claim that there would be more traffic “on or near” that Haskell Farm ignores the relocation of Haskell and Louisiana Streets. (Knowles Declaration, Aplt. App. (I), p. 187-200.)

11. Response to ¶ 11:

Response to ¶ 11(a): Disputed. (Knowles Declaration, Aplt. App.(I), p. 187-200; Aplt. App. (IV), p. 1426.)

Response to ¶ 11(b): Disputed. Although the 38,000 vehicles on Haskell from 31st Street to the South Lawrence Trafficway was inadvertently left off Table 6, the Corps’ EIS and FHWA Section 4(f) Evaluation used traffic data from the segment on Haskell Avenue between 31st Street and the proposed interchange with the SLT to predict noise levels. The e-mails referenced by plaintiffs were merely the agency’s inquiry to confirm that the traffic volumes had been considered. In comments related to the draft 4(f)Evaluation, Appellants concede as much (Aplt. App. (IV), p. 1377.) Based on the highway traffic noise analysis and abatement policy and guidance, it takes a doubling of traffic volumes in order to make a 3 decibel (dB) increase in the sound level and studies have shown that this increase (3 dB) is barely detectible by the human ear. This means that the traffic volumes on this segment of Haskell Avenue would need to increase to over 60,000 VPD to make a discernible difference in what is heard by the human ear. More importantly, the doubling

of the distance from the noise source has an effect of 4.5 dB. Thus, if you were standing 100 feet to the west of existing Haskell Avenue, there would need to be 762,492 vehicles on the realigned segment of Haskell to generate the same noise level as 20,900 vehicles at the existing Haskell Avenue location. (Knowles Declaration, ¶¶ 4-10 and attachments 1, 2 (Highway Traffic Noise Analysis and Abatement Policy and Guidance), 3 and 4, Aplt. App.(I), p. 187-274.)

Response to ¶ 11(c): Undisputed but irrelevant. The adverse impact is not the increase in traffic in and of itself but that under 42A, Haskell Street and Louisiana abut the Baker Wetlands and with 32B, Louisiana is moved 2,500 feet west and Haskell is moved 1,000 feet east of the Baker Wetlands. Using the drop-off rate of 4.5 dB per doubling distance, there is a 19.5 dB reduction by relocating Haskell 300 meters away from the Wetlands and there would be approximately a 48 dBA reduction by relocating Louisiana 800 meters. (Knowles Declaration attachment 3, Aplt. App.(I), p. 272.)

Response to ¶ 11(d): Disputed. Whether or not there are 38,000 vehicles on relocated Haskell Avenue, the noise produced at the Wetlands is less than the 20,900 vehicles produced by the 42A alternative. See response to 11(c). (Knowles Declaration, Aplt. App (I), p. 188-189, ¶¶ 5, 6, 7, 8 and 9.)

Response to ¶ 12(a): Disputed. Not supported by the record. Appellants' statement that two-third of the wetlands frontage will never be developed is not supported by the record. (Letter from Douglas County Administrator, Supp. App. p. 270-275.) Land located in the floodplain may be developed as represented by the land immediately west of the Baker Wetlands(also in the floodplain) which was zoned and approved for apartments, prior to its purchase by KDOT for use in the mitigation. The map cited to support the statement that no land use other than floodplain is

planned or anticipated for these areas is a current land use map and not a map of future, planned or allowed uses. (Land Use Map, Aplt. App. (II) p. 626.)

Response to ¶ 12(b): Disputed. A close review of the map cited in footnote 80 shows that some development has occurred in the floodplain. Sec. 4(f) Evaluation, Ex. 4f-13, Aplt. App. (IV) p. 1274.

Response to ¶ 13(a): Disputed. The record does not support Appellants' statements that all alternatives have bridges over the flood ways. None of the 32nd Street alternatives cross the Wakarusa River floodway. (FEIS, Aplt. App. (II) p. 658, last line). The FEIS found that the 32nd Street Alternatives had the least potential to impact beneficial floodplain values. The 42nd Street corridors are in the group that had the highest potential to impact beneficial floodplain values. (FEIS, Aplt. App. (II) p. 658).

Response to ¶ 13(b): Undisputed. The issues were considered by the Corps in reaching its decision.

Response to ¶ 14(a): Undisputed

Response to ¶ 14(b): Undisputed. See response to ¶ 2. The Corps noted although the State Historic Preservation Officer concurred the proposed 32B Alternative will have an adverse effect, pursuant to 36 C.F.R. Part 800.5, on the Haskell Institute Historic District, he also found the proposed mitigation measures are "appropriate for mitigating the adverse effect on the eligible historic district." The officer agreed it was appropriate to remove 31st Street and place it immediately adjacent to the proposed 32B Alternative right-of-way as doing so would limit the intrusions to one traffic corridor bisecting the historic district, thereby maintaining the current condition. (ROD 2003, Aplt. App. (III), p. 984.) The State Historic Preservation Officer, also said

“The tree growth that exists along the levee situated on the northern portion of the Baker Wetlands creates a visual barrier between the HINU campus and the Baker Wetlands.” ...“There will be no increase in visual disturbances to the Historic District, and the mitigation proposed will create conditions that mirror the visual barrier that currently exists between the HINU campus and the Baker Wetlands. The proposed 32nd Street Alignment B Alternative also avoids all bridges and water control gate structures that contribute to the Historic District.” (ROD 2003, Aplt. App. (III), p. 984.)

Response to ¶ 15(a): See response to 14(b).

Response to ¶ 15(b): See response to 14(b).

Response to ¶ 15(c): Disputed. The cited record does not support the Appellants’ statements. The Corps considered all of these arguments and positions.

KDOT’S ADDITIONAL MATERIAL FACTS

1. In July, 2002, KDOT applied to the Corps for a Section 404 permit. The permit was required because KDOT wished to construct a highway through federally protected wetlands. The permit requested approval of the 32B Alternative of the SLT (Aplt. App. (II), p. 481.) As part of the process, the Corps conducted an environmental study and prepared the FEIS for the SLT, which was finalized in December, 2002 (Aplt. App. (II), p. 473.)

2. Subsequent to a public review of the FEIS, the Corps issued its Record of Decision which found:

“...It is my decision based on all available information, including a Final EIS, that issuance of a permit under the authority of Section 404 of the Clean Water Act to authorize the applicant’s preferred alternative to relocate approximately six miles of K-10 Highway on a route identified as 32nd Street Alignment B is in compliance with Section 404(b)(1) Guidelines and is not contrary to the public interest....” (ROD 2003, Aplt. App. (III), p. 926.)

The basis for the Corps's finding is set out in the totality of the ROD 2003. (Aplt. App. (III), p. 921-1109.)

3. In determining the selected alternative, the Corps made a comparison of the preferred alternative (32B) and alternative alignment (42A) in regard to 19 important categories identified during the public interest review. (FEIS Table 2.20, Selection Matrix, p. 2-35 to 2-36, Aplt. App. (II), p. 554-555.) Among others, the Selection Matrix made the following conclusions:

Impact Category	32 nd Street B	42 nd Street A
Wetlands Mitigation	Approximately 317 acres of wetlands will be created for a net increase of 259 acres	Net increase 76 acres
Noise: Future Condition	With mitigation, less noise in Baker Wetlands and on HINU property than with 42 nd Street	More noise in Baker Wetlands and on HINU property than 32 nd Street with mitigation
Light: Future Condition	With mitigation, less light in Baker Wetlands and on HINU property than with 42 nd Street	Foreseeable cumulative future impacts will result in more light in Baker Wetlands and on HINU property than with 32 nd Street with mitigation
HINU: Future Condition	Foreseeable cumulative future impacts to HINU will be less than with 42 nd Street	Potential noise and light impacts to the Medicine Wheel and Sweat Lodges. Foreseeable cumulative future impacts to HINU will be greater than with 32 nd Street
Baker Wetlands: Future Condition	Net increase of approximately 251 acres. Foreseeable cumulative impacts to Baker Wetlands are substantially less than with 42 nd Street	Foreseeable cumulative future impacts to Baker Wetlands are substantially greater than with 32 nd Street
Haskell Institute Historic District: Future Condition	Foreseeable cumulative future impacts are substantially less than with 42 nd Street	Foreseeable cumulative future impacts are substantially greater than with 32 nd Street

Impact Category	32 nd Street B	42 nd Street A
Baker Wetlands Natural Landmark: Future Condition	Foreseeable cumulative future impacts are substantially less than with 42 nd Street	Foreseeable cumulative future impacts are substantially greater than with 32 nd Street
Flood Plain and Floodway	The alignment will have minimal impact on the flood plain and will not impact the floodway	The alignment will have a significantly greater impact on the flood plain than 32 nd Street

4. In the ROD 2003, the Corps conducted an evaluation of the two preferred alternatives (32B and 42A) and considered a broad range of potential impacts and operational characteristics. The Corps identified six key evaluation criteria and intensified its focus on those areas. The six criteria were roadway safety, efficiency, cost, land use, direct wetland impacts, and cultural/historic property impacts. (ROD 2003, Aplt. App. (III), p. 929-930.)

5. Included in the factors evaluated was the cumulative impacts assessment. The Corps determined among the impacts identified, reasonably foreseeable cumulative future impacts associated with the 42nd Street Alignment would be significant. The Corps addressed reasonably foreseeable cumulative future impacts in the FEIS in accordance with NEPA requirements and the Council on Environmental Quality Guidance. It concluded such impacts are an important consideration in the selection of a roadway alignment which will best satisfy the overall public interest in this matter. (ROD 2003, Aplt. App. (III), p. 930.)

6. The Corps noted the Council on Environmental Quality Fifth Annual Report, 410-411, December, 1974, states secondary and induced effects must be considered and may be more significant than the project's primary effects. (ROD 2003, Aplt. App. (III), p. 930.)

7. The Selection Matrix from the FEIS (Vol. 1, Table 2.20) was included as a part of the ROD 2003 Findings. (ROD 2003, Aplt. App. (III), p. 931-933.)

8. The Corps evaluated and determined, in regard to 42A, foreseeable future development which can reasonably be expected to include construction of residential dwellings and/or businesses on undeveloped properties located north and south of the Wakarusa River in the vicinity of Baker Wetlands. This foreseeable future development is expected to increase traffic on 31st Street, Haskell Avenue and Louisiana Street, which is likely to result in expansion of one or more of these roads from two lanes to four lanes. Such development will diminish or eliminate the rural character of the property south of 31st Street by converting undeveloped land to an urban environment. Urbanization of the area and the associated increases in traffic will result in substantially more noise, light, urban debris, and visual disturbances within the area surrounding Baker Wetlands, which includes the HINU campus. (ROD 2003, Aplt. App. (III), p. 931.)

9. The Corps determined the magnitude of the reasonably foreseeable cumulative future impacts expected to occur to Baker Wetlands in association with 42nd Street Alignment is significant and an important factor in the selection of a route which will best satisfy the overall public interest in this matter. (ROD 2003, Aplt. App. (III), p. 931)

10. Based on an evaluation of all of the potential impacts identified by the Corps, including foreseeable cumulative future impacts, the Corps determined none of the alignments within the 42nd Street corridor represent the least environmentally damaging practicable alternative, and selection of an alignment within said corridor would be contrary to the public interest. (ROD 2003, Aplt. App. (III), p. 929)

11. The path of 42C proposed by PBPN follows the same route as 42A and 42B until they turn northeast after having passed east of the Baker Wetlands. Therefore, the determination of the foreseeable cumulative future impacts to the 42nd Street alignment on the Wetlands applies equally

to 42A, 42B and 42C. (Plaintiffs' Exhibit 8, Design map of 42C Alignment; ROD 2003, Aplt. App. (III), p. 929; ROD 2003, Aplt. App. (III), p. 935)

12. No alignment within the other roadway corridors evaluated by the Corps provides the long-term protection and benefits to Baker Wetlands which are afforded by selection of the 32B Alternative with its mitigation plan. Dr. Roger Boyd of Baker University manages Baker Wetlands and is an authority on the ecology of the wetlands complex. Dr. Boyd participated in the design of the mitigation plan and supports selection of 32B. (*See* Appendix I, Section F, Item 2 for comments presented by Dr. Boyd concerning his position on the matter.) (ROD 2003, Aplt. App. (III), p. 934.)

13. The Corps evaluated local land use planning and projections including:

- (a) current discussions by Douglas County and the City of Lawrence to extend the urban growth area into the rural landscape located south of the Wakarusa River;
- (b) current local development patterns, such as the rapid development which has occurred along the completed western leg of the bypass; and
- (c) general growth plans related to highway construction in or near other communities.

The Corps determined reasonably foreseeable cumulative future impacts associated with the 42nd Street Alignment are likely to result in isolation and encapsulation of Baker Wetlands in an area saturated by urban development. The Corps further determined encapsulation of Baker Wetlands in an urbanized setting is likely to result in substantial wetlands losses and degradation of the long-term vitality of the wetlands complex and its serene environmental setting. (ROD 2003, Aplt. App. (III), p. 934.)

14. The Corps determined the 42nd Street Alignment would also reasonably be expected to accelerate development within agricultural areas adjacent to Baker Wetlands east of Haskell Avenue and west of Louisiana Street. Such development would be likely to include construction of residential and/or commercial properties and would further increase traffic on local roads bordering Baker Wetlands. (ROD 2003, Aplt. App. (III), p. 935.)

15. The Corps stated the EPA concluded it is apparent the reasonably expected future conditions and cumulative effects of multiple planned actions within the project area argue in favor of the selected alternative (32B). The EPA further concluded the assumptions which underpin the arguments for selection of the 32B Alternative are credible and are consistent with both the Clean Water Act Section 404(b)(1) Guidelines and NEPA Implementing Regulations. (ROD 2003, Aplt. App. (III), p. 936.)

16. The alignment of the 32B corridor was designed to avoid as many historic features in the protected area as is feasible. The alignment avoids the historic east-west dike and adjacent drainage canal located along the northern edge of Baker Wetlands. The alignment also avoids all historic bridges and water control gate structures within the district. (ROD 2003, Aplt. App. (III), p. 941.)

17. Recent noise studies have shown the total audible disturbance associated with construction of the proposed 32B Alternative, with the mitigation, will be less in the year 2025 than such disturbances associated with the 42A Alternative or the “No Build” Alternative. (ROD 2003, Aplt. App. (III), p. 942.)

18. The 32B Alternative is the Board of County Commissioners of Douglas County’s preferred alignment. (ROD 2003, Aplt. App. (III), p. 954.)

19. Baker University created Baker Wetlands by physically modifying the drainage structures installed by the Haskell Institute early in the 1900's. (ROD 2003, Aplt. App. (III), p. 966.)

20. On June 10, 2003, the Corps met with David Prager, attorney for PBPN. Mr. Prager delivered a letter dated June 10, 2003 which argued for the first time in favor of selection of the proposed PBPN 42nd Street Alignment C route. The Corps objected to the proposed new alignment as a new issue which should have been discussed prior to completion of the FEIS. (ROD 2003, Aplt. App. (III), p. 973.)

21. In the June 10, 2003 letter, PBPN contended the use of the 42C Alternative would reduce bridge costs by \$19,000,000. The Corps, with the assistance of KDOT, analyzed the alleged savings and determined PBPN's contention was inaccurate because said alternative would produce only a savings of \$5,300,000 less than 42A. In order to reach the \$19,000,000 alleged savings, the engineer for PBPN used cost figures for a two-lane roadway and two-lane bridges instead of the four-lane project required. (ROD 2003, Aplt. App. (III), p. 973-74; Letters from June 2003-October 2003, Supp. App. 75-182; Pasley e-mail responding to Hellmer design, September 4, 2003, Supp. App. p. 168-172, Aplt. App. (III), p. 978-82.)

22. In issuing its ROD 2003, the Corps considered the information provided by PBPN and, after correction of errors, notified PBPN cost was only one of many factors considered in the final selection of an alternative and referred PBPN to the FEIS for the analysis. (ROD 2003, Aplt. App. (III), p. 974.)

23. PBPN claims the drawing identified as "Area of Potential Effects," dated September 27, 2001, specifically identified the 42C Alignment. PBPN also claimed in its letter of July 18, 2003, its 42C design was deliberately redrawn and misrepresented by KDOT and HNTB.

PBPN further complained KDOT and HNTB lied about certain bridge heights. The Corps investigated these allegations and concluded it had not identified “any reason to believe the information is false or misleading.” The Corps responded Exhibit A, “Area of Potential Effects” merely presented “conceptual corridors.” Contrary to PBPN’s letter, the exhibit does not identify individual alternative roadway alignments. Further, the final 42nd Street alignments identified as reasonable alternatives were routed to avoid Lawrence community park land, farmsteads, a cemetery, historic properties and more. (ROD 2003, Aplt. App. (III), p. 975-76.)

24. The Corps did not consider the 42C Alternative to be a desirable alternative. The information presented by PBPN to support its claim the route should be preferred above all other alignments was considered and found not to support such a claim. (ROD 2003, Aplt. App. (III), p. 976.)

25. The Corps further determined the PBPN’s request to reopen the environmental impact comment period for a route the Corps had already determined as not a desirable alternative, and the preparation of a supplemental environmental impact statement, would create substantial and unwarranted delay for the final decision and was not justified. (ROD 2003, Aplt. App. (III), p. 976-77.)

26. The Corps addressed PBPN’s complaint the proposed 42C Alternative was considered but then disappeared without any explanation whatsoever from the draft and FEIS. (ROD 2003, Aplt. App. (III), p. 976, 979, 980.)

27. The PBPN’s alleged cost savings of \$19,000,000 is based on a two-lane road project which is not under consideration by KDOT. The PBPN engineer reduced the width of the 42A Alternative bridges from four lanes to two lanes but failed to reduce the 32B Alternative bridges for

proper comparison. The Corps determined the PBP cost comparison between the two alternatives is not reasonable or valid. (ROD 2003, Aplt. App. (III), p. 980.)

28. Although the Corps considered the cost an important factor in the evaluation, the determining factor in the Corps's final decision was the effect on Baker Wetlands from foreseeable cumulative future impacts associated with alignments within the 42nd Street corridor. A discussion of this is included in Section 5 of the ROD 2003. (ROD 2003, Aplt. App. (III), p. 982.)

29. Because of possible federal aid highway funding of the SLT, the FHWA determined it would complete the Section 4(f) process as part of its plan to issue a Record of Decision to complete the NEPA process. The final Section 4(f) Evaluation was issued November, 2007. (Aplt. App. (IV), p. 1205.) In it, the FHWA concluded "...Based upon the considerations contained in this document, there is no feasible and prudent alternative to the use of land from the Haskell Agricultural Farm Property (HAFP) and the proposed action includes all possible planning to minimize harm to the HAFP resulting from such use." (4(f) Evaluation, Aplt. App. (IV), p. 1279.)

30. In the 4(f) Evaluation, FHWA found "The traffic issues that prompted consideration of a bypass route around the City of Lawrence as early as 1964 have continued to grow in intensity. The traffic situation in Lawrence has deteriorated to a point where lack of an adequate connection between K-10 Highway east of Lawrence with I-70 west of Lawrence threatens the safety and efficiency of the state transportation system in the key corridor between Topeka, Lawrence and Johnson County." (4(f) Evaluation, 4f-5, Aplt. App. (IV), p. 1213.)

31. The Baker Wetlands encompass approximately 573 acres just south of the Haskell campus. They are crossed in four different areas with separate underground pipelines originally

granted to Williams Natural Gas Company. (4(f) Evaluation, 4f-18, Aplt. App. (IV), p. 1226; 4(f) Evaluation, 4f-19, Aplt. App. (IV), p. 1227.)

32. The planning level cost estimate for development of 42A using KDOT typical unit costs is estimated to be \$166,900,000 in 2007 dollars. (4(f) Evaluation, p. 4f-34, Aplt. App. (IV), p. 1242.)

33. The planning level cost estimates were developed for 32B using KDOT typical unit costs. The project costs for the fully built four-lane freeway were estimated to be \$147,900,000 in 2007 dollars. (4(f) Evaluation, p. 4f-30, Aplt. App. (IV), p. 1238.)

34. In analyzing the direct impacts of the 32B Alternative to the HAFP, the FHWA noted the roadway corridor would be constructed south of the east-west dike and canal located along the northern edge of Baker Wetlands to avoid and preserve “the significant structures.” The 32B Alternative would alter small portions of the surface of the farm property. The borrow area located immediately east of the north-south access road is a recent feature created by Baker University and the dike along the western edge of the property has already been modified over its entire length when it was relocated approximately 25 to 30 feet east of its historic location. The historic open views of the farm property have already been modified by second growth trees on the southern half of the HINU campus and a line of trees along the east-west dike at the northern edge of Baker Wetlands. The roadway corridor will be located parallel to and immediately south of the tree line on the northern edge of Baker Wetlands and therefore will be generally screened from the HINU campus. Open views from the east, west and south will be preserved. (4(f) Evaluation, p. 4f-35, Aplt. App. (IV), p. 1243.)

35. In evaluating the avoidance alternatives, while the 42A Alternative would have no direct impacts to the HAFP, FHWA determined it would result in greater long-term cumulative adverse impacts to the HAFP than an alignment traveling through the property. The long-term adverse social and environmental impacts would result from increase in traffic along roads adjacent to the HAFP (Louisiana, Haskell and 31st Street), reasonably foreseeable development immediately adjacent to the HAFP and the uncertain financial stability of a portion of the HAFP if the 32B Alternative was not selected. (4(f) Evaluation, p. 4f-39 Aplt. App. (IV), p. 1247.)

36. The noise impact comparison of the 32B Alternative and the 42A Alternative is described in the response to comment 19. It was determined the noise impact from the 42A Alternative would be greater than the 32B Alternative with mitigation. (4(f) Evaluation, Aplt. App. (IV), p. 1247-1249.)

37. In May, 2008, the FHWA issued its Report of Decision determining the 32nd Street Alignment B Alternative is the least environmentally damaging and the only feasible and prudent alternative. (Aplt. App. (IV), p. 1436-1515.) The FHWA screened 16 possible alternatives -- in addition to a “No Build” Alternative. It conducted five levels of screening and, as a result, determined the 32B Alternative was the selected alternative and would be compared with the 42A Alternative Alignment. (Aplt. App. (II), p. 521-524, 547.)

38. FHWA, in order to issue its ROD 2008, considered:

- (a) the Corps Draft and FEIS for the South Lawrence Trafficway;
- (b) the Corps ROD 2003;
- (c) the 4(f) Evaluation;

- (d) all of the information collected by the Corps during development of the FEIS for this project;
- (e) comments received after publication that FHWA intended to adopt the EIS; and
- (f) information analyzed during the Section 4(f) Evaluation.

(ROD 2008, Aplt. App. (IV), p. 1437, 1442.)

FHWA considered alternatives, including the “No Build” Alternative and five roadway corridors with a total of twelve alternative alignments in the EIS. (ROD 2008, Aplt. App. (IV), p. 1439.) The 32B Alternative was determined to be highly desirable based on an evaluation of foreseeable cumulative future impacts, cost, efficiency, and other factors discussed in the FEIS. It satisfies the project’s purpose and need, and is consistent with Lawrence and Douglas County’s local planning objectives. (ROD 2008, Aplt. App. (IV), p. 1441.) FHWA completed a Section 4(f) Evaluation in which it was determined there were no feasible and prudent alternatives to using land from the HAFP. (ROD 2008, Aplt. App. (IV), p. 1441.) Because, the mitigation plan for the 32B Alternative will result in net benefits to the HAFP, FHWA concludes the 32B Alternative results in the least overall harm in light of Section 4(f)’s preservation purpose. FHWA agrees with the Corps’ determination the 32B Alternative is the least environmentally damaging and the environmentally preferred alternative and included all possible planning to minimize harm to the potential area. (ROD 2008, R. Vol 10, p. 920/1008, (7742) and (ROD 2008, R. Vol. 10, p. 913-993 (7735-7815).)

SUMMARY OF ARGUMENTS

The Corps completed an FEIS and a 4(f) Evaluation in its process of approving the 32B route for the South Lawrence Trafficway. Appellants contend the FEIS is defective for four reasons. The

noise study issues and their claim that 42C was unjustifiably omitted were fully addressed by the Corps. Appellants also contend that the 32B mitigation costs were not included in the FEIS and there is significant documents, both in the FEIS and in the agency record, that the mitigation costs were considered and that appellants failed to raise the issue with the Corps. The issue is therefore waived. Any technical defects in the FEIS were harmless error and appellants have not alleged prejudice.

Appellants contend that FHWA failed to properly apply the standard of imprudence in the 4(f) Evaluation. The Court may reverse and remand only if there is a significant chance that but for any alleged errors, the FHWA might have reached a different result. No such evidence exists in this case. Neither the cost mitigation issue nor the noise study geographic scope issue was raised with the agency and any such claim is therefore waived. Route 42A was properly determined to be imprudent and the selection of Route 32B should be upheld.

ARGUMENT AND AUTHORITIES

SCOPE OF REVIEW

This is an action for judicial review of an administrative decision by the Federal Highway Administration (FHWA). The scope of judicial review of such actions is governed by 5 U.S.C. § 706. The statute states:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this Title . . . or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

In the present case neither (2)(E) or (2)(F) apply. Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, or when the agency action is based on a public adjudicatory hearing. *See, Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (U.S. 1971).

De novo review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2)(F) in only two circumstances. Neither situation exists here. *See, Overton Park, supra* at 415.

Therefore, this Court is merely required to engage in a substantial inquiry of the generally applicable standards. *Overton Park, supra* at 414. The Secretary's decision is entitled to a presumption of regularity. *See, e.g., Overton Park* at 415, citing *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185, 56 S. Ct. 159; 80 L. Ed. 138 (1935).

The Court is first required to decide whether the Secretary acted within the scope of his authority. *See, e.g., Overton Park* at 415, citing *Schilling v. Rogers*, 363 U.S. 666, 676-677, 80 S. Ct. 1288; 4 L. Ed. 2d 1478 (1960). Here, the Plaintiffs do not even contend the action was beyond the scope of the Secretary's authority. The Court need only determine the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 (2)(A). *See, Overton Park, supra* at 416.

To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See, McBee v. Bomar*, 296 F.2d 235, 237 (6th Cir., 1961); *In re Josephson*, 218 F.2d 174, 182 (1st Cir., 1954); *Western Addition Community Organization v. Weaver*, 294 F.Supp. 433 (N.D. Cal., 1968) and *Wong Wing Hang v. Immigration and Naturalization Serv.*, 360 F.2d 715, 719 (2nd Cir., 1966).

STANDARD OF REVIEW

Environmental Impact Statement

Section 102(2)(C) of NEPA requires an environmental impact statement contain a "detailed statement" of:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which

would be involved in the proposed action should it be implemented.
42 U.S.C. § 4332 (2)(C).

The requirement of a "detailed statement" insures the integrity of the administrative process. *Sierra Club v. Morton*, 510 F.2d 813, 820 (5th Cir. 1975). The requirement also enables the reviewing court to determine the agency with "good faith objectivity has taken a hard look at the environmental consequences of a proposed action and at alternatives to said action." *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573, 575 (5th Cir. 1978). "Although the procedural requirements of NEPA must be satisfied, the courts will require only the 'statutory minima,' refusing to substitute their judgment for the judgment of the administrative agencies charged with satisfying the requirements of NEPA." *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. Unit B 1981).

The Supreme Court of the United States has stressed the appellate function in reviewing an environmental impact statement is a limited one. NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals would have reached had they been members of the decision-making unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S. Ct. 1197, 1219, 55 L. Ed. 2d 460, 488 (1978).

The court's role is to insure the agency took a "hard look" at the environmental consequences of the proposed action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S. Ct. 2718, 2730 n. 21,

49 L. Ed. 2d 576, 590 n. 21 (1976). Balancing the substantive environmental issues is consigned to the judgment of the agency. *Kleppe, supra*, citing *Natural Resources Defense Council, Inc. v. Morton*, 148 U.S. App. D.C. 5, 458 F.2d 827, 838 (D.C.Cir. 1972). See also *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98, 103 S. Ct. 2246, 2253, 76 L. Ed. 2d 437, 447 (1983) and *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28, 100 S. Ct. 497, 500, 62 L. Ed. 2d 433, 438 (1980).

4(f) Test

Following an environmental impact assessment, if a roadway is to be constructed using publicly owned land of a public park, historic site, or wildlife or waterfowl refuge, the Secretary of Transportation is to conduct what is referred to as a 4(f) Evaluation. 49 U.S.C. § 303(c). The statute provides such a highway can only be constructed if (1) there is no prudent and feasible alternative and (2) the project includes all possible planning to minimize harm to the protected area. *Eagle Foundation, Inc. v. Dole*, 813 F.2d 798 (7th Cir. Ill. 1987). Court review of a 4(f) Evaluation is to be thorough but narrow. *Eagle Foundation, Inc., supra* citing *Overton Park, supra*. The court is not empowered to substitute its judgment for that of the agency. *Eagle Foundation, Inc.* at 803. To affirm the agency decision, the Court must find that the agency could have reasonably believed that no feasible and prudent avoidance alternative exists or that the alternatives involve unique problems of extraordinary magnitude. (23 C.F.R. §774.17.)

The "probing" inquiry ensures the court learns what is going on and does not decide on the basis of superficial beliefs and assumptions. The deferential review ensures once the court is satisfied the Secretary took a close look at the things which matter and made the hard decisions, those decisions stick. "The court's role is to find out whether the Secretary considered what she had

to consider, put out of mind what she was forbidden to consider, and dealt rationally with the competing relevant issues. As with cases under other statutes dealing with the environment.” *Eagle Foundation, Inc.* at 803.

A prudent judgment by an agency is one which takes into account everything important which matters. A cumulation of small problems may add up to a sufficient reason to use § 4(f) lands. *Eagle Foundation, Inc.* at 805. The Secretary's obligation is to look at enough alternatives to make possible an informed judgment about whether one is likely to be feasible and prudent. *See Monroe County Conservation Council, Inc. v. Adams*, 566 F.2d 419, 425 (2d Cir. 1977), *cert. denied*, 435 U.S. 1006, 56 L. Ed. 2d 388, 98 S. Ct. 1876 (1978); *Life of the Land v. Brinegar*, 485 F.2d 460, 470-72 (9th Cir. 1973), *cert. denied*, 416 U.S. 961, 40 L. Ed. 2d 312, 94 S. Ct. 1979 (1974). The proper inquiry is not whether more options remain to be examined -- for that will be true always -- but whether enough have been examined to permit a sound judgment the study of additional variations is not worthwhile. *Eagle Foundation, Inc., supra* at 807.

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. *Committee to Preserve Boomer Lake Park v. United States Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. Okla. 1993) *citing* *Druid Hills Civic Assoc. v. Federal Highway Admin*, 772 F.2d 700, 711 (11th Cir. 1985). If the record reveals the agency examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made, the agency's decision is entitled to deference. *Glendale Neighborhood Ass'n v. Greensboro Hous. Auth.*, 956 F.

Supp. 1270, 1277 (M.D.N.C. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).)

ARGUMENT

MITIGATION COSTS

Appellants contend in ¶ 5 of their Statement of Facts that the 32B mitigation plan costs were not included in the FEIS and rely primarily on a footnote on page 2-32 of the FEIS (Aplt. App. (II), p. 551. This footnote does not support appellants' claim and the agency record is replete with discussions of the mitigation costs. Moreover, an examination of the agency record reveals that at no time did appellants ever contend that the total costs for 32B were missing the mitigation costs when compared to the costs of 42A or 42C. The first time the question of any missing mitigation costs was raised was at the trial level long after the agency record was closed.

Persons challenging an agency's compliance with NEPA must "structure their participation so that it...alerts the agency of the [parties] position and contentions," in order to allow the agency to give the issue meaningful consideration. (*Department of Transportation v. Public Citizen*, 541 U.S. 752; 124 S. Ct. 2204; 159 L. Ed. 2d 60; (2004) citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519, 553, 55 Law Ed. 2d 460, 98 S. Ct. 1197 (1978).) On the issue of whether or not mitigation costs were excluded in a cost comparison of 32B to 42A or 42C, appellants failed to raise the issue at any time before the agency.

Appellants contend at the trial court and in its current brief that \$10,000,000 was missing from the mitigation plan costs in the total cost of 32B. Appellants claim that FHWA omitted the 32B mitigation costs from its Section 4(f) Evaluation but their cite to the record is to a single page in the 2002 FEIS. A more complete reading of the FEIS discloses that as early as 2002, the

mitigation costs were extensively discussed in Chapter 4.13 Wetlands in the FEIS. (FEIS, p. 4-29 through 4-33; Aplt. App. (II), p. 661-665.) In those paragraphs, it is clear that the 32nd Street corridor costs include between \$8.5 million and \$18.6 million in mitigation costs, depending upon the alignment. The text makes clear that the mitigation costs include funds for land acquisition, a 10,000 square foot Wetlands and Cultural Education Center, relocation of 31st Street, relocation of Haskell Avenue and Louisiana Street and long-term maintenance, sound walls and landscaping, operation and administration of the expanded Baker Wetlands, including campgrounds and hiking trails. Table 4-11 on page 4-33 makes a comparison of the various alternatives and 32E shows mitigation costs of \$8,481,000 and this alternative does not anticipate relocation of Haskell or Louisiana Streets while 32B reflects mitigation costs of \$18.6 million which includes relocation of those streets. The \$8,481,000 for 32E is for the acquisition of the 317 acres of wetlands, construction of the Wetlands and Cultural Education Center, construction of sound walls and landscaping, campgrounds and hiking trails. (FEIS Table 4-11, Aplt. App. (II), p. 665 and text p. 663.)

There was a lengthy series of communication starting on June 10, 2003 with a meeting and letter from Mr. Prager, counsel for Prairie Band, primarily contending that the cost of 42A was equal to or less than the cost of 32B. (Supp. App. p. 75-182.) Mr. Prager's letters all focused primarily on road and bridge costs and never mention mitigation costs. In response, the Corps wrote on July 16, 2003 an extensive explanation of the basis for its rejection of Prairie Band's cost analysis and included in those documents a short version of alignment costs which included a determination of mitigation costs of \$13.3 million which specifically included the Baker Wetlands contract at \$4.35 million in addition to the actual walls, roadway relocation and trees which are part of mitigation

costs. Prairie Band was in receipt of this information and made no comment. (Supp. App. p. 110-120, 115.)

In the process of the dialogue about the costs of 32B compared to 42A or 42C, Prairie Band's attorney wrote, on August 19, 2003, a letter focused on the roadway costs and requesting a reopening of the EIS. Attached to that letter was correspondence from Raymond G. Hellmer, Jr., a professional engineer hired by Prairie Band to provide designs and opinions as to the benefits of 42A and 42C. Mr. Hellmer's report at page 2 acknowledges the mitigation costs for 32B at \$18.6 million and the mitigation costs for 42A at \$1.9 million. Mr. Hellmer contends that when mitigation costs, traffic volumes and total project costs are considered, 42A is superior. On page 3 of his report, he claims that with mitigation costs included, 42C would cost only \$92.2 million and 32B would cost \$110.2 million due specifically to the mitigation expenditures of \$18.6 million. (Aplt. App. (III), 1065-1070, Supp. App. p. 129-133.)

The correspondence in regard to these total cost discussions continues through and including October 6, 2003. Partly in response to Mr. Prager's letter of August 19, 2003, KDOT responds with a letter of September 15, 2003 referring Mr. Prager to Table 2-18 of the FEIS and pointing out the requirement that all costs must be for a four-lane freeway. Mr. Hellmer arrived at his values of 42A and 42C by costing a two-lane roadway. KDOT points out that using costs of a four-lane freeway for all alternatives reflects ultimate costs of 32B of \$110.2 million and 42A of \$128.5 million. Attached thereto is a summary of the cost estimates reflecting that 32B costs \$96.9 million (without mitigation costs) and 42A costs \$126.6 million (without mitigation costs). At this point in time, mitigation costs had been reduced to \$13.3 million for 32B and when that is added to the \$96.9 million, it totals the \$110.2 million reflected in KDOT's letter. Similarly, the 42A total of \$126.6

million when added to \$1.9 million in mitigation costs equals the \$128.5 million reflected in the letter. (Supp. App. p. 157-160.)

The reduction from the \$18.6 million for mitigation for 32B contained in the FEIS and the \$13.3 million discussed in the previous correspondence is explained in an e-mail of December 2006 from HNTB. Jerry Irvine, project manager, in attempting to reconstruct the numbers, determined that the mitigation costs shown at \$18.6 million included certain roadway/bridge costs which were later removed to arrived at the \$13.3 million. (Supp. App. p. 247-253.) Additional e-mails were sent on December 7, 2006 which contain the same information which was used in an analysis to update the estimated costs from 2002 to 2007 and the attachment reflects total costs for 32B of \$123 million and for 42A at \$175.7 million. (Supp. App. p. 204-210.) Total costs of 32B and 42A were again reviewed in February 2007 and the mitigation costs for 32B were reviewed and adjusted to \$22.1 million as the bridge costs were added back in. From that analysis, Table 2-18 was prepared for inclusion in the 4(f) Evaluation. (Aplt. App. (IV), p. 1183-1185.)

Subsequent to the preparation of the draft 4(f) Evaluation, public comment was requested. Letter No. 185 from Haskell Environment Research Studies Center, dated January 1, 2007 acknowledged the inclusion of the mitigation costs for both 32B and 42A at \$18.6 million and \$1.9 million. (Aplt. App. (IV), p. 1358-68, 1361.)

In late January and early February 2007, Mr. Prager, counsel for Prairie Band, submitted multiple letters which were all primarily focused on noise issues and the only question raised in any was a request for explanation as to an adjustment in the mitigation costs from \$18.6 million in the FEIS to \$13.3 million in the 4(f) Evaluation. Nowhere in any of the 2007 correspondences from Mr. Prager do any of the appellants object to the total costs attributed to 32B or make any allegation

that those costs fail to include the full mitigation costs. (Prager letters, January 19, 2007-February 1, 2007, Aplt. App. (IV), p. 1373-1397.) Appellants' failure to object to the 32B costs as not including mitigation costs at the agency level is a contributing cause to the record being fragmented as to whether those costs were fully included.

Appellants' counsel manipulated the road relocation costs (Appellants' Brief, p. 12, 17, 37 and 39) and by making assumptions that mitigation costs were not included, which are not supported by the record, appellants convinced the trial court that the mitigation costs must have been excluded from the estimate. The record before the agency does not support appellants' claims or the trial court's conclusion. As it relates to the FEIS, the obligation on the agency is to take a hard look at the alternatives. (*Overton Park*, 401 U.S. at 416.) In this instance, the record reflects the mitigation costs (land acquisition, Education center, noise walls, landscaping, road relocation, hiking trails, and operation and maintenance) were included in the FEIS, Appellants and their expert engineer used the mitigation numbers to argue over total cost comparisons. The mitigation costs were adjusted when it was determined that they included some bridge costs. The record supports that the mitigation costs were properly considered in the total costs of 32B. Appellants waived any objection by not raising the issue with the agency.

The Court should apply a "rule of reason" to determine whether claimed deficiencies in an FEIS are significant enough to undermine NEPA's purpose of informed decision making. (*Fuel Safe Wash. v. Fed. Energy Regulatory Commission*, 389 Fed. 3d 1313, 1323 (10th Cir. 2004); *Association Working for Aurora's Residential Env't v. Colorado Dept. of Trans.*, 153 Fed. 3d 1122, 1130 (10th Cir 1998).) Appellants had multiple opportunities from 2001 through 2007 to raise objection and assert their claim that the mitigation costs were not included and they failed to do so and, as such,

they have waived that argument. (*Department of Transportation v. Public Citizen*, 541 U.S. 752; 124 S. Ct. 2204; 159 L. Ed. 2d 60; (2004) citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519, 553, 55 Law Ed. 2d 460, 98 S. Ct. 1197 (1978).) Appellants' claim and the trial court's finding that the mitigation costs are unsupported and are not included in the estimates of 32B cost is unsupported by the record and based on the rule of reason, the FHWA cost estimate is not clearly erroneous and should have been properly considered in determining that 42A was imprudent.

NOISE IMPACTS

Appellants claim the FEIS violated NEPA by failing to determine the noise increase by comparing predicted noise levels with existing noise levels. It is undisputed that the Corps commissioned URS, a contractor, to complete a traffic noise study, as required by NEPA regulations. (FEIS R. Vol. 2 at 893; Aplt. App. (III), p. 798.) The FEIS reflects that the noise study was performed in accordance with federal regulations. (FEIS R. Vol. 2 at 662, 890 and 892; Aplt. App. (III), p. 795-797.) The traffic noise study states that it did not compare existing noise levels to predicted noise levels but it did include "increase over existing" noise level data in tables which it attached to the report. (FEIS R. Vol. 2 at 902-905; Aplt. App. (III), p. 807-810.) The FHWA's final Section 4(f) Evaluation stated that under the NAC (Noise Abatement Criteria), acceptable noise levels for the 32B project area range from 67 dBA (Category B) to 72 dBA (Category C) and that existing noise levels ranged from 51.1 dBA to 64.1 dBA. (23 C.F.R. §772.9(a), (b), (3).) Traffic noise impacts occur when predicted traffic noise levels approach or exceed the noise abatement criteria ("NAC") or when they substantially exceed existing noise levels. (23 C.F.R. §772.11(g).)

An examination of the URS study reflects on Attachment A that all of the existing readings for 31st Street were below 64.2. (R. Vol. 2, p. 0890-905, 897, 901; Aplt. App. (III), p. 795-810, 802, 806.) The charts represented by Attachment D and Attachment E project future noise levels with noise abatement walls for 32B outside the walls at 65 dBA or lower and for 42A at 65.8 dBA or lower. (R. Vol. 2, p. 904-905; Aplt. App. (III), p. 809-810.) The noise maps only show areas of decibel ranges for 60 dBA and 56 dBA. (R. Vol. 2, p. 897-900; Aplt. App. (III), p. 802-805.) Any area outside the 56 dBA contour line would have a reduced noise impact and are below the threshold for the definition of a “traffic noise impact.” For 32B, the future noise calculations take into consideration the noise walls and the relocation of 31st Street, Haskell and Louisiana and the future noise levels are equal to or below current noise levels. Since the projected noise levels for 32B do not exceed significantly the current noise levels and do not exceed the noise abatement criteria, then they do not constitute “traffic noise impacts.” (Aplt. App. (III), p. 799.)

Since 42A is located primarily in undeveloped land, there are no noise abatement criteria. (*Id.*) The impact of 42A on the Baker Wetlands is the noise generated from Haskell, 31st Street and Louisiana and those noise measures were taken and projected and the Corps concluded that, with mitigation, due to increased traffic around the Haskell Farm, the indirect audible disturbances of Section 4(f), protected property would exceed the direct 32B noise impacts. (R. Vol. X, 6865.)

All information in regard to existing and projected noise levels was available in the charts that were part of the traffic noise analysis, a comparison of existing and projected noise could be made and the projected noise levels, with mitigation, did not exceed NAC or existing levels. The purpose of the noise study is to decide if noise mitigation should be considered. It was for 32B and therefore satisfies that intent of and the minimum requirements of NEPA.

As noted by the trial court, even if the court concludes that the noise study technically fails to meet the requirements of NEPA, the court should take due account of the rule of prejudicial error, 5 U.S.C. §706. FHWA errors require reversal only if appellants can show prejudice from the errors. (*New Mexico, ex. rel. Richardson*, 556 F. 3d 708 (citing *Bar MK Ranches v. Yuetter*, 994 F. 2d 735, 740 (10th Cir. 1993).) The court should analyze whether or not the failure to determine traffic noise impacts is merely a “fly speck” or whether it is significant enough to defeat the goals of informed decision making and informed public comments. (*New Mexico, ex. rel. Richardson*, 556 F. 3d at 704.) As determined by the trial court, appellants do not allege and the record does not reflect that a noise impact analysis which compared existing noise levels to future noise levels for 32B and 42A, to determine whether mitigation measures were necessary, would have changed the outcome. Appellants have not demonstrated that FHWA’s non-compliance, if any, with 23 C.F.R. §772 would justify reversion or remanding the FHWA’s ROD.

Appellants raise for the first time either at the agency level or the district court their allegation that the noise study was deficient in its geographic scope. Nowhere in the record before the agency do appellants raise this issue. Persons challenging an agency’s compliance with NEPA must “structure their participation so that it...alerts the agency of the [parties] position and contentions,” in order to allow the agency to give the issue meaningful consideration. (*Department of Transportation v. Public Citizen*, 541 U.S. 752; 124 S. Ct. 2204; 159 L. Ed. 2d 60; (2004) citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. at 553.)

The traffic noise analysis contains all information necessary to meet the minimum requirements of NEPA. Its purpose is to help decide whether mitigation is advisable. In the 32B analysis mitigation was designed and included. With the mitigation, the noise readings do not

exceed NAC and are not substantially in excess of existing. The noise analysis substantially complies with NEPA. Even if it does not, the error does not constitute prejudicial error. FHWA errors require reversal only if Appellants can show prejudice for the errors. *New Mexico ex. rel. Richardson*, 565 F.3d at 708. Appellants have alleged no prejudice.

THE RECORD SUPPORTS FHWA'S FINDING THAT 42A WAS IMPRUDENT

Appellants contend that Federal Highway's Section 4(f) Evaluation fails to properly apply the standard for imprudence. Inherent in their arguments is the position that FHWA is prohibited from viewing the deficiencies of the avoidance alternative collectively in order to determine that it presents unique problems of an extraordinary magnitude. This is contrary to the holding of *Boomer Lake*, 4 F.3d 1550 and citing *Eagle Found., Inc. v. Dole*, 813 F. 2d 798, 804, 810 (7th Cir. 1987) citing *Hickory Neighborhood Defense League v. Skinner*, 910 F. 2d 159, 164 (4th Cir. 1990)

The FHWA final Section (4) Evaluation concluded that the 42A alternative was imprudent based on the cumulative impact of seven factors. Appellants challenge the findings of FHWA on all seven factors. The FEIS initially analyzed 32B and 42A in regard to 19 important categories identified during the public interest review. (FEIS Table 2-20, Selection Matrix, p. 2-35 to 2-36, Aplt. App. (II), p. 554-555.)

FHWA concedes that both 32B and 42A meet the purpose and needs of the SLT but concluded that the 32B alternative better met the purpose and need by diverting more traffic from local streets and improving safety on the local street network. (Section 4(f) Evaluation, Aplt. App. (IV), p. 127.) Appellants challenge the conclusion of FHWA by claiming that the KDOT traffic study supports appellants' claim that 42A diverts more vehicles per day than 32B. The court should reject this claim as it requires the court to referee a disagreement over the appropriate methodology

to project city traffic reductions. The court is not equipped to do so. *N. Buckhead Civic Association v. Skinner*, 903 F. 2d 1533, 1544 (11th Cir. 1990); *Druid Hills Association v. Federal Highway Administration*, 772 F. 2d 700, 711 (11th Cir. 1985); *Boomer Lake*, 4 F. 3d at 1553. The court may only determine whether FHWA's method for predicting future traffic volume has a rational basis and, if so, FHWA met its responsibility in analyzing traffic counts and its forecasting methodology is not arbitrary and capricious. (*Valley Cmty. Pres. Comm'n v. Mineta*, 371 F.3d 1073, 1091 (10th Cir. 2004).) Appellants claim that FHWA arbitrarily found that 42A's traffic volume and length contributed to its imprudence and that the difference was minor. Any enhancement of safety, even a slight one, is a relevant factor in determining whether an alternative is prudent. (*Boomer Lake*, 4 F.3d at 1550.) It was proper for FHWA to consider greater city traffic reduction, higher vehicle per day capacity, lower accident rates and the availability of a shorter route under 32B as factors in determining whether 42A was imprudent and such actions were neither arbitrary nor capricious nor a clear error of judgment.

Appellants claim the determination that 42A was imprudent is flawed because the FEIS and 4(f) Evaluation did not determine the predicted accident rates for 32B and 42A. Appellants did not raise this issue with the agency and it is waived. (*DOT v. Public Citizen*, 541 U.S. at 764.)

SAFETY

Appellants claim, the determination that 42A was imprudent, is flawed because the FEIS and 4(f) Evaluation did not determine the predicted accident rates for 32B and 42A. Appellants did not raise this issue with the agency and it is waived. (*DOT v. Public Citizen*, 541 U.S. at 764.)

COSTS

Appellants' allegations as to mitigation costs and a comparison of the costs between 32B and 42A were previously presented and will not be repeated in detail herein but are incorporated by reference. As previously set forth, there is no evidence in the record that \$10,000,000 in mitigation costs were omitted. There is also no evidence in the record that 42C, if properly designed as a four-lane roadway, would cost less than 32B and therefore, Federal Highway did not arbitrarily fail to consider 42C as a Section 4(f) alternative. 42C suffers from all of the other shortcomings of each 42nd Street corridor alternative and was properly rejected regardless of appellants' claim that it might cost less than 42A.

FLOODWAY AND FLOOD PLAIN IMPACTS

FHWA Final Section 4(f) Evaluation concedes both alternatives would affect the Wakarusa flood plain, but concludes that 32B would affect the flood plain and floodway less than 42A. FHWA also stated that 42A would pass through the Wakarusa floodway in three places and have a significantly greater impact on the river and its riparian corridors. (4(f) Evaluation, Aplt. App. (IV), p. 1272.) 32B crosses two miles of the northern edge of the Wakarusa flood plain but does not cross the Wakarusa River and would therefore avoid impacting the Wakarusa River floodway. There is no evidence in the agency record, submitted by appellants or otherwise, to support that constructing three bridges over the floodway would have less impact on the floodway than 32B, which does not touch the floodway. The FHWA conclusion that 42A would have a greater impact on the Wakarusa floodway is not arbitrary, capricious or clearly erroneous.

EFFECT ON PLANNED DEVELOPMENT

If 32B is not constructed, the undeveloped land immediately west of the Baker Wetlands on Louisiana and other properties east of Haskell will be available for development. The property west of Louisiana has already been zoned and platted for multi-family residential. (cite) The FHWA concluded that the new wetlands created by the 32B mitigation plan would create a buffer between the Baker Wetlands and any new development. (4(f) Evaluation, Aplt. App. (IV, p. 1248.) Insulating the Baker Wetlands from whatever future traffic is generated or the development of other uses which surround it provides a benefit. Such a finding is not arbitrary or capricious nor is it a clear error of judgment and it is therefore an appropriate factor to consider in determining whether 42A is imprudent.

DIRECT AND SECONDARY IMPACTS

Appellants again argue that FHWA arbitrarily failed to determine or consider the relevant noise increase impacts of the alternative. These arguments were previously addressed in the noise impacts section and are incorporated for purposes of this response. They object that the contour maps are defective in that they do not show readings beyond 56 dBA. The minimum reading to constitute a NAC for any category is 57 dBA and therefore, the contours sufficiently identify all areas in which an NAC might be considered. (FEIS, p. 4-19, Aplt. App. (II), p. 651.)

Appellants contend that erroneous traffic volumes were used and raised those issues with the Corps. Appellants contend that 4(f) Evaluation, Table 6, erroneously excludes the highway traffic from 32B. They attempt to add highway traffic, a direct impact, to analyze the secondary and the cumulative impacts. Table 6 of the 4(f) Evaluation is simply an analysis of the “secondary and cumulative impacts.” The noise study indicates that the 32B highway traffic, with noise wall

mitigation, will produce no greater noise than existing and no noise in excess of the NAC guidelines. (Noise Analysis, R. Vol. 2, p. 890-905; Aplt. App. (III), p. 795-810; Knowles Declaration, ¶¶ 5-9; Aplt. App. (I), p. 187-200.) Table 6 was intended to show the magnitude of the local traffic on the surrounding roadways. There is no question that each of these issues of traffic volume was raised with the Corps and analyzed by it. Traffic projections require a high level of technical expertise and they are therefore properly left to the informed discretion of the FHWA. (*Valley Cmty. Pres. Comm'n. v. Mineta*, 371 F.3d 1073, 1091.) It is appellants' burden to prove that FHWA's traffic forecasting methodology is, in fact, arbitrary and capricious, and they have presented no expert testimony or other evidence to do so but merely manipulate different segments of the traffic study to argue that their conclusions are more accurate. Appellants' analysis of the traffic study has been inaccurately completed as more fully reflected in the Declaration of John Knowles. (Knowles Declaration, Aplt. App.(I), p. 187-200, ¶¶ 5, 6, 7, 8 and 9.)

Appellants again raise the contention that 38,000 vehicles on Haskell Avenue were excluded from consideration. The Corps found that such traffic would have little or no noise impact on the Baker Wetlands because Haskell Avenue will be moved roughly 1,000 feet away. (Knowles Declaration, Aplt. App.(I), p. 187-200.)

Appellants claim that FHWA arbitrarily ignored 32B's impact on Haskell Farms historic integrity and eligibility. They rely on their alleged facts 14(b), 15(a)-(c). Each of those factual paragraphs is disputed by defendants. The National Park Service indicated that the Baker Wetlands was eligible for inclusion in an expanded Haskell Institute National Historic Landmark boundary. Baker University responded that it did not wish to expand that national historic landmark and the Haskell Indian Nation University and the Bureau of Indian Affairs failed to respond. Further, the

State Historic Preservation officer found that the proposed mitigation measures are “appropriate for mitigating the adverse effect on the eligible historic district.” The officer also found that the tree growth that exists along the levee situated on the northern portion of the Baker Wetlands creates a visual barrier and there will be no increase in visual disturbance to the historic district. (See KDOT’s response to appellants’ statement of facts 14(b) and 2.)

In face of contradictory information supported in the record, a decision by FHWA to select one set of facts over another cannot be arbitrary, capricious or a clear error of judgment.

NET BENEFIT

Appellants argue that the net benefit of 32B should not be considered in determining 42A imprudent based on their claim that the mitigation plan is unfunded and therefore should not even be considered. This position is not supported by the record. As discussed in the mitigation costs section of this argument, the record reveals in numerous places the type of mitigation and its costs which are included in the costs of 32B and it is fully relevant to consider all mitigation issues. Appellants do not claim that FHWA failed to analyze the amount of traffic which would traverse the Baker Wetlands, the noise to be generated, the noise walls, the relocation of Haskell Street and Louisiana Street and the other issues of the mitigation plan. They merely claim that in their opinion, these actions cause a net detriment to the Baker Wetlands and not a benefit. Merely challenging the conclusion arrived at by FHWA does not meet the burden of proving that FHWA’s determination was arbitrary, capricious or a clear error in judgment. FHWA weighed appellants’ concerns and after taking a “hard look,” it concluded that the 32B alternative mitigation plan would yield a net benefit to the Haskell Farm and Baker Wetlands. The court is in no position to second guess the FHWA’s expert weighing of the technical considerations involved. (*Boomer Lake*, 4 F.3d at 1551.) If the

court determines that the 4(f) Evaluation contains clear errors, they may reverse and remand only if there is a significant chance that, but for those errors, the FHWA might have reached a different result. (*National Parks and Conservation Association*, 998 F. 2d at 1533 (quoting *Salt River Project Agric. Improvement and Power District*, 762 F.2d at 1060-61,n8).) No such evidence exists and the determination of the 4(f) Evaluation and ROD 2008 should be affirmed.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Oral argument is desired in this appeal to address questions that may arise from the briefs of the parties.

CONCLUSION AND RELIEF SOUGHT

The FHWA decision is entitled to a presumption of regularity. The Court need only determine the actual choice made by the agency was not “arbitrary, capricious, an abuse of discretion or otherwise not in accordance of law.” To make this finding, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. The Court 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.)

Appellants have not shown that clear error existed or that the FHWA failed to consider the relevant issues and have failed to substantiate that NEPA requires reversal for any technical violation. The FHWA Record of Decision issued May 2008 should be affirmed.

Respectfully submitted,

s/ Eldon J. Shields

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July 22, 2011

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**CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS**

I hereby certify that a copy of the foregoing APPELLEE'S RESPONSE BRIEF, a submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/Eldon J. Shields

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record receiving electronic notification and that I served the foregoing by first-class mail, postage prepaid, upon any counsel of record not receiving electronic notification.

s/Eldon J. Shields

Eldon J. Shields, #08266