

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.

---

**APPELLANTS' OPENING BRIEF**

---

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

---

Robert V. Eye  
David Prager, III  
112 SW 6th Ave, Suite 202  
Topeka, KS 6663  
785-234-4040  
Attorneys for Plaintiffs/Appellants

Oral Argument is requested.

April 20, 2011

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PRIOR OR RELATED APPEALS .....	vi
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS.....	6
SUMMARY OF THE ARGUMENT .....	25
STANDARD OF REVIEW(I) .....	25
ARGUMENT (I) .....	26
I. FEDERAL HIGHWAY’S DECISION SHOULD BE REVERSED BECAUSE ITS FEIS FAILED TO COMPLY WITH NEPA AND ITS IMPLEMENTING PROCEDURES AND REGULATIONS .....	26
A. Failure to Measure Noise Impacts.....	27
1. Federal Highway’s FEIS violated NEPA by failing to determine the noise increase impact for the SLT alternatives .....	27
2. The FEIS Noise Study was deficient in its geographic scope.....	31
B. The FEIS Violated NEPA by Eliminating 42C Without Explanation and Failing to Consider it as an Alternative.....	32
1. The FEIS violated NEPA and 50 C.F.R. § 1502.14(a) by eliminating 42C without explanation .....	32

2. The FEIS violated NEPA by not considering 42C in detail as a formal alternative ..... 32

C. Federal Highway Failed to Accurately Determine the Cost of 32B in Violation of NEPA ..... 34

D. Federal Highway Failed to Apply the Accident Rate Standard for Determining the Safety of the Alternatives, Violating NEPA ..... 35

E. The NEPA Violations in the FEIS Require Reversal of Federal Highway’s May 2008 Record of Decision ..... 35

II. FEDERAL HIGHWAY ARBITRARILY DECIDED THAT THE 42ND ST. ALIGNMENT IS IMPRUDENT UNDER SEC. 4(f) ..... 36

STANDARD OF REVIEW (II) ..... 38

ARGUMENT (II)..... 38

1. Purpose and Need.....39

    a. Diversion of City Traffic.....39

    b. Traffic Volume and Length.....40

    c. Safety.....41

2. Cost.....44

3. Floodway and Floodplain Impact.....45

4. Effect on Planned Development.....46

5. Direct and Secondary Impacts of the Alternatives.....47

    a. Omitted Traffic Noise Impacts.....48

    b. Erroneous Traffic Volumes on and near the Haskel.....48

c. Traffic on Louisiana Street and Haskell Avenue west and  
east of the Baker Wetlands of the Haskell Farm.....50

d. Damages by 32B to the Haskell Farm’s Historic  
Integrity.....51

6. Impacts on Other Historic Sites and Woodlands.....53

7. The “Net Detriment” and the Imprudence of 32B.....54

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT..... 55

CONCLUSION AND RELIEF SOUGHT ..... 56

CERTIFICATE OF COMPLIANCE ..... 58

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY

REDACTIONS ..... 59

CERTIFICATE OF SERVICE ..... 61

ATTACHMENTS.....a

## TABLE OF AUTHORITIES

### CASES

<i>Catron Cty. Bd. of Commissioners v. United States Fish &amp; Wildlife Serv.</i> , 75 F.3d 1429 (10th Cir.1996) .....	29, 30
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971) .....	37, 38, 41
<i>Committee to Preserve Boomer Lake Park v. USDOT</i> , 4 F.3d 1543 (10th Cir. 1993) .....	37, 38
<i>Davis v. Mineta</i> , 302 F.3d 1104 (10th Cir. 2002) .....	30
<i>Eagle Found., Inc. v. Dole</i> , 813 F.2d 798 (7th Cir. 1987).....	38
<i>Environmental Defense Fund, Inc v. Froehlke</i> , 477 F.2d 1033 (8th Cir.) 1973).....	29
<i>Fuel Safe Wash. V. Fed. Energy Regulatory Comm’n</i> , 389 F.3d 1313 (10th Cir. 2004) .....	32
<i>Hickory Neighborhood Defense League v. Skinner</i> , 910 F.2d 159 (4th Cir. 1990) .....	37
<i>Izaak Walton League of America, Inc. v. Kimbell</i> , 516 F.Supp.2d 982 (D. Minn. 2007).....	30
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	27
<i>Natural Resources Defense Council, Inc., v. Callaway</i> , 524 F.2d 79 (2nd Cir. 1975) .....	29

<i>New Mexico ex rel. Richardson</i> , 565 F.3d 683 (10th Cir. 2009) .....	30
<i>Realty Income Trust v. Eckerd</i> , 564 F.2d 447 (D.C. Cir. 1977) .....	29
<i>Robertson v. Methow Valley Citizens Council et al</i> , 490 U.S. 332 (1989) .....	26, 29
<i>Save our Ecosystem v. Clark</i> , 747 F.2d 1240 (9 <sup>th</sup> Cir. 1984) .....	29
<i>Sierra Club v. Marsh</i> , 872 F.2d 497 (1st Cir.1989) .....	30
<i>Sierra Club v. United States Army Corps of Engineers</i> , 701 F.2d 1011 (2d Cir.1983) .....	34
<i>Stop H-3 Ass’n v. Brinegar</i> , 740 F.2d 1442 (9 <sup>th</sup> Cir. 1984) .....	33

## STATUTES

5 U.S.C. § 706(2)(A) .....	36, 45, 50, 51,53
5 U.S.C. § 706(2)(C) .....	36
5 U.S.C. § 706(2)(D) .....	36
23 U.S.C § 138 .....	5
28 U.S.C. § 1291 .....	1
28 U.S.C. § 1331 .....	1
33 U.S.C. § 1344 .....	6
49 U.S.C. § 303 .....	5

**OTHER**

23 C.F.R. § 650 .....	20
23 C.F.R. § 772.5(g) .....	27, 28
23 C.F.R. § 772.9(b) .....	28
23 C.F.R. § 774.15(e)(2) .....	31
36 C.F.R. § 60.3(h) .....	21
40 C.F.R. § 1500.1(b) .....	27
40 C.F.R. § 1502.14(a) .....	27, 32, 35
40 C.F.R. § 1502.24 .....	27
40 C.F.R. § 1502.9(a) .....	32
40 C.F.R. § 1506.3 .....	37
40 C.F.R. § 1506.3(a) .....	35
40 C.F.R. § 1508.25 .....	7
40 C.F.R. § 1601.7 .....	7
Fed. R. App. 4(a)(1)(B) .....	1

### **PRIOR OR RELATED APPEALS**

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



Robert V. Eye, on behalf of Prairie Band Pottawatomie Nation, et al.,  
plaintiffs-appellants, for their opening brief states:

### **STATEMENT OF JURISDICTION**

The United States district court had jurisdiction over this case under 28 U.S.C. § 1331. On November 5, 2010, the district court entered a memorandum and order that affirmed the Federal Highway Administration's Record of Decision. (Aplt.App.(I) p. 349)(Attachment 1, p. A-1). On November 8, 2010, the district court entered judgment dismissing the Plaintiffs' claims against all Defendants. (Aplt.App.(I) p. 408)(Attachment 2, p. A-60). On January 3, 2011, the notice of appeal was timely filed under Fed. R. App. 4(a)(1)(B). This Court's jurisdiction derives from 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

- I. Federal Highway's decision should be reversed because its FEIS failed to comply with NEPA and its implementing procedures and regulations.
  - A. Failure to Measure Noise Impacts.
    1. Federal Highway's FEIS violated NEPA by failing to determine the noise increase impacts for the SLT alternatives.
    2. The FEIS noise study was deficient in its geographic scope.
  - B. The FEIS violated NEPA by eliminating 42C without explanation and failing to consider it as an alternative

1. The FEIS violated NEPA by eliminating the 42C alignment. The FEIS violated NEPA and 40 C.F.R. § 1502.14(a) by eliminating 42C without explanation.
  2. The FEIS violated NEPA by not considering 42C in detail as a formal alternative.
- C. Federal Highway failed to accurately determine the cost of 32B.
  - D. Federal Highway failed to apply the accident rate standard for determining the safety of the alternatives.
  - E. The NEPA violations in the FEIS require reversal of Federal Highway's May 2008 Record of Decision.
- II. Federal Highway Arbitrarily Decided that the 42nd St. Alignment is Imprudent under Sec. 4(f).
- A. Federal Highway's wide-ranging review of 42A violated the *Overton Park* standard for imprudence.
  - B. Purpose and Need. Federal Highway arbitrarily considered 42A imprudent even though it indisputably meets the purpose and need.
    1. Diversion of City Traffic. Federal Highway arbitrarily found 42A imprudent using the erroneous assumption that 32B would divert more city traffic.

2. Traffic Volume and Length. Federal Highway arbitrarily found that 42A's traffic volume and length contributed to its imprudence, contrary to *Overton Park*.
  3. Safety. Federal Highway arbitrarily failed to consider the relevant accident rate standard for safety and arbitrarily found 42A to be unsafe based solely on its length, contrary to *Overton Park*.
- C. Cost. Federal Highway arbitrarily failed to consider relevant cost factors by omitting substantial costs for 32B and failing to consider the cheaper 42C alignment.
- D. Floodway and Floodplain Impacts. Federal Highway arbitrarily found 42A to have floodway and floodplain impacts.
- E. Effect on Planned Development. Federal Highway arbitrarily used normal changes to planned development as a basis for finding 42A imprudent.
- F. Direct and Secondary Impacts of the Alternatives. Federal Highway arbitrarily omitted significant direct impacts of 32B and exaggerated the secondary impacts of 42A.

1. Omitted Traffic Noise Impacts. Federal Highway arbitrarily failed to determine or consider the relevant noise increase impacts of the alternatives.
  2. Erroneous Traffic Volumes on and near the Haskell Farm. For 32B, Federal Highway arbitrarily failed to consider the 55,566 vehicles on the 32B freeway in its traffic analysis.
  3. Traffic on Louisiana Street and Haskell Avenue west and east of the Haskell Farm. Federal Highway arbitrarily omitted 38,000 vehicles on Haskell Ave. for 32B and arbitrarily found that secondary traffic impacts were a problem for 42A.
  4. Damage by 32B to the Haskell Farm's Historic Integrity and Eligibility. Federal Highway arbitrarily ignored relevant authoritative evidence and failed to consider whether 32B would impact the Haskell Farm's historic integrity and eligibility.
- G. Impacts on Other Historic Sites and Woodlands. Federal Highway arbitrarily considered 42A imprudent based upon non-existent impacts to historical properties and irrelevant impacts to trees.

H. The “Net Detriment” and the Imprudence of 32B. Federal Highway arbitrarily relied upon the alleged “net benefit” of 32B in considering 42A imprudent.

### **STATEMENT OF THE CASE**

Plaintiffs challenged the Record of Decision (ROD) and Final Environmental Impact Statement (FEIS) supporting construction of the multi-lane 32B Alternative freeway across historic property, the Haskell Farm, which includes the Baker Wetlands, a National Natural Landmark. (Aplt.App.(I) p. 11). Plaintiffs argued that the FEIS for the Sec. 4(f)<sup>1</sup> decision was defective because it (1) failed to include a proper noise study (Aplt.App.(I) p. 102-105), (2) omitted the 42C alignment without explanation or justification (Aplt.App.(I) p. 116-120); (3) failed to include 32B’s Mitigation Plan costs (Aplt.App.(I) p. 115-116); and (4) applied an improper safety criterion related to accidents (Aplt.App.(I) p. 98-99). The Plaintiffs also have challenged the finding under Sec. 4(f) that the 42A avoidance alternative was imprudent. (Aplt.App.(I) p. 95-122).

Federal Highway argued that the noise study was legally adequate. (Aplt.App.(I) p. 394). The district court found that the noise study was defective

---

<sup>1</sup>Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. §303, and section 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §138. Both statutes, which are essentially identical, are referred to herein simply as “Section 4(f).” They prohibit highway projects that use Sec. 4(f) property unless “there is no feasible and prudent alternative to the use of such land.” In the current case, there is no issue concerning the feasibility of the SLT alternatives.

by failing to measure noise increase impacts. (Aplt.App.(I) p. 384). Federal Highway justified elimination of the 42C alignment on the basis of an adequate review with which the district court agreed. (Aplt.App.(I) p. 375-380). Federal Highway asserted that all of 32B's mitigation costs had been included.

(Aplt.App.(I) p. 284) The district court ruled that not all 32B costs were included and that Federal Highway's cost estimate for it was "clearly erroneous."

(Aplt.App.(I) p. 394) Federal Highway asserted that the 32B alternative is safer than the 42A avoidance alternative. (Aplt.App.(I) p. 177). The district court ruled that the 32B alternative was "slightly" safer than 42A. (Aplt.App.(I) p. 392).

Despite the FEIS defects found by the district court, the ROD was affirmed because the defects were ruled harmless error. (Aplt.App.(I) p. 384-385, 398, 402). On the Sec. 4(f) determination, the district court ruled that Federal Highway could have reasonably believed that the 42A alternative presented unique problems of extraordinary magnitude thereby rendering it an imprudent choice. (Aplt.App.(I) p. 402).

## **STATEMENT OF THE FACTS**

1. In May of 2001, KDOT notified the Corps that it needed a permit to construct 32B through the Baker Wetlands across the center of the Haskell Farm.<sup>2</sup>

---

<sup>2</sup>FEIS, Aplt.App.(II) p. 506-507. See Attachment p. A-1, Plaintiffs' Ex. 1, Sec. 4(f) Evaluation, Ex. 4f-8, Aplt.App.(IV) p. 1240. Clean Water Act, 33 U.S.C. §1344.

In response, the Corps issued a notice of intent to prepare an EIS in August of 2001.<sup>3</sup> The EIS scoping process was conducted, including a public meeting and time for public comment.<sup>4</sup> The Corps released a draft EIS (“DEIS”) on August 16, 2002 and a final EIS (“FEIS”) in December 2002.<sup>5</sup>

2. In preparing the DEIS, a KDOT consultant concluded that the Haskell Farm is historic property.<sup>6</sup> Under Sec. 4(f), 32B cannot be constructed over the Farm unless there is no feasible and prudent alternative. On November 1, 2007, Federal Highway prepared a Sec. 4(f) Evaluation, found 42A imprudent and approved 32B.<sup>7</sup> It adopted the Corps’ 2002 FEIS as its own for its Sec. 4(f) May 2008 decision approving 32B.<sup>8</sup>

3. Defective Analysis of Noise Impacts in the DEIS, FEIS and Sec. 4(f) Evaluation.

---

<sup>3</sup>FEIS, Aplt.App.(II) p. 506-507.

<sup>4</sup> FEIS, Aplt.App.(II) p. 708-709. 40 C.F.R. §1601.7. The “scope” of an EIS “consists of the range of actions, alternatives and impacts to be considered.” 40 C.F.R. § 1508.25.

<sup>5</sup>FEIS, Aplt.App.(II) p. 473, 479.

<sup>6</sup> FEIS, Aplt.App.(II) p. 612. Documentation and Recommendations Concerning Determination of Eligibility For the National Register of Historic Places of Haskell Indian Nations University and the Baker Wetlands, Douglas County, Kansas, Brockington & Harvey, December 2001, (the “Brockington Report”), FEIS, Aplt.App.(III) p. 842. This determination was officially approved by the National Park Service in November 2002. Determination of Eligibility Notification, U.S. Dept. of Interior, November 7, 2002, p. 2, Aplt.App.(III) p. 838.

<sup>7</sup>Sec. 4(f) Evaluation, Aplt.App.(IV) p. 1205.

<sup>8</sup> The FHWA “adopted the Corps’ FEIS” and issued its Sec. 4(f) decision. FHWA Record of Decision, p. 1, Aplt.App.(IV) p. 1437.

(a). According to the FEIS, “The noise analysis published in the Draft EIS was incorrect due to inaccurate traffic data and the failure to convert metric units to English units. The model used for the draft EIS report was inadvertently based only on traffic using the westbound lanes of the highway.”<sup>9</sup>

(b). FHWA procedures and regulations for NEPA and Sec. 4(f) require that noise impact studies must include “a comparison of the predicted noise levels with . . . the existing noise levels.”<sup>10</sup> The FEIS noise study admits that it did not do this. “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.”<sup>11</sup>

Despite this shortcoming, Federal Highway used the FEIS noise study’s contour maps in its 2007 Sec. 4(f) Evaluation.<sup>12</sup>

#### 4. The EIS and Sec. 4(f) Evaluation Omitted the 42C Alignment.

---

<sup>9</sup>FEIS, p. 4-19, Aplt.App.(II) p. 651.

<sup>10</sup>FHWA Technical Advisory T 6640.8A, Noise Impacts §V.G.9(b), Aplt.App.(II) p. 436; 23 C.F.R. § 772.5(g) and 23 C.F.R. § 772.9(b), Attachment pages A-2 and A-3.

<sup>11</sup>Revised Preliminary South Lawrence Trafficway Traffic Noise Analysis Summary, p. 2, FEIS Aplt.App.(III) p. 799.

<sup>12</sup>The Sec. 4(f) Evaluation noise contour maps (Appendix F, p. 2, Sound Level Contours, Aplt.App.(IV) p. 1427, are the three FEIS noise study contour maps, Aplt.App.(III) p. 802, 804, 805.



(a) In 2001, there were five SLT alignments being considered.<sup>13</sup> The only 42nd St. alignment considered crossed the eastern Wakarusa River floodway at its narrowest place, just west of an “S” curve in the river.<sup>14</sup> (This is referred to as the “42C” Alignment.) Many EIS documents continued to show the 42C alignment as late as the December 2002 FEIS.<sup>15</sup>

(b) The FEIS only discussed the 42A and 42B Alternatives,<sup>16</sup> which both cross the river ¼ mile east of 42C.<sup>17</sup> The FEIS did not in any way identify or discuss 42C, and it only discussed the elimination of 42B.<sup>18</sup>

(c) In June 2003, the Prairie Band Potawatomi Nation (“Prairie Band”) requested the Corps to consider 42C.<sup>19</sup> The Prairie Band’s engineer determined that with 42C, bridge lengths could be reduced by 1,950 feet.<sup>20</sup> There is a cost savings of \$11,745 for every linear foot of 4-lane bridge converted to fill and

---

<sup>13</sup> There were “five proposed trafficway alignments” at the August 2001 public scoping meeting. Aplt.App.(III), p. 1045. They had “developed 5 alternatives.” Aplt.App.(III), p. 1041.

<sup>14</sup> September 27, 2001, HNTB “Area of Potential Effects” map, Aplt.App.(III) p. 1039, and August 26, 2001, *K.C. Star* article, Aplt.App.(III) p. 1046.

<sup>15</sup> See Noise Analysis Map for the 42<sup>nd</sup> St. Alignment, Aplt.App.(III) p. 805, and FEIS Concept Corridors map, Aplt.App.(II) p. 569. Both showed a planned 42C river crossing. The Areas of Potential Effect Map, FEIS Ex. I-2, Aplt.App.(II) p. 516, is also only consistent with 42C because it does not include the area of the 42A river crossing east of 42C.

<sup>16</sup> FEIS, p. 4, Sec. .6, Aplt.App.(II) p. 482.

<sup>17</sup> The Design Map of 42C shows 42A and 42C, Plaintiffs’ Ex. 8, Aplt.App.(I) p. 132.

<sup>18</sup> FEIS, p. 8, Sec. .9, Aplt.App.(II) p. 486.

<sup>19</sup> Prairie Band letter to the Corps, June 10, 2003, Aplt.App.(III) p. 995.

<sup>20</sup> Aplt.App.(III) p. 1068.

pavement.<sup>21</sup> With a 1,950 foot reduction in bridge length, \$22.9 million in costs would be saved with 42C.<sup>22</sup> The Corps admitted that 42C would save at least \$5.3 million,<sup>23</sup> which is a \$7.5 million savings in today's costs.<sup>24</sup>

(d) The Corps produced KDOT's draft version of 42C (Enclosure 2),<sup>25</sup> and it discussed the disappearance of 42C from the EIS process:

The HNTB conceptual 42nd Street alignment identified on Enclosure 2 was evaluated by KDOT during the agency's initial review phase. The alignment is located approximately one-half mile west of the 42nd St. Alignment A alternative and passes through the floodplain in an area where the floodway is divided. The alignment was one of the 15 alignments considered and rejected early in the KDOT's evaluation process. The alignment was eliminated since other 42nd St. alignments provided less curvature and, therefore, a safer and more desirable alternative.<sup>26</sup>

(e) As acknowledged by KDOT,<sup>27</sup> the Corps was "satisfied that the [42C] alternative redrawn by KDOT is reasonable and it reflects appropriate roadway

---

<sup>21</sup> \$12,824/ft. for bridges - \$1,079/ft. for fill and pavement = \$11,745/ft. savings for shorter bridges. Based upon updated costs, the 4,300 foot bridge on 42A would cost \$55.1 million or \$12,824 per linear foot. (\$105/sq. ft. x 90' width x 115% for contingency x 118% for final design = \$12,824/foot of bridge). Aplt.App.(IV) p. 1520. The 2003 non-bridge freeway costs were \$830 per linear foot. Aplt.App.(III) p. 1070. Updating this cost with the 30% increase would give current costs of \$1,079 per foot of freeway.

<sup>22</sup> 1,950 x \$11,745 = \$22,902,750.

<sup>23</sup> Corps letter to Prairie Band, July 16, 2003, p. 3, Aplt.App.(III) p. 1014.

<sup>24</sup> KDOT concedes that at least \$7.5 million in today's costs would be saved with the 42C alignment. KDOT Response Brief, p. 13, ¶20(c), Aplt.App.(I) p. 287.

<sup>25</sup> Corps letter, July 16, 2003, p. 4, Aplt.App.(III) p. 1015.

<sup>26</sup> Corps letter to Prairie Band, June 16, 2003, p. 2, Aplt.App.(III) p. 1013.

<sup>27</sup> KDOT Response Brief, p. 12, ¶19(a), Aplt.App.(I) p.286.

design.”<sup>28</sup> (The curves designed by KDOT for 42C were as “allowed by the American Association of State Highway and Transportation Officials criteria.”)<sup>29</sup> Although reasonable and feasible,<sup>30</sup> 42C was omitted from the EIS process due to KDOT’s unspecified safety concerns.

(f) In May 2006, the Prairie Band requested that Federal Highway not adopt the Corps’ FEIS due to its omission of 42C.<sup>31</sup> It also informed Federal Highway that its draft Sec. 4(f) Evaluation had omitted 42C.<sup>32</sup> Nevertheless, Federal Highway adopted the Corps’ FEIS for its Sec. 4(f) decision without ever considering 42C.<sup>33</sup>

(g) The 42C alignment disappeared from the FEIS and Sec. 4(f) Evaluation in the same way. The same map was used to identify the alternatives, with the 42nd St. Alignment being 42C.<sup>34</sup> Then the only 42nd St. alignments considered were 42A and 42B, and 42C was not mentioned.<sup>35</sup>

---

<sup>28</sup>Corps Record of Decision, Aplt.App.(III) p. 976, ¶3, approving KDOT’s design of 42C, which is Enclosure 2, Aplt.App.(III) p. 1015.

<sup>29</sup> Corps letter to Prairie Band, June 16, 2003, p. 2, Aplt.App.(III) p. 1013.

<sup>30</sup> “A feasible alternative is an alternative that it is possible to engineer design and build.” FHWA Section 4(f) Policy Paper, p. 2, Aplt.App.(IV) p. 1115.

<sup>31</sup>Prairie Band letter to FHWA, May 30, 2006, Aplt.App.(IV) p. 1503.

<sup>32</sup>Prairie Band letter to FHWA, January 19, 2007, p. 2, Aplt.App.(IV) p. 1160.

<sup>33</sup>FHWA Record of Decision, p. 1, Aplt.App.(IV) p. 1437.

<sup>34</sup> Sec. 4(f) Evaluation, Ex. 4f-6, Aplt.App.(IV) p. 1234, is virtually the same map as FEIS, Ex. II-3, Aplt.App.(II) p. 569.

<sup>35</sup> Sec. 4(f) Evaluation, p. 4f-25, 1st paragraph, Aplt.App.(IV) p. 1233.

5. The FEIS and Sec. 4(f) Evaluation Omitted 32B's Mitigation Plan Costs.

The FEIS and Sec. 4(f) Evaluation contain the same "Mitigation Plan" for 32B. It would (1) acquire and convert 317 acres to tall grass, wet meadow or woodlands; (2) remove 31st St. from Haskell property; (3) build a 10,000 square foot Wetland Center; (4) construct hike and bike trails; (5) buy Baker University an annuity; and (6) build parking and camping areas and make street, utility and drainage improvements.<sup>36</sup> The 32B Mitigation Plan costs were not included in the FEIS.<sup>37</sup> Nevertheless, Federal Highway approved the FEIS for its Sec. 4(f) decision in 2007.<sup>38</sup> Federal Highway omitted the 32B Mitigation Plan costs from its Sec. 4(f) Evaluation.<sup>39</sup> The omitted 32B Mitigation Plan costs are roughly \$10 million.<sup>40</sup>

---

<sup>36</sup> Proposed Mitigation Plan for 32B, FEIS, Aplt.App.(II) p. 690, copied at Sec. 4(f) Evaluation, Ex. 4f-10, Aplt.App.(IV) p. 1253, and discussed at p. 4f-64, Aplt.App.(IV) p. 1278.

<sup>37</sup> The \$18.6 million of FEIS 32B mitigation costs only "includes relocation of 31st Street, Haskell Avenue and Louisiana Street, as well as noise walls and landscaping." FEIS, p. 2-32, footnote 12, Aplt.App.(II) p. 551.

<sup>38</sup> FHWA Record of Decision, p. 1, Aplt.App.(IV) p. 1437.

<sup>39</sup> See Aplt.App.(IV) p. 1183, showing "Mitigation costs" of \$22.1 million for the same non-Mitigation Plan items as in the FEIS. This \$22.1 million was shown as 32B's "Mitigation" cost in Table 5, Aplt.App.(IV) p. 1272. See also Aplt.App.(IV) p. 1519, 1523-1528, where none of the costs for the 32B Mitigation Plan items can be found in 32B's cost.

<sup>40</sup> The estimated 2003 cost for the 32B Baker Contract alone was \$4.35 million. Aplt.App.(III) p. 1017. The 42A Mitigation Plan cost is listed at \$2.0 million and has about one-fourth of the wetland mitigation of the 32B Plan. Sec. 4(f) Evaluation, p. 4f-64, Table 5, Aplt.App.(IV) p. 1272; FEIS, Aplt.App.(II) p. 693, copied as Sec. 4(f) Evaluation, Ex. 4f-10, Aplt.App.(IV) p. 1254.

6. The FEIS and Sec. 4(f) Evaluation Failed to Determine Accident Rates.

To meet the purpose and need for safety, an alternative's freeway must have a predicted accident rate of 1.34 accidents/million vehicle miles or less.<sup>41</sup>

Improvement of accident rates is the focus of the purpose and need under FHWA procedures.<sup>42</sup> The FEIS and Section 4(f) Evaluation did not determine the predicted accident *rates* for the 32B or 42A freeways. They only stated the changes in the *number* of accidents for the 32B and 42A freeways.<sup>43</sup>

7. The 32B and 42A Alternatives.

The 32B Alternative's four-lane freeway and relocated 31st St. "will have a direct adverse impact on the [Haskell] Farm Property . . . Physical impacts . . . would involve construction of approximately one mile of 300- to 400- foot wide roadway corridor across the Haskell [Farm]."<sup>44</sup> (*See* Attachment 3, p. A-61, Plaintiffs' Ex. 1). The 32B Alternative would destroy 53 acres of wetlands in the Farm's Baker Wetlands, a National Natural Landmark.<sup>45</sup> In 2025, the 32B traffic

---

<sup>41</sup> FEIS, p. 1-6, Aplt.App.(II) p. 509, and Sec. 4(f) Evaluation, p. 4f-11, Aplt.App.(IV) p. 1219.

<sup>42</sup> FHWA Technical Advisory T 6640.8A, §V.D.(8), Aplt.App.(II) p. 425.

<sup>43</sup> FEIS, p. 2-29 and Table 2-12, Aplt.App.(II) p. 548, and Sec. 4(f) Evaluation, p. 4f-63 and Table 3, Aplt.App.(IV) p. 1271. The source of their numbers for changes in freeway accidents was not provided or explained.

<sup>44</sup> Sec 4(f) Evaluation, p. 4f-35, Aplt.App. (IV) p. 1243.

<sup>45</sup> Sec. 4(f) Evaluation, p. 4f-36, Aplt.App.(IV) p. 1244. As a National Natural Landmark it is officially recognized as "undisturbed wetland prairie." Sec. 4(f) Evaluation, p. 4f-14, Aplt.App.(IV) p. 1222, and *see* <http://www.nature.nps.gov/nnl/docs/NNLRegistry.pdf>, p. 39 (p. 45/116).

corridor crossing the Farm would have at least 55,566 vehicles per day (“vpd”) of freeway traffic and 19,500 vpd on relocated 31st Street.<sup>46</sup> The 42A Alternative would entirely avoid the Haskell Farm. (See Attachment 5, p. A-63, Plaintiffs’ Ex. 4<sup>47</sup>). The EIS and Sec. 4(f) Evaluation considered the 32B “Preferred” Alternative, the 42A “Avoidance” Alternative and the No-Action Alternative.

8. Efficiency.<sup>48</sup>

(a) Level of Service: In general, 42A and 32B would equally “operate at a level of service A.”<sup>49</sup>

(b) Traffic Volume: The FEIS estimated the 42A freeway to have 51,932 vpd and the 32B freeway to have 55,566 vpd in 2025.<sup>50</sup>

(c) Length: The 32B freeway is 5.61 miles and the 42A freeway is 6.48 miles. The No-Action Alternative is 6.89 miles, which is the existing K-10 city-connecting route on Iowa Street and 23rd Street.<sup>51</sup>

---

<sup>46</sup>FEIS, Aplt.App.(II) p. 549, and Aplt.App.(III) p. 813.

<sup>47</sup>Sec. 4(f) Evaluation, Ex. 4f-9, Aplt.App.(IV) p. 1241.

<sup>48</sup> “Efficiency can be measured by level of service, volume of traffic and length.” FEIS, p. 2-30, Aplt.App.(II) p. 549.

<sup>49</sup> FEIS, p. 2-30, Aplt.App.(II) p. 549.

<sup>50</sup>FEIS, Aplt.App.(II) p. 549.

<sup>51</sup> FEIS, Aplt.App.(II) p. 549, and see Level of Service on K-10 connecting route map, Sec. 4(f) Evaluation, Ex. 4f-3, Aplt.App.(IV) p. 1217.

9. Purpose and Need.

(a) 32B and 42A meet the purpose and need.<sup>52</sup>

The purpose and need for the proposed project is to provide a safe, efficient, environmentally sound and cost-effective transportation facility for users of K-10 Highway and the surrounding state highway system and, to the extent possible, to alleviate congestion on Lawrence city streets.<sup>53</sup>

(b) Diversion of City Traffic. There is a purpose and need “to alleviate congestion on Lawrence city streets.” On all city streets considered in the FEIS, 42A would divert 9,300 more vehicles than 32B. (Attachment 6, p. A-64<sup>54</sup>)

(c) There was particular concern about Iowa and 23rd Streets:

Accident rates for the city streets used as a K-10 Highway connection—specifically the section of Iowa Street between the K-10 Highway/US-59 Highway interchange and 23rd Street, and the section of 23rd Street between Iowa and Haskell Avenue — exceed the statewide average for similar facilities.<sup>55</sup>

On these most dangerous city streets, 42A would divert 5,300 more vehicles/day than 32B. (See Attachment 8, p. A-66<sup>56</sup>) On Iowa St. where crash rates are highest

---

<sup>52</sup> “[32B] and [42A] meet the purpose and need for the project . . .” Sec. 4(f) Evaluation, p. 4f-63, Aplt.App.(IV) p. 1271.

<sup>53</sup> FEIS, Sec. .5, p. 4, Aplt.App.(II) p. 482.

<sup>54</sup> Plaintiffs’ Ex. 5, Aplt.App.(I) p. 130. All traffic numbers in Ex. 5 were taken from the FEIS, Aplt.App.(III) p. 813 (Attachment 7, p. A-65), or, if available, from the newer Sec. 4(f) Evaluation, App. F, p. 1, Aplt.App.(IV) p.1426.

<sup>55</sup> FEIS, p. 1-5 to 1-6, Aplt.App.(II) p. 508-509, which refers to FEIS Ex. I-4, Crash Rate Comparison, Aplt.App.(II) p. 518.

<sup>56</sup>  $192,700 - 187,400 =$  a 5,300 vpd greater reduction with 42A. Attachment 8, p. A-66, Plaintiffs’ Ex. 17, Aplt.App.(I) p. 348.



at 375% of normal, 32B would worsen the traffic conditions by causing 4,200 more vehicles than No-Build.<sup>57</sup> With 42A, the traffic would fall by 10,700 vpd.<sup>58</sup>

(d) Accident Rates. “In order to meet KDOT’s purpose and need statement, an alternative must provide a safe facility as measured by capacity and access control. The alternative must yield a predicted collision rate at or below the statewide average” of 1.34 accidents per million vehicle miles.<sup>59</sup> Because 42A met the purpose and need,<sup>60</sup> it is a safe facility and has accident rates of 1.34 or less.]

#### 10. Traffic On or Near the Haskell Farm in 2025.

(a) In its Sec. 4(f) analysis of traffic impacts on the Farm, Federal Highway omitted the 55,566 vehicles/day on 32B’s freeway.<sup>61</sup> When this is included, the traffic there would be far greater with 32B. 32B would have 135,566 vpd, 49% above the No-Action level. 42A would have 80,900 vpd, 11% *below* the No-Action level.

---

<sup>57</sup> 121,000 – 116,800 = a 4,200 vpd increase in traffic on Iowa Street with 32B. Attachment 8, p. A-66, Plaintiffs’ Ex. 17, Apl’t.App.(I) p. 348.

<sup>58</sup> 121,000 – 110,300 = a 10,700 vpd decrease with 42A. Attachment 8, p. A-66, Plaintiffs’ Ex. 17, Apl’t.App.(I) p. 348.

<sup>59</sup> FEIS, p. 1-6, Apl’t.App.(II) p. 509, and Sec. 4(f) Evaluation, p. 4f-11, Apl’t.App.(IV) p. 1219.

<sup>60</sup> “[32B] and [42A] meet the purpose and need for the project . . . ” Sec. 4(f) Evaluation, p. 4f-63, Apl’t.App.(IV) p. 1217.

<sup>61</sup> Sec. 4(f) Evaluation, Table 6, Apl’t.App.(IV) p. 1276.



Computation of Traffic Volumes in 2025  
on or near the Haskell Farm with SLT Alternatives

<u>Streets from FHWA Table 6:</u> <sup>63</sup>	(in vehicles per day <sup>62</sup> )		
	<u>No-Action</u>	<u>32B Alternative</u>	<u>42A Alternative</u>
On 31 <sup>st</sup> Street between Louisiana St. and Haskell Ave.	25,900	19,500	19,600
On Louisiana Street between 31 <sup>st</sup> St. and the Wakarusa River	14,400	15,900	16,000
On Haskell Ave, between: 31 <sup>st</sup> St. and 27 <sup>th</sup> St.	35,500	27,900	24,400
On Haskell Ave, between: 31 <sup>st</sup> St. and Wakarusa River <sup>64</sup>	<u>15,200</u>	<u>16,700</u>	<u>20,900</u>
Vehicles/day on street segments	91,000	80,000	80,900
Plus: 32B Freeway Vehicles/day		+ <u>55,566</u>	
Total Vehicles/day on or near the Haskell Farm in 2025	<u><b>91,000</b></u> (100%)	<u><b>135,566</b></u> (149%)	<u><b>80,900</b></u> (89%)

(b) The 42A Alternative would not cause an increase in total 2025 traffic on or near the Haskell Farm. In 2025, the No Build traffic on these streets would be 91,000 vpd. The traffic with 42A would be 80,900 vpd or 10,100 vpd *less* than No Build.

(c) Even if the traffic on relocated Louisiana and Haskell were subtracted for 32B, 32B would still have more traffic on or near the Farm than 42A. The traffic with 32B would be 103,000 vpd<sup>65</sup> compared to 80,900 vpd with 42A.

<sup>62</sup> All traffic numbers here were taken from the FEIS, Aplt.App.(III) p. 811, or, if available, from the newer Sec. 4(f) Evaluation, App. F, Aplt.App.(IV) p.1426.

<sup>63</sup> This schedule uses the same street segments that FHWA used in its Sec. 4(f) Evaluation, Table 6, p. 4f-68, Aplt.App.(IV) p. 1276.

<sup>64</sup> In Table 6, Federal Highway omitted the 38,000 vehicles/day on Haskell Avenue between 31st Street and the 32B SLT Interchange. See Fact No. 11(b). These 38,000 vehicles are not included in these computations.

<sup>65</sup> 135,600 -15,900 -16,700 = 103,000.

11. (a) The 2002 FEIS assumed without traffic estimates that 42A “will substantially increase traffic on both Haskell Avenue and Louisiana Street” along the Farm’s Baker Wetlands.<sup>66</sup>

(b) In 2007, KDOT prepared estimates for this traffic, but it omitted the traffic on “Haskell: 31st to SLT” for 32B.<sup>67</sup> After hearing the traffic there would be 38,000 vpd with 32B,<sup>68</sup> Federal Highway replied, “This is interesting . . . 2.5 times more traffic on Haskell between 31st and the SLT for 32B vs. 42A.”<sup>69</sup> Nevertheless, Federal Highway omitted the 32B line for “Haskell: 31st to SLT” and its 38,000 vehicles from the Sec. 4(f) Evaluation and traffic analysis.<sup>70</sup> The Evaluation then criticized 42A for having 4,200 more vehicles than 32B on the southern end of Haskell Avenue.<sup>71</sup>

(c) On Louisiana Street west of the Baker Wetlands, 42A will not add to the future traffic. Each alternative would have basically the same 2025 traffic there: No Build (14,400), 32B (15,900) and 42A (16,000).<sup>72</sup>

---

<sup>66</sup> Aplt.App.(II) p. 557. The FEIS did not estimate traffic south of 31st Street. FEIS, Aplt.App.(III) p. 813.

<sup>67</sup> Aplt.App.(IV) p. 1199.

<sup>68</sup> Schwartz email to Meyer, Aplt.App.(IV) p. 1198.

<sup>69</sup> Meyer email to Armstrong, Aplt.App.(IV) p. 1197.

<sup>70</sup> Sec. 4(f) Evaluation, Appendix F, p. 1, Aplt.App.(IV) p. 1426. “For the Preferred Alternative this traffic is [only] South of the SLT to the Wakarusa River.” Sec 4(f) Evaluation, Table 6, p. 4f-68, Aplt.App.(IV) p. 1276.

<sup>71</sup> Aplt.App.(IV) p. 1275.

<sup>72</sup> Aplt.App.(IV) p. 1426.

(d) On the north end of Haskell Avenue east of the Baker Wetlands, 32B would result in 38,000 vpd, which are 17,100 more than with 42A.<sup>73</sup>

12. (a) The Baker Wetlands are entirely located in the Wakarusa River floodplain. The land on its east and west sides also is located within the floodplain. (*See* Attachment 5, A-63.<sup>74</sup>) Two-thirds of this frontage never will be developed because it is in a floodway or mitigation area.<sup>75</sup> For the remaining third of floodplain frontage, the future land use plans state that it is “not recommended for urban development.”<sup>76</sup> “Development within the floodplain will be discouraged by the city and county.”<sup>77</sup> No land use other than floodplain is planned or anticipated for these areas.<sup>78</sup>

(b) Over the past 20 years there has been growth in west Lawrence near the West Leg of the SLT (west of Iowa Street).<sup>79</sup> None of that growth occurred in the Wakarusa River’s adjacent floodplain.<sup>80</sup>

---

<sup>73</sup> 38,000 – 20,900 = 17,100. Aplt.App.(IV) p. 1198; Aplt.App.(IV) p. 1426.

<sup>74</sup> Plaintiffs’ Ex. 4, Sec. 4(f) Evaluation, Ex. 4f-9, Aplt.App.(IV) p. 1241.

<sup>75</sup> Two-thirds (1.46 miles) of the 2.19 miles of the frontage on the east and west sides of the Baker Wetlands can never be developed because it is in a floodway, in one of the mitigation areas or on the one parcel already developed. Prairie Band letter to Meyer, January 19, 2007, Aplt.App.(IV) p. 1165-1168.

<sup>76</sup> FEIS, p. 4-1, Aplt.App.(II) p. 633.

<sup>77</sup> FEIS, Aplt.App.(II) p. 637.

<sup>78</sup> Land Use Map, Aplt.App.(II) p. 626.

<sup>79</sup> Sec. 4(f) Evaluation, p. 4f-65, Aplt.App.(IV) p. 1273.

<sup>80</sup> See Sec. 4(f) Evaluation, Ex. 4f-13, Aplt.App.(IV) p. 1274.

13. (a) The FEIS and Sec. 4(f) Evaluation determined no floodplain or floodway impacts for 42A other than its mere presence.<sup>81</sup> Because of bridges over the floodplain and floodways for all alternatives, “Increase flood risk associated with this project is minimal.”<sup>82</sup> Although the EIS mentioned potential impacts on floodplain development and floodplain values, no specific impacts were determined other than wetland impacts.<sup>83</sup> The Evaluation concluded that 32B would destroy 58 acres of wetlands<sup>84</sup> compared to 4.45 acres for 42A.<sup>85</sup>

(b) FHWA Headquarters had difficulty finding any floodplain impacts: “It is not clear from the discussions whether the FEIS considered whether these two alternatives had a significant floodplain encroachment . . . Can either alternative be said to have a ‘significant encroachment?’”<sup>86</sup> It then condemned 32B as contrary to Federal Highway policy. “Our regulations (23 C.F.R. § 650) state that it is FHWA policy to avoid longitudinal encroachments (like in 32nd St B) when practicable.”<sup>87</sup> The conflict of 32B with FHWA policy was not mentioned in the Sec. 4(f) Evaluation.<sup>88</sup>

---

<sup>81</sup> Aplt.App.(II) p. 660, and Sec. 4(f) Evaluation, Aplt.App.(IV) p. 1249, 1272.

<sup>82</sup> FEIS, Aplt.App.(II) p. 658.

<sup>83</sup> FEIS, Aplt.App.(II) p. 658.

<sup>84</sup> FEIS, Aplt.App.(II) p. 660.

<sup>85</sup> Aplt.App.(IV) p. 1244, 1249.

<sup>86</sup> FHWA HQ Comments, December 7, 2006, Aplt.App.(IV) p. 1154.

<sup>87</sup> FHWA HQ Comments, December 7, 2006, Aplt.App.(IV) p. 1154.

<sup>88</sup> Sec. 4(f) Evaluation, p. 4f-36, Aplt.App.(IV) p. 1244.

14. (a) In November 2002, the National Park Service found the Haskell Farm “eligible for listing in the National Register of Historic Places.”<sup>89</sup>

[H]askell’s significance lies with its integration of academic, industrial, and agricultural training. This approach to integrated training was essential to the Federal government’s approach to Native American education. Under this approach to understanding Haskell’s significance, the presence of the Baker Wetlands is vital to the National register eligibility of the Haskell campus (as the campus is essential to the eligibility of the Wetlands).<sup>90</sup>

(b) The Haskell Farm satisfied the Brockington Report’s “two major integrity issues, general appearance (views within and of the area), and the preservation of [historic] structures and features.”<sup>91</sup>

General Appearance. Historically, the Haskell Farm was open land . . . Views today also show open land and wide vistas (Figures 22-27<sup>92</sup>) . . . A few trees are present today, primarily along remnant dikes and canals; these trees do not appear in historic photographs. After careful consideration, it is recommended here that these differences in appearance are relatively minor and do not constitute a significant loss of integrity . . .

It should be noted that there is little modern (structural) intrusion on the view shed with and of the Baker Wetlands.”<sup>93</sup>

Preservation of Structures. “ . . . significant historic structures in the Baker Wetlands that date to an early period of the former Haskell Institute when the property was part of the school’s farm. Historic

---

<sup>89</sup> Aplt.App.(III) p. 838. “The National Park Service [has] the authority and responsibility for administering the National Register program.” 36 C.F.R. § 60.3(h).

<sup>90</sup> Aplt.App.(III) p. 879.

<sup>91</sup> Aplt.App.(III) p. 871.

<sup>92</sup> Figures 22-27, Aplt.App.(III) p. 908-910.

<sup>93</sup> Aplt.App.(III) p. 872-873.

features include the landscape, water control structures, drainage structures, levees and bridges.”<sup>94</sup>

The historic dikes, canals, and water control structures maintain today relatively good integrity.<sup>95</sup>

“While modified, these former agricultural lands still retain the essential physical characteristics associated with this area from the historic period.”<sup>96</sup>

15. (a) Impact of 32B on the Haskell Farm’s General Appearance.

The National Park Service concluded that 32B would have a “great impact” on the general appearance aspect of the Farm’s historic integrity:

Both the appearance and size of the former agricultural area are very important to understanding the history of Haskell... The Brockington report concluded on page 28 that ‘ . . . visual and structural integrity alterations from the historic Haskell Farm to today's Baker Wetlands are not major.’ . . . We suggest that while the physical aspects of the open land may be subtle, they are not of less importance than the structures; they greatly complement and add to the understanding of the NHL. The creation of any road through the wetlands or upper fields 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.<sup>97</sup>

(b) Impact of 32B on the Farm’s Historic Structures.

The 32B Alternative would directly impact most of the historic structures that were the basis for the Farm’s historic integrity. Several intact historic

---

<sup>94</sup> Aplt.App.(III) p. 828.

<sup>95</sup> Aplt.App.(III) p. 873.

<sup>96</sup> Aplt.App.(III) p. 839.

<sup>97</sup> National Park Service letter to Corps, Aplt.App.(III) p. 1094.

structures were identified in the Baker Wetlands.<sup>98</sup> “Most prominent are an east-west levee and canal . . . , a north-south canal . . . and east and west side levees with shallow canals.” “[A]ssociated with the canals . . . are water control structures” #1, #2 and #3.<sup>99</sup> In the middle, there is also a north-south road and bridge over the east-west canal that provide historical and current access between the northern Haskell campus and the Baker Wetlands.<sup>100</sup> These historic structures and the 32B traffic corridor are shown on Attachment 4, p. A-62, Plaintiffs’ Ex. 3.<sup>101</sup> This map shows that the 32B corridor would directly impact most of the Farm’s historic structures. The corridor would run parallel and very near the east-west levee and canal, crossing it at both ends. It would run over the north-south canal and the east and west side levees. It would sever the north-south road and run over or very near the access bridge and water control structures #2 and #3.

(c) Loss of the Haskell Farm’s Historic Integrity with 32B.

The MPO is the area’s official land use planning agency.<sup>102</sup> It concluded that

---

<sup>98</sup> Aplt.App.(III) p. 873.

<sup>99</sup> Aplt.App.(III) p. 873, and Figure 28, Aplt.App.(III) p. 911.

<sup>100</sup> “The north south road through the central part of the wetlands area is still in place . . . This road was the major access from the Haskell Farm to the northern campus area. The large concrete bridge on this road (dating from 1919) traversing the northern (east-west) canal and levee is still in place and in use.” Aplt.App.(III) p. 874, and see Figure 31, Aplt.App.(III) p. 913.

<sup>101</sup> Aplt.App.(I) p. 128.

<sup>102</sup> A primary function of the Lawrence-Douglas County Metropolitan Planning Organization (“MPO”) is “the preparation, adoption, and maintenance of long

32B would cause the Haskell Farm to lose its historic integrity:

The four-lane 32nd Street alignment has significant adverse impacts on the Haskell Institute Historic District. While mitigation measures are proposed in the EIS, the MPO does not consider them sufficient to maintain the integrity of the district. As proposed, the historic district will be divided by a much wider and heavily traveled road project than exists currently. The project includes the relocated 31st Street adjacent to a new 32nd Street 4-lane highway. Along with buffer walls, these projects will effectively cut off the southern from the northern portions of the historic property. The walls and roadways will also disrupt the visual and environmental unity of the historic district and separate the historic farming structures from land they have been connected with.<sup>103</sup> (Emphasis added.)

The MPO is adamant that the proposed 32nd Street alignment will harm the Haskell Institute Historic District and that other prudent alternatives exist that should be pursued.<sup>104</sup>

(d) The MPO stated that 32B should not be built due to the “changing development potential south of Lawrence.”<sup>105</sup> Three years earlier, in 2004, the Lawrence Urban Growth Area had been expanded 2 ½ miles further south, from the Wakarusa River to ½ mile south of North 1000 Road.<sup>106</sup>

---

range comprehensive plans to guide the future development of the Lawrence-Douglas County land area.” Douglas County Code, Sec. 12-104.

<sup>103</sup>MPO letter to FHWA, May 30, 2006, p. 2, Aplt.App.(IV) p. 1417.

<sup>104</sup>MPO letter to FHWA, January 2, 2007, Aplt.App.(IV) p. 1415. The Lawrence City Commission also concluded that 32B “severely damages the connection between HINU and the wetlands – essentially placing an impenetrable barrier between the HINU family of students, faculty and friends and this wonderful natural area.” Aplt.App.(IV) p. 1482.

<sup>105</sup> Aplt.App.(IV) p. 1417.

<sup>106</sup> Aplt.App.(IV) p. 1173, Aplt.App.(III) p. 1077.



## **SUMMARY OF THE ARGUMENT**

The FEIS is defective because it (1) failed to include a proper noise study; (2) unjustifiably omitted the 42C alternative; (3) failed to include 32B's Mitigation Plan costs; and (4) applied an improper criterion to determine comparative safety of alternatives. The Section 4(f) decision is erroneous because the 42A alternative does not present unique problems of extraordinary magnitude. The district court affirmed Federal Highway's ROD "with misgivings." (Aplt.App.(I) p. 350). However, the district court ruled that the FEIS defects were harmless error. (Aplt.App.(I) p. 384-385, 398, 402). Plaintiffs maintain that failure to adhere to NEPA's procedural requirements on material issues is prejudicial error. Further, the material defects in the FEIS also cause the Section 4(f) to be defective. The FEIS does not establish that the 42A alternative has unique problems of extraordinary magnitude.

The FEIS establishes that the 32B alternative will cause appreciably greater harm to the Haskell Farm/Baker Wetlands than the 42A alternative.

## **STANDARD OF REVIEW (I)**

The standard of review of the district court's rulings is *de novo*. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F. 3d 683, 704 (2009) (internal cites omitted).

## ARGUMENT (I)

I. Federal Highway's decision should be reversed because its FEIS failed to comply with NEPA and its implementing procedures and regulations. Under the APA, it acted "in excess of its authority," "without observance of [NEPA] procedures required by law" and in violation of 5 U.S.C. § 706(2)(C) and 706(2)(D). It arbitrarily failed to include in the EIS the required NEPA information pertaining to noise, the 42C alignment, costs and safety in violation of 5 U.S.C. § 706(2)(A).

NEPA imposes procedural requirements before Federal Highway can issue a decision approving an SLT alternative. Under NEPA, the EIS is the procedural means to, *inter alia*, determine impacts and consider alternatives. The U.S. Supreme Court has explained the role of NEPA and environmental impact statements:

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's 'action-forcing' purpose in two important respects... It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

*Robertson v. Methow Valley Citizens Council et al.*, 490 U.S. 332, 348-349 (1989).

The NEPA regulations require that federal “agencies shall (a) rigorously and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). The agencies must maintain the scientific integrity of their discussions and analyses and must make high-quality information available to the public.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. 40 C.F.R. § 1502.24.

NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and actions taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.  
40 C.F.R. § 1500.1(b).

In general, NEPA requires that federal agencies take a “ ‘hard look’ at environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976).

#### A. Failure to Measure Noise Impacts.

1. Federal Highway’s FEIS violated NEPA by failing to determine the noise increase impacts for the SLT alternatives.<sup>107</sup> For noise impacts, Federal Highway’s EIS must include “a comparison of the predicted noise levels with...the existing noise levels.”<sup>108</sup> Under 23 C.F.R. § 772.5(g) “traffic noise impacts” occur “when

---

<sup>107</sup>Issues raised Aplt.App.(I) 102-105. The district court agreed that noise increase impacts had not been analyzed. Aplt.App.(I) p. 384.

<sup>108</sup>FHWA Technical Advisory T 6640.8A, October 30, 1987, Noise Impacts Sec. 9(b), Aplt.App.(II) p. 436.

the predicted noise levels substantially exceed the existing noise levels;”<sup>109</sup> and 23 C.F.R. § 772.9(b) requires these noise impacts to be determined.<sup>110</sup> The EIS’s noise study in this case admits that it failed to determine the noise increase impacts by comparing the alternatives’ predicted noise with existing noise. “Due to the conceptual nature of this project, the predicted noise levels were not compared to the existing noise levels.” (Fact No. 3(b))

The district court found that Federal Highway failed to comply with its noise impact regulations but refused to reverse the agency:

By not comparing existing noise levels with the NAC or with predicted future noise levels for each alternative, the FHWA did not comply with the noise study requirements contained in 23 C.F.R. Part 772. Its decision to select the 32B Alternative should therefore be reversed and remanded if reliance on the defective noise study constitutes prejudicial error.

*Attachment 1*, p. A-36, Aplt.App.(I), p. 384.

Here, plaintiffs can show prejudice only if the FHWA would have rejected the 32B Alternative but for this error. The procedural error which plaintiffs cite does not rise to this level.

Plaintiffs 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 . . . would have changed the outcome.

*Attachment 1*, p. A-37, Aplt.App.(I), p. 385.

---

<sup>109</sup> Attachment 10, p. A-68, 23 C.F.R. § 772.5(g).

<sup>110</sup> 23 C.F.R. § 772.9(b) requires that the “Analysis of traffic noise impacts...(b)...shall include...(2) prediction of traffic noise levels; (3) determination of existing noise levels [and] (4) determination of traffic noise impacts...” See Attachment 11, p. A-69 for 23 C.F.R. § 772.9(b).

The district court held that the NEPA errors in this case are harmless without proof that the correct NEPA procedures would have changed the agency's decision. This is directly contrary to the law in the Tenth Circuit and elsewhere. "That the Secretary may ultimately make the same decision . . . is immaterial; the . . . alleged injury results from Secretarial failure substantively to consider the environmental ramifications of its actions in accordance with NEPA." *Catron Cty. Bd. of Commissioners v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir.1996).<sup>111</sup>

NEPA's purpose is to influence the decision making process "by focusing the [federal] agency's attention on the environmental consequences of a proposed project," so as to "ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349. "[W]hen a decision to which NEPA obligations attach is made without the informed environmental

---

<sup>111</sup> See also *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456-7 (D.C. Cir. 1977) ("Ordinarily where an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted until the agency brings itself to compliance." The "presumption is that an action proceeding in violation of NEPA should be enjoined."); *Environmental Defense Fund, Inc. v. Froehlke*, 477 F.2d 1033, 1037 (8th Cir. 1973) (NEPA violation is irreparable harm requiring "blanket injunctive relief."); *Save Our Ecosystem v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (The policies underlying NEPA "weigh the scales in favor of those seeking the suspension of all action until the Act's requirements are met."); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 90 (2nd Cir. 1975) (Without injunctive relief, "application of a 'rule of reason' would convert an EIS into a mere rubber stamp for *post hoc* rationalization of decisions already made.")

consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.” *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir.1989) (Breyer, J.) (quoting *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir.1983) (emphasis omitted)). This harm is considered harm to the environment because “the ‘risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation’ by the acting federal agency.” *Catron Cty.*, 75 F.3d at 1433 (quoting *Marsh*, 872 F.2d at 504). The law in the Tenth Circuit is that harm to the environment is presumed when an agency fails to comply with NEPA. *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir.2002).

Federal Highway’s failure to determine noise impacts in its EIS is not a procedural “flyspeck.” *New Mexico ex rel. Richardson*, 565 F.3d at 704. NEPA and its procedures and regulations expressly require that noise impacts must be determined in the EIS. *See Davis*, 302 F.3d at 1115-1116; and also *Izaak Walton League of America, Inc. v. Kimbell*, 516 F.Supp.2d 982, 996 (D. Minn. 2007) (absence of supporting data [concerning noise impacts] deprives interested parties of information relevant to the agency’s decision-making process and thus undermines the procedural safeguards of NEPA). Lack of the required noise impact information in the EIS was not harmless error. “Informed public input can hardly be said to occur when major impacts of the adopted alternative were never disclosed.” *New Mexico ex rel. Richardson*, 565 F.3d at 708.

Federal Highway’s regulations express heightened concern when “the proximity of the proposed project substantially impairs . . . attributes of a property protected by Section 4(f).” 23 C.F.R. §. 774.15(e)(2). Here the location of the 32B traffic corridor and its noise are on or near most of the historic structures that give the Haskell Farm its historic significance. (Fact No. 15(b)). The FEIS also failed to specifically determine 32B’s noise impacts on the Sec. 4(f) historic structures.

2. In addition to its defective methodology, the FEIS noise study was deficient in its geographic scope.<sup>112</sup> The EIS defines the environmental impact study area as being the full six-mile length of the SLT alternatives.<sup>113</sup> However, the noise study considered noise for only one mile of 32B.<sup>114</sup> Thus, the study lacks 5/6ths or roughly 80% of 32B’s impact area. The error in the noise study’s methods is thus compounded by its deficient geographic scope. If for these reasons only, Federal Highway’s decision must be reversed due to the defective noise study.

---

<sup>112</sup> Issue raised Aplt.App.(I) p. 105. The district court did not rule on this issue.

<sup>113</sup> “The project’s area of potential effect can be found in Exhibit I-2.” FEIS, p. 1-5, Aplt.App.(II) p. 508. The yellow EIS “study area” is along and within ½ mile of the entire 32B and 42nd St. alignment routes and everything between them. FEIS, Ex. I-2, Aplt.App.(II) p. 516.

<sup>114</sup> The noise study considered only a one-mile segment of 32B. 32B noise contour map, Aplt.App.(III) p. 804. On the other hand, the study inexplicably considered a three-mile segment for 42A. 42A noise contour map, Aplt.App.(IV) p. 805.

B. The FEIS violated NEPA by eliminating 42C without explanation and failing to consider it as an alternative.<sup>115</sup>

1. The FEIS violated NEPA and 40 C.F.R. § 1502.14(a) by eliminating 42C without explanation. The 42C alignment would reduce the 42nd St. alignment cost by \$7.5 million to \$22.9 million. (Fact No. 4(c)). From its inception, the SLT EIS planned a 42C alignment across the narrowest part of the Wakarusa River eastern floodway. (Fact No. 4(a)).

The unexplained elimination of 42C from the EIS violated 40 C.F.R. § 1502.14(a).<sup>116</sup> The Corps admitted that 42C was considered before it was omitted from the EIS process. (Fact No. 4(b)). Elimination of reasonable alternatives is predicated on a discussion of “the reasons for their having been eliminated.” 50 C.F.R. § 1502.14(a). KDOT and the Corps conceded that the 42C alignment was a “reasonable alternative.” (Fact No. 4(e)). It should not have been eliminated without any discussion in the EIS.

2. The FEIS violated NEPA by not considering 42C in detail as a formal alternative. “In deciding whether an agency has adequately identified and considered all reasonable alternatives courts look closely at the objectives identified in an EIS’s purpose and need statement.” *Fuel Safe Wash. V. Fed.*

---

<sup>115</sup>Issues raised Aplt.App.(I) p. 116-120, ruled on at Aplt.App.(I) p. 375-380.

<sup>116</sup> A draft EIS prepared under 40 C.F.R. § 1502.9(a) “must fulfill and satisfy to the fullest extent possible the requirements established for final statements.” The elimination of 42C should also have been disclosed in the DEIS for public comment and questioning before the FEIS was issued.



*Energy Regulatory Comm’n*, 389 F.3d 1313, 1323 (10th Cir. 2004) (quoting from *Citizen’s Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1031 (10th Cir. 2002)). Federal Highway concedes that 42A meets the SLT’s purpose and need (Fact No. 9(a)), and 42C is basically the same design as 42A except for greater curvature. Notwithstanding its curvature, 42C “is reasonable and it reflects appropriate roadway design.” (Fact No. 4(e)). Thus, 42C is a reasonable and substantially cheaper alternative that NEPA requires to be studied *in detail* in the EIS. “All reasonable alternatives under consideration . . . need to be developed to a comparable level of detail.”<sup>117</sup>

Even though the Corps concluded that 42C “is reasonable and reflects appropriate roadway design,” the Defendants contend that 42C could be eliminated without mention in the EIS because it is curvier and, therefore, presumably unsafe. Their vague accusations about the safety of 42C have no scientific basis.

The Ninth Circuit has cautioned that “undue deference to a prior pronouncement that an alternative is undesirable because of safety considerations would transform such a pronouncement into a ‘talismán’” to be used to ensure approval of the non-avoidance alternative. “For these reasons, there is a need for an especially ‘thorough, probing, and in-depth review’ when safety issues are presented for review.” *Stop H-3 Ass’n v. Brinegar*, 740 F.2d 1442, 1452-53 (9th

---

<sup>117</sup> FHWA Technical Advisory, p.16, Aplt.App.(II) p. 427.

Cir. 1984). No such probing review of the relative safety of 42C occurred in this case. The Defendants did not determine 42C's accident rate or compare it to the EIS's standard of 1.34 accidents/mvm. They instead used a superficial "curvy equals unsafe" talisman, which could be used to summarily reject any reasonable alternative with more curves.

Like their EIS, the Defendants failed to take a "hard look" and "[r]igorously explore and objectively evaluate" 42C, as required by NEPA and 40 C.F.R. § 1502.14(a). The EIS's failure to formally consider 42C as an alternative or to even discuss its existence and reasons for elimination are additional procedural violations of NEPA that require reversal.

C. Federal Highway failed to accurately determine the cost  
of 32B in violation of NEPA.<sup>118</sup>

Federal Highway approved the 2002 FEIS for its Sec. 4(f) decision even though the \$10 million cost of the 32B Mitigation Plan was omitted. (Fact No. 5). "In order to fulfill its role, the EIS must set forth sufficient information for the general public to make an informed evaluation . . . and for the decision maker . . . to make a reasoned decision after balancing the risks and harm to the environment against the benefits to be derived from the proposed action." *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2nd Cir.1983) (internal

---

<sup>118</sup> Issues raised Apl't.App.(I) p. 115-116. The district court agreed that these 32B costs had been omitted. Apl't.App.(I) p. 392-394.

citations omitted). The FEIS misinformed the public and the decision maker about the “benefits to be derived from” 32B by substantially understating its cost. The FEIS’s failure to take a “hard look” at the real costs of 32B is an additional procedural violation of NEPA.

D. Federal Highway failed to apply the accident rate standard for determining the safety of the alternatives, violating NEPA.<sup>119</sup>

NEPA requires that the alternatives, including their safety, must be “rigorously and objectively evaluate[d].” 40 C.F.R. § 1502.14(a). To meet the purpose and need, an alternative cannot exceed 1.34 accidents per million vehicle miles driven. (Fact No. 6). Nowhere did the FEIS discuss this accident rate for the alternatives. Instead of considering accident rates, the FEIS considered changes in the number of accidents for each alternative. (Fact No. 6).

E. The NEPA violations in the FEIS require reversal of Federal Highway’s May 2008 Record of Decision.<sup>120</sup>

Federal Highway issued a notice of intent to adopt the Corps FEIS under 40 C.F.R. § 1506.3.<sup>121</sup> Adoption is permitted if the original EIS “meets the standards for an adequate statement.” 40 C.F.R. § 1506.3(a). In this case, the FEIS is inadequate, as explained above. With the defective FEIS, Federal Highway did not

---

<sup>119</sup>Issues raised *Aplt.App.(I)* p. 98-99. The district court did not decide this issue over the accident *rate* standard. *Aplt.App.(I)* p. 391-392.

<sup>120</sup>*Aplt.App.(IV)* p. 1436.

<sup>121</sup>*Aplt.App.(IV)* p. 1152.

issue a ROD that “complies with the requirements of [NEPA].”<sup>122</sup> Thus, its ROD must be reversed without appellate review of whether its Sec. 4(f) reasoning on imprudence was arbitrary. Without NEPA compliance, the Sec. 4(f) determination in the ROD was procedurally made “in excess of . . . statutory authority” and “without observance of procedures required by law.” 5 U.S.C. § 706(2)(C) and §706(2)(D).

## II. Federal Highway Arbitrarily Decided that the 42nd St. Alignment is Imprudent Under Sec. 4(f).

The first half of this brief discussed how NEPA procedures were not followed in the EIS. The remainder of this brief will discuss under Sec. 4(f) how Federal Highway arbitrarily failed to consider relevant factors, committed clear errors of judgment and could not have reasonably believed 42A to have unique problems of extraordinary magnitude. 5 U.S.C. § 706(2)(A).

Sec. 4(f) requires that Federal Highway must select the 42nd St. avoidance alternative unless it is not prudent. The U.S. Supreme Court has defined imprudence under Sec. 4(f):

[The agencies] argue . . . that the requirement that there be no other ‘prudent’ route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of [Sec. 4(f) land] against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches

---

<sup>122</sup> Aplt.App.(IV) p. 1437.

to these other factors whether, on balance, alternative feasible routes would be ‘prudent.’ But no such wide-ranging endeavor was intended. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

Instead, the agency can only find an alternative imprudent if it has unique problems of extraordinary magnitude:

[T]he protection of [Sec. 4(f) lands] was to be given paramount importance,” and that such lands “were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of [Sec. 4(f) land] unless he finds that alternative routes present unique problems.  
*Id.* at 412-413

Federal Highway recognized *Overton Park*’s high standard for imprudence:

[T]o find that an alternative (that avoids a 4(f) resource) is not ‘prudent’ one must find that there are unique problems or unusual factors involved with the use of such alternatives. This means that the costs, social, economic and environmental impacts, and/or community disruption resulting from such alternatives reach extraordinary magnitudes.<sup>123</sup>

The Tenth Circuit has discussed the *Overton Park* standard for imprudence.

“Sec. 4(f) requires the problems encountered by proposed alternatives to be ‘truly unusual’ or ‘reach[ ] extraordinary magnitudes’ if [Sec. 4(f) land] is taken.”

*Committee to Preserve Boomer Lake Park v. USDOT*, 4 F.3d 1543, 1550 (10th Cir.1993). *Accord Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 164 (4th Cir.1990) (Strong and compelling reasons required to reject

---

<sup>123</sup> FHWA Section 4(f) Policy Paper, p. 2, Aplt.App.(IV) p. 1115.

avoidance alternatives); and *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 804 (7th Cir.1987).

## STANDARD OF REVIEW (II)

The standard of appellate review of a Sec. 4(f) decision was discussed in detail in *Boomer*, 4 F.3d at 1549:

*Overton Park* instructed reviewing courts to conduct a three-tiered inquiry of the Secretary of Transportation's decision to fund a highway across land covered by Sec. 4(f). First, the reviewing court is 'required to decide whether the Secretary acted within the scope of his authority' under Sec. 4(f). *Id.* at 415, 91 S.Ct. at 823. In this initial inquiry, we 'must 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.' *Id.* at 416, 91 S.Ct. at 823. Second, the court must decide whether the Secretary's ultimate decision was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.' *Id.* (quoting 5 U.S.C. Sec. 706(2)(A) (1964 ed., Supp. V)). This inquiry involves determining 'whether the [Secretary's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' *Id.* Finally, the Supreme Court instructs reviewing courts to determine 'whether the Secretary's action followed the necessary procedural requirements.' *Id.* at 417, 91 S.Ct. at 824 . . . Our review must be probing and thorough, but 'the Secretary's decision is entitled to a presumption of regularity.' *Overton Park*, 401 U.S. at 415.

## ARGUMENT (II)

Federal Highway's wide-ranging review of 42A violated the *Overton Park* standard for imprudence.<sup>124</sup> Federal Highway's 4(f) decision could not find a single, solitary unique problem for 42A. Instead, its decision was a "wide ranging

---

<sup>124</sup>Issues raised Apl't.App.(I) p. 94, ruled on at Apl't.App.(I) p. 387-390.

endeavor,” using minor variations or normal aspects of 42A that it claims “collectively rather than individually have adverse impacts that present unique problems.”<sup>125</sup> This accumulation of molehills cannot be a reasonable basis for proving 42A to have unique problems of extraordinary magnitude. As it flyspecked 42A, Federal Highway ignored relevant and adverse impacts of 32B.

This brief will analyze Federal Highway’s Sec. 4(f) decision in order of its seven subjects: (1) purpose and need; (2) cost; (3) floodway and floodplain impact; (4) effect on planned development; (5) secondary and direct impact on the Haskell Farm; (6) impacts on historic sites and woodlands; and (7) the alleged “net benefits” of 32B.

#### 1. Purpose and Need.

Federal Highway arbitrarily considered 42A imprudent even though it meets the purpose and need.<sup>126</sup> (Fact No. 9(a)).

(a) Diversion of City Traffic: Federal Highway arbitrarily found 42A imprudent using the false assumption that 32B would divert more city traffic.<sup>127</sup> It failed to determine or even state any numbers for this assumption. The numbers

---

<sup>125</sup> Sec. 4(f) Evaluation, Aplt.App.(IV) p. 1279.

<sup>126</sup> Issues raised Aplt.App.(I) p. 95-99, ruled on at Aplt.App.(I) p. 390-392.

<sup>127</sup> “Although [32B] and [42A] meet the purpose and need for the project, [32B] would divert more traffic from local streets, thereby improving safety on the local street network.” Sec. 4(f) Evaluation, p. 4f-63, Aplt.App.(IV) p. 1271.

from the FEIS instead show that 42A is the preferable route because it would divert 9,300 more vehicles/day than 32B. (Attachment 6, p. A-64, Fact No. 9(b)).

On the most dangerous city streets, 42A would divert 5,300 more vehicles/day than 32B, while 32B makes unsafe conditions worse. (Attachment 8, p. A-66; Fact No. 9(c)). The 42A Alternative outperforms 32B in diverting more city traffic. It was arbitrary for Federal Highway to assume otherwise.

(b) Traffic Volume and Length: Federal Highway arbitrarily found that 42A's traffic volume and length contributed to its imprudence. For level of service, the 42A and 32B freeways function equally well at an A level of service. (Fact No. 8(a)). Federal Highway still complained that 42A's freeway is projected to carry slightly less traffic.<sup>128</sup> In 2025, the freeways are estimated to carry 51,932 vpd for 42A and 55,566 vpd for 32B. (Fact No. 8(b)). Thus, 42A diverts more city traffic and still has more capacity to handle future traffic than 32B. Its 7% lower freeway traffic volume is a benefit, not a problem.<sup>129</sup> It was arbitrary for Federal Highway

---

<sup>128</sup>Sec. 4(f) Evaluation, p. 4f-63, Apl't.App.(IV) p. 1271.

<sup>129</sup>  $51,932/55,566 = 93\%$ .



to consider minor differences in freeway traffic volume to indicate a unique problem of extraordinary magnitudes for 42A.<sup>130</sup>

Federal Highway disfavored 42A because it is slightly longer.<sup>131</sup> (42A's freeway is .87 mile (or 16%) longer than 32B's.)<sup>132</sup> Considering that the Haskell Farm is over one square mile, 42A's extra .87 mile length to avoid it is relatively minor. Any avoidance alternative like 42A that goes around land is naturally going to be longer than running directly through it. Contrary to *Overton Park*, Federal Highway arbitrarily found 42A imprudent based on this normal circumstance of slightly greater length.<sup>133</sup>

(c) Safety: Federal Highway failed to consider the relevant accident rate standard for safety and arbitrarily found 42A to be unsafe based solely on its length, contrary to *Overton Park*. Like the EIS, Federal Highway failed to apply the safety standard of 1.34 accidents/mvm driven. It failed to consider or even state the expected accident rates for the 42A or 32B freeways. (Fact No. 6). In any case, Federal Highway determined that 42A and 32B meet the purpose and need.

---

<sup>130</sup>Because KDOT's 2025 traffic estimates have shown roughly a 20% margin of error, this 7% difference is probably not even statistically meaningful. KDOT's 2001 62,000 vpd estimate for 42A's freeway has fallen 19% to its current 51,932 vpd figure. KDOT Response Brief, p. 6, ¶11(b), Aplt.App.(I) p. 280. From 2001 to 2010, KDOT's estimate for Haskell Ave.'s traffic rose and fell by 20%. (2001: 32,000; 2007: 38,000; 2010: 25,600) Federal Highway Response Brief, Ex. 1, p. 2, ¶5, Aplt.App.(I) p. 188.

<sup>131</sup>Aplt.App.(IV) p. 1271.

<sup>132</sup>Fact No. 8(c):  $6.48 - 5.61 = .87$ ;  $6.48/5.61 = 116\%$ .

<sup>133</sup>401 U.S. at 413, requiring proof of "truly unusual factors" to find imprudence.

(Fact No. 9(a)). Thus, they both must have met the purpose and need requirement that their freeways not exceed the statewide average of 1.34 accidents/mvm. (Fact No. 9(d)). As such, the 42A freeway is either completely average (at 1.34) or better than average in terms of the safety standard. Thus, *Overton Park* prohibits Federal Highway from using safety as a basis for finding 42A imprudent.

Instead of applying the 1.34/mvm accident rate standard, Federal Highway arbitrarily considered changes in annual accident numbers for which, as in the FEIS, there is no supporting evidence. (Fact No. 6). Federal Highway found 42A imprudent because it would reduce the annual number of accidents by 108 compared to 120 for 32B.<sup>134</sup> In order to demystify Federal Highway's unsupported numbers, one can reverse engineer its computation of the 12 accident/year difference.

Assuming that Federal Highway used the same statewide average of 1.34 accidents/mvm for 42A and 32B, the 12 accident/year difference is the result:

---

<sup>134</sup>Sec. 4(f) Evaluation, p. 4f-63, Table 3, Aplt.App.(IV) p. 1271.

Difference in 42A Freeway 32B Freeway Accidents/Year<sup>135</sup>

Number of Vehicles/Day	51,392	55,566
Miles They Travel/Trip	x 6.48	x 5.61
Days/Year	<u>x 365</u>	<u>x 365</u>
Vehicle Miles/Year	122,829,566	113,779,720
Million Vehicle Miles/Year	122.83	113.78
Ave. Accidents/Million Vehicle Miles	<u>x 1.34</u>	<u>x 1.34</u>
Accidents/Year for Freeway	164.59 -	152.47 = 12.12 $\approx$ <u>12</u>

This computation demonstrates that the 12 accident/year difference is entirely a normal function of the number of vehicles and the distanced traveled,<sup>136</sup> and is not caused by some extraordinary safety problem with 42A. Similarly, the related cost of these accidents is also a normal result of 42A's slightly greater length.

The 42A freeway is simply 16% longer<sup>137</sup> with 7% less traffic.<sup>138</sup> (Fact No. 8(c) and (b)). It thus has 12 (or 8%)<sup>139</sup> more accidents/year due entirely to slightly greater length, which is the usual condition for most avoidance alternatives.

Therefore, *Overton Park* prohibits these 12 accidents from being used as a basis for imprudence. It was arbitrary and illegal for Federal Highway to do so.

<sup>135</sup> The formula here is  $(122.83 \times 42A \text{ Rate}) - (113.78 \times 32B \text{ Rate}) = 12$ . Simplified, the formula is  $(1.080 \times 42A \text{ Rate}) - 1.05 = 32B \text{ Rate}$ . If 42A rates of less than 1.34 were used, then the 42A and 32B rates would still remain basically equal to maintain the 12 accident difference. For example, if the 42A Rate were 1.2, the 32B Rate would be 1.19.

<sup>136</sup> "Accident rates and costs are projected based on a number of factors, the most important being the number of vehicles that use a facility and the distance they travel." FEIS, Aplt.App.(II) p. 548.

<sup>137</sup>  $6.48/5.61 = 116\%$

<sup>138</sup>  $51,932/55,566 = 93\%$

<sup>139</sup>  $164.59/152.47 = 108\%$

## 2. Costs

Federal Highway failed to consider relevant cost factors by omitting substantial costs for 32B and failing to consider the cheaper 42C alignment.<sup>140</sup> Federal Highway's Sec. 4(f) Evaluation, like the FEIS upon which it is based, omitted roughly \$10 million of 32B "Proposed Mitigation Plan" costs. (Fact No. 5) The district court agreed that these costs had been omitted, finding that "[t]he FHWA's own numbers do not include several big ticket items . . . The FHWA cost estimate is therefore clearly erroneous . . ." Attachment 1, p. A-46.<sup>141</sup>

Federal Highway's arbitrary omission of the 32B Mitigation Plan costs was substantial error. When the \$10 million of omitted cost is added to 32B's cost, the alleged \$19 million cost difference between 32B and 42A is more than cut in half.<sup>142</sup> The remaining cost difference would be virtually eliminated by saving at least \$7.5 million with the 42C alignment. (Fact No. 4(c)). With these revisions, it is clear that the minor difference in cost between 32B and the 42nd St. alignment is not a unique problem of extraordinary magnitude.

Although 42C was eliminated as a NEPA alternative in the EIS, this did not excuse Federal Highway from considering 42C as a possible Sec. 4(f) alternative:

---

<sup>140</sup> Issues raised Aplt.App.(I) p. 115-116. The district court agreed that these 32B costs had been omitted. Aplt.App.(I) p. 392-394.

<sup>141</sup> Aplt.App.(I) p.394.

<sup>142</sup> The cost difference between 42A and 32B according to Federal Highway is \$19 million (\$166.9 million - \$147.9 million). Sec. 4(f) Evaluation, p. 4-64, Table 5, Aplt.App.(IV) p. 1272.

[S]imply because under NEPA an alternative (that meets the purpose and need) is determined to be unreasonable, does not by definition, mean it is imprudent under the higher substantive test of Section 4(f) . . . In other words, there is more room to reject alternatives as unreasonable under NEPA than there is to find those same alternatives are imprudent under Section 4(f).<sup>143</sup>

Federal Highway arbitrarily failed to consider 42C as a Sec. 4(f) alternative. (Fact No. 4(e) and (f)). Thus, under 5 U.S.C. § 706(2)(A), the Sec. 4(f) decision must be reversed both because it arbitrarily omitted substantial costs for 32B and because it failed to consider the relevant factor of 42C as a cheaper alternative.

### 3. Floodway and Floodplain Impact

Federal Highway arbitrarily found 42A to have floodway and floodplain impacts.<sup>144</sup> Although it asserted that 42A had an impact, like the EIS, the Sec. 4(f) Evaluation utterly failed to explain why or how. (Fact No. 13(a)). The mere fact that an alternative is located in a floodplain or floodway does not mean that it impacts them. None of the alternatives have flooding impacts there because they have *bridges*. (Fact No. 13(a)). The only specific evidence was that 32B would destroy 58 wetland acres compared to 4.45 for 42A and that 32B is disfavored by FHWA's own policies. (Fact No. 13(a) and (b)). The conflict of 32B with FHWA policies was not mentioned in the Sec. 4(f) Evaluation. (Fact No. 13(b)). For the floodways and floodplain, Federal Highway arbitrarily disfavored 42A as

---

<sup>143</sup>FHWA Section 4(f) Policy Paper, p. 5, Aplt.App.(IV) p. 1118. In this case, the Corps determined 42C to be reasonable. (Fact No. 4(d)).

<sup>144</sup>Issues raised Aplt.App.(I) p. 112-113, ruled on at Aplt.App.(I) p. 394-396.

imprudent for no apparent reason and arbitrarily failed to consider 32B's extensive wetland damage and conflict with its own policies.

#### 4. Effect on Planned Development

Federal Highway arbitrarily used normal changes to planned development as a basis for finding 42A imprudent.<sup>145</sup> In a rhetorical parade, it complained that 42A will:

“induce and accelerate” growth south of the Wakarusa River, “create infrastructure demand . . . more quickly and in greater capacity than anticipated,” “cause the assumptions . . . to be reconsidered” and cause a “commercial node . . . having more mixed and dense urban population than . . . [on] the land use map,” “could require expansion of wastewater plant capacity sooner than expected” and may require “updates . . . regarding specific land uses.”<sup>146</sup>

In other words, 42A would have the normal result of requiring additional planning for associated land uses and infrastructure. Although it would cause planners to consider new things and issues, this is a normal part of the process. “Land use planning is an ongoing, organic exercise, particularly in fast growing areas.”<sup>147</sup>

Further, all of these alleged growth effects for 42A would occur within the southern urban growth area as expanded 2½ miles further south in 2004.<sup>148</sup> These

---

<sup>145</sup> Issues raised Aplt.App.(I) p. 109-112, ruled on at Aplt.App.(I) p. 396-400.

<sup>146</sup> Sec. 4(f) Evaluation, p. 4f-65-67, Aplt.App.(IV) p. 1273-1275, reciting comments from the County Administrator, Sec. 4(f) Evaluation, Appendix G, Aplt.App.(IV) p. 1429.

<sup>147</sup> Aplt.App.(III) p. 1102.

<sup>148</sup> Aplt.App.(I) p. 137.

effects of 42A on planned development are not an extraordinary problem but merely a normal one.

Federal Highway's above comments about 42A were taken from the County Administrator. The long-range planning function is not his; it rests instead with the Lawrence-Douglas County Planning Commission (the "MPO"). (Fact No. 15(c)). As the official planning agency, the MPO had a completely different opinion. "The MPO is adamant that the proposed 32nd Street alignment will harm the Haskell Institute Historic District and that other prudent alternatives exist that should be pursued." (Fact No. 15(c)). The MPO stated that 32B should not be built due to the "changing development potential south of Lawrence." (Fact No. 15(d)). The MPO would gladly eliminate 32B from its plans in favor of other prudent options, and it expressed no opposition to 42A. Federal Highway arbitrarily failed to consider these very relevant MPO condemnations of 32B.

#### 5. Direct and Secondary Impacts of the Alternatives

Federal Highway omitted significant direct impacts of 32B and grossly exaggerated the secondary impacts of 42A on the Haskell Farm.<sup>149</sup> The principal reason Federal Highway determined 42A imprudent was its claim that "although [42A] would have no direct impacts on the [Haskell Farm], it would result in

---

<sup>149</sup> Issues raised Aplt.App.(I) p. 99-112, ruled on at Aplt.App.(I) p. 396-400.

greater long-term secondary and cumulative adverse impacts.”<sup>150</sup> Federal Highway’s main rationale was its arbitrary finding that 42A will cause more traffic and development impacts on or near the Farm than 32B. Its conclusions do not withstand inspection.

(a) Omitted Traffic Noise Impacts: Federal Highway arbitrarily failed to determine or consider the relevant noise increase impacts of the alternatives.<sup>151</sup> Instead of doing the noise increase impact analysis required by NEPA, Federal Highway arbitrarily relied on the defective FEIS noise study for its Sec. 4(f) decision. (Fact No. 3(b)). It pointed to the FEIS noise study’s maps and declared that “the total audible disturbance associated with [32B] will be less” in 2025 “than noise disturbances from adjacent roads associated with [42A].”<sup>152</sup> Unfortunately, the noise increase impacts of the alternatives never were determined in the FEIS study, as discussed above in Sec. I.A. The Sec. 4(f) Evaluation contour maps are from the same defective FEIS study and, like the FEIS, they failed to determine or analyze the noise increase impacts.<sup>153</sup>

b) Erroneous Traffic Volumes on and near the Haskell Farm: For 32B, Federal Highway arbitrarily failed to consider the 55,566 vehicles on the 32B

---

<sup>150</sup> Sec. 4(f) Evaluation, p. 4f-67, Aplt.App.(IV) p. 1275.

<sup>151</sup> Issues raised Aplt.App.(I) p. 102-105, ruled on at Aplt.App.(I) p. 380-385, 406.

<sup>152</sup> Sec. 4(f) Evaluation, p. 4f-68-69, Aplt.App.(IV) p. 1276-1277.

<sup>153</sup> The noise contour maps do not show noise increase impacts, they show the noise abatement criteria (NAC) sound level contours for each alternative.



freeway in its traffic analysis.<sup>154</sup> (Fact No. 10(a)). When the 32B freeway is included in Sec. 4(f) Evaluation, Table 6, the traffic on and near the Farm is obviously much greater with 32B. With 32B, this traffic in 2025 would be 135,566 vehicles/day, a 49% increase above the No-Action level. For 42A, this traffic would be 80,900 vehicles/day, an 11% *decrease* from the No-Action level. (Fact No. 10(a)).

The 42A Alternative would not increase the total traffic that affects the Haskell Farm. Even if no SLT were built, the No-Action traffic there would be 91,000 vehicles/day. With 42A, the traffic would be 80,900 vehicles, or 10,100 *less* than for No-Action. (Fact No. 10(a)). The future increases in local traffic would exist for reasons other than 42A. Thus, Federal Highway's finding that 42A would indirectly impact the Farm by increasing traffic there is directly contrary to the evidence. The fact is that 42A would improve these traffic conditions compared to No-Action and 32B.

KDOT has argued that because Haskell Ave. and Louisiana St. would be relocated with 32B, they should not be in Table 6.<sup>155</sup> Even if this traffic were removed for 32B, there would still be 103,000 vehicles/day with 32B and only 80,900 with 42A. (Fact No. 10(c)). Federal Highway ignored the elephant in the

---

<sup>154</sup> Issues raised Aplt.App.(I) p. 100-102. Plaintiffs cannot locate a ruling regarding omission of the 55,566 vehicles for 32B.

<sup>155</sup> KDOT Response Brief, Aplt.App.(I) p. 281.

living room, *i.e.*, the 55,566 vehicles on the 32B freeway running directly over the Farm. Federal Highway's arbitrary exclusion of the 32B freeway traffic from Table 6 was substantial error in its impact analysis and is further grounds for reversal under 5 U.S.C. § 706(2)(A).

(c) Traffic on Louisiana Street and Haskell Avenue west and east of the Baker Wetlands of the Haskell Farm: Federal Highway arbitrarily omitted 38,000 vehicles on Haskell Ave. for 32B and then found that secondary traffic impacts were a problem for 42A.<sup>156</sup>

The 2002 FEIS assumed, without estimates, that 42A would cause unusual increases in traffic on Haskell and Louisiana along the Baker Wetlands. (Fact No. 11(a)). Federal Highway continued this theory, claiming that 42A's secondary traffic impacts would be greater than the direct impacts from 32B.<sup>157</sup> The traffic numbers estimated in 2007 do not support their theory. On Louisiana Street this future traffic would be basically the same for all alternatives. (Fact No. 11(c)). On the north end of Haskell Avenue, 32B would result in 38,000 vehicles/day, or 17,100 *more* than for 42A. (Fact No. 11(d)). Confronted with this inconvenient truth for 32B, Federal Highway arbitrarily omitted these 38,000 vehicles from its

---

<sup>156</sup> Issues raised Aplt.App.(I) p. 100-102, 109-110, ruled on at Aplt.App.(I) p. 397-400.

<sup>157</sup> “[42A] is expected to accelerate development south of the Wakarusa River, which will increase traffic on both Haskell Avenue and Louisiana Street since both roads provide primary north/south routes into Lawrence . . .” Sec. 4(f) Evaluation, p. 4f-67, Aplt.App.(IV) p. 1275.

Sec. 4(f) Evaluation and traffic analysis. (Fact No. 11(b)). It then criticized 42A for having 4,200 more vehicles than 32B on the southern end of Haskell where floodplain development clearly is not reasonably foreseeable. (Fact No. 11(b) and 12(a)).

If anything is extraordinary here, it is the 38,000 vehicles on Haskell Avenue with 32B. In addition to their direct traffic impacts, these 38,000 vehicles were relevant evidence of possible commercial development pressures on *non-floodplain* land north of the 32B SLT interchange. Viewed in comparison, the additional 4,200 vehicles on the south end of Haskell with 42A cannot reasonably be viewed as an unusual problem that supports a finding of imprudence. The additional 4,200 vehicles on the south end of Haskell with 42A are less than one-fourth of the additional 17,100 vehicles on its north end with 32B. Federal Highway's arbitrary view of 42A's secondary impacts was largely based upon its omission of these 38,000 vehicles on Haskell for 32B, its omission of the 55,566 vehicles on 32B's freeway, its defective noise study and its arbitrary, double-standard assumptions about floodplain development. These circumstances require reversal of Federal Highway's Sec. 4(f) decision. 5 U.S.C. § 706(2)(A).

(d) Damage by 32B to the Haskell Farm's Historic Integrity and Eligibility: Federal Highway arbitrarily ignored relevant authoritative evidence and failed to consider whether 32B would impact the Haskell Farm's historic integrity and

eligibility.<sup>158</sup> In 2002, the Haskell Farm was found historically eligible based upon the “two major integrity issues, general appearance (views within and of the area), and the preservation of [historic] structures and features.” (Fact No. 14(b)). On these two key issues, 32B would do profound damage. The National Park Service concluded that 32B would have a “great impact” on the general appearance aspect of the Farm’s historic integrity. (Fact No. 15(a)). The 32B Alternative would also directly and severely impact most of the historic structures that were the basis for its historic integrity. (Fact No. 15(b)). Accordingly, the MPO concluded that 32B would cause the Farm to lose its historic integrity and, therefore, its historic eligibility. (Fact No. 15(c)).

In the face of all these authoritative opinions about 32B’s serious impacts on the Farm’s historic status, Federal Highway arbitrarily failed to analyze the relevant issues to determine whether its historic status would continue with 32B. In fact, it openly acknowledged that it failed to consider the National Park Service guide on how to apply the National Register criteria.<sup>159</sup> Federal Highway’s Sec. 4(f) decision must be reversed for this additional reason that it arbitrarily failed to

---

<sup>158</sup>Issues raised Aplt.App.(I) p. 106-109. The district court did not rule on these issues.

<sup>159</sup>Federal Highway objected to admission of the National Park Service’s publication, “How to Apply the National Register Criteria for Evaluation,” because it “was not before the Federal Defendant during the administrative process and was not considered in making the final agency decision at issue in this case.” Aplt.App.(IV) p. 1535.

consider the relevant profound impacts of 32B on the Haskell Farm's historic integrity and eligibility, in violation of 5 U.S.C. § 706(2)(A).

#### 6. Impacts on Other Historic Sites and Woodlands

Federal Highway arbitrarily considered 42A imprudent based upon non-existent impacts to historical properties and irrelevant impacts to trees.<sup>160</sup> It complained that 42A could impact the Oregon and California Trails, including their Blanton's Crossing. It made this capricious conclusion without determining their actual locations, mentioning that 42A would have no direct impact on Blanton's Crossing,<sup>161</sup> or disclosing that Blanton's Crossing is not even historic property.<sup>162</sup> There was some evidence that these trails "traveled north/south through the middle of the west half of the Baker Wetlands,"<sup>163</sup> but this would place them more in the vicinity of 32B. Federal Highway then mentioned a minor 42A impact on the historical Meairs Farmstead but then found there would be "no adverse effect" with vegetative screening.<sup>164</sup> Accordingly, it is clear that Federal Highway arbitrarily disfavored 42A as imprudent based upon capriciously assumed or non-existent impacts on historical properties. Federal Highway's concern that 42A would affect

---

<sup>160</sup>Issues raised Aplt.App.(I) p. 113, ruled on at Aplt.App.(I) p. 400-401.

<sup>161</sup> Federal Highway admitted elsewhere that 42A "would avoid direct impacts to Blanton's Crossing." Comment 4 Response, Aplt.App.(IV) p. 1261.

<sup>162</sup> Sec. 4(f) Evaluation, p. 4f-69, Aplt.App.(I) p. 1277. Blanton's Crossing was officially found not to be historically significant. Aplt.App.(IV) p. 1155-1158.

<sup>163</sup> Sec. 4(f) Evaluation, p. 4f-55, Aplt.App.(IV) p. 1263.

<sup>164</sup> Sec. 4(f) Evaluation, p. 4f-69, Aplt.App.(IV) p. 1277. The SHPO determined there would be "no adverse impact" after minor mitigation. Aplt.App.(IV) p. 1201.

a few more acres of trees than 32B is also capricious. Highways are routinely built through woods. This does not begin to show a unique problem for 42A.

#### 7. The “Net Detriment” and the Imprudence of 32B

Federal Highway arbitrarily relied upon the alleged “net benefit” of 32B in considering 42A imprudent.<sup>165</sup> This is irrelevant to whether 42A has unique problems of extraordinary magnitude. In any case, some of the alleged benefit was for 32B’s unfunded Mitigation Plan.<sup>166</sup> Because the Plan was not included as a cost for 32B, it was arbitrary for it to even be considered. The only other alleged 32B benefit is the relocation of Haskell Ave., Louisiana Street and 31st Street.<sup>167</sup> Relocating Haskell and Louisiana would remove 32,600 vehicles/day from a few acres on the east and west sides of the Haskell Farm. (Fact No. 10(a)).<sup>168</sup> In exchange, 32B would destroy 53 wetland acres and bring 56,000 loud<sup>169</sup> freeway vehicles across the Farm’s center. This is obviously a net detriment for the Farm, not a benefit.

It is 32B that has the unique problems. Its 300’-400’ wide traffic corridor would destroy 53 acres of the Baker Wetlands, a National Natural Landmark

---

<sup>165</sup>Issues raised Aplt.App.(I) p. 120-121, ruled on at Aplt.App.(I) p. 401-402.

<sup>166</sup>Aplt.App.(IV) p. 1278.

<sup>167</sup>31st Street would be relocated but not removed from the Farm.

<sup>168</sup>See Fact No. 10 (a). For 32B:  $16,700 + 15,900 = 32,600$ .

<sup>169</sup>“Traffic at 65 miles per hour sounds twice as loud as...30 miles per hour.”FHWA, Highway Traffic Noise, p. 2-3, <http://www.fhwa.dot.gov/environment/htnoise.htm>.

recognized for its “undisturbed wetland prairie.” (Fact No. 7). Its corridor would run over or near most of the historic structures, cutting the Haskell Farm in two and likely ending its historic integrity and eligibility. (Fact No. 15(a)-(c)). The 32B alignment would cause the Farm, the historic structures and its entire route to have noise increase impacts, the severity of which is still unknown due to a defective EIS noise study. (Fact No. 3(b)).

The 32B Alternative would divert less city traffic. (Fact No. 9(b)). It would make traffic conditions worse on the most dangerous city street segments. (Fact No. 9(c)). It would flood the Haskell Ave. SLT Interchange near the Farm with 38,000 vehicles/day. (Fact No. 11(b)). Its longitudinal floodplain encroachments would be contrary to Federal Highway policy. (Fact No. 13(b)). It would cost \$10 million more than anyone expected. (Fact No. 5). It would be constructed without the EIS ever considering 42C, which is \$7.5 to \$22.9 million cheaper than the current 42A alternative. (Fact No. 4(c)). When the analysis is based on facts and not arbitrary speculation, it is clear that the imprudent alternative is 32B.

#### **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

Federal Highway's May 2008 Record of Decision was based upon a materially defective FEIS. The FEIS failed to measure noise impacts, it omitted 42C, it misstated 32B's cost and it failed to apply its standard for safety. NEPA requires reversal of the ROD and the issuance of an injunction prohibiting any activity to build 32B.

Additionally, the ROD's Sec. 4(f) finding that 42A was imprudent must be reversed. Like its FEIS, the ROD failed to measure noise impacts, omitted 42C, misstated 32B's cost and ignored its safety standard. In a wide-ranging review prohibited by *Overton Park*, it concluded 42A imprudent without finding a single unique problem for it. The ROD is full of arbitrary speculation and clear errors in judgment. It failed to consider relevant evidence of city traffic actually diverted, omitted the entire 32B freeway from its Haskell Farm traffic analysis, concealed 38,000 vehicles on Haskell Ave. for 32B and failed to determine 32B's likely severe impact on the Farm's historic integrity and eligibility. Contrary to *Overton Park*, the ROD found 42A imprudent based upon the normal circumstances of slightly greater length. When the facts are actually examined, the ROD's criticisms are proved arbitrary and it is 32B that emerges as the imprudent alternative. Federal Highway's ROD finding 42A imprudent must be reversed for substantial violations of NEPA and the APA.



Respectfully submitted,

---

Robert V. Eye, No. 10689

/s/ Robert V. Eye

Robert V. Eye, No. 10689

David Prager, III, No. 10090

KAUFFMAN & EYE

112 S.W. 6th Avenue, Suite 202

Topeka, Kansas 66603-3850

785-234-4040 Phone

bob@kauffmaneye.com

Attorneys for Plaintiffs /Appellants

## **CERTIFICATE OF COMPLIANCE**

### **Section 1. Word count.**

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,794 words.

I relied on my word processor to obtain the count and it is Microsoft Word.

I certify that the information in this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: \_\_\_\_\_  
Robert V. Eye  
Attorney for the Plaintiffs

By: /s/ Robert V. Eye  
Attorney for the Plaintiffs

**CERTIFICATE OF DIGITAL SUBMISSION  
AND PRIVACY REDACTIONS**

I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF, as 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.

---

April Middleton  
Legal Assistant

---

/s/ April Middleton  
Legal Assistant

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was furnished through (ECF) electronic service on this the 20th day of April, 2011, to the following:

Jackie A. Rapstine, jackie.rapstine@usdoj.gov, Attorney for the United States

Oswald S. Dwyer, Jr., oswald@ksdot.org, Attorney for Defendants Miller and KDOT

Eldon J. Shields, ejshields@gsrlaw.com, Attorney for Defendants Miller and KDOT

Robert F. Flynn, robertflynn@gsrlaw.com, Attorney for Defendants Miller and KDOT

Maureen E. Rudolph, Maureen.Rudolph@usdoj.gov, efile\_nrs.enrd@usdoj.gov

Oswald S. Dwyer, Jr., Oswald@ksdot.org, jessicakn@ksdot.org

and the **APPELLANT'S APPENDIX** was served on the 20th day of April, 2011, by depositing the copies in the U.S. mail, postage prepaid and addressed to the following:

Office of the Clerk  
United States Court of Appeals Tenth Circuit  
Byron White United State Courthouse  
Denver, CO 80257

Jackie A. Rapstine  
Office of United States Attorney - Topeka  
290 U.S. Courthouse  
444 S.E. Quincy  
Topeka, KS 66683-3592

Eldon J. Shields  
Gates, Shields & Ferguson, PA  
10990 Quivira Rd., Suite 200  
Overland Park, KS 66210

---

April Middleton  
Legal Assistant

/s/ April Middleton  
Legal Assistant

# **ATTACHMENTS**

**ATTACHMENTS INDEX:**

**Page**

1. Memorandum and Order,  
filed November 5, 2010, Aplt.App.(I) p. 53.....A-1
2. Judgment, November 8, 2010, Aplt.App.(I) p. 408.....A-60
3. Plaintiffs' Exhibit 1, Map of 32B Alternative,  
Sec. 4(f) Evaluation, Ex. 4f-8, Aplt.App.(I) p. 126.....A-61
4. Plaintiffs' Exhibit 3, Historic Structures in the Baker Wetlands  
of the Haskell Agricultural Farm Property and the  
32B Alternative Traffic Corridor, Aplt.App.(I) p. 128.....A-62
5. Plaintiffs' Exhibit 4, Map of 42A Alternative, Sec. 4(f)  
Evaluation, Ex. 4f-9, Aplt.App.(I) p. 129.....A-63
6. Plaintiffs' Exhibit 5, Computations of City Traffic Reductions  
with the SLT Alternatives in 2025, Aplt.App.(I) p. 130.....A-64
7. Traffic Estimates for City Traffic Street Segments in 2025,  
Kansas Department of Transportation, FEIS,  
November 9, 2001, Aplt.App.(III) p. 813.....A-65
8. Plaintiffs' Exhibit 17, Comparison of Traffic on Streets  
With Highest Accident Rates for SLT Alternatives  
in 2025, Aplt.App.(I) p. 348.....A-66
9. Plaintiffs' Exhibit 10, KDOT Map of 42C Alignment,  
Enclosure 2, Aplt.App.(III) p. 1015 .....A-67
10. 23 C.F.R. § 772.5.....A-68
11. 23 C.F.R. § 772.9.....A-69