

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01135-REB
(Consolidated with Civil Action No. 10-cv-00462-REB)

COLORADO RAIL PASSENGER ASSOCIATION,
Plaintiff,

v.

FEDERAL TRANSIT ADMINISTRATION, DENVER UNION STATION PROJECT
AUTHORITY and REGIONAL TRANSPORTATION DISTRICT, a political subdivision
of the State of Colorado
Defendants.

EMERGENCY MOTION AND MEMORANDUM IN SUPPORT FOR
A TEMPORARY RESTRAINING ORDER AGAINST DEFENDANTS DENVER UNION
STATION PROJECT AUTHORITY and REGIONAL TRANSPORTATION DISTRICT

Dated this 12th day of March, 2010.

Respectfully submitted,

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Fed. R. Civ. P. 65, and D.C. LCivR 65.1, Plaintiff Colorado Rail Passenger Association ("ColoRail"), moves the Court for an immediate Temporary Restraining Order ("TRO") enjoining Defendants Federal Transportation Administration ("FTA"), Denver Union Station Project Authority ("DUSPA") and Regional Transportation District ("RTD"), and their agents or assigns, from commencing and/or continuing any work on the Denver Union Station Project (the "Project") pending the outcome of Plaintiff's appeal of administrative action taken by Defendants. The purpose of the appeal is to invalidate the Record of Decision ("ROD") issued on October 17, 2008.

Filed contemporaneously herewith is ColoRail's Amended Complaint for Injunctive Relief against the Defendants DUSPA and RTD. By this Motion, Plaintiff seeks temporary and preliminary injunctive relief with respect to substantial construction activity which Defendants have announced will commence on March 15, 2010.

Plaintiff has sought the relief requested twice before. Plaintiff's first effort was denied by Judge Kane in Case No. 09-1135 for want of jurisdiction over the parties Plaintiffs sought to restrain. Thereafter, Plaintiff filed for injunctive relief against DUSPA and RTD in Case No. 10-0462. The second case was consolidated with Case No. 09-1135. Plaintiff then renewed its request for injunctive relief to this Court. This Court

denied the renewed request on procedural grounds for failure to file the Complaint and the Motion separately pursuant to D.C. LCivR 65.1. This Court also found that in its complaint/motion, Plaintiff had failed to adequately address the likelihood of success on the merits of its underlying claim that Defendant FTA had committed NEPA violations in connection with development of the FEIS and issuance of the ROD based thereon. The Court further questioned if the relaxed standard heretofore adopted in the 10th Circuit in *Walmer v. United States DOD*, 52 F.3d 851 (10th Cir. Kan. 1995) was still viable, and referred the Plaintiff to *Predator Int'l, Inc. v Gamo Outdoor USA, Inc.*, - F.Supp.2d -, 2009 WL 3526497, 2009 U.S. Dist. LEXIS 124252, in this regard.

Plaintiff has now filed an Amended Complaint requesting injunctive relief against DUSPA and RTD, and submits this Motion and Brief in support of that request. Notwithstanding the previous failed efforts to enjoin Defendants from commencing and continuing work on the DUS redevelopment project, the matter Plaintiff brings to this Court's attention is of overriding public concern. The harm to the natural¹ and human environment threatened by the commencement of construction can never be undone, as more fully set forth in the Amended Complaint, incorporated by reference, and in this Motion. It is for this reason that Plaintiff resorts to this Court's inherent power to do equity and re-evaluate the merits of the instant request for injunctive relief even though the request has been denied twice before on largely technical grounds.

¹ Sometimes referred to as the physical environment.

The FTA's decision to provide DUSPA and RTD with the authority and funding to implement the "build alternative" at DUS violates the National Environmental Policy Act, 42 U.S.C. sections 4321 to 4307e, ("NEPA"), and is arbitrary and capricious under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. section 701 et seq., ("APA") and is made without observance of NEPA procedure required by law. The final environmental impact statement (FEIS), ROD and current actions implementing that decision are proceeding without the benefit of the statutorily required environmental review and analysis required by NEPA and CEQ regulations (40 CFR Parts 1500-1508). These actions include construction of an underground bus facility, realignment of existing railroad tracks, moving the existing light rail station from its present location adjacent the DUS to a location nearly a quarter mile away adjacent to the UP/BNSF Consolidated Main Line ("CML"), destruction of an historic passenger tunnel leading from the DUS Great Hall to the current train tracks, and the facilitation of major private real estate development in the area made possible by, and an integral part of, the FTA action.

Each of the foregoing actions threatens to result in irreparable harm to environmental resources, to Plaintiff's interest, and to the interests of the public, generally. Construction authorization for the area around DUS will not only result in immediate ground-disturbing activities as trenches are dug, pipes laid, a tunnel collapsed, foundations excavated and cement poured, but it will also open the door to DUSPA and private real estate developers to begin environmentally destructive

construction activities on a project which has not been properly analyzed for its environmental impacts as a “connected action” with respect to areas which are not properly part of the Environmental Impact Statement (“EIS”) and in violation of CEQ regulations in 40 CFR § 1508.35 mandating EIS scope. The irreparable harm will include, among other things, degradation of the irreplaceable historic environment of Lower Downtown Denver (the physical or natural environment); and harm to the traveling public and mobility impairment for disabled and elderly persons (the human environment). Further, the harm results from danger signals arising from the failure of FTA to take a “hard look” at serious environmental problems that have been inadequately analyzed or proposed to be mitigated.

Construction around DUS began February 22, 2010, albeit on a minor scale. Plaintiff has learned, however, that construction on a much larger scale will begin on Monday, March 15, 2010. Specifically, private real estate developers are poised to commence work on a large scale real estate project not included in the 2004 Master Plan or in the FTA’s FEIS and discussion therein of the “build alternative” as the preferred alternative. The transportation redevelopment scheme as set forth in the 2004 Master Plan and DEIS is responsive to and observant of the needs of people who use DUS as commuters, regional travelers, patrons and residents of downtown Denver, but that scheme was radically expanded and changed in the 2008 Master Plan Supplement, FEIS and ROD. The FEIS does address adequately the impact of the development it recommends and such failure falls squarely within the type of irreparable harm to the

public interest which NEPA is designed to avoid or otherwise mitigate. This type of irreparable harm runs counter to the national environmental policy objective to “use all practicable means and measures. . .to create conditions under which man and nature can exist in productive harmony” [NEPA § 101 (a), 42 U.S.C. § 4331] and other interests and objectives inherent to NEPA. In the context of NEPA, irreparable harm to the environment occurs because uninformed or irresponsible decision-makers make irreversible and irretrievable commitments of resources needed for a course of action that becomes more difficult to reverse the longer it continues.

The requested TRO is necessary to avoid these irreparable environmental, informational and public harms. The ROD in this case was not based on an FEIS which properly addresses all environmental concerns raised by the specter of private development around DUS. Dirt cannot seamlessly be put back into the holes once they are dug and there is still time to restrain any further breaking of ground while this Court evaluates whether the FTA will be required to prepare a Supplemental EIS ("SEIS") as required by both CEQ and FTA regulations. Only immediate injunctive relief will preserve the status quo while the parties engage in that additional study, investigation, and analysis which NEPA requires must occur before our government spends nearly a half a billion dollars on a project which will forever change the landscape, the environment, and the ambience of downtown Denver.

II. STATEMENT OF FACTS

For the purposes of this Motion, Plaintiff incorporates all factual allegations set forth in the complaint [#1] against FTA, the complaint/motion [#52] against DUSPA and RTD and the amended complaint [#61] against DUSPA and RTD, and stresses the following facts:

At the outset, DUS encompassed the historic train station, which, together with surrounding land, consisted of 19.5 acres. These 19.5 acres were purchased by RTD in 2001 with funds apparently received from the FTA. In 2004, RTD, the City and County of Denver, the Colorado Department of Transportation ("CDOT") and the Denver Regional Council of Governors ("DRCOG") adopted the Denver Union Station Master Plan. The DUS Master Plan was supplemented in the spring of 2008, just 4 weeks prior to the issuance of the FEIS. Pursuant to the Master Plan, the DUS project was to establish a multimodal transportation hub of international significance; the emphasis was on transportation. Pursuant to NEPA, Defendants FTA and RTD developed the DEIS at issue in this case. The DEIS focused on regional transportation, but did not contemplate an underground bus facility and did not analyze the environmental impact of private large scale residential/commercial development within or beyond the original 19.5 acres purchased by RTD. In contrast, the FEIS recognized, but did not analyze, that development beyond the original footprint and the ROD, upon which the Notice to Proceed with construction was based, accepted this recommendation.

Attached to the Amended Complaint as Exhibits "A" and "B", and incorporated here by reference, are two artists renditions, one from the DEIS and the other from the FEIS. Exhibit "A," from the DEIS, in picture #1 shows the "close in" location of all the proposed transportation elements. Picture #2 shows how the transportation elements have been relocated, spreading them outside the 19.5 acre site owned by DUSPA. Exhibit "B," from the FEIS, shows the significant private development component which will take place on the site. With the lone exception of the DUS building itself, all other blue colored buildings are private development the environmental impact of which has not been evaluated by FTA and RTD.

Whereas the FTA's funding to the Project was largely completed when RTD purchased DUS in 2001, a portion of the remaining funds for the project will come from disbursement of taxpayer money explicitly authorized by the FTA ROD in the form of Railroad Rehab Investment Fund (RRIF) and Transportation Innovative Financing Investment Act (TIFIA) loans approved by virtue of the ROD. While a press conference was held some weeks ago announcing the approval of these loans, upon information and belief, these loans have not yet been fully approved. To allow DUSPA to proceed with construction, on February 16, 2010, RTD approved a bridge loan of \$9,000,000.00 to RTD.

III. STANDARDS FOR GRANTING TEMPORARY RESTRAINING ORDER

The standards for a temporary restraining order are the same as those for a preliminary injunction. *Populist Party v. Herschler*, 746 F.2d 656, 658 (10th Cir. 1984). As set forth in *Walmer v. United States DOD*, 52 F.3d 851 (10th Cir. Kan. 1995):

A preliminary injunction may issue if the movant shows clearly: 1) irreparable injury if the injunction is not granted; 2) the threatened injury outweighs any harm the preliminary injunction will cause the opposing party; 3) the preliminary injunction is not adverse to the public interest; and 4) a substantial likelihood of success on the merits...

The 10th Circuit has adopted a modified "likelihood of success" requirement. If the movant has satisfied the first three preliminary injunction requirements, the movant may establish likelihood of success by showing questions "so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation."

The Court in *Predator Int'l, Inc. v Gamo Outdoor USA, Inc.*, - F.Supp.2d -, 2009 WL 3526497, 2009 U.S. Dist. LEXIS 124252, cites *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F.Supp 2d 1233, 2009 U.S. District LEXIS 85824, 2009 WL 2868818, at *4 n.1 (D.Colo. Sep. 3, 2009, which confirms the continued viability of the "relaxed standard" by stating:

"([T]he Tenth Circuit appears to recognize the continuing validity of the modified success-on-the-merits formula notwithstanding the Winter decision.") (citing *RoDa Drilling*)."

Based on the record as developed in the Amended Complaint and this Motion, however, Plaintiff's likelihood of success is not dependent on a relaxed standard of review. Plaintiff can show significant "disconnects" between the Master Plan and the DEIS on the one hand and the FEIS and the ROD on the other. See Amended

Complaint [#61], paragraph 30-33. The problem in adjudicating, fully, the merits of Plaintiff's claim that NEPA has been violated lies in the sheer length of the administrative record which encompasses some 28,000 pages. Nevertheless, in the amended complaint and herein, Plaintiff does raise questions so serious substantial difficult and doubtful as to make the issues ripe for litigation and deserving of more deliberate investigation than can be afforded on application for injunctive relief.

The purpose of a TRO is to maintain the status quo pending a hearing on a request for a preliminary or permanent injunction. Nevertheless, where a temporary restraining order is unambiguous as to its continuing nature, and is issued after notice and a hearing on the relevant standards, it may properly be continued for a duration more characteristic of a preliminary injunction. *United States v. Crawford*, 329 F.3d 131, 137 (2nd Cir. 2003), *cert. denied*, 124 S.Ct. 329 (2003). In this light, and if the Court deems it necessary, Plaintiff welcomes the opportunity to participate in a hearing on this motion to assist the Court in crafting a TRO which can continue until the Court adjudicates Plaintiff's appeal. Plaintiff has already filed its Opening Brief to which FTA has filed a Response. Colorado Rail's Reply is due on March 12, 2010². FTA is permitted a Surreply. In addition, three entities have filed *amicus* briefs. In view of the fact that the matter is nearly fully briefed, a continuing TRO, as opposed to a more

² Colorado Rail may seek until Monday March 15, 2010 to file its Reply, but a brief delay should not significantly affect the timing of this Court's ultimate determination of the Appeal.

formal preliminary injunction, is well-suited to the exigencies of this case and would promote judicial economy.

IV. STANDARD OF REVIEW

Where a statute, such as a NEPA, does not provide for a private right of action, the APA provides for judicial review of challenges to final agency actions. See *Lodge Tower Condominium v. Lodge Properties, Inc.*, 880 F. Supp. 1370, 1376 (D. Colo. 1995); *aff'd* 85 F.3d 476 (10th Cir. 1996) (When a court reviews agency actions and decisions, "the standard of review is expressly set forth in the APA [Administrative Procedure Act, 5 U.S.C. sections 701-706].")

Judicial review of both formal and informal agency action is governed by § 706 of the APA, which provides that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards. [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 n. 30 (1971)] (citing 5 U.S.C. § 706(2)). Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 413-14, 91 S. Ct. at 822 (construing § 706(2)(A)-(D), the "generally applicable" standards). Formal agency action must be set aside not only for failing under any of the "generally applicable" standards, but also if the action is unsupported by "substantial evidence" in the hearing record. *Id.* at 414, 91 S. Ct. at 822 (construing § 706(2)(E)). These standards require the reviewing court to engage in a "substantial inquiry." *Overton Park*, 401 U.S. at 415, 91 S. Ct. at 823. An agency's decision is entitled to a presumption of regularity, "but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review." *Id.*

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573-74 (10th Cir. 1994). Because the arbitrary and capricious standard "focuses on the rationality of the agency's decision

making process rather than on the rationality of the actual decision, ... the agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.*, at 1574.

V. ARGUMENT

The Equities and the Public Interest Favor a TRO

Not only will Plaintiffs prevail on the merits of this case, but the irreparable harm to the Plaintiff outweighs the harm to the DUS project proponents, and the public interest favor granting an injunction.

i. Plaintiffs Will Suffer Irreparable Injury

It is important to note that although the Court must weigh the equities even where a NEPA violation has been found, harm to the environment and the Plaintiff is usually found where NEPA has been violated, and it is the rare case indeed where a plaintiff has been found to have suffered irreparable harm on the merits of a substantial NEPA claim but has been refused an injunction because of lack of harm or a balancing of the equities. As the Tenth Circuit has stated: “[W]e hold that harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure.” *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002). See also *Catron County v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1440(10th Cir. 1996) (“An environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable.”) Further, as the Tenth Circuit has stated in regards to NEPA, the statute creates a procedural right, the violation of which creates the risk of “real environmental harm [as a result of]

inadequate foresight and deliberation.” *Catron County*, 75 F.3d at 1433. Additionally, the risk of irreparable harm is impossible to assess because the studies that would assess that harm are incomplete due to the inadequacy of the FTA’s DEIS and FEIS process. Legal remedies are inadequate, however, because permitting construction to proceed before the NEPA studies have been completed would defeat the purpose of undertaking the studies, whose purpose is to make the agency aware of relevant environmental considerations before acting. *Sierra Club v. Hodel*, 848 F.2d at 1097.

Some courts have adopted what is known as the “NEPA exception.” In *State of California v. Bergland*, 483 F. Supp, 465 (E.D. Cal. 1980), the court stated:

Normally, once a substantial NEPA violation has been shown, an injunction should issue without detailed consideration of traditional equity principles. . . Congress has weighed the equities and determined that failure to examine environmental issues represents irreparable injury. . . .

The court also noted that if the agency was allowed to proceed before it complies with NEPA, the Act would be an “exercise in futility.” *Id.* At 498-499.

Likewise, Plaintiff will suffer irreparable informational injury, which translates into “real environmental harm” under NEPA, as a consequence of “inadequate foresight and deliberation,” (*Catron County*, 75 F.3d at 1433), if the Defendants are allowed to pursue construction without first conducting required NEPA analysis of the impacts of such actions. NEPA is frequently referred to as “an environmental disclosure Act.” The CEQ regulations in 40 CFR § 1500.1 state:

NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

While the FTA has prepared a detailed FEIS, the impact analysis is inadequate, faulty, and does not comply fully with NEPA, the CEQ regulations, and the FTA regulations in 23 CFR Part 771 which adopt the CEQ regulations.

A lead agency's NEPA violations inflict substantial and irreparable informational harm upon Plaintiffs and the general public. The substantial harm to Plaintiffs and the public "is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decision-makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (*emph. in original*); *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 738 n.18 (9th Cir. 2001) (harm to environmentally informed decision-making justified injunction). The principle in *Sierra Club* that a violation of NEPA constitutes an irreparable injury rests on NEPA's purpose to foster informed decision-making. *Sierra Club*, 872 F.2d at 500. In the context of NEPA, irreparable harm to the environment occurs because uninformed or irresponsible decision-makers commit themselves to a course of action that rarely can be undone given "a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Id.* at 500.

Allowing the FTA to proceed with this action amounts to “irreversible and irretrievable commitments of resources” NEPA § 102(2)(C)(v), 40 USC § 4332.

ii. Irreparable Environmental Harm and Harm Arising From FTA’s Uninformed Decision-Making Outweigh Any Potential Competing Harm to Third Parties.

Regarding potential economic losses to FTA, RTD, and third party interests, such as the developers, from construction delays pursuant to a TRO , Courts have repeatedly held that economic interests are not irreparable and, therefore, as a matter of law, they do not outweigh threatened irreparable environmental harm.

As the Tenth Circuit has stated: “[a]ny increased costs from [project] delay while an EIS is being prepared is not sufficient to establish prejudice, because NEPA contemplates just such a delay.” *Park County Resource Council, Inc. v. U.S. Dept. of Agriculture*, 817 F.2d 609, 618 (10th Cir. 1987), (citations omitted), overruled on other grounds, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In Park County, the economic harm fell on third party oil and gas companies. *Id.* Where, as here, the irreparable environmental harm arises from the government’s failure to lawfully carry out its statutory obligations under NEPA, “economic loss cannot be considered compelling if it is to be gained in contravention of federal law.” *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988), citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988).

Where there is a threat of irreparable environmental harm, “more than pecuniary harm must be demonstrated” in order to avoid preliminary injunctive relief . *Northern*

Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986). In *National Parks Conservation Assn. v. Babbitt*, the Court found that economic harm does not outweigh the public interest in ensuring that agencies comply with NEPA. 241 F.3d 722, 738 (9th Cir. 2001) (enjoining National Park Service action pending EIS despite economic harm to third parties, holding that a “loss of anticipated revenues does not outweigh the potential irreparable damage to the environment.”) See also, *Alaska Wilderness Recreation and Tourism Ass’n. v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995) (enjoining timber sales awarded to third parties pending the Forest Service’s compliance with NEPA); *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (finding that potential financial harm to Forest Service, intervening timber companies and surrounding communities, was outweighed by irreparable environmental harm.)

In *National Wildlife Federation v. National Marine Fisheries Service*, 235 F. Supp. 2d 1143, 1162 (W.D. Wash. 2002), the U.S. Army Corps of Engineers sought to avoid a preliminary injunction by arguing that delaying dredging would cost the government \$10,000 per day and demobilizing the contractor could cost up to \$800,000. The court found that these harms were “economic, and therefore, not irreparable,” and it concluded that these concerns did not outweigh the threat of irreparable environmental injury resulting from the proposed dredging activities. *Id.* Therefore, even if an injunction would cause the developers substantial financial hardship, economic harm is not irreparable and, as a matter of law, it does not override a threat of irreparable environmental harm. See *Save Our Sonoran*, 408 F.3d at 1125 (affirming a preliminary

injunction because, while the developer “may suffer financial harm,” without injunction, irreparable environmental harm was likely, and emphasizing that this is a “classic, and quite proper, examination of the relative hardships in an environmental case”).

iii. A Preliminary Injunction (TRO) is not Adverse to the Public Interest

The public interest favors an injunction. “[T]here is an overriding public interest in preservation of the undeveloped character of the area recognized by [NEPA]. This public interest in preserving the character of the environment is one that the plaintiffs may seek to protect by obtaining equitable relief.” *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 at 1250 (10th Cir. 1973) (citations omitted). See also *Sierra Club v. Lujan*, 716 F. Supp. 1289, 1293. (D. Ariz., 1989) (Where environmental laws have been violated and harm to the environment is imminent, “[t]he public interest is obvious,” and an injunction should issue.)

The radical differences between the DEIS and the FEIS with respect to reasonable alternatives considered and their comparison also harm the public interest. Because of these differences, the FEIS has evolved into a document which bears little to no relationship to the DEIS. One form of relief would be to require the FTA to prepare a new FEIS based on the DEIS and new public comments or to prepare both a new DEIS and FEIS.

iv. Plaintiffs are Likely to Prevail on the Merits

a. The FTA Failed to Analyze the Impacts of Public and Private "Connected Actions" with Cumulative Impacts in the FEIS and ROD

The FTA violated NEPA by failing to analyze the cumulative effects of connected and cumulative public and private actions which are schedule to occur as depicted in Exhibits A and B. Cumulative effects result from the incremental impact of past, present, or “reasonably foreseeable” future actions, whether the action is taken by federal agencies or private parties. (See 40 CFR § 1508.7) Private development associated with the DUS is certainly reasonably foreseeable as some is already planned and perhaps even financed. While the proposed private “bookend” buildings which will bracket the DUS are depicted in the DEIS and FEIS, the remaining development around DUS is a foreseeable private action that will have significant environmental impacts, including major visual impacts, by cutting off or degrading views to and from the DUS. In this case, private development is inextricably linked, financially, physically, and environmentally to the transportation elements of the project. Indeed, “but for” the FTA funded DUS transportation hub much of the planned private development, depicted on Exhibit B, would not take place or would take place in a much longer time frame. Some of the private development, particularly residential and office buildings in the DUS environ depends on transportation improvements, contrary to the FTA position. The fact that it may be privately funded is irrelevant to NEPA cumulative impact analysis requirements.

While both public and private development at DUS were analyzed and planned together in the 2004 Master Plan, as supplemented in 2008, the private development aspect was not evaluated in either the DEIS nor the FEIS other than to state that there was no need to evaluate their impact. The Supplement states that the plan "envisions a regional multimodal transportation center that encourages private buildings on the site to create an active, economically successful, cost-effective, and attractive urban place." The transportation elements at DUS will dictate the timing of private development. *2004 Master Plan at p. 24.* Private development was expected at that time to provide almost 25% of the funding for the entire DUS redevelopment. *2004 Master Plan at p 25.* The public and private developments are parts of a larger action and depend on each other for their justification; in fact, the DUS project is meant to encourage the linking of land use and transportation. *2008 Master Plan Supplement at p 34.* The current primary linkage is that the private development must generate Tax Increment Financing ("TIF") tax revenue to flow to DUSPA to enable it to pay the principal and interest on the two US DOT loans to DUSPA needed to construct the public transportation features. Accordingly, public and private development is inextricably connected and interdependent with cumulatively significant environmental impacts.

NEPA requires FTA to address connected actions in the same impact statement. *40 C.F.R. § 1508.25(a)(1).* Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Without doubt, a cumulative impact analysis for the DUS project must include not only the federally

funded actions but also the private development actions that are connected, interrelated, and depend at least in part on the federal action taking place. In other words, much of the associated private development would not take place in the near-future time frame "but for" the implementation of the FTA proposal described in the EIS. They are "reasonably foreseeable future actions" regardless of whether they are now planned in detail, funded, or under construction. Although they cannot presently be described in detail, they are far from being only speculative. Further, these private developments are closely interrelated to total funding of the DUS transportation hub proposal. As the 10th Circuit has stated:

A connected action is defined as being closely related to other actions is identified based on three factors:

- i) Automatically triggers other actions which may require environmental impact statements.
 - ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
- 40 C.F.R. § 1508.25(a)(1).

In *Custer County Action Assoc. v. Garvey*, 256 F.3d 1024, 1037 (10th Cir. 2001), we noted that projects that have independent utility are not connected actions under 40 C.F.R. § 1508.25(a)(1)(iii). An inquiry into independent utility reveals whether the project is indeed a separate project, justifying consideration of the environmental effects of that project alone. [*Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 400 (5th Cir. 1981)]. *Utahans for Better Transportation v. U.S. Dept. of Transportation*, 305 F.3d 1152, 1182-83 (10th Cir. 2002).

Here, development of DUS is part and parcel of private development immediately to the west and in the immediate vicinity. As such, the actions are connected. Connected actions and cumulative actions with incremental impacts must be analyzed in the same EIS. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113,1121-22 (9th Cir. 2005) (entire private development must be analyzed in EIS even though federal permit triggering EIS extended to only portion of property). The actions associated with private development will have the same or similar impacts as the DUS-related transportation facilities. They include, but are not limited to, those on air quality, construction traffic impacts, historic resources, noise, and visual resources. Simply put, the FTA had the responsibility under NEPA to analyze all of the environmental aspects of the DUS project and its failure to do so renders the EIS flawed as a matter of law.

b. The EIS is Improperly Segmented between Private Development & Transportation Elements

The segmentation issue arises when an EIS is prepared on an individual action rather than a group of public and private actions that are closely interrelated or connected. *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). This type of piecemealing occurs when agencies limit the impact analysis to the "federally-assisted" parts of a project thereby segmenting other actions, e.g. private development made possible by the federal assistance. *City of Davis* dealt with the impact of projects that are growth inducing and serve as a catalyst for other development. In such cases, the impacts of both public and private actions must be analyzed in the same EIS.

To determine the appropriate scope of an EIS, an agency is required to analyze three types of actions: (1) connected actions; (2) cumulative actions; and (3) similar actions. 32 C.F.R. § 651.51; 40 C.F.R. § 1508.25(a). Actions that are "connected" must be analyzed together in the same EIS. 40 C.F.R. §§1508.25(a)(1); *Id.* § 1502.4(a); *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1305 (9th Cir. 2003); *Churchill County v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001). The purpose of the connected action rule is to prevent agencies from segmenting a single action into individual components, thereby understating the overall environmental impacts. *Wetlands Action Network v. U.S. Army Corps of Eng'rs.*, 222 F.3d 1105, 1108 (9th Cir. 2000). Actions are connected if they "are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Although connected action analysis is generally applied to two separate federal actions, courts have also applied the test to allegedly improperly segmented federal and private/local action. See *Citizens' Committee to Save our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1028 (10th Cir. 2002) (applying the connected action test to allegedly connected ski area development on federal and private lands). See also *Village of Los Ranchos De Albuquerque v. Barnhart*, 906 F.2d 1477, 1483 (10th Cir. 1990) (federal and local highway projects).

Both the private and public development at DUS were analyzed and planned together in the 2004 Master Plan and 2008 supplement. The public and private developments are described in those documents as intertwined and mutually supportive. *2008 Master Plan Supplement at 34* (stating that the plan "envision[s] a

regional multimodal transportation center that encourages private buildings on the site to create an active, economically successful, cost-effective, and attractive urban place.") The DUS project is meant to encourage "the linking of land use and transportation." *Id.* The public and private development are parts of a larger action and depend on each other for their justification because they are inextricably linked physically and financially. For example, the possibilities for private development at DUS directly depend on the alternative chosen for the DUS redevelopment. *DUS FEIS at 5-74* (stating that "DUS property deemed unnecessary for transportation purposes will be subject to disposition pursuant to federal requirements.") The failure of the FTA EIS to analyze the environmental impact of the contemplated private development renders the EIS flawed as a matter of law.

c. The DUS EIS Fails to Evaluate a Reasonable Range of Alternatives and the Environmental Impacts of those Alternatives.

NEPA requires federal agencies to consider "alternatives to the proposed action" in an EIS. 42 U.S.C. § 4332(2) (C) (iii). An agency is thus required to "rigorously explore and objectively evaluate all reasonable alternatives" 40 C.F.R. § 1502.14. Reasonable alternatives are those that would achieve the objectives stated in the purpose and need section of the NEPA document. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

The CEQ regulations and the NEPA literature, including a number of law review articles, consider alternatives to be the "heart" of an EIS (40 CFR §1502.14). However,

the “alternative” requirement does not mean that every conceivable alternative must be examined to meet the intent of the Act and the regulations. As on Court stated:

Common sense also teaches us that the “detailed statement of alternatives” cannot be found wanting simply because the agency failed to include every alternative device and thought by the mind of man. Time and resources are simply too limited...to ferret out every possible alternative. . . . *Natural Resources Defense Council v. Morton*, 458 F2d 827, D.C. Cir. 1972.

Nevertheless, a major deficiency in the DUS FEIS is the failure to “rigorously explore and objectively evaluate all reasonable alternatives” as required by the CEQ regulations [see 40 CFR § 1502.14 (a)]. Under *Morton*, the DUS FEIS list of alternatives does not comply with NEPA or CEQ regulations. The FEIS addresses only two (2) alternatives to the “No Action” alternative, the Phase I and the Build Alternative. The “no action” alternative is included only because of the CEQ requirement in 40 CFR § 1502.14 (d). In addition to the NEPA § 102(2)(C)(iii) requirement to examine alternatives in the EIS, NEPA § 102(2)(E) requires the FTA to “study, develop, and describe appropriate alternatives” to a proposed action which “involves conflicts concerning alternative uses of available resources.” This certainly applies to the instant case. The FEIS failed to evaluate any alternative beyond the FasTracks and RTD elements, for example intercity rail, additional Amtrak trains, and intercity bus lines. Thus the station is limited to the planned RTD corridors, existing Amtrak and Ski Train service and does not allow for growth in additional passenger rail service.

The DUS DEIS identified and “screened” 40 alternatives according to mostly non-environmental criteria. The Build Alternative was already selected before the FEIS process began. Apparently, no other “reasonable” alternative was determined as meeting the purpose of and need for the DUS development as a transportation hub. Such a determination is not credible.

All of the DEIS alternatives were developed with the public participation of the Union Station Advisory Committee (USAC). In contrast, the “Build Alternative” of the FEIS was developed by the Master Developer and presented to the USAC for *pro forma* endorsement.

d. The FTA Violated NEPA Because RTD’s NEPA Contractor, Carter & Burgess, Acted With a Conflict of Interest That Compromised the Integrity of the NEPA Process.

CEQ regulations allow an agency to select a contractor to prepare an EIS on its behalf. 40 C.F.R. § 1506.5(c). When it does so, however, conflicts of interest must be avoided and the consultant must “execute a disclosure statement . . . specifying that [it has] no financial or other interest in the outcome of the project.” *Id.* The intent of this statement is to avoid situations where the consultant has an interest in the outcome of the NEPA process. CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (Jul. 28, 1983). A contractor that has a known conflict “should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.” CEQ’s Forty Most Asked Questions, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981) (“Forty Questions”).

The term “financial or other interest” is not defined in the CEQ regulations. In guidance materials, however, the CEQ has stated that it interprets conflict of interest “broadly to cover any known benefits other than general enhancement of professional reputation.” *Forty Questions*, 46 Fed. Reg. at 18,031.

The Tenth Circuit has addressed conflicts of interest in the transportation context. See *Ass’ns Working for Aurora’s Residential Env’t v. Colo. Dept. of Transp.*, 153 F.3d 1122 (10th Cir. 1998) (hereinafter “AWARE”). There, the Colorado Department of Transportation had a practice of awarding contracts related to the construction phase of a project to the consultant that prepared the underlying NEPA document for the project. The Plaintiffs contended that the EIS was tainted by bias because the consultant “had an incentive to promote the build alternative over a non-build alternative at the time it aided in the preparation of the EIS.” *Id.* at 1128. The court held, however, that because the “[c]ontractor had no contractual guarantee of future work on the project” at the time the EIS was prepared, no conflict of interest existed. *Id.* at 1129. The court explained that “the ultimate question for the court is . . . whether the alleged breach compromised the integrity of the NEPA process.” *Id.* at 1129.

1. Carter and Burgess’s Financial Interest in the FasTracks Program Creates a Conflict of Interest.

Parson Brinkerhoff and Jones Lang LaSalle, acting as joint venturers, were initially hired to prepare the DUS EIS by for RTD and the FTA. See *AR011892* [#19]. Carter & Burgess (sometime also referred to as “C&B”), won a six-year Project

Management Consultant (PMC) contract, with a six-year option, for program management of the \$4.7 billion, 12-year construction of RTD's FasTracks project. That contract, signed June 28, 2005, is valued at \$51,138,621.00. *See AR013466.*

The PMC Contract, at page 29, Article 31.0, Section A, the contract reads:

A. RTD will separately contract for individual FasTracks corridor planning, environmental, engineering and construction work. To avoid any potential conflict or unforeseen conflict of interest the selected PMC prime consultant will not be permitted to perform any new or follow-up work for corridor DEIS/FEIS, Preliminary Engineering, Final Design, Construction, or Design/Build Contracts. AR012466

However, in the "Scope of Work" to be performed, C&B was tasked with reviewing the DEIS/FEIS for the US 36 Corridor, the East Corridor, the North Metro Gold Line Corridor and the DUS DEIS/FEIS. *See AR12734.* As part of that PMC contract, CB, acting as an extension of RTD, essentially took over the production of the DEIS/FEIS. RTD's project manager is listed in the EIS as Gina McAfee. DUS EIS at 9-1. However, Ms. McAfee is not an employee of RTD. Rather, she is employed by Carter & Burgess.

Unlike the consultant in AWARE, Carter & Burgess has more than a theoretical conflict or nonbinding expectation of future work. Carter & Burgess had a written contract to perform services on the FasTracks project at the time it was directing the preparation of the DEIS/FEIS. The AWARE court held that a contractor, like Carter &

Burgess, that has “an agreement, enforceable promise or guarantee of future work’ has a conflict of interest under § 1506.5(c).” *Id.* at 1128.

While it appears that Carter & Burgess has executed a corporate disclosure statement, as required by CEQ’s regulations, on or about February 1, 2005, as part of the PMC contract which was awarded in June, 2005, it does not appear that any further disclosure was ever made. Courts have found the failure to execute such a statement to be a factor in analyzing conflicts of interest issues. See, e.g., *AWARE*, 153 F.3d at 1129.

2. Carter & Burgess’s Conflict of Interest Compromised the Integrity of the NEPA Process.

Carter & Burgess had a conflict of interest, and that conflict of interest “compromised the integrity of the NEPA process.” *AWARE*, 153 F.3d at 1129.

a. The Preferred Alternative Favors FasTracks Components.

Carter and Burgess’ conflict arguably drove the design and selection of the preferred alternative in the EIS by favoring FasTracks components over non-FasTracks components. As the managing consultant for the FasTracks program, Carter & Burgess will guide the entire build out of the FasTracks program. This gives it a financial interest in favoring FasTracks components at DUS over other non-FasTracks components. FasTracks “is RTD’s 12-year comprehensive plan to build and operate high-speed rail lines and expand and improve bus service and park-n-Rides throughout the region.” Thus, although the RTD FasTracks program involves multiple modes of transportation, it does not cover the entire range of modes that will be housed at DUS.

The DUS EIS preferred alternative favors FasTracks light rail over non-FasTracks rail (such as Front Range or I-70 rail) and favors RTD bus service over other bus service (by providing only two bus bays for intercity Greyhound service).

b. Ms. McAfee Improperly Influenced the Public Comment Process.

Gina McAfee also arguably attempted to improperly influence the outcome of the NEPA process. During the comment period on the final DUS EIS, she appears to have solicited favorable comments because, she said in her email subject line, “We are getting a flood of comments in on DUS - all negative.” *See AR019326*. On September 29, 2008 at 12:13 pm, this email was sent to Ellen Ittelson, an employee of the City & County of Denver, one of the partners in the DUS project. At 1:13 pm Ms. Ittelson forwarded the email on to Shannon Gifford, a Union Station Advisory Committee Co-Chair. Ms. Gifford presumably forwarded the email on to others, as a flood of positive comments came in the closing hours of the comment period. Ms. Ittelson even offered to “compose the basics” for the requested “positive comments. At 2:38 pm Ms. Gifford submitted a glowing letter praising the current version of the “Build Alternative”. At 2:12 pm, Dana Crawford, a long time Denver real estate developer filed her email support of the current Build Alternative. At 2:10 pm, Jerold Glick, another real estate developer and Union Station Advisory Committee Co-Chair, registered his support for the “wing buildings” as requested in Ms. McAfee’s email. In a letter addressed to “RTD DUS EIS Project Manager, c/o Gina McAfee”, Ms. Tamara Door, President of the

Denver Downtown Partnership, Inc., gave her support for the redevelopment as described in the FEIS, and praised the transparency of the process. The initial violation was Ms. McAfee's email seeking to improperly skew the totality of comments in favor of the Build Alternative. This was compounded by Ms. Ittelson's acting upon that request by forwarding McAfee's email to Shannon Gifford, USAC Co-Chair, and by offering to ghost write favorable comments.

Additionally, there were critical comments from Amtrak, the Open Space Initiative Group, Jon Esty, Bob Brewster, and the Plaintiff properly submitted on the last day of the comment period. Although described by McAfee as an oversight, the bulk of Mr. Brewster's letter and Plaintiff's entire comments were "inadvertently omitted" from the FEIS and ROD.

c. The Agency Did Not Exercise Sufficient Control Over Carter & Burgess.

Even if Carter & Burgess had a stake in the outcome of the DUS project, the alleged conflict of interest may be overcome if the agency preparing the EIS exercised substantial oversight over the contractor. *AWARE*, 153 F.3d at 1129; *Center for Biological Diversity v. Federal Hwy. Admin.*, 290 F. Supp. 2d 1175, 1186-87 (S.D. Cal. 2003). However, this does not appear to be the case here. Instead, the solicitation for favorable comments described above was made by the C&B's Gina McAfee acting as RTD's Project Manager to Denver City Planner Ellen Ittelson, the City and County of Denver's project manager for the EIS. Ms. Ittelson forwarded this solicitation to

potential supporters, offered to “compose the basics” herself, and defended Ms. McAfee’s decision to solicit positive comments. So, far from exercising substantial oversight of the contractor, one of the agency partners of the DUS EIS appears to have participated in the allegedly improper activities.

VI. No Bond, or a Nominal Bond, is Required

The Courts have recognized that “only nominal bonds and nominal liabilities for wrongful injunctions are imposed in NEPA cases. The imposition of substantial liability would, according to the [district] court, frustrate the policy of Congress ‘to encourage actions on environmental grounds.’” *State of Kansas Ex Rel. Stephan v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983). See also *Von De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985), amended 775 F.2d 998 (no bond required; “special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute.”; “The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review.” If a bond were required, Plaintiffs, a grass roots non-profit, would be unable to proceed with this case, the goals of NEPA could not be ensured, and the public interest would suffer.

VII. PROPOSED CASE MANAGEMENT SCHEDULE

This request for injunctive relief is brought within an existing case in which a briefing schedule has already been established. Specifically, Plaintiff has filed an Opening Brief in 09-1135-JLK, to which FTA had filed a Response. Plaintiff's Reply is

due on March 12, 2010. FTA is entitled to file a Surreply. No hearing is currently scheduled, but Plaintiff welcomes the opportunity to be heard more fully on the issues raised in the Amended Complaint for Injunctive Relief filed contemporaneously herewith, if the Court concludes that such a hearing is appropriate.

VIII. CONCLUSION

A temporary restraining order, prohibiting the identified RTD and DUSPA actions in particular and implementation of the ROD and the FTA's Notice to Proceed in general, of adequate duration to facilitate the conclusion of this case is appropriate given the distinct imbalance between the irreparable harm Plaintiffs and the environment would suffer in the absence of an injunction, and the financial harm to the Defendants resulting from postponing construction on site. Plaintiff has shown: 1) irreparable injury if the injunction is not granted; 2) the threatened injury outweighs any harm the preliminary injunction will cause the opposing party; 3) the preliminary injunction is not adverse to the public interest; and 4) a substantial likelihood of success on the merits under the applicable "relaxed standards" and under the normal strict standards. For the foregoing reasons, Plaintiff's emergency motion for temporary and preliminary injunctive relief should be granted. A Proposed Order is submitted herewith.

Dated this 12th day of March, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2010, a true and correct copy of the foregoing Motion was delivered via email and to the US Postal Service, First Class Postage Prepaid, for immediate delivery to:

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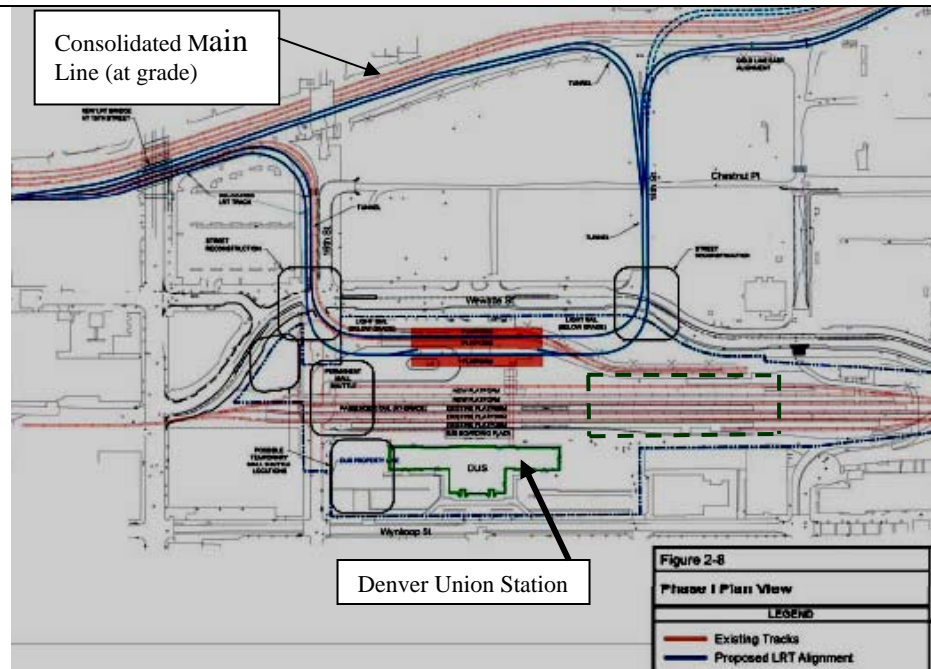
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Denver Union Station Transportation Elements Plans

1. According to 2006 Draft Environmental Impact Statement (DEIS).
2. As later revised with significant changes upon retention of Master Developer and without a Supplemental DEIS or Public Hearing.

1. Draft Environmental Impact Statement (DEIS), March 24, 2006, and 2006 Master Plan: Layout of primary transportation elements, all of which were in close proximity to the DUS Building and to each other.



2. 2007 Revision of Plan upon retaining the Master Developer; Layout of primary transportation elements significantly changes with Light Rail moved away from Station and RTC buses underground between Station and Light Rail Station.



Main Transit Elements: Light Red = Commuter Rail & “Heavy” Rail (Amtrak; Ski Train, etc) underground at Station and at grade coming in to Station Dark Red = Light Rail Station underground adjacent to rail with access to south (left); Blue = Light Rail access from CML; RTD Buses underground in DUS Plaza; Green Dashed lines Other buses and vehicles: two levels over tracks.

Main Transit Elements: Orange = Light Rail at grade on CML (Light Rail Station to be at top end of blue Bus Terminal); Green = Commuter Rail & “Heavy” Rail (Amtrak, Ski Train, etc) at grade; Blue = Bus Terminal underground with moving walkways. Black = Consolidated Main Line (CML) freight and coal trains.

Notes: When the Plan 2 above was developed, Commuter Rail & “Heavy” Rail were below grade. In early 2008, rail was required to be at grade. (2) After 2007, the south access was eliminated requiring a “Stub” (dead-end) station rather than a “through” station, thereby eliminating the south access for future expansion and efficient operations.

