

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.**

**AMENDED COMPLAINT FOR INJUNCTIVE RELIEF UNDER NEPA and CRCP 65
AGAINST DENVER UNION STATION PROJECT AUTHORITY and
REGIONAL TRANSPORTATION DISTRICT
AND THOSE ACTING IN CONCERT THEREWITH**

COMES NOW the Plaintiff, Colorado Rail Passenger Association, and pursuant to F.R.C.P. 15, which permits an amended complaint as a matter of right, for its complaint for injunctive relief against Defendants Denver Union Station Project Authority (hereinafter "DUSPA" or "the Authority") and Regional Transportation District (hereinafter "RTD") and any person(s) or entities acting in concert therewith, states as follows:

1. Plaintiff Colorado Rail Passenger Association (hereinafter "ColoRail") is a domestic non-profit corporation, duly organized under the Laws of the State of Colorado, with its main office in downtown Denver.

2. ColoRail works to develop, preserve and improve passenger rail services in and through the State of Colorado and the nation. ColoRail supports efforts to

provide multi-modal solutions to Colorado's growing transportation problems.

ColoRail believes that passenger rail in some of the state's busiest corridors can provide a mobility choice for travelers who either cannot or do not wish to drive.

3. Defendant DUSPA is a domestic non-profit corporation, duly organized under the Laws of the State of Colorado by the Mayor of Denver and the Denver City Council, with its main offices located at 1225 Seventeenth Street, Suite 3050, Denver, CO 80202.

4. Denver Union Station ("DUS") and its surrounding environ is planned for re-development as a multimodal transportation center to serve as the future hub for several transportation modes in Denver's metropolitan area, pursuant to a Final Environmental Impact Statement (hereinafter "FEIS") and the resultant Record of Decision (hereinafter "ROD") issued by the Federal Transportation Authority (hereinafter "FTA") under the National Environmental Policy Act (hereinafter "NEPA").

5. The Authority is organized exclusively for the limited purpose of financing, acquiring, owning, equipping, designing, constructing, renovating, operating, maintaining and taking any other action that a Colorado nonprofit corporation may take with respect to the Denver Union Station Project, including the historic Denver Union Station building, supporting public infrastructure, local, regional and commercial bus facilities, track and rail projects involving intercity passenger rail facilities including light rail, and other public transit-related infrastructure (collectively

referred to as the “Project”).

6. Defendant RTD is a political subdivision of the State of Colorado and exists pursuant to the Regional Transportation District Act, C.R.S. § 32-9-101, et. seq., as amended, with its administrative offices located at 1600 Blake Street, Denver, CO 80202.

7. FTA and RTD are joint lead agencies with respect to preparation of the DUS Draft Environmental Impact Statement ("DEIS") and the FEIS.

8. This Court has jurisdiction because this injunction is sought under NEPA and the Administrative Procedure Act (hereinafter “APA”), 5 USC 706 and a Federal Question is presented

9. Congress enacted NEPA to, among other things, “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “that will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

10. To fulfill this goal, NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the environment.” 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1501.4.

11. The Denver Union Station Project is a “major Federal action” .

12. DUS encompasses a historic train station, which, together with surrounding land, consists of 19.5 acres. These 19.5 acres were purchased by RTD in 2001.

13. 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 Master Plan was supplemented in 2008.

14. Pursuant to the Master Plan, the DUS redevelopment project was to emphasize transportation.

15. As required by NEPA, Defendants herein, and those acting in concert with them, developed the Draft Environmental Impact Statement ("DEIS") at issue in this case. The DEIS focused on regional transportation needs, but did not contemplate an underground bus facility and did not contemplate development beyond the original 19.5 acres purchased by RTD.

16. In 2005, Carter and Burgess, now known as Jacobs Engineering Group (hereinafter referred to as "C&B"), was retained to act as Project Management Consultant ("PMC") for RTD's FasTracks project. The terms of the C&B PMC contract prohibit C&B from performing any new or follow up work for corridor DEIS/FEIS, preliminary engineering, final design, construction or design/build contracts. The contract has a value to C&B of in excess of 51 million dollars.

17. The C&B PMC contract identifies C&B as an extension of RTD staff.

18. Notwithstanding both the terms of the C&B PMC contract and the very nature of the relationship between RTD, as a joint lead agency with responsibility for preparation of the EIS, and C&B as an entity with a stake in the outcome of at, minimum, the FasTracks component of the DUS redevelopment, C&B was assigned the

task of overseeing the DEIS/FEIS process.

19. As a result, C&B assumed primary responsibility for preparation of the DEIS/FEIS NEPA documents. The DEIS project manager, one Gina McFee, designated by RTD with respect DEIS/FEIS preparation was an employee not of RTD, but of C&B. This relationship is more fully dissected in Plaintiff's Complaint [#1] against the FTA and its Opening Brief [#54] and are incorporated here by reference pursuant to FRCP 10(c).

20. C&B had, and continues to have, a financial interest in the outcome of DUS redevelopment and stands to benefit significantly in a "build alternative," which was the preferred alternative adopted and published in the ROD.

21. As the DEIS public comment period was drawing to a close, Ms. McFee was concerned about extensive negative public comment with respect to the "build alternative." She influenced a Denver City Planner, one Ellen Ittleton, to solicit comments in favor of the "Build Alternative." Several favorable comments were received shortly thereafter.

22. The DEIS was the product of extensive work by numerous individuals performed over a period of years. As required by law, the DEIS was the subject of extensive public debate. The DEIS does not address the environmental impact of large scale residential development beyond the original footprint contemplated by the DUS Master Plan, which development is an integral component of the build alternative.

23. In contrast, the FEIS recommended development beyond the original

footprint.

24. Attached as Exhibits "A" and "B", are two artist's renditions of two layouts of the transportation infrastructure and the proposed skyline after all real estate development is completed.

25. Exhibit "A" shows two sketches. The first, taken from the DEIS, shows the "close in" location of all the proposed transportation elements, as contemplated by the Master Plan and as submitted to the general public for comment. The second sketch, taken from the FEIS, shows how the transportation elements have been relocated, spreading them beyond the original 19.5 acres, to over 32 acres. No DEIS was prepared on this new 32 acre site.¹

26. Exhibit "B", taken from the FEIS, shows the significant private development component which is anticipated to occur at DUS. With the lone exception of the DUS building itself, all other buildings depicted in blue are private development. Neither the human element nor the natural element of the environmental impact of the private development was examined as part of the NEPA process overseen by C&B, RTD and FTA.

27. The ROD accepted the recommendation as set forth on the second sketch found in Exhibit "A." The second sketch requires significant construction work with respect to FasTracks, the very project in which C&B has a significant financial interest.

¹ In an apparent effort to harmonize the disconnect between the 2004 Master Plan and 2006 DEIS on one hand, and the September 2008 FEIS on the other hand, RTD and FTA issued in August 2008 a "supplemental" Master Plan, which set forth all the re-located elements championed in the FEIS, and in October 2008, the ROD.

28. Pursuant to the ROD, the FTA issued its Notice to Proceed with re-development plans which were not made part of the DEIS process. In other words, RTD, DUSPA, and those acting in concert with them, including C&B, are undertaking massive re-development without having developed a NEPA mandated EIS consistent with the scope of the project contemplated in the FEIS and ROD.

29. The ROD was issued without the benefit of a statutorily appropriate environmental review and analysis required by NEPA and CEQ regulations. Specifically, the transportation re-development scheme set forth in the 2004 Denver Master Plan is responsive and observant to the needs of those who will use DUS. The DEIS, as eventually issued, captured the spirit of the Master Plan, but the requirements of the Master Plan were not met in the FEIS, rendering the ROD defective as a matter of law. In short, the FEIS is a new proposed action with respect to which there has been no opportunity for public comment and with respect to which FTA did not oversee the “hard look” required by Congress when it enacted the NEPA process.

30. The 2004 Master Plan discussed development of 19.5 acres located between 16th and 18th Streets, and Wynkoop and Wewatta Streets, with smaller areas south of 16th near Wewatta and north of 18th. The existing Consolidated Main Line Right of Way (“CMLROW”) was to be for Light Rail, with station access underground adjacent to the Great Hall of DUS via 16th and 18th Streets as illustrated in Exhibit “A” sketch 1.

31. The 2006 DEIS evaluated the environmental impacts, both human and

natural, of a project with the scope set forth in paragraph 30 immediately above.

32. The 2008 Master Plan Supplement, issued only weeks before the FEIS, contained a "Vision Statement" which expanded and changed the parameters for development set forth in the 2004 Master Plan and the 2006 DEIS, from the relatively narrow re-development alleged in paragraph 30. The 2008 Supplement represents a major expansion of the project to 32.5 acres in a large "Transit District" within an area from Wynkoop Street to the CML railroad tracks, and from 16th to 18th Streets west of Wewatta Street, and extending south and north to include areas between 15th and 20th Streets from the track side of the of the Historic Station west to Wewatta Street. The tail tracks south of the north side of 16th Street are to be abandoned and removed. These tail tracks are critical for any future southbound traffic. The Light Rail station was moved to the CML.

33. The FEIS, issued within weeks of the 2008 Master Plan Supplement, recommends the re-development as envisioned in paragraph 32, above, as opposed to the redevelopment contemplated in paragraph 30, above.

34. The ROD adopted and approved the recommendations of the FEIS.

35. The FEIS can only be characterized as a substantial change to actions proposed in the DEIS.

36. The changes are of a magnitude sufficient to conclude that significant new circumstances and information exist relevant to the human and natural environmental concerns and bearing on the newly proposed actions as set forth in the FEIS and the

impact of those actions.

37. The changes to the proposed actions cannot be said to result in fewer or diminished environmental impacts than evaluated in the DEIS, a conclusion reinforced by application of logic and common sense.

38. The expanded actions proposed in the FEIS and adopted in the ROD are not analyzed in the DEIS, resulting in an absence of a DEIS encompassing the analysis contained in the FEIS, as required under NEPA and CEQ.

39. While FTA and RTD may have complied with NEPA in connection with the DEIS, they have not complied with NEPA in evaluating the impact to the human and natural environment of the project as contemplated in the FEIS.

40. Based on the ROD, RTD and DUSPA and those acting in concert with RTD and DUSPA, including C&B and others, are in the process of undertaking certain actions, including, but are not limited to:

- a) Construction of an underground bus facility;
- b) re-alignment of existing railroad tracks;
- c) moving the existing light rail station from its present location adjacent to DUS to a location nearly ¼ mile away and adjacent to the Consolidated Main Line ("CML");
- d) destruction of an historic passenger tunnel leading from the DUS Great Hall to the current train tracks.

41. RTD and DUSPA have announced that the foregoing activity will commence on Monday, March 15, 2010 with excavation of the site of the proposed underground bus facility, the environmental effects of which has not been adequately

analyzed by FTA and RTD² in the DEIS and which are not addressed in the FEIS.

42. While waiting for funds from as yet incomplete federal loans, RTD has authorized a bridge loan to DUSPA sufficient to permit DUSPA to hire construction companies to begin ground disturbing activities as trenches are dug, pipes laid, a tunnel excavated and foundations poured. Once these activities are commenced, it will be impossible to restore the physical environment to what it was before the ground was broken. The threatened harm to the physical environment is, therefore, irreparable, as a practical matter and as a matter of law.

43. The activities ColoRail seeks to enjoin threatens irreparable degradation of the irreplaceable historic environment of Downtown Denver.

44. The activities, if permitted to continue, will irreparably harm the traveling public and will impair mobility for the disabled and the elderly.

45. The activities, if permitted to continue, will open the door to connected private commercial development, the cumulative impact of which has not been adequately addressed in the NEPA mandated process.

46. FTA's and RTD's NEPA violation with respect to unexamined, cumulative consequences of private development connected to the redevelopment threatens to inflict substantial and irreparable informational harm upon Plaintiff and the general

² The so called "Bus Box" will be a 35 foot deep underground facility located in an area with a 14 foot deep water table, which will require, by best estimates, diesel exhaust fans removing the exhaust of over 20 busses, and pumps removing water, mag chloride, spilled diesel and oil, all running 24/7. The FEIS did not examine what effect a properly operating system would have on the natural environment, let alone how any breakdowns would be addressed to prevent any contamination of the ground water.

public.

47. If the specific activities listed in paragraph 40 above are permitted to commence, a chain of events will be set into motion which will be impossible to undo. Excavation to permit construction of an underground bus facility cannot be undone. The historic tunnel, once destroyed, can never be resurrected. Movement of train tracks and the light rail station will result in an inevitably irreversible and irretrievable commitment of resources.

48. Plaintiff has a probability of success on the merits of its claim that a NEPA violation has occurred. The lead agencies failed to prepare an FEIS which fairly includes all matters set forth in the DEIS, failed to analyze connected private development in the analysis of cumulative impacts, failed to prepare a comprehensive analysis of all environmental impacts of a build alternative that will inevitably result from the degree of development depicted on Exhibit "B," and failed to comply with the entire NEPA process and NEPA's implementing regulations by recommending a build alternative which goes far beyond what was contemplated in the DEIS. The lead agencies also permitted an entity with a financial interest in the build alternative to oversee the EIS NEPA process which resulted in an impermissible conflict of interest to occur.

49. The administrative record in this matter comprises approximately 28,000 pages.

50. ColoRail has shown the existence of multiple questions connected to the

NEPA process and the end result of that process which are serious, substantial, difficult and doubtful.

51. In light of the sheer magnitude of the record, the procedural flaws set forth by Plaintiff herein cannot be analyzed quickly. The issues raised by Plaintiff are ripe for litigation and deserving of more deliberative investigation.

52. Harm to the environment is presumed in this case because FTA and RTD failed to comply with NEPA procedure.

53. It is currently impossible to assess the degree of NEPA harm which will be caused if the activities set forth in paragraph 40 are permitted to occur because the studies that would assess that harm to both the human and natural environments are incomplete due to the inadequacy of FTA and RTD's DEIS and FEIS process.

54. Permitting construction to commence before a determination is made that NEPA studies have been appropriately completed with respect to cumulative impacts of private development connected to the DUS redevelopment would defeat the purpose of undertaking the studies to begin with.

55. The balance of the equities favors an injunction at this point. If construction is allowed to proceed before FTA and RTD comply with NEPA then NEPA itself would be an exercise in futility.

56. What RTD and DUSPA are poised to commence does not implicate or advance national security interests nor does it threaten to decrease the nation's combat readiness in the future. Construction activity contemplated in and around DUS is a

commercial enterprise which threatens the physical (natural) and human environment of the region.

57. Delay in commencement of construction may cause some monetary harm to various private parties, but that harm does not outweigh the harm to the environment which will occur once excavation at DUS begins, nor does it outweigh the informational harm to the public which arises from FTA and RTD's failure to explore, fully, the environmental impact of redevelopment outlined in the FEIS and the ROD where such development is not adequately addressed within the decision making process required by NEPA and CEQ at the DEIS stage of the EIS process.

58. Any delay is likely to be of limited duration. ColoRail has submitted its Opening Brief in its administrative appeal of the ROD. FTA has filed a Response, and RTD and DUSBA have submitted *amicus* briefs. Colorado Rail's Reply is due on March 12, 2010, to which FTA is permitted a Surreply. Once the matter is fully briefed, the Court will, in due time, rule on the merits of Plaintiff's appeal. Delay in construction while the issues raised are decided will not cause the sort of harm which will result if construction is commenced or continued and the Court ultimately agrees that NEPA violations have occurred.

59. The public interest is well served if an injunction enters. Where NEPA is violated and where, as here, harm to the physical environment is imminent, the public interest is obvious and injunctive relief is the only way to protect that interest.

60. No bond is required in this case. Plaintiff is a grass roots non-profit

organization and cannot afford substantial liability while it pursues the appeal. If a bond is required then FTA and RTD's NEPA violations may escape judicial review and the public interest will suffer.

FIRST CLAIM
(INJUNCTIVE RELIEF)

61. Plaintiff incorporates the foregoing allegations as though fully set forth.

62. The proposed actions of RTD, DUSPA and those acting in concert with RTD and DUSPA will result in immediate and irreparable injury to the physical and human environment in and around DUS.

63. The threatened injury outweighs any harm any Injunctive Order will cause to RTD, DUSPA and those acting in concert with RTD and DUSPA.

64. The relief requested is not adverse to the public interest. To the contrary, the public interest is best served if the RTD, DUSPA and those acting in concert with RTD and DUSPA are enjoined from proceeding until judicial review of the ROD is concluded.

65. Plaintiff has demonstrated a substantial likelihood of success on the merits of its claim the Defendants have failed to engage in that level of analysis of the environmental impact of the proposed build alternative as set forth in FEIS demanded by NEPA.

66. Plaintiff has alleged facts which raise questions so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more

deliberate investigation than is possible on application for injunctive relief.

67. Plaintiff has alleged facts which demonstrate a substantial likelihood that Plaintiff will prove violations of NEPA even without application of any relaxed standard for evaluating the likelihood of success.

68. An Injunction of sufficient duration to permit the Court to evaluate Plaintiff's appeal of the ROD is necessary to preserve the status quo and to prevent irreparable harm to the physical and human environment which will occur if construction is commenced or continued at DUS, quite apart from the legal harm caused by violations of NEPA.

69. Only the tough medicine of an injunction with respect to the work RTD, DUSPA and those acting in concert with them are set to commence on Monday, March 15, 2010, will preserve the status quo while the Court evaluates Plaintiff's appeal of the ROD. Any harm, NEPA or otherwise, caused by commencement and continuation of construction at DUS along the lines set forth in the FEIS and the ROD can never be undone.

70. Plaintiff welcomes the opportunity to be heard on the issues raised herein.

WHEREFORE, ColoRail respectfully requests that this Court enter Orders enjoining RTD and DUSPA and any entity or person acting in concert with RTD and DUSPA from commencing or continuing any groundbreaking work at the DUS redevelopment site, specifically including those activities set forth in paragraph 40 of

this Complaint for Injunctive Relief, and for such other an further relief which may be appropriate under the circumstances presented.

Dated this 12th day of March, 2010. Respectfully submitted,

THEUNE LAW OFFICES, PC

By: /s/ Philipp C. Theune

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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 Amended Complaint was delivered via email and to the US Postal Service, First Class Postage Prepaid, for immediate delivery to:

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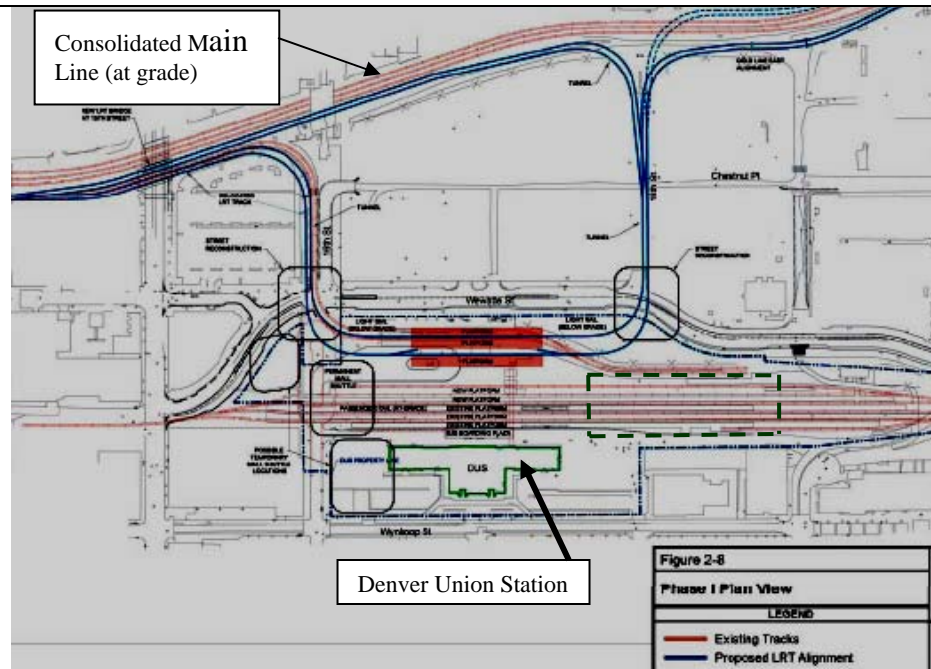
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Denver Union Station Transportation Elements Plans

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.



Denver Union Station Final Environmental Impact Statement



Figure 5-11
Future Development: Massing and Scale
Source: SOM 2008

Plaintiff's Exhibit "B"