**No. 03-35540**

---

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

**Citizens for Mobility, et al.,**

**Plaintiffs/Appellants**

**v.**

**Norman Mineta, et al.,**

**Defendants/Appellees.**

---

**On Appeal From the United States District Court for the Western District of Washington**

---

# Reply Brief of Appellants

---

John D. Alkire, WSBA #2251
1201 Third Avenue, Suite 5100
Seattle, WA 98101
(206) 583-8458

Jon W. MacLeod, WSBA #8491
1201 Third Avenue, Suite 5100
Seattle, WA 98101
(206) 621-6581

James P. Savitt, WSBA #16847
Savitt & Bruce
1325 Fourth Avenue, Suite 1410
Seattle, WA 98101-2406
(206) 749-0500

Attorneys for Appellants

## CONTENTS

# TABLE OF AUTHORITIES

**Cases**



**Rules**

The briefing in this appeal demonstrates the parties dispute few if any material facts, but instead disagree about the legal significance of these facts. Disagreements about applicable law are subject to the "de novo" and "rule of reason" review standards. FTA and Sound Transit seek to emphasize the "arbitrary and capricious" standard, but that standard applies only to review of disputed facts, not to review of issues of law.

## 1. Initial Segment Will Have Potentially Significant Environmental Effects not Evaluated in the 1999 FEIS.

In its Opening Brief, at 4-8, and 11-14, CFM identified those potentially significant environmental effects of Initial Segment not previously addressed in the 1999 FEIS. In a remarkable shift, FTA chooses not to address directly those arguments about potentially significant environmental effects. Rather, FTA mounts a completely *new* argument, namely that the impacts are not on the "physical environment". FTA cites for this proposition *Bicycle Trails Council of Marin v. Babbitt,* 82 F.3d 1445, 1466 (9th Cir. 1996). Notably, FTA did not cite this case below, and the district court did not rely on it; the FTA did not raise the "physical environment" defense below, and the district court did not consider it.

In *Bicycle Trails,* the court considered an action of the Golden Gate National Recreation Area ("GGNRA"), a federal agency, to restrict bicycle access to certain existing trails. The action involved no physical construction plan or related physical change to the environment.

Here, the material facts could not be more different. FTA and Sound Transit propose spending over $2 billion on a rail *construction project.* It is hard to imagine a proposal more directly connected to the "physical" environment than a construction project. FTA and Sound Transit propose spending over $100 million reconstructing the DSTT alone.[1] In its brief, FTA simply ignores these undisputed facts.

Notwithstanding FTA's contrary arguments, this case is just like *Coalition on Sensible Transportation, Inc. v. Dole,* 642 F. Supp. 573 (D.D.C. 1986), *aff'd*., 826 F.2d 60 (D.C. Cir. 1987), where the court held that traffic and safety issues resulted from, and had a close causal connection with, proposed additional lanes to a highway. *Id.* at 586 n.3. Here, similarly, the traffic and safety issues are associated with, and have a close causal connection with, the planned reconstruction of the DSTT for mixed rail-bus use.[2] Thus, the Administrative Record in this case directly

---

[1] According to the EA, the expected costs of reconstructing the DSTT for rail-only operations were $25 million. (EA at 46; AR 502550.) Expected additional costs of reconstructing the DSTT for mixed bus-rail use would be between $ 36 million and $43 million, plus an additional $50 million for the "tail track" under Pine Street, or a total of at least $86 million for additional construction changes to the "physical environment" related just to mixed use of the DSTT. (EA at 45-46; AR 502549-50.)

[2] In the EA, FTA explains that "transportation" is an "element of the environment". (Table S-2, AR 502503.) In the EA's discussion of "Changes in Environmental Effects and Mitigation" (EA at 19, AR 502523), the EA includes subsection 3.1.2 on the "Downtown Seattle Transit Tunnel". (EA at 21, AR 502525.) Within that

contradicts FTA's claim (FTA Brief at 13) that "a safety concern" is not an "environmental impact".[3]

In a nutshell, FTA would seek to apply *Bicycle Trails* to the facts of *Coalition on Sensible Transportation*. Its argument, presumably, would lead to the conclusion that if one builds a highway, a power plant, or any other physical structure, NEPA does not require examination of traffic or safety effects, because they are not impacts on the "physical" environment. This is not the law.[4] FTA's long and winding dissertation on *Bicycle Trails* is completely disconnected from the undisputed facts of this case, and equally so from the law that applies to those facts.[5]

---

subsection, the EA identifies "Transit Impacts" and "Safety" as two of the environmental effects pertaining to proposed changes to the DSTT. (EA at 25, 26; AR 502529, 502530.)

[3] Sound Transit explains that the Initial Segment EA addressed, "the potential changes in the environmental impacts resulting from construction and operation of the 14-mile Initial Segment, including the safety impacts of joint bus and rail use of the DSTT . . . ." Sound Transit Brief at 10 (emphasis added). Similarly, Sound Transit refers to "the environmental impacts, including the 'safety issues' of joint bus/rail operations in the DSTT." *Id*. at 25.

[4] In addition to *Coalition on Sensible Transportation, see also Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1039 (D.C. Cir. 1973)(traffic problems), and *McDowell v. Schlesinger*, 404 F.Supp. 221,246 (W.D. Mo. 1975)(noise, traffic congestion, burdens on existing mass transportation systems).

[5] FTA's argument at p. 23 n.16 about uncertainty and incomplete information also misses the mark. CFM's complaint about incomplete information pertains to the 1999 FEIS, and therefore 40 C.F.R. § 1502.22 applies. As for the EA and the

## 2. The Record Discloses No Convincing Statement of Reasons Showing Initial Segment's Environmental Impacts Are Insignificant.

Here again, FTA refuses to meet CFM's arguments directly. It chooses instead to advance a tautology: Because FTA has decided those environmental impacts of Initial Segment not previously examined in the FEIS are insignificant, there is no need to provide a convincing statement of reasons why this is so. That, of course, is not the law. *See* CFM's Opening Brief at 14-16, and cases cited therein.

FTA also props up a straw man, arguing falsely that CFM asserted the "fire/life/safety issues did not receive adequate consideration". FTA Brief at 28. That is not CFM's argument. CFM argues that the evidence, in the Administrative Record, of the fire/life/safety issues demonstrates those issues are of potential environmental significance and should have been addressed in an EIS or SEIS. CFM Opening Brief at 13-14; *see also* District Court Order at 12, *quoting Wisconsin v. Weinberger,* 745 F.2d 412, 418 (7th Cir. 1984).

---

uncertainty it manifests with respect to the DSTT mixed-use issues, the words of this court in *Public Citizen v. Dep't. of Transp.*, 316 F.3d 1002 (9th Cir. 2003), apply here directly: "If the environmental effects of a proposed agency action are uncertain, the agency must usually prepare an EIS: 'Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent 'speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available

Compounding its error, FTA argues that discussion of the fire/life/safety issues in the *EA* somehow is sufficient. Discussion in the *EA* is not the point: The issue is whether the questions addressed are of potential environmental significance, such as to require discussion in an EIS or SEIS.[6] This issue FTA refuses to confront directly.

At page 30 of its brief, FTA states there is "nothing in the administrative record" casting doubt on FTA's administrative conclusion that "[t]he Initial Segment would not be expected to impact public services or safety compared to the original project." But FTA simply ignores the statement in the DSTT Joint Operations Report, previously quoted by FTA itself at page 17 of its Brief, that "the

---

data are gathered and analyzed prior to the implementation of the proposed action." *Id.* at 1024 (quoting earlier cases).

[6] FTA seeks further to deflect attention from the issue raised by CFM, by insisting all fire/life/safety issues identified by FTA were "resolved" in the final EA. CFM would simply invite the court to compare the pertinent pages of the draft EA (AR 502238-42, and 502253-54), with those of the final EA (AR 502511-17, and 502530-31), with the understanding that the FTA staff questions were raised between draft and final product. The limited and conclusory information added in the final version of the EA does not adequately address the questions identified. *See also* CFM Opening Brief at 6-7. FTA also seeks to rely on Exhibit A to the Uyeno Decl., SER 66, for the proposition that the final EA "resolved" these questions adequately; yet a review of that document also indicates to the contrary. Further, the district court ruled that this Exhibit A documentation had not originally been included in the Administrative Record, that there was "no showing" the documentation "was considered in the decision making process," and that the district court would not rely upon it. Order at 6 n.9.

introduction of light rail vehicles in the transit tunnel will significantly change the operation of the tunnel and require that fire/life/safety standards are met for both light rail and buses." AR 502688.

FTA and Sound Transit offer, in conclusory fashion, that "significant changes" in operation of the tunnel do not necessarily suggest potentially "significant" new environmental impacts requiring treatment in an EIS or SEIS. This is not the convincing statement of reasons required by controlling law. *Public Citizen v. Dep't of Transp.,* 316 F.3d 1002, 1021 (9th Cir. 2003). The agency decision must be based on a "*reasoned evaluation* of the relevant factors". *Id., quoting Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378 (1989)(emphasis added).

**3. The EA is not a Substitute for an EIS or SEIS.**

FTA studiously ignores the district court's statement, quoted at page 20 of CFM's brief, that: "Plaintiffs have the burden of producing evidence of some potentially significant environmental impact that went unexamined *in the Urban EA*." Order at 16 (emphasis added). Notwithstanding FTA's extensive hyperbole, this statement by the district court remains an incorrect statement of the law. *See* CFM Opening Brief at 20.

**4. Initial Segment was not Evaluated as an Alternative in any EIS or SEIS.**

It is undisputed that the "Initial Segment" project alternative was not evaluated as an alternative in any EIS or SEIS.[7] Order at 21; *see also* FTA Brief at 17. Indeed it was not even *identified* as an alternative in any EIS or SEIS. *See* CFM's Opening Brief at 22, *citing* AR 502215. From these undisputed facts, CFM argues that under controlling law Initial Segment should have been so identified and evaluated. CFM Opening Brief at 22-24.

In response, FTA contends that Initial Segment was within the "range of alternatives" addressed in the FEIS, and that was sufficient. FTA Brief at 33-40.[8] Yet FTA simply fails to address the application of its own regulation, 23 C.F.R.

---

[7] The 2002 Amended ROD states that Initial Segment or the "Amended LPA" is the "project" to which the Amended ROD applies. (AR 502694.) Sound Transit's 2001 funding application to the FTA likewise makes it clear that "Initial Segment" is the "project" in question. (AR 500439.)

[8] CFM believes the court need not reach this issue in light of even more specific, controlling, laws and regulations bearing directly on FTA's duty to address and evaluate designated alternatives. *See* text accompanying n. 9 *infra*. Nevertheless, CFM does not agree that Initial Segment is "within the range of alternatives" addressed in the FEIS; thus, 40 C.F.R. § 1502.2(e) requires that: "The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate decisionmaker." Here, this did not occur because Initial Segment was not identified or evaluated in the 1999 FEIS. Further, as noted by Sound Transit, the district court found that discussion of Initial Segment in the EA "expanded" the alternatives analysis. (Sound Transit Brief at 33.) This notion of expansion in the EA is inconsistent with the notion that Initial Segment was "within the range" of alternatives analyzed in the 1999 FEIS.

§ 771.125(a)(1), requiring that the *EIS* (*not* an EA) "evaluate all reasonable alternatives considered." There is no room for FTA to argue here that Initial Segment is not an alternative "considered" by it—for FTA is proposing that Sound Transit *construct* this alternative!

Apparently, although not clearly, FTA would argue that if it complies with the "range of alternatives" requirement, it need not comply with 23 C.F.R. § 771.125(a)(1).[9] Stated differently, it would argue that it must comply with some laws, but not all of them. Civil disobedience, however, is not a remedy available to federal administrative agencies.[10]

In contending that it need not evaluate Initial Segment as an alternative in an EIS or SEIS, FTA relies on just three cases: *Half Moon Bay Fishermans' Marketing Ass'n. v. Carlucci,* 857 F.2d 505 (9th Cir. 1988); *Northern Plains Resource Council v.*

---

[9] Yet, FTA has not even argued that the general "range of alternatives" requirement somehow preempts the more specific requirement of 23 C.F.R. § 771.125(a)(1), nor is there any basis for such an argument here. The CEQ regulations require agencies to adopt procedures to insure compliance with NEPA. 40 C.F.R. § 1505.1. FTA implemented this requirement in part by its regulation, 23 C.F.R. § 771.125(a)(1). The CEQ regulations are clear that specific agency implementing regulations "supplement" the CEQ regulations, 40 C.F.R. § 1507.3, and the FTA regulations themselves confirm that the "provisions of the [FTA] regulation *and* the CEQ regulation apply. . . ." 23 C.F.R. 771.109(a)(1)(emphasis added).

[10] *See Public Citizen v. Dep't. of Transp.*, 316 F.3d 1002, 1027 (9th Cir. 2003), where this court emphatically rejected USDOT's contention that it need not comply with NEPA in connection with transportation planning and rulemaking.

*Lujan,* 874 F.2d 661 (9th Cir. 1989); and *Arizona Cattle Growers Ass'n. v. Cartwright,* 29 F.Supp. 2d 1100 (D. Az. 1998). The two Ninth Circuit cases, *Half Moon Bay* and *Northern Plains,* are clearly distinguishable for reasons set forth in CFM's Opening Brief at page 23 n.17, and page 18, respectively.

*Arizona Cattle,* a district court opinion, offers no support to FTA here. It involved a complex case stemming from amendment of a U.S. Forest Service plan covering forest territory throughout Arizona and New Mexico. At issue were the *planning* Draft EIS and the *planning* Final EIS. *Id.* at 1103, 1110-13.[11] The material in question was contained in the Final EIS (although apparently not in the Draft EIS); here, by contrast, the Initial Segment changes in question were *not* addressed

---

[11] The court in *Arizona Cattle* emphasized that the planning guidelines at issue in the case were "not currently binding" and that "an additional NEPA process will be required when site-specific implementation occurs during a 'new *project* decision.'" 29 F.Supp. 2d at 1114 (emphasis added). The court noted that agency counsel "represented emphatically that the guidelines would not be enforced prior to a new *project* decision on a specific site," and affirmed: "Defendants are bound by these representations." *Id.* at 1119 (emphasis added).

Despite the foregoing safeguards, in *Arizona Cattle* the district court still clearly struggled with the case, and ruled in favor of the agency only reluctantly:

> While it is clear that the process invoked by the USFS was not ideal and may have resulted in some notice violations of NEPA . . . , these violations did not hamper the overall NEPA process. . . . [T]he court does not conclude that . . . the agency's findings on appeal were arbitrary and capricious.

29 F.Supp. 2d at 1120-21.

or evaluated in the Final EIS. In *Arizona Cattle*, the scope and nature of impacts from the planning process was unclear, inasmuch as no implementation could occur until defendants completed further NEPA procedures at the *project* stage; here, by contrast, FTA proposes that Sound Transit build the Initial Segment project *now*.

**5. FTA Failed to Evaluate the TSM Baseline Alternative in any EIS or SEIS.**

FTA ignores the veritable thicket of interrelated statutes and regulations cited by CFM (CFM's Opening Brief at 25-28), and instead argues blithely that NEPA does not require evaluation of the TSM alternative in an EIS. By this argument, FTA persists in its effort to avoid the obvious effect of its own controlling laws and regulations.[12]

FTA complains that by citing and relying on FTA's NEPA Regulation, 23 C.F.R. § 771.125(a)(1), CFM reads a regulation "out of context". Yet in the same breath, FTA then argues that it unilaterally may decide to discuss *some* reasonable alternatives in an EIS, but not others. This is not the law. The law requires FTA to

---

[12] Indeed, it also ignores its own published guidance, in *"FTA's Frequently Asked Questions, 'Key Changes Introduced in Rule'":* "CEQ and FTA regulations governing the NEPA process require the consideration of all reasonable alternatives that address the purpose and need for Federal action. This set of alternatives will normally include some level of evaluation of a TSM alternative that would generally fit the second definition of the New Starts baseline alternative . . . . For clarity, the NEPA document will refer to this alternative by a descriptive name such as the TSM

address in an EIS not some, but *"all* reasonable alternatives considered." *Id.* (emphasis added).[13] FTA apparently would ask this court to interpret § 771.125(a)(1) in the "context" of ignoring the plain language of the regulation.

FTA argues that it need not evaluate a TSM alternative separately from "no-build" if, "the adopted . . . plan includes within the corridor all reasonable cost-effective transit improvements short of the new starts project . . . ." (FTA Brief at 42-43, *quoting* 49 C.F.R. Part 611, Appendix A.) In this case, however, it is undisputed that Sound Transit's "no-build" proposal does *not* include within the corridor, "all reasonable cost-effective transit improvements short of the new starts project".

"No-build", obviously, is a no-build alternative, whereas TSM is a "build" alternative. The TSM alternative is the "best that can be done" to improve transit service in the corridor without a *major* capital investment in new infrastructure. (Alkire Dec., Sept. 18, 2002, para. 27, SER 000010; *see also* CFM Opening Brief at 25 n.19 and authority cited therein.) That is not what FTA evaluated in the FEIS.[14]

---

alternative or Better Bus alternative." *Id.* at page 5 of 13 (quoted in para. 28 of Alkire Decl., Sept. 18, 2002, SER 66 at 000010.)

[13] *Accord*, 40 C.F.R. § 1502.14 ("evaluate all reasonable alternatives", *id.* –(a), and "[i]dentify the agency's preferred alternative or alternatives", *id.* – (e)).

[14] FTA describes the "no-build" alternative evaluated in the 1999 FEIS as: "The No-Build Alternative represents the current transportation system plus projects in the

In this case, *all* of the "build" alternatives in the 1999 FEIS are rail alternatives: "The build alternatives would consist of constructing and operating a light *rail* line." (AR 3165; emphasis added.)

Sound Transit observes that several TSM alternatives were evaluated in a local *planning* EIS in 1993. (Sound Transit Brief at 35; *see also id.* at 5.)[15] Yet it is undisputed that none of those 1993 TSM alternatives was evaluated in the 1999 *project* FEIS at issue here; and, it is equally clear that none of the TSM alternatives was compared with the Initial Segment alternative (which was not even defined until 2001).[16]

---

region's 20-year Metropolitan Transportation Plan." (AR 3094.) By contrast, according to Sound Transit, the TSM alternative involves improvements greater than, and in addition to, the "no-build" alternative, and evaluation of that separate TSM alternative "is a requirement" for FTA funding review. Sound Transit Brief at 34 n.10. *See also* Order at 23. Similarly, the 1993 planning EIS distinguishes clearly between no-build and TSM, stating that under no-build, "[n]o beneficial impacts can be identified for this alternative," whereas "the TSM alternative would support measures to reduce vehicle trips, with beneficial effects on regional mobility and air quality." AR 11626.

[15] This discussion by Sound Transit undermines FTA's unsupported assertion, in its Brief at 43, that "[n]othing before the Court indicates that the FTA has evaluated any other baseline alternative besides the 'no-build' alternative."

[16] *See* 40 C.F.R. § 1502.14 (requirement to present alternatives in "comparative form," so as to provide a "clear basis for choice among options").

FTA has offered no citation to the Administrative Record supporting the proposition that it need not evaluate a TSM alternative in the FEIS. Thus, once again, its legal argument is not tethered to the facts.[17]

**6. Mitigation of Safety Risks Has Not Been Ordered.**

The law requires FTA's FEIS to describe mitigation measures that are to be incorporated into the proposed action. (*See* CFM Opening Brief at 28-29.) This has not been done. There is no statement in the FEIS, SEIS, ROD, or Amended ROD [18] describing mitigation measures to be incorporated into the proposed Initial Segment action, or, more particularly, its planned mixed use of the DSTT. *Id. Accord,* FTA Brief at 14 ("FTA did not require Sound Transit to commit to any mitigation [regarding mixed bus-rail use in the DSTT].") FTA objects to CFM's argument via

---

[17] FTA contends that CFM did not challenge its failure and refusal to evaluate the TSM alternative in the FEIS. (FTA Brief at 43 n.28.) This contention is plainly false. *See* CFM's Memorandum in Support of Renewed Motion for Partial Summary Judgment, Sept. 18, 2002, at pp. 18-19, ER 43.

[18] Title 40 C.F.R. § 1502.2 refers to the "record of decision" ("ROD"), and states that it shall: "(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable to any mitigation." FTA's Amended ROD does not comply with this regulation, as it contains no discussion of mitigation of impacts resulting from mixed use of the DSTT. FTA's discussion in n.19 of its Brief is irrelevant. CFM is not arguing that final mitigation plans must be in hand, but rather that commitments must be made and reflected in the Administrative Record.

a bootstrap, contending that the *EA* found no need to discuss mitigation, and therefore "there was simply nothing to discuss". FTA Brief at 45. This is tantamount to saying, "we need not address mitigation issues because we say so."

Sound Transit argues differently, conceding that mitigation of safety impacts is necessary, but contending that identification of the mitigation measures "in the Initial Segment EA" constitutes compliance with applicable mitigation requirements. (Sound Transit Brief at 38.) This is not a correct statement of the law.[19]

It is undisputed that safety impact mitigation related to mixed use of the DSTT is not specified in the FEIS, in the original ROD, or in the Amended ROD, and from this record there is simply no way of knowing what the mitigation requirements are, or how they would be enforced.

---

[19] *See* n. 18 above and CFM's Opening Brief at 28-29.

## CONCLUSION

For the reasons stated above and in CFM's Opening Brief, this court should reverse the district court and order that an EIS or SEIS be prepared for the "Initial Segment" rail transit project.

Respectfully submitted this ____ day of December, 2003.


_____
John D. Alkire, WSBA #2251
1201 Third Avenue, Suite 5100
Seattle, WA 98101
(206) 583-8458

_____
Jon W. MacLeod, WSBA #8491
1201 Third Avenue, Suite 5100
Seattle, WA 98101
(206) 621-6581

_____
James P. Savitt, WSBA #16847
Savitt & Bruce
1325 Fourth Avenue, Suite 1410
Seattle, WA 98101-2406
(206) 749-0500
Attorneys for Citizens for Mobility, et al.
Plaintiffs/Appellants

## CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Reply Brief of Appellants is proportionately spaced, has a typeface of 14 points or more and contains 2,144 words.

_____ _____

Date Signature of Filing Party

## CERTIFICATE OF SERVICE

I, June Starr, certify that on December 5, 2003, caused to be delivered by hand, two copies of Reply Brief of Appellants upon the following parties, and by Federal Express, Priority Overnight, postage prepaid for next day delivery, the original and fifteen copies of Reply Brief of Appellants on the Clerk of the Ninth Circuit Court of Appeals at 95 Seventh Street, San Francisco, California 94103-1526:

Brian Kipnis, Esq.
Chief of Civil Division &
Assistant U.S. Attorney
601 Union Street, Suite 1500
Seattle, WA 98101-3903

Paul J. Lawrence, Esq.
Preston, Gates & Ellis
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

_____
JUNE STARR