

**WORKING COPY**

Judge Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CITIZENS FOR MOBILITY; STUART  
WEISS; DONALD F. PADELFORD;  
RICHARD NELSON; RICHARD FIKE;  
THOMAS COAD; and EMORY BUNDY,

Plaintiffs,

v.

RODNEY E. SLATER, Secretary of  
Transportation; NURIA I. FERNANDEZ,  
Administrator of the Federal Transit  
Administration; HELEN M. KNOLL,  
Regional Director, Federal Transit  
Administration, Region X; U.S.  
DEPARTMENT OF TRANSPORTATION;  
FEDERAL TRANSIT ADMINISTRATION;  
and CENTRAL PUGET SOUND  
REGIONAL TRANSIT AGENCY,

Defendants.

NO. C00-1812Z

**REPLY RE: FEDERAL  
DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT**

Defendants Norman Y. Mineta, Secretary of Transportation; Jennifer L. Dorn,  
Administrator, Federal Transit Administration; Richard F. Krochalis, Regional Administrator,  
Federal Transit Administration Region X; United States Department of Transportation; and  
Federal Transit Administration (collectively, "federal defendants"), by and through John  
McKay, United States Attorney for the Western District of Washington, and Brian C. Kipnis,  
Assistant United States Attorney for said District, hereby submit this memorandum in reply to

REPLY RE: FEDERAL DEFENDANTS' CROSS-MOTION FOR  
SUMMARY JUDGMENT - 1  
(C00-1812Z)

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1 plaintiffs' opposition to their cross-motion for summary judgment.<sup>1</sup>

2 **ARGUMENT**

3 I. PLAINTIFFS HAVE FAILED TO IDENTIFY ANY UNEXAMINED,  
4 POTENTIALLY SIGNIFICANT, ENVIRONMENTAL IMPACT WHICH  
5 NECESSITATES AN SEIS.

6 Federal defendants believe that their prior memorandum and both memoranda filed on  
7 behalf of Sound Transit adequately support their position that the FTA fully complied with its  
8 obligations under the National Environmental Policy Act (NEPA). Accordingly, federal  
9 defendants submit this very short reply to state their position on two points raised by  
10 plaintiffs' reply/opposition memorandum.

11 The FTA believes that the touchstone for the Court's determination of these competing  
12 motions should be, as gleaned from Northern Plains Resource Council v. Lujan, 874 F.2d 661  
13 (9<sup>th</sup> Cir. 1989), whether, regarding Initial Segment, "the significant environmental impacts are  
14 addressed" in the Central Link Light Rail Transit Project Final Environmental Impact  
15 Statement (FEIS), issued in November, 1999. AR at 3043-4012. Northern Plains Resource  
16 Council establishes that, absent some unaddressed significant environmental impact, no further  
17 compliance with NEPA is required despite the fact that an adopted alternative is not analyzed  
18 as such in an EIS. Id. at 665-666.

19 It is, of course, federal defendants' and Sound Transit's position that nothing about the  
20 implementation of Initial Segment, which is, as its name implies, simply a segment of the  
21 Central Link proposal, results in significant environmental impacts different from those  
22 already analyzed in the EIS. That position, of course, is based on the supplemental EA,  
23 which, together with the record of decision, reaches that conclusion. A.R. at 502491-502693.

24 Plaintiffs' burden, therefore, was to come forward with some potentially significant  
25 environmental impact, unexamined in the EIS. In this regard, plaintiffs' effort to distinguish

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26 <sup>1</sup> This reply memorandum is submitted one day late. Counsel for federal defendants  
27 assumed, without verifying, that this reply brief was required to be filed on a Thursday, as is  
28 the case with most motions noted in this District. However, the Court's order of August 20,  
2002, specifically required that it be filed on December 18, 2002, a *Wednesday*. Federal  
defendants' counsel apologizes to the Court and counsel for this oversight.

1 Northern Plains Resource Council, is illuminating. According to plaintiffs, while Northern  
2 Plains Resource Council, involved “indistinguishable” environmental consequences, here we  
3 have “a material change of plans, two years after the publication of the FEIS, that alters the  
4 physical impacts in the real, affected environment.” Plaintiffs Reply Memo. at p. 10, *ll* 1-5.

5 This, of course, is not the focus of attention under NEPA. NEPA does not concern  
6 itself with mere “physical impacts in the real, affected environment.” NEPA concerns itself  
7 with *environmental* impacts which are significant. 42 U.S.C. § 4332(C). In other words, it is  
8 of no consequence for purposes of NEPA that Initial Segment differs from the alternatives  
9 identified in the Central Link EIS in “the real environment” unless the alteration results in  
10 significant environmental impacts which were not addressed in the EIS.

11 The fundamental difficulty with plaintiffs’ argument is that they have been unable to  
12 identify any such impacts. The focus of their attention appears to be on alleged safety issues  
13 associated with the decision to adopt joint bus-transit use of the Downtown Seattle Transit  
14 Tunnel (DSTT). See Plaintiffs’ Reply Memo. at p. 20, *ll*. 5-41. However, the proposal to  
15 adopt joint bus-transit use of the DSTT was thoroughly analyzed in the supplemental EA and  
16 no potentially significant environmental impacts were identified. See Sound Transit’s Reply  
17 Memo. at p. 10, *ll*. 3-12. Because plaintiffs have failed to demonstrate any arbitrariness in  
18 that determination, it should not be disturbed. See Citizens to Preserve Overton Park v.  
19 Volpe, 401 U.S. 402, 416 (1971).

20  
21 II. THE FTA DID NOT ENGAGE IN SEGMENTED ENVIRONMENTAL  
22 ANALYSIS.

23 Plaintiffs do not contend that the FTA unlawfully segmented the Central Link project so  
24 as to minimize its potential environmental effects. See Wetlands Action Network v. United  
25 States Army Corps of Engineers, 222 F.3d 1105, 1117-1118 (9<sup>th</sup> Cir. 2000). Indeed, such an  
26 argument would be unavailing because the agency examined the environmental impacts arising  
27 from the Central Link proposal as fully built-out, and not just those arising from the minimally  
operable segment (MOS) for which federal funding was sought.

28 Rather, plaintiffs contend that the cumulative impacts requirement of NEPA somehow

1 precludes a project proponent from building a project that is smaller in scope, or a segment of,  
2 an originally proposed version of the project. There is no support in either Wetlands Action  
3 Network or any other case of which federal defendants are aware for such a proposition.

4 The cumulative impacts requirement is one that is intended to ensure that federal  
5 agencies do not avoid their responsibility under NEPA for conducting a thorough  
6 environmental review by artificially minimizing the scope of a project proposal. However,  
7 there is nothing in the cumulative impacts requirement which forecloses a project proponent  
8 from scaling back a project from that which was initially approved, or, as plaintiffs put it,  
9 "dividing the Central Link project into 'multiple actions.'" Plaintiffs' Reply Memo. at p. 13,  
10 ll. 32-43.

11 NEPA concerns are implicated only to the extent that the decision to build out only a  
12 segment of a project as originally proposed creates an unexamined, potentially significant,  
13 environmental impact. In that event, supplemental environmental analysis by the federal  
14 agency would be required to assess that potential.

15 That is precisely what occurred here, and no unexamined, potentially significant  
16 environmental effects were identified. There has been no unlawful "segmentation," of the  
17 project as that term is applied in NEPA litigation.

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**CONCLUSION**

For the foregoing reasons, defendants Norman Y. Mineta, Secretary of Transportation; Jennifer L. Dorn, Administrator, Federal Transit Administration; Richard F. Krochalis, Regional Administrator, Federal Transit Administration Region X, the U.S. Department of Transportation and the Federal Transit Administration, hereby respectfully request that plaintiffs' renewed motion for partial summary judgment be denied, and their cross-motion for summary judgment be granted.

DATED this 19th day of December, 2002.

JOHN MCKAY  
United States Attorney

  
BRIAN C. KIPNIS  
Assistant United States Attorneys

Attorneys for Federal Defendants