

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

COLORADO RAIL PASSENGER ASSOCIATION,

Plaintiff,

v.

FEDERAL TRANSIT ADMINISTRATION,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND
PETITION FOR REVIEW OF AGENCY ACTION

This is a complaint for judicial review under the Administrative Procedure Act, 5 USC 706, of the Federal Transit Administration's (FTA) October 18, 2008 final Record of Decision for Denver Union Station ("ROD"). For the reasons identified below, the ROD is arbitrary, capricious, an abuse of discretion, and contrary to applicable law. The FTA's reliance on the ROD should be enjoined, and the ROD should be set aside and remanded to the agency for further proceedings."

INTRODUCTION

1. Although Denver and Colorado have many important historic buildings and places, Denver Union Station is easily the major monumental structure and the major symbol of Denver's cultural change from a small mining camp into the present metropolis. More than any other place in Colorado, it is also a place of personal meaning to millions who have arrived here or traveled through Denver. It is a place commemorating the civic leaders and the builders and workers of the early days. The participants in the Union Station Advisory Committee referred to it as an icon, as the

gateway to Denver and Colorado, as the symbol of our historic development, and as a unique asset to be cherished.¹

2. Denver Union Station currently encompasses the historic train station along with 19.5 acres of surrounding land, purchased by the Regional Transportation District (“RTD”) in 2001. The station currently is used by intercity bus, taxis, RTD local and regional buses, RTD Light Rail (currently serving the southern Metro Denver Area), RTD’s 16th Street Shuttle, Amtrak’s California Zephyr, visiting and originating private rail cars, and until last month, the Ski Train.

3. RTD, the City and County of Denver (Denver), the Colorado Department of Transit (CDOT), and the Denver Regional Council of Governments (DRCOG) developed and adopted the Denver Union Station (“DUS”) Master Plan in 2004.

4. The vision statement of the DUS Master Plan indicates DUS is to become a multimodal transportation hub of international significance and a prominent and distinctive gateway to downtown Denver and the region. The station is to be a critical element of the public and private local, regional, statewide and national transportation systems, both existing and future, together with private development and inspiring civic features. *2004 DUS Master Plan*.

5. The goal of the DUS Master Plan was to identify and evaluate potential transportation, development and civic components, along with design character, financing, and ownership and governance structures for the Denver Station site. The Master Plan was to establish a final integrated plan that provides the best possible solution for redevelopment of the site in light of the project’s vision while recognizing transportation connectivity as its primary focus.

¹ Draft Consulting Party Report, Open Space Initiative Group, Denver, CO March 21, 2008

6. The purpose of the proposed DUS project is broad, yet clear: “to enhance the function of DUS as a multimodal transportation center for the Metro Denver Region and the entire State of Colorado.” DUS EIS at 1-5. The needs for the project include:

- a. Allowance of future expansion of service. DUS EIS at 1-10.
- b. Provision of transit mode connectivity. Id.
- c. Provision of varied ground transportation options. Id. at 1-11.
- d. Accommodation of projected increases in ridership. Id.
- e. The “[N]eed to provide connections with national, statewide, regional, and local systems and networks.” Id. at 1-12.

JURISDICTION AND VENUE

7. This court is authorized to review the ROD and the complete administrative record on which it is based under the Administrative Procedure Act, 5 USC 706, et seq.

8. Venue exists under 28 U.S.C. § 1391(e) to seek judicial review of the Record of Decision in the District of Colorado.

9. The FTA's October 18, 2009 ROD is final agency action within the meaning of the Administrative Procedure Act. This action is filed within the limitations period provided by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) §6002.

PARTIES AND STANDING

10. Plaintiff Colorado Rail Passenger Association (“ColoRail”) is a statewide, voluntary organization, with its main office in downtown Denver, which works to develop passenger rail services in and through the state of Colorado. ColoRail also 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.

11. ColoRail was involved in the design process for the redevelopment of DUS by serving on the Union Station Advisory Committee (USAC) throughout the duration of that group. ColoRail also submitted formal comments to the Master Plan and the FEIS. Those comments were submitted in response to the FEIS, but were omitted from the FEIS and ROD. Upon questioning the Project Manager Gina McAfee, ColoRail was told that it was an oversight and those comments would be included in a Supplemental FEIS and ROD, however no Supplemental FEIS or ROD was ever received or posted on the DUS official website.

12. Plaintiff has standing to bring this action by virtue of the declarations of impact by 3 ColoRail members, David Pitts, Jay Jones and Donald Zielesch.

13. Defendant Federal Transit Administration (FTA or Agency) is an agency within the United States Department of Transportation (DOT) and is the lead federal agency of the United States providing financial assistance to this project.

14. The FTA issued the ROD based upon the Final Environmental Impact Statement (FEIS) that is the subject of this complaint.

LEGAL FRAMEWORK

A. *The National Environmental Policy Act (“NEPA”)*

15. 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.

16. 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. The agency should describe “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(c)(ii). Overall, an EIS must “provide [a] full and fair discussion of significant impacts” associated with a federal decision and “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1

17. NEPA requires federal agencies, including FTA, to include within an EIS “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(c)(iii). The alternative analysis is the “heart” of a NEPA document, and the statute’s implementing regulations emphasize an agency’s duty to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.16.

18. An EIS also must identify direct, indirect, and cumulative impacts for each reasonable alternative. 40 C.F.R. § 1502.15. Cumulative effects are “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

19. The Council on Environmental Quality (“CEQ”) regulations, which apply to the NEPA process, 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.”²

20. A contractor must be disqualified if they have a conflict that compromised the integrity of the NEPA process.

21. 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.

22. 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).

23. 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. Actions are connected if they “are interdependent parts

² CEQ’s *Forty Most Asked Questions*, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981) (“*Forty Questions*”).

of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1).

B. The Administrative Procedure Act (“APA”)

24. This action is brought pursuant to the APA.

25. The APA allows persons and organizations to file a complaint for judicial review of final agency actions to the federal courts. 5 U.S.C. §§ 702, 704. The APA declares that a court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

STATEMENT OF FACTS

26. RTD purchased the 19.5 acre site, now referred to as “Denver Union Station” even though the station and tracks themselves only take up less than five (5) acres, in 2001. Interestingly, between the Vision Plan of 2003, Master Plan Sept 2004, Draft EIS in June 30, 2006, and the FEIS, the project grew from 19.5 acres to 32.7 acres, now including the private developer’s land, in order to accommodate the relocation of the Light Rail station.

27. As part of the DUS project, which ultimately will provide a central terminus for RTD’s FasTracks light & heavy metro area passenger rail system, the consulting firm of Jacob Carter Burgess, later re-named Carter & Burgess (JCB) was hired to prepare the draft and final EIS. Gina McAfee, an environmental planner with JCB was named as RTD’s Union Station EIS project manager, even though JCB was also a contract winner on the larger FasTracks project, valued at, upon information and belief, at more than \$225,000,000.00.

28. The Vision Statement set forth in the September 2004 Master Plan prepared for the DUS project stated:

DUS will be a multimodal transportation center of international significance and a prominent and distinctive gateway to downtown Denver and the region. The Station will bring critical elements of the public and private local, regional, statewide, and national transportation systems, both existing and future, together with private development and inspiring civic features. DUS will create an exciting setting that will improve the connections between all transportation modes, respect the character and historical significance of the Station and its adjacent neighborhoods, and provide a stimulating environment for public activity and economic vitality.

29. The Final EIS (FEIS), under the Purpose and Need section stated:

1.4.1 Project Purpose

The purpose of the proposed project is to enhance the function of DUS as a multimodal transportation center for the Metro Denver Region and the

entire State of Colorado. Improving DUS will bring together the various modes of transportation into one place and provide efficient and convenient access to and from downtown Denver. The proposed transportation improvements would help relieve traffic congestion, improve air quality, and provide additional mode options for the traveling public.

With an expanded multimodal center, an opportunity exists to provide effective connections between the various transportation modes and services planned to serve DUS. These modal and service connections are expected to improve regional mobility and provide greater access to employment, community services, and other regional destinations.

It is also anticipated that improved transit connections to the region will increase transit use due to the variety of services offered, the multiple destinations served, the ease of transfers, and the improved passenger convenience. Without such an expanded multimodal center, current and planned transportation services would be limited in service effectiveness and passenger convenience. DUS would not be able to accommodate the level of transit service needed for the growing region and passengers would be forced to use multiple transfer facilities to make connections. Traffic flow on major downtown streets would be affected, due to bus and rail services having to terminate at multiple downtown locations instead of converging at a central location to distribute passengers. Projected transit ridership would likely be lower under a decentralized system, due to reduced passenger convenience and less ease of transfer to reach destinations outside of downtown. The opportunity exists to re-establish DUS's historic prominence as a full-service transportation hub and reinforce it as a distinctive gateway to downtown Denver, the Metro Denver Region, and the State of Colorado.

30. In reviewing the FEIS and the Record of Decision (ROD), it becomes clear that this project started off as a transportation project with some real estate development, separate from the transportation multi-modal hub development, and in fact, the FEIS states repeatedly:

The anticipated private redevelopment of the DUS property is independent of the Build Alternative recommended in this document because (1) it is governed by established zoning approved by the City of

Denver for the property, (2) its development does not depend on the transportation improvements, (3) it does not affect the selection of the preferred transportation alternative, (4) it will be paid for from private funds and (5) it will not require federal approvals.

31. However, closer inspection reveals that the transportation hub (which is now proposed to spread out over the entire 32.7 acre site) cannot be built without significant funding from the private developers, and so the EIS needs to analyze the impact of the entire combined project, as set forth in more detail below.

FIRST CAUSE OF ACTION

The FTA Violated NEPA because the RTD's NEPA Contractor, JCB, Acted With a Conflict of Interest That Compromised the Integrity of the NEPA Process.

32. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

A. JCB's Financial Interest in the FasTracks Program Creates a Conflict of Interest.

33. The DUS EIS was prepared for RTD and the FTA. RTD's project manager is listed in the EIS as Gina McAfee. FEIS at 9-1. Ms. McAfee is not an employee of RTD. Rather, she is employed by JCB, a project design and technical services provider. Upon information and belief, JCB has a contract for work on RTD's larger FasTracks development and Plaintiff believes the contract for this work is valued at over \$225 million. JCB has more than a theoretical conflict or nonbinding expectation of future work. JCB had a written contract to perform services on the FasTracks project at the

time it was assisting in the preparation of the EIS, and JCB continues to be the main managing consultant on the FasTracks program.

34. It also does not appear that JCB has executed a corporate disclosure statement, as required by CEQ's regulations.

B. JCB's Conflict of Interest Compromised the Integrity of the NEPA Process.

34. Not only did JCB have a conflict of interest, but that conflict of interest compromised the integrity of the NEPA process.

35. JCB's conflict drove the design and selection of the preferred alternative in the EIS by favoring FasTracks components. As the managing consultant for the FasTracks program, JCB 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.

36. 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." 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 final design for DUS favors FasTracks components over non-FasTracks components. 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 service, such as Greyhound).

37. JCB's contracts to implement FasTracks gave it a financial interest in "preferred alternative" in the DUS EIS. During the comment period on the final DUS EIS, Gina McAfee requested entities with an interest in the "preferred alternative" in the DUS EIS to send in positive comments favoring the "preferred alternative". Ms. McAfee 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, “There has been a flood of negative comments.”

38. Instead, the solicitation for favorable comments described above was made to Denver City Planner Ellen Ittelson, the City and County of Denver’s project manager for the EIS. Upon information and belief, Ms. Ittelson forwarded this solicitation to potential supporters, offered to “compose the basics” herself, and defended Ms. McAfee’s decision to solicit positive comments.

39. This action compromised the integrity of the NEPA process.

40. FTA's oversight of the NEPA process did not alleviate the conflict of interest by JCB. FTA allowed entities with an interest in the selection of the Preferred Alternative to prepare the EIS and conduct the NEPA process with minimal oversight and based upon the work of a contractor, JCB, that had a financial interest in the selection of the Preferred Alternative.

41. FTA's failure to supervise the NEPA process and failure to ensure the objectivity of it compromised the integrity of the EIS and rendered the ROD arbitrary and capricious.

42. JCB’s conflict of interest “compromised the integrity of the NEPA process,” and so the EIS should be set aside.

SECOND CAUSE OF ACTION
The Final Environmental Impact Statement (“FEIS”)
Improperly Segments the Transportation Elements of Denver Union Station (“DUS”)
from the Private Development Elements.

43. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

44. The FTA violated NEPA because the DUS EIS does not identify the foreseeable impacts of the private redevelopment. That private redevelopment is

reasonably foreseeable and is inextricably linked, *financially and physically*, to the transportation actions proposed in the EIS.

45. The private development is a connected action that was improperly segregated from the transportation components at DUS.

46. Both the private and public development at DUS were analyzed and planned together in the Master Plan and the Draft EIS. The public and private developments are described in those documents as intertwined and mutually supportive. 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.*

47. The public and private developments are parts of a larger action and depend on each other for their justification because they are inextricably linked physically. For example:

a. The possibilities for private development at DUS directly depend on the alternative chosen for the DUS redevelopment. DUS EIS at 5-74 (*stating that “DUS property deemed unnecessary for transportation purposes will be subject to disposition pursuant to federal requirements.”*) *Emphasis added.*

b. ColoRail asserts that the planned RTD regional bus facility (“bus box”) is a choice of transportation design that is driven by a desire to accommodate more commercial development at an undue sacrifice of transportation function.

c. The transportation elements at DUS dictate the timing of the private development. 2004 Master Plan at 24 (“The site’s physical limitations, however, will dictate that significant transportation infrastructure must be in place before certain private development can occur.”)

48. There is connected action because the public and private developments at DUS are inextricably linked financially. Private development is expected to provide

almost one quarter of the funding for the DUS redevelopment. DUS Master Plan at 25.

For example:

- a. FEIS at 5-79 (“Government revenues stemming from the Build Alternative will increase throughout the region.”)
- b. Master Plan at 24 (“The estimated public costs of the project of \$560 million . . . include some provisions for future private development that must be built along with below-grade transportation elements.”)
- c. Id. (Private funding will be a component of the overall funding package, but that funding “will not become available until significant under ground transportation infrastructure has been completed.”)
- d. Id. (“It is expected that, over time, the net revenues yielded by private use and development of the site will provide funding for the public elements of the site.”)

THIRD CAUSE OF ACTION
The FEIS Fails to Take a “Hard Look” at the
Cumulative Impacts of the Private Development.

49. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

50. The EIS fails to take a hard look at the cumulative impacts of the private development. The EIS does contain a brief section discussing these cumulative impacts, but that section is inadequate because it fails to address impacts of the private development on transportation.

51. The FTA is required to analyze the cumulative impacts of the DUS proposal. 40 C.F.R. § 1502.16(a), (b). Cumulative impacts are not limited merely to other federal actions. Rather, they are the “impact on the environment which results from the incremental impact on the action when added to other past, present, and

reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions.” Id. § 1508.7. Even if the court finds that the DUS project was not improperly segmented, the private development was a reasonably foreseeable future action that must be analyzed as a cumulative impact.

FTA is required to take a “hard look” at these reasonably foreseeable cumulative impacts.

52. The private redevelopment at DUS is discussed as a cumulative impact of the proposed action. See DUS EIS at 5-69; 5-73. Although little detailed analysis is included in the EIS, this private redevelopment is discussed briefly in sections addressing social issues (5-75), visual impacts (5-77), economics (5-79) and other resources.

53. The EIS’s section discussing cumulative impacts on transportation, however, does not discuss the private development. DUS EIS at 5-74. This is probably because the authors of the EIS do not see the private development as a transportation component that has any affect on regional transportation issues. Plaintiff believes that the private development is a large driver of the proposed regional transportation design, and that it constrains the potential options and possibilities for future expansion of transportation in the area. The failure to analyze the cumulative effects of the private development on transportation options and availability is arbitrary and capricious.

FOURTH CAUSE OF ACTION

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

54. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

55. The DUS EIS evaluates only a “no action” alternative, the preferred alternative, and the “Phase I Alternative of the Vision Plan.” The “Phase I Alternative” is simply a portion of the full build out of the preferred alternative. DUS EIS Abstract.

The DUS EIS fails to consider a reasonable range of alternatives. The FTA did not consider reasonable alternatives that would accomplish the purpose and need of the proposed action, including alternatives that would 1) increase capacity for expansion of intercity rail; 2) preserve the option to construct a southern through station; and 3) provide for an above ground bus facility.

56. The FTA is also required to analyze the environmental impacts of each of the considered alternatives.

57. An agency is required to “rigorously explore and objectively evaluate all reasonable alternatives” in order to “sharply defin[e] the issues and provid[e] a clear basis for choosing among options.” 40 C.F.R. § 1502.14. This section is considered the “heart of the environmental impact statement.” *Id.* 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).

FIFTH CAUSE OF ACTION
The DUS EIS's Selection of the Preferred Alternative
Arbitrary and Capricious Because it Fails to Achieve the
Purpose and Need for the Project.

58. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

59. The alternatives screening process is described in Chapter 2 of the DUS EIS. DUS EIS at 2-2. This section screens out alternatives that would provide for future intercity rail projects. It states that “[e]xpansion of intercity rail has not been funded as part of this or any other project, and is not one of the primary transportation elements envisioned in the purpose and need.” *Id.* at 2-21.

60. Excluding intercity rail is arbitrary and capricious because the purpose and need statement for DUS does not exclude intercity rail from the transportation elements it envisions, rather it includes it. See DUS EIS at Chapter 1. In fact, the

purpose and need statement says that “interstate, regional and local rail” and “future high-speed rail” are “services planned to use the DUS multimodal transportation system at full build out.” DUS EIS at 1-5. It further lists passenger rail on the North I-25 corridor as a planned rail service. Id. at 1-9. Thus, the failure to evaluate alternatives that include intercity rail was arbitrary and capricious because intercity rail would achieve the purpose and need for the project.

61. Additionally, other elements of its preferred alternative would have achieved the purpose and need, and should have been considered in the DUS EIS.

62. ColoRail, as well as others, has indicated that they favor a southern through-connection for DUS, which would be necessary, or at least highly advantageous, to any Front Range Rail option. The DUS EIS states that such a through-station is not feasible, and so does not analyze this option as an alternative in the EIS, although they fail to state why it is not feasible. DUS EIS at 2-21; 4-37

47. The Preferred Alternative actually fails to achieve that same purpose and need. The selection of the preferred alternative was arbitrary and capricious because that alternative explicitly declines to consider and address intercity rail expansion; an element that was listed as a purpose and need for the project. See, e.g., DUS EIS at 2-21.

SIXTH CAUSE OF ACTION

The FEIS Fails to Adequately Assess the Consistency of the DUS Project with Other Transportation Plans, and Fails to Ensure that DUS will Not Restrict Alternatives for Other Reasonably Foreseeable Transportation Improvements.

63. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

64. The EIS fails to adequately analyze the consistency of the DUS redevelopment with other regional transportation plans. This failure leads the EIS to fail to recognize that the DUS project will restrict the potential alternatives available for

other reasonably foreseeable transportation improvements in violation of applicable regulations.

65. On one hand RTD argues that there are reasonably foreseeable transportation improvements which can be handled by using the Consolidated Mail Line (CML), which requires moving the coal traffic OFF the CML, however such a move is only in the discussion stage.

A. CEQ NEPA Regulations Require FTA to Consider Related Transportation Plans.

66. CEQ regulations require the FTA to identify in the DUS EIS how and whether the EIS is consistent with approved transportation plans of other entities. 40 C.F.R. 1506.2(d).

The following are identifiable potentially relevant transportation plans:

- a. The South I-25 EIS (identifies rail in the vision statement).
- b. The North I-25 EIS (identifies passenger rail as part of the preferred alternative).
- c. The Colorado Passenger Rail Study (looked at various rail networks around the state and prioritized the Front Range network).
- d. The Colorado State Rail Plan (identifies different passenger rail needs including the Front Range).
- e. The CDOT Transportation Commission list of State Significant Rail Corridors (this list includes the Front Range lines and also DUS itself).
- f. The I-70 Preliminary EIS (identifies transit and rail as part of the preferred alternative).
- g. DRCOG Regional Transportation Plan or the Metro Vision Plan
- h. Pike's Peak Area Council of Governments 2035 Plan
- i. Pueblo Area Council of Governments Plan

- j. North Front Metropolitan Planning Org Plan
- k. Rocky Mountain Authority Rail (RMRA) Feasibility Study (studied current expression of the feasibility and planning efforts along the I-25 and I-70 corridors)

67. The EIS contains a section on “Compatibility with Local Land Use and Transportation Plans.” DUS EIS at 3-9 – 3-12. This section, however, analyzes only local and neighborhood level plans and ignores regional and statewide plans. None of the plans listed above were addressed.

B. FTA NEPA Regulations Require that the DUS Project not Restrict Alternatives for Other Reasonably Foreseeable Transportation Projects.

68. The DUS project design violates FTA NEPA regulations that require FTA projects to ensure compatibility with other reasonably foreseeable transportation projects. FTA NEPA regulations require that:

In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall: . . . not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. 23 C.F.R. 771.111(f) (2008) (emphasis added).

69. The current Preferred Alternative for DUS will result in the station opening at capacity for commuter rail and intercity buses. Plaintiff believes expansion of such service to DUS is reasonably foreseeable, and that approval of the preferred alternative violates FTA’s regulations.

SEVENTH CAUSE OF ACTION
The FEIS Fails to Comply with 4(f) of the
U.S. Department of Transportation Act of 1966

70. Plaintiff incorporates all the preceding allegations as if set forth in full herein.

71. As the FEIS states, Section 4(f) of the U.S. Department of Transportation Act of 1966 prohibits the U.S. Department of Transportation (DOT) from approving any transportation program or project from using any...land of an historic sites of national, state, or local significance unless (1) there is no “prudent and feasible alternative” to using the property AND (2) the program or project included “all possible planning to minimize harm” to the historic site resulting from such use. “Use” of an historic site include “encroachment” on the property or substantial impairment of its historic integrity.

72. As the FEIS discusses in Chapter 6 of the FEIS, there are numerous DUS project elements that substantially encroach on 23 identified historic properties in the “area of potential effects” and substantially impair their historic integrity. In fact, a key element of the project, the controversial private “bookend buildings” (virtually ignored in the FEIS) that would occupy and obliterate an historic open space setting for the DUS, substantially encroach on and impair the DUS itself which is listed on the National Register of Historic Places (NRHP) and designated as a Denver landmark in 2004!

73. As has happened with numerous transportation projects at other location for which EISs have been prepared, the FEIS denies that there is even one “prudent and feasible alternative.” Also, there is very little evidence that “all possible planning to minimize harm” to the historic resources would be implemented.

74. Agency discretion under the Administrative Procedure Act and the 4(f) requirements are “clear and specific” and act as a bar to allow construction on historic properties which will be encroached on and diminished by the DUS project.

75. The agency action complained of herein is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs’ request that this Court:

- a. Declare that the FTA has failed to comply with NEPA;
- b. Set aside the October 17, 2008 ROD for the DUS project because on the agency's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- c. Enjoin the FTA from further progress or funding on the DUS Project;
- d. Order that a new FEIS be prepared in accordance with NEPA and any other applicable state and federal laws; and
- e. Award Plaintiff's costs and reasonable attorneys' fees as authorized under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and any other statute.

Dated: May 18, 2009

Respectfully submitted,

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