

## 11<sup>TH</sup> U.S. DISTRICT COURT DISMISSES COLORAIL LAW SUIT

“...The Court does not determine whether the agency arrived at the right result through its EIS process. Rather, the Court determines only whether the agency followed the right process” (Order Affirming Record of Decision, Civil Case No. 09-cv-01135-W-JM-KMT, Colorado Rail Passenger Association plaintiff v. Federal Transit Administration, page 31

This pretty much sums up the Court’s decision. In dismissing the ColoRail law suit, the Court determined that the Federal Transit Administration (FTA) did not act in an “arbitrary and capricious” manner with its oversight of the National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) review of the Denver Union Station (DUS) project. In the absence of any more stringent legislation, this standard governs the review of federal agency action. It conveys tremendous authority and discretion to federal agencies and is the weakest review standard. Essentially, it calls for completion of a process that allows public comment without much concern for the relative merits of arguments put forward by the commenting parties. Hence the merit of ColoRail’s arguments carry little weight as long as we were given an opportunity to state them and FTA’s actions are not illegal.

The Court arrived at the following findings with respect to four specific points raised in the ColoRail law suit:

First, the Court did not find that a conflict of interest existed sufficient to set aside the FTA Record of Decision (ROD). ColoRail had noted that the contractor conducting the public review had such a conflict. This was because the contractor had substantial control over the formulation of the findings of the EIS and because of an email the contractor sent to real estate development interests just before the close of the public comment period. In that email, the contractor advised the recipients that it had received a “flood of negative comments” about the “build alternative” favored by developers and urged that they submit positive comments. Among several factors, the Court did not find evidence that the contractor stood to benefit financially by this action and that many other consultants were also in a position to influence the decision so any conflict of interest that existed would be minimal. Note that in the written decision, the Court only considers that the contractor had sent the email, not what was said about the public’s opposition to the real estate developers’ “build alternative.” In the decision, the “fairness” of that action to unsolicited, public commentators including ColoRail and the implications it has on the impartiality of the contractor principally responsible for writing the EIS is not a legal issue.

Second, the court did not find sufficient “connectivity” to set aside the ROD. ColoRail argued that the favoring of private development in the “build alternative” resulted in greater expense to environmental and social benefits because of the location of transportation facilities, for example moving light rail away from the other rail lines to free up space for commercial buildings. We were also concerned about the limitations on any future rail and bus capacity including a through track and expansion of the underground bus box in the “build alternative”. In a peculiar twist, the Court turned ColoRail’s argument about private development at the DUS site on its ear. Our view is that extensive private development will occur under any transportation scenario and therefore it need not trump intermodal functionality and its social and environmental benefits. Therefore, we argued for the benefits of

integrated transportation facilities. The Court decision agrees that major growth will occur under any scenario but that it is not connected with the other planning issues and that therefore our arguments are wrong. The Court considered the ColoRail and FTA arguments only in light of whether or not development will be spurred and not its impacts on transportation functionality and the resulting environmental and social impacts. Once again, process trumps merit.

Furthermore, the Court found that the FTA complied with the requirements of NEPA which involve consideration of the cumulative effects “reasonably foreseeable” from actions resulting from the ROD. Because FTA considered possible expansion it met the legal test even though it didn’t provide for it in the final EIS and ROD. This consideration boiled down to the fact that no future expansion is currently planned and funded. So we are left with little if any possibility for a through track, a bus box below the water table with 22 slots surrounded by concrete, and a light rail facility relocated away from the rail head. This is done to facilitate three office buildings that could have been built anyway but in a way that doesn’t impede the best, most environmentally and socially sensitive transportation facilities. One thing is clear: once the bus box is buried and private development occurs, FTA is correct, none of this expansion will be “reasonably foreseeable.” Once again, merit and reality fall to process.

Third, the Court found that it was within FTA’s authority and discretion to limit the final analysis of alternatives to the three that were considered. This action by FTA omitted the alternative with the best transportation functionality, hence least environmental and social impacts. This pro real estate decision by FTA was within their authority under a process related legal framework, so be it.

Fourth and finally, the Court also found that ColoRail did not have or establish its “standing” to challenge the historic preservation issues surrounding the EIS and DUS development.

It is important to note that the Court was clear that its role is only to determine if FTA executed its responsibility sufficiently enough to meet the process requirements. Hence, it appears FTA needed to make sure enough questions were asked, not weigh the quality of the answers. This is not uncommon from other community experience with FTA and the NEPA review process. Furthermore, since FTA had eliminated consideration of more transportation friendly alternatives, none of these ideas and supporting evidence was on the table. Essentially, ColoRail would have had to re-engineer and produce for the Court years of public process to reintroduce the plan favored by Denver, the Regional Transportation District, the Denver Regional Council of Governments and the Colorado Department of Transportation in the Master Plan of 2003. We did not have the resources to do this.

In the end, the alternative selected for DUS came down to the political muscle of the current real estate development community versus that of the advocates for future public transportation options. NEPA lawsuits generally delay and sometimes improve federal decisions but they rarely cause major changes to them unless there is a major ground swell of public complaint causing the agency to reconsider. We won’t see that until well in the future when the DUS limitations become clear but this decision is long forgotten.