

ENVIRONMENTAL CHALLENGE TO FEDERAL HIGHWAY PROJECT  
THROUGH PARK

James C. Kozlowski, J.D., Ph.D.  
© 1994 James C. Kozlowski

The "Boomer Lake" decision described below illustrates the applicability of federal environmental law to the taking of public parkland for highway purposes. Like most highway projects, the "Boomer Lake" case study involved the use of federal funds. As a result, such highway projects are subject to section 4(f) requirements of the Transportation Act which is intended to mitigate, if not eliminate, the impact of federally funded highway projects on existing parkland. In addition, since such projects typically involve "major federal actions having a significant impact upon the human environment," the National Environmental Policy Act (NEPA) requires federal agencies to assess the impacts of such actions on parkland.

Thunder Road

In the case of *Committee to Preserve Boomer Lake Park v. Department of Transportation*, 4 F.3d 1543 (10th Cir 1993), six residents of Stillwater, Oklahoma, living in the vicinity of Boomer Lake Park, formed the Committee to Preserve Boomer Lake Park (the Committee) and filed a lawsuit in district court challenging a decision by the Federal Highway Administration (FHWA) "to provide federal funds for the road project and its decision not to prepare an environmental impact statement (EIS)." Specifically, the Committee to Preserve Boomer Lake Park alleged "the Federal Highway Administration's decision to fund the highway violated section 4(f) of the Transportation Act, and further ... the agency's decision not to conduct an environmental impact statement was erroneous." The facts of the case were as follows:

Boomer Lake Park is a 347-acre, municipally owned park in Stillwater, Oklahoma of which Boomer Lake comprises roughly 220 acres. Lakeview Road, an east-west route through the City of Stillwater, was a narrow, two-lane street with a one-lane bridge. The road's alignment followed a city section line until it intersected the southern part of Boomer Lake, whereupon the road turned south along the lake, then east over the Boomer Lake Dam, and then back north before returning to its original east-west alignment...

The subject of this litigation is the reconstruction of Lakeview Road. After several public informational hearings, the Stillwater City Commission decided to rebuild Lakeview Road on an elevated causeway and bridge across Boomer Lake. The proposed alignment envisioned widening Lakeview Road into a four-lane undivided road which would follow the section line in a direct route across the lake, thus eliminating four curves in the original route, two of which were substandard and made ninety-degree turns.

The proposed construction, however, would cross the lake and park, taking up approximately 3.3 acres of land in Boomer Park and another 2.4 acres of Boomer

## February 1994 Law Review

Lake for the causeway and bridge. After conducting a cost analysis on the project and after holding more public hearings, the City Commission again voted in favor of the straight alignment across the lake. To mitigate the taking of 3.3 acres of parkland, the City of Stillwater provided 3.3 acres of equivalent land on Whittenberg Lake for public recreational use. The National Park Service agreed the land at Whittenberg Lake was equivalent to the value and usefulness of the Boomer Lake Parkland being taken.

In 1988, the Oklahoma Department of Transportation (ODOT) requested federal highway funds from the Federal Highway Administration (FHWA) for the reconstruction of Lakeview Road. The ODOT solicited comments from local, state and federal agencies concerning the possible social, economic and environmental effects of the proposed Lakeview Road project. The ODOT initially submitted a draft Environmental Assessment (EA) and § 4(f) statement concerning the project which was rejected by the FHWA for failing to consider an alternative, in addition to a no-build alternative, which completely avoided the park.

A second draft was submitted, hereinafter referred to as the EA/4(f) statement, which compared three alternatives: (1) a no-build alternative; (2) a four-lane road with a straight alignment across Boomer Lake built upon a causeway and bridge (the causeway alternative); and (3) a four-lane road with an alignment around the southern end of Boomer Lake and the park (the avoidance alternative). The avoidance alternative consisted of a southwesterly diversion from Lakeview Road's current alignment to a point approximately 850 feet south of the section line and roughly 500 feet south of the dam. .. The FHWA accepted the new document and after a public hearing, found there was no prudent and feasible alternative to the proposed use of parkland under § 4(f) of the Transportation Act. The FHWA also issued a finding of no significant impact (FONSI) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321- 4347 (1988).

The federal district (i.e. trial) court granted the defendants' motion for summary judgment. The court held that "under § 4(f) of the Transportation Act, the FHWA could have reasonably believed that all of the alternatives to the proposed project while ... arguably feasible, were not prudent and presented unique or uniquely difficult problems." The district court also held that "the FHWA's decision to issue a FONSI was not arbitrary and capricious and the Committee failed to allege any substantial environmental issues omitted from the Agency's consideration." The Committee appealed.

On appeal, the Committee contended the FHWA violated section 4(f) of the Transportation Act in approving the use of federal funds to construct a highway that would use parkland. As described by the appeals court, section 4(f) of the Transportation Act, 49 U.S.C. § 303(c) (1988) provided as follows:

The Secretary [of Transportation] may approve a transportation program or project ... requiring the use of publicly owned land of a public park [or] recreation area ... only if- (1) there is no prudent and feasible alternative to using the land; and (2) the program or project includes all possible planning to minimize harm to the park [or] recreation area ... resulting from the use. A virtually identical provision is contained in

the Federal-Aid Highways Act, 23 U.S.C. § 138 (1988).

As noted by the appeals court, the Committee did not allege that "the highway project failed to include the requisite planning to minimize harm." Accordingly, the appeals court found the specific issue was "whether there was a prudent and feasible alternative." Further, the appeals court acknowledged that the United States Supreme Court in the landmark case of *Citizens to Preserve Overton Park v. Volpe*, ("Overton Park"), 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), had "instructed reviewing courts to conduct a three-tiered inquiry of the Secretary of Transportation's decision to fund a highway across land covered by section 4(f)":

First, the reviewing court is "required to decide whether the Secretary acted within the scope of his authority" under § 4(f). In this initial inquiry, we "must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems." Second, the court must decide whether the Secretary's ultimate decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

This inquiry involves determining "whether the Secretary's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Finally, the Supreme Court instructs reviewing courts to determine whether the Secretary's action followed the necessary procedural requirements. In reviewing the district court's conclusion to uphold the agency's decision, we apply the above inquiry without deference to the district court. Our review must be probing and thorough, but "the Secretary's decision is entitled to a presumption of regularity."

On appeal, the Committee argued that "the administrative record is devoid of any discussion on why the alternative routes were not prudent and feasible and thus claims the Secretary did not act within the scope of his authority pursuant to section 4(f)." Applying "the first Overton Park inquiry," the appeals court acknowledged that "[t]he Secretary of Transportation may only approve federal funding of a highway through parkland if "there is no prudent and feasible alternative." 49 U.S.C. § 303(c)."

There is no "feasible" alternative if "as a matter of sound engineering it would not be feasible to build the highway along any other route." Such a determination provides for little administrative discretion.

The term "prudent," in contrast, involves a common sense balancing of practical concerns, but section 4(f) requires the problems encountered by proposed alternatives to be "truly unusual" or "reach extraordinary magnitudes" if parkland is taken. Thus, although costs and community disruption should not be ignored in the balancing process, the protection of parkland is of paramount importance. Because the government does not suggest that the alternative routes were infeasible, we limit our review to whether the alternatives were imprudent.

As indicated in Overton Park, highway projects will often be more direct in route, cost less, and involve less community disruption if built over parkland. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there

would have been no need for the statutes.

However, under the circumstances of this case, the appeals court found that the environmental assessment (the EA/4(f) statement) "set forth a number of reasons why the alternatives were imprudent."

The EA/4(f) statement analyzed projected traffic volumes and the ability of the avoidance and causeway alternatives to accommodate the traffic. From a traffic analysis standpoint, the causeway alternative was deemed the "best and only alternative.".. Additionally, the causeway route was deemed beneficial by providing better fishing access, improving water quality, and connecting the east and west sides of the park (the road was designed to include a walkway/bikeway parallel to the road).

As a result, the appeals court found that "the record indicates the Secretary acted within the scope of his authority and could reasonably have believed the alternatives involved unique problems which rendered them imprudent."

The inability of an alternative to accommodate future traffic volumes is justification for rejecting that alternative. Similarly, if an alternative does not satisfactorily fulfill the purposes of the project, which in this case included providing an east-west transportation route through town, then the alternative may be rejected... Safety and cost concerns are also valid considerations in rejecting an alternative. Although none of these factors alone is clearly sufficient justification to reject the alternatives in this case, their cumulative weight is sufficient to support the Secretary's decision... [T]his court must consider whether the Secretary's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment... We are instructed to conduct a careful and searching inquiry into the facts, but once we are satisfied the Secretary took a "hard look" at the relevant factors, we are not to substitute our judgment for that of the agency.

Having rejected the Committee's section 4f claims, the appeals court then addressed the Committee's allegations concerning violations of NEPA (the National Environmental Policy Act).

NEPA requires agencies to prepare a detailed statement of the environmental impact of any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations to be followed by agencies in deciding whether to prepare an environmental impact statement (EIS) under NEPA. These regulations allow agencies to conduct an environmental assessment (EA) in order to decide whether an EIS or a FONSI is appropriate. The CEQ regulations allow agencies to adopt their own procedures which supplement and help promulgate the CEQ regulations. 40 C.F.R. § 1507.3 (1992). The Department of Transportation adopted such a procedure in Order 5610.1C...

An EA is essentially a more concise and less detailed version of an EIS. One of the principal purposes of an EA is to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI." 40 C.F.R. s 1508.9(a)(1)

## February 1994 Law Review

(1992). By conducting an EA, an agency considers environmental concerns yet reserves its resources for instances where a full EIS is appropriate. The EA must "include brief discussions of the need for the proposal, of alternatives ..., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. 40 C.F.R. s 1508.9(b) (1992)..."

NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.

Agencies are not, however, required "to elevate environmental concerns over other appropriate considerations," but instead, are required to take a "hard look" at the environmental consequences before taking a major action. NEPA is essentially procedural in that it does not require major federal actions to have no significant environmental impact, it only requires that the environmental impacts be considered in the decision process.

On appeal, the Committee argued that "the FONSI was improperly issued because the highway would necessarily have a significant effect on the human environment of Boomer Lake and Park and, therefore, an EIS was required."

An agency's decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise and accordingly, is reviewed under the deferential arbitrary and capricious standard of review. By challenging the FONSI, it is the Committee's burden to establish the agency's decision as arbitrary and capricious.

In our review, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one.

As described by the appeals court, the Committee contended that "the FHWA failed to take a hard look at the adverse environmental effects associated with the highway's construction."

The Committee focuses on two types of impacts on Boomer Lake Park: (1) increased noise and visual clutter due to traffic which in turn would affect recreational and passive activities in the park; and (2) the causeway would bifurcate the lake, preventing sailboats and windsurfers from navigating the entire length of the lake, and creating a visual barrier to views of the dam and northern portion of the lake.

However, in the opinion of the appeals court, "a review of the EA/4(f) statement reveals that the FHWA considered the claims now raised by the Committee."

The EA/4(f) statement included a detailed noise pollution analysis, and although the analysis focused primarily upon the impact to local residences, the statement did note that there would be an increase in noise levels in a small section of the park. The

## February 1994 Law Review

EA/4(f) statement did not analyze the visual impact of the causeway in any detail, but did note that although some park users may consider the causeway and its traffic aesthetically displeasing, it would appear much like it did when the road was located on the dam except that it would be somewhat closer to the majority of the park. As for the Committee's claim concerning boat passage under the bridge, the record indicates the bridge would allow small boats to pass underneath, and although the area available for boating would be slightly diminished due to displacement by the causeway, the "difference should not significantly hamper this activity."

Thus, since the FHWA considered the environmental impacts of the proposed highway, including the issues raised by the Committee, the decision to issue a FONSI was properly "based on a consideration of the relevant factors" [ as required by NEPA].

Further, the appeals court found that "the Committee's claims of adverse environmental effects are at best speculative and fails to convince us that the FONSI was clearly in error." As a result, the appeals court concluded that "[t]he EA/4(f) statement's discussion of the proposed project and its alternatives indicates that the agency took a "hard look" at the environmental implications of the project and found there would be no significant impact." The appeals court, therefore, affirmed the summary judgment in favor of defendants.