

IRIGONEGARAY & ASSOCIATES
1535 S.W. 29th Street
Topeka, Kansas 66611-1901
(785) 267-6115
(785) 267-9458 FAX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PRAIRIE BAND POTTAWATOMIE NATION;)
SIERRA CLUB; WETLANDS)
PRESERVATION ORGANIZATION; JAYHAWK)
AUDUBON SOCIETY; SAVE THE WAKARUSA)
WETLANDS, INC.; KANSAS UNIVERSITY)
ENVIRONS; ECOJUSTICE;)

COMPLAINT

Plaintiffs,)

Civil No. _____

vs.)

FEDERAL HIGHWAY ADMINISTRATION;)
J. MICHAEL BOWER, in his official)
capacity as Division Administrator,)
Federal Highway Administration,)
KANSAS DEPARTMENT OF)
TRANSPORTATION and DEBRA L.)
MILLER, In Her Official Capacity)
as Secretary of the State of)
Kansas Department of)
Transportation,)

Defendants.)

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief challenging the approval of a multilane freeway, the South Lawrence Trafficway ("SLT"), through the environmentally important, historic and sacred Haskell-Baker Wetlands near Lawrence, Kansas. Plaintiffs claim that Defendants acted

arbitrarily and capriciously in violation of the Administrative Procedure Act ("APA") and have failed to comply with the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA"), Section 4(f) of the Transportation Act, Section 106 of the National Historic Preservation Act ("NHPA"), American Indian Religious Freedom Act (AIRFA), and executive orders pertaining to Environmental Justice, in their approval of the eastern leg of the SLT.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), and 5 U.S.C. § 702, 706 (Administrative Procedure Act) and may issue a declaratory judgment and further relief under 28 U.S.C. § 2201 and 2202.

2. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

3. An actual, justiciable controversy now exists. Plaintiffs are entitled to the relief sought herein to redress the harm they are suffering and would otherwise continue to suffer if such relief were not granted.

PARTIES

Plaintiffs

4. THE PRAIRIE BAND POTTAWATOMIE NATION (PBPN) is a federally recognized Indian tribe exercising jurisdiction over the Prairie Band Pottawatomie Reservation in Kansas. The Prairie Band

has members that attend and that have attended Haskell Indian Nations University in Lawrence, Kansas. A current member of the Nation's Tribal Council is on its Board of Regents. Prairie Band Pottawatomie tribal members have used the Haskell-Baker Wetlands (hereinafter referred to as Haskell-Baker Wetlands or the Wetlands) for farming, studying, contemplation, religious and spiritual activities as well as for the collection of native plants. The proposed SLT will adversely affect the cultural, historical, environmental and spiritual interests and values of the Prairie Band Pottawatomie Nation and its members.

5. SIERRA CLUB (SC) is the largest grass roots environmental organization in the world with approximately 800,000 members worldwide including approximately 4,000 members in Kansas of whom approximately 800 members live in Douglas County, Kansas. The Kansas Chapter of the SC, the Wakarusa (Lawrence) Group of the SC and the Kanza (Kansas City area) Group of the SC, and their members, have organized many outings into the Haskell-Baker Wetlands in order to educate their members and the general public about wildlife in the Wetlands and to observe and photograph native plants and animal species. The proposed SLT will adversely affect the activities of the SC and its members in the Haskell-Baker Wetlands.

6. WETLANDS PRESERVATION ORGANIZATION (WPO) is an unincorporated Kansas organization based at Haskell Indian Nations University (HINU), in Lawrence, Kansas, dedicated to preserving

traditional wetlands and virgin prairie, especially the Haskell-Baker Wetlands (hereinafter Haskell-Baker Wetlands or Wetlands) adjacent to the HINU campus. Plaintiff WPO has a membership of primarily Native Americans, many of whom use the Haskell-Baker Wetlands for study, contemplation, religious activities, exercise, and the collection of native plants. Their use and enjoyment of the Wetlands area and surrounding land will be significantly diminished if the east leg SLT is built. Noise, pollution, visual blight, and increased wildlife fatalities related to the SLT will eliminate or reduce the value of many spiritual, aesthetic, religious and recreational opportunities enjoyed by members. WPO has participated in litigation and administrative proceedings involving the SLT for more than ten years. WPO participated in defendants' public involvement process leading up to the issuance of the First Environmental Impact Statement (FEIS), Record of Decision (ROD), and the § 404 permit. WPO was a plaintiff in prior litigation to preserve the Wetlands from destruction by the SLT. The proposed SLT will adversely affect the activities of the WPO and its members by severely and extensively disrupting the natural environment of the Haskell-Baker Wetlands.

7. JAYHAWK AUDUBON SOCIETY (JAS) is a not-for-profit group organized under the laws of Kansas for the purposes of promoting the understanding of and advocating conservation of the natural world. Many JAS members use the Haskell-Baker Wetlands for bird watching and other activities. JAS has sponsored yearly public

educational activities in the Haskell-Baker Wetlands and has funded educational materials about the Wetlands for many years. JAS has also sponsored public educational events concerning the Haskell-Baker Wetlands and about the effect of the proposed SLT on the wildlife which inhabit the Wetlands, especially birds. JAS has submitted comments and letters to various federal public officials concerning the SLT and its impact on the Wetlands since May, 1987. JAS participated in the public involvement process leading up to the issuance of the FEIS, ROD, and the § 404 permit. The proposed SLT will adversely affect the activities of the JAS and its members by severely and extensively disrupting the natural environment of the Haskell-Baker Wetlands.

8. SAVE THE WAKARUSA WETLANDS (SWW) is a Lawrence, Kansas, based group dedicated to ensuring the long-term preservation of the Haskell-Baker Wetlands. SWW members promote broad public understanding of the educational, aesthetic, ecological, spiritual and historic significance of the Wetlands. SWW members use the Wetlands as a place to pray and meditate, take photographs, create artwork and poetry, observe wildlife (especially with children) and lead tours of the Wetlands for various groups. SWW members also use the Wetlands for studying the night sky because the Wetlands are one of the least light polluted places in Lawrence. SWW members also use the Wetlands to gather sacred plants for medicinal purposes. SWW members have conducted prayer and memorial services in the Wetlands. SWW members have actively

opposed a road through the Haskell-Baker Wetlands since 1986. The proposed SLT will adversely affect the activities of the SWW and its members who use the Haskell-Baker Wetlands.

9. KU ENVIRONS (KUE) is a student organization based at the University of Kansas in Lawrence, Kansas. The membership of KUE includes students majoring in environmental studies and others concerned about environmental issues, particularly in the Lawrence area. KUE members have for many years used the Wetlands as a classroom training ground for environmental studies and field ecology coursework as well as a location for walking, bicycle riding and observing wildlife. KUE has been involved in various efforts to preserve the Wetlands from destruction by the SLT including being a plaintiff in a prior litigation. The proposed SLT will adversely affect the activities of the KUE and its members in the Haskell-Baker Wetlands.

10. Plaintiff EcoJustice (EJ) is primarily a student organization at the University of Kansas. EJ members have used the Wetlands in various ways including leading educational tours of the Wetlands, hiking, gathering native foods, and observing wildlife. These activities would be adversely affected by building the SLT across the Haskell-Baker Wetlands.

Defendants

11. DEFENDANT FEDERAL HIGHWAY ADMINISTRATION (FHWA) is the federal agency that approves plans for the east leg of the SLT and also administers federal funds that would be used for the highway.

FHWA also engaged in a review of the EIS and Section 4(f) Evaluation conducted by the U.S. Army Corps of Engineers regarding the east leg of the SLT. FHWA selected the 32nd Street Alignment B Alternative that would destroy a large part of the Haskell-Baker Wetlands. The requirements specified at 23 U.S.C. 106 that cause FHWA involvement in funding and approval of plans requires compliance with NEPA, 42 U.S.C. 4331-35 and 49 U.S.C. 303(c) and other applicable federal law.

12. DEFENDANT BOWEN is the FHWA Division Administrator in Topeka, Kansas and is responsible for, *inter alia*, issuance of the subject ROD. Defendant Bowen has duties to assure that the east leg of the SLT complies with all applicable federal law.

13. DEFENDANT KANSAS DEPARTMENT OF TRANSPORTATION (KDOT) is the proponent of the SLT through the Haskell-Baker Wetlands and the applicant for and the recipient of § 404 permit to construct the SLT. KDOT is authorized by K.S.A. 75-5001 et seq. to build state and federal highways in Kansas.

14. DEFENDANT DEBRA MILLER is the secretary of the KDOT and, in her official capacity, oversees the activities of KDOT including compliance with applicable federal law.

STATUTORY AND REGULATORY FRAMEWORK

National Environmental Policy Act (NEPA)

15. NEPA, 42 U.S.C. §§ 4321, et seq., requires that, for any major federal action that may have a significant impact on the environment, the responsible federal agency must prepare a Draft

Environmental Impact Statement (DEIS) and a Final Environmental Impact Statement (FEIS).

16. Federal regulations implementing NEPA impose rigorous requirements for procedural compliance. Environmental information is expected to be of "high quality" and include "accurate scientific analysis". There is an explicit recognition that "expert agency comments and public scrutiny are essential to implementing NEPA". And NEPA documents, such as the instant EIS, "must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail". 40 C.F.R. 1500.1(b).

17. NEPA regulations expect that the process will "foster excellent action" by helping officials to make decisions based on the "environmental consequences, and take actions that protect, restore and enhance the environment". 40 C.F.R. 1500.1(c).

18. NEPA regulations make enforcement of the Act the shared responsibility of the President, the federal agencies, and the courts. 40 C.F.R. 1500.1(a).

19. Federal agencies are required to utilize "all practicable means...to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 C.F.R. 1500.2(f).

20. The EIS must consider all reasonable and practical alternatives to the proposed action, discuss the direct and

indirect environmental impacts of the proposed action, and discuss and evaluate the effectiveness of mitigation measures that could avoid or minimize such impacts. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500.2, 1502.14, 1502.16, 1508.20. An EIS must also describe and address any potential inconsistencies between a proposed project and federal, state, and local policies. 40 C.F.R. § 1502.16(c).

21. NEPA requires that federal agencies, as early as possible and before reaching decisions, compile and carefully consider detailed information concerning significant environmental impacts of a proposed action and all reasonable alternatives, and carefully consider and respond to comments from other interested agencies and the public relating to the environmental consequences of proposed federal actions and alternatives. 40 C.F.R. 1502.

22. The regulations implementing NEPA provide that a federal agency which has prepared an EIA for a proposed project must issue a public ROD stating the agency's decision concerning the action, whether all practicable means to avoid or minimize environmental have been adopted and, if not, why they were not. 40 C.F.R. § 1505.2(c). The ROD should also describe how the decision squares with the agency's statutory missions and policies. The agency must also adopt and summarize a monitoring and enforcement program for any mitigation in the ROD. 40 C.F.R. 1505.3.

22. Compliance with NEPA is the responsibility for the federal agencies. 40 C.F.R. 1500.1(a). To ensure the objectivity

and integrity of the NEPA process, NEPA's implementing regulations require that the EIS be prepared directly by the lead federal agency or be independently reviewed and evaluated by the lead agency. 40 C.F.R. 1505.3.

23. The EIS is to assess environmental consequences "rather than justifying decisions already made. 40 C.F.R. 1502.2(g).

Clean Water Act

24. The Clean Water Act ("CWA"), 33 U.S.C. § 1251, et seq., is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(2). Dredged or fill materials are pollutants under the CWA. 33 U.S.C. 1362(6). Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the COE to issue permits to discharge or place dredged or fill materials into waters of the United States, including wetlands, only at specified sites and under prescribed circumstances and conditions.

25. The § 404 program places a high priority on the control of activities that are potentially damaging to the nation's Wetlands and other waters. Regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to section 404(b)(1) and a memorandum of understanding between EPA and COE further define the COE's duty in evaluating individual permits under CWA.

26. The EIS must evaluate whether an activity is water dependent and, if not, there must be a presumption that an

environmentally less damaging practicable alternative exists.

40 C.F.R. § 230.10(a)(3).

27. The applicant proposing a project that is not water dependent, as in this case, must show that all reasonable/practicable available alternatives to the impacts resulting from the discharge of dredged or fill material have been considered, and that no practicable alternative exists which would have less adverse impact on the aquatic environment. 40 C.F.R. § 230.10(a).

28. If the permit applicant establishes that no less damaging, practicable alternative is available, the applicant must then show that all appropriate and practicable steps will be taken to minimize adverse impacts of the discharge on Wetlands. 40 C.F.R. § 230.10(d).

29. Only after the permit applicant has shown that the avoidance and minimization criteria are satisfied can the COE consider mitigation. 40 C.F.R. 230.10(d).

30. In establishing mitigation requirements, the COE must strive to achieve a goal of no overall net loss of wetland values and functions, meaning a minimum of one-for-one functional replacement with an adequate margin of safety to reflect scientific uncertainty. 40 C.F.R. 230.91-230.93.

31. The COE cannot authorize a discharge if the discharge would violate other applicable laws. The COE must also independently determine that the project will not cause or

contribute to violations of state water quality standards. 40 C.F.R. § 230.10(b)(1); 40 C.F.R. § 230.10(c). This duty exists independently of any obligation of the state to determine whether the project will cause or contribute to diminished state water quality under CWA section 401.

Transportation Act

32. The Transportation Act, 49 U.S.C. § 303, et seq., is designed to "preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. § 303(a). The Transportation Act authorizes the U.S. Department of Transportation (USDOT) and FHWA to permit

the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site)

only "if there is no prudent and feasible alternative" and "the project includes all possible planning to minimize harm." 49 U.S.C. § 303(c).

National Historic Preservation Act (NHPA)

33. The National Historic Preservation Act, 16 U.S.C. 470f, requires that, prior to the expenditure of federal funds or the issuance of any license for a project, the head of the responsible agency must take into account the effect of the project on any district, site, or area that is included in or is eligible for

inclusion in the National Register of Historic Places or for listing as a National Historic Landmark.

34. The implementing regulations of NHPA, 36 C.F.R. 800, require that the Section 106 process must be completed prior to the approval of the expenditure of any federal funds.

35. The Section 106 process involves a consultation procedure with affected local governments, Indian tribes, to determine if they might attach religious or cultural significance to the affected area, the State Historic Preservation Officer (SHPO) and additional consulting parties with a demonstrated interest in the project. 36 C.F.R. 800.3.

36. Under these regulations, the lead agency must identify the area of potential effect on historic properties and determine if there will be an adverse effect on the historic properties. 36 C.F.R. 802.4.

37. Such an adverse effect is caused when the project may alter, directly or indirectly, any of the significant characteristics of the historic property in a way that would diminish the integrity of the historic property. 36 C.F.R. 800.5(a)(1)(2).

38. Once it is determined that an adverse effect will result, the agency must consult with all parties to develop and evaluate alternatives or modifications that could avoid, minimize or mitigate these adverse effects. 36 C.F.R. 800.5(d)(2), 36 C.F.R. 800.6(a).

Administrative Procedure Act

39. The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., requires, among other things, that federal agency actions and decisions follow all statutorily prescribed procedures and comply with all applicable laws. The APA also requires that a reviewing court hold unlawful and set aside any agency actions, findings, or conclusions that violate the APA or other federal laws or which are arbitrary and capricious.

The American Indian Religious Freedom Act (AIRFA)

40. The AIRFA, 42 U.S.C. 1996 requires federal agencies to consider American Indian religious values. Federal agencies must obtain and consider the views of American Indian leaders and avoid unnecessary interference with American Indian Religious practices.

FACTUAL BACKGROUND

42. The current SLT proposed project consists of a seven mile multilane freeway extending from U.S. 59 Highway (Iowa Street) to K-10 in eastern Douglas County.

43. A southern bypass project around Lawrence has been discussed and planned since 1964, and was partially built in the 1990's. The South Lawrence Trafficway was conceived as a federal-aid highway project jointly funded by local, state and federal monies.

44. Congress passed, in 1987, the Surface Transportation and Uniform Relocation Assistance Act (STURAA), an appropriations bill which provided funds for state-designated projects under the

normal Federal Aid to Highways Act (FAHA) procedure as well as "bonus funds" for specific highway projects called demonstration projects. Section 149 of Title I of STURAA authorized 157 demonstration projects, including the South Lawrence Trafficway (SLT). Congress appropriated \$7.2 million for the SLT.

45. The STURAA authorization covered the years 1987-1991, subject to annual appropriation bills. The 1988 Department of Transportation and Related Agencies Appropriations Act of 1988, Section 345, amended section 149(a)(72), the description of the SLT, as follows:

a limited access road of approximately 14 miles in length which, at its western terminus, will provide access from an east-west Interstate highway route to a reservoir and a university research park, will proceed easterly around the southern portion of the City of Lawrence and, at its eastern terminus, will provide access to a business park and a limited access east-west State Highway.

46. In 1991, Congress reauthorized and again funded the FAHA through the Intermodal Surface Transportation Efficiency Act (ISTEA), P.L. 102-240. Section 1106(a)(2)(102) specifically authorized an additional \$3.3 million for the SLT as a Rural Access Project.

47. A final environmental impact statement and ROD for the Trafficway were issued by FHWA in 1990, selecting a route west and south of Lawrence and choosing 31st Street as the route for the eastern leg of the project. On April 22, 1993, the US Army Corps

of Engineers (COE) issued a Clean Water Act section 404 permit for the 31st Street route.

49. This route and the EIS supporting its selection were unsuccessfully challenged in Northern Crawfish Frog (Rana Areolata Circulosa) v. Federal Highway Administration, 858 F. Supp. 1503 (D.Kan.1994).

50. Haskell Indian Nations University (Haskell or HINU), located in Lawrence, Kansas, is a college administered by the United States Department of Interior Bureau of Indian Affairs under the direction of a Board of Regents. All of its students and a substantial portion of its faculty are Native Americans. The proposed 31st Street alignment was adjacent to the Haskell campus and on the edge of the Haskell-Baker Wetlands, a natural study area originally part of Haskell located at the southern portion of the Haskell campus. The currently proposed 32nd Street route is approximately 500 feet south of the Haskell campus present southern boundary.

51. On October 27, 1993, the Haskell Board of Regents requested that all construction of the SLT that affected Haskell cease until the effect on Haskell's property, cultural traditions and spiritual sites could be fully evaluated. Based on Haskell's concerns and request, KDOT and Douglas County suspended work on the SLT project east of US 59.

52. In April, 1994, to facilitate construction phasing and available funding limits, KDOT requested and FHWA approved the

segmentation of the SLT project. The three segments of the western leg of the SLT have been constructed and are in use.

53. On May 6, 1994, FHWA, determined that an SEIS was necessary for the eastern part of the SLT project, between US 59 and K-10 Highway, to "address the issued raised by Haskell, their students and others concerning the impacts the proposed SLT may have on American Indian spirituality and culture" and solicited cooperating federal and local agencies to assist in its preparation.

54. On October 2, 1995, the draft SEIS was issued by FHWA, with cooperating agencies KDOT, Douglas County, the US Army Corps of Engineers (Kansas City District), the Bureau of Indian Affairs, and the Environmental Protection Agency.

55. FHWA and other cooperating agencies were unable to reach agreement on a preferred route for the eastern leg of the SLT because of concerns expressed by various agencies over possible damage to the Haskell-Baker Wetlands and to Haskell by each of the proposed routes.

56. KDOT convinced FHWA to discontinue the EIS process and began buying land in anticipation of building a road on the proposed 31st route without completion of the environmental studies.

57. Various individuals and environmental groups, including some of the plaintiffs in this action, filed suit in this Court to require the federal agencies involved with the SLT to comply with

NEPA and complete the suspended SEIS for the eastern leg of the SLT.

58. This Court entered a permanent injunction requiring the completion of the SEIS, Ross v. Federal Highway Admin., 972 F.Supp. 552 (D.Kan.1997).

59. The decision was affirmed by the United States Court of Appeals for the 10th Circuit in Ross v. Federal Highway Admin., 162 F.3d 1046 (10th Cir. 1998), finding that the entire SLT, including the portion at issue here, was a federal project and that federal environmental laws were applicable to the entire project.

60. In February, 2000, the Federal Highway Administration completed the SEIS for the eastern portion of the SLT as ordered by this Court. A ROD was issued which selected the No-Action option.

61. No further planning activities were undertaken by FHWA concerning the SLT and no construction activities were ever commenced on the proposed 31st Street route.

62. The COE did not renew the 404 permit for the proposed 31st Street route and it has expired.

63. On May 8, 2001, KDOT resurrected the moribund SLT concept and notified the COE Kansas City District (KCD) that it was again evaluating proposals to build a southern bypass around Lawrence, Kansas, which would connect to the state highway K-10.

The letter requested that COE/KCD prepare environmental documentation required to ensure compliance with NEPA.

64. On July 26, 2001, COE/KCD agreed to again become the lead federal agency for review and evaluation of KDOT's proposal in accordance with NEPA requirements and to review KDOT's new Section 404 permit application for a proposed 32nd Street route through the Haskell-Baker Wetlands, a minor variation on the rejected 31st Street route.

65. KDOT offered large monetary payments and other inducements to Baker University, the owner of the Haskell-Baker Wetlands, and to Douglas County only if they agreed to support the 32nd Street route and not if they supported an alternative route. KDOT has widely, frequently and publicly supported and advocated for the 32nd Street route in various public meetings and in the media beginning in 2001 but KDOT has made little or no mention of alternative highway routes or other transportation alternatives to meet the stated purpose and need for the road.

66. Defendant KDOT stated that the purpose and need for the proposed project is to provide a safe, efficient, environmentally sound and cost-effective transportation facility for users of K-10 Highway and the surrounding state highway system and, to the extent possible, to alleviate congestion on Lawrence city streets.

67. A Draft EIS was issued on August 9, 2002. A public hearing was held in Lawrence, Kansas, on September 12, 2002, which ran late into the night to accommodate over 100 presenters. The

vast majority of the speakers rejected the 32nd Street route and advocated a route which did not harm the Haskell-Baker Wetlands.

68. The Draft EIS evaluated KDOT's preferred alternative, Route 32B through the Haskell-Baker Wetlands (the route for which the 404 permit had been sought) and Route 42A, south of the Wakarusa River which would not harm the Wetlands, even though KDOT and its consultant had done minimal preparatory work for a possible route south of the river.

69. More than 1000 comments were submitted by the public, private organizations, and government agencies on the FEIS.

70. Comments opposing the 32nd Street route submitted by various members of the plaintiffs including WPO, SC, SWW, KUE, and JAS, and other commentators stated that, among other things, the DEIS:

- (a) failed to require an appropriate purpose and need statement from KDOT and failed to consider the divergence from the Congressional statement of purpose and need in the original funding legislation;
- (b) failed to consider a reasonable range of alternatives to the SLT;
- (c) failed to adequately analyze the alternatives it purported to consider;
- (d) failed to adequately disclose the full environmental impacts of the SLT;
- (e) failed to adequately study the potential impacts of the

SLT on Haskell Indian Nations University and the Haskell-Baker Wetlands;

- (f) failed to adequately identify and discuss measures that could be taken to avoid, minimize, or compensate for the SLT's impacts;
- (g) failed to adequately assess cumulative impacts;
- (h) failed to adequately respond to comments submitted;
- (i) failed to consider the combined impact of the SLT and other nearby highway projects planned or approved;
- (j) failed to adequately assess the disproportionate impact of the SLT on Native American people and sites, particularly Haskell, its Medicine Wheel and sweatlodge sites, and the Haskell-Baker Wetlands;
- (k) failed to acknowledge that a reasonable alternative existed which would meet the purpose and need of the project without the extensive damage to the Haskell-Baker Wetlands;
- (l) failed to take into account the predetermined decision-making by KDOT and the improper fiscal incentives to attract support for 32B;
- (m) failed to adequately assess the cultural significance of the Haskell-Baker Wetlands to Native American people and to properly follow Section 106 consultation and mitigation procedures;
- (n) failed to adequately protect designated local park

- facilities and a National Natural Landmark;
- (o) failed to address likely violations of the Clean Air Act if the project is built as planned;
 - (p) failed to fully account for budget shortfalls that will delay the possible construction phase and circumstances now present are substantially changed;
 - (q) failed to fairly and uniformly present accurate cost comparisons between the alternatives to facilitate fair and reasonable decision making; and
 - (r) failed to adequately consider future planned growth in and around Lawrence and land use planning over the proposed construction period which would occur regardless of where the SLT were located or if it were built.

71. In December, 2002, COE released its FEIS on the SLT, selecting Defendant KDOT's preferred 32B alternative. COE made this decision recognizing that this 32B would have a greater negative impact on the Wetlands than other possible routes but justified the choice by asserting, without support, that a route south of the Wetlands would spur urban development there and thus cause greater future harm to the Wetlands.

72. On or about December 27, 2002, the PBPB delivered a letter to COE calling attention to its "serious concerns over the Corps' considerations of the possible alignments of the South Lawrence Trafficway." The concerns communicated to Defendant COE

by the PBPB included discussion of the principle that existing Wetlands should be avoided if possible, the need to consider all wetland impacts, the need to consider trafficway hydrology effects and the gross miscomputation of the costs of the SLT alternatives in the DEIS.

73. On or about February 14, 2003, the PBPB delivered another letter to COE, and provided evidence from Dr. Roger Boyd, the Wetlands manager, of the unique nature and extreme importance of preserving the Haskell-Baker Wetlands as a study area.

74. This April 22nd letter also provided evidence to COE of the long-standing intention of KDOT to build the SLT only through the Haskell-Baker Wetlands and not fully consider a range of reasonable practicable alternatives.

75. On June 10, 2003, the PBPB delivered a letter to COE which provided an explanation of how to possibly reduce the cost of the 42nd Street alignment by roughly \$20 million which would make the costs of the 32B route and this alternative 42C route roughly equal. The letter also identified the specific places of the narrower eastern Wakarusa River floodways where substantially shorter bridges for that route could be located.

76. On June 26, 2003, the PBPB delivered a letter to Defendant COE. This letter again called attention to the lack of adequate consideration of a 42nd Street route over the narrower part of the eastern floodways and it requested him to obtain independent engineering advice to analyze this less expensive 42C

alternative. This letter requested that this revised 42C route and costs be reviewed and noticed to the public as a formal alignment, as should have been done in the first place.

77. On July 18, 2003, the PBPN delivered a letter to COE. This letter explained in detail how Defendant COE's July 16, 2003, letter opinion concerning the 42C route was written by KDOT's lead consultant, HNTB and KDOT and contained numerous and substantial misrepresentations by them which were adopted by COE. The PBPN inquired why the 42C route had inexplicably disappeared from consideration as an EIS alternative and requested that the Corps prepare a Supplemental Environmental Impact Statement that included the 42C route as an alternative. Finally, the PBPN offered to provide the COE an expert report from an independent engineer to analyze the 42C alternative.

78. The July 18, 2003, letter also reminded COE that Defendant KDOT's consultant, HNTB, that had prepared the FEIS, was contractually obligated to obtain approval of the 32B route, in violation of their duty to fairly present all alternatives in the NEPA documents and that Defendant COE had failed to independently review HNTB's work in this light.

79. On July 18, 2003, The National Haskell Board of Regent unanimously adopted a resolution supporting the expansion of the National Historic Landmark (the old Haskell campus) to include the former Haskell farm area, encompassed within the Haskell-Baker

Wetlands and reiterated their opposition to any SLT route through the Wetlands.

80. On July 22, 2003, the PBPN delivered a letter to COE. This letter provided additional information as to why the 42C alignment bridge costs in the FEIS were miscomputed and excessive and requested an SEIS to analyze the costs using two-lane mainline bridges.

81. On July 24, 2003, the PBPN delivered yet another letter to COE. This letter provided information showing substantially reduced costs for a 42C route at Phase I (2 lanes) and at Phase II (4 lanes) due to shorter and narrower bridges for that route. This letter again requested that an SEIS be prepared to consider this variant on the 42C route.

82. On July 28, 2003, the PBPN delivered another letter to COE. This letter explained how COE's July 16, 2003, letter incorrectly overstated 42C costs by at least \$15 million by miscalculating paving costs, excavation costs, etc.

83. On August 5, 2003, the PBPN delivered another letter to COE. The letter again explained why the DEIS and FEIS were defective due to the omission of the 42C alternative from the EIS and the problem of the FEIS using excessive bridge widths. New and additional information concerning routes and costs was submitted in the form of an opinion letter of highway engineer Raymond Helmer which was attached and which showed that the costs used as the basis for the comparative route costs in the FEIS had

been substantially miscomputed and thus, overstated. The PBPN again requested that an SEIS be performed to analyze the 42C alternative design and cost with exploration of further mitigation for that route and again requested government to government consultation to discuss this new information.

84. On August 19, 2003, the PBPN delivered a letter to COE, which included the August 19, 2003, engineer's report and design map of Mr. Helmer. Mr. Helmer gave his expert opinion that the 42C route is at least \$16.6 million cheaper than 32B and that "the 42C alternative, as properly drawn, has no indication of material safety, ramping or other problems." The PBPN again requested an SEIS be prepared in light of this important new information.

85. On October 1, 2003, the PBPN delivered a letter to COE. This letter and attachments explained in detail the computation of the Phase I (2 lane) and II (4 lane) costs for SLT Routes 42C and 32B and demonstrated that the 42C route was \$7 million to \$16.5 million cheaper. This letter again requested that an SEIS be performed.

86. On October 6, 2003, the PBPN delivered a letter to COE. This letter provided COE with additional evidence that the SLT mainline bridges and their costs should have been computed using two-lane, 40 foot wide bridges instead of the 90 foot wide bridges actually assumed in the FEIS. This error resulted in substantial overstated cost in comparing the 32B and 42C routes.

87. On November 24, 2003, the PBPN delivered a letter to COE. This letter provided him with evidence that Lawrence's Urban Growth Area, its *Horizon 2020* future land use plan, its transportation plan through 2025 and its wastewater treatment plan were all being revised to accommodate accelerated growth south of Lawrence and south of the Wakarusa River. The letter explained how this undermined many of the assumptions in the FEIS and would prevent the 32C route from being either circumferential or a bypass around Lawrence, since it would pass directly through the urban area. The PBPN again requested that an SEIS be performed based on this important new information.

88. On December 11, 2003, the PBPN delivered a letter to COE, that summarized past HNTB/KDOT bias and the COE's failure to independently verify its work and requested the formulation and refinement of the 42C alternative by an independent engineering firm. This letter requested that mitigation measures also be considered for a 42C alternative, which according to the letter, at a relatively low cost would alter many of the comparative factors between the 32B and 42C routes in the FEIS. Finally, this letter pointed out additional problems with the FEIS, including improper bias by KDOT and its consultants in favor of the 32B route, failure to properly develop mitigation proposals for the 42C route, inconsistency of the 32B route with newly revised land use, traffic planning and waste water plans, failure to properly compare safety and efficiency estimates for the two routes which

caused an unfair and improper bias in favor of the 32B route, improper use of future traffic projections to favor the 32B route and, finally, failing to acknowledge and properly value the substantial differences in wetland impacts between the two routes. The PBPN again sought an SEIS.

89. In December, 2003, COE released its ROD on the SLT and selected the 32B alignment, ignoring all of the information submitted on the record concerning contractor problems, improper cost estimates and other problems with the 32B alignment, and refused to initiate an SEIS to deal with actual and forthcoming changes in the Lawrence and Douglas County planning process concerning developments south of the Wakarusa River.

90. In March, 2004, Defendant COE granted defendant KDOT a ten-year Clean Water Act Section 404 permit for the 32B route, despite evidence in the record that showed that during the time period the urban area of Lawrence would grow south of the proposed route, rendering it ineffectual as a circumferential bypass highway and making it an urban freeway through the City of Lawrence.

91. Subsequent to COE's December, 2003, ROD there was no indication that funding for the proposed SLT project was available. No actions were taken to construct the proposed SLT project based on the COE's ROD and 404 permit issuance to Defendant KDOT.

92. On information and belief, plaintiffs alleges that approximately \$1.5 million has been earmarked by Congress in 2007 for certain SLT preconstruction activities. Expenditure of the earmarked funds is dependent on FHWA's approval of the COE's EIS.

93. In order for FHWA to approve the COE's EIS the FEIS and 4(f) determination had to be reviewed by FHWA and submitted again for public comments.

94. The public comments were substantially similar to those referenced above that were made about the COE's DEIS and 4(f) determination.

95. Prior to FHWA's approval of the COE FEIS, additional comments were also provided by PBPN regarding the FEIS and 4(f) determination. These comments included criticisms that the 42C alignment omission was unjustified, the 42A and 32B cost estimates were faulty; the mitigation plans did not address 42nd Street issues; that the comparison of impacts of 32B and 42A was faulty; that the SLT 32B design criteria were contrary to the specifications of the Lawrence Urban Growth Area and inconsistent with future land use plans; and that a 42D alignment should be considered.

96. FHWA made no changes to the COE FEIS based on any of the public comments it received.

97. FHWA approved the COE's FEIS in a ROD dated May 2, 2008. The ROD adopted all parts of COE's FEIS.

98. The present 32B route of the SLT would bisect the Haskell-Baker Wetlands, formerly a part of the HINU and a place of cultural and historical importance to Haskell students, alumni and Native American people in general.

99. The 32B route of the SLT would directly eliminate at least 55 acres of Wetlands and impact approximately 2800 feet of stream channel. The 32B route would also adversely impact water quality.

100. The 32B route of the SLT would severely impact an ecologically important environment for native wildlife and plant species by destroying parts of the Wetlands, interfering with wildlife migration paths and driving away numerous birds and animals from the highway area.

101. The 32B route of the SLT, particularly the proposed relocation of Haskell Avenue and the interchange with the SLT, will impact several publicly owned sites with historic significance, including HINU and the City of Lawrence Prairie Park Nature Center.

102. The 32B route of the SLT will impair important cultural and historic resources, namely the Haskell-Baker Wetlands.

103. The 32B route of the SLT will have a significant effect and disproportionate impact on Native Americans.

PLAINTIFFS' CAUSES OF ACTION
FIRST CAUSE OF ACTION--VIOLATION OF NEPA--PURPOSE AND NEED

104. Defendant's statement of the purpose and the need for this highway project conflicts with the Congressional mandate for the highway and is thus arbitrary and capricious.

105. The purpose and need for the SLT, as stated in the FEIS, is unreasonable, vague and inconsistent with prior statements of the purpose and need for the road.

106. The ROD relies on the defective FEIS statement of purpose and need and both documents thus violate NEPA.

SECOND CAUSE OF ACTION--VIOLATION OF NEPA--ALTERNATIVES

107. The failure of the FEIS and the ROD to fully and fairly consider all reasonable alternatives to the 32B route violates NEPA.

108. The reasonable alternatives the FEIS neglects to fully and fairly evaluate include all or a combination of the following:

- (a) routes south of the Wakarusa River, including but not limited to alignment 42C;
- (b) the integration of the SLT planning and route selection with other planned or ongoing regional highway improvements, including US Highway 59 and the Kansas Turnpike;
- (c) other methods of reducing travel demand, including land use planning, mass transit, toll charges, local street design modifications, etc.;
- (d) the no-build alternative, alone or in combination with an east of Lawrence connector to the Kansas Turnpike;

- (e) different alignments (including ones which would impact fewer Wetlands than any alternative considered in the FEIS, including the 32B and 42A routes).

THIRD CAUSE OF ACTION--VIOLATION OF NEPA IMPACTS

109. The failure of the FEIS to adequately identify, disclose, and study, the direct, indirect, and cumulative impacts of the SLT on the natural and human environment is a violation of NEPA.

110. Impacts not adequately identified, disclosed, or studied, include (but are not limited to):

- (a) impacts of the SLT on the Haskell-Baker Wetlands, including its greatly compromised availability as an outdoor classroom for HINY and other educational institutions and the existing boardwalk;
- (b) impacts of the proposed sound walls, the adjacent local 4-lane highway and the diverted water flow in the Wetlands;
- (c) impacts on Lawrence City Prairie Nature Center;
- (d) impacts on wildlife and wildlife migration patterns in and through the Haskell-Baker Wetlands;
- (e) noise impacts on birds and other wildlife in the Wetlands and on Haskell and surrounding neighborhoods;
- (f) land use and growth impacts;
- (g) impacts caused by the destruction of existing Wetlands;
- (h) air quality impacts;

- (i) surface and ground water (including hydrologic) impacts;
- (j) impacts on Native Americans' use of the Wetlands as a place of worship and to gather traditional medicinal plants; and
- (k) indirect impacts on the Haskell-Baker Wetlands, including KU, HINU, Baker University, and local school system biology and ecology study opportunities and other indirect impacts.

111. The FHWA's ROD relies on the defective COE FEIS thus violate NEPA.

FOURTH CAUSE OF ACTION--VIOLATION OF NEPA--MITIGATION

112. The failure of the FEIS to adequately identify, discuss, and determine the effectiveness of measures that could be taken to avoid, minimize, or compensate for the SLT's impacts on the natural and human environment violates NEPA.

113. Measures the FEIS failed to consider that could be taken to avoid, minimize, or compensate for the SLT's impacts include (but are not limited to):

- (a) decreasing the length of bridges over the Wetlands by rerouting the SLT as suggested by the PBNP;
- (b) mitigating wetland and wildlife impacts; and
- (c) considering means of reducing travel demand including the SLT alternatives specified above such as mass transit, toll roads, improved local traffic patterns, local land use planning, etc.

114. The FHWA's ROD relies on the defective COE FEIS and both documents thus violate NEPA.

FIFTH CAUSE OF ACTION--VIOLATION OF NEPA--RESPONSE TO COMMENTS

115. The failure of the COE FEIS and the ROD to adequately respond to significant comments submitted on the DEIS and FEIS is a violation of NEPA. The FHWA's ROD relies on the defective COE FIES and both documents thus violate NEPA.

SIXTH CAUSE OF ACTION--VIOLATION OF NEPA--SCOPE OF EIS

116. The failure of Defendants to prepare a broader EIS, which considers the SLT along with US Highway 59 expansion, Kansas Turnpike expansion, and other ongoing and planned Eastern Kansas highway projects violates NEPA. Failure to perform a broader scope EIS further constrains the proper consideration of all reasonable alternatives.

117. The scope of issues in the FHWA's ROD and the COE FEIS is arbitrarily narrow and therefore violates NEPA.

SEVENTH CAUSE OF ACTION--VIOLATION OF NEPA--SUPPLEMENTAL EIS

118. Defendants failure to prepare a Supplemental EIS to analyze a shorter and less expensive 42C route based upon new and additional information supplied by Plaintiff PBPN and others concerning changes to the Lawrence City urban growth area and planning decisions for increased population growth, land use and waste water treatment facilities south of the Wakarusa River which are planned to occur during the time frame of the construction of the SLT violates NEPA and invalidates the FEIS.

119. The FHWA ROD and the COE FEIS fail to fully consider this information and call for a Supplemental EIS and therefore also violate NEPA.

EIGHTH CAUSE OF ACTION--VIOLATION OF NEPA--PREDETERMINED OUTCOME

120. By providing financial and other incentives for only one route, 32B, by publicly advocating for and irretrievably committing to that one route, by studying it more fully than any other route and by failing to fully review all real alternatives and their true comparative costs, COE predetermined the outcome of the analysis in violation of NEPA. This violation causes FHWA's ROD to violate NEPA.

**NINTH CAUSE OF ACTION--VIOLATION OF NEPA--OBJECTIVITY,
INTEGRITY AND CONTRACTOR OVERSIGHT**

121. The failure of COE's FEIS to comply with applicable statutory and regulatory requirements, including 40 C.F.R. § 1550.24, to ensure the professional and scientific integrity of the FEIS' analysis and methodology, violates NEPA.

122. The failure of COE's FEIS to comply with applicable statutory and regulatory requirements, including 40 C.F.R. § 1550.22, relating to incomplete and unavailable information regarding adverse effects, violates NEPA.

123. The failure of COE's FEIS to comply with applicable statutory and regulatory requirements, including NEPA § 102(d), 42 U.S.C. § 4332(d), and 40 C.F.R. § 1506.5, regarding the

objectivity and oversight of KDOT and its contractor which prepared the DEIS and FEIS, violates NEPA.

124. The FHWA's ROD relies on the defective COE FEIS and therefore violates NEPA.

**TENTH CAUSE OF ACTION--VIOLATION OF THE CWA--PRESUMED
NON-WATER DEPENDENT ALTERNATIVES**

125. The failure of the CWA section 404 permit and its supporting documentation to overcome the statutorily presumed existence of non-water dependent alternatives is a violation of the CWA.

126. The FHWA's ROD and the CWA section 404 permit therefore violate the CWA.

**ELEVENTH CAUSE OF ACTION--VIOLATION OF THE CWA--PRACTICABLE
ALTERNATIVES**

127. The failure of the CWA section 404 permit and its supportive materials (including the COE FEIS) to consider less damaging practicable alternatives to the 32B route, and to adequately analyze the alternatives violates the CWA.

128. The failure of the COE to select the least damaging practicable alternative that the FEIS does address is in violation of the CWA.

129. The FHWA's ROD and the CWA section 404 permit thus violate the CWA.

**TWELFTH CAUSE OF ACTION--VIOLATION OF THE CWA--AVOIDANCE
AND MINIMIZATION OF IMPACTS**

130. The failure of the CWA section 404 permit and FEIS to adequately avoid and minimize the impacts of the aquatic environment is a violation of the CWA.

131. The ROD and the CWA section 404 permit rely on this defective evaluation and therefore also violate the CWA.

THIRTEENTH CAUSE OF ACTION--VIOLATION OF THE CWA--MITIGATION

132. The failure of the COE to consider adequate mitigation for the SLT's impacts violates the CWA.

133. The FHWA's ROD and the CWA section 404 permit rely on this defective decision and therefore also violate the CWA.

FOURTEENTH CAUSE OF ACTION--VIOLATION OF THE CWA--WATER QUALITY EVALUATION

134. The failure of the COE to independently determine that the 32B route will not cause or contribute to violations of state water quality standards violates the CWA. (CITE)

135. This duty exists independently of any obligation of the state to determine whether the 32B route will cause or contribute to state water quality standards under the CWA section 401.

136. The FHWA's ROD and the CWA section 404 permit rely on this defective decision and therefore also violate the CWA.

FIFTEENTH CAUSE OF ACTION--VIOLATION OF THE TRANSPORTATION ACT

137. The failure of the FEIS to demonstrate that there is no prudent and feasible alternative to using protected sites and to minimize harm to the protected sites violates USDOT and FHWA duties under the Transportation Act, 49 U.S.C. § 303, et seq.

138. The FHWA ROD relies on the defective COE FEIS and therefore violates the Transportation Act.

SIXTEENTH CAUSE OF ACTION--APA VIOLATIONS

139. The RODs and CWA section 404 permit constitute "final agency action" within the meaning of the APA.

140. Defendants' acts and omissions with respect to the preparation and substance of the DEIS, FEIS, and CWA section 404 permit, the responses and comments submitted on the DEIS and FEIS, the ROD's reliance on the FEIS and CWA section 404 application, and the decision contained in the ROD and CWA section 404 permit, were arbitrary and capricious, an abuse of discretion, without observance of the procedures required under the APA, NEPA, its implementing regulations, CWA and/or otherwise were not in accordance with law.

EIGHTEENTH CAUSE OF ACTION--SECTION 106 VIOLATION--NATIONAL HISTORIC PRESERVATION ACT--HISTORIC AND CULTURAL RESOURCES

141. The old campus of HINU, north of the proposed SLT route, is listed as a National Historic Landmark.

142. The Haskell-Baker Wetlands through which the SLT would run, is eligible for listing on the National Register of Historic Places by virtue of its long term ties to HINU as its farm in the past and to Native Americans in the area, the fact that a segment of the Oregon Trail crosses it, and because of its connection to the National Historic Landmark at the other end of the HINU campus.

**NINETEENTH CAUSE OF ACTION --VIOLATION OF AMERICAN INDIAN
RELIGIOUS FREEDOM ACT, 42 U.S.C. 1996**

143. The failure of the COE's FEIS and FHWA's ROD to adequately consider the impacts to American Indian religious practices violates 42 U.S.C. 1996.

144. The COE's FEIS and FHWA's ROD that adopts the 32B alignment will cause, if the SLT is built, unnecessary interference with American Indian religious practices.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant them:

1. A declaratory judgment that:

a) the COE FEIS and the FHWA ROD do not comply with NEPA and are therefore invalid along with any permits and approvals which rely on the same;

b) the COE FEIS, FHWA ROD, and CWA section 404 permit do not comply with applicable CWA requirements and are therefore invalid;

c) the COE FEIS and the FHWA ROD do not comply with applicable Transportation Act 4(f) requirements and are therefore invalid;

d) National Historic Preservation Act;

e) the COE FEIS and FHWA ROD violate the Civil Rights Act;

f) the COE FEIS and FHWA ROD violate the American Indian Religious Freedom Act;

g) Defendants' acts and omissions in the preparation and issuance of the FEIS, ROD, and CWA section 404 permit are arbitrary and capricious, constitute an abuse of discretion, fail to observe required procedures, and otherwise are not in accordance with law, and violate NEPA, the CWA, the Transportation Act, the National Historic Preservation Act, and APA;

2. A permanent injunction:

a) ordering defendants to comply with the requirements of NEPA, the CWA, the Transportation Act, the National Historic Preservation Act, AIRFA, and the APA;

b) revoking, or requiring Defendant FHWA to withdraw its ROD along with any permits and approvals which rely on the same;

c) prohibiting Defendants from taking any other action in which in any way supports or furthers funding, design, property acquisition, construction or development of the 32B route of the SLT until defendants have remedied their violations of NEPA, the CWA, the Transportation Act, the National Historic Preservation Act, and the APA;

d) requiring Defendants to prepare a new or supplemental EIS for the SLT;

e) requiring Defendants to adequately and fully analyze all impacts and all reasonable alternatives;

f) require Defendants to adequately and fully analyze all disproportionate impacts on Native Americans including impacts on religious practices;

g) require Defendants to adequately and fully analyze the impacts of the proposed SLT on historic sites;

h) require Defendants to adequately and fully analyze the impacts of the proposed SLT on parks and other designated areas;

i) require Defendants to adequately and fully analyze the impacts of the proposed SLT on maintaining the status of Douglas County CAA attainment area.

An award of their reasonable attorneys fees, costs and expenses associated with this litigation and such other and further relief as this Court may deem just and proper.

Dated this 24th day of October, 2008.

Respectfully submitted,

IRIGONEGARAY & ASSOCIATES
1535 S.W. 29th Street
Topeka, Kansas 66611-1901
(785) 267-6115

By: /s/ Robert V. Eye
Robert V. Eye, #10689
Attorney for Plaintiffs

Kelly J. Kauffman, #23161
KAUFFMAN LAW OFFICES
COLUMBIAN BUILDING
112 S.W. 6th Avenue, Suite 202
Topeka, Kansas 66603-3850
(785) 234-4040
(785) 234-4260 FAX

LOCATION OF TRIAL

Plaintiffs request that the location of trial in this matter be held in Kansas City, Kansas.

Robert V. Eye, #10689