



# Ninth Circuit Rejects Challenges to Arizona Highway Project

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On December 8, 2017, the Ninth Circuit Court of Appeals unanimously rejected two challenges to the 20-mile South Mountain Freeway Project in Phoenix, Arizona. The decision is the latest in a series of court decisions rejecting efforts to block construction of the long-debated project -- a key element of the transportation network of metropolitan Phoenix. *Protecting Arizona's Resources and Children v. Federal Highway Administration*, No. 16-16586 (9th Cir. Dec. 8, 2017). Two plaintiff groups had challenged the Federal Highway Administration's approval of the Project under the National Environmental Policy Act (NEPA) and section 4(f) of the Transportation Act.

The decision is the latest ruling by the Ninth Circuit concluding that transportation agencies may (1) define a project's purpose and need statement and the range of alternatives based on the objectives described in an approved regional transportation plan (RTP), and (2) rely on the socioeconomic projections adopted by the metropolitan planning organization to form the basis of both the Action and No-Action Alternatives.

Nossaman served as counsel to the Arizona Department of Transportation. Nossaman partner Robert Thornton argued the cases in the Ninth Circuit.

## **Agency Has Considerable Discretion to Determine Project Purpose and May Rely on Regional Transportation Plan**

Appellants claimed that the Federal Highway Administration's and Arizona Department of Transportation's (the Agencies) use of the RTP to shape the purpose and need for the project improperly sidestepped the NEPA review process. The Ninth Circuit, relying on its decision in *HonoluluTraffic.com v. Federal Transit Administration*, 742 F.3d 1222 (9th Cir. 2014), disagreed. While the Agencies used the RTP to inform the Project's purpose and need, they examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies to establish the Project's underlying

purpose and need and confirm that a freeway was still necessary as set forth in the RTP.

### **Agencies May Screen Alternatives from Detailed Review**

Appellants argued that the Agencies failed to consider a reasonable range of alternatives and inappropriately screened a number of alternatives during the NEPA scoping process. The Ninth Circuit held that the EIS complied with NEPA in its analysis of alternatives. The EIS examined in detail three alignment alternatives for the Western Section of the Project, one alignment alternative for the Eastern Section of the Project, and a No-Action alternative. The Court cited the Agencies multivariable screening process over the course of thirteen years, the examination of modal alternatives, and the fact that the Agencies provided reasons for elimination of each alternative from detailed study to conclude that this was a reasonable range of alternatives for detailed study.

### **Federal Agency May Rely on Socioeconomic Projections Created by the Metropolitan Planning Organization as a Basis for the No-Action Alternative So Long As It Explains That Choice**

Appellants claimed that the environmental analysis for the Project was flawed because both the Action and No-Action Alternatives relied on socioeconomic projections approved by the local metropolitan planning organization. Appellants argued that reliance on the same socioeconomic projections as the basis for both the Action and No-Action Alternatives caused the environmental analysis to assume the construction of the Project. The Ninth Circuit disagreed. The Ninth Circuit found that the Agencies' reliance on the same socioeconomic projections to form the Action and No-Action Alternatives were appropriate, because the No-Action Alternative assumed that '[e]xisting residential land use patterns and trends would be maintained,' and then modeled the effects if the [Project] were not built. This analysis is in keeping with prior Ninth Circuit decisions that have found that a federal agency may rely on socioeconomic projections generated by a metropolitan planning organization so long as the decision to do so and the reasoning behind that decision is disclosed. Here, because the Federal Highway Administration disclosed that it was relying on these socioeconomic projections and explained the basis for its decision to do so, the Court concluded that the No-Action Alternative analysis was neither arbitrary nor capricious.

### **Demonstrating Compliance with National Ambient Air Quality Standards Inherently Protects Children's Health**

Appellants challenged the EIS on the basis that it did not sufficiently analyze the Project's potential Air Quality impacts to children's health. The Court agreed with the District Court that because the Agencies conclusively demonstrated that the Preferred Alternative would not cause any new violations of National Ambient Air Quality Standards, would not exacerbate any existing violations, and would not delay attainment of any air quality standards or milestones, the EIS appropriately addressed children's health impacts.

### **MSAT Analysis Need Not Include a Health Effects Study to Comply with NEPA**

The Court also found that the Agencies' Mobile Source Air Toxics (MSAT) analysis complied with NEPA, noting that the Agencies followed the latest FHWA guidance and an EPA model, documented the effects, and provided a detailed explanation of the determination that an analysis of near-roadway MSAT emissions was unnecessary.

### **A 15% Level of Design Is Sufficient So Long As Impacts Can Be Analyzed and Mitigated**

Appellants again argued that the 15% level of design for the Project did not allow for proper analysis and mitigation of potential impacts. The Ninth Circuit concluded that the Agencies provided an appropriate analysis of the Project's potential impacts and a sufficiently detailed discussion of mitigation measures for those impacts in compliance with NEPA.

### **Federal Agencies May Reject Alternatives that Avoid Use of Section 4(f) Properties Where They Fail to Meet the Project's Purpose and Need**

The Court rejected Appellants' Section 4(f) claim that the Agencies improperly rejected feasible and prudent alternatives. The Final EIS identified all Section 4(f) Properties within the Study Area, described avoidance alternatives, and documented that all alternatives avoiding the Section 4(f) Properties are not feasible and prudent. The Ninth Circuit upheld the Agencies' elimination of a number of alternatives for failure to meet the Project's purpose and need.

### **Agencies May Rely on Future Planning to Minimize Harm to Section 4(f) Resources During the Design Phase**

Finally, the Ninth Circuit concluded that the Agencies conducted all possible planning to minimize harm to the Section 4(f) Resources impacted by the Project. Rejecting Appellants' argument that the Project's 15% level of design was deficient, the court noted that the cited level of design did not hinder the Agencies from conducting the necessary planning. The EIS detailed measures to minimize harm, including consulting with the Gila River Indian Community during the Project design phase to continue to attempt to reduce harm to the South Mountains