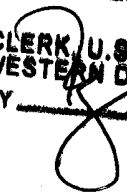


FILED

FEB - 5 2009

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AQUIFER GUARDIANS IN URBAN)
AREAS, and TEXAS UNITING FOR)
REFORM AND FREEDOM,)

Plaintiffs,)

vs.)

CIVIL ACTION NO. SA-08-CA-154-FB

US FEDERAL HIGHWAY)
ADMINISTRATION; AMADEO)
SAENZ, JR., Executive Director,)
Texas Department of Transportation;)
and TERRY BRECHTEL, Executive)
Director, Alamo Regional Mobility)
Authority,)

Defendants.)

ORDER CONCERNING US HIGHWAY 281 TOLL ROAD PROJECT

BACKGROUND

The slow death of cancerous droughts and sudden aneuritic destruction by flash floods of Biblical proportion and Darwinian effect have been part of South Texas for millennia.¹ Now, however, 2.5 million *Homo sapiens* in the region compete with each other and other species for limited transportation resources and scarce water supplies.² This case is but a small piece of seeking reasonable balance and solutions within the framework of the rule of law and the reality of suburban sprawl.

¹ See generally ANDREW SANSOM, WATER IN TEXAS (University of Texas Press) (2008).

² Texas Population Projection 2000-2015 (Central Texas Region) available at <http://www.thecb.state.tx.us/Reports/PDF/0951.PDF> (last visited Feb. 3, 2009); see e.g., 1950 Bexar County census: 500,460; 2000 Bexar County census: 1,392,931; estimated 2007 Bexar County census: 1,594,493 available at <http://www.txcip.org/tac/census/profile.php?FIPS=48029> (last visited Feb. 3, 2009).

Uncle Fred and Aunt Della Grantham were far tougher and less formally educated than we are today. They survived World War I and II, influenza and polio epidemics, the Great Depression, roughneck oilfield work and child birth five times. They lived on a small farm with a hand-pump water well and outdoor “plumbing.” Visiting children could go with Uncle Fred to pick a watermelon and Aunt Della took them to gather eggs from the chicken coop. They knew nothing about computers or air conditioning or environmental impact statements, but they were wise enough not to build the privy close to their water supply. Technology and population growth have presented modern Texans with more complex challenges and opportunities to develop new wisdom, but the old lessons still ring true.

As the Court noted in its order of August 20, 2008, US Highway 281 has been the subject of past litigation which took fourteen years to complete.³ Since that observation, and notwithstanding a highway construction contract to begin in October 2008, the Federal Highway Administration has withdrawn its approval of the Texas Department of Transportation’s finding of no significant environmental impact presaging the need for a full environmental impact statement, which will consume months if not years.

PENDING ISSUES

Before the Court are plaintiffs’ motions to compel (docket nos. 84 and 88) and defendant United States Federal Highway Administration’s (“FHWA”) amended motion to dismiss (docket no. 99), along with the responses and replies of the parties.

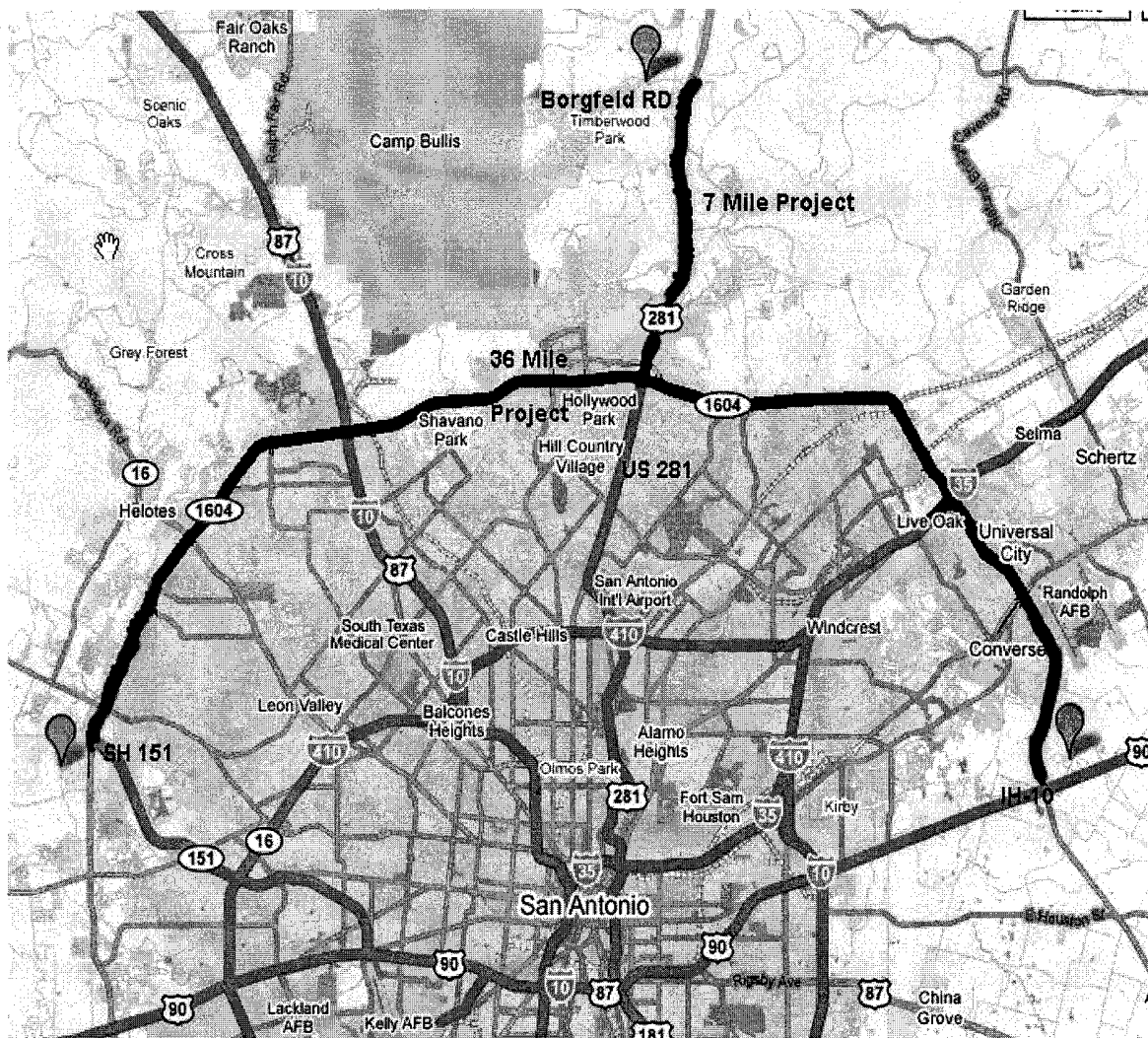
³ See City of San Antonio v. Congregation of Sisters of Charity of Incarnate Word, 360 S.W.2d 580 (Tex. Civ. App.–Waco 1962, writ ref’d n.r.e.), cert. denied, 372 U.S. 967 (1963) (filed 1961; concluded 1963), and its sequel City of San Antonio v. Congregation of Sisters of Charity of Incarnate Word, 404 S.W.2d 333 (Tex. Civ. App.–Eastland 1966, no writ) (concluded 1966); San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 420 U.S. 926 (1975).

Plaintiffs seek declaratory and injunctive relief based on defendants' issuance of a finding of no significant impact, affectionately known as a FONSI (no relation to Henry Winkler). Specifically, plaintiffs seek relief from the planning, financing, land acquisition, and construction on the US Highway 281 toll road project from Loop 1604 to Borgfeld Road until an environmental impact statement has been prepared. Since the filing of this litigation, the finding of no significant impact has been withdrawn, (docket no. 87), FHWA is now requiring that the Texas Department of Transportation ("TxDOT") complete the preparation of an environmental impact statement for any project in the US Highway 281 corridor, (docket no. 99), and work on this section of the proposed toll road has been stopped. (Docket no. 105). Accordingly, issues related to this seven mile stretch of road are presently moot.

Plaintiffs also say a proposed thirty-six mile toll expansion of Loop 1604 and the US Highway 281 project should be analyzed in a single document pursuant to the National Environmental Protection Act. Plaintiffs and defendants acknowledge the Alamo Regional Mobility Authority ("ARMA") has advertised and is pursuing the project as one single "starter system" toll road. TxDOT and ARMA agree the financing of the Loop 1604/US Highway 281 system will be integrated. TxDOT has recommended a FONSI issue on the proposed \$1.7 billion, thirty-six mile long Loop 1604 project. FHWA has yet to accept or reject this recommendation. Given the related issues, the Court ordered (docket no. 69) that defendants produce to plaintiffs the administrative record on the Loop 1604 project. Defendants have failed to do so on the ground that plaintiffs' requests relating to the Loop 1604 project are moot. Specifically, TxDOT says consideration of the proposed Loop 1604 project is inappropriate because: (1) the Loop 1604 project is not part of the US Highway 281 project, nor was it examined in the FONSI prepared for the US Highway 281 project; (2) TxDOT has not completed its environmental

study of the proposed Loop 1604 project; (3) TxDOT has not submitted the proposed Loop 1604 project to FHWA for final review; and (4) no final agency action has been taken by FHWA with respect to the proposed Loop 1604 project. Moreover, the Court assumes the ongoing decision making process will include transparency and public participation.

The diagram below is instructive in showing what lies down the road:



While the Court has no highway engineering expertise, it seems commonsensical that two intersecting parts costing billions would be connected to create an Aristotelian whole.⁴ Nevertheless, the issue is

⁴ "The whole is more than the sum of its parts." *Metaphysica* 10f-1045a (340 BCE).

effectively in neutral gear until FHWA makes its assessment of whether a full environmental impact statement is appropriate for the Loop 1604 project as it has done with the US Highway 281 project.

CONCLUSION

Though the two projects, interrelated or not, are presently at a red light, the issues of water quality and quantity and traffic gridlock will not disappear into the legal smog. But, the Court cannot see at this intersection whether those questions will involve toll roads, light rail, endangered *Homo sapiens* or *Dendroica chrysoparia*,⁵ or poisoned water. What is known is that we, like the dinosaurs and the cockroaches, will either adapt, move or die.⁶

No San Antonian is an island, entire of itself;
each is a piece of South Texas, a part of the Edwards escarpment.
If our refuse washes into the aquifer,
all are the less.

Any species' death diminishes the whole,
because we are all involved in life,
and therefore never send to ask for whom the road tolls;
it tolls for thee.⁷

⁵ The Golden-cheeked warbler.

⁶ Chris Stringer, PhD, Palaeontologist and Research Leader in Human Origins, Natural Museum of History, London.

⁷ Adapted from "For Whom the Bell Tolls":

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

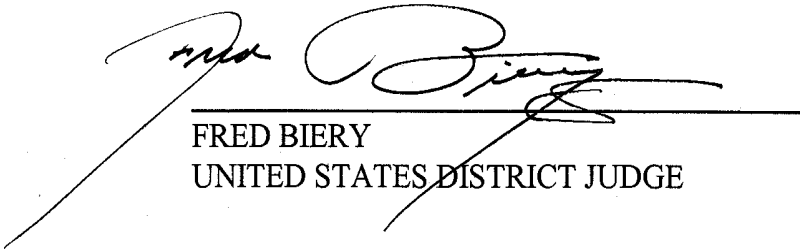
John Donne, Devotions Upon Emergent Occasions, no. 17 (Meditation) (1624).

ACCORDINGLY, IT IS ORDERED that plaintiffs' motions to compel (docket nos. 84 and 88) and defendant US Federal Highway Administration's amended motion to dismiss (docket no. 99) are DENIED.

IT IS FURTHER ORDERED that this case is ADMINISTRATIVELY CLOSED pending application for further relief by any party. Remaining motions pending with the Court, if any, are dismissed as moot.

It is so ORDERED.

SIGNED this 5th day of February, 2009.



FRED BIERY
UNITED STATES DISTRICT JUDGE