## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

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THOMAS MATHEWS, CHAD	)	
ALDERMAN, RANDALL DAMON,	)	
DORIS RENDER, HAROLD RENDER,	)	
and BRENT HINDERS,	)	
	)	Civil No. 4:02-CV-10652
Plaintiffs,	)	
	)	
vs.	)	
	)	
NOMRAN MINETA, as Secretary of )		
Department of Transportation; BOBBY	)	ORDER
BLACKMON, as Division Administrator,	)	
Federal Highway Administration;	)	
and CITY OF DES MOINES, IOWA,	)	
	)	
Defendants,	)	
	)	
	)	

Plaintiffs filed a complaint claiming that defendants' decision to construct a highway in Des Moines, Iowa violated § 4(f) of the Federal Highway Act and §§ 314.23 and 314.24 of the Iowa Code. The federal and city defendants filed motions to dismiss on February 28, 2003 and March 5, 2003, respectively. Plaintiff filed resistances on March 17 and 18, 2003. The federal defendants replied on March 24, 2003. Plaintiff filed a supplemental resistance on April 1, 2003, to which the federal defendants replied on April 4, 2003. The Court issued an Order on April 11, 2003, finding that plaintiffs' challenge should have been brought under the Federal Administrative Procedures Act, and that the applicable six-year statute of limitations had run on this claim. The Court withheld ruling on whether any circumstances justified reviving the statute of limitations. A hearing was held on this issue

on April 30, 2003. The matter is now fully submitted.

## I. BACKGROUND

Martin Luther King, Jr. Parkway ("MLK") is a major arterial street in Des Moines, Iowa.

Proposals have been considered for the reconstruction of MLK for a number of years. On December 28, 1987, defendants submitted a final environmental impact statement ("EIS") addressing the affects different construction alternatives would have on Water Works property. *See* Defendant's Exhibit H (EIS). Three construction alternatives were considered in the EIS. The "Preferred Alternative" was projected to impact approximately twelve acres of Water Works property, "Alternative A" seven acres, and "Alternative B" seventeen acres. *Id.* Detailed maps depicting the proposed construction were contained in the EIS. *Id.* 

In the EIS, the Federal Highway Administration ("FHWA") initially found that the Water Works property affected by the project did not qualify as a park under § 4(f) of the Federal Highway Act. Id. In the alternative, the FHWA stated that even assuming the property qualified as a park, there were no feasible and prudent alternatives to using the property, and that all possible planning to minimize harm had been incorporated in the proposed project. Id. In reaching that conclusion, the FHWA considered the impact construction would have on the vegetation of Water Works property. It stated, in relevant part:

<sup>&</sup>lt;sup>1</sup> Section 4(f) of the Federal Highway Act has been recodified and is found in 49 U.S.C. § 303. However, this code section continues to be referred to as § 4(f). Section 4(f) precludes the Department of Transportation ("DOT") from approving a construction project that uses land from a publicly owned park unless certain determinations are made.

[T]rees, shrubs, grasses and forbs" would be impacted . . . The project will remove approximately five acres of this flood plain vegetation . . . [and] will . . . remove approximately two acres of upland vegetation, dominated by oaks and hickories. Plant removal from the project will have negative impacts on wildlife in the area that uses it as habitat. It will also have aesthetic impacts.

*Id.* at 5.60. The FHWA specified that the following kinds of trees would also be affected: willow, silver maple, box elder, elm, bur oak, green ash, and black walnut. *Id.* 

On March 9, 1988, the FHWA issued a Record of Decision. *See* Brief In Support of Federal Defendants' Motion to Dismiss, Exhibit 2 (Record of Decision). The Selected Alternative for the project consisted of the construction of a four-to six-lane divided highway. *Id.* It combined portions of various Alternatives that were described in the final EIS. *Id.*<sup>2</sup>

Since the Record of Decision issued in 1988, plans for the MLK reconstruction project have evolved. At the April 30<sup>th</sup> hearing, plaintiff Thomas Mathews ("Mathews"), testified that the most recent MLK reconstruction plan ("Current Plan") significantly differs from the 1988 Selected Alternative. Mathews testified that it was his "very strong impression" that the Current Plan results in the removal of more trees than the 1988 Selected Alternative. However, Mathews admitted he had not thoroughly reviewed the EIS, which described the impacts reconstruction would have on vegetation. He also admitted that the 1988 Selected Alternative and the Current Plan would affect the same areas of Water Works property.

Dr. McMullen, the Chief Executive Officer of Water Works Park, also testified that the 1988 Selected Alternative and the Current Plan would impact the same areas of Water Works Park

<sup>&</sup>lt;sup>2</sup> A Supplemental EIS was prepared and a Supplemental Record of Decision was issued on December 21, 1999. These documents did not address any issue pertaining to Water Works property.

property. Dr. McMullen testified that the affected property is being used by the public and Water Works Park in the same way today as it was used in 1988. Like Mathews, Dr. McMullen testified that the Current Plan would require a greater number of trees to be removed.

Jeb Brewer ("Brewer"), an engineer for the City of Des Moines, also testified that the 1988

Selected Alternative and the Current Plan would impact the same areas of Water Works Park

property. He agreed that the Current Plan requires the removal of a few more trees than the the 1988

Selected Alternative. However, in Brewer's opinion, the Current Plan would not impact Water Works

property in a significantly different way than the 1988 Selected Alternative.

## II. APPLICABLE LAW AND DISCUSSION

As the Court found in its April 11, 2003 Order, the statute of limitations on plaintiffs' federal cause of action expired on March 9, 1994. The issue now before the Court is whether factual circumstances justify reviving the statute of limitations on plaintiffs' federal cause of action. Having reviewed the record, including the evidence admitted at the April 30<sup>th</sup>, 2003 hearing, the Court finds that there is no basis upon which to revive the statute of limitations.

Plaintiffs alleged that defendants have recently proposed changes in the reconstruction of MLK that impact Water Works property more significantly than the 1988 Selected Alternative would have.<sup>3</sup> The Court finds the 1988 Selected Alternative and the Current Plan affect the same areas of land. The

<sup>&</sup>lt;sup>3</sup> Plaintiffs have not argued that the relevant Water Works property is being used by Water Works Park in a different way today than it was in 1987, when the FHWA determined that land did not qualify as 4(f) property. The record reflects that the relevant areas are being used today in the same way they were used in 1988.

Court further finds that both reconstruction alternatives affect that land in similar ways. *Compare*Defendant's Exhibit 2 (Current Plan Under Design Martin Luther King Jr. Parkway); and Defendant's Exhibit 1 (1988 Selected Alternative Martin Luther King Jr. Parkway). The 1988 EIS specified that the reconstruction project would negatively impact seven acres of vegetation, including trees. It listed at least nine species of trees that would be impacted. Plaintiffs do not allege that the Current Plan impacts additional species of trees. Instead, they allege that the number of trees that will be removed under the Current Plan is higher than the number that would have been removed under the 1988 Selected Alternative. Plaintiffs have failed to establish that the Current Plan requires the removal of a significantly higher number of trees than the 1988 Selected Alternative, and they have not presented any other evidence of a material change in the reconstruction project that justifies reviving the statute of limitations. The Court therefore denies plaintiffs' request to revive the six-year statute of limitations that expired on March 9, 1994. Plaintiffs' federal claim is dismissed.

Plaintiffs also filed claims pursuant to §§ 314.23 and 314.24 of the Iowa Code. In its discretion, the Court declines to exercise supplemental jurisdiction over these claims. *See* 28 U.S.C. § 1367 (District court may decline to exercise supplemental jurisdiction over a state law claim if it has dismissed all the claims over which it had original jurisdiction). Plaintiff's state law claims are therefore dismissed.

## III. CONCLUSION

After the 1987 EIS and the 1988 Record of Decision were issued, plaintiffs were on notice that the MLK reconstruction project would impact Water Works property. They were also on notice that the reconstruction project would require the removal of a number of trees. The Current Plan for MLK reconstruction affects the same areas of Water Works property. Although the Current Plan requires the removal of a few more trees than the 1988 Selected alternative, this does not justify reviving a statute of limitations that expired nine years ago. The Court grants defendants' motion to dismiss all of plaintiffs' claims. The Clerk is directed to enter judgment in favor of defendants on all counts.

IT IS ORDERED.

This 9th day of May, 2003.

United States District Court