

OPE 19-11

Judge Brown States in Court: Fri. Nov. 5, 1971 P.S.

'Objectors Didn't Prove Prudent Alternative Route'

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Federal Chief Judge Bailey Brown said the objectors to the Overton Park expressway "did not come close to proving an obviously feasible and prudent alternative" route other than that chosen by the state and federal government to go through the central city park.

Judge Brown made this observation shortly before the expressway case came to an end, after 25 days of hearing, at 3:26 p.m. yesterday.

"I don't think they came

close to proving an obvious feasible and prudent alternative," Judge Brown told J. Alan Hanover, the attorney for the defendant state highway department, "but they may have opened up some possibilities."

Judge Brown added, "But they didn't come as close to proving, judicially, what I thought they would."

Judge Brown said, referring to the testimony of Secretary of Transportation John A. Volpe, however, that "what is worrying the court is that he did not apply the

(to Mr. Volpe)

standards (correct legal standards of park preservation) as the standards turned out to be (as spelled out in the Supreme Court remand) and what's in evidence supports that he did not. That's what's worrying the court."

Indicating that he is giving strong consideration to remanding the case to Volpe for further consideration, Judge Brown said if he did this, the Secretary "would have to make a decision not only on what he had before him in 1969 but what he has before him now—specifically the record of this trial. He

would have a better basis for making a decision now than (he did have) in 1969."

U.S. Attorney Thomas F. Turley, referring to a remand, said, "I know a hard decision is facing the court, but it's no answer by washing our hands (of the matter) and sending it back to the Secretary."

"I know the instinct of a lawyer, having been one myself, is like a bulldog to win the fight as quickly as he can where he is," said Judge Brown.

Turley said that it would

*said this to Hanover

not be just a matter of sending the case back to the Secretary for further consideration on the basis of "the correct legal standards."

"We've got to go to two hearings before we can even go back to the Secretary. There would have to be hearings on location and design. We'd be walking back through the route that brought us here and after it is all done Mr. Vardaman or somebody else would differ with the decision and come up with a different idea and come back to this courtroom

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Judge Points Out Angles in Decision

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on a pro-bono publico (for the good of the public) basis and back we'd go to Cincinnati (to the Sixth Circuit Court of Appeals)," Turley said.

"I say this is the time to put this dog at rest," said Turley. He asked Judge Brown to give the government a decision on the case instead of a remand.

Judge Brown said, "Even if the court thought it was clear from his (Volpe's) deposition (that right legal tests had not been applied), I still couldn't stop the trial right in the middle and send it back to him without hearing the rest of the proof."

Hanover's chief argument was that the court did not have to determine whether Secretary Volpe applied the correct and stringent park preservation standards as interpreted by the Supreme Court, but that he "did indeed" apply the legal standards of "a reasonable man" in determining there was no other feasible and prudent location.

John W. Vardaman, the Washington, D.C. attorney for the objectors, argued that there "was no evidence" in the administrative record to support the contention that Sec. Volpe ever considered alternatives so the court "had to remand."

"Wouldn't you be better off," Judge Brown asked Hanover, "to send the whole case back to him (Volpe) and let him go back and look at the whole record and apply the right standards than if you would get a decision upholding Secretary Volpe and an Appeals Court would make the determination based on the administrative record? If they didn't affirm you then where would you be?"

Turley jumped to his feet and said: "No, we wouldn't be better off. We've got a 1971 NEPA (National Environmental Policy Act, the strong parklands preservation act) that would have to be considered. That would not be helpful at all."

Hanover argued that in his deposition Volpe said, after reading the Supreme Court remand of the case, that if he "had to do it all over again (make the Overton Park decision) he would do it the same way." Hanover asked Judge Brown: "What would be the use of sending it to him, have him make the same decision, and have it back before you again?"

Judge Brown said, "The use would be that it is not the court's prerogative to make an administrative decision but is a matter reserved for the Secretary."

"It is always possible for an attorney to urge the court to do something that will give him a quick victory that turns out to be a bad

mistake," said Judge Brown to Hanover and Turley.

"I listened to you two gentlemen before and let you talk me into it for a quick victory and it turned out to be a horrible mistake," said Judge Brown.

"I don't think you made a horrible mistake," said Hanover.

"Well, the proof of the pudding is in the eating," said Judge Brown, "and it was a horrible mistake (to not hold a full investigation at the front end of the case)."

"What we should all be concerned with," said Hanover, "is getting this case settled as quickly and correctly as possible under the law. If it (the expressway) is to go through the park, let's get it settled. If it's not to go through the park, let's get it settled. The worst thing that can happen is for it (the case) to stay in lengthy litigation and keep the community in an uproar."

Most of the afternoon's arguments centered on the question of whether Secretary Volpe had done everything reasonably possible to minimize harm to the park.

During the 25 days of trial, 32 witnesses testified.

Turley said 240 exhibits were entered into the record of the case, containing, he estimated, about 25,000 pages of documents. Turley said, "We have 7,000 to 8,000 pages of daily transcripts alone now in this record."

Judge Brown gave the objectors in the case until Monday, Nov. 15, to get their legal briefs in on the matter; he gave the state and federal government until Monday, Nov. 22 to respond, and the objectors until Thursday, Nov. 25, to reply. His decision will be made after that.