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Judge Orders Brinegar To Decide On I-40

By MICHAEL LOLLAR

United States Dist. Judge Bailey Brown yesterday remanded the Overton Park expressway case to the federal Transportation Department, holding that former Transportation Secretary John Volpe's determination in the case was incomplete.

He ordered Transportation Secretary Claude Stout Brinegar to reach a new decision by June 4, choosing the park route for Interstate 40 or a specific "feasible and prudent alternative."

The ruling upheld arguments by the state Transportation Department, which claimed Volpe erred in his Jan. 18 rejection of the park route since he neglected to choose a specific alternative to the park route.

Instead, Volpe had said, "I cannot find that there are no prudent and feasible alternatives to the use of parkland." He went on to suggest "possible" alternatives which the state "may wish to consider."

The Citizens to Preserve Overton Park argued there is only a "semantic difference" between a finding that there "is a feasible and prudent alternative" and a decision which says "I cannot find that there is no feasible and prudent alternative."

Attempting to resolve the semantic dispute, Judge Brown said: "This court is of the view that, contrary to the contention of plaintiffs and the secretary (Volpe), the secretary was obligated to do more than to decide that he could not find that there was no feasible alternative."

He said Section 4f of the 1966 Depart-

ment of Transportation Act provides that "the secretary may not approve use of parkland unless there is no feasible and prudent alternative. Thus if he approves use of parkland, he must find there are no such alternatives; on the other hand, if he disapproves such use, he must find that there is such an alternative."

When preliminary arguments became mired in confusion Wednesday, Judge Brown summed it up: "The reason we're getting so abstruse is that lawyers (for the plaintiffs) are trying to defend what Secretary Volpe did, when, all the time, it was clear what he was supposed to do."

In his ruling yesterday, he said a specific, affirmative ruling is necessary "if the state defendant is to have effective judicial review of the secretary's finding. . . . Obviously a court could not review a finding that there is a feasible and prudent alternative unless the secretary designates what it is."

Charles F. Newman, attorney for the Citizens to Preserve Overton Park, objected to the remand, but said he is "confident" Brinegar will reach the same decision as Volpe.

Alan Hanover, special counsel for the Transportation Department, made no predictions. However, if Brinegar rejects the park route, he said he will file a new petition asking that the state be allowed to complete the freeway

through the park using state and local funds.

He said Volpe's decision ignored selection of an alternative, and, therefore, "simply denies the use of federal-aid funds to build the highway."

Brinegar filed a brief in federal court here March 26, claiming it would be "entirely inappropriate" for him to make a new decision in the case. He said Volpe's ruling was sufficient and binding.

Judge Brown's decision was no surprise. After the state filed its petition in February, the judge indicated agreement, saying he felt Volpe's ruling was "incomplete and should be reconsidered."

97E 21-33