

**SIMONS & SLATTERY** | L L P

BRAC Commission

DCN 7629

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August 12, 2005

Honorable Anthony J. Principi, Chairman  
2005 Defense Base Realignment and Closure Commission  
2521 S. Clark St., Suite 600  
Arlington, VA 22202

**Re: Implications of Buster Welch, et al. v. USAF, et al. to the Closure Recommended by BRAC of Ellsworth AFB, South Dakota**

Dear Chairman Principi:

The Defense Base Realignment and Closure Commission is aware of the successful challenge to the Realistic Bomber Training Initiative (RBTI) associated with Dyess AFB, Texas. That challenge was undertaken by separate groups of ranchers, landowners and others in two separate cases. I represent a group of plaintiffs who live principally near or under the Lancer, MOA of the RBTI. A few are impacted by the flights along IR-178 as are all of the Davis Mountain Trans Pecos Heritage Association (DMTPHA) plaintiffs represented by Mr. Murray Feldman and with whom your staff has had significant contacts.

My clients formed an organization called the Heritage Environmental Protect Association (HEPA) to review and comment upon the RBTI modifications proposed for the airspace. Through me, HEPA ultimately filed an action entitled, Buster Welch, et al. v. United States Air Force, et al., Civil Action No. 5:00CV0392-C, USDC Texas, Northern District, Lubbock Division. The parties in both cases participated in the scoping meetings where literally hundreds of people made comments at each location in West Texas and New Mexico.

As Mr. Feldman explained to your staff, eventually the two cases were heard simultaneously by U.S. District Court Judge Cummings, but they were never consolidated. The HEPA plaintiffs challenged on some similar grounds and several different issues, the most notable of which was our emphasis on the several noise issues. In both cases, Judge Cummings' rulings ignored a faulty Administrative Record on the subject. In the end, Judge Cummings separately issued two lengthy decisions for the cases in favor of the United States Air Force.

Honorable Anthony J. Principi

August 12, 2005

Page 2

HEPA filed a separate appeal to the Fifth Circuit Court of Appeals. For purposes of efficiency and judicial economy, the HEPA and DMTPHA plaintiffs did agree to consolidated briefing and oral argument on appeal. Previously, we had joined DMTPHA as a petitioner-intervenor to challenge separately the FAA's decision approving the RBTI airspace modifications based on a faulty NEPA analysis. As you know, the Fifth Circuit vacated both decisions issued by Judge Cummings, the Air Force's record of decision (ROD) on the final EIS, and the FAA's non-rulemaking decision document (ROD equivalent) approving the RBTI airspace modifications. The Court remanded the final EIS to the Air Force to prepare a supplemental EIS (SEIS) to evaluate the impact of wake vortex and to assess the impact of the RBTI on civil and commercial aviation.

Mr. Feldman has evaluated the wake vortex issues for your staff. I just wish to emphasize that the Fifth Circuit did not limit the evaluation to impacts on buildings and structures. In its order, the Court said simply the Air Force must evaluate the impact of wake vortex. Consequently, we strongly believe that means evaluation on buildings and structures of course, but also on livestock management, wildlife, recreational hunting, general recreation, and on direct overflight of humans. If the Air Force properly evaluates the spectrum of issues, then the SEIS will not be issued for some considerable time.

The evaluation of the impact on civil and commercial aviation is equally important as Lubbock International Airport has to modify its flight routes to the southeast to accommodate the Lancer MOA. Those modifications extend commercial flying times. Therefore, the Air Force must reconsider the impact to Lubbock, as well as the civil aviation employed by ranchers and others in the SEIS.

Lubbock was not consulted during the first NEPA scoping. The city considered litigating against the Air Force, but after the fact (issuance of the ROD), the Air Force met with Lubbock officials and made a deal to control airspace from the Lubbock airport with new equipment. Yet significant airspace remains closed to commercial traffic for long periods and this will only be exacerbated by the Ellsworth B-1s using the same airspace. After a proper SEIS evaluation, the Air Force and FAA may conclude that the impact to Lubbock is severe enough to modify substantially the lancer MOA.

Finally, the Fifth Circuit ordered Judge Cummings to set the RBTI operating conditions pending the completion of the SEIS. Mr. Feldman has explained that the Air Force is not operating below 12,000' MSL in the Lancer MOA, and nothing below 500' AGL along IR-178. These were offered voluntarily by the Air Force. Please note that we continue to be puzzled how the Air Force can continue to train in unapproved airspace. Consequently, Judge Cummings' operating conditions are appealable by both groups of plaintiffs and an appeal is being considered as the judge completely ignored the wake vortex evaluations prepared by the experts.

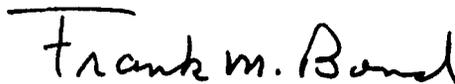
Honorable Anthony J. Principi  
August 12, 2005  
Page 3

The Air Force may be disingenuous to the BRAC by not revealing that the Air Force needs to do a NEPA evaluation on the cumulative impact of the B-1s shifted from Ellsworth to Dyess. Because of the number and size of aircraft, we believe the Air Force will need to do a full EIS. It is not enough to do an environmental assessment (EA) as the cumulative impact will be magnified substantially and the number of training flights may exceed the authorized sortie numbers. Now is the time to do a full cumulative impact analysis while the SEIS is being prepared because the move of the B-1 wing from Ellsworth is foreseeable. To do a mere EA later is the piecemeal approach abhorred by NEPA.

The report that Ellsworth B-1s are being moved to Dyess was not good news to my clients. They already believe they live in a war zone. The Ellsworth B-1 wing exacerbates the real impact on these people. And it seems clear to us that, for the most part, the B-1s will not fly from Dyess to train in the already approved airspace near Ellsworth AFB.

Please contact me if I can answer questions or provide you with more explanation of the HEPA plaintiffs' position on the RBTI.

Sincerely yours,

  
Frank M. Bond

FMB/gdg

cc: HEPA Litigation Committee  
Mr. Murray Feldman, Counsel for Davis  
Mountains Trans-Pecos Heritage Assoc.