IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15277

HONOLULUTRAFFIC.COM; *et al*,

Plaintiffs-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION; *et al.*

Defendants-Appellees,

and

FAITH ACTION FOR COMMUNITY EQUITY; *et al.*

Defendants-Intervenors-Appellees

On Appeal from the United States District Court,
For the District of Hawaii
Civil No. 11-00307 AWT

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

As we stated in our opening brief, "Only this Court can prevent Appellees from forever despoiling the integrity of Honolulu's historic downtown, its waterfront, and its Chinatown." Appellants' Opening Brief ("App.") at 1. Or, as characterized by the National Trust for Historic Preservation, the organization created by Congress to further the historic preservation policies of the United States (and whose Board includes, ex officio, the Attorney General of the United States), "the failure of the Federal Transit Administration . . . to comply with Section 4(f) of the Transportation Act" with respect to this "massive elevated rail project [which] will cut through the historic core of Honolulu and will adversely affect numerous historic properties and districts along its 20 mile length…" National Trust Amicus Brief ("Amicus") at 2.

As further stated by the National Trust, "Section 4(f) . . . is one of the two most stringent environmental statutes ever enacted by Congress." *Id* at 4.[1]

* Sec 4(f) explicitly prohibits approval of a transportation project that requires the use of historic sites (including Native Hawaiian burial sites) or parkland unless there is no "feasible or prudent" alternative.

[1] The other is the Endangered Species Act.

* Here in its Environmental Impact Statement/Section 4(f) Evaluation the FTA considered only three substantially identical alternatives, all involving heavy rail, steel wheel on steel rail elevated trains between the same termini, differing only with respect to small portions of the route.

* The document did not evaluate other alternatives which were both "reasonable" (NEPA) and "prudent and feasible" (4(f)), including Managed Lanes, light rail, and Bus Rapid Transit ("BRT"). Those omissions violated both statutes in the most fundamental of manners.

> In doing so Appellees attempt to excuse their omissions by relying on a document prepared by the City for a very different purpose (to assist the City in determining its preferred proposal). The document in no way complied with either NEPA or 4(f).

> When Appellees did get around to purporting to comply with 4(f) (with an already contaminated process which had unlawfully eliminated alternatives) they did so without following the FTA's own regulations (adopted in 2008, after the City's "preference" process, but before the FTA's purported 4(f) evaluation).

* This then, is the sorry tale — how Appelles misused (unlawfully) a NEPA process to eliminate "reasonable" alternatives and then imported the

faulty conclusions into the 4(f) process to eliminate "prudent and feasible" alternatives. Both were illegal. The consequences are drastic. Appellants respectfully ask — indeed, beg — this Honorable Court for relief.

ARGUMENT

I. THE PROJECT WILL SIGNIFICANTLY AND IRREPARABLY DAMAGE HONOLULU'S HISTORIC DOWNTOWN

The City tried to create the impression that the Project's impact on historic resources in downtown Honolulu (including Chinatown and the Dillingham Building, addressed in part IV) will be minor or incidental. *See* City at 7-8. The record flatly contradicts that notion. *See, e.g.*, 3ER745 (aesthetic impacts); 6ER1467-69 (adverse effects to Chinatown Historic District), 6ER1508-10 (adverse effects on historic Dillingham Building); Amicus at 7-15.

Perhaps seeking to distract from the evidence in the record, the City has presented two images designed to suggest that the Project will simply alter an existing roadway. City at 7-8. Tellingly, the City's images do not include ***the Project***. *Id*. A visual representation of the Project, prepared by the American Institute of Architects, appears on the next page.

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II. THIS COURT HAS JURISDICTION

The City raises a series of jurisdictional objections recycled from its failed Motion to Dismiss this appeal. The Motion to Dismiss was properly denied on May 3, 2013. Order (Dkt. 22). The City's arguments have not gained merit in the interim.

A. Jurisdiction Exists Under 28 U.S.C. § 1291

Under 28 U.S.C. § 1291, this Court has jurisdiction over appeals from "final decisions of the district courts of the United States." A decision is "final" if it is (1) "a full adjudication of the issues" and (2) "clearly evidences the judge's intention that it be the court's final act." *Disabled Rights Action Committee v. Las Vegas Events, Inc*. 375 F.3d 861, 870 (9th Cir. 2004).

As explained in Appellants' Opening Brief, the District Court's Judgment and Partial Injunction ("Judgment") satisfies both criteria. App. at 3-4, 9-11. The Judgment finally resolved the last issue before the District Court. *Id*. Moreover, the District Court was explicit in declaring the Judgment a final, appealable decision: it stated its intent to rule "in the form of final judgment so that…there will be an appealable order " and the Judgment says, on its face, "the court now enters its final Judgment." *Id*.; 1ER2, 50.

Appellees nonetheless contend that the Judgment is not final, repeating many of the arguments in the City's Motion to Dismiss. Federal Appellees ("FTA") at 1-4; City at 22-26; Intervenors ("Int.") at 3. The premise of those arguments — namely, that Appellants must satisfy a three-part test specific to "remand orders" — remains inaccurate. The three "tests" proposed by the City are not, in fact, "strict prerequisites" for appellate jurisdiction *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175-76 (9th Cir. 2011) citing *Gillespie v. U.S. Steel Co.*, 379 U.S. 148, 152 (1964) and *Skagit County Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996).[2]

The City also suggests that appellate jurisdiction is unwarranted because Appellants have an opportunity to participate in the FTA's Supplemental Environmental Impact Statement ("SEIS") process. But the SEIS addresses only the issues on which Appellants won before the District Court. Since the Defendants did not file a cross-appeal, those issues by

[2] In a footnote, the City suggests that *Sierra Forest Legacy* is a per curiam opinion without precedential value. Not so. Although the *Sierra Forest Legacy* panelists came to different conclusions about the merits of the case, they all agreed that this Court had jurisdiction. *Sierra Forest Legacy*, 646 F.3d at 1168-70 (reviewing positions of panelists). Since then, *Sierra Forest Legacy* has been relied on multiple times, by this Court and others. *See, e.g.*, *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013); *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 673 F.3d 518, 527 (7th Cir. 2012).

definition are not before this Court. This appeal addresses Appellees' illegal failure to consider and adopt ***alternatives to building*** an elevated heavy rail system (*i.e.*, light rail, BRT, and/or Managed Lanes), while the SEIS addresses the ***details of implementing*** the final segment of the elevated heavy rail Project. Appellees are "promoting a meaningless remand," an exercise this Court has compared to "inviting [Appellants] to a party with no cake." *Skagit County*, 80 F.3d at 384; *see also Sierra Forest Legacy*, 646 F.3d at 1175-76. [3]

Moreover, deferring jurisdiction until after the SEIS process would impermissibly foreclose meaningful appellate review. *See Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (rule against foreclosure of meaningful review).[4] As explained more fully in Appellants' Opposition to the Motion to Dismiss, the District Court ordered the preparation of an SEIS but (1) left all Project approvals in place and (2) authorized the City to proceed with three of the Project's four segments. *See* Opposition to Motion to Dismiss

[3] Indeed, as in *Sierra Forest Legacy*, Appellees have already released a Draft SEIS stating that no changes will be made to the elevated heavy rail Project. *Sierra Forest Legacy*, 646 F.3d at 1174-76; *see also* Opposition to Motion to Dismiss (Dkt. 11-7) at 17-18 (comparing cases).

[4] Although the rule against foreclosure of review usually arises in the context of an agency's appeal, it also applies to appeals filed by non-agency litigants. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075-76 (9th Cir. 2010).

(Dkt. 11-7) at 6-8. The City recently announced that construction is scheduled for September, 2013. *Id*. at 8, 12. Thus, the practical effect of accepting the City's position would be to defer appellate jurisdiction over timely litigation until at least 75% of the Project is well under way. *Id*. Such a schedule would practically foreclose meaningful appellate review, impermissibly denying justice by delay. *Gillespie*, 379 U.S. at 152 (practical construction); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (danger of denying justice by delay).

B. In the Alternative, Jurisdiction Exists Under 28 U.S.C. § 1292

Under 28 U.S.C. § 1292(a)(1), this Court has jurisdiction over appeals from interlocutory orders granting or denying injunctive relief. The Judgment granted (in part) and denied (in part) Appellants' request for injunctive relief. 1ER1-3. Therefore, even if the Judgment were not a "final decision" within the meaning of 28 U.S.C. § 1291 (*see* part II.A, above), appellate jurisdiction would exist under 28 U.S.C. § 1292.

The City and the FTA claim that 28 U.S.C. § 1292 is irrelevant because this appeal does not address the District Court's injunction. City at 21-22; FTA at 3. They are mistaken. Appellants' Opening Brief explicitly identified 28 U.S.C. § 1292 as a basis for jurisdiction. App. at 3-4. And 28 U.S.C. § 1292, provides appellate jurisdiction "not only over orders

concerning injunctions, but also over matters inextricably bound up with the injunctive order from which the appeal is taken." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002) abrogated on other grounds as stated in *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010). Here, the District Court's decision on Appellants' NEPA and Section 4(f) claims determined the scope of the injunction imposed in the Judgment. *See, e.g.*, 1ER95-96. Therefore, 28 U.S.C. § 1292 would confer appellate jurisdiction over the merits of Appellants' NEPA and Section 4(f) arguments. *See Hahn*, 307 F.3d at 824 (summary judgment on NEPA claims "inextricably bound" to later partial injunction).

III. THE FTA AND THE CITY VIOLATED NEPA

This Court has characterized NEPA as "the broadest and perhaps most important of the federal environmental statutes" and described the EIS as NEPA's "chief tool." *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008). The "heart" of an EIS, in turn, is a rigorous evaluation of alternatives. *Id.*; 40 C.F.R. § 1502.14. This is not merely a paperwork exercise or a process for explaining choices already made; rather, it is an "action-forcing device" that must be integrated into

agency decisionmaking. *Oregon Natural Desert Ass'n*, 531 F.3d at 1121; *see also* 40 C.F.R. §§ 1500.1(a),(c), 1502.1, 1502.2(g).[5]

The FTA and the City violated these fundamental requirements by eliminating from consideration every alternative to the City's "preferred" elevated heavy rail system ***before*** preparing their EIS. In doing so, they reduced the EIS's evaluation of alternatives — the "action-forcing device" at the "heart" of "perhaps the nation's most important environmental law" — to a formalistic ritual for explaining prior choices. More specifically, the FTA and the City violated NEPA because the EIS failed to evaluate all reasonable alternatives (part III.A) and/or because the Project's Purpose and Need was defined so narrowly as to preclude consideration of reasonable options (part III.B).

A. The EIS Did Not Evaluate All Reasonable Alternatives

NEPA's implementing regulations, promulgated by the White House Council on Environmental Quality ("CEQ") and applicable to all federal agencies, require that an EIS "rigorously explore and objectively evaluate ***all***

[5] NEPA imposes strict requirements on agency decisionmaking, but, unlike Section 4(f) (discussed in part III, below), it does not mandate a specific substantive outcome. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). We address NEPA prior to Section 4(f) in order to explain Appellees' erroneous reliance on the City's 2005-2006 "Alternatives Analysis" and the Safe Accountable Flexible Efficient Transportation Equity Act ("SAFETEA-LU").

reasonable alternatives." 40 C.F.R. § 1502.14 (emphasis added). The EIS violated this requirement by (1) failing to evaluate a reasonable range of alternatives (part III.A.1) and (2) arbitrarily and capriciously excluding from detailed evaluation Managed Lanes and Light Rail alternatives, both of which are reasonable ways to address Honolulu's traffic problems (part III.A.2).

1. The EIS Did Not Evaluate A Reasonable Range Of Alternatives

The range of alternatives that an EIS must consider is "dictated by the nature and scope of the proposed action." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995). Here, the "nature and scope" of the proposed action — a new $5 billion, 20-mile public transit system extending across metropolitan Honolulu — was quite broad. Therefore, the range of alternatives evaluated in the EIS should also have been quite broad. *Id*.

But the range of alternatives presented in the EIS was extremely narrow. In fact, it was hardly a "range" at all. The EIS was presented three virtually-identical versions of the City's preferred elevated heavy rail project. 3ER563-97. The only difference among them was a short segment of the route in which one variation would replace the rail station serving the

Honolulu airport with a rail station in the "Salt Lake" neighborhood, half a mile away. 3ER566. The EIS did not evaluate any alternatives to building an elevated heavy rail system. 3ER562; *see generally*, 3ER563-97.

Under Circuit precedent, the EIS did not evaluate a reasonable range of alternatives. *See, e.g.*, *Friends of Yosemite Valley*, 520 F.3d at 1039 (five action alternatives proposed similar outcomes); *Oregon Natural Desert Ass'n*, 531 F.3d at 1126, 1144-45 (seven action alternatives would increase off-road vehicle use); *Nat. Res. Def. Council v. U. S. Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005) (ten action alternatives would result in development of roadless areas). Indeed, just one month ago this Court struck down a NEPA document because there was no meaningful difference between the four development alternatives evaluated therein. *See W. Watersheds Project v. Abbey*, No. 11-35705, 2013 U.S. App. Lexis 11533, *40-41 (9th Cir. June 7, 2013) ("each alternative considered would authorize the same underlying action").

Rather than evaluating a broad range of alternatives in the EIS (as NEPA requires), the City and the FTA improperly relied on the City's 2005-2006 "Alternatives Analysis" (or "AA"). The explicit purpose of the AA was to help the City identify a "locally-preferred" transit option, a precondition to the City's application for federal transit funds. *See*

9ER9435. Appellees now claim that the City's selection of a locally-preferred alternative eliminated from the EIS all other options. *See, e.g.*, 3ER562. This fundamental error impermissibly restricted the range of alternatives in the EIS, violating NEPA in three ways:

(1) An EIS must "[r]igorously explore and objectively evaluate **all** reasonable alternatives," not merely those preferred by the project proponent. 40 C.F.R. § 1502.14(a) (emphasis added). CEQ guidance establishes that reasonable alternatives "include those that are ***practical*** or ***feasible*** from the technical and economic standpoint,… rather than simply ***desirable***" from the standpoint of a project proponent. 46 Fed. Reg. 18,026, 18,027 (Mar. 17, 1981) (emphasis added). The EIS did not consider any alternative to elevated heavy rail, the option deemed most desirable by the City. 3ER562; 3ER563-97; 9ER2318.

(2) The EIS assumes that City's selection of "locally-preferred" alternative rendered all other alternatives "unreasonable" (*i.e.*, unsuitable for detailed evaluation). *See* 3ER562. As a matter of both law and logic, that assumption is untenable. *See Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (distinguishing between "preferred" and "reasonable"); *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1327

(S.D. Cal. 1998) (same), *aff'd* 196 F.3d 1057 (9th Cir. 1999) (adopting District Court opinion).

(3) The City's selection of elevated heavy rail as the "locally-preferred alternative" was not a NEPA decision and was not accompanied by a completed EIS. It cannot be relied upon by the FTA to limit the scope of subsequent NEPA review. 40 C.F.R. §§ 1502.20, 1508.28; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004) (invalidating EIS purporting to rely on prior watershed analysis); *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1068-69, 1073 (9th Cir. 2002) (invalidating EIS purporting to rely on prior planning documents).

Appellees' counter-arguments are most notable for their failure to assert that the EIS, a NEPA document, satisfies the requirements of ***NEPA***. Instead, Appellees focus on the "statutory context" of the Safe Accountable Flexible Efficient Transportation Equity Act ("SAFETEA-LU"), arguing that it renders irrelevant the NEPA authority cited in Appellants' Opening Brief. FTA at 22-28; City at 32-37; Int. at 23-24, 37 n.15. But Congress has explicitly declared that "nothing in [SAFETEA-LU] shall be construed as superseding, amending, or modifying [NEPA] or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute." 23 U.S.C. § 139(k). Therefore,

the NEPA standards for an EIS are fully applicable in the statutory context of SAFETEA-LU. *Id.*

Appellees also suggest that an appendix to SAFETEA-LU's implementing regulations (23 C.F.R. part 450) authorized them to limit the scope of the EIS to the City's "preferred" elevated heavy rail system. FTA at 22-25; City at 34-35; Int. at 24-25. But that appendix (like SAFETEA-LU itself) states that the validity of an EIS continues to be "judged by the standards applicable under the NEPA regulations and guidance from [CEQ]." 23 C.F.R. part 450 App. A at #2; *see also* 23 U.S.C. § 139(k). The EIS does not meet those standards.

Appellees also point to various material encouraging cooperation between federal and non-federal agencies, some of which allows federal agencies to rely on studies prepared by state or local agencies. FTA at 22-27; City at 32; Int. at 37 n.15. But none of the cited material limits the range of alternatives that must be considered in an EIS.[6] Every EIS — whether or

[6] Appellees place particular emphasis on *The Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994). *See* FTA at 27-28; City at 31-33; Int. at 31, 33-34, 37 n.15. That case upheld an agency's reliance on local population, housing, and land-use data (1) to determine expected growth rates in the project area and (2) to determine future traffic conditions. *Laguna Greenbelt*, 42 F.3d at 525-26 (expected growth), 526-27 (traffic conditions). That is a far cry from Appellees' reliance on the City's preference to eliminate from consideration every alternative to elevated heavy rail. *Laguna Greenbelt* does not authorize any such thing.

not prepared as a collaboration between federal and non-federal agencies — must "[r]igorously explore and objectively evaluate ***all*** reasonable alternatives" within the meaning of NEPA. 40 C.F.R. § 1502.14(a) (emphasis added). That did not happen here.

The City claims to be "puzzled" by Appellants' citation of cases discussing tiering. City at 37. This Court has described tiering as "avoiding detailed discussion by referring to another document containing the discussion." *Kern*, 284 F.3d at 1073; *see also* 40 C.F.R. §§ 1502.20, 1508.28. Here, the City and the FTA assert that the EIS does not need to evaluate alternatives to the City's elevated heavy rail project because the requisite analysis can be found in the AA — in other words, they seek to exclude alternatives by tiering from the AA. *See* City at 32-33; FTA at 18-20, 23-25. The cases that the City finds so "puzzling" clearly prohibits agencies from limiting the scope of their NEPA review by referring to earlier material that was not evaluated in an EIS. *See* App. at 25. The AA was not evaluated in an EIS; therefore, it could not be used to limit the scope of subsequent NEPA review. *Id.*

The City also pretends to be confused about the significance of *Citizens for a Better Henderson* and *Surfrider*. City at 38-39. The relevance of those cases is quite plain: The City claims that its selection of elevated

heavy rail as the "preferred" alternative eliminated all other transit options from consideration in the EIS, but *Citizens for a Better Henderson* and *Surfrider* clearly state that identifying one alternative as "preferred" does not render other alternatives "unreasonable." *Citizens for a Better Henderson*, 768 F.2d at 1057; *Surfrider*, 989 F. Supp. at 1327 (adopted at 196 F.3d 1057).

2. The EIS Improperly Excluded Managed Lanes And Light Rail From Detailed Evaluation

The EIS also violated NEPA by arbitrarily and capriciously excluding reasonable alternatives — including Managed Lanes, Bus Rapid Transit ("BRT"), and Light Rail — from detailed evaluation in the EIS. *See Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056-57 (9th Cir. 2011) (failure to include a viable alternative renders EIS inadequate); App. at 11-12, 14-16 (describing alternatives).

(a) Managed Lanes

Appellants' Opening Brief explained that the City and the FTA improperly assumed that the City's selection of elevated heavy rail as the "locally-preferred alternative" eliminated the alternative of Managed Lanes (a limited-access roadway for transit and carpool vehicles) from consideration in the EIS. App. at 27. Their decision to exclude Managed

Lanes from the EIS violated NEPA for all of the reasons set forth in part III.A.1, above.

Appellants Opening Brief also explained that the City's evaluation of Managed Lanes in the AA suffered from numerous errors. App. at 27-28. A panel of the City's own experts, known as the Transit Advisory Task Force ("Task Force"), reviewed the AA and recommended changes that "could make [Managed Lanes] more attractive and/or feasible." 9ER2325; *see also* 9ER2342, 2357, 2363-64. The City and the FTA violated NEPA by failing to follow through on any of the Task Force's recommendations. *See, e.g.*, *Oregon Natural Desert Ass'n*, 531 F.3d at 1120-21 (evaluation of alternatives is "action-forcing"); *Cal. v. Block*, 690 F.2d 753, 771 (9th Cir. 1982) (agency must "internalize opposing viewpoints into the decision-making process"); *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d. 1109, 1119 (D.C. Cir. 1971) (agency cannot "sit back, like an umpire").

The City argues that the Task Force's recommendations were non-substantive. City at 44. The argument is facially unreasonable. The City convened the Task Force for the specific purpose of providing substantive expertise on transportation alternatives. *See* 11ER2865-68.

The City's position is based on the inaccurate notion that the Task Force recommendations focused on improving operation of the Managed Lanes facility and did not address the larger problem of traffic on local streets. City at 44 (citing 2SER251). As explained more fully in Appellants' Opening Brief, the AA process raised three categories of concerns about Managed Lanes (congestion on local streets near Managed Lanes entrances/exits, federal funding, and transit service), and the Task Force addressed each of them. App. at 16-17.[7]

(b) Light Rail

The City asserts that Light Rail was eliminated from consideration on the basis of the AA. City at 45. That decision was improper for all of the reasons set forth in part III.A.1, above.

Appellants' Opening Brief explained that the decision to exclude Light Rail was also improper because of flaws in the City's analysis. App. at 30-31. The City inaccurately concluded that Light Rail would not meet

[7] Moreover, the City's concerns about traffic on local streets apply to the Project just as surely as they apply to Managed Lanes. The Project, like Managed Lanes, is a fixed piece of linear infrastructure that would be accessed by customers driving or taking a bus on the existing roadway network. *See Se. Alaska Conservation Council*, 649 F.3d at 1059 (arbitrary and capricious to reject alternative based on drawback shared by proposed project). In fact, Managed Lanes offers an advantage over the Project by eliminating the need for bus-to-rail transfers, thereby increasing the flexibility of the system and offering the opportunity for a door-to-door ride.

the Project's Purpose and Need for operational reasons: service would be limited to once every three minutes, operations could not be expanded in the future, and unacceptable safety problems would occur. *Id*.

The City's counter-arguments (City at 44-48) fail to establish that the Project will provide service more frequently than every three minutes; fail to show that expansion was identified in the Project's Purpose and Need Statement; and fail to identify any data demonstrating that Light Rail, one of the most common transit technologies in the United States, is unreasonably risky. *See* 3ER479 (common technology), 545-47 (project purposes do not mention expansion), 578 (frequency of service).

The FTA claims that Appellants' Light Rail claims have been waived, citing *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008). In that case, the plaintiffs failed to raise a claim in their complaint, the district court denied leave to amend, and plaintiffs failed to appeal that ruling. *Navajo Nation*, 535 F.3d at 1079-80. Here, on the other hand, the Complaint properly raised NEPA claims with respect to Light Rail. *See* FAC at ¶¶ 80, 85 (1SER122-23, 130-32). The claims were not waived.

B. The City And The FTA Violated NEPA By Defining The Project's Purpose And Need So Narrowly As To Preclude Consideration Of Alternatives

In defending the narrow range of alternatives evaluated in the EIS, Appellees contend that the City's preferred elevated heavy rail line was the only option capable of meeting their Purpose and Need for action. For all of the reasons set forth above, Appellants strongly disagree.

But ***if*** it is true that the City's preferred alternative is the only option capable of meeting the Purpose and Need for action, the EIS violates NEPA by defining Purpose and Need so narrowly as to preclude consideration of a reasonable range of alternatives. *See Nat'l Parks and Conservation Ass'n v. U.S. Dep't of Interior ("NPCA")*, 606 F.3d 1058, 1070 (9th Cir. 2010) *cert denied* 130 S.Ct. 1783 (2011); *Davis v. Mineta*, 302 F.3d 1104, 1109 (10th Cir. 2002); *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997).

Appellees attempt to demonstrate that each of the seven subsections of the EIS's Purpose and Need Statement is consistent with federal transportation policy. *See* Fed. at 16-18; City at 29-31; Int. at 23-26. But in trying to justify the Statement of Purpose and Need on a subsection-by-subsection basis, Appellees have missed the forest for the trees: NEPA does not simply require that the subsections of a Statement of Purpose and Need

be ***individually*** justifiable; it also requires that the full Purpose and Need Statement, ***taken as a whole***, be broad enough to permit consideration of reasonable alternatives. *NPCA*, 606 F.3d at 1070. Appellees do not (and cannot) explain how the Statement of Purpose and Need, taken as a whole, permitted detailed evaluation of anything other than the City's "preferred" alternative.

Instead, Appellees suggest that the EIS's Purpose and Need Statement should be upheld as consistent with SAFETEA-LU. FTA at 17-18; City at 30-31; Int. at 23-24. But, as noted above, Congress has explicitly declared that SAFETEA-LU does not supersede, amend, or modify NEPA. 23 U.S.C. § 139(k). And the FTA's own guidance explicitly states that "SAFETEA-LU does not substantively change the concept of purpose and need" established in CEQ's NEPA regulations. 2FER528-50. Thus, Appellees' (purported) compliance with SAFETEA-LU does not excuse them from defining Purpose and Need broadly enough to satisfy NEPA. 23 U.S.C. § 139(k); 2FER528-50.

The FTA cites *City of Carmel-by-the-Sea v. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997) for the proposition that the EIS's Statement of Purpose and Need should be upheld as a reasonable "level of service." FTA at 14-15. *City of Carmel-by-the-Sea* rejected a fact-specific claim

challenging a Purpose and Need Statement's reference to "Level of Service C." *City of Carmel-by-the-Sea*, 123 F.3d at 1155-57. This case, on the other hand, does not involve a challenge to the reasonableness of an individual project objective or service level. The issue presented here is whether the EIS's Statement of Purpose and Need, a whole, is broad enough to permit consideration of a reasonable range of alternatives. And, with that in mind, it is worth noting that Appellees' EIS failed to evaluate a single alternative to the City's preferred project, but the EIS upheld in *City of Carmel-by-the-Sea* fully evaluated eight alternatives deemed consistent with project purposes. *Compare* 3 ER 564-97 *with City of Carmel-by-the-Sea*, 123 F.3d at 1157-59.

Intervenors (but not the FTA or the City) attempt to distinguish *NPCA* on the ground that case involved a project proposed by a private developer. Int. at 28-29; *NPCA*, 606 F.3d at 1070. The argument is without merit. The rule articulated and applied in *NPCA* is not limited to private developers; it also applies to public transportation projects like the one at issue here. *See, e.g., City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d at 1157 (public highway);[8] *Davis*, 302 F.3d at 1109 (transportation infrastructure).

[8] As noted above, the portion of *City of Carmel-by-the-Sea* upholding "Level of Service C" is distinguishable. However, the legal rule applied in both *Carmel-by-the-Sea* and *NPCA* — namely, that an EIS cannot limit

Intervenors also argue that the Purpose and Need Statement in the EIS must have been broad enough to permit consideration of alternatives because numerous alternatives were considered in the (earlier) AA. Int. at 26-29. The argument makes little sense. The AA alternatives to which Intervenors refer were eliminated from consideration for (allegedly) failing to satisfy Purpose and Need. 3ER562. Rather than demonstrating the breadth of the EIS's Purpose and Need Statement, the fate of the AA alternatives confirms that the Statement was too narrow.

Finally, it is worth noting the irreconcilable conflict between Appellees' position on NEPA alternatives and Appellees' position on Purpose and Need. In the context of alternatives, Appellees argue that the only option that can meet the EIS's Purpose and Need Statement is the City's preferred elevated heavy rail system. But in the context of Purpose and Need, Appellees argue that the EIS's Statement of Purpose and Need was broad enough to allow evaluation of a range of reasonable options. They cannot have it both ways. *See NPCA*, 606 F.3d at 1070; *Davis*, 302 F.3d at 1109.

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consideration of alternatives by defining Purpose and Need in unreasonably narrow terms — applies here.

IV. THE FTA VIOLATED SECTION 4(F)

Section 4(f) imposes a substantive mandate prohibiting federal approval of transportation projects that use historic properties unless there is "no prudent and feasible alternative" to such use and "all possible planning to minimize harm" has been completed. 49 U.S.C. § 303(c). The Supreme Court has made it clear that this mandate prioritizes preservation interests over concerns about cost, convenience, and community disruption. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 (1971). Federal agencies must fully comply with Section 4(f) ***before*** approving transportation projects. *N. Idaho*, 545 F.3d at 1158-59.

Here, the FTA violated two fundamental requirements of Section 4(f): (1) it approved the Project's use of the Chinatown Historic District and the Dillingham Transportation Building despite the existence of feasible and prudent alternatives (part IV.A) and (2) it approved the Project without fully identifying and evaluating potential use of Native Hawaiian burials (part IV.B).

A. The FTA Violated Section 4(f) By Failing To Avoid The Use Of Historic Properties

It is undisputed that the Project will use Chinatown and the Dillingham Building, both of which are historic properties protected by

Section 4(f). The only question is whether there was any "prudent" alternative to such use.[9]

In answering that question, the FTA was required to apply the "substantially outweighs" standard set forth in the 2008 Section 4(f) regulations (part IV.A.1). As described below, the agency failed to do so with respect to Managed Lanes (part IV.A.2) and BRT (part IV.A.3).

1. The FTA Was Required To Apply The "Substantially Outweighs" Standard Set Forth In The 2008 Section 4(f) Regulations

Any discussion of prudence must begin with *Overton Park*, the only Supreme Court case addressing Section 4(f).[10] There, the Court declared that "only the most unusual situations" should be exempted from Section 4(f)'s preservation mandate, and, for that reason, alternatives to the use of historic resources are not imprudent unless they present "truly unusual factors" or "unique problems." *Overton Park*, 401 U.S. at 411, 413.

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[9] For purposes of Section 4(f), the concept of feasibility is limited to matters of engineering judgment and is not at issue here. 23 C.F.R. § 774.17.

[10] The City's total failure to cite — let alone analyze — *Overton Park* is so remarkable that it brings to mind the curious incident of the dog in the night:

Gregory: "Is there any other point to which you would wish to draw my attention?"
Sherlock Holmes: "To the curious incident of the dog in the night-time."
Gregory: "The dog did nothing in the night-time."
Sherlock Holmes: "That was the curious incident."

Arthur Cohan Doyle, *The Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES, 347 (1960).

To avoid inconsistencies in the application of *Overton Park*, Congress later directed the preparation of regulations defining "the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives to the use of Section 4(f) property." *See* P.L. 109-59, 119 Stat. 1876-77 (Congressional direction).

The resulting regulations took effect in April, 2008 — more than two years before the Project was approved — and, by their own terms, supersede inconsistent provisions of previously-issued regulations and guidance. 73 Fed. Reg. 13,368, 13,374. None of the Appellees disputes that the FTA was required to apply the 2008 regulations to the Project.

The 2008 regulations establish a three-part definition of feasibility and prudence. *See* 23 C.F.R. § 774.17. Part (1) of the definition specifies that a feasible and prudent alternative is one that "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." *Id.*[11] Part (3) of the definition provides that the "severe problems" referenced in Part (1) include situations where "[the alternative] compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need." *Id.*

[11] Part (2) of the definition concerns feasibility, and is not at issue.

The Federal Register statement accompanying the final 2008 regulations (the "2008 Preamble") clearly explains that the 2008 regulatory definition of prudence "requires the [agency] to take into consideration the importance of protecting the Section 4(f) property." 73 Fed. Reg. 13,391. The Preamble further specifies that such consideration must "begin with a thumb on the scale on the side of avoiding the Section 4(f) property." 73 Fed. Reg. 13,391-92.

The FTA nonetheless asserts that the 2008 regulations "nowhere require" agencies to weigh an alternative's drawbacks against the importance of avoiding use of a 4(f) resource. FTA at 41. It also represents that "the regulations simply explain that '[a]n alternative is not prudent if: (i) [i]t compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need." *Id*. Both statements are flat-out wrong. Part (1) of the 2008 regulatory definition plainly states that an alternative is "feasible and prudent" unless it causes "severe problems of a magnitude that ***substantially outweighs the importance of protecting the Section 4(f) property.***" 23 C.F.R. § 774.17 (emphasis

added).[12] And the 2008 Preamble clearly states that the "substantially outweighs" test is required. 73 Fed. Reg. 13,391-92.

Appellees cite several pre-2008 cases for the proposition that alternatives failing to meet Purpose and Need are imprudent even if they do not present "unique problems" or "truly unusual factors." *See* FTA at 38-40; City at 50-51; Int. at 39 n.16. But the cited authority predates the 2008 regulatory definition of imprudence and therefore does not control here. Indeed, this appears to be the first occasion for an appellate court to apply the 2008 definition.[13]

FTA argues that its interpretation of the 2008 regulations is entitled to deference. FTA at 43-44. But, as explained above, that interpretation is contrary to the plain language of 23 C.F.R. § 774.17 and the Preamble. Moreover, it appears to have been presented for the specific purpose of bolstering Appellees' litigation position. Therefore, no deference is due.

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[12] Also false is the FTA's claim that the 2008 Rulemaking Statement "confirms" that agencies need not apply the "substantially outweighs" standard to Purpose and Need. FTA at 42. The portion of the Rulemaking Statement cited by the FTA explains why inconsistency with Purpose and Need is listed in part (3) of the 2008 definition of imprudence; it does not exempt Purpose and Need from the "substantially outweighs" test required in Part (1) of that definition. *See* 73 Fed. Reg. 13,393.

[13] *Citizens for Smart Growth v. Sec'y of the Dep't of Transp.*, 669 F.3d 1203 (11th Cir. 2012) was decided in 2012, but concerned a project approved two years prior to the 2008 regulations. *Id*. at 1209.

See, e.g., *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (plain language of regulation); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002) (contemporaneous rulemaking statement); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (no deference to interpretation offered strictly for litigation purposes).

2. The FTA Arbitrarily And Capriciously Concluded That Managed Lanes Are Imprudent

Appellants' Opening Brief explained that Managed Lanes would avoid using Chinatown and the Dillingham Building, but were not addressed in the FTA's Section 4(f) Evaluation; instead, they were rejected as imprudent during the AA for (allegedly) failing to meet the Project's Purpose and Need. App. at 40-41.

Appellants also explained that there are four fundamental problems with the FTA's rejection of Managed Lanes on the basis of the AA:

(1) The AA was prepared in connection with the City's selection of a "locally-preferred alternative"; it did not involve any Section 4(f) analysis or decisionmaking. App. at 41-42.

(2) The timing of the AA process (2005-2006), the Section 4(f) regulations (2008), and the FTA's Section 4(f) evaluation (2009-2010) were such that the AA could not have applied the regulatory definition of

imprudence (with its requirement to determine whether Managed Lanes' (alleged) inconsistencies with Purpose and Need substantially outweigh the importance of avoiding the Project's use of Chinatown and the Dillingham Building). App. at 42-44.

(3) The AA's analysis of Managed Lanes was flawed, and the FTA and the City erred in failing to follow through on the recommendations of the Task Force. App. at 42.

(4) A November 4, 2009 letter from honolulutraffic.com to the FTA ("2009 Letter"), unrebutted in the record, provided the agency with data demonstrating that Managed Lanes would be prudent. App. at 42-43, 45.

Appellees offer little in the way of specific counter-argument. FTA at 44-47; City at 49-51. The FTA makes a general reference to "extensive Section 4(f) analysis" in Chapter 5 of the EIS. FTA at 44. But Chapter 5 of the EIS does not evaluate Managed Lanes. 4ER913-986 (entire chapter), 951-960 (discussion of Chinatown and Dillingham). Instead, it states that alternatives to elevated heavy rail were eliminated from consideration during the AA process. 4ER917-18. As explained above, that approach violated Section 4(f).

Appellees submit laundry lists of alleged problems with Managed Lanes. Fed. at 45-46; City at 50; Int. at 32-35. But lists of allegations

cannot substitute for actual Section 4(f) analysis. *See Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976) (distinguishing between "some discussion of advantages and disadvantages" and Section 4(f) analysis). Appellees fail to cite any record evidence that the FTA applied the 2008 regulatory definition of imprudence to the MLA. FTA at 44-51; City at 50-51; Int. at 29-40. Indeed, given the timing of the AA (2005-2006), the regulations (2008), and the Section 4(f) evaluation of Chinatown and the Dillingham Building (2009-2010), there is no way the agency could have done so.[14]

The FTA seeks to minimize the importance of the 2009 Letter (a topic completely ignored by the City) by suggesting that the data and information presented therein was specifically addressed in the EIS.[15] FTA at 46-47. In support of that contention, it refers to 2SER191 and 2SER249. *Id*. Neither supports the FTA's position: 2SER191 is a letter ***from*** honolulutraffic.com ***to*** the FTA; 2SER249 fails to mention the data at all, referring instead to the AA process. The FTA never addressed or rebutted the information in the

[14] Appellees' inaccurately suggest that the FTA merely neglected to make formal findings. FTA at 49-50; City at 50. Not so. The agency failed to undertake the ***analysis*** required by the 2008 regulations.

[15] Contrary to the FTA's suggestion (FTA at 46), the Letter explicitly addressed transit speeds, congestion reduction, transit ridership, and the possibility of door-to-door service for those dependent on transit. 5ER1125-27.

2009 Letter, rendering its approval of the Project arbitrary and capricious. *Butte County v. Hogen*, 613 F.3d 190, 195 (D.C. Cir. 2010); *see also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167-68 (9th Cir. 2003) (arbitrary and capricious failure to address reasonable comments).

3. The FTA Arbitrarily And Capriciously Failed To Consider BRT

Appellants' Opening Brief explained that the FTA arbitrarily and capriciously failed to consider BRT:

(1) In a prior EIS (the "BRT EIS"),[16] the FTA and the City endorsed a BRT system serving precisely the same transportation corridor where the Project is now scheduled to be built. 11ER2920-46, 3010-32, 3331.

(2) The BRT EIS explicitly concluded that BRT would effectively reduce congestion, facilitate transit-oriented development, provide an alternative to private automobile travel, would substantially improve mobility for minority and low-income populations, and would not use any historic properties protected by Section 4(f). 11ER2927-30, 2939; 12ER3230-36, 3326, 3331.

[16] Two virtually-identical copies of the BRT EIS appear in the record. The copy dated 2002 was used by the City to comply with Hawaii state law and appears at 11ER2893-13ER3338. The copy dated 2003 was used by the City and the FTA to comply with NEPA and Section 4(f) and appears at 1FER1-2FER527.

(3) The City made a "political decision" to abandon BRT in 2005, but insisted that the analysis in the BRT EIS remained valid. 11ER2891.

(4) The BRT system endorsed in the BRT EIS was not considered in the AA (2005-2006), the EIS (2007-2010), or the FTA's Section 4(f) evaluation (2009-2010). 11ER9584-89; 9ER9444, 9462-72.

None of the Appellees disputes any of these points.

Instead, they suggest that the FTA complied with Section 4(f) by evaluating a different alternative, referred to as Transportation System Management (or "TSM"). FTA at 47-48; City at 51-52. But, as explained more fully in Appellants' Opening Brief, TSM and BRT are simply not the same. App. at 46. Although both alternatives involve buses (rather than trains) they are very different in other respects. Most importantly, TSM involved "optimizing" existing bus routes "without building…a system of dedicated bus lanes," whereas BRT included a new network of exclusive bus lanes and bus stations. *Compare*, *e.g.*, 9 ER 2480 *with* 11 ER 2920, 3012.

The City and the FTA also suggest that neither TSM nor BRT could provide timely and effective transit service because they would operate in mixed (*i.e.*, buses and cars) traffic conditions. FTA at 47-48; City at 52-53. In doing so, they ignore the analysis in their own BRT EIS, which concluded that BRT would "offer a fast, efficient mode of travel through the congestion

for those choosing to travel by transit, because transit vehicles would use [] un-congested exclusive and semi-exclusive transit lanes." 11ER2927-30. Appellees' unexplained and unjustified change of position was arbitrary and capricious. *See, e.g.*, *Humane Soc'y v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (failure to address conclusions of previous NEPA document); *Native Ecosystems Council*, 418 F.3d at 963-64 (unexplained change in agency position).[17]

Moreover, even if TSM and BRT were the same, the FTA violated Section 4(f). As Appellees admit, TSM was eliminated from consideration during the AA. FTA at 47; City at 51. For all of the reasons set forth in parts IV.A.1 and IV.A.2, that decision could not have been made on the basis of the 2008 regulatory definition of imprudence.

B. The FTA Violated Section 4(f) By Failing Fully To Identify And Evaluate Native Hawaiian Burials

Five straightforward, undisputed points demonstrate that the FTA violated Section 4(f) by approving the Project before fully identifying and evaluating Native Hawaiian burials:

[17] The City seeks to minimize the importance of BRT's exclusive (express buses only) and semi-exclusive (express buses and local buses) transit lanes by referring to them as "a fraction" of the overall transit system. City at 52. The City fails to mention that the relevant "fraction" is more than two-thirds. 11ER2920, 3012; *see also* 1FER134-36.

(1) The Section 4(f) regulations and Circuit precedent require that historic resources be identified and their potential use evaluated (and avoided) prior to project approval. 23 C.F.R. §§ 774.3, 774.9; *N. Idaho*, 545 F.3d at 1158-59.

(2) In 2008, the City prepared an archaeological report that contained a "provisional" literature review, but concluded that more detailed Archaeological Inventory Statements ("AISs") were necessary to fully identify and evaluate the Project's potential use of burials. 8ER2181; 9ER2197-2211.

(3) The City and the FTA approved the Project without completing AISs on three of the Project's four segments, including segments identified by the City as likely to contain burials. 5ER1107, 8ER2061, 9ER2195.

(4) The FTA and the City based their decision to defer completion of AISs on 36 C.F.R. § 800.4. *See* 2ER302.

(5) Circuit precedent provides that 36 C.F.R. § 800.4 does not authorize agencies to defer Section 4(f) analyses until after project approval. *N. Idaho*, 545 F.3d at 1158-59.

Appellees largely ignore Section 4(f), instead arguing that they complied with regulations implementing Section 106 of the National Historic Preservation Act. FTA at 54-56; City at 55-56; Int. at 46-49. But

this Court has explicitly and unambiguously held that the ***Section 106*** regulations do not authorize agencies to defer their ***Section 4(f)*** analyses until after project approval. *N. Idaho*, 545 F.3d at 1158-59.

Indeed, "an agency is required to complete the §4(f) evaluation for the entire project before issuing its ROD." *N. Idaho*, 545 F.3d at 1159. The FTA and the City briefly and misleadingly suggest that they met this requirement by identifying "historic properties along the entire [Project] corridor."[18] FTA at 57-58; City at 56. While it is true that the FTA identified historic buildings "along the entire corridor," they did not fully identify ***all*** types of historic properties "along the entire corridor," as evidenced by their failure to AISs on Native Hawaiian burials in three of the Project's four segments.[19]

Nor did the City's 2008 archaeological report cover the entire Project route. The report did not involve original fieldwork and therefore was limited in scope to the portions of the Project previously studied by others. 8ER2084-87 (methodology), 2179 (additional burials likely in areas not

[18] Intervenors contend that *N. Idaho* does not apply because it involved a situation where the lead agency made no effort to identify historic resources. Int. at 49-51. Appellants' Opening Brief explained why that contention is inaccurate. *See* App. at 54.

[19] The District Court held that the FTA also failed to identify and evaluate Traditional Cultural Properties prior to project approval. 1 ER 61-63.

previously investigated). Indeed, the 2008 report explicitly states that additional study was needed. 8ER2080, 2088, 218; 9ER2197.

The FTA and the City claim that 23 C.F.R. § 774.9(e) justifies their actions. FTA at 52-53; City at 56 n.15. But that regulation was not the basis for their decision provide a basis for upholding agency action. *See Motor Vehicle Mfrs. Ass'n Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, 23 C.F.R. § 774.9(e) simply provides that Section 4(f) may apply to historic resources accidentally discovered during construction. It does not permit agencies to ***intentionally*** defer Section 4(f) analyses until construction is under way.[20] If agencies were allowed to do so, they could sidestep Section 4(f)'s substantive mandate at will, subverting Congress' clear intent to prioritize preservation interests over other concerns. 49 U.S.C. § 303(a); *Overton Park*, 401 U.S. at 412 (preservation given "paramount" importance).

The FTA argues that its chosen method of compliance is entitled to deference. It is mistaken. The FTA's decision to approve the Project before

[20] Subsection (a) of § 774.9 clearly requires that agencies undertake their identification and evaluation of historic resources prior to project approval. Moreover, the requirements imposed by § 774.9(e) are not the same as (and tcannot substitute for) the substantive mandate of Section 4(f). *Compare* 23 C.F.R. § 774.9(e) (expedited process accounting for level of investment) *with* 49 U.S.C. § 303(c).

fully identifying and evaluating Native Hawaiian burials was inconsistent with the plain language of the Section 4(f) regulations and subverts Congressional intent. *See* 23 C.F.R. §§ 774.3, 774.9(a), 774.9(b) (regulations); 49 U.S.C. § 303(a) (Congressional intent). Therefore, no deference is due. *Native Ecosystems Council*, 418 F.3d at 960 (contrary to regulations); *M-S-R Pub. Power v. Bonneville Power Admin.*, 293 F.3d 833, 845 (9th Cir. 2002) (subvert Congressional intent).

The City and the Intervenors suggest that the issue of Native Hawaiian burials is moot because all AISs are now complete. While the AISs are complete, their adequacy has yet to be determined. Moreover, even if the issue were moot, the most appropriate resolution would be to vacate the relevant portion of the District Court's decision, not to affirm it. *See, e.g., Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878-80 (9th Cir. 2006). That is particularly true in this case, where (1) the District Court's decision regarding burials is inconsistent with clear Circuit precedent and (2) the National Trust, chartered by Congress to help develop the rule of law in historic preservation cases, has concluded that Appellees violated Section 4(f). *N. Idaho*, 545 F.3d at 1158-59; Amicus at 1-2, 22-27.

Finally, we note that the City and the FTA have carefully worded their arguments so as to imply a difference between "known" and "unknown"

burials. Neither Section 4(f) nor its implementing regulations recognizes such a distinction. 49 U.S.C. § 303(c); 23 C.F.R. part 774. After all, the purpose of completing a Section 4(f) evaluation is to ***learn*** whether historic resources will be affected.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2002, the body of the foregoing brief contains 8,254 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 8,400 words permitted by the Court's July 2, 2013 Order (Ninth Cir. Dkt. 61). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

By /s/ Nicholas C. Yost

Dated: July 8, 2013

DENTONS US LLP

By /s/ Nicholas C. Yost
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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFFS-APPELLANTS' REPLY BRIEF**
2. **PLAINTIFFS-APPELLANTS' FURTHER EXCERPTS OF RECORD VOLUMES 1-2**

was served on all interested parties electronically through CM/ECF

DATED: July 8, 2013

/s/Nicholas C. Yost
NICHOLAS C. YOST