IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN F. CAYETANO; WALTER HEEN; HAWAII'S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAII ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI, Plaintiffs, vs. FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; and WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu Department of Transportation, Defendants.	Civil No. 11-00307 AWT Honolulu, Hawaii August 21, 2012 10:18 a.m. Motions Hearing

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE A. WALLACE TASHIMA
UNITED STATES CIRCUIT JUDGE SITTING BY DESIGNATION

APPEARANCES:

For the Plaintiffs:
MATTHEW G. ADAMS, ESQ.
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, California 94105

MICHAEL JAY GREEN, ESQ.
841 Bishop Street, Suite 2201
Honolulu, Hawaii 96813

For the Defendant:
Federal Transit Administration
HARRY YEE
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

DAVID B. GLAZER, ESQ.
US Department of Justice
Natural Resources Section
301 Howard Street, Suite 1050
San Francisco, California 94105

NANCY-ELLEN ZUSMAN
Assistant Chief Counsel
US Department of Transportation
Federal Transit Administration
200 West Adams Street, Suite 300
Chicago, Illinois 60606

TIMOTHY H. GOODMAN
Senior Trial Attorney
US Department of Transportation
Federal Transit Administration
Office of Litigation
1200 New Jersey Avenue, SE
Washington, DC 20590

For the Defendant:
City and County of Honolulu
ROBERT D. THORNTON, ESQ.
Nossaman LLP
18101 Von Karman Avenue, Suite 1800
Irvine, California 92612

LINDSAY N. McANEELEY, ESQ.
Carlsmith Ball LLP Honolulu
American Savings Bank Tower
1001 Bishop Street, Suite 2200
Honolulu, Hawaii 96813

APPEARANCES CONTINUED:

For the Intervenor Defendants: WILLIAM MEHEULA, ESQ.
Winer Meheula & Devens LLP
707 Richards St. PH1
Honolulu, Hawaii 96813

Court Reporter: Katherine Eismann, CSR, CRR, RDR
United States District Court
300 Ala Moana Boulevard, C-338
Honolulu, Hawaii 96850
(808)541-2062 ke@hid.uscourts.gov

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(Tuesday, August 21, 2012, 10:18 a.m.)

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COURTROOM MANAGER: Calling the case of this is Civil 11-00307 AWT. Honolulutraffic.com, et al., versus Federal Transit Administration, et al. This case has been called for cross-motions for summary judgment.

Counsel, please make your appearances for the record.

THE COURT: Okay.

MR. ADAMS: Good morning, Your Honor. Matthew Adams for the plaintiffs. Mr. Yost just had emergency surgery, so I am pinch hitting today. And with me are Mr. Green and Governor Cayetano.

MR. GREEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. YEE: Good morning, Your Honor. Harry Yee, Assistant United States Attorney. And also representing the Department of Transportation, Federal Transit Administration are David Glazer with the Department of Justice, Nancy-Ellen Zusman, Assistant Chief Counsel, and Timothy Goodman, Senior Trial Counsel.

I have to apologize up front, Your Honor. I have a 10:30 hearing up in Judge Gillmor's court, so I will be leaving as soon as the introductions are over.

THE COURT: That's fine.

MR. YOST: Thank you.

THE COURT: But you've got someone to cover for you, right?

MR. YEE: Yes. Mr. Glazer is going to be arguing for the government today, Your Honor.

THE COURT: Fine.

MR. MEHEULA: Good morning, Your Honor. Bill Meheula for the intervening defendants.

MR. THORNTON: Good morning, Your Honor. Robert Thornton on behalf of the City and County of Honolulu and Defendant Wayne Yoshioka.

MS. McANEELEY: Good morning, Your Honor. Lindsay McAneeley on behalf of the City.

THE COURT: All right. Good morning to you. Be seated, please, counsel.

I am sorry there are no seats. There are a number of people standing, but I guess this is the best we can do.

Now we have a -- the main issue today or the main subject is the motion for cross-motions for summary judgment. Before I get there, there's a preliminary matter I should rule on, because -- I know you may think it irrelevant.

But a day or two ago -- oh, no, more than that. A week ago, who was this? Plaintiffs filed a request for a judicial notice. There's an opposition. I don't particularly want to hear argument.

Does somebody want to -- anybody feels their position

is not adequately stated in the papers on this simple issue?

All right. This is a request for judicial notice by the plaintiffs. They want the Court to take notice of a single fact arising from the August 11 primary election, and that is who received the most votes. There's opposition from the defendant.

I am going to -- I'm going to deny the motion, not because it's a matter in controversy, but because, you know, I just don't think it's relevant as to who got the most votes in the primary. The election still remains to be settled. And besides, you know, who wins the election is not going to be determinative of what happens in court.

My job is not to try to replace what the elective official or the policy makers or the transit officials in Washington have decided. It's just -- the only issues here, as all lawyers know, is only whether or not the federal agency and the City have comported with the law in the actions they have taken. In other words, whether they have acted reasonably, whether they have considered all the alternatives and so forth.

And as to those issues, I just don't think who got the most votes in the primary is relevant at all. So, I deny the motion for the request for judicial notice.

Let me see if there's something else of a preliminary nature. I have a -- I have a filing from the intervenor defendants. That's the Faith Action for Community Equity and

others about taking notice of a -- I think a brief, right? Filed in an action in Idaho. I'm not quite sure what that means, but I guess if -- counsel will get to argue.

Now I sent out a notice to try to structure the argument. You know, there are enough issues here to -- I guess we could be here all day. But I have reviewed the briefs, and I am familiar with them and with the record, at least to a certain extent. You know, the record is quite a voluminous. I don't know how many pages if we had it in hard copy it would be. Certainly hundreds of thousands seems like to me. Thousands of pages. But I am familiar with the issues.

So, I think counsel should, you know, focus their argument on what they think are the crucial issues, and, you know, what they think need to be covered in the time that we have.

Now, I have allocated, I think, 30 minutes to each side, side meaning for defendants and the plaintiffs. And after that, you know, I will give everybody a chance to go around, and if they have some differing positions or, you know, something else they want to raise.

But we are not going to cover everything today, but I think, you know, just I think what counsel consider to be the primary issues. So, there are cross-motions for summary judgment. In that situation, I don't know who should go first. But because overall the plaintiffs carry the burden, I am going

to hear from plaintiffs first. Right?

So I will give the plaintiffs 30 minutes, and then I will give the defendants 30 minutes, and then we will see what happens on rebuttal. All right. Who is that? Mr. Thornton or --

MR. THORNTON: No, Your Honor. Mr. Adams, I believe, will go first.

THE COURT: Right. Mr. Adams.

MR. ADAMS: It is us, Your Honor. Would you like us --

THE COURT: Yes, I think so, so everybody can hear you.

MR. ADAMS: Your Honor, Matthew Adams again for the plaintiffs. I will go right into the two issues that the Court identified in yesterday's order starting with the NEPA issue, and then moving on to the Section 4(f) tunnels issue, and then I am hoping, time permitting, to then briefly touch on two other issues that we think are key in this case, two other 4(f) alternatives, the managed lanes alternative and the special AV bus route and transit alternative, and then hopefully saving some time at the end for Native Hawaiian burials and TCPs.

The Court asked for oral argument on the issue of NEPA and alternatives. And, of course, alternatives are at the heart of NEPA. Under NEPA the purposes of a project must be framed broadly enough to allow consideration of alternatives.

And then of course in an environmental impact statement or EIS, federal agencies have to rigorously pursue and objectively evaluate all reasonable alternatives, and that language comes straight from the CEQ NEPA regulations.

THE COURT: Well, of course the issue here is some of the alternatives were eliminated in what they call the -- what did they call it? The alternative analysis or something like that.

MR. ADAMS: That's right, Your Honor.

THE COURT: That was early on, so they never got to the point of being considered under NEPA. So the question is, is that -- to me, at least, one of the questions is is that a way of proceeding? You know, is that -- does that comport with the law?

MR. ADAMS: Your Honor, if I could address that. What defendants did here is they essentially relied on that alternatives analysis or AA as they call it to rule out all transit options but one on the ground that nothing else met the purpose and need of the project.

And that means we have got one of two problems. Either the purpose and need was defined too narrowly to actually permit further consideration of alternatives or some of those alternatives were improperly determined to be inconsistent with the purpose and need. One way or the other, defendants have violated NEPA, and that's sort of the core of

our case on this issue.

Defendants have tried to justify the situation by relying on a federal law called SAFETEA-LU, and I think their position is that SAFETEA-LU fundamentally changes NEPA such that it allows all alternatives except for their preferred alternative to be eliminated before the EIS process starts.

And if Congress had wanted to allow that in SAFETEA-LU, it certainly could have. But instead what Congress said was that nothing in SAFETEA-LU, quote, unquote, shall be construed as superseding, amending, or modifying NEPA or any other federal environmental statute. And Your Honor can find that at 23 U.S.C. 139(k). So, in other words, the standards for evaluating the sufficiency of an EIS remain the same whether an AA is involved or not.

And then of course we get into the question of deference. Defendants claim that they are entitled to deference on the question of how SAFETEA-LU and NEPA fit together. But of course as I just mentioned, this is an issue that Congress has spoken directly to, and so there's no deference here. You don't even get into the question of whether defendants have a reasonable position.

Your Honor, there are a number of more specific alternatives arguments raised in our papers. I'd like to just highlight one of them, and that is the issue of bus rapid transit or BRT. And the issue here, Your Honor, this is an

alternative that would involve adding a network of express buses and running in their own lanes instead of doing an elevated heavy rail project.

And the issue is that in 2003, defendants went through an entire EIS and Section 4(f) evaluation the result of which was a determination that this BRT system was the best transit option for Honolulu. So, not just a reasonable option but the best option.

And it's important to note that that -- that study, that analysis was done by the exact same lead agencies that are sitting here before you today, the FTA and the City. It was done in the same transportation corridor, it was done by the same environmental consultants, and it even had a very similar statement of purpose and need.

That BRT project was never built, but it remained an option available to the plaintiffs when they were undertaking NEPA this time around. And Your Honor, we would submit that the option that was deemed best in 2003 was certainly reasonable enough to consider in the EIS that was produced a couple years later.

There's several other sort of narrower NEPA issues that are presented in our papers. Those have been fully briefed. The issues of the managed lanes alternative, the panel of experts, and the City Council approval. And unless Your Honor has questions on those, I will pass on to the second

issue that --

THE COURT: What do you mean by when you say City Council approval? You mean certain changes were subject to City Council approval? Is that what you mean?

MR. ADAMS: Your Honor, there's some evidence in the record that judges sitting in this Court approached the City about finding a different route from the one that was selected, and that they were told that those alternatives were unlikely to be considered because they might involve City Council approval.

Well, NEPA explicitly requires that agencies consider a broad range of alternatives including alternatives that are outside the jurisdiction of the lead agency.

THE COURT: But the letter -- or the response, I think, had an alternate basis. Not only that City Council approval was required but that, you know, there was -- I think according to the letter -- I don't remember the language -- but something like, you know, besides there aren't any viable alternatives. Something like that, right? Didn't the letter say that?

MR. ADAMS: It did say something about that, Your Honor, but I think as we read the letter the thrust of it is, Look, we have already decided this. We are not going to go back and look at it again. You know, it's going to require us to go back on the decisions that we made as part of that

alternatives analysis or AA that we were talking about.

THE COURT: In other words, what I am getting at is I don't think the fact that any change would be subject to City Council approval is -- is that important a factor, because as you say the City's position was, you know, there aren't any changes we can make anyway. Something like that, right?

MR. ADAMS: Well, I think it was the City's obligation to respond to that letter and look to see if changes can be made. And again the problem is that all those decisions were made outside of the NEPA process before it began.

THE COURT: Right, right. I understand your position on that.

MR. ADAMS: Thank you, Your Honor. Moving on to the second issue raised in yesterday's order, which is the Section 4(f) tunnels issue, and I think in particular the issue there is whether defendants gave sufficient consideration to the prudence and feasibility of an alternative that involves a tunnel beneath Beretania Street. And the short answer to that, Your Honor, is no.

The FTA's Section 4(f) evaluation, which is part of their final EIS, says that a tunnel would cost $650 million measured in 2006 dollars, and for that reason it was imprudent. That was the finding. And there are several problems with that.

First of all, the 650 million-dollar figure is not

the cost of the Beretania Street tunnel. That referred to the King Street tunnel which is something different. And there is no specific cost estimate for Beretania Street tunnel in the 4(f) evaluation.

THE COURT: Well, as you read the -- read the report, the statement, does it assume that the Beretania -- Beretania Street tunnel would be just as expensive as the King Street alternative?

MR. ADAMS: It does not, Your Honor. It doesn't address it with any sort of --

THE COURT: It's not addressed at all.

MR. ADAMS: No.

THE COURT: As far as you can tell.

MR. ADAMS: Right. The only thing we know is based on the diagrams in the Section 4(f) evaluation which shows that the Beretania Street tunnel is shorter. And that's all we know from the Section 4(f) evaluation.

I am not a tunnels expert, but a, you know, shorter tunnel seems like it would be cheaper. There is evidence in the administrative record, though, Your Honor, that does sort of cast a little bit of light on what a Beretania Street tunnel might cost, and that is the 2007 tunnels memorandum. I think the parties have been referring to it. You can find that at administrative record 65-336. That's the particular page.

The 2007 tunnels memo presents some -- some estimates

that show costs that are much lower than 650 million. They range from 77 million to 130 million for a Beretania Street tunnel, and that range sort of depends on the specific tunnel route, and whether you include contractor markups and that sort of thing. But again all of them are far less than 650 million.

In their papers, the defendants have tried to explain this discrepancy by noting that the 2007 estimates are really focused on construction of the tunnel itself. And they don't account for things like, let's see, the tracks, and the design costs, and the insurance, and the contingencies and things like that.

But a lot of those things are going to be needed by the project as well, so their explanation doesn't tell us what we really want to know here which is what's the difference between the project and the project with the Beretania Street tunnel. And, you know, the only thing we have to go on is that 77 to 130 million estimate.

There's a third problem here though, too. And that is that we are just working with the raw numbers. There is no evaluation of the tunnel costs in terms of the total overall cost of the project. That was the approach that was endorsed by the Ninth Circuit in the *Stop H-3 versus Dole* case, which is at 740 F2nd at 1452. 740 F2nd at 1452.

And that approach really does make some sense, because all transportation projects are very expensive. So if

you just work with the raw numbers, no alternative would ever be prudent.

Here, if you apply those 2007 tunnels memo numbers with all the appropriate caveats, Your Honor, you come out with a figure that says that the Beretania Street tunnel would be between 3 and 4 percent of the total project costs. And while I realize that all projects are different and all project costs are different, I think it's worth noting that in the *Stop H-3* case the Ninth Circuit found that 11 percent was not imprudent.

There's a fourth problem here as well, Your Honor, and that concerns the absence of a substantially outweigh test in the Section 4(f) evaluation for these tunnels. Let me explain that for a moment.

The 2008 4(f) regulations set out six considerations that can support a finding of imprudence, but only if they substantially outweigh the value of the 4(f) resources that would be used. So the list of six considerations does include costs -- excuse me -- cost increases of a, quote, unquote extraordinary magnitude.

But again you can't just say, Hey, it's too expensive and move on. You have to weigh the added expense against the preservation values. And Your Honor, as we noted in our brief, the Department of Transportation in enacting this regulation issued some Federal Register notice language that explained this a little bit, and it says that the weighing analysis has

to, quote, unquote begin with a thumb on the scale in favor of preservation. And that can be found at 73 Federal Register at 13-391.

Here I think there's no evidence in the Section 4(f) evaluation that defendants used either the thumb or the scale. And for that reason, too, Your Honor, the tunnels evaluation was arbitrary and capricious.

If I may, Your Honor, I would like to just pass on to two other alternatives also under Section 4(f) before we get to burials. The first being the managed lanes alternative or MLA. The second being the bus rapid transit alternative I mentioned earlier. I am going to sort of treat them together, because they are similar for purposes of this argument in many respects.

Both of them would involve -- excuse me -- avoid the use of the Chinatown Historic District and also the Dillingham Transportation Building. Both of them were eliminated from consideration during this AA phase. And defendants think that both of them are imprudent because they allegedly here are inconsistent with project purposes. And there are a couple of different problems with that approach.

The first problem I think is just a question of timing. The timing is such that defendants couldn't possibly have applied the substantially outweighs test. Let me explain that for just a moment. So the AA recall was done in

2005-2006. That's two years before the regulations with the substantially outweigh test and three years before the defendants ever determined which properties the project would, quote, unquote use.

In other words, what they are relying on is the 2005-2006 document that was supposed to be weighing imprudence against uses that weren't determined until three years later. And Your Honor, we think there is just no way of reconciling that time line.

The second problem, and maybe this isn't all that surprising in light of what I just said, is that the AA doesn't actually contain any Section 4(f) analysis. There is nothing on use. There is nothing on prudence. There is nothing on feasibility. There is nothing on weighing. There is just nothing.

Defendants have characterized this as a sort of magic-words-type of argument and sought to dismiss it as such. But just to be really clear about this, our contention is that the analysis is missing, not that they failed to use certain magic words or anything like that. The bottom line here is that the AA just isn't a 4(f) analysis.

Then there are two issues which are unique to the respective alternatives. With respect to the MLA there is the issue of the 2009 Slater letter. You know, Your Honor has noted how voluminous this record is. Everything under the sun

seems to be have been documented. And we have looked from end to end of this thing, and the Slater letter is the only document to so much as mention the 2008 regulation and the MLA in the same place.

And in the briefing we explained that that letter from one of the plaintiffs explains why the MLA is in fact prudent. There is no evidence in the record of any consideration of that letter or any response by the agency. And so, Your Honor, on this record, where the agency didn't and really couldn't have applied the right regulation, plaintiffs did, and then the agency didn't respond, it seems like the only conclusion is that this was arbitrary and capricious.

In the case of the BRT, Your Honor -- and this is the last point I will make about alternatives under Section 4(f). There is the additional issue of that 2003 EIS that I mentioned. And here the issue is similar but not exactly the same to the one I mentioned under NEPA.

The bottom line being, you know, how could the alternative that was deemed best in 2003 by these same people, working with the same environmental consultants, the same transportation corridor not even be prudent enough to consider just a couple years later, and that's the core of it.

Your Honor, I'd like to move on to burials briefly before concluding. There's been extensive briefing on this. In fact the lion's share of the briefing in this case seems to

have been about Native Hawaiian burials and TCPs. But I would like to just really focus in on three points.

The first point is the *North Idaho* case is really what controls here. Defendants have tried to distinguish it by characterizing *North Idaho* as the kind of case where defendant -- where the Department of Transportation agency didn't do any kind of 4(f) analysis on three of the four project phases, and that explains why the Ninth Circuit ruled the way it did.

But if Your Honor will look at the district court case in *North Idaho*, which we submitted a week ago, it shows that the defendants are just wrong about that.

The defendants in *North Idaho*, they did this preliminary overview and promised to have more detailed studies later. They produced a map showing where resources were likely to be located. They did a detailed study for one of the project phases but not for the rest.

And that's really the exact same approach that the Department of Transportation agencies have taken in this case. The cases are very similar factually, and so the result should be the same.

Your Honor mentioned intervenor's filing at the very beginning here. I reviewed that this morning by a telephone screen, which is not ideal for looking at briefs. And as far as I can tell -- and don't hold me to this. But as far as I

can tell, it doesn't change anything about the analysis I just presented.

What it says is that *North Idaho*, just like our case, is a situation where the Department of Transportation agency started but didn't complete its 4(f) analysis before approving the project.

Second issue on burials, Your Honor, defendants say that none of this matters because they can always rearrange the columns supporting the rail line in order to avoid burials. And I would just note three things on that.

First, the record of decision does not require avoidance. What it requires is that if the burial is found, the City has to prepare some sort of protocol for dealing with the burial, and that the protocol has to include an option for avoidance, but it doesn't require avoidance and that standard is not the same as the Section 4(f) standard.

Second, burials can be quite large. There's evidence that one burial site that's known in the downtown area is approximately 230 feet by 640 feet. That's at AR 37782, 37782. There is other evidence of a burial site that's 150 feet long and that's at 37769. So these aren't things that can just be necessarily avoided by repositioning a column or sliding things 5 feet in one direction or another. We are talking about potentially large resources.

And then the final thing I will say, Your Honor, is

that -- on this topic is the rail line's already adjacent to a number of other Section 4(f) resources. For example, 10 feet away from the edge of Mother Waldron Park. So if you get into this business of moving the line a little bit that way, moving the line a little bit the other way, you are running the risk of causing problems with other resources. And that's why these analyses really have to be done before the project is approved.

And finally, last issue on burials, Your Honor, defendants' justifications for their phasing approach here applied to Native Hawaiian burials I think we have dealt with in our papers, but I would just highlight the fact that none of those really explains their failure to complete their surveys for TCPs which are above ground and so presumably not subject to the same concerns.

THE COURT: Now your position is that the neither the case law or the regulations require that survey to be completed in advance.

MR. ADAMS: We think they both do, Your Honor. So the regulation specifically says that potential uses of 4(f) properties have to be -- have to be identified and evaluated while alternatives are under consideration. And of course alternatives are under consideration before the project is approved but not after.

And then the way that the *North Idaho* case fits in is you may recall that rather than justifying their approach on

the basis of the 4(f) regulations, what defendants have done here is that they have elected to proceed under some National Historic Preservation Act Regulations 36 C.F.R. 800.4. And what *North Idaho* said is quite explicitly 36 C.F.R. 800.4 does not work for Section 4(f). You can't justify phasing under 36 C.F.R. 800.4 and still comply with 4(f). And that's of course the exact thing that -- that defendants have tried to do here.

Your Honor, I know I am running short on time here, but I would just like to close by highlighting one thing that we presented in our briefs.

This is a big project of course, and the beginnings of construction are underway. But federal funding has not been committed yet. The City is aware that it's proceeding at its own risk. The City says that everything that it's been doing can be undone, and that it has the wherewithal to do that. So there is time to enforce the federal environmental laws that are designed to prevent this kind of arbitrary and capricious decision making, and we would respectfully request that the Court do that.

THE COURT: Along that line, let me ask a question now. I remember at one of the earlier hearings probably Mr. Yost said something about, you know, the plaintiffs weren't seeking a preliminary injunction, because you had some kind of assurance from the City about something, right? Do you recall that? Were you here then?

MR. ADAMS: I was here, but, Your Honor, I hesitate to speak for Mr. Yost. But what I remember is that the City has worked with us to explain what its construction schedule is going to be so that we could sort of collaboratively try and move this thing so it didn't require the case to be heard twice. Once on preliminary injunction --

THE COURT: Right.

MR. ADAMS: -- once on the merits. And after some early hiccups where we had some problems with the administrative record and --

THE COURT: Well, the reason I asked that question though, because the statement you just made that well nothing has been done so far that can't be undone.

MR. ADAMS: Yes.

THE COURT: Didn't you say something like that?

MR. ADAMS: That's right, Your Honor. That's what Mr. Thornton's letter to Mr. Yost, I believe, said.

THE COURT: Right.

MR. ADAMS: And that was earlier this summer, and Mr. Thornton shared the construction schedule with us.

THE COURT: All right. Okay.

MR. ADAMS: All right. Your Honor, unless you have further questions, I will be seated.

THE COURT: No, thank you, Mr. Adams.

MR. THORNTON: Good morning, Your Honor. Robert

Thornton again for City and County of Honolulu. Our side has divided up the time, Your Honor, between myself. And I am going to address the first issue identified in the Court's minute order of yesterday, followed by Mr. Glazer to address the second issue, and then finally intervenor's counsel to address the cultural resources issue.

THE COURT: How have you divided up the time?

MR. THORNTON: Well, we don't have -- I mean, we sort of have it 12 and a half, 12 and a half, and five or so, Your Honor, but Mr. Glazer had indicated he was going to cede me a few extra minutes, so we will play it by ear.

THE COURT: So that's kind of a flexible guideline, right?

MR. THORNTON: A flexible guidelines, Your Honor.

THE COURT: Thank you.

MR. THORNTON: But we will try to remain within the Court's suggested limitations.

First of all, as the Court noted, Your Honor, there is a voluminous administrative record here. And just as the plaintiffs did throughout their briefs, they have cited minute portions of this record to mischaracterize what's gone on with the review of this project.

This project has been debated and discussed more than any project in the state's history. Indeed it's been under consideration for decades. Just this last phase was nearly a

six-year environmental process. It's been subject to a robust debate, a robust policy debate, and as the Court noted at the beginning of the hearing today, that's -- the policy issue has been decided. It's not an issue for this Court.

The only issue for this Court is whether the Federal Transit Administration's approval of the project was arbitrary and capricious. And as the Court is well aware, that's a narrow standard of review as the Ninth Circuit has reminded us in the *Seminole Lands Council* decision.

I have a number of slides here, Your Honor, because I want to refer specifically to documents from the administrative record. Not to -- not to characterizations of the administrative record as we just heard from plaintiffs' counsel, but to specific records from the administrative record addressing specifically initially the Beretania alignment alternative. Now, Miss McAneeley will help me.

So, the first slide, Your Honor, and I believe with the technology in the courtroom it will appear on your screens and also the screens available to counsel.

This slide indicates the various alternatives that were evaluated in the course of the alternatives analysis process. The yellow line, Your Honor, there is the so-called Beretania tunnel alternative. Portions of it or tunnel portions of it are above grade on a fixed guide way ending at the University of Hawaii.

Now the next slide, Your Honor, go to the next slide. This shows the evaluation of the activity centers. And again, Your Honor, the administrative record citations just in the interest of time are shown on all of these slides to show where this information has come from in the administrative record.

So this is a slide that shows the major activity centers along those alternatives. The yellow represents the major activity centers serviced by the Beretania alignment. The red lines -- the red bubbles, rather, Your Honor, show the major activity centers that would be serviced by the approved project.

If we go to the third line -- the third slide rather, discussion, major activity centers. Now this is from the environmental impact statement, Your Honor, that discusses the rationale and why it's important to locate the project in a place that was approved by all of these agencies. Because that's where the jobs are in Downtown Honolulu. That's where the areas that are subject to redevelopment and higher density development that's going to be servicing transit needs. And, most importantly, Your Honor, the approved alignment has a terminus at the Ala Moana Center which as noted in the environmental impact statement has 56 million visitors annually, is obviously a major transit hub, a major place where people want to go sort of using transit in the City.

Now if we can go to the next.

THE COURT: Now, just for my information, am I correct that the -- that the Beretania alignment route doesn't go all the way to Ala Moana? Is that right?

MR. THORNTON: It does not. And I don't know whether Miss McAneeley can go back to the very first slide, but if you refer back to that very first slide, Your Honor, you can see that when you start down that alignment, the Beretania alignment, it does not make sense. And it is really not feasible to then go to the Ala Moana Center because of the orientation. And that's why that design, that particular design of that alignment was extended to the University of Hawaii campus.

And that's -- that's one of the key issues in deciding that the Beretania tunnel alternative, among others that I will get into, was -- did not accomplish the purposing of this project.

Now the next slide, Your Honor, again from the documentation in the alternatives analysis, is a discussion of the specific question of whether the Beretania alignment would accomplish purpose and need. And as noted in the highlighted text, the Beretania Street/South King Street alignment would serve substantially fewer transit riders than the other alignment and notes that the Nimitz Highway, which is the approved alignment, would be the best alignment option within Section 5 which is the relevant section here.

Now if we can go to the next slide, Your Honor. This is another discussion again from the documentation in the alternatives analysis. Noting that the stronger TOD potential is along the approved alignment and that the South King Street alignment, which in this context refers to the Beretania alignment of the alternative, is the farthest from major activity centers and in a low-density residential and commercial area in this section of the project corridor.

Now, why is this important, Your Honor? Why is this relevant? And we can't play transit planner. Certainly I am not a transit planner. Mr. Adams is not a transit planner. He's admitted he's not an engineer. We are not the experts. The experts looked at these alignment alternatives and they concluded that the Beretania alignment doesn't work.

Why doesn't it work? Because it violates the most fundamental rule of transportation planning. For transit systems to be effective in getting people out of their cars, the route must go to where people want and need to travel and very close to major activity centers.

It has to be close enough for people to be able to walk to and from the transit station. To bring it close to home, Your Honor, in California, where you and I live, it would be as if you had planned a transit system for San Francisco and not have it serve the Market Street corridor in San Francisco. It wouldn't make any sense. Or to have a transit system in

Downtown Los Angeles, where you and I live, Your Honor, and not have it serve the Civic Center, not have it serve the downtown center office and commercial center of Downtown Los Angeles. It wouldn't make any sense, and that's what the experts here concluded.

Now, I want to walk you through, Your Honor, the analysis, excerpts of the analysis in the alternatives analysis, comparing the effects of the Beretania alignment alternative with the effects of the approved alignment. Because, again, Mr. Adams a few minutes ago said that the record is devoid of any analysis, so let's go through that.

The next slide is the slide doing the relative impacts on cultural practice and resources in the study area. And as you can see, Your Honor, under the Beretania Street/King Street alternative the total number of resources impact is 159 versus 35. The resources that may be affected by construction, 128 under Beretania, 25 under Nimitz Street. You know, a factor of four to five times greater impact from the Beretania alignment.

Next slide, please. This is a slide again from the documentation of the -- from the alternatives analysis. Historic resources in the study area, the Beretania alignment, of potentially eligible resources -- and Your Honor will recall potentially eligible in this context means resources potentially eligible under Section 106 of the National Historic

Preservation Act which means they are potentially subject to Section 4(f) as well. 56 properties under the Beretania alignment, 33 under the approved project.

If we can go to the next slide. Finally a summary, Your Honor, of the comparative impacts of these two alignment options, again Beretania the dark circle indicating highest potential, relative potential for impact on historic resources from the alternative.

Now finally, if that isn't enough, Your Honor, the coup des grace, and Mr. Adams has referred to the cost, and he acknowledges he is not an expert. And as the Court is well aware, even if he was an expert, a disagreement amongst experts does not make an agency decision arbitrary and capricious. But the plaintiffs don't have an expert here. They have lawyers who are attempting to characterize the record.

But this is a summary of the comparative costs, again not of the -- not of the King Street tunnel but of the Beretania tunnel documented in the analysis for the alternatives analysis, that the net additional cost of the Beretania alignment is $650 million in 2006 dollars, escalated, as we indicated in our brief, and documented through -- through the time of construction, $800 million for that alignment option, not even considering the additional -- obvious additional maintenance costs associated with a tunnel.

This is a classic example, Your Honor, of a technical

determination that was made by the relevant agencies. And under Supreme Court precedent of *Marsh versus Oregon Natural Resources* and the Ninth Circuit case of *Lands Council*, the Federal Transit Commission has the ability and the right to rely on its experts. And the fact that others may disagree with that analysis does not make the FTA's determination arbitrary and capricious.

Now we have also argued, Your Honor, that FTA appropriately could also make the determination that Beretania was not a prudent alternative under Section 4(f) because of the relatively small amount of harm -- small amount of use rather under Section 4(f) in the downtown area.

I want to go quickly because of the absence of time. First to the next slide which is -- which is from the Federal Transit Administration's Section 4(f) regulations. I think that's the next one, Lindsay.

This is -- this is from the definition of feasible and prudent alternative under the Federal Transit Administration's regulations, and it provides they decided as a matter of policy, and regulatory policy, that an alternative is not prudent if it compromises the project to a degree that is unreasonable to proceed with the project in light of its stated purpose and need.

And that's -- that's the test that is applied. That is a regulation adopted by the Federal Transit Administration

after notice and comment rule making subject to *Chevron* deference, and that is the basis for rejecting the Beretania alignment alternative as not prudent.

THE COURT: Is there something in the FEIS or somewhere that -- in other words, reaches this conclusion on the basis of some reason that the Beretania option does compromise the project? Does it say that somewhere?

MR. THORNTON: The documentation -- the FTA, in the record of decision, Your Honor, made the finding required by Section 4(f) that there were no feasible and prudent alternatives. And the documentation supporting that finding --

THE COURT: That's just general. That doesn't, you know, tell you anything.

MR. THORNTON: It is -- it is the finding that is required by the statute, Your Honor.

THE COURT: I know, but I mean that's so general that, you know, no one could ever attack that, because they would say, Well, there are no feasible alternatives period. I don't have to give you a reason why I don't think there is.

MR. THORNTON: We are not suggesting that the agency can just make the finding. What we have attempted to --

THE COURT: Is there some rational analysis with respect to the Beretania alignment that reaches that conclusion?

MR. THORNTON: The analysis is reflected in the

documentation that we just went through, Your Honor. And --

THE COURT: That is not analysis. In other words, you have pointed to a lot of bits and pieces of data, but no -- you know, there is nothing in the EIS as far as I could find that pulls that together with respect to the Beretania Street alignment that says, for these reasons, this is not a prudent alternative, is there?

MR. THORNTON: The alternatives analysis, which federal -- the Federal Transit Administration approved and approved the findings of the alternatives analysis, and that was referred to in the environmental impact statement, includes the documentation on why it is that the Beretania alternative does not accomplish the purposes of the project.

THE COURT: Well, it includes the data and the documentation, as you did, and a very nice job, you know, go through the -- go through all the underlying ROD and pull all this out and say for these reasons, it's not a prudent alternative. But the EIS doesn't do it. You can't do it for them.

MR. THORNTON: We can't do it for them, Your Honor, but what we can do and what the Court could do is look at the administrative record and the cases we have cited in our brief. The Court is not limited to the bare finding that the agency makes.

The agency made the finding required by the statute.

But it's appropriate for the Court to look to what's in the administrative record to determine whether there's sufficient evidence in the administrative record to support that statutory finding of the agency.

The agency was not required as a matter of law to make the specific finding regarding Beretania. It was required to make the finding that there were no feasible and prudent alternatives to the use of 4(f) properties.

THE COURT: I am not really talking about findings. What bothered me more is evidence in the record that they actually considered this data that you are pointing to.

MR. THORNTON: Well, the evidence in the record, this analysis, this documentation is included in the background documentation supporting the alternatives analysis. The alternatives analysis in turn, Your Honor, was approved and concurred in by the Federal Transit Administration and was referenced in the environmental impact statement.

And as Your Honor is aware, the environmental impact statements very commonly incorporate other information. Otherwise we would end up with -- we have, you know, a multi-hundred-thousand page record here. We would end up with a multi-hundred-thousand page environmental impact statement.

The CEQ's NEPA regulations say that impact statements should normally -- for a complex project should normally be no more than 300 pages. Well, you couldn't comply with that

regulation if you had to include all the documentation of EIS itself.

We have cited, Your Honor, the Ninth Circuit decision in *Laguna Greenbelt*, which held that it was appropriate for a federal agency, in that case the Federal Highway Administration, to rely on environmental analysis and documentation prepared in that case by a local transportation agency, just as was the case here.

The federal -- but the Federal Transit Administration went beyond that here. They specifically reviewed as we've outlined in detail in our papers. They had a robust debate about alternatives within the Federal Transit Administration. Mr. Glazer will deal with the MLA issue. But there was a robust debate within FTA regarding the alternatives analysis, what alternatives to evaluate, how much to evaluate it, in what depth. Indeed with regard to the managed lane alternative there were two different variations that were evaluated.

So we believe, Your Honor, the record does document that the Federal Transit Administration's bottom line conclusion, that there was not a feasible and prudent alternative, is not arbitrary and capricious.

Now I wanted to quickly go, Your Honor, to the issue of the balancing of the impact, because that's really important here. There are only two uses of the approved project, two uses under Section 4(f). The first is within the Chinatown

Historic District. And what Your Honor has before you now is the outlined of the Chinatown Historic District. As you can see, it actually goes out into the water area as it was mapped, whether that makes any sense or not.

The project, obviously, as we all know is located along Nimitz Highway. The project itself does not use, does not modify, does not use any contributing element of the Chinatown historic resources. None. And as we all know, anybody who has visited Chinatown in Honolulu knows there are numerous noncontributing elements. Modern buildings, et cetera. If we can go to the next. So, that was the one 4(f) use that was found as a result of the process.

The other, the only other 4(f) use had to do with the parcel in which the Dillingham Transportation Building is located, a very lovely building we all acknowledge, Your Honor. But again the project has no impact, no use, does not modify the Dillingham Transportation Building.

Why was there a 4(f) use determination made? Because if Your Honor looks at the yellow crosshatch there, that is the area where stairs and escalators and an elevator will touch down on what is a modern plaza. Indeed, I visited it yesterday, Your Honor, and it's where the trash dumpsters associated with the adjacent facility are located. That was the use determination made.

So under the 4(f) regulations, it was appropriate for

the Federal Transit Administration to consider the relative harm here or the relative use, which is, in our view, minor in comparison to all of the very significant problems that we have identified with regard to the Beretania alternative.

I suspect I have used more than the time that my colleagues have assigned to me, so I would like to ask Mr. Glazer to speak to the NEPA issues, Your Honor.

THE COURT: All right. Thank you, Mr. Thornton.

MR. GLAZER: Good morning, Your Honor. David Glazer for the federal defendants.

As Mr. Thornton said, I'll be addressing the Court's question on the NEPA analysis and whether it adequately addressed the reasonable range of alternatives.

And I think the primary issue here is one of timing. Plaintiffs take issue with the sequencing of the agency's analysis, but in fact the agency proceeded in the manner that Congress directed them to.

Stepping back a moment, NEPA has long provided that agencies shall cooperate -- federal agencies that is -- shall cooperate with state and local planning agencies to the fullest extent possible to reduce duplication. And that principle is reflected in NEPA's regulations at 40 C.F.R. 1506.2(b), as well as in the Ninth Circuit's 1994 decision in the *Laguna Greenbelt* case in which the Court said it's perfectly acceptable under NEPA for a federal FEIS to rely on state planning documents.

It's also reflected in DOT's own NEPA regulations which, under the CEQ regulations, had to have been -- had to be approved by the Council on Economic Environmental Quality before they could become law.

So the issue of deference that plaintiffs raise, that, oh, no deference is afforded to the agency's interpretation of NEPA, well, first the agency's interpreting its own transportation planning regulations. Second, CEQ endorsed that approach. So, it is a perfectly reasonable interpretation of federal law to dovetail state and local planning efforts with the federal EIS analysis.

Further, SAFETEA-LU, a statute that plaintiffs' counsel referenced, specifically directs the federal agencies not to duplicate state and local planning efforts. And as final guidance on this clarification of the planning process, DOT promulgated an appendix to the Part 450 regulations which explained how the state and local planning regulations -- efforts are supposed to dovetail with NEPA analysis.

It specifically says that alternatives that do not meet the purpose and need may be screened out during the planning process. It specifically says that during the planning process, if the agency -- planning agency focuses on a particular mode of transportation, the EIS doesn't need to consider other modes.

This is perfectly in accordance with SAFETEA-LU which

directs -- or rather with SAFETEA-LU and the New Starts Program. New Start says you need to do an alternatives analysis, and that includes coming up with a locally preferred alternative. SAFETEA-LU says that -- that analysis can then be folded into NEPA's analysis and doesn't need to be redone from scratch. So in short the process that the agencies implemented was what it was directed by law to do.

But this isn't a case where the agencies dismissed out of hand alternatives relying only upon their discretion to screen out alternatives that did not look promising without further analysis.

THE COURT: Well, lots of -- lots of alternatives were screen out early, right?

MR. GLAZER: Yes, but after extensive analysis.

THE COURT: Before the EIS process even started.

MR. GLAZER: Right, but after extensive analysis. I mean the alternative screening memo and the alternatives report runs hundreds of pages. It's practically an EIS unto itself, and it's a process into which the public had ample opportunity for input both in writing and in attending numerous -- I think there were something like -- I don't know how many public meetings, but the public outreach was extensive.

The MLA was rejected for perfectly legitimate reasons in this analysis. It failed to compete on a number of parameters with the fixed guide way system. It was more

expensive. It didn't create the transit travel time reliability that the fixed guide way system does. It doesn't increase ridership to the same extent.

Its performance as essentially mixed traffic mode is inversely related to the degree to which people can have access to it, because the more access points you establish, the slower it runs. Also, one of the purpose and needs of the project was to promote transit equity, which is perfectly in accord with federal law.

And under the Ninth Circuit case law where you have a project such as this proposed by a nonfederal project proponent, it's appropriate to look to the federal policies that underlie the federal agency's involvement for the scope of the purpose and need.

One of these purposes under the New Starts Program is to improve transit equity. That means making transit available and affordable to the people who need to rely it to get to their jobs on time. And this is something that the managed lane alternative doesn't provide.

I am not sure how I am doing on time.

COURTROOM MANAGER: Nine more minutes.

MR. GLAZER: Total?

COURTROOM MANAGER: About nine more minutes.

THE COURT: Well, since you are pausing, let me ask you a question. One of the things that bothers me is, you

know, in this case, the TCPs, the traditional cultural properties were not identified until what, well after the ROD was issued, right?

MR. GLAZER: The TCP --

THE COURT: Just a minute now.

MR. GLAZER: Sorry.

THE COURT: Just a minute. So my question to you is this. That to me seems to be contrary to what our case law requires in the district under the case referred to earlier, the *North Idaho CAN* case. What is your response to that?

MR. GLAZER: Well, my response is traditional cultural properties, there was only one that was identified. That was Chinatown. That was identified in the programmatic agreement. That was identified before the ROD came out.

The programmatic agreement also deals with the possibility that you might find other TCPs that hadn't been identified for whatever reason, and it establishes a protocol for dealing with that.

THE COURT: Well, the problem is, there were quite a few TCPs identified later, but no effort was made, as the *North Idaho* case seems to require, to identify those before the ROD is issued during that process. In other words, you know, it wasn't considered in the preparation of the ROD.

MR. GLAZER: I am not sure which TCP -- there's historic properties that were subject to the 4(f) analysis

that's different from TCPs generally. And there is, as I understand it, only one identified TCP, and that is Chinatown. There were other historic uses that Mr. Thornton is able to speak to.

THE COURT: So, the government's position is that the only TCP the Court should be concerned with in this case is China -- is the Chinatown Historic District.

MR. GLAZER: That's right.

THE COURT: And if there are other TCPs that should have been considered, that's a failure of the agency not to consider them.

MR. GLAZER: No. The regulations provide that the agencies must make a reasonable good faith effort to identify properties of historic interest.

THE COURT: Which wasn't done in this case.

MR. GLAZER: But it was. The analysis that underlies the agency's determinations runs thousands of pages. And they went through the entire alignment very carefully, and all of that's set out in the various reports. So I mean the analysis that went into locating those properties that could be located was extensive and done prior to the ROD.

THE COURT: Okay. Go ahead.

MR. GLAZER: I think I will close before turning argument over to counsel for the intervenors with a discussion of BRT.

I mean the only evidence in the record that the plaintiffs cite to, as far as I recall from the briefs, was their own letter which touts a 10-year-old analysis that they today characterize as demonstrating that BRT is the best option.

But that's not even the standard of review. It's not whether the agency chose the best option. It's whether the option the agency chose was arbitrary and capricious, and that certainly can't be the conclusion based upon this extensive record.

THE COURT: Okay. That's fine.

MR. GLAZER: Thank you, Your Honor.

THE COURT: All right. Thank you.

Now we have the intervenors, right?

MR. MEHEULA: Yes, Your Honor. May it please the Court, Bill Meheula for the intervenor defendants.

Your Honor, I was going to talk about primarily the burial issue. But before that, I just wanted to raise that in regard to the Beretania tunnel, I saw nothing in the administrative record where the plaintiffs raised it, objected to the elimination of it, or ever advocated it. So, our position is that they waived that alternative, being able to argue it in this case.

On the issue of the burials, Your Honor.

THE COURT: Yes.

MR. MEHEULA: You know, there is no doubt about it that Native Hawaiian burials are important. And I think that to start off, you have to understand that the SHPO in this case, William Aila, he actually was the president of Hui Malama in 2009. In 2009 he actually attended one of the 80 meetings concerning the drafting of the programmatic agreement, and then later on he became the SHPO in 2011, and he signed the programmatic agreement.

So why is it that the SHPO agreed to it, the Advisory Council agreed to it, the City and the FTA agreed to it? And it really has to do with the facts as to how it came about. Mr. Adams says that the facts are similar to *North Idaho*. It's actually just the opposite.

The situation here, Your Honor, is that because they have -- you had a lot of high potential burials in the downtown area, in the Kakaako area. Because of that, they didn't want to do extensive subsurface testing before they knew exactly where the columns were going to go, and the stations were going to go, and the utility relocation areas were going to be.

In fact, the EIS clearly states that if they did it early on, when they only had conceptual designs, that they will expose the testing to 10 times more than they could do it later. And so if they did it earlier, they would expose the burials to a greater risk by doing the testing than the project would ever subject the burials to. So that's the reason.

And, you know, the plaintiffs in their complaint, their motion, their opposition memorandum do not address that issue. And that is the reason why the programmatic agreement came into being. So that when they -- when you got to the position of the FEIS in June of 2010, there were only still conceptual designs. And so they needed to enter into the programmatic agreement to say that when they get the preliminary engineering designs that identify these -- the exact locations, the APE, it's at that point that they can do the testing.

And the City committed, in the programmatic agreement, that they do it as soon as practicable. We know from the -- we know from -- I cited it in my reply brief that they now have the AIS plan for phase four that they entered into in September of 2011. They say that the work is going to be done between six to 10 months. That's what it says in there, all of that testing. So it's going on right now.

They haven't found anything yet, but it's going on right now. And they are doing the detailed examination. So that, Your Honor, is a rational basis for deferring. And that's what the *City of Alexandria* is about. They said similarly that there was a rational reason to defer doing the testing concerning these ancillary areas.

So when you get to -- when you get to *North Idaho*, why doesn't that apply here? It doesn't apply here because in

that case, they had three segments where they didn't do any technical study. They didn't do any 106 identification or 4(f) evaluation concerning the three segments.

That's exactly what -- and Mr. Adams submitted this memorandum that -- the district court case where they sort of hint there that that may be a little ambiguous, and that's why I submitted the reply brief by the plaintiffs on appeal to the Ninth Circuit where they say that --

THE COURT: What about -- what about Mr. Adams' point that in the record now there are two identified burial sites that are large enough -- I forgot the exact dimensions. But they are so large that they can't be avoided by, you know, simply moving one of the columns a little bit?

MR. MEHEULA: Well, Your Honor, the situation -- the situation is that the City has committed in the PA and then they recommitted in their papers to this Court that they will avoid.

And what the programmatic agreement says, Your Honor, is that if they find any kind of burial during the AIS investigation, that the OIBC, the Oahu Island Burial Council has exclusive jurisdiction to determine whether or not they want to preserve in place or relocate. And the City said that they would not contest whatever their decision is, and they would agree to it.

So our position, Your Honor, is no matter what they

run into, that the City and the FTA have agreed that they will avoid it if that's what the OIBC wants.

And the OIBC, Your Honor, if you look at HRS 6E-43.5, that kind of describes who the OIBC is. They are a bunch of very qualified Native Hawaiians who understand burial rights. So if they believe that it should be -- it should be preserved in place, it will be preserved in place, and the City is contractually bound by it.

So the question is, Your Honor, did the -- did the SHPO, and the Advisory Council, and the City, and the FTA, did they act unreasonably by -- by deciding that, no, it's better to wait until we have those detailed plans. And I submit, Your Honor, that it's not and it falls right into *City of Alexandria*.

Now Your Honor mentioned, you know, is there case law or regulations that say that there is no discretion here. That you have to complete the 4(f) evaluation on everything, and you can't defer anything because of *North Idaho*.

And I submit, Your Honor, not. Because if you take -- if you look at the -- particularly because if you look at the changes that were made in 2008 to 74 -- 774.9(b) and (b) -- they might be on there. Yeah, it is. It's right there. So those -- those changes, Your Honor, were made and these changes were not considered by -- in the *North Idaho* case.

But these changes, basically by adding the language

in there in (b) in particular, except as provided in paragraph (c) of this section, and then (c)(2) allow 4(f) approval after the ROD enters. So you have got regulations that state exactly that.

And if you take a look at the 73 FR 13368 at Page 15, they describe why it is that they made this change. And it's exactly for this type of reason. That if you are in a *City of Alexandria* situation, you can approve the 4(f) if you find it later if it's deferred rationally. That's what we have got here. And they did it in *City of Alexandria*.

If I could just close by mentioning something on the TCPs, Your Honor. The TCPs, like the archaeological resources, were thoroughly studied in a number of reports, technical reports that were filed in August of 2008. So you have the archaeological, the historic, and the cultural resources technical reports.

The cultural resources technical reports are the ones that deal with the TCPs. So what happened in this situation and why is it that the programmatic agreement says that they are going to do another TCP study?

And what happened was they were having these 80 meetings almost totally concerning the burial issue and whether or not it should be deferred. Once -- once they decided it was going to be deferred, then they went in to making sure that the archaeological inventory survey was very thorough, so that they

would basically do subsurface testing in all areas where the project would touch.

But during those discussions, somebody said, Well, you know, can we do the cultural resources study again, because there may be some folks out there that you didn't discuss with or record their stories about any Hawaiian -- Native Hawaiian history concerning an area. And they -- and in the spirit of cooperation, they said, Okay. Fine. We will do it again.

And so far they have done -- how many segments?

MR. THORNTON: Three.

MR. MEHEULA: Three, three segments and no new TCPs have been found, and they are going to --

COURTROOM MANAGER: Time.

MR. MEHEULA: They are in the process of doing phase four right now, and that one is going to be complete in February of 2013. Thank you, Your Honor.

THE COURT: Okay. Thank you. All right. I will hear now I guess plaintiff's -- plaintiff's rebuttal to the various defendants' and intervenor's arguments. And then I will give the defendants a chance to speak, too, because they have their own motions for summary judgment pending.

Go ahead, Mr. Adams.

MR. ADAMS: Your Honor, Matthew Adams again for the plaintiffs. They kind of ganged up on me there, so I am going to be hitting a few different issues starting with the last

ones referenced by Mr. Meheula and moving sort of in reverse order.

Mr. Meheula says that the defendants could not have completed more detailed studies than they did, because they either don't know, or couldn't know, or can't know the precise locations of the support columns until the final design process. And I think the administrative record shows that this is not the case.

First of all, there is the AIS that the defendants did prepare. That is a detailed study that was prepared prior to the ROD, so they must have known something in order to do that.

Second of all, defendants apparently committed to complete the rest of them prior to the, quote, unquote, final designed process. And Your Honor could find that at AR Page 93.

Then Your Honor to this issue of the specific column locations, there are, by my count, at least 15 pages of the administrative record identifying specific column locations. I would be happy to read those off to you, but they are all found between AR 59621 and 59891. And so clearly it was possible to know where at least some of the columns went. And then there are other pages showing the specific locations of station infrastructure, so those could have been surveyed as well. Those are at 59622, 675, 734, 806, 835.

Defendants also say it's just too disruptive to do these studies in an urban environment, and I would like to address that briefly if I might. They want to paint this as sort of an all or nothing type of thing, either entire neighborhoods are going to be torn down to do the studies or not. And it's not like that.

We know that by taking a look at the study that they did complete, and the study that they did complete shows what their methodology was. And that methodology required a test pit area for the columns of 2 meters by 2 meters, and testing at the station locations that's about 6 or 8 meters long but less than a meter wide. And those citations are at 59496 to 97 and 59496 respectively. So these are not things that are going to require massive disruption and relocation.

And let's see. I guess I would just close on that issue, Your Honor, by noting that nothing in 4(f) or the 4(f) regulations gives the agencies the discretion to rely on disruption as a basis to defer these 4(f) studies. They are proceeding under the National Historic Preservation Act regulations. Again, they have -- they have no authority to implement that act and they are not due any sort of deference.

Mr. Meheula mentioned SHPO several times, but he also noted accurately that the OIBC is a state agency charged with dealing with burials. And I would direct the Court's attention to AR page 125000 which presents the OIBC's perspective on when

4(f) should have been completed.

There is the question of the *City of Alexandria* case, Your Honor. The *North Idaho* Court specifically interpreted that as being about ancillary facilities. In other words, it wasn't the impact of the project that hadn't been considered. It was, you know, where are you going to stack this dirt. Where are you going to put these backhoes. That kind of thing.

There is also a distinction there because *City of Alexandria* involved a memorandum of agreement under the NHPA rather than a programmatic agreement as here, and the difference between the two is the memorandum of agreement or MOA happens when all impacts have been identified and resolved, whereas the PA, as here, is sort of an agreement to agree in the future or to work things out later on down the line.

Mr. Meheula mentioned the relationship between the *North Idaho* case and the 2008 regulations. I think he may have been mistaken, and I would direct the Court's attention to footnote seven where the *North Idaho* Court explicitly says that the result is the same under the 2008 regulations. That's clearly something they were looking at.

There is also mention of a number of technical reports, pages and pages of them about cultural places. And I would just focus in on the difference between those preliminary studies and a full 4(f) evaluation. The technical reports that were referred to, they don't apply the criteria for eligibility

for the National Register. They didn't evaluate the possibility that the project would, quote, unquote use those places, and they certainly didn't consider alternatives to such use.

Mr. Meheula cited to a number of things that have happened after the record of decision and I think probably are not properly before the Court. That's sort of post-decisional stuff. But to the extent that the Court is inclined to review that material, we would just ask for an opportunity to submit copies of the April 2012 draft TCP study on the City's website which suggests that there are several new TCPs that have been identified.

Excuse me, Your Honor, while I flip a little bit here. There was a mention of transportation equity, and I just want to address that quickly. There has been a lot of language in the briefs suggesting that that's not something that plaintiffs are comfortable with. That what we are proposing is somehow inherently inequitable.

That is not the case. There is nothing inherently more equitable about a train than some other form of transportation. And in particular, I would direct Your Honor's attention to the bus rapid transit EIS which concluded, among other things, that bus rapid transit would, quote, unquote improve mobility for minority and low-income residents throughout the corridor. And Your Honor can find that at AR

Page 47964.

Mr. Glazer mentioned the idea of good faith effort in the context of burials. Again, that's the National Historic Preservation Act regulation. That is not the Section 4(f) regulation. I think we appropriately dealt with that in our papers, but I would be happy to take questions on that.

And then that finally, Your Honor, I think brings us back to the two questions that we began with, which is the NEPA question.

THE COURT: Before you go there.

MR. ADAMS: Yes.

THE COURT: Let me ask you to address -- which I hadn't thought of -- Mr. Meheula's point that he contends that the plaintiffs have waived any issues about the Beretania alignment, because you never -- you never complained about it earlier.

MR. ADAMS: Well, speaking of waiver, Your Honor, that's the first I have heard of that argument here today at the hearing. But more fundamentally, the Beretania Street alternative is an alternative to the use of Chinatown Historic District and also to the use of Dillingham Transportation Building. And there is extensive record of the plaintiffs saying you got to find something that doesn't use those resources.

THE COURT: So it's inherent -- consideration of that

alternative, your position is inherent in your objection to the -- to the use of these other properties, namely Chinatown and Dillingham Building.

MR. ADAMS: Your Honor, we objected to the use of those buildings. We said find an alternative. They said everything else has been eliminated. And we now find ourselves here today asking about whether some of these things have properly been eliminated or not.

THE COURT: All right. I understand your position.

MR. ADAMS: Thank you, Your Honor. There were a couple of NEPA issues that I would like to address if I might, Your Honor. And I will start with the narrowest ones and then kind of move to the broadest ones.

Mr. Glazer mentioned the Section 450 appendix. And I just want to make it really clear that the text of that says that the CEQ NEPA requirements for the presentation of alternatives continue to apply. And of course that interpretation of CEQ's regulations is not, contrary to defendants' position, something that they have any discretion for.

Mr. Glazer mentioned that the AA is an EIS into itself, I think. And I don't think that's accurate. First of all, as Your Honor mentioned, it was prepared at a time when not all the studies had been done.

Second of all, the scope of the analysis was a little

bit narrower than would be required in a NEPA analysis. For example, things like cumulative impacts or growth-inducing impacts that would normally be addressed in detail were not in that case.

And finally, it wasn't coordinated with other agency reviews as the NEPA analysis would be. And that's actually the source of our problem here today was that this was done outside of NEPA, and so it wasn't coordinated with 4(f) or NHPA or anything like that.

Finally, I would like to, on NEPA, address the idea that our position would require some sort of duplication. Would make things unmanageable for agencies that want to do transportation projects. And that's just not true.

It's not a question of can you do an AA or can you apply -- comply with NEPA. It's certainly possible to do both. So, for example, here I think the AA mentioned that there were 70 some possible routes. And in this case, what defendants did was they basically took them all off the table and then said we are going to do an EIS on this thing.

But what they could have done is they could have said, Hey, we have done this -- enough planning to know that we have got it down from 70 to, I don't know, five or six or whatever was pretty reasonable, and then they could have done an EIS on that. And that's in fact the way that this is supposed to proceed.

We have no objection to local agencies doing planning. We have no objection to the idea of incorporation by reference, but that's supposed to be something that you do to cut down on bulk in an EIS. It's not supposed to replace the EIS.

That gets us back to the question of the 4(f) tunnels. And, Your Honor, I think I still have a couple minutes, if I am doing this right.

THE COURT: Go ahead.

MR. ADAMS: Your Honor is correct in saying that the cost information about the Beretania Street tunnel is not in the Section 4(f) evaluation. And that is what I said when I was up here last.

The only thing we really have to go on here is the finding with respect to costs. That's the basis for the agency's decision, and so that really needs to be the basis for our review, as I think Your Honor was suggesting, particularly in light of the Supreme Court cases, the *Motor Vehicle* case and the *SEC versus Chenery* case.

Second, I'd like to address this idea that it doesn't matter how the decisions are documented. I don't think that's the case, Your Honor. And I would direct the Court's attention to 23 C.F.R. 774.7 which says that, you know, some of this stuff has to be documented in the 4(f) evaluation, and there has to be at least an appropriate amount of detail to explain,

you know, what the decision is and why it was -- and why it was supportable.

There was reference to something like $800 million with respect to the Beretania Street tunnel. I am not sure I followed the entire discussion, but my recollection is that that was a cost for the Beretania/King alignment, so it's more than just a tunnel. I am sure Mr. Thornton will correct me if I am wrong about that.

And then just very quickly, Your Honor, sort of pulling out to the absolutely broadest level here, I mean what defendants' case boils down to is look at the size of that administrative record. Look at all the stuff that's in it. It's in there somewhere.

But that's not enough. We have federal environmental laws that are designed to require agencies to follow a very specific path to make sure they are considering the right things at the right times. You know, agencies do this all the time. It's certainly not overly onerous. And all we are asking is that they follow the schedule and the path that's laid out in the statutes and the regulations. That's all.

Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Adams.

MR. THORNTON: Your Honor, I want to take a step back and talk about how the process is supposed to have worked globally, because I think that's been lost in this argument

this morning.

There's been a reference to the alternatives analysis not being part of the NEPA process. That's not correct. The alternatives analysis is inherently a part of the NEPA process as that process has been defined in the Federal Transit Administration NEPA regulations. Regulations, by the way, Your Honor, that had to have been approved by the Council on Environmental Quality. Point number one.

Point number two, Your Honor, we are supposed to have a rational process for evaluating alternatives under NEPA. That process for transportation projects starts with the comprehensive transportation planning process that is separate and apart from the evaluation of individual projections. That happened here.

There was a regional transportation planning process that was conducted by City and County of Honolulu and the Regional Transportation Agency, and they identified rail as the keystone of the transportation system. That was a plan that was approved by the U.S. Department of Transportation.

We are supposed to have a process where we narrow alternatives, as we discussed, Your Honor, during the hearings on our motions for partial summary judgment concerning the failure of the plaintiffs to raise a number of issues during the administrative process. And that's exactly what's gone on here.

In fact this morning has reminded me a little bit of our favorite parlor game or sidewalk game Three-Card Monte. We have alternatives being suggested, such as the Beretania tunnel alternative, that were never raised by the plaintiff during the administrative process. They never endorsed it. Indeed, we scoured the administrative record, Your Honor, yesterday to find a single comment endorsing the Beretania tunnel, and we could not find.

Now, it may be in the multi-hundreds of thousands of pages that someone suggested that. But we know for certain that the plaintiffs never endorsed, advocated. We know that the plaintiffs, throughout the process, advocated the managed lane alternative. There is no doubt about that.

We also know that both the City and the Federal Transit Administration extensively analyzed the managed lane alternative. Indeed they analyzed two variations of the managed lane alternative. The Federal Transit Administration made a specific finding in the record of decision regarding the managed lane alternative.

Now if plaintiffs had told us, as they were required to do during the administrative process, that they really wanted the Beretania tunnel alternative, then I'm sure the Federal Transit Administration would have done that, but they didn't.

Now, the greatest comment this morning was they are

now endorsing the BRT as an alternative. Your Honor, the lead plaintiff in this case, Mr. Slater, was the lead plaintiff challenging the BRT alternative. So it's an example of the problem that the Supreme Court cogently articulated in the *Vermont Yankee* decision to address this very problem of late hits by project opponents to suggest alternatives that are not reasonable. That were not raised during the administrative process. That's exactly what's gone on here, Your Honor.

THE COURT: What about the argument Mr. Adams just made that, Well, you know, his -- I shouldn't say advocacy of the Beretania alternative, but that Beretania should be considered as an alternative is inherent in his opposition to use of Chinatown and Dillingham Building?

MR. THORNTON: But during the managed lane -- during -- excuse me, Your Honor. During the administrative process, they never suggested the Beretania alignment as an alternative to the use of 4(f) resources.

They did suggest the managed lane alternative. I will acknowledge that. And the managed lane alternative was addressed in detail. But they have waived -- they failed to exhaust their administrative remedies with regard to the Beretania alternative, and that claim is waived in our view just as Your Honor ruled with regard to some of their other claims in our prior motions.

NEPA, as has been interpreted by the courts, does not

require federal agencies to analyze every alternative conceivable by the mind of man. If that's not a direct quote from the U.S. Supreme Court decision in *Vermont Yankee*, it's real close.

And the Ninth Circuit in the *Westlands* case, which we have cited in our papers, reiterates that point. That it is entirely within the discretion of the federal agency to narrow alteratives to those that achieve the statutory objectives set out by Congress. And the statutory objectives set out by Congress here, Your Honor, include those that we have articulated regarding transportation equity, which is a fundamental purpose of this project.

Now, plaintiffs prefer a different policy. And they can advocate a different policy in an electorial process, they can advocate it in a legislative process, but they can't advocate a different transportation policy in the judicial process. And that's what they are attempting to do.

Now I wanted to say, Your Honor, a few things about -- because I think there have been some mistreatments of facts regarding the analysis of TCPs, traditional cultural properties.

First, let's clarify, for purposes of the law of Section 4(f) and Section 106, there is no special status regarding traditional cultural properties. They are a cultural resource like a burial is a cultural resource or an

archaeological artifact is a cultural resource. It's a type of a cultural resource that can be evaluated.

There was an extensive cultural resources inventory that evaluated the entire length of the project. There was consultation with the State Historic Preservation Office, Officer, and the Advisory Council on Historic Preservation which are the two entities empowered under federal law and federal regulations to provide advice to federal transportation agencies regarding the appropriate mechanism, appropriate level of effort to investigate potentially -- potential historic properties for purposes of Section 106 and Section 4(f).

Now I wanted to throw up one slide, Your Honor, to make a point that I think has not been made terribly clearly. And that is the inherent link in the Federal Transit Administration 4(f) regulations, between the Section 106 process and the Section 4(f) process.

Mr. Adams has essentially argued, Well, that was for 106, and they can do that for 106, but they can't do that under Section 4(f). Our position, Your Honor, is those regulations link the Section 106 process with the Section 4(f) process as referenced here in the regulation that's before you, Your Honor. That the -- this is a Section 4(f) regulation that refers back to the Advisory Council regulations in Part 36 C.F.R. -- sorry. 36 C.F.R. Part 800. If we can now go to the level of effort.

The level of effort required by the Advisory Council regulations is a reasonable good faith effort to carry out appropriate identification efforts which may include, not must include, not shall include, may include background research, consultation, oral history interviews, sample field investigation, and field survey. All of that was done here, Your Honor.

Now, plaintiffs criticize us because the decision was made not by the City, not by the Federal Transit Administration, but by the State Historic Preservation Officer and the Advisory Council, and I might add in consultation with the Oahu Island Burial Council, the Native Hawaiian organizations, not to conduct premature subsurface investigations.

Now, Mr. Adams, as lawyers are want to do, love to engage in disciplines in which they are not licensed to practice. Mr. Adams referred to engineering information. I want to say a few words about the engineering process associated with major transportation facilities.

The engineering of a major transportation facility, like this project, goes through multiple stages of engineering, starting with conceptual engineering. And the locations of guide way columns and stations that Mr. Adams referred to that's referred to in the environmental document, that is what the engineers would refer to as conceptual engineering.

Indeed, Your Honor, the regulations of the Council on Environmental Quality tell federal agencies that you really shouldn't engage in detailed engineering of a project before you have a project description. Why not? Because they don't want agencies to commit the resources so they get committed to a particular solution. But there's a practical reasons not to do it.

Engineering is really, really expensive. To do final design for a project of this magnitude is -- I am going to throw a number out. The usual number is about 10 percent of the project cost. So if we have a project that's $5 million, you are talking about a lot of money, Your Honor, to do final engineering. That's why you don't do final engineering until you have the project approved, because inherently a project is going to be modified.

So we -- we don't have final design plans completed, but we have completed the archaeological inventory survey for phases one through three as intervenor's counsel has referred to. And so there is all this speculation. We might hit burials. There might be a TCP.

The facts are today, through phases one through three of the project, studies that have been concurred in by the State Historic Preservation Officer, who is the, you know, really kind of the final word on it, no burials were discovered, no additional traditional cultural properties.

There was an original study. Yes, there was a suggestion to do further -- to do -- find traditional cultural properties, Your Honor, I won't profess to understand it completely. But it involves basically engaging in consultations and interviews with Native Hawaiian organizations to attempt to identify it.

But the fact today is no additional traditional cultural properties that would be impacted by the project have been identified in phases one through three.

Now, the study for phase four is still out there, and so something might be identified. But you can't speculate and say something might be identified or a burial might be identified.

Now Mr. Adams referred to the potential sizes of burials, and I think the Court said, Gee, aren't -- you know, isn't there evidence that those burials exist? No, there isn't. There is nothing in the record to indicate that this project will impact any known burial.

And that's why a very careful process was designed in consultation with the State Historic Preservation Officer, in consultation with the Advisory Council to wait until more detailed engineering was completed so that a specific investigation protocol could be developed.

And for phase four, particularly in the Kakaako area where there is the risk that we will find those resources, that a very detailed subsurface investigation, but only of those

areas that are going to be disturbed by the project, not so that we are going out willy-nilly digging up looking for burial sites.

And aside from the cost and the disruption, which you might say, Well, maybe that's not sufficiently important. But the real concern, and it was a concern articulated by the Oahu Island Burial Council during the process, was we don't want you going out there willy-nilly digging up areas that you might disturb them in the course of the archaeological investigation.

Indeed it's one of the things that makes archaeological investigations controversial to Native America community or Native Hawaiian communities is that sometimes the investigation does more damage than the project.

The bottom line here, Your Honor, is the City has made a commitment that it is going to modify the design. We have a project that is an elevated project that allows for the movement of column locations and other project features, and the City has made that commitment.

So we don't have a 4(f) issue if there's no use. You don't -- you don't get to a 4(f) problem if you are not using a 4(f) resource. So again, we have speculation that there might be a burial or a TCP. And by the way, they are not automatically a 4(f) resource. There has to be a process to evaluate whether they are, and that again is the job of the Federal Transit Administration in consultation with the State

Historic Preservation Officer.

And then there would be evaluation. Well, if the project -- will the project impact the resource, if indeed it's determined to be eligible. And then the project would be revised. And that commitment, as intervenor's counsel indicated, is documented in the programmatic agreement and subsequently in our papers where we have made that commitment.

I want to bring this back, Your Honor, to the arbitrary and capricious standard of review. Differences of opinion, and we have heard a lot of differences of opinion from plaintiffs' counsel today, does not constitute a basis for finding that an agency decision was arbitrary and capricious.

Lands Council tells us there are three things. Did the agency rely on factors Congress did not intend it to consider? That hasn't been demonstrated.

Did the agency, quote, entirely fail to consider an important aspect of the problem? That hasn't been demonstrated.

Did the agency offer an explanation that is so implausible that it could not be ascribed to a difference in view? That's the standard that we are operating under here today. Not speculation about burials or TCPs that might or might not exist, that might or might not be eligible, and that might or might not be impacted by the project.

I think I am going to defer to my co-counsel

colleagues to make a few words.

THE COURT: All right. Thank you, Mr. Thornton.

MR. THORNTON: Thank you, Your Honor.

MR. GLAZER: I just have two minor points on transportation equity. I think they were the points that plaintiffs' counsel led his rebuttal with.

The MLA under the plaintiffs' own development of that alternative, as I understand it, would include tolls that range from $4.50 to 7.75. I also understand that the bus fare is only 250 flat rate, less with a monthly pass.

So if you are comparing these alternatives, and you are a person who depends on transit, and you are working hard to makes ends meet, this is a very big deal for you. And because transportation equity is one of the purposes -- policies behind New Starts, and because it was appropriately incorporated into the purpose and need of the FEIS, it is appropriate to eliminate an alternative that doesn't meet that important policy objective.

As far as bus rapid transit goes, the EIS rejected that alternative, because it was similar to the transit system management alternative that was reviewed, and it did not provide any significant transit benefits. And under Ninth Circuit law, the agency doesn't have to review in detail an alternative that is very similar to one that they did review.

That's all I have. Thank you.

THE COURT: All right. Thank you, Mr. Glazer.

Does the intervenor want to be heard? Go ahead.

MR. MEHEULA: Thank you, Your Honor. Your Honor, I just wanted to respond to the comments that Mr. Adams made concerning the burials and then speak a little bit about transportation equity.

With respect to the burials, one of the points that Mr. Adams made was that the archaeological inventory survey plan for the first phase was done in March -- was entered into in March of 2009 before the FEIS was finalized and the ROD entered. And so his point was, Well, why couldn't you do it for phase four? And we addressed this in our memo.

But if you look at the AIS plan and -- you will see that -- that the locations of the different parts of the project are based on conceptual designs. If you -- if you look at the pages on there, they are based on conceptual design.

And the reason why that was acceptable for phase one, because a determination was made, accepted by the SHPO, that in that area, the potential for Native Hawaiian burials was low, and therefore a sampling process was acceptable.

A sampling process is not acceptable to the SHPO or to Native Hawaiian organizations in phase four, because the potential for Native Hawaiian burials there is high. And that's why it's got to be exact, and that's why the PA commits the City to do testing in every area where the project is going

to disturb ground.

He mentions that -- that it's -- it's really not too disruptive to -- to do this work, because you only have to hit certain areas. But again, he doesn't answer the question about until you have those more specific designs. And the FEIS says it would be 10 times larger, the area of testing, if you did it before you had the specific designs. I mentioned it earlier that he didn't address it in the papers, and he didn't address it in today either.

Mr. Adams commented about *City of Alexandria*, and he said in that case it's distinguishable from this case because there we are dealing with just ancillary work that needed to be done on the project that wasn't addressed by the 106 identification and 4(f) evaluation. And he also said that the MOA there was appropriate because all impacts had been identified and resolved.

That's not true. I mean the point of that case was that they deferred doing that 4(f) evaluation on these areas, because they needed more specific designs in order to locate those areas. The same situation we have here.

The other thing is that it said that -- that case said that the deferral is appropriate if there's a rational reason for it, and if otherwise the project had done a full 106 identification and 4(f) evaluation, which is what they did there, and which is what the City and the FTA did here.

But the *City of Alexandria* went one step further, and they addressed the question of 9(a), 774.9(a), and that's the question about you need to do the 4(f) evaluation at a time when the alternatives are still being considered.

And they said but -- but that doesn't apply if you did -- if at the time that the MOA or the PA is entered, that you had done a thorough investigation of those alternatives. If they were -- if the avoidance alternatives were deemed imprudent at that point, deferring isn't going to make them prudent later on, and that's exactly the situation we have here.

Now, Mr. Adams cites to footnote seven of *North Idaho*. And he says that my reference to the 208 amendments to 774.9 were addressed there. And what that footnote says is that we are not making decision based on the amendments. But in this case, in our opinion, it wouldn't change the decision. And at any rate, Your Honor, that footnote is dicta. It's not -- it's not a holding of the case.

Finally, Your Honor, on transportation equity, the law is really clear. It says that -- in fact a New Starts Program says that it was found -- it was found that the welfare of the lower income individuals may be seriously and adversely affected when public transportation is either unavailable or unaffordable. That's at 49 U.S.C. 5301.

It goes on to say, the central purpose of the New

Starts Program is to provide financial assistance to help carry out national goals relating to mobility for elder individuals, individuals with disabilities, and economically disadvantaged individuals. And it goes to say, for the New Start projects, the secretary must analyze, evaluate, and consider the costs of urban sprawl and the degree to which the project increases the mobility of the public transportation dependent population or promotes economic development.

Transportation equity is one of the -- is one of the purpose and needs of the project, and the project scores high on that. The plaintiffs' alternatives do not score high on that. The FEIS says, regarding the managed lane alternative, because of the estimated high toll costs for users, the managed lane alternative would also not support the identified need to improve transportation equity for all users including low-income populations.

It goes to say the island as a whole gains by having future development concentrate around station areas as opposed to the present sprawl that ultimately costs everyone more. This savings is aimed particularly at those who need it most, the transit-dependent, lower income, economically vulnerable communities of concern.

Of the 35 percent of the population that resides in the areas containing concentrations of communities of concern, over half would realize a substantial transit traveling savings

from the project.

Your Honor, this issue of transportation equity is not only relevant to show that -- that the plaintiffs' alternatives are not prudent and not reasonable, but it's also relevant on the issue of balancing of harms in the event the Court finds some sort of error and is going to move the case into the -- the next phase, the remedial phase.

And my point, Your Honor, is that under the *Monsanto* case, the 2010 United States Supreme Court case, it is now the law of our country that in order for federal court to issue an injunction of a project like this, that it needs to find that the balance of harm between my clients, for example, Faith Action for Community Equity, and the plaintiffs, the plaintiffs have to prove that the balance of harm is in their favor.

And, Your Honor, I realize that esthetic environmental concerns are serious concerns. But, Your Honor, the concerns of my clients and who they stand for and the fact that this is one opportunity to get a transportation solution that will help them, so that they don't have to stay in traffic four hours a day, and pay gas, parking downtown, and for cars that they can't afford. Thank you.

THE COURT: All right. Thank you. Anything else you think you have to say?

MR. ADAMS: Your Honor, again, they sort of ganged up on me there. They got me out numbered. I would be happy to do

just a two-minute surrebuttal, but I --

THE COURT: Go ahead. All right. Two minutes.

MR. ADAMS: Two minutes. Point number one, Your Honor, Section 106 and Section 4(f) are not the same. One has a substantive mandate. One does not. If you allow identification of resources to be deferred, you essentially eviscerate the substantive mandate.

Point number two, on the issue of potential sizes of the burials, I don't want to turn this personal, but I have given the Court the cites 37782, 37769. It is in fact in the record. I would again direct the Court's attention to the OIBC letter at 125000. I think that states its position.

Finally, on this issue of there is no 4(f) because we don't know anything about use yet. Well, that's sort of the crux of the issue here, isn't it? If you don't go out and do the surveys, of course you are not going to find any use. Essentially what the defendants are doing is they are refusing to look, and they are proceeding on the basis that nothing has been found. And that is arbitrary and capricious.

Thank you, Your Honor.

THE COURT: All right. Thank you. Okay. I think everybody has had their opportunity to be heard maybe for the last time in this case. At least I view these -- and I think we discussed this before -- these cross-motions as at least being potentially dispositive.

I think if -- and I haven't made up my mind, you know. If the plaintiffs prevail on any substantial point, then I think, you know, we will have to have some discussion on a remedy and what follows after that. But, you know, I haven't reached that point yet. But we will see if we have to get there or not.

But I appreciate -- I appreciate the argument of all counsel. It's been very helpful. And at this point then, I take these cross-motions for summary judgment by plaintiffs and defendants under submission.

All right. So we will stand in recess at this time. Thank you very much.

MR. ADAMS: Thank you, Your Honor.

MR. THORNTON: Thank you, Your Honor.

(Recess, 12:11 p.m.)

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COURT REPORTER'S CERTIFICATE

I, KATHERINE EISMANN, Official Court Reporter, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that the foregoing is a true, complete, and correct transcript of the proceedings had in connection with the above-entitled matter.

Date: August 22, 2012.

/s/ ***Katherine Eismann***

Katherine Eismann, CSR CRR RDR