IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM, et al., Plaintiffs, vs. FEDERAL TRANSIT ADMINISTRATION, et al., Defendants, and FAITH ACTION FOR COMMUNITY EQUITY, et al., Intervenor Defendants.	CV 11-00307 AWT Honolulu, Hawaii December 12, 2012 10:00 A.M. Remedy Phase Hearing

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE A. WALLACE TASHIMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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WEDNESDAY, DECEMBER 12, 2012 10:05 O'CLOCK A.M.

THE CLERK: Calling the case of this is Civil 11-00307 AWT, Honolulutraffic.com, et al., versus Federal Transit Administration, et al. This hearing has been called for the Remedy Phase Hearing.

Counsel, your appearances, please.

MR. YOST: For the plaintiffs, Your Honor, Nicholas Yost, and I'm joined by Matthew Adams here and by Uesugi, who is standing in for Mr. Green.

THE COURT: All right. By the way, Mr. Yost, we missed you at the last hearing. I understand you had some medical issues?

MR. YOST: Yes, Your Honor. I had two back surgeries, which is why I'm still wearing this thing, and -- but things are getting better and better.

THE COURT: That's good. Glad to hear that. All right.

MR. YOST: Thank you for inquiring, Your Honor.

THE COURT: Defendants. No, no -- yeah, city defendants.

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

THE COURT: All right.

MS. McANEELEY: Good morning, Your Honor. Lindsay

McAneeley on behalf of City and County of Honolulu and Wayne Yoshioka.

THE COURT: Okay. Good morning to you.

Go ahead.

MR. GLAZER: Good morning, Your Honor. David Glazer on behalf of the federal defendants, and with me at counsel table is Nancy-Ellen Zusman of the Federal Transit Administration.

THE COURT: Okay. Good morning to you.

Good morning. Intervenors; right?

MR. MEHEULA: Right.

THE COURT: Okay. Go ahead.

MR. MEHEULA: Bill Meheula for the intervenor defendants.

THE COURT: All right. Good morning to you.

Why don't you all be seated.

Let's see now. I called this -- I called this hearing for several reasons. One, now that I think, you know, I'll call them liability issues are pretty much sorted out now, the question is what kind of remedies are the plaintiffs entitled to and, you know, how should they be designed.

There are several things that impact that. One probably is, you know, the state of the project at this point. Two, I don't know how much the state court injunction, what effect that will have on this, but that's a factor, I suppose.

Three, assuming, as we should, I guess, that everybody has an open mind on the matters which, you know, the summary judgment order says should be redetermined, then are there any ongoing activities that would impinge upon those choices, in other words, narrow or practically defeat those choices if the project were continue in its present course. I mean, I guess that's my concern. I'd just like to see the reconsideration by the federal defendants be made with, you know, I guess with an open mind as possible, you know, without saying, well, they've already answered the question once and that's why we're set to go that way.

So I think keeping those things in mind, I guess, you know, I've read all your papers. I guess I'll give everybody a chance to speak.

I'll start with the plaintiffs. It's your case. What do you want to add to your papers? Who's going to speak? Mr. Yost?

MR. YOST: Thank you, Your Honor.

First, as Your Honor has urged, we have tried to tailor our requested relief so as to accommodate the varying and diverse interests that are there. Comparing what we have said in our brief with what the federal government and the city have said in their brief, we're in agreement that an injunction on construction activities in phase 4 is appropriate. The federal government in their proposed order also say that

certain planning activities and so on can go on in the interim, and we at page 48 of our brief come up with a somewhat similar evaluation.

Third, the above relief will encompass the areas which are voided by the adoption or should it be adopted of the Beretania tunnel alternative, which is to say Mother Waldron Park and those TCPs within the phase 4 area. The defendants ask that the injunction on construction activities run until 30 days after the FTA files with the court its notice of compliance, and we gear it to the conclusion of the process which result presumably in amended Record of Decision. So that's doesn't seem to be a matter of enormous difference.

The area where -- which is difficult is phases 1 through 3. The defendants ask the construction proceed unimpeded on phases 1 through 3, defendants' proposed order, paragraph 3, second sentence. That is overbroad for two reasons. One, with respect to the TCP identified by Mr. Lee, which is the subject of his declaration and which is in phase 1, we had placed into the record Mr. Lee's declaration. The court hasn't ruled on the supplemental documents which the city has offered after the close of the briefing, but, obviously, that impinges on that.

Then there is with respect to phases 1, 2, and 3 a more -- what I think is a more difficult issue to deal with, which is when, as you, Your Honor, said in outlining what your

hopes were with respect to the federal government's keeping an open mind, an open mind with respect to the Beretania tunnel and the TCP and Mother Waldron Park, and we have said at least three different places in our brief much the same thing: that the government should not be able to do something which has the effect of narrowing or eliminating certain alternatives. That gets to the issue of whether the matter should be remanded without -- with or without vacatur, without vacating the existing paperwork which is there.

But it is our position, Your Honor, that the federal government in looking at particularly the Beretania tunnel alternative, if it truly approaches it with an open mind we'll look at it in not totally a linear way. You'll recall that the court upheld their dismissal of the King tunnel alternative, saying that the court deferred to the government's finding that $650 million was an excessive amount and, however, no such record had been built with respect to the Beretania alternative.

We get to the Beretania alternative, and presumably they'll come back with a number on that, which, you know, I hope we'll be able to, excuse me, to examine, to question, and so on, but in doing that it's essential that they not confine themselves to what is the cost of a tunnel. There are other ways of looking at things.

And you may recall, Your Honor, that this project is

currently a 20-mile project. This project when it got underway earlier on was a 34-mile project. That was the city's locally preferred alternative. It had extensions on both ends of what is to happen now, both ends of what is now the 20-mile alternative. And the EIS is quite frank in saying we are cutting back on both lengths -- both ends to save money. Later on we'll come back and ask for further, you know, be able to extend that. But if they were able to save money by trimming one end or the other end, that today impinges upon what they do in phases 1, 2, and 3, particularly phase 1, in that a package in which, say, Beretania is somewhat more expensive than the -- than a non-Beretania route than the approved route, one way to pay for this is to do what they did before and just trim it -- trim it back.

This then gets into alternate means of funding. Funding, I think, will be the critical issue when we get to Beretania. That we look at the attachments to the government's -- to Faith Miyamoto's supplemental declaration, and that includes the Full Funding Grant Agreement. And that has lots of interesting material in it. The total cost is $5.1 billion. The grantee's share -- in other words, the city -- has to come up with 3.3 million of that, excuse me, and that leaves the feds coming up with something like 1.8 billion. And they have already spent some; so we're talking about 1.5 billion, which is outstanding to today. Now, that outstanding

funding which they are looking for is not limited to phases 1, 2, and 3.

THE COURT: Wait a minute. You just said what? The outstanding funding they're looking for?

MR. YOST: That's right. The one and a half billion dollars which the full funding agreement asks the federal government to pay for, you know, the remaining portion of what the federal government is to contribute to this is not limited to 1, 2, and 3.

And this gets into something where the record is murky, and I would invite the government agencies perhaps to elaborate, but the full funding agreement according to the HART, which is Honolulu Rapid Transit group, according to their press release the full funding agreement went to congress on November 19th. It then goes into effect according to statute -- and we cite that statute, I believe, on page 42 of our brief -- it goes into effect 30 days thereafter. So that means a very short while from now, next week, suddenly the feds are going to have provided what I think is their last funding. That's it. And it's not limited to phases 1, 2, and 3.

The city has the opportunity to -- since it's providing two thirds of the funding anyway, if something has to be done right now the city can come up with the money. It's not dependent upon the feds to, excuse me, the feds to do that. The EIS also at page 6.6 gives other funding sources that are

available, private funds, airport funds, the reduction in the state take of the GET surcharge. In other words, there are various ways in which the city can pay for what the federal government does not pay.

And I'm going to return again to that Full Funding Grant Agreement, the document that was lodged with the United States congress on November 19th to take effect 30 days thereafter. Now, I looked through it, and maybe I missed something, maybe there was some documents which for reasons I couldn't understand the governments have not provided, but nowhere in there do they tell the congress that this court has issued an order on section 4(f). The Miyamoto declaration has considerable materials in it on the -- on what has to happen with the Full Funding Grant Agreement. There is a section 3(a) in which there's no knowledge of facts and circumstances affecting the continued validity of earlier certifications. No mention of this order. There is a section on section 16(a) on environmental protection. No mention of this court's order. The grantee's attorney in an unsigned document there lists the pendency of three documents -- three lawsuits, which include this one, which include the California Supreme Court -- pardon me. The Hawai'i Supreme Court case, but they say nothing about the order. They just say there are three lawsuits that could impinge upon this.

Attachment 5 to Miyamoto talks about the prior grants

and related documents, EIS, and the Record of Decision. No mention of the order. Attachment 7 measures to mitigate the environmental impacts. It goes into FEIS and the 4(f) evaluation, the programmatic and agreement. There's no mention of the order.

So we are stuck with an order here which goes into effect, I believe, on December 19th and which then ends the federal contribution to what -- to what is going to -- what is going to happen. That's why we think it's important not that the whole of the Record of Decision or the whole of the FEIS be set aside but those portions of it which are changed by this court's order, that they be set aside, that they be vacated. And I'll give three basic reasons why that is the case.

First, APA section 706.2 says very explicitly the reviewing court shall set aside action found to be arbitrary and capricious, as this court found with respect to the Beretania tunnel. Both the federal government and the city in their November 30 pleadings were studiously avoiding the Overton Park case. I understand why they avoid Overton Park, but Overton Park is the law of the land. It is the last, it is the only Supreme Court case dealing with section 4(f). It simply could not be more direct on its face than it actually is. Overton Park, basically, says this is no longer a balancing process. Congress has balanced with the narrowest of, pardon me, of exceptions.

Now, returning to 706.2 there's been discussion of three Ninth Circuit cases which have found exceptions to the rule of 706.2 that a matter found to be arbitrary and capricious shall be set aside: the Idaho Farm Bureau case, the Western Oil and Gas case, and the California Communities Against Toxics case. And each of these according to the Ninth Circuit is a very, quote, limited, quote, rare, quote, unusual exception, one of whom would have resulted in the extinction or could have resulted in the extinction of endangered species, a second one of them could have resulted in the thwarting the operation of the Clean Air Act in California, and the third could cause power shortages and rolling blackouts. I mean these were real, real problems, and they found exceptions in that -- in those areas. I think then we have to go back and look at what is involved in the permitting of -- or not permitting, selection and not selection of Beretania.

First, Beretania, of course, avoids Chinatown and avoids the Dillingham building, it avoids the whole downtown, it avoids the Mother Waldron Park; so the law is that it must be chosen, unless it is found to be not feasible or prudent.

Then the agency's own regulations 23 C.F.R. 774.17 then go into the definitions of what's feasible and what is prudent. And feasible is, essentially, an engineering judgment. It doesn't work as a question of sound engineering. And it picked that up directly from the Supreme Court's

language in Overton Park.

Prudence gives a series of I believe it's six issues, none of which seem to have been advanced and certainly not on, as this court found, not on the record on which one could decide to set aside the -- not follow the Beretania tunnel alternative. And the one again which I suspect that we will get to as this proceeds is probably cost, and the phrase used is cost of extraordinary magnitude, and that, too, is taken from the Overton Park case. I mean the Overton Park case really delineates everything that happens with respect to 4(f). And at page 47, page 48 of our brief we in three separate places state that no action should be taken affecting the feasibility or prudence of the selection of Beretania, of Mother Waldron Park, and of areas with TCPs.

Then returning to sort of the general overall look at what's happening, we in our brief advanced and the government -- the governments have not really taken issue with, and they hadn't discussed at all in their opening briefs sort of what happens mechanically. And Your Honor referred to supplementing the ROD, supplementing the FEIS and so on, if that is appropriate, which we think is precisely the right thing to be doing. And we just -- I emphasize that on pages 5 and 6 of our brief and at page 46 of our brief we go into the methods that are set out by the regulations dealing with EISs and RODs as to the mechanics, and simply it's -- you go through

much the same sort of process as you do the first time with a draft document, and the agency has some discretion as to what that document is going to be. Your Honor referred to an EIS, and we would be rather startled if it's not an EIS, but, you know, conceivably they could decide to do an EA. But at any rate it goes out for comment and that in the interim the agency is not to do things which prejudice the outcome, the very issue that Your Honor showed himself concerned with at the beginning.

So to recapitulate we believe and the governments agree that an injunction is appropriate. Whether vacatur is or is not appropriate is a question of difference. We believe that that should be tailored but there should be vacatur as to 4(f) and there is a 4(f) section of the ROD, there is a 4(f) section of the EIS, that those would be appropriate portions to set aside. And that's bearing in mind the APA's directive that the court shall set aside agency action found to be arbitrary and capricious.

Secondly, the very clear wording of section 4(f). This is not like NEPA. This is a directive statute. It's like "Thou shalt not kill." It just can't be more direct. And the Supreme Court in, excuse me, in Overton Park described it as a clear and specific directive and again as a plain and explicit bar to the use of federal funds for the construction -- in that case it was a highway. This is a different sort of transportation project. In Overton Park it said it's not

confined to agency description, that the 4(f) considerations are ones of, quote, paramount importance, and that's what ultimately counts.

So, Your Honor, we ask that in that tailored manner that the court vacate those portions of the existing documents which impinge upon those matters which the court have found the agencies to have violated the law or at least a lot more explanation is needed and to set those aside. With that, Your Honor, I will stop, unless you have questions at this point.

THE COURT: No. I have some question for the defendants but not for you at this point. But I'll give you a chance for rebuttal. All right?

MR. YOST: Thank you very much, Your Honor.

THE COURT: Thank you.

Who's going to be first up? For city defendants, huh?

MR. THORNTON: Your Honor, Robert Thornton again for the City and County of Honolulu and Wayne Yoshioka.

So, Your Honor, I think it's -- in light of what plaintiffs' counsel has just indicated it's appropriate to sort of revisit the bidding here and where we stand. The court's summary judgment order and the court's prior order on our motion for partial summary judgment, the court granted our motion for summary judgment with regard to all of the National Environmental Policy Act claims, all of the National Historic

Preservation Act claims, and I emphasize that. Obviously, Your Honor's aware of that because some of the comments of plaintiffs' counsel a minute ago suggested he wants to litigate some of those NEPA claims. The NEPA claims have been resolved in favor of defendants; so any notion of vacating the EIS, reversing the EIS is simply inappropriate and not in accordance with the court's ruling in this case.

Now, Your Honor, the city defendants and the federal defendants have proposed an order that we believe explicitly goes and addresses the three issues identified in the court's summary judgment order that require further evaluation and that expressly responds to the concern that the court articulated this morning that to establish an order that insures that the Federal Transit Administration and the City and County of Honolulu will keep an open mind with regard to alternatives with regard to the Beretania tunnel alternative in phase 4, and we will demonstrate this morning, Your Honor, as I believe we have in our papers, why our order specifically addresses the court's concern. The form of the order that is before you from both the federal defendants and the city defendants avoids any harm in phase 4.

And again, Your Honor, that's the Center City section and that includes -- and, Your Honor, here's a slide. This is exhibit 1 to the declaration of Mr. Grabauskas showing the different phases of the project. I know the court's fully

aware of this, but just so we're all on the same page, showing that phase 4 extends the entirety of the Center City portion of the project from Kalihi to the Ala Moana Center. So that includes Chinatown, it includes Kaka'ako, it includes the Ala Moana Center. So all the areas that Mr. Yost has just expressed concern about are in phase 4 and would not be harmed, no construction would occur in that area pending the defendants' compliance with the court's summary judgment order. And note, Your Honor, that phase 3 there ends at the Middle Street transit center.

Now going to the next slide, please. You know, to further demonstrate this, Your Honor, here's a slide again exhibit 15 to the declaration of Faith Miyamoto that we've submitted shows the adopted alignment in blue, shows the Beretania tunnel alternative in yellow, and extending all the way up a mile further to the west, Your Honor, shows the beginning of construction of phase 4. So there can be no doubt that the form of the order that the defendants have proposed preserves the ability both as a legal matter and as a practical matter to consider the Beretania tunnel alternative further as the court has required in its summary judgment order.

Now, the form of the order that we have submitted does allow construction to proceed in phases 1 through 3, and we'll describe to the court why we believe that's critical. It keeps the Record of Decision in place. And a few moments ago

Mr. Yost started referencing the Full Funding Grant Agreement. The Full Funding Grant Agreement is pretty important. It is the agreement that has been six years in the making and pursuant to which the city will be eligible to receive $1.5 billion or approximately 30 percent of the project cost. It also makes it possible for the city to receive the $450 million that is scheduled to be received from the federal government in the next two years, money that congress has authorized in the transportation bill that was enacted in the summer of 2012, and that is critical to keeping this project on schedule and on budget.

And Mr. Yost made references to not a big deal to not have this money available. Well, I'm sorry, I beg to differ, Your Honor, and the facts demonstrate otherwise. The notion that you can -- a project of this magnitude that's been -- that has got a very complex finance plan, that you could suddenly say, oh, $1.5 billion is not going to be available to the project and $450 million in the next two years, and that's not a big deal and not going to have an impact on the project. And I reference, Your Honor, attachment 3 to the Full Funding Grant Agreement, which is exhibit 28 to the Supplemental Declaration of Faith Miyamoto, which we submitted, and that shows the breakdown of the allocation of federal cost. And contrary to plaintiffs' counsel's representation today the federal funding that will be eligible to be provided goes through all phases of

the project, including -- and includes such work as right-of-way acquisition, final design work, which are substantial costs. And so the notion that you could simply say that funding is not available and that does not have an enormously adverse impact is simply not consistent with the facts, Your Honor.

And it's critical that the city be able to continue with final design. Final design in this project commenced over a year ago. Plaintiffs never attempted through the course of this litigation to seek to enjoin final design activities. They were fully aware that final design is proceeding. And for them to come back at this stage and through the back door and attempt to, in effect, enjoin final design. Let me explain that, Your Honor. Under the federal law, 43 U.S.C. Section 5309, the City and County cannot expend funds on final design without a Record of Decision. So the notion that you can somehow partially vacate the Record of Decision, as plaintiffs have suggested here, without doing enormous damage to this project is simply not accurate.

Now, I want to address also that this proposed order that's been submitted by the defendants -- go to the next slide -- is entirely consistent with the applicable regulations governing not only the National Environmental Policy Act, but, of course, as I mentioned a moment ago, Your Honor, the court has ruled that the defendants complied with the National

Environmental Policy Act, but the court has said that the court wants and is requiring the city and the FTA to conduct -- to supplement the FEIS with regard to the limited issue of the Beretania tunnel alternative and, depending on the results of the additional analysis, on Mother Waldron and the traditional cultural properties to then determine whether a supplement is necessary. But this is the applicable regulation adopted by the Federal Transit Administration, 23 C.F.R. 771.130(f), that expressly provides that it's not necessarily required to suspend activity. And, actually, this is one point where I'm in agreement with Mr. Yost. Paragraph 3 does not require the suspension of the project activities for any activity not directly affected by the supplement. Well, the supplement that Your Honor has required here is with regard to phase 4 of the project, not with regard to phases 1 through 3. So there's no basis under this regulation to not allow work to proceed in phases 1 through 3.

Now to the next slide. This, Your Honor, is the applicable regulation from the section 4(f) regulations again adopted by the Federal Transit Administration. It essentially says the same thing and references back to the NEPA regulations. So the two applicable regulations here under NEPA and 4(f) clearly provide that work can continue on a project pending the completion of a supplemental document. And we've cited a number of cases in our papers where the courts have

upheld that approach.

Now, plaintiffs' proposed remedy in sharp contrast, Your Honor, would have enormous impacts on the public, would jeopardize the $1.5 billion that will be -- the city will be eligible to receive pursuant to the Full Funding Grant Agreement, including as I mentioned the $450 million that has been authorized by congress and that's been scheduled to be received.

Now, I want to correct Mr. Yost on one point. He seemed to be suggesting that once the Federal Transit Administration executes the Full Funding Grant Agreement that's the end of the story with regard to federal oversight of this project. Nothing can be further from the truth, Your Honor. If only life was that simple. There is extensive ongoing control and discretionary authority by the Federal Transit Administration over this project. And another point to correct plaintiffs' counsel. Once the Full Funding Grant Agreement is signed it does not immediately mean that all of those funds will be provided. In fact, the Full Funding Grant Agreement specifically provides that the provision of the funds is subject to appropriations. Now, congress has authorized the first two tranches of the $450 million, which is critical to keeping the project on schedule.

Now, next, Your Honor, vacating some or all of the ROD -- and we question whether plaintiffs' proposal is really

partial vacatur. We think it is tantamount to a complete injunction and to completely, completely vacating approvals, but that would have enormous increase, enormous costs to complete the design of the project. We've submitted declarations for Mr. Grabauskas, the CEO of HART, and from Mr. Willoughby of Parsons Brinckerhoff, the contracts control manager, documenting that the form of the relief sought by plaintiffs would result in an increase in costs of the project of approximately 149 million people.

And, finally, Your Honor, since we're in the context of equity proceedings here, plaintiffs' order would put thousands of people out of work. The Environmental Impact Statement for this project documents that approximately 10,000 people will be directly or indirectly employed on this project. Many of those people are working today, and, if the Record of Decision is vacated as plaintiffs have suggested, those people are going to be put out of work, and all work on the project would be stopped.

Now, defendants have complied -- our order complies with the requirements of the court's summary judgment order regarding the additional section 4(f) TCP, traditional cultural properties, in phases 1 through 3. And I want to quote from the court's order. This is from the court's summary judgment order slip opinion at page 12. The court said, quote, Before continuing with the project in any way that may use

unidentified TCPs defendants must complete their identification of the aboveground TCPs within the quarter, closed quote.

Now, defendants have now completed, Your Honor, as we've documented, all of the TCP studies in phases 1 through 3, and this is documented in the declaration of Faith Miyamoto, paragraphs 6 through 26 and exhibits 3 through 14. These studies were conducted by a cultural resources firm with extensive experience in native Hawaiian cultural affairs. They were conducted after extensive consultation with the native Hawaiian community and a number of interviews with those native Hawaiians and organizations identified that may have information relative to the identification of traditional cultural properties.

Finally, Your Honor, the state historic preservation officer diligently reviewed and commented on the TCP studies for phases 1 through 3, and as indicated on this slide, Your Honor, this is exhibit 13 at page 1, the state historic preservation officer's concurrence letter to the Federal Transit Administration for phases 1 through 3 in which the historic preservation officer said SHPD concurs on the evaluation of significance for the 22 potential TCP sites evaluated and for the "no adverse effect" on the two sites deemed eligible for the National Register.

Now, I know Your Honor is entirely familiar as a result of this case with how the system works, but just to

restate that, section 4(f) applies only to historic sites determined to be eligible for inclusion on the National Register. So we've gone through the process for phases 1 through 3. All the potential TCPs have been studied. There were two sites that were identified that were determined to be eligible for inclusion on the National Register. Neither of those sites is impacted by the project. So as we stand here today, Your Honor, the section 4(f) process, if we go to the next slide, is complete with regard to the evaluation of TCPs in phases 1 through 3. And again, Your Honor, this is from the FTA section 4(f) regulations, 23 C.F.R. 774.15 where the regulations said a constructive use does not occur where that "no adverse effect" determination is be.

So as we stand here today, the work is being completed that was indicated in the court's summary judgment order for phases 1 through 3. Work is continuing in phase 4 That's contemplated to be completed this fall, approximately September. But no TCPs that are eligible for the National Register will be impacted by the project in phases 1 through 3. So that's a key fact.

Now, plaintiffs in their papers for the first time in this proceeding made some new and additional claims to which we've responded to in our opposition brief, and these relate to the analogation of the existence of so called karst caves or karst caverns in phase 1 up on the 'Ewa plain. Karst caverns,

Your Honor, are underground cavities where water flows through and limestone rock is removed. And the allegation in a nutshell, if we can go to the -- I'm not sure we have a slide on this.

The allegation in a nutshell by Mr. Lee was that somehow we had missed karst caves that existed within phase 1. And Mr. Lee claims that karst caves -- there's no allegation that a karst cave is a traditional cultural property but that somehow, if there is a karst cave and somehow if the project construction interferes with the flow of water through a cave, that somehow downstream on the coast where Mr. Lee gathers seaweed, that that activity may constitute a traditional cultural property that may have an adverse effect. The only problem, Your Honor, is there's absolutely no evidence of existence of a karst cave in phase 1, and this is a result of multiple geotechnical borings conducted not only for this project but for a development project in the same area.

THE COURT: Well, let me ask this. I was curious about that, too, because first time I ever heard of a karst cavern. But where do you suppose the plaintiffs' evidence comes from of the existence of that kind of a cavern system?

MR. THORNTON: The only, quote, unquote, evidence that the plaintiffs have submitted, Your Honor, is Mr. Lee's declaration. And you can look at the declaration, and it's nothing more than an unsubstantiated claim. And that's a claim

now that has been evaluated by the city, it's been evaluated by the Federal Transit Administration, and, most importantly, Your Honor, it's been evaluated by again the state historic preservation officer. Mr. Lee made these claims some months ago, almost a year ago. They were evaluated by all the relevant authorities, and they were determined to be without substance. So the state historic preservation officer, which again is the final authority in conjunction with the Federal Transit Administration for purposes of a) identifying a potential traditional cultural property -- again there's no suggestion a karst cave is, but there is no evidence that they exist. There are multiple geotechnical borings.

Now, this is not only the conclusion, Your Honor, of the FTA, the state historic preservation officer, but these very same claims were brought by Mr. Lee and opponents to the development project in the same area through which the project will run. They were considered in a formal adjudicatory hearing before the Hawai'i State Land Use Commission. And in the findings of the Hawai'i State Land Use Commission, which are included as exhibit 20 to the supplemental -- no, this is the supplemental declaration of Faith Miyamoto. At page 80 this is one of several findings made by the Hawai'i Land Use Commission, and I'll just read it, Your Honor. According to petitioners -- petitioner is the petitioner for the development project. Hydrology expert who has drilled or supervised the

drilling of more than 60 wells in the 'Ewa region since the early 1980s, it is unlikely that a karst system exists beneath the petition area. During the drilling of more than 60 wells in the 'Ewa region no karst or karst cave systems were ever encountered in the bore holes nor were there underground aqueducts. So -- and the findings go on in some detail to further document.

So this is a claim that we have one declarant making an allegation. And I have to say, Your Honor, it's not unusual in projects of this type where there are opponents where -- in fact, this has a term of art in the industry as well. Late hits on a project, a new claim that's raised years after the public review of the draft Environmental Impact Statement, to have a new assertion come forward at the eleventh hour clearly designed to try to convince this court to enjoin work on phases 1 through 3. There is simply no basis -- no evidence to support this allegation.

Finally, Your Honor, I want to address the fourth factor or fourth criteria articulated by the Supreme Court in the Monsanto proceeding because we are here in the context of a request by the plaintiffs for an injunction. In the context of equitable proceedings the Supreme Court, as the court is aware, has made it clear that injunctions are not to be considered to be standard operating procedure or to be issued as a matter of course. And the court has articulated the criteria governing

them, and the fourth criteria was the injunction not do a disservice to the public interest.

And here we believe that the remedy and the injunction requested by plaintiffs would do an enormous disservice to the public interest. It would effectively stop all work on the project after the six years of effort for the city and FTA to reach agreement on a Full Funding Grant Agreement would prevent moving forward with that. It would prevent the city from receiving the $450 million that congress has authorized for this project. It would stop even final design, Your Honor, because, as we've indicated, you need a Record of Decision to engage in final design work or you need a final agency action. It would stop the 15 active construction contracts that are in place for phases 1 through 3. It would result in enormous delay damages of at least $149 million, if not more. And in considering the public interest, Your Honor, we think it's appropriate that the court look at congress' view of the public interest here, and congress has made it clear in a number of statutes, but here's one that we've cited from 49 where congress has explicitly said it's in the public interest to develop and revitalize the public transportation systems. And that's exactly what this project is about.

Finally, Your Honor, in equity proceedings, as we are here, it's appropriate for the court to take into consideration the public's interest as that has been defined and determined

by the public. And we're in one of those circumstances where we've had the public express their views, and they expressed their views repeatedly and clearly through the ballot box. As Your Honor's aware, the citizens of Honolulu have now endorsed this project not on one occasion, not on two occasions, but on three occasions. The elected representatives of the people of Honolulu and of the people of Hawai'i have continued to express their support for the completion of this project as evidenced by the state legislation providing the requisite state legislative authorization by the federal legislation that I've referenced to the action of congress last summer to authorize the funds and most recently by the mayoral election. We had plaintiffs throughout these proceedings constantly referring to the election. Indeed, this case was to a significant extent part of that electoral strategy. That's fair enough. We live in a democracy. They can seek to change the public's view about a project through the democratic process. They attempted to do that, and they failed. All sides of that recent election viewed that election as another referendum on the project, the governor of the state acknowledged that in a public statement, and the voters overwhelmingly elected the candidate who unabashedly supported the project.

There is no doubt, Your Honor, that an injunction in phases 1 through 3 or vacating the ROD would do an enormous disservice to the public interest. Now, I want to say a couple

of things about plaintiffs' counsel's reference to the issue of vacatur. Vacatur is acting -- ordering agencies -- remanding an action back to a federal agency, and not vacating the underlying federal agency action is not an unusual action by the federal courts. We cited a number of cases where the courts have used their -- exercised their equitable discretion. The Ninth Circuit has indicated in the Ohio Farm Bureau case that the decision not to vacate an agency action is within the court's equitable discretion. We think that's particularly appropriate here, Your Honor, where the form of the vacatur plaintiffs seek would, in effect, be a permanent injunction. And in that context we think you're subject -- the court is then subject to the criteria established by the Supreme Court in the Monsanto case.

So we've framed an order here, Your Honor, that addresses the concerns articulated by the court by the three issues identified in the court's summary judgment order. We've preserved the ability to evaluate alternatives within phase 4, which is the area of concern with regard to the section 4(f) sites, but it allows the final design work to proceed, it would allow the Full Funding Grant Agreement to be executed so that the city retains the eligibility -- it retains the ability -- the city retains the ability to receive the $450 million that congress has authorized and that is now available, and it serves the public interest, Your Honor.

I'd be happy to answer any questions you may have.

THE COURT: I have, I think, one area of some questions.

In phase 4 itself has the city completed all of its real estate acquisition activities for phase 4 properties?

MR. THORNTON: Your Honor, I don't know the answer to that, but it may be that others here --

THE COURT: Well, the reason I'm asking you that is your proposed injunction does not -- or your proposed order permits, I think, real estate acquisitions to go forward, and don't you think if you continue to acquire, if this is true, along the phase 4 route, it's going to lock you in to that route and, you know, make it very, very unlikely the city will want to consider the other alternative.

MR. THORNTON: Your Honor, first, I -- obviously, the mere acquisition of real property without construction doesn't do any environmental harm, and so --

THE COURT: No, but you're spending millions of dollars.

MR. THORNTON: The court -- the city would be spending money, but the Ninth Circuit has held in the cases we've cited, the Pit River case and the other cases, that continued momentum on the project is not grounds to enjoin that activity, you know, the so-called bureaucratic inertia concern is not sufficient grounds to stop activity that will not have

environmental harm. And the mere acquisition of real property is not going to have environmental harm.

THE COURT: Okay, Mr. Thornton. Thank you very much.

MR. THORNTON: Your Honor, just as a housekeeping measure, we had submitted opposition papers and supplemental declaration because of the new issues raised by the plaintiffs in their papers for the first time. This is an evidentiary proceeding under the Ninth Circuit and other applicable case law. We have the right to submit opposition testimony. I know that the court's scheduling order did not -- didn't precisely contemplate that nor did it preclude the opportunity, but we think given the fact that this is an evidentiary proceeding, that we have the right to submit this material. And I would indicate, Your Honor, that if -- plaintiffs have objected to the submission of our opposition papers, but that if -- we are amenable to providing an opportunity to plaintiffs to submit a reply brief, if they so desire, Your Honor. Thank you.

THE COURT: All right. I'll -- I think I've seen it. I haven't ruled on it, have I, on that --

MR. THORNTON: You have not ruled on our application, Your Honor.

THE COURT: Right. But I'll ask Mr. Yost about that.

Thank you very much, Mr. Thornton.

Okay. Federal defendants.

MR. GLAZER: Good morning, Your Honor. David Glazer for the federal defendants. I just want to say a few words about "vacatur"; although, I think Mr. Thornton's largely covered that topic. But as he indicated, vacatur is a drastic remedy that's in search of a solution. In other words, it's simply not necessary to give plaintiffs the relief they believe they're entitled to. That can be accomplished through the relief that I think, as far as phase 4 goes, the parties are largely in agreement on.

Similarly, the parties are in agreement in the main on how agencies will proceed. They'll do additional environmental analysis. They'll either amend the ROD, if called for, or reaffirm the ROD, if that's how the analysis turns out. Vacatur is simply not needed to effectuate that procedure, but as Mr. Thornton indicated, it would have extremely deleterious consequences for the project going forward.

So in that way we're in this situation that was present in the Californians Against Toxics case in which -- provide a little context. It was a case in which some environmental groups sued the EPA over EPA's approval of a plan to be implemented by the local air district that would transfer certain pollution credits to a power plant. The Ninth Circuit found that the approval of the plan was improper and vacated it to the agency -- rather remanded it to the agency without

vacatur, reasoning that vacatur would have unintended consequences for the power plant itself that weren't needed to address the issues that the plaintiffs had raised. That's the same here. The plaintiffs don't need vacatur as a remedy for the phase 4 issues. It would, however, seriously call into question or eliminate federal funding for the project.

THE COURT: What about Mr. Yost reading of the APA that under 706 -- what was it, 706.2? That, you know, the APA requires the court to set aside action that's, you know, found to be arbitrary and capricious.

MR. GLAZER: I think the courts read that with a pragmatic mind. On all the cases that all sides have cited on the vacatur issue have made it clear that vacatur is subject to the court's equitable discretion. There is no case that takes issue with that, no case that says the APA requires vacatur. In fact, it's not inconsistent -- the plain language of the statute isn't inconsistent with the exercise of discretion. The court has set aside the agency's findings as to three issues. That doesn't mean the underlying decision pending remand must be vacated as long as we don't take action inconsistent with the court's order, which we're agreeing not to do.

And as far as section 4(f) goes, there's nothing in section 4(f) that mandates vacatur. Any reading of Overton Park that suggests that result would conflict with Weinberger

where the court found that the Navy had violated the Clean Air Act -- I mean the Clean Water Act but said, be that as it may, an injunction, you know, considering all the factors is not appropriate.

That's all I have.

THE COURT: Okay, Mr. Glazer. Thank you very much.

MR. GLAZER: Thank you.

THE COURT: Okay. Intervenors want to be heard?

MR. MEHEULA: Yes, Your Honor.

THE COURT: Go ahead.

MR. MEHEULA: May it please the court, Bill Meheula for the intervenor defendants.

Your Honor, I wanted to talk about the first and third requirements of the Monsanto injunction and also in connection with that -- and those would be whether there is a likely irreparable harm to the plaintiffs and that they've sustained that burden, and the other one is the balance of hardship between the parties. And in connection with that, Your Honor, with regard to vacatur the plaintiffs in their first amended complaint put it under injunctive relief, and, as Mr. Glazer said, vacatur is part of the court's equitable discretion. And the cases have held that one of the requirements of vacatur is that there's a consideration of the disruptive consequences of an interim vacatur. So under those circumstances, Your Honor, I'd like to talk about the

particular hardship to the parties with respect to injunctive relief request and vacatur request.

I'd like to start on the plaintiffs' side first. The plaintiffs did not discuss their particular harm, but I think it's important to discuss their particular alleged hardship and then compare that with intervenor defendants' particular hardship. And the only way you can do that is, I think, an analysis of the three errors that the court found: the Mother Waldron Park, the Beretania tunnel, and TCPs.

So with respect to the Mother Waldron Park the only plaintiff that's implicated on that is Michelle Matson. And as you recall, Your Honor, that the city and the FTA defendants filed a motion to -- motion for summary judgment against Michelle Matson on the grounds of lack of standing. And in defense of that Michelle Matson submitted a declaration in April, one of their standing declarations, and there she says that I also frequent and enjoy outdoor space and gathering place opportunities of the public parks in downtown areas such as Mother Waldron Park.

In your May 17th order you stated, While Matson does not specify when or how often she plans to return to Mother Waldron Park, she has expressed an intention to continue to use it, and the Ninth Circuit has found that repeated past use of a local park is sufficient to establish standing.

Now, by bringing up the standing argument I'm not

trying to reargue that at this point, Your Honor, but I think it is relevant to show what type of particular interest we're talking about that the plaintiffs are asserting in regard to Mother Waldron Park. She is the only plaintiff that has an interest in it.

In support of their remedy brief or attached to their remedy brief is another declaration by Michelle Matson, and this time she says that she goes to the area but that she doesn't really say she goes to the park. What she says is, quote, I frequently go to this area for public meetings and enjoy the historic open space of this park and its art deco features. She says she visits the park, but in light of her more specific statement it's really unclear whether she actually goes to the park.

And like I said, we're not rechallenging standing at this point, but I think it's important to understand what type of interests that the plaintiffs are asserting with respect to Mother Waldron Park because the equitable requests that they are making requires the court to compare the interests of the parties.

And by bringing this up I'm not trying to comment on the seriousness of their declarations. But with respect to the TCPs, Your Honor, the only plaintiff that has an interest there is plaintiff Walter Heen. In his April 2012 standing declaration he says he's concerned that construction along the

system's entire route will cause serious disturbance to places of importance to his native culture, including unforeseen burials. Mr. Heen in his November 30 declaration attached to plaintiffs' remedy brief says he attaches great value to my native Hawaiian heritage and to places of importance to my culture, including burial sites and other cultural sites.

I believe he's sincere in that regard, Your Honor, but what's important is that he does not identify any aboveground TCPs that are threatened by the project, none that are threatened by the project, none that are threatened in phase 4, and none that he says that he's used in the past. So, you know, that's the type of interest that they're trying to protect here in regard to TCPs.

With respect to the Beretania tunnel you've got three declarations. You've got the Heen, Matson, and the Slater, three plaintiffs that have submitted declarations on November 30th. And all they say is that they enjoy Chinatown and the Dillingham Transportation Building. Now, Chinatown is a TCP, and both Chinatown and the Dillingham Transportation Building are admittedly used by the project. But the FEIS at AR 719 and 725 said that they took steps to minimize any harm.

What's significant is that in the plaintiffs' First Amended Complaint and in their Complaint they didn't argue or contest that the steps that mitigate the harm to Chinatown or to the Dillingham Transportation Building were improper. There

is no allegation like that, and that's why your decision didn't address that. The project is oceanside of those two properties. But they do say that they enjoy Chinatown and the Dillingham Transportation Building; so -- but what they argue is that, if you do the Beretania tunnel, you will avoid those, and, therefore, that's the interest that's being -- that's being damaged or potentially harmed. And so, you know, with respect to Beretania tunnel that's what we're talking about as far as what plaintiffs' hardship might be under the circumstances.

Now to talk about the intervenor defendants. Their hardship, as we've set forth earlier in this case, and I just want to reemphasize here, are several. Number one, we've got transportation equity. We've got a large population of low income, middle income, minority groups, communities of concern that live in West O'ahu. They regularly incur the worst traffic in the United States, and they spend two to three hours a day in traffic where people who don't have those type of economic concerns don't. So the opportunity to do further work, to do homework, to exercise, to cook good meals, to spend time with your family are reduced significantly. This is an income gap issue, and it's one of the things that the FTA requires that transportation equity be one of the purposes before they will award federal funding, and they found that the project does address it and that the other alternatives do not.

The other one related to that, Your Honor, is one of my clients is the Carpenters Union or an organization where the Carpenters Union is a member of it. The carpenters -- about 47 percent of the carpenters in -- on O'ahu are without work, and they've been without that level of work since about 2007. As Mr. Thornton said, the project will provide, as set forth in the FEIS, about 10,000 jobs per year for about 15 years until the end of the project in 2019, and then the FEIS goes on to say that transportation development or transportation-oriented development would continue or take off from that point. So it's very important from economic harm from the standpoint of my clients.

Reduction in traffic. The plaintiffs set forth in their reply -- in their remedy brief that the amount of the traffic reduction from the project according to the FEIS is 1.5 percent. Your Honor, I believe that is a misstatement. What they're talking about there is they point to table 312, and what 312 indicates is that -- what it measures is island-wide all day measurement of the number of vehicle trips, but there are other measurements and they misread that one.

The table that actually compares all of the different measurements is table 314, and that one measures island-wide -- I mean, island-wide; that's for all of O'ahu, not just in the corridor -- daily vehicle miles traveled, vehicle hours traveled, and then the third one is vehicle hours of delay.

Now, the FEIS says the last one is the most important because that's the one that saves people time on the road. And what they say is daily vehicle miles traveled, there's going to be a 4 percent benefit from the project. In vehicle hours traveled there's going to be 8 percent benefit. But in vehicle hours of delay there's going to be an 18 percent benefit. Not only that but the FEIS goes on to show that when you take the "to work" and "from work" in the corridor, that the benefit is 38 percent benefit. So there are extraordinary traffic reduction benefits from the project that and that is --

THE COURT: Well, except there's -- right. There's one study that says the congestion is going to be reduced in the corridor by 1.3 percent, which it doesn't seem like very much.

MR. MEHEULA: No, but, Your Honor, what I tried to explain there is what they did was they misread table 312, and 312 only discussed daily vehicle miles traveled. Now, there are three other important measurements: vehicle hours traveled, vehicle hours of delay. All three of those are compared side by side in table 314 so you can see it. Why I say they misread it is because even on the measurement they were talking about, which is island-wide daily vehicle miles traveled, the table 314 has it a 4 percent improvement. And then the other ones, like I said, 18 for delay -- vehicle hours of delay, and if you use the corridor to and from work, which

is really the main problem, it's a 38 percent improvement. And that's all in the FEIS.

And the final one I want to discuss, Your Honor, is reduction of gas pollutants. So we're talking about an environmental hardship to the intervenor defendants if the project does not move forward. And in this I just refer the court to the FEIS at AR 533 and 554, and that's where it shows that the regional transportation pollutant emissions will be reduced between 3.9 and 4.6 percent and that the -- assuming electricity is generated from combustion of oil, the daily thermal units saved by the project will be about 2,440 million British thermal units. So significant gas pollutant reduction from the project.

And my final point, Your Honor, is that when you compare the type of potential harms that the plaintiffs will -- might suffer and it's -- at this point it's speculative, which they haven't proved, and they need to prove under the law that their harm -- their irreparable harm is likely. They have not done that. They just assume that, but they haven't done that. And if you look at the type of harm under those declarations, it kind of bears it out. But then if you compare that with the real type of harm that intervenor defendants will suffer if their project don't go forward, then under those circumstances an injunction that enjoins work in phase 4 or inequitable entry of any kind of judgment that vacates the ROD would be

inappropriate. Thank you.

THE COURT: Okay. Thank you.

Mr. Yost.

MR. YOST: Thank you, Your Honor. If it's okay with Your Honor, I will ask the counsel for the city to bring up one of their slides in Mr. Thornton's presentation. The second slide, I believe it was, was a chart dealing with the TCP study phase 4 limits, which was exhibit 15 to the Miyamoto declaration. If satisfactory to Your Honor, I'll ask -- I only ask that you look at this, Your Honor.

The TCP study phase 4 limits are shaded with the vertical blue stripes. They cover the existing route. Also on that map is the Beretania Street tunnel route. There is no intention for having a TCP study on the Beretania Street tunnel.

Second matter. Mr. Thornton sort of hinted that I was trying to relitigate NEPA issues by reference to RODs and EISs and so on. That is not the case. Your Honor very properly referred in the 4(f) context to those as the documents which reflect what takes place under 4(f), and that is precisely what the agency's own regulations 23 C.F.R. part 774 do. Just throughout they use the NEPA documentation as the means of establishing what they're doing under 4(f).

Third matter, the city keeps saying they completed the TCP evaluation for phases 1 through 3, and that's sort of

behind us, and, you know, we haven't taken that on. At the same time the city has noted in Miyamoto's declaration in paragraph 20 and the Miyamoto declaration at paragraph 21 the city's consultant's reports in paragraph 20, which said there were 26 TCPs likely eligible for listing and then 10 more properties requiring further analysis. And then a month later -- and this is in the Miyamoto declaration, 21 -- the city came out with a determination of eligibility, in other words, the city's document, and somehow that 26 TCPs plus 10 possibles got reduced to two TCPs, neither of which harmed anything. The city did not furnish the documents. It just -- to support its argument, it and the Miyamoto declarations reference them, but I will warrant what is in them. That doesn't -- that doesn't lead to a lot of confidence on my part.

Fourth matter, with respect to the court's suggestion of our filing a supplemental brief to respond to the city's supplemental brief, that's agreeable with us as long as nothing happens which locks in the Full Funding Grant Agreement by December 19th. So if that were put off for a number of days, that would, you know, that would be agreeable.

And then, finally, with respect to the FTA and the Full Funding Grant Agreement only the FTA can comply with section 4(b). It's not something the city can do. And if the FTA commits to full funding before 4(f) compliance is complete, in violation of law the reconciliation process would have been

divorced from the agency decision-making, exactly what is not supposed to happen.

Absent questions, Your Honor, I have nothing further.

THE COURT: No, I don't. Thank you, Mr. Yost.

MR. YOST: Thank you, sir.

THE COURT: Mr. Thornton, you want to say something else?

MR. THORNTON: Your Honor, I would like to respond to one of Mr. Yost's points about the TCP studies for phases 1 through 3.

Process, Your Honor. This is an open process. As Your Honor recalls, there are a large number of entities that participate in the cultural resource reviews. Under the programmatic agreement there are these things called consulting parties. They have regular meetings with the consulting parties. Indeed the plaintiffs' groups are included in the consulting parties groups. Mr. Lee, plaintiffs' declarant, participates in the consulting parties meetings. The National Trust for Historic Preservation, an amici who filed papers in support of plaintiffs, is a consulting party. They participate in the meetings of the consulting parties. The drafts of the TCP studies for phases 1 through 3 were submitted through that process.

Everybody had an opportunity to review and comment on those; so for plaintiffs' counsel to stand here and suggest

that they have not had an opportunity to review those studies, Your Honor, is flat not true. Those folks had an opportunity to review those studies, they had an opportunity to comment on those studies, and no one, Your Honor, in the context of those proceedings objected to the determination of the eligibility of those TCP properties. So for plaintiffs to stand here today and suggest that they haven't had an adequate opportunity to participate in that process is simply not correct.

THE COURT: When you say "those properties," you're talking about --

MR. THORNTON: I'm talking about --

THE COURT: -- in the earlier phases.

MR. THORNTON: -- the evaluation in phases 1 through 3, yes, Your Honor. Evaluation in phase 4 is proceeding, and those folks will have the same rights and opportunity to review and comment on those studies. But they had that opportunity -- they had been an opportunity to contest. Now, if Mr. Yost wants to bring a new lawsuit to claim that somehow he has a new National Historic Preservation Act claim, then I think the statute of limitations has run, but, you know, that's a different lawsuit, Your Honor. But for them to stand here and say they have not had an opportunity or somehow they're calling into question the determinations were made that were made in an open public process is simply not accurate.

THE COURT: Okay. Nothing else; right? Okay.

All right. I'm going to take this matter under submission. I hope to have an order out in short order. In fact, you know, I think it will be -- some of it at least will be in the form of final judgment so that, you know, at some point there will be an appealable order, I assume, but I think we're about at that place and to finalize that, even though as the, I guess, proposals on all sides suggest, there ought to be some -- some continuing oversight jurisdiction, but still I think that can take place even with the final judgment; right?

So anyway I appreciate your briefing and your argument, and this matter is now submitted. All right? Thank you.

(Court recessed at 11:28 A.M.)

COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true, complete, and correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, December 12, 2012.

/s/ Debra Chun

DEBRA KEKUNA CHUN

RPR, CRR