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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 Services

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. 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; WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services,

Defendants.

Civil No: 11-00307 AWT

**MEMORANDUM OF CITY DEFENDANTS IN RESPONSE TO THE COURT'S SCHEDULING ORDER RE REMEDY DATED NOVEMBER 1, 2012 (ECF NO. 183)**; DECLARATION OF DANIEL A. GRABAUSKAS; EXHIBITS 1 - 2; DECLARATION OF THOMAS J. WILLOUGHBY; DECLARATION OF FAITH MIYAMOTO; EXHIBITS 3 - 15; and [PROPOSED] ORDER REGARDING REMEDIES; CERTIFCATE OF COMPLIANCE; CERTIFICATE OF SERVICE

(Presiding: The Honorable A. Wallace Tashima, United States Circuit Judge Sitting by Designation)

Date Action Filed: May 12, 2011
No Trial Date Set

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# ACRONYM AND ABBREVIATION LIST

| Acronym or Abbreviation | Definition |
|---|---|
| Advisory Council | Advisory Council on Historic Preservation |
| APA | Administrative Procedure Act |
| AR | Administrative Record |
| City | City and County of Honolulu |
| Final EIS | Final Environmental Impact Statement |
| FTA | Federal Transit Administration |
| National Register | National Register of Historic Places |
| NEPA | National Environmental Policy Act |
| ORTP | Oʻahu Regional Transportation Plan 2030, as amended |
| Project | Honolulu High-Capacity Transit Corridor Project |
| ROD | Record of Decision |
| Section 106 | 16 U.S.C. § 470 |
| Section 4(f) or 4(f) | 49 U.S.C. § 303 |
| TCPs | Traditional Cultural Properties |

## I. INTRODUCTION

The City and County Defendants ("City") submit this memorandum in response to the Court's Scheduling Order Re Remedy dated November 1, 2012 (ECF No. 183). The City requests that the Court adopt a remedy order that:

(1) remands the matter to the Federal Transit Administration ("FTA") without vacatur;

(2) limits any injunction to construction within the construction Phase 4 (the Kalihi/Chinatown/Downtown/Kaka'ako/Ala Moana Center phase)[1] of the Project pending Defendants' compliance with the Court's Summary Judgment Order ("SJ Order") (ECF No. 182);

(3) requires Defendants to file a status report within 180 days regarding Defendants' compliance with the SJ Order; and

(4) terminates the injunction 30 days after the FTA files notice with the Court of its compliance with the SJ Order.

The City's Order Regarding Remedies filed herewith ("Proposed Remedy Order") meets these requirements.

The Defendants have now completed the evaluation of the effects of the Project on potential above-ground traditional cultural properties ("TCPs") in Phases 1 through 3 in consultation with the State Historic Preservation Officer and

[1] The four construction phases are shown on the map attached as Exhibit 1 to the Declaration of Daniel A. Grabauskas filed in support of the City's Memorandum.

other consulting parties in compliance with the requirements of Section 4(f) and as contemplated by the Programmatic Agreement. The State Historic Preservation Officer has reviewed the additional TCP studies in Phases 1 through 3 and has concurred with the FTA's determination that the Project will not have an adverse effect on any above-ground TCPs in Phases 1 through 3. Thus, the three issues identified in the Court's SJ Order are limited to Phase 4.

The City's Proposed Remedy Order balances the equities as required by equitable principles and the Supreme Court and Ninth Circuit cases governing equitable relief in Administrative Procedure Act matters. The Proposed Remedy Order:

1. Avoids any adverse environmental impacts within the portions of the Project that are relevant to the three discrete Section 4(f) issues identified in the SJ Order pending the completion of the required additional analyses under Section 4(f) (evaluation of potential above-ground TCPs that may be used by the Project, evaluation of whether the Beretania Street Tunnel Alternative is a feasible and prudent alternative, and evaluation of whether the Project will constructively use Mother Waldron Park);

2. Preserves the ability of the Defendants to modify the alignment of the Project in Phase 4 if required by the additional analyses specified in the SJ Order;

3. Minimizes the enormous economic and other harm that Hawai‘i would suffer from a work stoppage on the Project, including the loss of thousands

of jobs in the local construction community that is still suffering from the recent great recession;

4. Avoids the potential loss of $1.43 billion in scheduled federal funding for the Project pursuant to the Full Funding Grant Agreement announced by the FTA;

5. Avoids a delay in the completion of the Project with attendant significant adverse economic and environmental impacts on the transit-dependent population and the public at large; and

6. Is consistent with FTA regulations that allow construction to continue while the agency is supplementing the EIS.

The Proposed Remedy Order is consistent with the remedy approved by the Ninth Circuit in *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1160-61 (9th Cir. 2008) (construction allowed in one phase while Federal Highway Administration completed a Section 4(f) analysis in other project phases). It "'balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944).

An order that vacates the Record of Decision or that enjoins all construction activities in all phases of the Project would be inconsistent with the standards for equitable relief. Enjoining all construction could jeopardize the most important

transit project in the State of Hawai‘i, increase the cost of the Project by at least $149 million, threaten the imminent approval of $1.5 billion in federal funding for the Project, and put thousands of Hawaii residents out of work. Moreover, such an order would be inconsistent with applicable FTA regulations, which simply require the suspension of work within the areas affected by a supplemental environmental impact/Section 4(f) statement and do not otherwise abrogate any outstanding approvals.

## II. BACKGROUND

The Court issued its SJ Order on the parties' cross-motions for summary judgment on November 1, 2012. (ECF No. 182.) The Court granted Defendants' Motions for Summary Judgment (ECF Nos. 145, 148) with respect to all of Plaintiffs' National Environmental Policy Act ("NEPA") and National Historic Preservation Act causes of action. With three exceptions, the Court also granted Defendants' Motions for Summary Judgment regarding Plaintiffs' Section 4(f) claims that were not previously dismissed by the Court. SJ Order at 44.

The Court granted Plaintiffs' Motion for Summary Judgment with respect to three discrete issues: (1) the need to complete the identification and evaluation of potential above-ground TCPs; (2) documentation in a supplement to the Final EIS of whether the Beretania Street Tunnel Alternative is a feasible and prudent alternative under Section 4(f); and (3) further evaluation of whether the Project will constructively use Mother Waldron Park. SJ Order at 12, 20-21, 27. The

Court issued a Scheduling Order Re Remedy that ordered additional briefing on the appropriate remedy in light of the Court's SJ Order. (ECF No. 182.)

The Record of Decision issued by the FTA incorporated the Programmatic Agreement by and among the Defendants, the State Historic Preservation Officer, the Advisory Council on Historic Preservation and other parties. AR1:00000030 at 83-229. The Programmatic Agreement requires the Defendants to conduct additional studies of previously unidentified TCPs to determine whether there are any TCPs in the Area of Potential Effect of the Project and whether the Project will have an adverse effect on such TCPs under Section 4(f) of the Department of Transportation Act and Section 106 of the National Historic Preservation Act. AR1:00000030 at 91; Declaration of Faith Miyamoto ("Miyamoto Decl."), ¶ 7. Because these additional TCP studies were initiated after the January 2011 Record of Decision, the additional studies were not part of the Administrative Record and thus were not before the Court at the time of the hearing on the summary judgment motions.

The City retained the SRI Foundation to carry out the additional TCP studies. Miyamoto Decl., ¶ 8. SRI Foundation is a nationally recognized historic preservation consulting firm with expertise in Section 106 and Section 4(f) compliance. Miyamoto Decl., ¶¶ 8, 20. The SRI Foundation hired Kumu Pono Associates LLC, a local Hawaiian firm with expertise in Hawaiian language, history and ethnography. SRI Foundation and Kumu Pono collected information

through archival research and informant interviews to: (a) determine whether previously unidentified places of religious and cultural significance might be in or near the Project's Area of Potential Effect; and (b) if such places exist, to determine and recommend whether they may be eligible for listing on the National Register of Historic Places. Miyamoto Decl., ¶ 8.

In the course of the additional TCP studies, the Defendants and the TCP consultants solicited input from the consulting parties to the Programmatic Agreement (including Native Hawaiian organizations) regarding the existence of any previously unidentified TCPs. Miyamoto Decl., ¶ 10. The additional TCP studies identified two TCPs (Huewaipi and Kuki'iahu) that were determined to be eligible for inclusion on the National Register of Historic Places. Miyamoto Decl., ¶ 22. On the basis of the studies, the FTA determined, and the State Historic Preservation Officer concurred, that the Project would not have any adverse effect on the two TCPs. Miyamoto Decl., ¶ 24. No land from either site will be taken for the Project. Miyamoto Decl., ¶ 23. Because the FTA and the State Historic Preservation Officer have determined that the Project will not have any adverse effect on the two TCPs in Phase 2 and no land will be taken from these two sites, the Project will also not "use" the TCPs under Section 4(f). 23 C.F.R. § 774.15(f)(1).

The FTA's "no adverse effect" determinations were made in consultation with the State Historic Preservation Officer. Miyamoto Decl., ¶¶ 14, 17-18, 21-26.

The FTA and the State Historic Preservation Officer made the no adverse effect determination only after reviewing the extensive TCP studies and consulting with Native Hawaiian organizations and the consulting parties to the Programmatic Agreement. None of the consulting parties objected to the no adverse effect determination. Miyamoto Decl., ¶ 20.

## III. STANDARDS GOVERNING THE REMEDY ORDER

### A. Vacatur Is Not Required on Remand for Additional Environmental Review

Remedies in cases brought under the Administrative Procedure Act ("APA") are controlled by principles of equity. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989) ("Our inquiry into the district court's authority to order equitable relief begins with the well-established principle that 'while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action'" (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Romero-Barcelo*, 456 U.S. at 311, quotation omitted.

Courts may choose not to vacate agency decisions upon remand to the agency for further proceedings. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *see also Native Ecosystems Council v. Kimbell*, 304 Fed. Appx. 537, 538 (holding that the district court's decision not to automatically vacate the record of decision was not an abuse of discretion); *ICORE, Inc. v. FCC*, 985 F.2d 1075, 1081 (D.C. Cir. 1982); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 2011 U.S. Dist. LEXIS 11764, *9-10 (upholding only partial vacatur of record of decision where equitable factors weighed in favor and parties agreed that most elements of record of decision should be retained).

**B. Injunctive Relief Is Not Automatic**

Injunctive relief, whether temporary or permanent, is an "extraordinary remedy, never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). Injunctive relief is not "automatic" in environmental cases. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987) (rejecting presumption of irreparable injury as a result of violation of Alaska Conservation Act); *Romero-Barcelo*, 456 U.S. at 306 (holding that district courts have discretion to decide whether to enjoin violation of Clean Water Act); *N. Cheyenne Tribe v. Norton*, 503 F.3d 836 (9th Cir. 2007). Indeed, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically

obligated to grant an injunction for every violation of law." *Romero-Barcelo,* 456 U.S. at 313.

"'A plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *Monsanto Co. v. Geertson Seed Farms*, 2010 U.S. LEXIS 4980, 130 S.Ct. 2743, 2756 (2010), quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Sierra Pacific Ind. v. Lyng*, 866 F.2d 1099, 1113 (9th Cir. 1989), quoting *Amoco Prod. Co.*, 480 U.S. at 542.

"Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims." *Romero-Barcelo,* 456 U.S. at 312 (citation omitted). Where there are competing claims of injury, "the court 'balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.'" *Id.* "In exercising their sound discretion, courts of equity should pay particular regard for

the public consequences in employing the extraordinary remedy of injunction." *Id.*, citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941).

## IV. THE DEFENDANTS' PROPOSED REMEDY ORDER IS CONSISTENT WITH EQUITABLE PRINCIPLES AND APPLICABLE CASE LAW

### A. Defendants' Proposed Remedy Order Avoids Any Irreparable Injury to Plaintiffs

The Court granted summary judgment for Defendants on all of Plaintiffs' NEPA and National Historic Preservation Act causes of action, and on all but three of Plaintiffs' Section 4(f) causes of action that were not previously dismissed by the Court. The Court's grant of summary judgment for Plaintiffs was limited to three discrete Section 4(f) issues: (1) the need to complete the identification and evaluation of effects of the Project on potential above-ground TCPs; (2) the need for additional evaluation of whether the Project would constructively use Mother Waldron Park; and (3) the preparation of a supplement to the Final EIS documenting whether the Beretania Street Tunnel Alternative in Phase 4 of the Project is a feasible and prudent alternative to the use of Section 4(f) sites in Phase 4. SJ Order at 12, 20-21, 27.

As discussed below, each of these issues concern limited and discrete portions of the Project alignment. Issues (2) and (3) are located wholly within Phase 4 of the Project, and Issue (1) remains outstanding only with respect to Phase 4 of the Project as described in the next paragraph.

The Defendants have now completed the evaluation of the effects of the Project on potential above-ground TCPs in Phases 1 through 3 in consultation with the State Historic Preservation Officer and other consulting parties in compliance with Section 4(f) and as provided in the Programmatic Agreement. Miyamoto Decl., ¶ 26. The FTA has determined that the Project will not have any adverse effect on any above-ground TCPs in Phases 1 through 3 of the Project. Miyamoto Decl., ¶ 26. The State Historic Preservation Officer reviewed the additional studies and concurred with the FTA's determination that the Project will not have an adverse impact on any above-ground TCP in Phases 1 through 3. Miyamoto Decl., ¶¶ 17, 24. Thus, the three issues identified in the Court's Summary Judgment Order are now limited to Phase 4. The Proposed Remedy Order ensures that there will be no irreparable injury to Plaintiffs.

### B. The Balance of Hardships Favors Limiting Any Injunctive Relief to Phase 4

#### 1. Stopping Construction in Phases 1 Through 3 Will Cause Enormous Harm to the Public

The balance of hardships favors limiting any injunctive relief to Phase 4 as reflected in the Proposed Remedy Order. The Project is one of the largest and most complex transportation projects now under construction in the United States. Declaration of Daniel A. Grabauskas ("Grabauskas Decl."), ¶ 16. The City has entered into design and construction related contracts for Phases 1 through 3 with a contract value of over $ 1.7 billion. Declaration of Thomas A. Willoughby

("Willoughby Decl."), ¶ 7. Extensive construction in Phase 1 commenced in April 2012. Grabauskas Decl., ¶ 16. Plaintiffs were fully aware of this ongoing construction during the pendency of this litigation and never sought any injunctive relief. Apparently, they were not concerned about irreparable harm to any of their interests attributable to this construction.

The completion of design and construction in accordance with the Project schedule requires the very close coordination and timing of contract activities. The suspension of any one construction contract has a ripple effect and adverse impacts on other contracts and on the entire Project schedule. As just one example, construction of the guideway and station components of the Project within any particular construction phase cannot fully commence until final engineering drawings are completed, real property is acquired, utilities are relocated and grading is completed. Construction equipment and materials must be ordered in a particular sequence to ensure that the necessary construction material and equipment is delivered to the Project site to avoid delays in construction, to comply with supplier contracts, to avoid increased costs, and to minimize storage and delivery costs. Construction of the Project within the available budget also requires close coordination of the availability of Project funds from the City and the funds anticipated to be made available by the FTA. Willoughby Decl., ¶ 9.

The Project's Executive Director and CEO estimates that an injunction on construction work in all Phases of the Project could delay the completion of the

Project by 7 months. Grabauskas Decl., ¶ 21.

Even after subtracting out the estimated impact of the temporary cessation of construction to address the decision of the Hawai‘i Supreme Court,[2] an injunction on construction activities in Phases 1 to 3 is estimated to increase the cost of the Project by $149 million. Willoughby Decl., ¶ 19. These estimates assume that the additional Section 4(f) analyses required by the Court's SJ Order will be completed prior to the scheduled start of construction of Phase 4 in June 2014. Willoughby Decl., ¶ 12. The completion of the additional analyses requires coordination with the State Historic Preservation Officer and other parties and is therefore outside of the control of the Defendants. If the additional studies are delayed further for any reason, the cost of an injunction will increase.

Unlike many important infrastructure projects, funding for the construction of the Project is available. The estimated Project cost is $5.2 billion. The Project is expected to be entirely funded from a dedicated state general excise and use tax surcharge and from federal funds. Grabauskas Decl., ¶ 14.

FTA is in the final stages of the approval of the Full Funding Grant

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[2] The City Defendants previously lodged with the Court the decision of the Hawai‘i Supreme Court in *Kaleikini v. Yoshioka,* No. SCAP-11-0000611 (ECF No. 181). Addressing an issue of first impression, the Supreme Court of Hawai‘i held that State law required the City to complete archaeological inventory surveys for all four Phases of the Project prior to commencing construction in any Phase. As a result, the City ceased all ground-disturbing construction activities, except for those activities that were necessary to responsibly conclude activities in progress

Agreement for the Project – the final step in FTA's lengthy New Starts planning and project development process. Grabauskas Decl., ¶ 22. The federal funds are critical to the viability of this project. The federal funding made available for the Project is the result of a multi-year financial, technical, and environmental evaluation by FTA and the City. The City is requesting a total of $1.55 billion in federal funds of which $120 million has already been appropriated between Fiscal Year 2008 and Fiscal Year 2011. The Project financial plan assumes that the City would receive $200 million in Fiscal Year 2012, $250 million each year between Fiscal Years 2013 and 2016, and $230 million in Fiscal Year 2017. Grabauskas Decl., ¶ 14.

If the Record of Decision is vacated, the City will be required to repeat several steps in the major capital investment planning and project development process. This could take several years, substantially delay construction and result in very significant increases in the cost to complete the Project which could jeopardize the Project itself. Grabauskas Decl., ¶ 22. As documented by the Project's Contracts and Controls Manager, each month of delay in the construction of the Project increases the cost of the Project by approximately $12 million. Willoughby Decl., ¶ 17. After many years of effort, the City and the FTA are on the verge of signing the Full Funding Grant Agreement. An order that vacates the

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and were otherwise needed to be completed for public health and safety reasons. Grabauskas Decl., ¶ 28.

Record of Decision or that enjoins construction would do enormous damage to the ability of the City to deliver this vital infrastructure Project to benefit the people of Hawai‘i and the nation.

### 2. The Proposed Remedy Order Minimizes the Hardship of An Injunction

Given the enormous economic and other harm of an injunction on all construction work, the Court should frame a remedy that minimizes this harm. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) ("Economic harm may indeed be a factor in considering the balance of equitable interests.") The Ninth Circuit has repeatedly denied injunctive relief where economic harm outweighs environmental impacts. *See, e.g.*, *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1189 (9th Cir. 1988) (need for development of oil and gas reserves weighs in favor of dissolving injunction of lease sale pending appeal); *Half Moon Bay Fisherman's Mktg. Ass'n. v. Carlucci*, 847 F.2d 1389, 1397-1398 (9th Cir. 1988) as amended, 857 F.2d 505 (9th Cir. 1988) (economic harm from delay in harbor deepening outweighs environmental harm).

The Proposed Remedy Order minimizes the hardship on the public by limiting any injunction to Phase 4. Because the additional Section 4(f) analyses required by the Court's SJ Order are also restricted to Phase 4, the Proposed Remedy Order limits the hardship to both the Plaintiffs and Defendants.

The Project's Contracts and Controls Manager estimates that an injunction

limited to Phase 4 would reduce the delay costs of an injunction from $219 million to $74 million, including the cost to prepare the additional studies. After netting out the delay costs attributable to the temporary suspension of work related to the Hawai‘i Supreme Court decision, the Proposed Remedy Order would reduce the delay costs of an injunction from $74 million to $4 million.

### 3. An Injunction Limited to Phase 4 Is Consistent With Applicable Case Law

Limiting any injunction to Phase 4 is consistent with applicable case law. *See N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d at 1160-61 (construction of highway project permitted for phase requiring no additional environmental review); *Envtl. Def. Fund, Inc. v. Froehlke*, 477 F.2d 1033, 1037 (8th Cir. 1973) (permitting limited injunctive relief where record demonstrated that resources would not be harmed while EIS was being completed).

In *North Idaho Community Action Network*, 545 F.3d at 1160, the Ninth Circuit, in fashioning a remedy for defendants' Section 4(f) violation, found it "unnecessary to enjoin the entire Project while the Agencies complete the necessary evaluation." It further noted that all parties agreed that the Section 4(f) evaluation had been completed for at least the first phase of project construction and concluded that the scope of injunctive relief should be limited to those phases of the project for which environmental review had not been fully completed. *Id.* at 1160-61.

The Eighth Circuit has allowed project construction to continue where the record demonstrated that resources would not be harmed pending completion of an EIS. In *Environmental Defense Fund, Inc. v. Foehlke, supra*, 477 F.2d 1033, the primary issue on appeal was whether the lower court erred in refusing to enjoin all activities relating to the construction of the project pending completion of the EIS. The trial court had enjoined the defendants from proceeding with certain activities and contracts, but permitted the defendants to continue certain on-going pre-construction and construction activities. *Id.* at 1036. The Eighth Circuit held that the trial court did not abuse its discretion in granting limited injunctive relief because "[t]he record [bore] out the trial court's finding that the river and life within it would not be harmed while the E.I.S. was being completed, and that only minimal environmental damage would be inflicted on the adjacent land during that period." *Id.* at 1037.

Similarly, in *Arkansas Community Organization for Reform Now v. Brinegar*, 398 F. Supp. 685 (E.D. Ak. 1975), the court declined to enjoin construction on portions of the project where continuation of the work in that segment was not going to inflict any immediate injury on anyone, but enjoining such work would harm "thousands of people in Little Rock who need an east-west expressway at least from I-430 to Dennison Street as soon as they can get it." *Id.* at 698-99.

Here, Plaintiffs cannot demonstrate any harm related to construction of the first three Phases of the Project. The additional review required for the Beretania Street Tunnel Alternative and the additional constructive use evaluation and determination for Mother Waldron Park both relate to Phase 4 of Project.

Additionally, although identification of TCPs potentially affects the entirety of the Project alignment, as detailed above, Defendants have already completed the additional TCP studies for Phases 1 through 3. In consultation with the Hawai‘i State Historic Preservation Officer, FTA determined that the Project will have no adverse effect on any TCP within Phases 1 through 3 of the Project. Thus, to the extent Plaintiffs can demonstrate any harm from failure to either vacate the Final EIS or ROD, or enjoin Project construction, such harm relates only to Phase 4 of the Project. In contrast, vacatur of the Final EIS or ROD or an injunction halting all Project activities would greatly and needlessly prejudice Defendants and the public. Project activities unaffected by the additional review should therefore be permitted to proceed during remand.

As Plaintiffs have acknowledged to the Court, they are fully aware of ongoing construction. The status of the construction of the Project is the subject of regular and ongoing press coverage in the Honolulu press. Plaintiffs made no attempts to seek injunctive relief of any of this construction work during the pendency of this litigation. This hardly reflects that Plaintiffs are concerned about

irreparable harm to any of their interests due to the current construction work outside of Phase 4.

#### 4. The Proposed Remedy Order is Consistent with FTA Regulations Governing Work During the Supplementation of an EIS

The Proposed Remedy Order complies with the FTA's regulations governing construction work while the agency is supplementing an environmental impact statement. The FTA regulation provides that the preparation of a supplement to an EIS ***does not*** necessarily:

> (1) Prevent the granting of new approvals;
>
> (2) Require the withdrawal of previous approvals; or
>
> (3) Require the suspension of project activities; for any activity not directly affected by the supplement.

23 C.F.R. § 771.130(f).

The Proposed Remedy Order is consistent with the FTA regulation. The Proposed Remedy Order keeps the FTA approval of the Project in effect and limits the injunction to Phase 4 – the portion of the Project that is the subject of the additional analyses required by the SJ Order.

### C. The Public Interest Favors Limiting Any Injunction to Phase 4

In addition to the other injunction criteria required by *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, parties seeking an injunction are required to demonstrate that the public interest will not be disserved by an injunction. *Id*. at

2756. There is overwhelming evidence that an injunction on all construction activities will disserve the public interest.

The Project is the result of several decades of planning and public debate regarding how to address the mobility needs of the residents of O‘ahu, including needs of the transit-dependent population, and the very severe traffic congestion attributable to population growth and Honolulu’s reliance on the private automobile as the primary mode of transportation. AR1:00000247 at 312-313; Grabauskas Decl., ¶ 6. The Project is a key element of the O‘ahu Regional Transportation Plan (“ORTP”) – the key policy document governing transportation improvements on O‘ahu. Grabauskas Decl., ¶ 7.

An injunction on all construction will have immediate and direct adverse impacts on the thousands of individuals working on the Project. An average of approximately 10,000 jobs each year will be attributable to rail construction. In addition to direct heavy engineering and construction jobs, this number includes indirect employment, which are jobs created in other sectors as a result of the Project, and induced employment, which results from an overall expansion of the regional economy as a result of the Project. Grabauskas Decl., ¶ 11.

A substantial number of these jobs will be held by the local community, including jobs of employees in the construction industry and in disadvantaged businesses that have been hit hardest by the recent great recession. “Although ‘preserving environmental resources is certainly in the public’s interest,’ protecting

the 'local economy' and 'preventing job loss' are in the public's interest as well." *Ctr. for Biological Diversity v. Provencio*, No. CV 10-330 (D. Ariz. Sep. 28, 2012) at 9, citing *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

An injunction on construction in all phases will delay completion of the Project by 7 months or more, as well as the realization of the substantial environmental benefits of the Project. First and foremost, a delay in the completion of the Project will delay the substantial traffic relief and mobility benefits provided by the Project. The Project has other important environmental benefits that would be delayed by an injunction. The Final EIS documents that the Project will reduce mobile source regional transportation pollutant emissions by between 3.9 and 4.6 percent compared to the No Build Alternative. AR1:000000247 at 533. The Project will also decrease greenhouse gas emissions from transportation sources on O'ahu. Assuming all electricity is generated from combustion of oil, the daily 2,440 million British thermal units saved by the Project will result in a daily reduction in greenhouse gas emissions of approximately 171 metric tons of carbon dioxide. AR1:000000247 at 554. Finally, the increased cost resulting from a delay in construction will ultimately be borne by the taxpayers and users of the Project, as that is the inevitable source of these additional funds.

More than any project in Hawai‘i’s history, the public, through its elected representatives and through direct votes, has expressed its support for the Project. In 2005, recognizing the need and public support for the Project, the Hawai‘i State Legislature authorized the City to levy a general excise and use tax surcharge to construct and operate a mass transit system serving O‘ahu. *See* Haw. Rev. Stat. § 46-16.8. The City Council subsequently adopted a tax surcharge to fund the Project. AR3:00055355. Further, the citizens of the City approved an amendment to the City Charter declaring that the City should establish a steel wheel on steel rail transit system. AR3:00055181 at 55182. Finally, by a vote of more than 63% in favor, a City Charter amendment was approved by the citizens of the City in 2010 to create a semi-autonomous transit authority to be known as the Honolulu Authority for Rapid Transportation, with the authority to develop, operate, maintain and expand the City fixed guideway rail project. AR00055031 at 55032.

Throughout this litigation, Plaintiffs have trumpeted Plaintiff Cayetano’s campaign for Mayor of Honolulu, centered on blocking the Project. Plaintiffs’ lawsuit was a key component of Mr. Cayetano’s election strategy. In our democracy, the public is provided an opportunity, through elections, to express their view of what the public considers to be the public interest. And in this case, the citizens of Honolulu have spoken in clear and unmistakable terms that they believe that the Project is in the public interest.

In the last month, the voters of the City reaffirmed their support for the Project by electing Kirk Caldwell as Mayor of the City. Project supporters and opponents alike all acknowledged that the recent mayoral election constituted yet another referendum on the Project. Grabauskas Decl., ¶ 13. Mr. Caldwell's campaign emphasized his support for the Project. The campaign of the unsuccessful candidate, Plaintiff Benjamin Cayetano, emphasized Mr. Cayetano's opposition to the Project. Grabauskas Decl., ¶ 13. The election of Kirk Caldwell as the Mayor of the City by a sizeable majority (and the defeat of Mr. Cayetano) demonstrates once and for all that the citizens support the Project and believe that the Project is critical to the public interest.

## V. CONCLUSION

The Court should exercise its equitable discretion to fashion a narrow remedy that remands the matter to the FTA without vacatur and that limits any injunction to Phase 4 pending Defendants' compliance with the SJ Order. The Proposed Remedy Order avoids any irreparable harm to Plaintiffs, and minimizes the harm to the Defendants and the public.

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DATED: November 30, 2012

/s/ John P. Manaut
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