UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15277

HONOLULUTRAFFIC.COM, ET AL,

Plaintiffs-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION, ET AL.

Defendants-Appellees.

FAITH ACTION FOR COMMUNITY EQUITY, ET AL.,

Defendants-Intervenors-Appellees

On Appeal From The U.S. District Court For The District of Hawaii, Civil No. 11-00307 AWT (Hon. A. Wallace Tashima)

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The District Court has jurisdiction over this case pursuant to 28 U.S.C. §1331 (federal questions).

On November 1, 2012, the district court issued an "Order on Cross-Motions for Summary Judgment" deciding three issues in favor of plaintiffs Honolulutraffic.com *et al.* (hereafter collectively "plaintiffs") and all other issues in favor of defendants. Excerpts of Record Vol. 1 ("1ER") 52-96. On December 27, 2012, the district court issued an order, entitled "Judgment and Partial Injunction," partially remanding the matter for additional studies and analyses, establishing a process for resolving any subsequent challenges to the adequacy of supplemental environmental documents produced during the remand, and enjoining construction activities and real estate acquisition activities in Phase 4 of the Project (downtown Honolulu). 1ER1-3. On February 11, 2013, plaintiffs filed the instant appeal.

The federal appellees[1] submit that the district court's judgment resolving some issues in favor of defendants but remanding others to

[1] The federal appellees are the Federal Transit Administration ("FTA"), Leslie Rogers, in his official capacity as FTA Regional Administrator, Peter M. Rogoff, in his official capacity as FTA Administrator, the

FTA for further consideration and decision is not a final judgment for purposes of 28 U.S.C. §1291, as that statute has been interpreted by this Court's case law. While plaintiffs have asserted 28 U.S.C. §1292(a)(1) (appeals from interlocutory orders granting or denying injunctive relief) as an alternative basis for appellate jurisdiction (*see* Br. 4), they have not presented any argument questioning the propriety of the district court's partial injunction. Accordingly, Section 1292(a)(1) cannot serve as a basis for appellate jurisdiction.

A final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In this case, litigation on the merits has not ended. *See* 1ER2 ("this matter is remanded to the Federal Transit Administration"). Significant issues remain regarding FTA's compliance with Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303. These remanded issues are not ministerial in nature. They will, at the very least, require FTA to supplement its decision and the Environmental Impact Statement (*see* 1ER 63, 71-72,

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United States Department of Transportation, and Ray LaHood, in his official capacity as Secretary of Transportation. For simplicity, we refer to federal defendants as "FTA."

78), and they could require FTA to "reconsider the project" (*id*. at 78). We agree with defendants-appellees City and County of Honolulu, et al., that it is likely that FTA's determinations on remand will be challenged, and that this challenge could easily result in a second appeal. *See* City Br. at 26-27.

For these reasons, the rule that "remand orders are generally not 'final' decisions for purposes of section 1291," *Pit River Tribe v. U.S. Forest Service,* 615 F.3d 1069, 1075 (9th Cir. 2010) (citing *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990)), should apply here. The policy behind that rule—avoidance of multiple, duplicative appeals in the same case—is strongly implicated where, as here, the issues remanded are intertwined with the issues that were not remanded, and on which the present appeal focuses. *See infra* at 35-36.[2] Plaintiffs should have no difficulty in obtaining review of all

[2] In *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Cir. 2011), this Court noted several considerations that could support a conclusion that a remand order is final for purposes of 28 U.S.C. §1291, including that the order "'conclusively resolves a separable legal issue.'" *Id.* at 1175, quoting *Collord v. U.S. Dep't of the Interior*, 154 F.3d 933, 935 (9th Cir. 1998). Here, the issues appealed are intertwined with, not separable from, the remanded issues.

issues at the end of the case. Accordingly, the Court should dismiss the instant appeal for lack of appellate jurisdiction.[3]

STATEMENT OF THE ISSUES

1. Whether the Environmental Impact Statement ("EIS") for the Honolulu High-Capacity Transit Corridor Project (the "Project") satisfied the requirements of the National Environmental Policy Act ("NEPA") to describe the Project's purpose and need and to evaluate alternatives in light of that purpose and need.
2. Whether it was arbitrary and capricious for defendants to determine that neither a Managed Lanes Alternative nor a Bus Rapid Transit Alternative fulfilled the Project's purpose and need, and therefore were not "prudent" alternatives to the use of certain historic properties within the meaning of Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303 ("Section 4(f)").
3. Whether defendants' efforts prior to Project approval to identify unknown burials and other potential archaeological resources

[3] On May 3, 2013, the Appellate Commissioner issued an order that, *inter alia*, denied the City defendants' motion to dismiss the appeal for lack of jurisdiction, but without prejudice to renewing the jurisdictional arguments in the answering briefs.

along the Project route, including plans to avoid burial sites that may be later discovered, satisfied the requirements of Section 4(f).

STATEMENT OF THE CASE

To avoid duplication, FTA will rely on the Statement found in the brief of the City defendants ("City Br.") at 6-20, which FTA believes accurately sets forth the necessary background for the issues raised in this appeal.

STANDARDS OF REVIEW

1. *Summary Judgment*. – This Court reviews *de novo* the district court's grant of summary judgment, applying the same standards as the district court. *See Arizona Past and Future Foundation, Inc. v. Lewis,* 722 F.2d 1423, 1425 (9th Cir. 1983) ("*Arizona Past and Future*").

2. *NEPA*. – Courts review an agency's compliance with NEPA under the Administrative Procedure Act. *N. Alaska Envtl. Ctr. v. Kempthorne,* 457 F.3d 969, 975 (9th Cir. 2006). A court may not set aside an agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). A decision is arbitrary and capricious if the agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation

that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*) ("*McNair*") (internal quotation marks omitted).

In reviewing agency compliance with NEPA, this Court has emphasized that "NEPA does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *N. Alaska Envtl. Ctr., supra*, 457 F.3d at 975, *quoting from Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999). "Under this deferential standard, this court must defer to an agency's decision that is 'fully informed and well-considered.'" *N. Alaska Envtl. Ctr., supra*, 457 F.3d at 975, *quoting from Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

3. *Section 4(f)*. – In reviewing FTA's compliance with Section 4(f) of the Transportation Act, a court looks to whether the agency: (1) acted within the scope of its authority; (2) did not act arbitrarily or capriciously or abuse its discretion; and (3) followed the necessary procedural requirements. *Citizens to Preserve Overton Park v. Volpe*,

401 U.S. 402, 415-17 (1971)("*Overton Park*"); *accord, Arizona Past and Future*, 722 F.2d at 1425. The Court's review is required to focus upon the administrative record. *Arizona Past and Future*, 722 F.2d at 1425. The arbitrary and capricious standard "is narrow, and [we do] not substitute [our] judgment for that of the agency." *McNair*, 537 F.3d at 987.

SUMMARY OF ARGUMENT

1. The EIS properly stated the purpose and need for the Project, as developed and refined through a lengthy and public local planning process. The purpose and need included providing high-capacity transit in a congested corridor, providing faster, more reliable public transportation than could be achieved by buses operating in traffic, providing reliable mobility in areas where people of limited income and an aging population live, advancing planning goals by serving rapidly developing areas to the west of the City, and providing an alternative to private automobile travel and improved transit links.

The defendants followed a process authorized by governing statutes and regulations to screen out alternatives that would not serve the project's purpose or need. The Managed Lane Alternative ("MLA")

supported by plaintiffs was reasonably determined in this process to not serve the purpose and need for several reasons: it would create significant new congestion near the entrances and exits to the managed lanes; it would not substantially improve access to transit for transit-dependent communities; it would not support the City's land-use planning objectives; and it would have other drawbacks such as a high cost.

Plaintiffs waived any claim that a light rail alternative required additional consideration by not clearly raising the argument in the district court. In any event, the EIS adequately explained why a light rail system would not fulfill project purpose and need because of limitations on such a system's capacity and speed, and because it would add to congestion and safety problems by occupying existing travel lanes.

2. The MLA was properly found not to be a "prudent" alternative to the use of historic resources in downtown Honolulu under the terms of Section 4(f), 49 U.S.C. §303(c). The Department of Transportation's ("DOT") 2008 regulations implementing Section 4(f) make clear that an alternative is not prudent if it "compromises the project to a degree that

it is unreasonable to proceed with the project in light of its stated purpose and need." 23 C.F.R. §774.17. The MLA failed to meet several components of Project purpose and need and it was reasonably determined not to be "prudent." This Court's cases make clear that an alternative's failure to meet project purpose and need is sufficient, without additional analysis, to render it imprudent under Section 4(f), and DOT's regulations embody that case authority.

Bus Rapid Transit ("BRT") similarly failed to fulfill project purpose and need. BRT would have done little to relieve congestion and improve travel reliability since buses would still have to operate at times in mixed traffic, and such a system would have been contrary to the City's smart growth land use policies designed to focus transit-oriented development in the Project corridor and discourage urban sprawl. Defendants were not required to make more particularized findings about the drawbacks of the MLA and BRT alternatives and weigh those drawbacks against the value of specific Section 4(f) properties. Because the administrative record strongly supports the conclusion that neither of these alternatives was prudent, the FTA's

approval of the Project was consistent with Section 4(f) and not arbitrary or capricious.

3. The City's and FTA's efforts to identify unknown archaeological sites such as Native Hawaiian burial locations and to provide for the protection of any such sites found during construction satisfied Section 4(f). While Section 4(f) itself does not speak to the issue of undiscovered archeological sites, DOT's 4(f) regulations specifically contemplate the use of identification procedures found in regulations promulgated pursuant to Section 106 of the National Historic Preservation Act ("NHPA"), as well as the use of Programmatic Agreements to afford protection to sites found during construction that may be eligible for inclusion on the National Register of Historic Places ("National Register"). As the district court found, the defendants followed the relevant procedures and met the requirements for a reasonable good faith effort to carry out appropriate identification efforts by conducting a thorough Archeological Resources Technical Report and by entering into a highly protective Programmatic Agreement that covered the entire Project. The district court correctly concluded that defendants had not improperly deferred compliance with Section 4(f), but rather

had fulfilled their statutory responsibilities in a way that protected potential undiscovered sites.

ARGUMENT

I. THE EIS COMPLIED WITH NEPA.

The district court properly rejected claims that the EIS utilized an improper statement of the project purpose and need, and failed to analyze reasonable alternatives. 1ER80-90. As the district court pointed out, the EIS specified a number of project purposes that were developed through a federally-supervised local planning process, mandated by federal law for projects such as this one. 1ER81 & n.6; *see also* discussion *infra* at 21-24. The stated purposes included: providing high-capacity rapid transit in a congested corridor; providing faster, more reliable public transportation; providing reliable mobility in areas where people of limited income and an aging population live; advancing local land use planning goals by serving rapidly developing areas to the west of the City; and providing an alternative to private automobile travel and improved transit links. 1ER81, *see also* 3ER545-46 (EIS discussion of purpose and needs); 9ER2315-16 (statement of purpose and need in 2007 Notice of Intent to prepare EIS for Project).

As the district court recognized, FTA and the City engaged in an extensive, open process, established by the applicable federal transportation statutes and regulations, to publicly analyze alternatives that could fulfill these purposes and needs. 1ER81-86. The process included a thorough "Alternatives Analysis" ("AA") and ultimately resulted in the identification of a "locally preferred alternative"—a fixed guideway rapid rail system—that was thoroughly analyzed in the EIS, along with several alternative alignments of part of the system, and a no-build alternative for purposes of comparison. This process, which provided an important role for the City, the local land use planning authority, was consistent with federal statutes and regulations that govern federally-funded highway and transit projects, as described *infra* at 21-27.

Plaintiffs fail to show any error in the district court's careful consideration of the NEPA issues. Plaintiffs' contention that the EIS should have given more detailed consideration to alternatives such as managed lanes or light-rail overlooks extensive evidence in the record of the consideration of these and other alternatives. It also ignores the congressionally-mandated Alternatives Analysis process that

determined that plaintiffs' preferred alternatives were unreasonable in light of the project purpose and need.

A. The Purpose and Need Statement Complied with NEPA.

As the district court recognized (1ER81), courts have "afforded agencies considerable discretion to define the purpose and need of a project," *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998), and a statement of purpose and need will be upheld if it is reasonable. *See Westlands Water Dist. v. Dept. of the Interior*, 376 F.3d 853, 866–68 (9th Cir. 2004) (upholding EIS where the preparers did not arbitrarily or capriciously narrow the scope of the purpose and need). Further, the reasonableness of a purpose and need statement must be assessed in light of the statutory context of the federal action at issue. 1ER82, citing, *inter alia*, *League of Wilderness Defenders v. U.S. Forest Service*, 689 F.3d 1060, 1070 (9th Cir. 2012).

Plaintiffs complain (Br. 32-33) that the EIS's statement of purpose and need was "unreasonable narrow" without discussing the actual substance of that statement, or considering the statutory context that gave rise to it. As the district court pointed out, there are several Project purposes, having to do not only with increasing transit capacity,

reliability and speed in this congested corridor but also providing enhanced mobility for low income or disabled individuals and supporting planned future development around transit stations and in areas west of Honolulu slated for planned growth. *See* 3ER545-546; s*ee also* 2ER255 (Record of Decision). A project may have multiple purposes, and alternatives can be rejected as unreasonable if they meet one purpose but fail another. *See League of Wilderness Defenders*, 689 F.3d at 1072 (finding that plaintiff failed to identify a viable but unexamined alternative that would have satisfy both stated project goals); *Ariz. Past & Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983) ("[a]lternatives that do not accomplish [both] purposes of the project may properly be rejected as imprudent.").

Moreover, it is appropriate for an EIS to state the purpose of a project in terms of providing certain levels of service. *See, e.g., City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155-57 (9th Cir. 1997) (upholding a statement of purpose and need for a highway project that included a specific level of desired traffic service); *see also League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1072 (9th Cir. 2012) (relying on *City*

of Carmel for proposition that "agencies need not consider in detail proposed alternatives that fail to meet specifically identified targets or densities"). Thus, it was reasonable for the EIS to identify the transportation purposes of the project in terms of providing "high-capacity rapid transit" in this corridor, and "faster, more reliable public transportation service," than could be achieved by a system limited to using already congested roadways. 3ER545.

In *Alaska Center for Environment v. Armbrister*, 131 F.3d 1285 (9th Cir. 1997) ("*Alaska Center*"), this Court upheld a statement of purpose and need that focused on the purpose of providing for the total demand for access to an Alaskan city that had previously been served only by a rail line. While plaintiffs in that case complained that framing the purpose in that way was too narrow because it effectively eliminated their favored alternative of upgraded rail service, this Court deferred to the agency's determination of project purpose. 131 F.3d at 1289. Similarly here, just because the EIS's statement of purpose and need effectively eliminates certain alternatives that cannot provide the level of desired improvement in capacity and reliability does not suggest that the statement is framed too narrowly. *See also City of Carmel*, 123

F.3d at 1155-57 (while describing purpose and need for highway in terms of providing a specific level of improved service eliminated other alternatives, it was not overly narrow for purposes of NEPA).

Since plaintiffs' favored alternatives would not provide the level of service specified in the EIS, they try to substitute a more general statement of purpose: providing a "new $5 billion public transit system in one of the nation's largest metropolitan areas." Br. 22. But they point to no reason why FTA and the City could not exercise their discretion to determine a purpose and need that included providing high capacity transit that is faster and more reliable than alternatives that rely on vehicles traveling in mixed-flow traffic, as well as providing enhanced mobility for low income or disabled individuals and supporting planned future development. The district court correctly refused to overturn that exercise of discretion. *See Westlands Water Dist.*, 376 F.3d at 866-68.

Plaintiffs also overlook that the reasonableness of an EIS's statement of purpose and need must be judged in light of the statutory context of the federal action at issue. *League of Wilderness Defenders*, 689 F.3d at 1070. Those aspects of the EIS Statement of Purpose and

Need (*see, e.g.,* 3ER545-46) that focus on furthering local land use planning efforts comply with Congress' intent in adopting the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005).[4] Congress there specified that a statement of purpose and need may include "achieving a transportation objective identified in an applicable * * * metropolitan transportation plan" and "supporting land use, economic development, or growth objectives" in applicable local plans. 23 U.S.C. §139(f)(3)(A)-(B). The *O'ahu Regional Transportation Plan 2030* is the applicable "metropolitan transportation plan," and the Project's purpose is to implement that Plan's transportation goals. 3ER545. Among other things, the Project supports land use and development objectives by helping to implement the City's General Plan goal of limiting urban sprawl by focusing new development in the

[4] These provisions of SAFETEA-LU, codified as 23 U.S.C. §139, governed the Project preparation and NEPA review in this case. Section 139 was again amended in October 2012 by P.L. 112-141, after this project was approved, but no party has contested that the 2005 SAFETEA-LU amendments govern here. When this brief cites 23 U.S.C. §139, it will be referring to the pre-2012 amendment version, which is reprinted in the City defendants' Statutory Addendum.

already urbanized H-1 Corridor and encouraging transit oriented development. 3ER528; 545-46.

The Statement of Purpose and Need finds further support in applicable statutes emphasizing the congressional desire to provide increased mobility to low income and minority residents. See 3ER546. Specifically, the purpose for the New Starts program under which federal funding is provided to the Project is "to provide financial assistance to * * * help carry out national goals related to mobility for * * * economically disadvantaged individuals." 49 U.S.C. §5301(f)(4). Such statutory goals further underscore the reasonableness of the agencies' chosen purpose and need.

In sum, the EIS's statement of purpose and need was plainly appropriate. As we show below, alternatives that did not utilize a rapid rail system on a guideway separated from existing roadways simply failed to accomplish these project purposes, and thus were not reasonable.

B. The Range of Alternatives Considered in the EIS Was Reasonable in Light of Project Purpose and Need.

The "range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the

project." *Laguna Greenbelt, Inc. v. U.S. Dept. of Transportation*, 42 F.3d 517, 524 (9th Cir. 1994). In *Laguna Greenbelt*, this Court considered claims against an EIS for a toll road in Southern California. The Federal Highway Administration's EIS analyzed in detail three alternatives: the toll road proposal preferred by the local sponsor (Orange County); a "second option following the same alignment and having the same general lane configuration, but differing somewhat in its operation and method of connecting with Interstate 5," and a "no-build alternative." *Id.* at 524. The EIS briefly discussed the reasons why alternatives such as expanding existing highways or building a smaller toll road with fewer lanes or narrower median had been rejected as infeasible in the planning process undertaken by state and local entities. This Court found that "the EIS discusses in detail all the alternatives that were feasible and briefly discusses the reasons others were eliminated. This is all NEPA requires –there is no minimum number of alternatives that must be discussed." *Id.*; *see also* 40 C.F.R. 1502.14(a).

This Court rejected the argument pressed by plaintiffs here that NEPA bars the federal transportation agency from using the results of

an alternatives screening process carried out by a state or local government:

> Laguna contends that reliance on prior state environmental documents was improper because the federal agency must analyze the environmental impacts and alternatives under NEPA. However, NEPA mandates state and federal coordination of environmental review. See 40 C.F.R. §1506.2(b). Here, *the absence of a more thorough discussion in the EIS of alternatives that were discussed in and rejected as a result of prior state studies does not violate NEPA.*

42 F.3d at 524, n.6 (emphasis added).

In 2011, this Court reaffirmed that NEPA does not require a federal agency acting jointly with a State or local government agency to reassess alternatives that have been rejected as unrelated to a project's purpose by the non-federal agency. *See Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1012-1013 (9th Cir. 2011). In that case, the Court relied on *Laguna Greenbelt* to find that the Bureau of Reclamation's consideration of only two action alternatives in an Environmental Assessment was reasonable, in light of the fact that Washington State had discarded other alternatives in earlier reviews under State laws. Other courts that have considered joint federal-state or federal-local transportation projects have reached the same result. *See Citizens for Smart Growth v. Secretary of Dept. of*

Transp., 669 F.3d 1203, 1212-1213 (11th Cir. 2012) (Department of Transportation EIS properly relied upon conclusions of local planning documents to reject alternatives; such local planning documents may be incorporated by reference into the EIS); *North Buckhead Civic Ass'n v. Skinner,* 903 F.2d 1533, 1541-1542 (11th Cir. 1990) (upholding FHWA EIS that adopted purpose and need statement, and screened out non-highway alternatives, based on conclusions reached in the local planning process).

Plaintiffs' argument that the EIS should have given detailed consideration to alternatives such as light rail and managed lanes that had been determined in the federally-approved Alternatives Analysis not to meet the project's purpose and need is particularly misguided in light of the statutory context applicable to this Project. Though this congressionally-mandated process was briefed in the district court and relied upon by the district court in its decision (1ER83, 85), plaintiffs' opening brief ignores it, mentioning in passing only that defendants "may suggest" that an appendix to the regulations implementing this process (23 C.F.R. Part 450, App. A) authorizes this process. Br. 25.

In fact, the statutory context is critical here. Congress has long demanded that federally-supported transportation projects must flow from metropolitan and statewide transportation planning processes, rather than being imposed by a federally-dominated process. The 2005 SAFETEA-LU amendments (see *supra* at 16-17) expressly provided that a local governmental entity such as the City could serve as a "joint lead agency with the Department for purposes of preparing any environmental document under the National Environmental Policy Act of 1969 and may prepare any such environmental document required in support of any action or approval by the Secretary" so long as the federal government provides guidance and independently evaluates, approves, and adopts such documents. *See* 23 U.S.C. §139(c)(3) in City Br. Statutory Addendum. In turn, 23 U.S.C. §139(f)(4)(B), as amended by SAFETEA-LU, provided that a state or local agency, when acting as a joint lead agency, shall after public participation "determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project," (which is referred to generally in the statute as the "alternatives analysis" process). Further, 23 U.S.C. §139(f)(4)(D) provided the non-federal lead agency

with the authority to identify a "preferred alternative." Finally, 23 U.S.C. §139(c)(5) confirmed that "[a]ny environmental document prepared in accordance with this subsection may be adopted or used by any Federal agency making any approval to the same extent that such Federal agency could adopt or use a document prepared by another Federal agency." These provisions authorized the process utilized by the City and FTA here, in which the City prepared the initial alternatives analysis and identified a preferred alternative, which was then adopted by FTA in an EIS that incorporated the City's analysis.[5]

Thus, as the district court recognized, Congress specifically contemplated that local and state transportation authorities could make determinations about project purposes and alternatives that met such purposes, so long as these determinations are made in an open process and pursuant to DOT guidance, as occurred here. 1ER84-86. Pursuant

[5] In addition, the statute governing funding for "New Start" initiatives like this one required use of the environmental review process set forth in 23 U.S.C. §139. To approve a grant of $75 million or more for a fixed guideway project, the Secretary had to find that the project was "based on the results of an alternatives analysis * * *," which is defined to include "the adoption of the locally preferred alternative as part of the long-range transportation plan * * *." 49 U.S.C. §5309(a)(1)(D); 49 U.S.C. §5309(d)(2)(A) (reprinted in City Br. Statutory Addendum).

to this statutory authorization, DOT promulgated implementing regulations that expressly provide that state or local transportation agencies may conduct "corridor or subarea studies" that may be used for "[p]reliminary screening of alternatives and elimination of unreasonable alternatives * * *." 23 C.F.R. §450.318(a)(3). Consistent with the statute, these regulations make clear that "[p]ublicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents, in accordance with 40 CFR §1502.21," so long as the supporting documents have been produced with a reasonable opportunity for the public to review and comment upon them, and the documentation of the elimination of unreasonable alternatives is available for review during the NEPA process. 23 C.F.R. §450.318(b).[6]

[6] For projects such as this one, the regulations further specify at 23 C.F.R. §450.318(d) that "[f]or transit fixed guideway projects requiring an Alternatives Analysis (49 U.S.C. 5309(d) and (e)), the Alternatives Analysis described in 49 CFR part 611 constitutes the planning required by section 1308 of the TEA–21." ["TEA-21" refers to the Transportation Equity Act for the Twenty-First Century, P.L. 105-178, Section 1308 of which required promulgation of regulations to integrate studies of major transportation investments with the "planning

The district court specifically relied on the provisions of 23 U.S.C. §139(c) and 23 C.F.R. §450.318 in finding that it was appropriate for the EIS to rely on the City's Alternatives Analysis to eliminate unreasonable alternatives from further consideration. 1ER84-85. The district court found that the statutory pre-conditions (*i.e.,* FTA supervision and opportunity for public comment) for incorporating a local planning document into an EIS by reference had been met. *See* 1ER85 (district court finds that "[t]here are a number of documents that indicate that the FTA played an active role in shaping, overseeing, and approving the AA;" and finds that "[t]here were also many opportunities for public comment on the alternatives discussed in the AA"). The court pointed to numerous record citations supporting these findings. *Id*.

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provisions of * * * the National Environmental Policy Act of 1969."] The regulations at 23 C.F.R. §450.318(d) go on to clarify that:

> [t]he Alternatives Analysis may or may not be combined with the preparation of a NEPA document (*e.g.,* a draft EIS). When an Alternatives Analysis is separate from the preparation of a NEPA document, the results of the Alternatives Analysis may be used during a subsequent environmental review process as described in paragraph (a).

This confirms that FTA may rely upon a locally-prepared Alternatives Analysis that was not itself part of a NEPA document, and incorporate it into the final EIS, as here.

Plaintiffs make no effort to refute the district court's careful analysis of FTA's and the City's compliance with the pertinent statutes and regulations governing consideration of alternatives. Plaintiffs instead rely (Br. 22-23) on general language from court decisions that did not arise in the context of a congressionally-mandated process integrating the NEPA evaluation of transportation alternatives with an Alternatives Analysis process designed to permit a State of local entity to formulate a preferred alternative.[7]

Similarly misplaced is plaintiffs' reliance on general statements in Council on Environmental Quality ("CEQ") regulations implementing NEPA that do not pertain to the situation presented here, where reliance on state and local planning documents is specifically

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[7] *See, e.g., Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008) (challenge to EIS on National Park Service plan for portion of National Park); *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995) (challenge to NEPA compliance on federal timber sales and cancellation of a long-term timber contract); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006) (challenge to NEPA compliance on transfer of Army brigade); *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 625 F.3d 1092 (9th Cir. 2010) (challenge to EIS on federal land management plan); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005) (challenge to NEPA compliance for federal forest plan).

authorized by statute. The CEQ regulation relevant here, as the district court pointed out (1ER85), is 40 C.F.R. §1506.2(b), which specifically encourages federal agencies to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law." *See Laguna Greenbelt,* 42 F.3d at 524 n.5 (finding that 40 C.F.R. §1506.2(b) supports propriety of EIS relying on determinations regarding alternatives made by local agency in joint transportation project).

Plaintiffs have waived any challenge to the district court's conclusion that the EIS's reliance on the alternatives analysis process for screening out unreasonable alternatives was consistent with 23 U.S.C. §139(c) and 23 C.F.R. §450.318, by presenting no argument to the contrary in their opening brief. *See Greenwood v. F.A.A.,* 28 F.3d 971, 977 (9th Cir. 1994) ("[w]e review only issues which are argued specifically and distinctly in a party's opening brief"). Even if not waived, plaintiffs' argument that NEPA generally bars reliance on a local government's alternatives screening process in this context is clearly contrary to the relevant statutes and regulations governing

transit projects such as this one, and to cases like *Laguna Greenbelt* that have considered joint local-federal transportation projects.

C. Defendants Adequately Explained Why the Managed Lanes Alternative Was Not a Reasonable Alternative.

NEPA does not require consideration of the environmental impacts of alternatives that are determined not to fulfill project purposes. *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180 (9th Cir. 1990) (agency is not required to "consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area"). An EIS must only "'briefly discuss'" the reasons that alternatives were eliminated from detailed consideration. *Laguna Greenbelt,* 42 F.3d at 524 (quoting from 40 C.F.R. §1502.14(a)). The district court found that the defendants' thorough consideration of a managed lane alternative ("MLA"), including their consideration of various MLA configurations, potential costs and serious drawbacks in terms of project purposes, was reasonable. 1ER86-88. Plaintiffs ignore the district court's careful evaluation and rejection of their contentions, and simply repeat their claims that defendants should have given more consideration to a three-lane version of an MLA, and should have made

different assumptions about costs and availability of federal funding. Br. 27-29.

The City's Answer brief at 39-45 describes the thorough consideration that was given to the MLA and variants thereof. It is sufficient to note here that the EIS clearly explained that the MLA was deficient in several important respects. For one, it offered only small benefits in the form of decreased travel time, and those small benefits would be negated by the creation of significant new congestion in areas leading up to and away from the entrances and exits to the managed lanes. Additionally, the MLA would not meet the Project goal of substantially improving access to transit for transit-dependent communities, nor would an alternative like MLA that relies on buses or cars support the City's land-use planning objectives. 3ER557-60; 4ER1033-34. While the MLA would have had less of an effect on cultural and historic resources downtown, the MLA's elevated lanes would be more visually intrusive because they would be much wider than the fixed guideway. The MLA would also have generated a greater amount of air pollution and noise, and would have other drawbacks such as a high cost. 3ER560, *see also* 2 City Defendants' Supplemental

Excerpts of Record ("SER") 249-251. Concerns raised by plaintiffs in the administrative process, such as whether MLA costs were reasonably estimated, whether a three-lane configuration should have been considered, and whether a project constructed in Tampa Florida was comparable, were all carefully addressed. 4ER1034-35; 2SER250-254).[9] As the district court noted, "[a]n agency has discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive.'" 1ER55, quoting from *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). Here, after thorough consideration, the defendants reasonably determined that the MLA would not meet Project purpose and need, and adequately explained that conclusion in the EIS. 3ER557-60.

[9] As the district court recognized, NEPA does not require separate analysis of alternatives that are not significantly distinguishable from those already considered. 1ER88, citing *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990); *see also Westlands*, 376 F.3d at 868. Here, a three-lane MLA would have had the same if not larger congestion impacts at entrances and exits as the two-lane alternative; it thus was not significantly distinguishable from the two-lane configuration. 2SER253.

D. Plaintiffs Have Waived Any Argument That Light Rail is a Reasonable Alternative Required by NEPA; Light Rail Was Properly Rejected As a Reasonable Alternative In Any Event.

The district court understood plaintiffs to argue that defendants had failed to consider reasonable alternative technologies in the EIS "including light-rail, monorail, magnetic levitation, and rubber-tired rail." 1ER88. The court rejected the claim regarding alternative technologies, and plaintiffs have not renewed that particular challenge on appeal. Instead, they have re-packaged their claim as one allegedly focused on light rail as an alternative transportation mode. They contend (Br. 29-30) that "[l[ight rail offers another feasible way to address Honolulu's traffic problems" and argue that light rail should have been treated as a reasonable alternative in the EIS.

Plaintiffs never presented *this* NEPA claim to the district court. See First Amended Complaint at ¶85, 1SER132 (briefly mentioning "[a]lternatives that would employ technologies other than 'steel wheel on steel rail' (such as monorail or light-rail systems), but not developing specific claim regarding light rail as reasonable alternative); s*ee also* Memorandum in Support of Summary Judgment at 55 (1SER65) (briefly listing "different transit technologies (bus, heavy rail, light rail,

etc.)" as options that would lessen impacts, but developing no argument specifically as to light rail). At most, plaintiffs simply mentioned light rail as one of "hundreds of reasonable possibilities for improving transportation and transit in Honolulu." *Id.,* 1SER65. A mere laundry list of possibilities is not the same thing as a developed argument that a particular alternative was required to be considered pursuant to NEPA.[10] This issue should accordingly be considered to have been waived. *See Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1079-80 (9th Cir. 2008) (*en banc*) (NEPA claim waived where not sufficiently presented to district court).

In any event, there is no merit to plaintiffs' claim regarding the alleged reasonableness of light rail as an alternative. As the EIS pointed out, "[c]orridor-wide at-grade light-rail transit was rejected

[10] Plaintiffs in district court made a distinct argument that light rail should have been considered a "reasonable and prudent alternative" to the use of particular historic properties in downtown, pursuant to Section 4(f). The district court rejected that contention (1ER78-79), and plaintiffs have not challenged that ruling on appeal. As plaintiffs recognize, NEPA and Section 4(f) are different statutes with different requirements and standards. Raising a claim that light rail is a reasonable and prudent alternative to the use of historic property under Section 4(f), a substantive statute, does not adequately alert the court or the defendants that they must respond to a contention that detailed analysis of this alternative is required by NEPA, a purely procedural statute.

because it would have required conversion of traffic lanes to rail throughout the corridor, thereby substantially reducing roadway capacity since no abandoned or undeveloped alignments are available in the study corridor." 3ER554; *see also* 3ER555 (at-grade systems such as light rail "would not have provided a reliable, high-capacity, exclusive right-of-way system" and short blocks in downtown area would have limited capacity of any at-grade system). Consideration was also given to a light rail system with only part of its operations at grade, but that too was found to pose fundamental problems with capacity, speed, reliability, and safety, as well as posing "the greatest potential for disturbance of archaeological and burial resources" due to the more extensive excavation required for a non-elevated system. 3ER562; *see also* 4ER1023 & 1036 (further explaining unreasonableness of light-rail alternative, in terms of reduced reliability, speed, safety, and expandability of system, as well as increased costs for additional right-or-way acquisition).[11]

[11] The City Br. at 45-48 further discusses the consideration given to light rail alternatives; FTA agrees with that analysis.

II. FTA Complied With Section 4(f).

Section 4(f) of the Department of Transportation Act prevents FTA from approving the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites of national, state, or local significance ("Section 4(f) property") unless it finds that: (1) there is no feasible and prudent alternative to the use of the land; and (2) if such land is used, the action includes all possible planning to minimize harm to the property resulting from the use. 49 U.S.C. §303(c). A decision as to whether an activity will "use" such land requires an assessment of the magnitude of direct, temporary, and "constructive" uses of land. *See* 23 C.F.R. §§774.17 (definition of "use") and 774.15 (defining "constructive use").

FTA here prepared a 72-page "Section 4(f) Evaluation," included in the EIS as Chapter 5, analyzing in detail the extent to which the Project used Section 4(f) properties and whether there were reasonable and prudent alternatives to such use. 4ER913-985. This evaluation found that the preferred alternative – a fixed guideway rapid rail system following an alignment that serves the Honolulu Airport – would result in the use or constructive use of several properties subject

to Section 4(f) for which there were no feasible and prudent avoidance alternatives. 4ER985. It also found that the Project included all possible planning to minimize harm to Section 4(f) properties resulting from such use. *Id.*

In the district court, plaintiffs challenged whether FTA had: 1) adequately identified underground Native Hawaiian burial sites that could be disturbed along the route of the elevated guideway; 2) properly identified traditional cultural properties ("TCPs"); 3) properly determined whether the Project constructively used other properties; 4) properly concluded that certain alternatives to the elevated guideway project, including the MLA, bus rapid transit, at-grade light rail, and the use of tunnels in the downtown area were not feasible and prudent alternatives; and 5) properly concluded that the Project included all possible planning to minimize harm to section 4(f) properties. 1ER55-80. After thorough consideration, the district court found some deficiencies in the 4(f) analysis that resulted in a remand to FTA for further consideration of the existence of additional above-ground TCPs, reconsideration of the "no-use" determination for Mother Waldron Park, and reconsideration of the prudence and feasibility of the Beretania

Street tunnel alternative. 1ER63, 71-72, 78. The court rejected all other challenges to FTA's compliance with Section 4(f).

Plaintiffs narrow their Section 4(f) challenges in this appeal to: 1) whether FTA erred by determining that the MLA and BRT alternatives were not "feasible and prudent alternatives" that would have avoided use of the Chinatown Historic District and the Dillingham Transportation Building (Br. 35-47); and (2) whether FTA failed to fully identify and evaluate Native Hawaiian burials before approving the Project (Br. 47-55). The district court, relying on a consistent line of Ninth Circuit precedent, found that FTA's determination that the MLA and other non-fixed-guideway alternatives such as BRT would not meet Project purposes and needs was supported by the record and justified FTA's determination that these were not "prudent" alternatives for avoiding the use of 4(f) properties. 1ER72-75, 78-79. After reviewing extensive efforts made by defendants to identify and evaluate underground Native Hawaiian burial sites and craft a plan for dealing with burials that may be discovered during construction, the district court found that defendants had satisfied all obligations under Section 4(f). 1ER56-61. Plaintiffs have shown no error in these determinations.

The Supreme Court explained in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), that an alternative is infeasible if, "as a matter of sound engineering" it cannot be built along that route, and imprudent if it presents "unusual factors" or extraordinary "community disruption" which counsel against building it. *Id.* at 411, 413. Plaintiffs first contend that, contrary to FTA's findings, both the MLA (discussed *supra* at 28-30) and a "Bus Rapid Transit" ("BRT") alternative would have provided reasonable and prudent alternatives to the use of two Section 4(f) properties, the Chinatown Historic District and the Dillingham Transportation Building.[12] As part of this argument,

[12] Plaintiffs (Br. 2, 5) and the National Trust as amicus (NT Br. 9-14) overstate the impact of the Project on these properties. While FTA's evaluation found a Section 4(f) "use," primarily because of impacts on views, it made clear with respect to the Chinatown Historic District that "[t]he Project will not substantially impair the physical connection to the waterfront," that the guideway and a station at the edge of Chinatown "will not block or obstruct primary views of any architecturally significant buildings or substantially impair the characteristics of its National Register eligibility," and that "the guideway has been designed to be as narrow as possible to minimize potential use of the Chinatown Historic District." 4ER951, 952. With respect to the Dillingham Building, while there will be a station with an entrance sited on a plaza next to this Building, "this landscaped plaza is not a contributing element to the HRHP-listed building;" further, the station entrance will not eliminate the open space in the plaza or alter its use, and will be designed to be compatible with use of the open space." 4ER954.

plaintiffs maintain that FTA failed to make an allegedly required component of a "not prudent" determination, namely a finding that the particular drawbacks of an alternative that fails to meet purpose and need "substantially outweigh" the importance of preserving particular 4(f) properties from use. Br. 36-40. The district court properly rejected these contentions. 1ER72-75, 78.

A. Alternatives That Do Not Meet The Purpose And Need For The Project May Be Found Imprudent Without An Additional Finding That Their Drawbacks "Substantially Outweigh" The Importance Of Preserving Particular 4(f) Properties.

As the district court noted, "Ninth Circuit case law is clear that alternatives that do not accomplish the stated purpose of a project may be rejected as imprudent" under Section 4(f). 1ER72. Thus, in *Alaska Center for the Environment v. Armbrister*, 131 F.3d 1285, 1288-89 (9th Cir. 1997) ("*Alaska Center*"), this Court held that the Federal Highway Administration ("FHWA") was not arbitrary or capricious in finding that a rail system was not a "prudent" alternative to a highway that used Section 4(f) land, because rail would not have met the full demand for access to a town, and thus would not have met the stated purpose and need of the project. Similarly, in *Arizona Past and Future Found.,*

Inc. v. Lewis, 722 F.2d 1423, 1428 (9th Cir. 1983), the Court upheld FHWA's determination that alternatives that would not have met the dual stated purposes of a proposed freeway segment were not prudent. In fact, all courts that have considered the issue have reached similar results. *See City of Alexandria, Va. v. Slater*, 198 F.3d 862, 873 (D.C. Cir. 1999) ("*City of Alexandria*") ("we have squarely held that an alternative cannot be a prudent one if it does not satisfy the transportation needs of the project"); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 203-204 (D.C. Cir. 1991) ("the case law uniformly holds that an alternative is imprudent under section 4(f)(1) if it does not meet the transportation needs of a project"); *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 164 (4th Cir. 1990) (same); *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700, 715 (11th Cir. 1985) (same); *Ringsred v. Dole*, 828 F.2d 1300, 1304 (8th Cir. 1987) (same).

This Court's cases also hold that a determination that an alternative does not fulfill a project purpose is sufficient to render it not "prudent" within the meaning of Section 4(f) without additional findings. *Alaska Center* squarely rejected the argument plaintiffs make

here at Br. 40, holding that where "the FHWA rejected the rail system alternative because it did not satisfy the purpose of the project * * * , the FHWA is not required to make a further showing of 'unique problems' or 'truly unusual factors' associated with the [rejected] alternative." 131 F.3d at 1289; *see also Arizona Past and Future*, 722 F.2d at 1428 (accepting determination that alternatives were not prudent "because they did not provide the necessary transportation service and relief of traffic congestion in central Phoenix," without requiring any additional showing of unusual factors).

Plaintiffs cite no case that has found that DOT must do more than determine that an alternative is imprudent because it fails to fulfill the purpose and need for a project.[13] Instead, they rely on an untenable interpretation of DOT's 2008 regulations implementing Section 4(f), particularly the definition of "not prudent" found at 23 C.F.R. §774.17. Plaintiffs contend that these regulations, even though expressly intended to codify existing case law (*see* 73 Fed. Reg. at 13,393),

[13] Plaintiffs cite (Br. 36) *Stop H-3 v. Dole*, 740 F.2d 1442, 1451-52 (9th Cir. 1984), but that case (like *Overton Park* itself) turned on whether certain alternative freeway alignments would cause sufficient community disruption and added costs to be considered imprudent; no party in either *Stop H-3* or *Overton Park* claimed that the alternatives at issue would not fulfill the purpose and need for the project.

actually rejected the rulings of cases such as *Alaska Center* by imposing a requirement to make an additional determination beyond finding that an alternative does not meet the purpose and need, namely that the drawbacks of that alternative would "substantially outweigh" the importance of preserving the particular properties used. Br. 40.

The regulations nowhere require this additional analysis for projects that do not meet purpose and need. The regulations simply explain that: "[a]n alternative is not prudent if: (i) [i]t compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need." 23 C.F.R. §774.17 (definition of "feasible and prudent avoidance alternative"). Accordingly, if a different mode of transportation (as here and in *Alaska Center*) fails to fulfill the stated purpose and need for a project, the agency can find that it would be unreasonable to proceed with it, without additional analysis.

Any ambiguity about the meaning of the regulations is resolved by the preamble. As the preamble explains, these regulations were promulgated pursuant to a directive from Congress in the 2005 SAFETEA-LU legislation that DOT promulgate regulations to clarify

the factors to be considered and standards to be applied in determining prudence and feasibility of alternatives under Section 4(f). 73 Fed. Reg. 13,368, citing Pub. L. 109-59 (2005), 199 Stat. 1144. In response to a comment, DOT provided the following explanation of the portion of the definition of feasible and prudent avoidance alternative that pertains to alternatives that do not meet the Project's purpose and need:

> [W]hether a project can go forward in a way that meets its purpose and need, is at the heart of why the project is being built. For example, if a primary purpose of the project is to rectify a safety concern, it would not be prudent to choose an avoidance alternative that fails to address the safety issue. The FHWA and FTA will keep this factor because of its importance to meeting the transportation mission of the FHWA and FTA *and the clear support in caselaw for eliminating alternatives that do not meet the transportation needs that the project is designed to fulfill. See, e.g., City of Alexandria v. Slater,* 198 F.3d 862 (D.C. Cir. 1999).

73 Fed. Reg. at 13393 (emphasis supplied).

As this confirms, the statement in the regulatory definition that, "[a]n alternative is not prudent if: (i) [i]t compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need," was intended to embody the case law that had developed on this issue. As shown *supra* at 38-40, that case law held without exception that the failure of an alternative to meet project

purposes and need renders it imprudent. The regulations plainly were not intended to add a new and unprecedented requirement that the agency must go on to balance the drawbacks of an alternative that fails to meet project purposes and need against the values of particular Section 4(f) properties and find that the drawbacks substantially outweigh the impacts to those properties. Nor does the plain text of 4(f) itself require the agency to undertake such an inquiry, and in the absence of any requirement in either the statute or the regulations, courts may not impose that hurdle upon the agency. *See McNair*, 537 F.3d at 993 (citing *Wilderness Soc'y v. Tyrrel*, 918 F.2d 813, 818 (9th Cir. 1990).

If there were any doubt about whether DOT's regulations impose an additional requirement for balancing drawbacks of an imprudent alternative against the value of particular 4(f) properties, DOT's interpretation that they do not must prevail unless it is "plainly erroneous or inconsistent with the regulation." *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013) (inner

quotes omitted).[14] Plaintiffs have come nowhere close to making such a showing.

The district court thus did not commit any error in concluding that FTA had fulfilled the requirements of Section 4(f) with regards to non-fixed guideway alternatives, such as MLA and BRT, by reasonably finding that they did not meet project purposes and need. 1ER74-75, 78-79.

B. FTA Adequately Documented Its Conclusion That Non-Fixed Guideway Rail Alternatives, Including MLA and BRT, Did Not Meet Project Purposes and Needs, and That Conclusion Was Not Arbitrary or Capricious.

Here, the extensive Section 4(f) analysis performed by FTA in Chapter 5 of the EIS (3ER680-695) made clear that only the Fixed Guideway Alternative had been determined to successfully fulfill the purpose and need for the project. 3ER683. While, in particular, the No-Build and the Transportation System Management Alternatives would

[14] FTA's interpretation that there is no such requirement is evident from the content of the 4(f) findings in this case (*see, e.g.,* 4ER917) and is deserving of deference. In any event, the Supreme Court has made clear that deference to an agency's interpretation of its own regulation is appropriate where the agency's interpretation is submitted to the Court in a legal brief. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

have had less impact on some Section 4(f) properties, FTA concluded that "these Alternatives would compromise the Project to the degree that it would not meet the Project's purpose and need" and therefore were not prudent. *Id.*

FTA's conclusion in that regard is reasonable and well supported by the record. In particular, the discussion in the EIS about whether other alternatives would meet the Project purpose and need refers the reader to the EIS's analysis of alternatives and also references the Alternatives Analysis conducted by the City. *Id.* The EIS explains in detail why non-fixed guideway alternatives would not fulfill project purposes and need. In particular, the MLA alternative, whether considered as a two-direction or a reversible lane option, was determined after analysis to not significantly reduce congestion, to produce only a limited improvement in bus system reliability, to not support planned concentrations of future population and employment growth, and to not substantially improve service or access to transit for transit-dependent communities—all important components of the Project purpose and need. 3ER559-60; 4ER1031-35. Other major problems with MLA include the lack of an identified funding source, its

high cost per transit benefit ratio, its higher air pollution and noise impacts than other alternatives, and its visual impact, given that it would be "much wider than the Fixed Guideway Alternative." 3ER560; *see also* 9ER2474-2477 (AA provides detailed analysis of why MLA fails to meet project purposes of reducing congestion, increasing transit reliability and speed, encouraging patterns of smart growth and economic development, and providing improved access for transit-dependent communities). As the district court found (1ER74-75), the record thus strongly supports the conclusion that the MLA would "compromise[] the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need," and that MLA therefore is not a "prudent" alternative. 23 C.F.R. §774.17.

Plaintiffs rely (Br. 42-43) on a letter to FTA from plaintiff Honolulutraffic.com contending that the MLA would meet project purposes and need. That letter, however, supported its conclusion by improperly redefining the Project's purpose and need to omit purposes such as increasing transit reliability and speed, supporting planning goals and improving access to transit-dependent communities. *See*

5ER1127.[15] Moreover, the letter relied on a study that the EIS had already addressed, concluding that it did not alter the analysis of the MLA. *See* 2SER191, 249. While plaintiffs disagree with the analysis relied upon by FTA in concluding that MLA failed to meet the purposes and need for the Project, an agency has discretion to rely on the opinions of its own experts. *Marsh v. Or. Natural Res. Council*, 490 U.S. at 378.

Similarly, alternatives that would use "express bus service that operated as bus rapid transit in existing facilities" were evaluated and found to not meet project purpose and need, for several reasons. 3ER557. Such alternatives "would have done little to improve corridor mobility and travel reliability" since buses would still have to operate in mixed traffic, and "[r]oadway congestion also would not have been alleviated." These alternatives would not have contributed to planning goals, and furthermore, "State legislation does not allow the local excise and use tax surcharge to be used for enhancement of the existing bus

[15] Plaintiffs complain that this letter did not receive a response (Br. at 42-43) but that is because the comment period on the Draft EIS ended on January 7, 2009 (4SER986), while the letter was not sent until November 4, 2009. 5ER1125. In any event, FTA's January 2011 ROD included findings as to why the MLA did not meet the Project's purpose and need. 2ER253.

transit system." *Id.* FTA did not need to separately evaluate the precise bus rapid transit proposal that had been the focus of analysis in a 2002 EIS[16] before determining that bus rapid transit would not fulfill the Project's purpose and need, since any system reliant on buses would pose the same basic problems of congestion, lack of reliability and inability to further planning goals.

Plaintiffs complain (Br. 41) that FTA's Section 4(f) evaluation does not discuss managed lanes specifically with reference to the Project's impacts on the Chinatown Historic District and the Dillingham Building. But nothing in the statute or the regulations required FTA to discuss a particular transportation system alternative that had been determined to not meet Project purpose and need in a way that referenced particular Section 4(f) properties.[17] As the cases including

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[16] This EIS was prepared pursuant to Chapter 343, Hawaii Revised Statutes and Chapter 200, Hawaii Environmental Impact Statement Rules. 11ER2895.

[17] While plaintiff here choose to focus on two of the identified Section 4(f) properties, their claim for particularized findings on the value of Section 4(f) resources would logically extend beyond those properties, and impose a potentially enormous burden on FTA to evaluate a variety of imprudent alternatives by balancing drawbacks of those alternatives against values of multiple 4(f) properties. There is no evidence that Congress in Section 4(f), or DOT in its regulations, ever intended to impose this significant burden. This Court has repeatedly held that

Overton Park (*see* 401 U.S. at 417) recognize, Section 4(f) itself does not require any formal findings. DOT's regulations simply require Section 4(f) evaluations to "include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative," without any mention of the requirements that plaintiffs imply. 23 C.F.R. §774.7(a).[18]

The case law has uniformly rejected claims like this one demanding more formality in the documentation of conclusions regarding imprudence of alternatives. See *Hickory Neighborhood Def. League v. Skinner*, 910 F.2d at 163 ("[a]lthough the Secretary's section 4(f) evaluation does not expressly indicate a finding of unique problems, the record amply supports the conclusion that the Secretary

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reviewing courts "may not impose procedural requirements not explicitly enumerated in the pertinent statutes." *See Conservation Congress v. U.S. Forest Service*, __ F.3d __, 2013 WL 2631449 at *6, quoting from *Earth Island Inst v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010); *see also Wilderness Soc. v. Tyrrel,* 918 F.2d 813, 818 (9th Cir. 1990).

[18] Plaintiffs also cite 23 C.F.R. §774.3(a), but that provision merely sets forth the determinations that must be made prior to approving the use of a Section 4(f) property. It largely repeats the statutory provisions, and does not require that determinations be made in any specific way. Nor does anything in the preamble to the regulations support imposition of the additional requirements favored by plaintiffs. *See* 73 Fed. Reg. at 13376-77 (discussing §774.7).

did determine that there were compelling reasons for rejecting the proposed alternatives as not prudent"); *Coalition on Sensible Transp. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) ("The record demonstrates consideration of the relevant factors" even though the agency did not make a formal determination; noting that "formal findings are not required in a § 4(f) determination" (citing *Overton Park v. Volpe*, 401 U.S. at 417); *Friends of Pioneer St. Bridge Corp. v. Fed. Highway Admin.*, 150 F. Supp. 2d 637, 655 (D. Vt. 2001) (upholding rejection of alternatives as imprudent because "while the 4(f) document itself may not have fully evaluated each alternative, there can be little question that the record contains rather extensive evaluations of the alternatives").

Finally, 23 C.F.R. §774.7(f) specifically provides that "[t]he Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration." This refutes plaintiffs' contention (Br. 41-42) that it was improper for FTA to rely on documentation, such as the Alternatives Analysis, prepared by the City. FTA made the ultimate determinations regarding whether alternatives were prudent in its Section 4(f) evaluation, and properly relied on earlier analysis done by

the City as well as on its own analysis in the EIS/Section 4(f) evaluation. 4ER917. The question for a reviewing court is whether in light of the entire record it was arbitrary or capricious for FTA to conclude that the MLA and BRT alternatives were not prudent in light of their failure to meet project purposes and need. Courts "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *McNair*, 537 F.3d at 987 (internal quotes omitted). Plaintiffs have not come close to showing that FTA's determinations regarding the imprudence of alternatives was arbitrary and capricious; the district court should be affirmed.

III. DEFENDANTS' APPROACH TO IDENTIFYING AND EVALUATING NATIVE HAWAIIAN BURIAL SITES FULLY COMPLIED WITH SECTION 4(F).

The district court carefully considered and rejected plaintiffs' challenge to the identification of burial sites (1ER57-61), finding in particular that "[d]efendants have made a significant effort to pinpoint

all known archaeological sites along the project route, and crafted a plan for dealing with any sites that may be later discovered as construction progresses." 1ER61. In that plan, the City has committed to modify Project design by relocating columns to avoid impacts to newly discovered burials. 2ER310-311.

Section 4(f) imposes obligations on FTA with respect to "land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site)," 49 U.S.C. §303(c), but does not directly address the subject of burials or other unknown archeological sites that may be discovered during construction and then found to be significant. This gap in the statute has been filled by DOT in its regulations, which at 23 C.F.R. §774.11(f) provide that "Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction * * *." Recognizing that potentially significant buried resources discovered during construction cannot be evaluated prior to project approval, the regulations set out special timing requirements in 23 C.F.R. §774.9(e). For archeological sites "discovered during construction," this section provides for an

expedited, post-discovery 4(f) evaluation to occur, which may consider, *inter alia,* "the level of investment already made" in the project. *Id.*

The preamble to the 2008 regulations recognizes with regard to undiscovered archeological resources that "it is not always possible to anticipate their presence prior to construction," and that "when such resources are uncovered during construction, it is appropriate to take the scientific and historical value of the resource into account in deciding how to expedite the Section 4(f) process." 73 Fed. Reg. at 13379. The preamble explains that, since amendments to Section 4(f) in 2005 made pursuant to SAFETEA-LU, the statute has contained an explicit connection to the consultation process required under section 106 of the National Historic Preservation Act, 16 U.S.C. §470f. *See* 49 U.S.C. §303(d)(2) (procedure for a finding of *de minimis* impact under Section 4(f) on historic sites invokes "consultation process required under section 106 of the National Historic Preservation Act").

Addressing the issue raised by plaintiffs here, the preamble then describes what should be done in advance of construction to afford appropriate protection to archeological resources that may be discovered during construction. It states that the "applicant can enter

into a programmatic agreement with their [State Historic Preservation Officer] setting forth more detailed procedures to comply with Section 4(f) and the National Historic Preservation Act when archeological resources are discovered during construction," and recommends "the inclusion of procedures for identifying and dealing with archaeological resources in the project-level Section 106 Memorandum of Agreement under the National Historic Preservation Act." 73 Fed. Reg. at 13,399-80.

As the district court found (1ER60-61), the defendants here followed the procedures recommended in the regulations, and looked to the NHPA Section 106 process for specific guidance on surveying for and dealing with undiscovered archeological resources. Defendants entered into a programmatic agreement with the State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (ACHP),[19] and other federal entities that, among other things, requires archeological inventory surveys to be conducted prior to the final engineering and design phase of the Project and provides

[19] The ACHP, which assists other federal agencies in complying with the NHPA, has promulgated regulations, found at 36 C.F.R. Part 800, to define how agencies meet their responsibilities under that Act.

specific protocols for addressing burials or other archeological resources that are found, with extensive coordination with the Oahu Island Burial Council as well as the SHPO. 2ER309-315; *see also* 4ER850-870, 924. In addition, defendants commissioned an extensive and thorough Archeological Resources Technical Report, which used soil survey data, archaeological records, land survey maps, and field observations to identify all known burial sites and to predict the likelihood of finding additional burial sites during the different phases of the Project. 8ER2051-2194.

The district court correctly noted that "[b]ecause Section 4(f) compliance is predicated on identification of historic sites via the §106 process, if an agency makes a 'reasonable and good faith effort' to identify historic sites, the agency's Section 4(f) responsibility should be satisfied." 1ER61. Other courts have upheld the use of the approach followed by defendants here, rejecting challenges that it violates Section 4(f) by "deferring" analysis. In *Valley Community Preservation Commission v. Mineta*, 373 F.3d 1078, 1089 (10th Cir. 2004), the Court held that FHWA complied with Section 4(f) when it made significant efforts to identify and evaluate historic properties along the project

corridor prior to project approval, and made reasonable provision for dealing with discoveries during construction by entering into a Programmatic Agreement with the State Historic Preservation Officer. Affirming the denial of a preliminary injunction, the court found that plaintiffs had failed to establish that the agency "declined to follow the necessary procedural requirements by adopting the Programmatic Agreement and deferring the evaluation of certain properties until after the issuance of the ROD." 373 F.3d at 1089.

Similarly, in *City of Alexandria*, the D.C. Circuit found that the agency did not violate Section 4(f) when it conducted a preliminary survey of historic properties prior to project approval and provided for additional analysis of newly identified historic properties at a later stage. 198 F.3d at 872-73. The court stated that "the precise identification of these sites requires 'substantial engineering work' that is not conducted until the design stage of the project; indeed the [agency] is required to conduct such 'final design activities' *after* it completes its Final EIS." *Id.* at 873. The court held that Section 4(f)

did not forbid the "rational planning process adhered to by the [agency]." *Id.*[21]

Plaintiffs and *amicus* National Trust claim that the approach used here was inconsistent with this Court's ruling in *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008), but that is incorrect. In *North Idaho*, the plaintiffs brought a challenge to a proposed highway construction project, claiming that the defendants failed "to survey for, identify, and evaluate the impacts on historic properties for all four phases of the Project as required by §106 and §4(f)." 545 F.3d at 1158. This claim was based on the fact that the defendants had "conducted a detailed [NHPA] § 106 identification process and § 4(f) evaluation only with respect to [one] phase of the Project, and [had] not done so with respect to the remaining three phases of the Project." *Id.* The Court found that the defendants' phased approach violated Section 4(f). *Id.* at

[21] In *City of Alexandria*, the plaintiffs also argued that the agency was obligated to conduct a complete Section 4(f) evaluation before the project approval because the agency could feasibly identify the sites that could be impacted by future construction activities "without doing 'final design' plans for the project." 198 F.3d at 873. The court held, however, that "the standard of 'feasibility,' while relevant to whether an agency may use 4(f) properties, has no application in determining when the agency must identify them." *Id.*

1159-60. The Court distinguished *City of Alexandria,* pointing out that FHWA in that case had "identified historic properties along the entire project corridor," before approval, while deferring analysis only with respect to a particular site where the determination of the existence of 4(f) resources would require substantial engineering work that would not be conducted until a later stage of the project. *Id.* at 1159 n.8. This case is like *City of Alexandria*, not *Northern Idaho*, because here defendants have identified historic properties along the entire corridor, and have developed a reasonable method for dealing with any additional historical resources that are discovered during construction, in consultation with the SHPO.[22]

The City's and FTA's effort to identify unknown archaeological sites more than satisfied the standard established in the Advisory Council regulations, which require a "reasonable and good faith effort to

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[22] In *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999), the Court found a violation of Section 4(f) because the agency, unlike here, deferred all analysis of potential undiscovered historic sites until after the approval of a project. 166 F.3d at 373. That Court did not impose any obligation to conduct below-ground surveys for unknown historic properties prior to project approval. *Id.* at 372-73. In *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, 701 F.2d 784, 788-89 (9th Cir. 1983), the Court found a violation of Section 4(f) because the agency failed to include an analysis of a *known* historic property - a historic bridge.

carry out appropriate identification efforts." 36 C.F.R. §800.4(b)(1). As the district court recognized, this is the only provision of any law establishing a standard for evaluating the defendants' efforts with regard to the identification of undiscovered archeological resources. 1ER61. Under that standard, such "efforts" must "take into account past planning, research and studies" and may include additional types of research, including sampling and field surveys. 36 C.F.R. §800.4(b)(1). Notably, the regulation does not require below ground surveys.

The district court did not err in finding that a reasonable and good faith effort had been made in this case to "pinpoint all known archaeological sites along the project route" and to "craft[] a plan for dealing with any sites that may be later discovered as construction progresses." 1ER61. In particular, it was reasonable not to require additional pre-approval excavations in the downtown area to identify possible burials sites, since the actual footprint of the elevated guideway's support columns was not known at that time and excavation would have to be much more extensive than the targeted excavation that could occur once there is certainty as to column placement.

8ER2079 (Archeological Resources Technical Report). Besides posing unnecessary risk to the burials themselves, such wide scale excavations beneath developed roadways and sidewalks to survey for burials would have been extremely disruptive to traffic and commerce in the downtown area and would pose risks to pedestrians. *Id.; see also* 8ER2181.

This Court stressed in its *en banc* decision in *McNair*, 537 F.3d at 993, that "[Courts] are not free to 'impose on the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'" (*Quoting Churchill County v. North*, 276 F.3d 1060, 1072 (9th Cir. 2001). The district court plainly did not err in finding that, in light of the significant efforts made by defendants to identify burial sites and to craft a protective plan for dealing with any sites discovered during construction, there were no grounds for courts to require defendants to carry out additional pre-approval surveys. 1ER60-61.

CONCLUSION

The appeal should be dismissed for lack of appellate jurisdiction. If the Court finds that it has jurisdiction, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF RELATED CASES

Federal appellees are not aware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in that Rule, the brief contains 12,294 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2013, I electronically filed the foregoing Answering Brief for the Federal Appellees with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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