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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

HONOLULU TRAFFIC.COM, *et al.*, Plaintiffs, v. FEDERAL TRANSIT ADMINISTRATION, *et al.*, Defendants.	Case No. 1:11-cv-00307 AWT **FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE WITH JUDGMENT AND PARTIAL INJUNCTION; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE** Date: February 6, 2014 Time: 10:00 a.m. Hon. A. Wallace Tashima

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Federal Defendants submit this memorandum in response to the Plaintiffs' November 7, 2013 Objection, ECF No. 257 ("Pl. Obj."), to the Notice of Compliance with Judgment and Partial Injunction (ECF No. 202) and Order on Cross-Motions for Summary Judgment (ECF No. 182), filed by the City and County of Honolulu Defendants ("City"[1]) on October 8, 2013, ECF No. 250.

I. BACKGROUND

A. Procedural History

On November 1, 2012, this Court granted summary judgment to the Federal and City Defendants, ECF No. 182 ("SJ Order"), on all issues under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, and Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f. SJ Order at 29–44. The Court also ruled in Defendants' favor on most of Plaintiffs' claims under Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303, except the claims (1) that Defendants improperly deferred the identification and consideration of above-ground Traditional Cultural Properties ("TCPs"), other than the Chinatown District, *id*. at 10–12; (2) that Defendants must reconsider their determination that the Project would not constructively use Mother Waldron Park and, if a constructive use determination is made, must consider

[1] The Federal and City Defendants are collectively referred to as "the Agencies."

prudent and feasible alternatives and appropriate mitigation measures, *id*. at 19–21; and (3) that Defendants must reconsider the viability of the Beretania Street Tunnel Alternative as a prudent and feasible alternative to the downtown portion of the Project alignment, *id*. at 25–27.

The Notice of Compliance, ECF No. 250, documents that the Agencies completed the required analysis on remand, issuing a Supplemental Environmental Impact Statement ("SEIS") and amended Record of Decision ("Amended ROD") on September 30, 2013. Plaintiffs challenge the SEIS's analysis of the Beretania Street Tunnel Alternative, but have not objected to the SEIS's treatment of Mother Waldron Park or the Agencies' identification of above-ground TCPs. Plaintiffs also now assert that supposedly "new" information requires further NEPA analysis. All of Plaintiffs' claims are refuted below.

B. Statutory Background

Where a transportation project is anticipated to use historic resources, Section 4(f) requires an agency to consider whether a "prudent and feasible avoidance alternative" exists that would avoid use of Section 4(f)-protected properties. 49 U.S.C. § 303(c)(1); 23 C.F.R. § 774.3(a)(1); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–17 (1971). A "prudent and feasible avoidance alternative" is one that "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." 23 C.F.R. § 774.17 (definition of

"Feasible and prudent avoidance alternative" at (1)). An alternative "is not feasible if it cannot be built as a matter of sound engineering judgment." *Id*. (definition of "Feasible and prudent avoidance alternative" at (2)). An alternative is not "prudent" if

> (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
>
> (ii) It results in unacceptable safety or operational problems;
>
> (iii) After reasonable mitigation, it still causes:
>
> > (A) Severe social, economic, or environmental impacts;
> >
> > (B) Severe disruption to established communities;
> >
> > (C) Severe disproportionate impacts to minority or low income populations; or
> >
> > (D) Severe impacts to environmental resources protected under other Federal statutes;
>
> (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
>
> (v) It causes other unique problems or unusual factors; or
>
> (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

23 C.F.R. § 774.17 (definition of "Feasible and prudent avoidance alternative" at (3)).

Where no "feasible and prudent alternative" exists, the agency must select from other alternatives the one that poses the "least overall harm." 23 C.F.R. § 774.3(c). Determining the "least overall harm" requires balancing

> (i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
>
> (ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
>
> (iii) The relative significance of each Section 4(f) property;
>
> (iv) The views of the official(s) with jurisdiction over each Section 4(f) property;
>
> (v) The degree to which each alternative meets the purpose and need for the project;
>
> (vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
>
> (vii) Substantial differences in costs among the alternatives.

23 C.F.R. § 774.3(c)(1).

C. Standard of Review

Decisions under Section 4(f) are reviewed under the "arbitrary and capricious" standard set out in Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *Overton Park*, 401 U.S. at 413–14. APA § 706 requires "the reviewing court to engage in a substantial inquiry," but at the same time provides that "the [Agency]'s decision is entitled to a presumption of regularity."

Overton Park, 401 U.S. at 415. "To make [its] finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. at 416. Finally, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id*.; *see also Stop H-3 Ass'n. v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984) (restating standard of review).

II. ARGUMENT

A. The SEIS Correctly Concluded that the Beretania Street Tunnel Alternative Was Not a "Feasible and Prudent Avoidance Alternative"

The SEIS correctly concluded that the Beretania Street Tunnel Alternative was not a proper "feasible and prudent avoidance alternative" because (1) it would not "avoid" use of Section 4(f) properties, as it must under 23 C.F.R. § 774.17; (2) its increased costs render it not "prudent" under the regulatory definition, *id*.; and (3) other factors "cumulatively cause unique problems or impacts of extraordinary magnitude" under that definition.

1. The Beretania Street Tunnel Would Use Other Section 4(f) Properties

The Beretania Street Tunnel Alternative would use Section 4(f) properties and therefore is not a proper "avoidance" alternative. The Beretania alignment would use four properties listed, or eligible for listing, on the National Register of Historical Places ("NRHP"): (1) the O`ahu Railway and Land ("OR&L") parcel;

(2) the former filling station on OR&L; (3) McKinley High School; and (4) the King Florist Building. SEIS at 39–47, 70. Plaintiffs disagree, but their disagreement lacks merit.

The OR&L Parcel

Plaintiffs' assertion that the Beretania Street Tunnel Alternative would not use the OR&L parcel is simply that — an assertion. *See* Pl. Obj. at 9–10. The proposed Ka`aahi Station that is part of the Beretania alignment would use the OR&L parcel by temporarily bracing, relocating, or removing two buildings and by permanently locating station features on the property. SEIS at 41. Plaintiffs merely insist that the proposed Ka`aahi Station is either unnecessary or could be moved elsewhere in order to avoid use of the OR&L parcel. *See* SEIS App. A (Response to Public Comments) at A-75–76.

The 2006 Alternatives Analysis includes the Ka`aahi Station among those considered as part of the Beretania Street alignment. AR00009479 (Fig. 2-7); SEIS App. A at A-75. Plaintiffs insist that the station is unnecessary, because (according to them) it would lie within 1,500 feet of the Iwilei Station. Pl. Obj. at 9. However, while the Iwilei Station is part of the Project, it is not part of the Beretania Street alignment. *See* SEIS at 22, Fig. 3 (depicting Beretania versus

Project alignments); *id*. at 33, Fig. 17 (same).[2] The Beretania alignment would not therefore include both the Iwilei and Ka`aahi stations.

Moreover, the proposed location of the Ka`aahi Station cannot be moved `Ewa (west) because, if built, the station would need to be located on a straight and flat section of track to meet the requirements of the Americans with Disabilities Act and the need to be able to safely load and unload passengers before the tracks descend underground. SEIS App. A at A-75; SEIS at 41. The station cannot be moved Koko Head (east), because it would then use A`ala Park, another Section 4(f)-protected resource, and would still require use of the OR&L parcel for excavation; thus, moving the station Koko Head would use two Section 4(f) properties. SEIS App. A at A-75; SEIS at 41. In addition, Nu`uanu Stream and the Chinatown Historic District are immediately Koko Head of A`ala Park, SEIS at 41, so that moving the station farther Koko Head would result in impacts to those resources.

In short, the Ka`aahi Station would need to be situated at its currently projected location, where it would use the OR&L property.

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[2] In Figures 3 and 17, the Beretania Street alignment stations are shown in red, while the Project alignment stations are shown in grey.

McKinley High School

The Beretania Street alignment would use the NRHP-listed McKinley High School, which has been described on the listing form as "architecturally significant as one of the most elegant examples of Spanish Colonial revival architecture in Hawai`i." SEIS at 43. The Beretania alignment, elevated at that location, would cross over the property and introduce visual impacts that would diminish the property's integrity of setting. *Id.* Features associated with the Pensacola Street Station and the elevated platform and guideway would permanently incorporate portions of the McKinley High School parcel, resulting in a direct use. *Id.*

Plaintiffs respond that the alignment would run outside of the historic part of the McKinley High School property and that the Pensacola Station would be screened-off from the property by a large, non-historic building; therefore, Plaintiffs maintain that the Beretania alignment would not use the High School. Pl. Obj. at 10–12. But the SEIS documents that the Pensacola station, that is part of the Beretania alignment alternative, would result in the use of McKinley High School because "station construction would permanently incorporate land into a transportation use and introduce visual elements, which would diminish integrity of the property's setting." SEIS at 43. The FSEIS also documents that the guideway would not be fully screened from the historic buildings on the High School property and would remain visible from a number of view points within the

property. SEIS at 44 (Fig. 19); SEIS App. A at A-76. The Beretania Street alignment, therefore, would use the historic property.

Finally, the Agencies determined that the Beretania alignment would use the McKinley High School because it would incorporate land from within the boundary of a historic property, the high school. SEIS at 37 (Table 2), 43. That determination was consistent with the Agencies' treatment of other Section 4(f) properties potentially affected by the Project (i.e., the Chinatown Historic District, the Dillingham Transportation Building, and the HECO Downtown Plant/Leslie A. Hicks Building).

The King Florist Building

Construction of the Beretania alignment's McCully Street Station and associated traction power substation would require acquisition and demolition of the NRHP-eligible King Florist Building. SEIS at 45. Plaintiffs insist that the King Florist Building is simply not that historic, implying that it really does not matter whether the Beretania alignment would use it or not. Pl. Obj. at 12–13. Plaintiffs then assert that even if the King Florist Building is worthy of protection, it need not be used by the Beretania alternative. *Id*. at 14. Neither claim is valid.

Despite Plaintiffs' protestations to the contrary, the King Florist Building was identified in the Agencies' original analysis as an historic property, along with many other properties whose historic value Plaintiffs have not (until now)

challenged. *See* Alternatives Analysis Appendix, Draft Historic/Archeological Technical Report, AR00061856 (identifying King Florist Building as an historic property); *see also* SEIS at 45; SEIS App. A at 76. It is not credible for Plaintiffs to dismiss the King Florist Building as not worthy of consideration.

Further, the Beretania Street alignment cannot avoid using the King Florist Building. That property would need to be demolished to make way for the McCully Street Station. SEIS at 45; SEIS App. A at A-76–77. The station cannot be relocated, because the only alternative locations involve greater use of other historic properties. SEIS at 45; SEIS App. A at A-77. Plaintiffs then argue for the first time that the City could have the guideway straddle King Street, which they insist would avoid either (1) demolishing buildings fronting King Street to make room for the station platform or (2) installing guideway columns in the middle of this one-way street to avoid using properties bordering the street.[3] Pl. Obj. at 14. Because they did not raise this issue in their comments on the DSEIS, they have waived it. *See, e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004) ("Because respondents did not raise these particular objections to the EA, … [they] have therefore forfeited any objection to the EA on [those] ground[s]"); *Vt. Yankee*

[3] *See* SEIS App. A at 77 (discussing the hazards of placing columns in the middle of a one-way street).

Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978) ("it is . . . incumbent upon [those] who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the [participants'] position and contentions" before a decision is made); *N. Idaho Cmty. Action Network v. Dep't of Transp.*, 545 F.3d 1147, 1156 n.2 (9th Cir. 2008) (per curiam) ("because the tunnel alternative was not raised and identified until … well after the notice and comment periods . . . closed, any objection to the failure to consider that alternative has been waived"); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (per curiam) ("Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision."); Order on Defs' Mot. for Partial Summ. J., ECF No. 137, at 9–10 (discussing waiver of Section 4(f) claims). Beyond the fact that Plaintiffs have waived the issue, it is simply impractical to use straddle bents over King Street. The section of King Street in front of the King Florist Building includes four traffic lanes and two parking lanes. *See* https://maps.google.com/maps?ie=UTF-8&q=South+King+Street+and+McCully+Street,+Honolulu,+Hawaii (last visited Dec. 30, 2013). It would require a very large aerial structure to straddle the width of the street, with all the attendant engineering complexities as well as the obvious visual impacts.

In sum, because the Beretania alignment would use other Section 4(f)

properties — the OR&L parcel, McKinley High School, and the King Florist Building — it is not a "feasible and prudent avoidance alternative" under 23 C.F.R. § 774.17.

2. The Beretania Street Tunnel Would Not be Prudent

The Beretania Street Tunnel Alternative is not a "feasible and prudent avoidance alternative" under 23 C.F.R. § 774.17 because it "results in additional construction, maintenance, or operational costs of an extraordinary magnitude" within the meaning of that regulatory definition. It further raises other considerations that render it not prudent under that provision. Plaintiffs nevertheless assert three reasons, none meritorious, that they insist undercut the Agencies' determination.

Costs

Plaintiffs contend that the SEIS overestimates the cost of the Beretania alignment because (1) it unnecessarily includes the Ka`aahi Street Station, and (2) it compares the Beretania Street alignment with the current Project alternative, which terminates only at the Ala Moana Center, rather than at the University of Hawai`i–Mānoa Campus. Pl. Obj. at 15–17. Plaintiffs further argue that even if the SEIS did not (in their view) overestimate the costs of the Beretania alignment, the projected increase in costs is not "extraordinary" and thus does not render the Beretania Street Tunnel Alternative not prudent. *Id*. at 17–18. These assertions lack merit.

The SEIS did not overestimate the cost of the Beretania alignment. The

SEIS compared the cost of Project, whose current terminus is the Ala Moana Center, with the Beretania Street Tunnel Alternative, with its logical terminus at the University of Hawai`i–Mānoa Campus. SEIS at 21–23, 49–50 (explaining that the Beretania alignment with service to the University achieves transportation benefits comparable to those of the Project). But the Beretania alignment would add almost a billion dollars in year-of-expenditure ("YOE") capital costs, SEIS at 65, 74, and there is no available funding source to cover that dramatic cost increase, *id*. at 65–66; 74–75.[4]

The Court's Order on Cross-Motions for Summary Judgment, ECF No. 182, concluded with regard to the King Street Tunnel alternative that

> whether viewed as a dollar amount or as a percentage of the Project's total cost, giving at least some deference to the agency's financial judgment, the Court cannot conclude that it was arbitrary and capricious for Defendants to conclude that an additional $650 million [in 2006 dollars] would be an extraordinary added cost.

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[4] In response to public comment, the SEIS further compared the capital cost of the Beretania alignment with the projected cost of the Project if its potential extension to the University of Hawai`i–Mānoa Campus were added to the existing Project alignment. *See* SEIS App. A at A-80; SEIS at 113–14 & 111 (Table 17). That comparison yields a difference of $140 million in YOE dollars between the Beretania alignment ($6,080 million) and the Project if extended to the Mānoa Campus ($5,940 million). However, neither the Court's remand order nor FTA regulations requires the Agencies to analyze a new alternative (the Project extended to the University), and the existing Project alignment stands on its own as one with logical termini. Therefore, the comparison of the existing Project to the Beretania Street Tunnel Alternative remains valid.

Id. at 25. The Court's finding above is the law of the case. *Earl Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2012) ("under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court in the same case."); *Richardson v. USA*, 841 F.2d 993, 996 (9th Cir. 1988) (same). The Beretania alignment would add $960 million in YOE capital costs to the existing Project at a time when there is no additional funding source to defray those increased costs. *See* SEIS at 65–66 (explaining funding shortfall). That fact renders the Beretania Street Tunnel Alternative not "prudent," consistent with the Court's earlier ruling.

Finally, although Plaintiffs glibly insist that the Beretania alignment need not include the Ka`aahi Street Station, *see* SEIS App. A at A-80, the record amply demonstrates the need for that station at its currently projected location, assuming the Beretania alternative were adopted, as discussed in Section II.A.1, above. *See* SEIS App. A at A-75; SEIS at 41. Thus, there is no basis for subtracting the cost of the Ka`aahi Station from the projected cost of the Beretania alignment.

Other Factors

The Amended ROD explains that other factors support the conclusion that the Beretania alignment is not a "feasible and prudent avoidance alternative" under 23 C.F.R. § 774.17. *See* Amended ROD at 13. Plaintiffs' arguments to the contrary are not persuasive.

First, although "feasible" from a purely technical standpoint, the substantial excavation needed for the Beretania Street Tunnel Alternative poses the significant risk of soil subsidence, which could damage historic buildings in the downtown district. SEIS at 47–49, 116. Second, although the Beretania alignment would avoid visual impacts to the Chinatown Historic District and along the waterfront, it would result in more significant visual impacts in the downtown area than would the Project, because its elevated portion would travel through an area with more view-sensitive elements than the area the Project alignment would traverse. *See* SEIS at 53. In particular, it would adversely affect views of and from Thomas Square, SEIS at 53, 56, which is a significant effect that the existing Project does not have. Third, in addition to using the OR&L parcel, McKinley High School, and King Florist Building, the Beretania alignment would have an adverse effect on 47 historic properties, whereas the Project would affect only 15. *Id*. at 57–59. Fourth, the Beretania alignment, because it requires construction of underground tunnels and portals, is more likely than the Project to disturb unknown archeological resources. *Id*. at 59–61. Fifth, construction of the Beretania tunnel would involve more substantial construction impacts over a wider area and lasting for a longer time than those anticipated under the Project. These would include a large staging area at the `Ewa tunnel portal to support removal and dewatering of tunnel spoils and twice the area of total construction easements (18 acres for the Beretania

Street Tunnel Alternative versus 9 acres for the Project alignment). *Id*. at 61. The Beretania alignment would also require more extensive and longer lasting traffic disruptions, including road closures; significant truck traffic needed to dispose of excavation spoils; and the possible disturbance of soils contaminated with lead and hydrocarbons. *Id.* at 62–65. In addition, construction of the Beretania alignment is more likely than the Project to encounter sensitive karst formations, about which Plaintiffs have earlier expressed concern.[5] *Id*. at 61–63; *see* Pl. Req. for Injunctive and Declaratory Relief, ECF No. 188, at 17–18 (raising karst issue). Finally, construction of the Beretania alternative would delay completion of the Project by two years. *Id*. at 67. These factors "cumulatively [would] cause unique problems or impacts of extraordinary magnitude," demonstrating under 23 C.F.R. § 774.17 that the Beretania alignment would not be "prudent."[6]

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[5] By contrast, extensive surveys have identified no karst formations that would be affected by the Project. *See* SEIS at 61.

[6] Plaintiffs cite to *Overton Park*'s discussion of "unique" factors and their application to potential alternatives, but that 1971 decision predates the Department of Transportation's current Section 4(f) regulations. The original Section 4(f) regulations provided that the Agency may use Section 4(f) properties only if it documents that "there are unique problems or unusual factors involved in the use of alternatives and that the cost, environmental impacts, or community disruption resulting from such alternatives reaches extraordinary magnitudes." Envtl. Impact & Related Procedures, 45 Fed. Reg. 71,968, 71,984 (Oct. 30, 1980), *codified at* 23 C.F.R. § 771.135(a)(2). The current regulations expressly state that multiple factors may be "minor" by themselves but, in aggregate, may "cumulatively cause
(Footnote continued)

In response, Plaintiffs largely ignore those specific findings of the SEIS. Pl. Obj. at 18–22. Plaintiffs dismiss the potential for excavation-caused soil subsidence, noting merely that excavation is technically "feasible," while ignoring the reality that it may not be "prudent." Plaintiffs then simply repeat their erroneous assertion that the Beretania alignment would not use the properties that the SEIS states it would use. *See* Section II.A.2, above. Similarly, Plaintiffs express skepticism that the Beretania alignment would cause more significant construction disturbances than the Project, but offer no real support for their dismissal of those concerns. In that connection, Plaintiffs imply that construction of the Beretania alignment may cause *fewer* impacts, because underground, wholly ignoring the explanation in the SEIS that such underground construction requires significant excavation and staging areas over a larger acreage and for a longer time than required by the Project. *See* SEIS at 61–65. Finally, Plaintiffs simply assert that completion of the Beretania alignment will not delay *other* segments of the Project. That assertion is irrelevant to the SEIS's conclusion that system users would experience a two-year delay in reaping all the benefits of the Project were the

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unique problems or impacts of extraordinary magnitude." 23 C.F.R. § 774.17 (definition of "feasible and prudent avoidance alternative" at (3)(vi)).

Plaintiffs' citation to *Stop H-3 Association v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976), is also inapt; in that case, the Secretary conceded that he had not complied (and made no attempt to comply) with Section 4(f).

Beretania Street Tunnel Alternative adopted.[7]

Plaintiffs raise the additional charge that the SEIS failed to take into account concerns raised by the district judges with offices in the U.S. Courthouse down-town. Pl. Obj. at 21. But these concerns are not Plaintiffs' to raise. *See Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976) (plaintiff must assert his own rights); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (same). Even if Plaintiffs were in a position to raise those issues, the assertion that the Beretania alignment may have benefits (to Courthouse occupants) is simply not relevant to whether the Beretania alignment poses problems that render it not "prudent" under Section 4(f) and its implementing regulations.[8] Moreover, FTA responded in detail to claims that the Project would create a safety risk at the Courthouse. SEIS, App. A at A-49-A-53. The U.S. Marshal's Service and the Federal Protective Service concluded that the Project "does not pose any additional threat to the Courthouse beyond that of surface traffic." SEIS, App.A at A-49.

Section 4(f) Regulations

Plaintiffs claim that the SEIS does not properly weigh the problems posed

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[7] Plaintiffs also lay any delay at the feet of the Defendants, but that is hardly a consideration at this point, given that the Agencies must consider the practical impacts of decisions made now on the system users they service.

[8] The Courthouse is not, of course, a Section 4(f) property.

by the Beretania Street Tunnel Alternative against the importance of preserving the Section 4(f) resources potentially affected by the Project. Pl. Obj. at 22–23. Under 23 C.F.R. § 774.17, the Agency may select a potential "feasible and prudent avoidance alternative" if it "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." *Id*. (definition at (1)). Plaintiffs insist that the discussion of the Beretania alignment should have included consideration of the Chinatown Historic District and Dillingham Transportation Building, properties unaffected by that alterative. *See* SEIS at 21 (Beretania alignment would not directly use Chinatown Historic District or Dillingham Transportation Building); SEIS App. A at A-80–81 (Response to Comment Den-18). But the SEIS properly concludes that the Beretania alignment is not a "feasible and prudent avoidance alternative" under the regulatory definition because it fails the first part of the test — that it not use *other* Section 4(f) properties. *See* SEIS at 116–17; SEIS App. A at A-81. Because the Beretania alignment would use other Section 4(f) properties, the Agencies did not need to consider whether it would also cause "other severe problems of a magnitude that substantially outweighs the importance of protecting" the Chinatown Historic District and Dillingham Transportation Building.

Nevertheless, the SEIS *did* consider the potential adverse effects of the Beretania alignment alongside the Project's use of the Chinatown Historic District

and Dillingham Transportation Building. *See* SEIS at 69 (Beretania alignment would adversely affect more historic properties than the Project); *id*. at 70 (Table 11, comparing relative impacts of the Project and the Beretania alternative, including effects on the Chinatown Historic District and Dillingham Transportation Building). The SEIS explains that the Project would not directly use the Dillingham Transportation Building itself or contributing buildings in the Chinatown Historic District, while the Beretania alignment would directly use individually-eligible historic buildings on the OR&L parcel, potentially eliminating the historic character of those properties, and would demolish the King Florist Building. *Id*. at 72. The SEIS further emphasizes that while the Chinatown Historic District and Dillingham Transportation Building are important historic properties, the Project would only use non-contributing elements that had been previously altered outside each property's period of significance. *Id*. at 72. That contrasts with the Beretania alignment's projected use (and demolition) of NRHP-eligible buildings. *Id*. at 72–73.

The SEIS therefore fully addresses the regulatory factors set out in 23 C.F.R. § 774.17.

B. The SEIS Correctly Concluded that the Project is the "Least Harm" Alternative

Plaintiffs claim that the SEIS's conclusion that the Project is the "least harm" alternative is arbitrary and capricious. Pl. Obj. at 23–25. In support,

Plaintiffs merely reiterate points made earlier and refuted above.

First, Plaintiffs continue to insist that the Beretania Street Tunnel Alternative would use fewer Section 4(f) properties than would the Project, but that assertion relies on the erroneous belief that the Beretania alignment would not use the OR&L parcel, McKinley High School, or the King Florist Building. *See* Section II.A.1, above. In addition, Plaintiffs cite without discussion pages from the original Final Environmental Impact Statement ("FEIS"), AR00000709, 718–27, and from the SEIS, at 39–47. The FEIS pages cited discuss the potential effects of the Project on four Section 4(f) resources: the Halekauwila Street lava rock curbs, the Chinatown Historic District, the Dillingham Transportation Building, and the HECO Downtown Plant/Leslie A. Hicks Building. As the FEIS explains, the lava rocks will be returned following construction to their approximate original locations. *Id*. at AR00000709–10. And as discussed above, the Project will not directly use contributing buildings in the Chinatown Historic District. *Id.* at AR00000718. Similarly, the Project will use only a modern, non-contributing area adjacent to the Dillingham Transportation Building. *Id.* at AR00000721. Finally, the Project will only use a non-contributing element of the HECO Downtown Plant/Leslie A. Hicks Building. *Id*. at AR00000727. In contrast to these modest impacts, the Beretania alignment would use and even demolish NRHP-eligible buildings or contributing buildings. SEIS at 72–73.

Second, Plaintiffs claim that the SEIS does not sufficiently address the historic value of the Chinatown Historic District and Dillingham Transportation Building, but as explained above, the SEIS clearly does.[9] *Id.* at 69, 70, 72.

Third, Plaintiffs assert that just as (in their view) the SEIS incorrectly found that the Beretania alignment would not be "prudent," the SEIS also improperly considered those same factors in determining that the Project is the "least harm" alternative. But as discussed in Section II.A.2, above, the SEIS's analysis of the "prudence" factors is supported by the record and supports a "least harm" determination, as well.

Fourth, Plaintiffs insist that the "least harm" determination fails to account for perceived impacts to the U.S. Courthouse. Presumably, Plaintiffs are arguing that impacts to the Courthouse should have been addressed in the context of "adverse impacts to resources not protected by Section 4(f)" under 23 C.F.R. § 774.3(c)(1)(vi). But the Agencies' original analysis adequately addressed potential impacts on the Courthouse, AR00000937–38, and Plaintiffs' claim that the FEIS did not adequately consider alternatives that avoided such impacts did not survive summary judgment, SJ Order at 39. There is no basis for revisiting those

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[9] The SEIS notes that "the Chinatown [District] and Dillingham Transportation Building [we]re listed [o]n the NRHP. . . . in the 1970s and are among some of the earliest properties in Hawai`i that were listed on the NRHP." *Id.* at 72.

issues now.

In short, the SEIS's "least harm" analysis complies with the regulatory requirements of 23 C.F.R. § 774.3(c)(1).

C. Plaintiffs' "New Information" Claim is Meritless

Plaintiffs state that the SEIS "admit[s] for the first time that some of the alternatives considered in the 2006 Alternatives Analysis . . . would meet the purpose and need for the Project." Pl. Obj. at 26. In so doing, they intimate that the SEIS potentially resurrected alternatives earlier rejected by the 2006 Alternatives Analysis. That is inaccurate. At the pages cited by Plaintiffs, the SEIS merely notes that the newly reanalyzed Beretania alignment — an alternative to the Preferred Alternative that was ultimately selected by the Agencies — would meet the purpose and need for the Project. *See* SEIS at 49–51 (noting that both the Project and Beretania alignments would be similarly effective in meeting the Project's purpose and need).[10] Nothing in the SEIS suggests that other alternatives previously rejected by the Alternatives Analysis, and on which Defendants were granted summary judgment, SJ Order at 21–28, should be reconsidered. *See* SEIS

[10] The Beretania Street Tunnel Alternative was earlier considered and eliminated because it would have performed relatively poorly in providing transportation benefits when considered in conjunction with that alternative's additional costs. SEIS at 17; *see also* FEIS, at AR00000709; Alternatives Analysis at AR00009520, 9540.

App. A at A-83 (explaining limited scope of SEIS on remand). Plaintiffs' "new information" claim is thus wholly without merit.

III. CONCLUSION

The SEIS fully complies with this Court's direction on remand and is consistent with the requirements of Section 4(f) of the Transportation Act and its implementing regulations. The Court should therefore lift the injunction imposed in its December 2012 judgment, ECF 202.

Respectfully submitted,

DATED: January 6, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rules 7.5 and 56.1 of the United States District Court for the District of Hawai‘i, the Federal Transit Administration, et al. (collectively, "Federal Defendants"), state that the accompanying **FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE WITH JUDGMENT AND PARTIAL INJUNCTION** contains **5,397** words, including headings, footnotes and quotations, but not counting he case caption, table of contents, table of authorities, exhibits or certificate of service, as calculated by the word count properties of the Microsoft Word software.

DATED: January 6, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following:

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