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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

HONOLULUTRAFFIC.COM;
CLIFF SLATER; BENJAMIN J.
CAYETANO; WALTER HEEN;
HAWAII'S THOUSAND
FRIENDS; THE SMALL
BUSINESS HAWAII
ENTREPRENEURIAL
EDUCATION FOUNDATION;
RANDALL W. ROTH; and DR.
MICHAEL UECHI,

Plaintiffs,

v.

FEDERAL TRANSIT
ADMINISTRATION; LESLIE
ROGERS, in his official capacity

Case No. 11-00307 AWT

**PLAINTIFFS'
OPPOSITION TO
DEFENDANTS' SECOND
(MARCH 5, 2012) MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

Hon. A. Wallace Tashima

Action Filed: May 12, 2011

Trial Date: None Set

as Federal Transit Administration
Regional Administrator; PETER
M. ROGOFF, in his official
capacity as Federal Transit
Administration Administrator;
UNITED STATES
DEPARTMENT OF
TRANSPORTATION; RAY
LAHOOD, in his official capacity
as Secretary of Transportation;
THE CITY AND COUNTY OF
HONOLULU; WAYNE
YOSHIOKA, in his official
capacity as Director of the City
and County of Honolulu
Department of Transportation.

Defendants.

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INTRODUCTION

Defendants have moved for partial summary judgment on Plaintiffs' claims under Section 4(f) of the Department of Transportation Act (Section 4(f)). Specifically, Defendants contend that Plaintiffs waived their Section 4(f) claims regarding the impacts of the Honolulu High-Capacity Transit Corridor Project (the "Project")¹ on seven historic resources.² For the reasons detailed below, Defendants' motion should be denied with respect to Pearl Harbor National Historic Landmark, Merchant Street Historic District, and Makalapa Navy Housing.

RELEVANT BACKGROUND

A. Section 4(f) Of The Department Of Transportation Act

Section 4(f) declares a national policy that "special effort should be made to preserve...public park and recreation lands...and historic sites."

See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 404-06 n.1-2 (1971) (discussing policy and purpose of Section 4(f)). Under this

¹ The Project is an elevated heavy rail line proposed to be built from Honolulu's historic core to a sparsely-populated agricultural area known as Kapolei. The Environmental Impact Statement and Section 4(f) Evaluation prepared for the Project admits that the rail line will have an adverse impact on more than 30 historic resources, will interfere with protected views, and will involve construction in areas likely to contain Native Hawaiian burials. Additional detail regarding the Project and its impacts is available in Plaintiffs' Complaint (ECF Doc. No. 1, ¶¶ 1, 23-31) and their Opposition to Defendants' Motion For Judgment On The Pleadings (ECF Doc. No. 43 at 3-4).

² Defendants have not challenged Plaintiffs' claims with respect to any of the other Section 4(f) resources at issue in this case. Nor have they sought summary judgment on Plaintiffs' claims under the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"). Therefore, regardless of the outcome of this Motion, the case will proceed to

policy, Section 4(f) resources (including, as relevant here, both parks and historic sites) are “to be given paramount importance.” *Citizens to Preserve Overton Park*, 401 U.S. at 412-13.

But Section 4(f) is not merely declaration of policy. It imposes a substantive mandate on federal decisionmakers. *See* 49 U.S.C. § 303(c); *Citizens to Preserve Overton Park*, 401 U.S. at 411; *N. Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147, 1158 (9th Cir. 2008).³ Specifically, Section 4(f) prohibits federal agencies from funding or approving transportation projects requiring the use of a park or historic site unless (1) there is no prudent and feasible alternative and (2) the project includes all possible planning to minimize harm. 49 U.S.C. § 303(c). The Supreme Court has characterized this mandate as “a plain and explicit bar” to the use of federal funds for project impacting Section 4(f) resources. *Citizens to Preserve Overton Park*, 401 U.S. at 411.⁴

Federal agencies are required to implement Section 4(f) by surveying, identifying, and evaluating parks and historic sites. *See N.*

resolution on the merits.

³ In this respect section 4(f) differs from NEPA and NHPA, which are primarily procedural. *See N. Idaho Community Action Network*, 545 F. 3d at 1158.

⁴ It has also observed that “only the most unusual situations” will satisfy the two exemptions to that bar. *Citizens to Preserve Overton Park*, 401 U.S. at

Idaho Community Action Network, 545 F.3d at 1158. This evaluation must be undertaken during the agency's consideration of project alternatives. *Id.*; *see also* 23 C.F.R. § 771.135(b). And it must be completed before the agency issues a Record of Decision on the project. *N. Idaho Community Action Network*, 545 F.3d at 1158-59; *see also* 23 C.F.R. § 771.135(i).

B. Defendants' Waiver Motions

On September 9, 2011, Defendants filed a Motion For Judgment On The Pleadings in which they argued that all Plaintiffs had waived their claims under Section 4(f) by failing to submit comments on the 4(f) process for the Project. *See* Defendants' Motion For Judgment On The Pleadings (ECF Doc. Nos. 37-40). The Court denied the Motion. *See* Order On Motion For Judgment On The Pleadings (ECF Doc. No. 57).

The City has now renewed its waiver arguments with respect to a much smaller sub-set of the Section 4(f) resources at issue in this case. The Federal Defendants have not joined in the City's motion.

STANDARD OF REVIEW

A. Motion for Summary Judgment

A motion for summary judgment may only be granted if "there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law.” Fed. R. Civ. P. 56. In applying this standard, the “evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Therefore, with respect to the motion here at issue, the evidence must be viewed in the light most favorable to Plaintiffs. *See Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 456 (1992).

B. Exhaustion Of Remedies/Waiver

1. Exhaustion/Waiver

Defendants contend that Plaintiffs waived their Section 4(f) claims by failing to exhaust administrative remedies.⁵ The purpose of the exhaustion/waiver requirement is to “permit administrative agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention.” *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). Consistent with that purpose, a plaintiff “need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised.” *Id.*

⁵ This type of argument is sometimes referred to as “exhaustion of administrative remedies” and sometimes as “waiver.” *See Portland General Electric v. Bonneville Power*, 50 F. 3d 1009, 1023-24 (9th Cir. 2007). Here, Defendants’ have consistently used the term “waiver”; for simplicity’s sake, Plaintiffs will do likewise.

Indeed, Ninth Circuit case law makes it clear that a plaintiff need not cite a specific statute, use a term of art, or “incant magic words...in order to leave the courtroom open.” *See, e.g., National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1066 (9th Cir. 2010) (comments need not cite specific statutory requirements); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002) (no need for “magic words”). On the contrary, “alerting the agency in general terms will be enough if the agency has been given a chance to bring its expertise to bear.” *Lands Council*, 629 F.3d at 1076; *see also City of Sausalito v. O’Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (“[a] party has participated in a sufficiently meaningful way when it has alerted the agency to its position and claims”).

In other words, Plaintiffs satisfy the exhaustion/waiver requirement if their participation in the administrative process, “taken as a whole, provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). Or, more simply, the exhaustion/waiver doctrine simply requires that the agency be allowed “to give the issue meaningful consideration.” *Id.* at 971.

2. The “So Obvious” Or “Independent Knowledge” Exception

Although parties challenging an agency decision are generally responsible for alerting the agency to their concerns, **the agency** bears the ultimate responsibility for complying with the law. *See Department of Transportation v. Public Citizen*, 541 U.S. 752, 765 (2004). For that reason, no exhaustion is required where issues are “so obvious that there is no need for a commentator to point them out.” *Id.*

The Ninth Circuit has interpreted the “so obvious” standard to mean that no exhaustion is required where the agency has “independent knowledge of the issues that concern[] plaintiffs.” *Ilio’ulaokalani Coalition v. Rumsfeld*, 464 F. 3d 1083, 1092 (9th Cir. 2006); *see also Barnes v. United States Department of Transportation*, 655 F. 3d 1124, 1132 (9th Cir. 2011). Therefore, Plaintiffs can also satisfy the exhaustion/waiver requirement if the evidence in the administrative record indicates that Defendants were independently aware of the issues about which Plaintiffs are concerned.⁶ *Id.*

⁶ This approach to the “so obvious” exception is consistent with the fundamental purpose of the exhaustion/waiver requirement — namely, to ensure that agencies be allowed an opportunity “to give the issue[s] meaningful consideration.” *See Great Basin*, 456 F.3d at 971.

ARGUMENT

A. Plaintiffs Did Not Waive Their Claims Regarding Pearl Harbor, Merchant Street Historic District, and Makalapa Navy Housing

Defendants claim that Plaintiffs waived their Section 4(f) claims regarding seven different 4(f) resources: Pearl Harbor National Historic Landmark, the Merchant Street Historic District, the DOT Harbors Division Building, the Pacific War Memorial Site, Makalapa Naval Housing, the Hawaii Employers' Council Building, and the Tamura Building. Def. Motion at 2.

Plaintiffs have now had an opportunity to review the Administrative Record, and they have found only limited evidence that Defendants were independently aware of issues related to the Project's impacts on the Pacific War Memorial Site, the Hawaii Employer's Council Building, the DOT Harbors Division Building, and the Tamura Building. Therefore, those resources do not fall squarely within the Ninth Circuit's "independent knowledge" exception. Plaintiffs will not pursue Section 4(f) claims specific to those four resources.

In contrast, the Administrative Record contains substantial evidence confirming that Plaintiffs did not waive their Section 4(f) claims with respect to (1) Pearl Harbor National Historic Landmark, (2) the Merchant Street Historic District, and (3) Makalapa Navy Housing. As explained in detail below, Plaintiffs properly raised concerns about all three resources

during the administrative process for the Project and, furthermore, the Record clearly demonstrates that Defendants had independent knowledge of concerns about each of the three.

1. Pearl Harbor National Historic Landmark

Pearl Harbor was designated a National Historic Landmark in 1964. AR 000247 at 000737. As such, it is an historic resource subject to protection under Section 4(f). *See* 23 C.F.R. § 774.17 (defining resources subject to Section 4(f)); AR 000247 at 000737-39 (evaluating Pearl Harbor as a 4(f) resource).

Plaintiffs properly raised their concerns about Pearl Harbor National Historic Landmark during the administrative process. For example, in comments on the *Draft Environmental Impact Statement and Section 4(f) Evaluation* (“Draft EIS”) for the Project, Plaintiff Hawaii’s Thousand Friends (“HTF”) objected to Defendants’ failure to provide the information necessary to “understand or assess [the Project’s] direct, indirect or cumulative impacts.” AR 000855 at 1917. HTF noted that “while the D[raft] EIS states that...Section 4(f) resource[s] have been evaluated,” the evaluation information was not provided to the public. *Id.* at 001918. HTF identified Pearl Harbor as one of the affected resources about which Defendants did not provide sufficient information or analysis. *Id.* at 1916-17. These comments alerted Defendants to HTF’s concerns

about the quality of the Section 4(f) analysis regarding Pearl Harbor National Historic Landmark, and therefore satisfied the requirements of the exhaustion/waiver doctrine. *See, e.g., Lands Council*, 629 F.3d at 1076 (no waiver where “the agency has been given a chance to bring its expertise to bear”); *City of Sausalito*, 386 F.3d at 1208 (“[a] party has participated in a sufficiently meaningful way when it has alerted the agency to its position and claims”).

Moreover, the Administrative Record clearly demonstrates that Defendants had independent knowledge of widespread concern regarding the Project’s impact on Pearl Harbor National Historic Landmark:

- The National Park Service, the federal agency charged with protecting National Historic Landmarks,⁷ informed Defendants of its concerns about impacts to Pearl Harbor National Historic Landmark and criticized Defendants’ Section 4(f) analysis. *See, e.g., AR 000855 at 00887-88* (refusing to concur with proposed Section 4(f) finding), 00892 (“significant concerns”), 00893 (absence of “consideration/analysis”), 00896 (again refusing to concur with proposed Section 4(f) finding).
- The United States Environmental Protection Agency (“EPA”), the federal agency charged with reviewing and rating the quality of Draft EISs,⁸ expressed concerns about Defendants’ assessment of impacts on Pearl Harbor National Historic Landmark and recommended that

⁷ *See, e.g., AR 058999* (“Congress has delegated to the National Park Service monitoring and technical assistance responsibilities to ensure that National Historic Landmarks retain the highest degree of integrity possible”).

⁸ The EPA rates all EIS pursuant to section 309 of the Clean Air Act. *See* 42 U.S.C. § 7609. EPA rated Defendants’ Draft EIS “EC-2,” meaning that (1) the Project raised significant environmental concerns and (2) that the Draft EIS did not contain sufficient information to fully assess environmental impacts. *See AR 00855 at 00966-67.*

Defendants pay “particular attention” to improving that assessment. AR 000855 at 000971.

- The Hawaii State Historic Preservation Division, the State agency responsible for identifying and evaluating potential impacts to Hawaii’s historic resources,⁹ informed Defendants of “questions regarding the inadequacy of the description given in the Draft EIS to the vital significance of the National Historic Landmark.” AR 000855 at 001106.

In sum, Plaintiff HTF properly advised Defendants of its concerns about Pearl Harbor National Historic Landmark during the administrative process for the Project. AR 000855 at 1915-18. And the National Park Service, the EPA, and the State Historic Preservation Division (essentially a “who’s who” of relevant regulators) provided Defendants with independent knowledge of widespread concerns related to the Landmark. AR 000855 at 000887-88, 000892-93, 000896, 000971, 001106. For both reasons, Plaintiffs’ claims regarding the Pearl Harbor National Landmark were not waived.

2. Merchant Street Historic District

The Merchant Street Historic District is a collection of nineteenth century buildings at the core of the historic downtown area of Honolulu.

⁹ SHPD is the State Historic Preservation Officer (or “SHPO”) for the State of Hawaii, and, in that capacity, plays a lead role in identifying historic properties and evaluating potential impacts on those properties under both the National Historic Preservation Act (“NHPA”) and Section 4(f). *See* 36 C.F.R. §§ 800.4(a) (identification of historic properties under NHPA), 800.5(a) (assessment of adverse effects under NHPA); 23 C.F.R. §§ 774.5(b)(1), 774.15(d)(3), 774.17 (SHPO’s role in making “use” determinations under Section 4(f)).

It has been listed on the National Register of Historic Places since 1973 (the Keeper of the National Register has affirmed that it represents “an incalculable asset as an historic record of Honolulu’s past” and has recognized need to preserve the District’s “small scale human environment”), and is therefore an historic resource subject to protection under Section 4(f). Declaration of Matthew Adams, ¶ 4, Ex. B at 2-3.

Multiple Plaintiffs expressed concerns about the impact of the Project on the historic resources in Downtown Honolulu. For example:

- Michelle Matson, a member of Plaintiff Honolulutraffic.com, submitted multiple comments asserting Defendants’ duty to comply with Section 4(f). *See, e.g.*, AR 000855 at 002490, 002496; AR 17157 at 17345. Among other things, she objected to Defendants’ failure to account for the Project’s impacts on the historic resources in downtown Honolulu. *See, e.g.*, AR 000855 at 2490-91, 2495-99; AR 0017157 at 17344-48. She also expressed specific concerns about the impact of the Project on protected views extending down Fort Street toward Aloha Tower and Honolulu Harbor, an area within the Merchant Street Historic District. *See, e.g.*, AR 000855 at 002497-98.
- Plaintiff Honolulutraffic.com lodged several objections to Defendants’ failure to comply with Section 4(f), and it developed an alternative to the Project that was designed to avoid the historic resources in downtown Honolulu. *See* AR 071958 at 071958 (proposing alternative and noting avoidance of Section 4(f) resources).
- Plaintiff HTF objected to the fact that the Project would “change the visual character” of the downtown streetscape and would disrupt the “historical []connection between downtown and the waterfront.” AR 000855 at 001922.

These comments put Defendants on notice of Plaintiffs’ concerns about Section 4(f) compliance and the Project’s impacts on the historic

downtown core of Honolulu (an area which includes the Merchant Street Historic District). Therefore, Plaintiffs satisfied the requirements of the exhaustion/waiver doctrine. *See, e.g., Lands Council*, 629 F.3d at 1076 (no waiver where “the agency has been given a chance to bring its expertise to bear”); *City of Sausalito*, 386 F.3d at 1208 (“[a] party has participated in a sufficiently meaningful way when it has alerted the agency to its position and claims”).

In addition, the Administrative Record clearly demonstrates that Defendants had independent knowledge of concerns regarding the Project’s impacts on the Merchant Street Historic District:

- The Advisory Council on Historic Preservation, the federal entity charged with overseeing compliance with the NHPA,¹⁰ informed Defendants of widespread concern about the Project’s impacts on Merchant Street Historic District: “the Hawaii [SHPD] and other consulting parties have raised concerns about...indirect and cumulative effects...on historic properties, particularly the Chinatown and Merchant Street Historic Districts.” AR 059002 at 059003.
- Historic Hawaii Foundation made similar comments. *See* AR 059005 at 59007 (“We remain concerned about indirect and cumulative adverse effects, especially within the Chinatown and Merchant Street Historic Districts”).
- Defendants’ notes and internal memoranda suggest that they were aware of concerns about the Project’s impacts on the Merchant Street. *See, e.g.,* AR 59177 at 59177-79 (draft responses to SHPD’s concerns about Merchant Street Historic District).

¹⁰ The Advisory Council is charged with administering the Section 106 consultation process and the federal regulations governing that process. *See* 36 C.F.R. § 800.2(b).

In sum, the Merchant Street Historic District is the historic core of downtown Honolulu, an area about which Plaintiffs expressed significant concerns (including the suggestion of an alternative designed to avoid impacts to the 4(f) resources in the area). *See, e.g.*, AR 000855 at 001922, 002490-91, 2495-99; AR 017157 at 17345; Adams Declaration, ¶ 4, Ex. B at 2-7 (location and historic attributes of District). In addition, the Administrative Record demonstrates that Defendants had independent knowledge of concerns about the Project's impacts on the historic character of Merchant Street Historic District. AR 059002 at 059003; AR 059005 at 59007; AR 59177 at 59177-79. For both of these reasons, Plaintiffs' claims regarding the Merchant Street Historic District were not waived.

3. Makalapa Navy Housing

Makalapa Navy Housing is a collection of historic residences. While there is considerable debate about whether Makalapa Navy Housing consists of one historic district or two historic districts, there is no question that the housing is an historic resource subject to the protections of Section 4(f). *See, e.g.*, AR 000247 at 000739-40 (Makalapa identified as a 4(f) resource); AR at 039709-10 (Makalapa eligible for listing in National Register of Historic Places); AR 60457 at 60458-60 (controversy regarding boundaries and number of historic districts).

Plaintiff HTF properly raised concerns about Makalapa Navy Housing during the administrative process for the Project. HTF noted that “while the D[raft] EIS states that...Section 4(f) resource[s] have been evaluated,” the evaluation information was not provided to the public. AR 000855 at 001918. HTF identified “Makalapa Naval Housing” as one of the affected community resources about which Defendants did not provide sufficient information or analysis. AR 000855 at 001914-15, 1917. These comments alerted Defendants to HTF’s concerns about the quality of the Section 4(f) analysis and the Project’s potential to impact Makalapa Navy Housing; therefore, they satisfied the requirements of the exhaustion/waiver doctrine. *See, e.g., Lands Council*, 629 F.3d at 1076 (no waiver where “the agency has been given a chance to bring its expertise to bear”); *City of Sausalito*, 386 F.3d at 1208 (“[a] party has participated in a sufficiently meaningful way when it has alerted the agency to its position and claims”).

In addition, the Administrative Record clearly demonstrates that Defendants had independent knowledge of concerns regarding Makalapa Navy Housing:

- The National Trust for Historic Preservation, a Congressionally-chartered historic preservation organization,¹¹ strenuously objected to

¹¹ The National Trust was chartered by Congress in 1949 for the purpose of furthering the historic preservation policies of the United States and facilitating public participation in the preservation issues. *See* 16 U.S.C. § 468.

Defendants' evaluation of Makalapa Navy Housing, noting, among other issues, the City's "apparent effort[s] to downplay or deny the substantial adverse effects of the [Project] — including direct physical encroachment — on the historic landscape and setting for Makalapa." *See* AR 60457 at 60458-60.

- The Historic Hawaii Foundation also expressed strong objections to Defendants' analysis of the Project's effects on the historic qualities of Makalapa Navy Housing. *See* AR 59005 at 59007 (Defendants' evaluation "appear[s] to be a gerrymander...which suggests a motive of convenience rather than a professional determination").
- The National Park Service articulated similar concerns. *See* AR 058999 at 05900-01 (noting persistent questions about Makalapa).
- Defendants' own "meeting notes" confirm that they were aware of concerns about the Project's impacts on Makalapa Navy Housing. *See* AR 058900 at 058901.

In sum, Plaintiff HTF properly raised concerns about Defendants' failure properly to evaluate Makalapa Navy Housing. AR 000855 at 001914-18. At least three other entities made strongly-worded objections on that same topic. AR 60457 at 60458-60; AR 59005 at 59007; AR 058999 at 05900-01. And the Administrative Record contains evidence that Defendants took notes on those objections. AR 058900 at 058901. Therefore, Plaintiffs' claims regarding the Makalapa Navy Housing were not waived.

B. The City's Continued Insistence On "Magic Words" Is Contrary To Controlling Case Law

Defendants nonetheless insist that Plaintiffs waived their Section 4(f) claims regarding Pearl Harbor National Historic Landmark, Merchant Street Historic District, and Makalapa Navy Housing. Essentially, they contend

that Plaintiffs' comments were overly "cryptic" and failed to formally allege specific, site-by-site violations of Section 4(f). *See* Def. Motion at 19. This argument is flawed in several respects.

First, the City has not identified a statute or regulation explicitly requiring that the commenting public formally allege specific, site-by-site violations of Section 4(f). *See* Def. Motion at 11-12, 18-19. The statute on which the City relies refers to Section 4(f) resources in the singular; but it says nothing about requirements governing public comment on a federal agency's Section 4(f) evaluation. *See* Def. Motion at 11; 49 U.S.C. § 303(c). And the regulation on which the City relies addresses **the time** at which an agency must conduct a Section 4(f) evaluation. *See* Def. Motion at 12-13; 23 C.F.R. § 774.9(a) (evaluation must take place "as early as practicable" and "when alternatives to the proposed action are under study"). The regulation cannot reasonably be construed as establishing standards for the public's comments on Section 4(f). *See* 23 C.F.R. § 774.9(a).

Second, and in that same vein, Defendants' insistence on a specific commenting format conflicts with controlling Ninth Circuit case law. *See Great Basin*, 456 F. 3d at 965 (comments "need not raise an issue using precise legal formulations"). The courts of this circuit have made it quite clear that public comments need not cite specific statutes, use terms of art, or use "magic words" in order to preserve their claims. *See, e.g., National*

Parks & Conservation Association v. Bureau of Land Management, 606 F. 3d 1058, 1066 (9th Cir. 2010) (legal terms not required); *Idaho Sporting Congress v. Rittenhouse*, 305 F. 3d 957, 966 (9th Cir. 2002) (no “magic words”).

Third, it is perfectly permissible for Plaintiffs’ litigation position to reflect further-refined versions of arguments previously made at the administrative level. Indeed, “the Ninth Circuit has long permitted plaintiffs to raise arguments...where they presented a much less refined legal argument” to an agency. *See Shasta Resources Council v. United States*, 629 F. Supp. 2d 1045, 1058 n.4 (E.D. Cal. 2010) citing *Great Basin*, 456 F. 3d at 695; *see also Lands Council*, 629 F. 3d at 1076 (“While plaintiff’s arguments are now more fully developed than they were in prior proceedings, [plaintiff] clearly put the [agency] on notice.”).

Fourth, as explained in the bullet-point summaries presented above, Plaintiffs did, in fact, present very specific Section 4(f) concerns. To cite just one example, Michelle Matson’s comments on the Draft EIS noted Defendants’ duty to comply with Section 4(f), identified a specific viewshed within the Merchant Street Historic District, and objected to the project’s interference with that viewshed. *See AR 000855 at 002497-98*. This was more than enough to put Defendants on notice of the nature and location of her concerns, thereby satisfying the requirements of the exhaustion/waiver

doctrine. *See City of Sausalito*, 386 F. 3d at 1208 (9th Cir. 2004) (“[a] party has participated in a sufficiently meaningful way when it has alerted the agency to its position and claims”).

Fifth, Defendants ignore the “independent knowledge” prong of the waiver/exhaustion standard.¹² *See* Def. Motion at 1-20 (failing to discuss the “independent knowledge” standard or the *‘Ilio’ulaokalani Coalition* case). As explained above, the Administrative Record clearly demonstrates that Defendants had independent knowledge of widespread concerns about the Project’s impacts on Pearl Harbor National Historic Landmark, the Merchant Street Historic District, and Makalapa Navy Housing. *See supra* at 9-15. For this reason, too, the requirements of the exhaustion/waiver doctrine have been satisfied. *‘Ilio’ulaokalani Coalition*, 464 F. 3d 1083, 1092 (9th Cir. 2006); *see also Barnes*, 655 F. 3d at 1132 (9th Cir. 2011)

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendants’ Motion be denied as to Pearl Harbor National Historic Landmark, Merchant Street Historic District, and Makalapa Navy Housing.

¹² Defendants’ failure to address the “independent knowledge” standard is quite remarkable. This issue was raised in the parties’ prior waiver/exhaustion briefing. It also came up at the hearing on Defendants’ Motion for Judgment on the Pleadings. And the Court’s December 12 Order denying the Motion For Judgment on the Pleadings explicitly referenced the “independent knowledge” standard. Order On Motion For Judgment On The Pleadings (ECF Doc. No. 57) at 4-5.

Respectfully submitted,

Dated: March 19, 2012

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