

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII

3
4 HONOLULUTRAFFIC.COM, et al.,) CIVIL NO. 11-00307AWT
5 Plaintiffs,)
6 vs.) Honolulu, Hawaii
7) November 30, 2011
8 FEDERAL TRAFFIC) 10:00 a.m.
ADMINISTRATION, et al.,)
9 Defendants.)
)
)

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

13 APPEARANCES:

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1 P R O C E E D I N G S

2 THE COURT: All right. Let's all be seated,
3 please. I ask the court to call the matter.

4 COURTROOM MANAGER: Civil 11-00307AWT,
5 Honolulutraffic.com, et al., versus Federal Transit
6 Administration, et al. This case has been called for
7 various motions and also status/scheduling conference.

8 Counsel, your names for the record, please?

9 MR. YOST: Nicholas Yost on behalf of plaintiffs.
10 I'm joined by Matthew Adams and Michael Green.

11 MR. GREEN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. YEE: Good morning, Your Honor.

14 Harry Yee, Assistant United States Attorney
15 appearing for Peter Whitfield, Department of Justice,
16 representing the Federal Transit Administration and all
17 named federal defendants.

18 THE COURT: Good morning.

19 MR. THORNTON: Good morning, Your Honor. Robert
20 Thornton on behalf of the City and County defendants. And
21 with me at counsels' table are John Manaut at the
22 Carlsmith Ball firm and, from the Corporation Counsel for
23 the City and County, Gary Takeuchi and Don Kitaoka.

24 THE COURT: All right. Good morning to you.

25 MR. MANAUT: Good morning.

1 THE COURT: All right. Why don't you be seated?

2 Okay. This is our first session. I don't know
3 how many more we're going to have. I know it's in the
4 paper today. It looks like there's going to be a little
5 more funding likely for this project. So I guess that's
6 not going to moot this case, lack of funding. So I think,
7 you know, we have to be prepared to go forward and try to
8 resolve this case in a timely manner. I think that's the
9 primary reason I called this conference today.

10 Before we get to that part, there's a motion
11 pending. I forgot whether it's just the federal
12 defendants. I guess all defendants, right? Motion
13 pending for, oh, I guess it's partial judgment on the
14 pleadings.

15 Now, I ruled on the accompanying motion for
16 judicial notice, oh, maybe a week or two ago. It seems to
17 me with that ruling, you know, the motion doesn't have too
18 much to stand on. But still, it's not completely --
19 completely undercut.

20 I think all that ruling indicates, though, is
21 that -- and I think it's recognized in the conference
22 report that some -- that the motion for judgment on
23 pleadings in a sense may be premature, but it's hard to
24 tell whether it's completely lacking in merit.

25 But whatever the case, I'll hear argument to the

1 extent you want to make it on the motion now. And I don't
2 know whether I'll rule today, but I don't think it makes
3 too much difference whether I rule on the motion today in
4 terms of the status conference because the motion's not
5 intended to do away with the entire case anyway. You
6 know, I think it's all in an attempt to streamline it.

7 So I'll hear argument from moving parties.
8 Plaintiffs can have a chance to respond, then I'll give
9 defendants their reply. Go ahead.

10 MR. THORNTON: Thank you, Your Honor. Again,
11 Robert Thornton on behalf of the City and County
12 defendants.

13 Thank you, Your Honor. We are obviously cognizant
14 and have reviewed the Court's ruling on the request for
15 judicial notice, but we would like to argue certain points
16 that we still think are relevant to put the motion into
17 proper context.

18 The first point, which is critical to this motion,
19 Your Honor, is to emphasize the elaborate nature of the
20 administrative proceedings, the lengthy administrative
21 proceedings regarding this project; that this particular
22 phase of the project's consideration by the Federal
23 Transit Administration and the City and County lasted over
24 five years. There were multiple opportunities for public
25 review and comment, really extraordinary opportunities for

1 public review and comment. There was public notice of the
2 alternatives analysis. There was a scoping process, so-
3 called scoping process that's conducted under the National
4 Environmental Policy Act, which provided a second step, if
5 you will, of public comment, where there were five public
6 hearings conducted. There was a circulation of draft
7 environmental impact statement with an extension of the
8 public comment period. And finally, there was the notice
9 of availability of the final environmental impact
10 statement leading to the record of decision by the Federal
11 Transit Administration.

12 And the reason I emphasize that, Your Honor, is
13 that the Supreme Court has made it clear in the Vermont
14 Yankee and Public Citizen cases that plaintiffs have an
15 obligation to structure their participation, to alert the
16 agency to the parties' contention with sufficient
17 specificity so that the agency may give meaningful
18 consideration and correct errors.

19 And the Court has told us that the process should
20 not be a game where plaintiffs make cryptic or obscure
21 comments only to later make specific claims for the first
22 time in a lawsuit. And as the Court's aware, this rule
23 was founded on the principle that courts should not
24 overturn administrative decisions unless those decisions
25 are arbitrary and capricious and, also, where the

1 plaintiffs timely raised specific claims during the
2 administrative process. And we've cited to the Court the
3 authority on pages 22 and 23 of our opening memo in
4 support of that proposition.

5 Now, we've noted in the Court's ruling on the
6 request for judicial --

7 THE COURT: Well, you know, it's different if no
8 plaintiffs make a comment. But a lot of your motion goes
9 to the fact that some of the plaintiffs didn't; you know,
10 have not commented, at least according to the truncated
11 ROD and -- but that doesn't do anything for you in terms
12 of narrowing the suit, does it?

13 MR. THORNTON: There's really two aspects to our
14 motion, Your Honor. One is the fact that four of the
15 plaintiffs, Plaintiffs Cayetano, Hee, Roth and the Small
16 Business Entrepreneurial Education Foundation, failed to
17 participate at all in the process. So it's not as if they
18 participated but relied on others to submit comments.
19 They failed, through a lengthy five-year process with
20 multiple opportunities, to participate at all.

21 THE COURT: Well, what difference does that make
22 if others participated?

23 MR. THORNTON: I think it makes a difference, Your
24 Honor.

25 THE COURT: No, it's like, you know, the standing

1 jurisprudence. So you've got a bunch of plaintiffs, and
2 one plaintiff is standing. That's sort of the end of the
3 standing inquiry, isn't it?

4 MR. THORNTON: We believe that under the Public
5 Citizen case, Your Honor, that the Supreme Court has
6 articulated that in order to participate as a plaintiff in
7 a federal lawsuit challenging federal agency decision,
8 that it's incumbent on the individual plaintiffs to
9 participate in the process. We think this is --

10 THE COURT: I'm not disagreeing with you. I'm
11 just speaking in terms of what it's going to do for you
12 practically in terms of, you know, defending against the
13 suit. Not much, is it?

14 MR. THORNTON: Well, Your Honor, the -- and let me
15 acknowledge the distinguished careers of those three named
16 plaintiffs. If I didn't acknowledge them, I'm sure
17 plaintiffs' counsel would remind me of that since they
18 prominently recite those individuals in all of those
19 papers.

20 So obviously they think it's significant that
21 those particular individuals are plaintiffs in this case.
22 We think it's significant, Your Honor, that those
23 individuals failed to participate. They -- if they
24 thought that this was an important matter -- and all three
25 of them as I understand it are lawyers. They clearly are

1 prominent individuals -- if they thought it was important
2 enough to bring a lawsuit, it should have been important
3 enough for them to participate in the administrative
4 process. That's our point, Your Honor, that they have
5 waived their ability to be plaintiffs in this case. Even
6 though, we understand, that the case may proceed on the
7 basis of the allegations and standing of other
8 individuals, the standing, I would point out, is yet an
9 issue yet to be contested. As Your Honor knows, when you
10 get to summary judgment stage of these cases, there is a
11 enhanced obligation on the part of the plaintiffs to
12 establish standing.

13 So for that reason, Your Honor, we think it's
14 important. The plaintiffs have made a significant point
15 of the participation of these individual plaintiffs, and
16 we think it's important to point out that they failed to
17 participate in the process at any time during the five
18 years of proceedings.

19 Now, in the Court's ruling on the request for
20 judicial notice, the Court noted that the record of
21 decision summarized the comments that had been made by
22 individuals in the record of decision but did not list all
23 of those comments. However, the final environmental
24 impact statement, which is Exhibit A to our request for
25 judicial notice, which the Court accepted into judicial

1 notice, at pages 604 to 607 in the PDF format of the EIS
2 lists each and every individual and entity and group that
3 provided comments on the draft environmental impact
4 statement; which, Your Honor, is the critical stage in the
5 process under the National Environmental Policy Act,
6 section 4(f), the Transportation Act, the National
7 Historic Preservation Act, to participate in the process
8 to alert the agency to the plaintiffs' concerns. And the
9 Court can refer to those pages of the final environmental
10 impact statement, and you can see that none of the four
11 plaintiffs that we've identified are listed there.

12 So although the final environmental -- or, rather,
13 although the record of decision does not list every entity
14 and individual that par -- that provided comments in the
15 final environmental impact statement, the final
16 environmental impact statement does include a
17 comprehensive list, and that's before the Court. So at
18 least the Court has evidence before it that -- that
19 that -- at that critical stage of the proceeding those
20 plaintiffs did not participate.

21 So finally on that point, Your Honor, we think
22 that it's inconsistent with the principle enunciated by
23 the Supreme Court in the Vermont Yankee and Public Citizen
24 cases for plaintiffs that entirely failed -- they didn't
25 appear at a hearing. They didn't submit a letter. They

1 didn't submit a comment. They didn't appear at a scoping
2 process. They didn't comment on the alternatives
3 analysis -- and yet now they're a named plaintiff in this
4 lawsuit.

5 Now, with regard to the 4(f) claims, Your Honor --
6 and again, I'm cognizant that the Court's ruling on the
7 request for judicial notice indicate that the Court
8 believes that it needs to have the entirety of the
9 administrative record before it in order to rule on this
10 aspect of our motion as well. But I wanted to set the
11 stage based on the evidence that is before the Court in
12 this motion and that's frankly uncontested; and that is,
13 of the 14 so-called section 4(f) properties -- Section
14 4(f), as the Court is aware, is a federal statute that
15 requires the Federal Transit Administration to make
16 certain findings for federal transportation projects that
17 will use certain designated properties. And I emphasize
18 the term "use," Your Honor, because that's a distinct
19 legal requirement separate and part from the National
20 Environmental Policy Act.

21 THE COURT: When you say in the 4(f) context "use"
22 means like to actually take as you would --

23 MR. THORNTON: "Use" means physical use or what
24 the courts, the Ninth Circuit, has characterized as
25 constructive use of the property; where an impact is so

1 severe that the Federal Transit Administration project is
2 constructively using that particular property, which is --

3 THE COURT: The way some people think the project
4 will impact this courthouse, right?

5 MR. THORNTON: That's -- that's one of the issues
6 that was raised.

7 THE COURT: Is that what you mean by constructive
8 use?

9 MR. THORNTON: I don't know but -- well, I think,
10 Your Honor, not to deny the importance of the courthouse,
11 obviously, but the courthouse would not qualify as a 4(f)
12 property.

13 THE COURT: I understand that. I'm just trying to
14 understand what you mean by constructive use.

15 MR. THORNTON: Constructive use, as it's been
16 interpreted by the courts and defined in the regulations,
17 means a use that's so severe that the functions and the
18 attributes of the property are significantly impacted.
19 It's a different concept, a more narrow concept, and it's
20 applicable to impacts under the National Environmental
21 Policy Act.

22 So the point in our motion, Your Honor, is that
23 with regard to six of the 14 4(f) properties that are
24 specifically delineated in the plaintiffs' complaint, that
25 there is no evidence that anybody mentioned those Section

1 4(f) sites. None whatsoever.

2 THE COURT: You mean there is no comment at all
3 with respect to six of the properties?

4 MR. THORNTON: That's correct, Your Honor.
5 There's no comments at all. There's no mention of them in
6 all of the plaintiffs' opposition papers in this motion.
7 I'm sure they scoured all of their record regarding their
8 members and their plaintiffs' comments. They were not
9 able to identify a single comment letter that named those
10 properties.

11 Now, plaintiffs say, well --

12 THE COURT: It's not critically -- of course, I've
13 never had anything to do with the 4(f) case. But it's not
14 clear to me that, you know, it has to be approached
15 property by property. But why can't you, you know, just
16 look at the project as a whole?

17 MR. THORNTON: Because, Your Honor, the statute
18 tells us it has to be approached property by property, the
19 statute and regulations.

20 THE COURT: Is it crystal clear?

21 MR. THORNTON: We believe it is crystal clear,
22 Your Honor. And we believe that the Ninth Circuit case
23 law also makes it clear that it is a property-by-property
24 evaluation. And we've cited the Greenbelt case, Your
25 Honor, for that proposition, which makes it clear.

1 THE COURT: I'm sorry. What's your best case on
2 that?

3 MR. THORNTON: Your Honor, we cited Laguna
4 Greenbelt, Inc., versus U.S. Department of Transportation.

5 THE COURT: Okay.

6 MR. THORNTON: But the statute, as the Court is
7 well aware, you don't need to go to a regulation if the
8 statute is clear. And the statute says that with regard
9 to -- to the designated 4(f) properties, which are certain
10 parks and historic sites, et cetera, that the Secretary of
11 Transportation is required to make a specific finding with
12 regard to the use of each of those individual properties.

13 So we think in the context of the clear terms of
14 the statute indicates that it's a property-by-property
15 designation. So in the context of these six properties we
16 think this is a very -- a factual circumstance that's
17 analogous to the facts in the Great Basin Mine Watch
18 decision that we cited to the Court, a Ninth Circuit
19 decision.

20 And in that case one of the claims alleged in the
21 lawsuit was that the mining activity was going to
22 adversely affect certain federal -- reserve federal water
23 rights. And the plaintiffs there, as the plaintiffs are
24 doing here, are saying, well, yes, it's true we didn't
25 specifically reference federal reserved water rights in

1 our comments, but we talked about adverse impacts on water
2 quality. We talked about water usage, et cetera. And
3 that should have been sufficient to have exhausted our
4 administrative remedies with regard to that claim.

5 And the Ninth Circuit held that that was not
6 sufficient, that those comments were too attenuated. The
7 specific claims characterized as a so-called 107 claim
8 because it derives out of an executive order that's
9 numbered 107. That, we think, is very analogous to the
10 circumstance where a statute has a specific requirement
11 that's distinct from the National Environmental Policy Act
12 requirements, where the evaluation is done on a site-
13 specific basis, where plaintiffs were able with regard to
14 certain sites -- and we've cited in our papers the fact
15 that -- that we know that plaintiffs were aware how to
16 make a 4(f) claim. And I would cite the Court to page 23
17 of Exhibit Q of our request for judicial notice, which
18 is --

19 THE COURT: Exhibit-what?

20 MR. THORNTON: Exhibit Q.

21 THE COURT: Okay, Q.

22 MR. THORNTON: Of our request for judicial notice.

23 THE COURT: Page?

24 MR. THORNTON: Page 23 of Exhibit Q.

25 THE COURT: Okay.

1 MR. THORNTON: Pages 23 and 24.

2 THE COURT: 23.

3 MR. THORNTON: This is a comment letter submitted
4 by the plaintiff Hawaii's a Thousand Friends. And on that
5 page the plaintiffs -- and they have it in all bold, all
6 bold and caps, "Probable violation of sections 4(f) of the
7 U.S. Department of Transportation Act, Re: Keehi Lagoon
8 Beach Park." And they go on for several paragraphs to
9 describe their claim with regard to the use of that
10 particular 4(f) property.

11 So in that case, Your Honor, we see that
12 plaintiffs, who are obviously quite sophisticated, were
13 represented throughout these proceedings by individuals
14 and entities that are quite sophisticated, familiar with
15 federal environmental process, that they were able to
16 articulate quite clearly their claim with regard to that
17 one 4(f) site. But you can scour the record, Your Honor,
18 and that is the only place in the record where a specific
19 4(f) violation is alleged.

20 Now, with regard to the other properties, I would
21 put the 4(f) properties -- of the 14 that are listed in
22 the plaintiffs' complaint, I would put them into three
23 categories, six in the category where no comment
24 whatsoever was made. The site was never identified by any
25 plaintiff. And that's Merchant Street Historic Park,

1 Pacific War Memorial site, Makalapa Naval Housing
2 District, the Hawaii Employers Council, the Tamura
3 Building, and the DOT Harbors Division Building. Nobody
4 made any comment. Nobody even identified those sites.

5 Then there are a second category of three
6 properties that the plaintiffs did identify, but they
7 never mentioned Section 4(f) in the context of their
8 comments on those properties. And that's Walker Park,
9 Queen Street Park, and the Pearl Harbor Historic District.

10 And then the third set of properties are
11 properties where at least one plaintiff made a reference
12 to Section 4(f) with regard to the property, although they
13 did not articulate a specific claim under 4(f). And
14 that's the properties Aloha Tower, Irwin Memorial Park,
15 Mother Waldron Park, and Piers 10 and 11.

16 So our point, Your Honor, is we think that there
17 is sufficient evidence before the Court. And I would say
18 that we understand the Court's point that in order to
19 finally decide whether there is an absence of comment on
20 these sites, that it may be that -- that the Court needs
21 the entirety of the administrative record. But I would
22 suggest that clearly had plaintiffs been able to identify
23 a comment with regard to those six properties, they would
24 have provided that. We note that in the plaintiffs'
25 opposition papers and in their own declarations they did

1 identify one additional comment by an individual that they
2 allege to be a member of one of the plaintiff
3 organizations that had made various 4(f) comments. But
4 again, not with regard to those six sites.

5 So in summary, Your Honor, we do not believe it
6 sufficient for plaintiffs to make vague references to
7 impacts to parks or to historic sites without making a
8 specific reference to how the project will use the park or
9 the historic site and why the Federal Transit
10 Administration designation of either no use, no
11 constructive use, or a de minimis impact, which are the
12 three different categories of characterization that's
13 available in the Federal Transit Administration under
14 Section 4(f). We do not think it's sufficient for the
15 plaintiffs just to say, oh, there are historic sites or
16 there are parks within the area of the project and that
17 there is this thing called Section 4(f). We do not
18 believe under the Ninth Circuit case law, and particularly
19 under the Great Basin Mine Watch decision, that those
20 kinds of comments are sufficient for the plaintiffs to
21 have demonstrated that they exhausted their administrative
22 remedies and adequately participated in the administrative
23 process.

24 Now, just one final point, Your Honor, and that
25 is, that if the Court feels that given the state of the

1 record or the evidence before the Court in this particular
2 motion that it's not able to -- to grant this particular
3 motion, it would be the defendants' intention to renew
4 this motion as a motion for partial summary judgment.

5 THE COURT: All right. Before you sit down, let
6 me just -- let me ask a question on the merits now.

7 Assuming plaintiffs get past the stage of I'll
8 call it standing but, you know, that they commented
9 sufficiently to go forward with the claim, what is the --
10 if we get to the merits, just tell me what the basic
11 standard is for judging a 4(f) claim.

12 MR. THORNTON: As a basis --

13 THE COURT: And I don't mean arbitrary and
14 capricious. I mean, you know, what's the basic standard?

15 MR. THORNTON: Well, the basic standard is
16 based -- the basic APA standard that's been articulated.
17 The Supreme Court articulated it in the Overton Park case.
18 But it is an arbitrary and capricious standard of review.

19 THE COURT: I know that. What does that mean in a
20 4(f) case?

21 MR. THORNTON: In 4(f), I believe, Your Honor, it
22 means that the Court is -- is required to determine
23 whether the Federal Transit Administration in this case
24 gave a careful inquiry as to the use and potential use of
25 4(f) properties and that its finding, its factual

1 determination that the project was not going to use or
2 was -- or that -- or that there was use but the -- there
3 was no reasonable and prudent alternative, that those
4 factual findings are not arbitrary and capricious. I
5 believe that is the applicable standard of review in this
6 case.

7 THE COURT: Is it incumbent on the agency in the
8 first instance to identify all the 4(f) properties?

9 MR. THORNTON: Yes, it is, Your Honor. And -- and
10 we believe that the FTA did that here.

11 THE COURT: And then the second step is to assess
12 whether or not there's any impact?

13 MR. THORNTON: If there's -- there's actually, I
14 would say, probably three steps to the 4(f) process.
15 There is -- the first step would be the identification of
16 the potential on the properties that require some level of
17 investigation to determine whether there may be a use of
18 the property. So that's kind of the first screening
19 level. The second screening level then is a -- a more
20 specific inquiry as to whether the project activities will
21 in fact use, actually use, take land out of the property
22 or constructively use the property. And then if the
23 agency determines that there is a use of the property,
24 then what the statute indicates that the agency is
25 required to determine whether there was any feasible and

1 prudential alternative. And those are terms of art that
2 I'm sure we'll brief at length in this case.

3 So those are the basic steps of the administrative
4 process regarding 4(f).

5 THE COURT: All right. Now, for these 14
6 properties -- when I say "these 14," the 14 that you say
7 were not sufficiently commented on -- for the 14
8 properties, they were identified by the FTA --

9 MR. THORNTON: That's correct.

10 THE COURT: -- as 4(f) properties?

11 MR. THORNTON: All --

12 THE COURT: So that's not an issue, right?

13 MR. THORNTON: That's not an issue, no.

14 THE COURT: All right. So the issue is whether or
15 not the FTA, I don't know, gave sufficient consideration
16 to the impact and whether its --

17 MR. THORNTON: I --

18 THE COURT: -- decision is supported.

19 MR. THORNTON: I think that's -- that's correct.

20 I would -- I would refine it perhaps a little bit, Your
21 Honor, to say at the end of the day the question is: Was
22 the -- was the agency's finding with regard to each of
23 those 4(f) properties, whether it was no use or
24 constructive use or no feasible and prudent alternative,
25 was that finding at the end of the day arbitrary and

1 capricious. I think that's the test.

2 THE COURT: All right. Thank you very much.

3 MR. THORNTON: Thank you, Your Honor.

4 THE COURT: All right. Mr. Yost?

5 MR. YEE: If I could have some brief argument,
6 Your Honor, on behalf of the FTA?

7 THE COURT: I'm sorry. Go ahead. Yes.

8 MR. YEE: Thank you, Your Honor. Again, Harry
9 Yee, Assistant United States Attorney for the Federal
10 Transit Administration and all named federal defendants,
11 Your Honor.

12 Just -- just a follow-up on a couple of points of
13 Mr. Thornton's this morning, Your Honor. You know, this
14 was a very lengthy process that the City and the FTA went
15 through to scope the environmental impact of this project.
16 There were public hearings on this matter. There were
17 extended periods of public comment for the draft
18 environmental impact statement for this project, multiple
19 opportunities, both before the Federal Transit
20 Administration and the City and County of Honolulu, to
21 comment on this project.

22 And to go, I think, to the concern that the Court
23 had about practicality, Your Honor, of the standing of the
24 three individuals and Small Business Enterprise Hawaii, I
25 think it's judicial economy, Your Honor. Is that if these

1 individuals have not participated at the agency level,
2 what is there for this Court to review that they've
3 commented on? And if the Court's concern is, hey, you
4 know, they've had --

5 THE COURT: What do you think --

6 MR. YEE: They're making the same comment that
7 other people are --

8 THE COURT: Just a minute. Are you saying a case
9 like this, that the -- the plaintiff is limited in
10 challenging a 4(f) designation to the scope of the
11 comments made in the administrative proceeding? That's
12 the only argument they can make in court? Is that what
13 you're saying?

14 MR. YEE: I believe so, Your Honor.

15 THE COURT: What is there to review? Is that what
16 you mean, or do you mean something else?

17 MR. YEE: Well, my point, Your Honor, is as to the
18 three named individuals and the institution that did not
19 participate at the administrative level, I think the
20 Court's point earlier was, well, they're essentially
21 making the same arguments that the plaintiffs who did
22 participate are making: why shouldn't they be able to
23 stay in this process?

24 well, it goes to the heart of the Administrative
25 Procedures Act and that is, again, standing, you know?

1 For the purposes of the Administrative Procedures Act,
2 they need to have participated because there is a vested
3 interest which they're carrying out in seeking judicial
4 review, Your Honor. And that's not present here.

5 And the argument, practically speaking, is
6 judicial economy. What purpose does it serve for this
7 Court to have these parties or any other parties who
8 choose to participate at this point? And that's my only
9 issue, Your Honor. Thank you.

10 THE COURT: All right. Thank you.

11 Okay, plaintiffs?

12 MR. YOST: Thank you, Your Honor.

13 Let me in response raise -- discuss four matters.
14 First, why, as Your Honor intimated, the administrative
15 record is important; two, responding to defendants' no
16 comments on the 4(f) site issue; three, responding to
17 defendants' -- plaintiffs' fail to exhaust issue; and 4,
18 responding to Your Honor's questions on Section 4(f).

19 First, starting with the administrative record.
20 The administrative record is absolutely basic to the
21 issues that are in front of the Court today and will be in
22 the future. It is for two reasons: One, for obviously
23 timing reasons; but more immediately, the administrative
24 record is important to see whether comments have been made
25 and are or are not before the agency at the time they made

1 their decision. And I will get to -- to the case
2 citations on that. But as Your Honor accurately said, if
3 somebody's raised the issue, then the issue is before --
4 is before the agency, and Mr. Yee's comment about judicial
5 economy is simply misplaced. Judicial economy is not
6 served if a case is going to go forward anyway by, you
7 know, delving into whether -- given that plaintiffs A, B,
8 C, and D have standing and have exhausted, whether or not
9 plaintiffs D and E did -- did or not.

10 In the -- let me turn to the administrative record
11 and the chronology. Here's a case where a complaint was
12 filed on May 12. Half a year has passed. On September 12
13 the government informed us that there -- they have
14 narrowed it to a universe of 500,000 documents that have
15 been assembled. That's Exhibit E to my declaration. As
16 of September 26, there were at least seven attempts to get
17 the administrative record from the federal government, and
18 that's cited in the Adams declaration and my declaration.

19 Since that time there have been more attempts.
20 And as of the date of the joint case management statement,
21 which was November 18th, the government still didn't say
22 when the administrative record would be prepared but only
23 said they would, quote, "update the Court," closed quote,
24 next year, on January 13th of -- on or before January 18th
25 on the status of the record. We need that record to pass

1 upon this case.

2 Let me pass now to the second matter, which is the
3 allegation that there are no comments on 4(f) sites.

4 First, that goes to the merits and presumably will be
5 discussed in the motion for summary judgment. Section
6 4(f) says what the feds must consider; it doesn't say how
7 individual plaintiffs are to structure participation. But
8 also, the government's assertion that there was no
9 comments on the -- on the 4(f) sites is simply wrong. The
10 comments are cited in our opposition, at page 16, and what
11 follows. There is the Honolulu Transit submission, which
12 Mr. Slater in his declaration included. Attached to the
13 Adams declaration is Hawaii Transit Members Michelle
14 Matson's submission.

15 It is important, I think, to look at what the
16 standard is. The Ninth Circuit has said, in the National
17 Parks case and in the Idaho Sporting Congress case, that
18 you don't have to use, quote, "magic words" -- excuse
19 me -- or cite statutes. And after all, Hawaii Transit,
20 for instance, was not represented by an environmental
21 lawyer. They didn't use magic words. But there are
22 phrases used in the various submissions like Downtown
23 Historic Districts, Downtown Waterfront. Ms. Matson used
24 the phrase "The Historic Complex," Exhibit I to the Adams
25 declaration. There is page 5-10 of the FEIS has a map

1 which shows these -- where these various places are and
2 where they are relative to the Historic Downtown, the
3 waterfront and -- and so on.

4 Next, this case is a case that revolves around
5 alternatives. Alternatives come up under 4(f).
6 Alternatives come up under NEPA. The very document which
7 is the nub of the case is entitled, "Draft Environmental
8 Impact Statement and Section 4(f) Evaluation." That is
9 what people commented on. Anybody who commented was
10 commenting on -- on 4(f).

11 Next, the defendants allege that some plaintiffs
12 failed to exhaust their administrative remedies. And as
13 Your Honor accurately pointed out at the outset, the
14 judicial economy simply does not require, and Ninth
15 Circuit law does not require, that either for purposes of
16 exhaustion or for standing that if somebody has raised the
17 issue that somebody else raise the issue as well.

18 Plaintiffs -- defendants, in making their motion
19 directed at certain of the plaintiffs, impliedly concede
20 that other plaintiffs did exhaust. And that's all that it
21 takes under the Ninth Circuit case, in Liliuokalani
22 Coalition versus Rumsfeld, in the Barnes versus Department
23 of Transportation case. That's enough.

24 And let me refer -- Mr. Thornton was -- was making
25 remarks about three of the plaintiffs and the degree to

1 whether they participated or not. Let me just take one by
2 one of an example.

3 Former Governor Cayetano has been speaking out on
4 the issue of this rail in public for consistently
5 throughout this entire process. It is not -- he did not
6 in the many presentations that he made, he did not appear
7 before a, quote, "NEPA" hearing or 4(f) hearing of one of
8 the agencies. He wrote, for instance, three op-ed pieces
9 in the local newspaper, in the Advertiser. He tells me
10 that he sent those to members of the -- of the City
11 Council. He was part of the public dialogue that was
12 taking place whether or not he additionally appeared in
13 a -- in a public forum.

14 THE COURT: Are you saying --

15 MR. YEE: In a 4(f) forum.

16 THE COURT: Are you saying that should qualify as
17 a comment on the (inaudible) --

18 MR. YOST: I'm saying that that is part of the
19 larger issue. But until we have the administrative
20 record, for instance, we don't know whether somewhere in
21 the 500,000 documents, we don't know whether another
22 member of the public picked up one of Governor Cayetano's
23 op-ed pieces and forwarded it to the agency and said, you
24 know, we agree with the -- with the governor on this.
25 That's why we need the administrative record in order to

1 be able to make that determination.

2 The Supreme Court, in saying what needs to be
3 exhausted and what doesn't need to be exhausted, used a
4 quote, "so obvious" test: If something's so obvious, it
5 doesn't have to be specifically raised. Well, here,
6 physically, we're talking about a rail system for 20
7 miles, elevated, concrete, 35 to 50 feet high, height of a
8 three- or four-story building -- as Your Honor pointed
9 out, coming right outside the window of this -- this
10 courtroom -- 21 rail stations, each the height of six-
11 story buildings.

12 There are renderings in the documents before the
13 Court. There are renderings from both the government and
14 Honolulu Transit attached to the Slater declaration.
15 There's also Exhibit F to the Adams declaration, which
16 were the comments that were submitted by the American
17 Institute of Architects, with their own renderings. It's
18 the sort of thing one can look at and just see, "This is
19 pretty obvious." And you think of the non-party entities
20 who commented in this process, to which we alluded in the
21 complaint, groups like the National Trust for Historic
22 Preservation, which is a federally chartered semi-
23 government agency, the American Institute of Architects,
24 the League of Women Voters of Honolulu. It's pretty
25 obvious the decision-makers knew that these were -- were

1 hot issues.

2 Then the Ninth Circuit, in elaborating on the
3 Supreme Court's "so obvious" test, said look at whether
4 the agency had independent knowledge. If the agency had
5 independent knowledge, then something doesn't have to be
6 raised specifically. And again, to know whether the
7 agency had independent knowledge, we need to see the
8 administrative record.

9 And the defendants themselves admit that there will
10 be an adverse impact on at least 32 historic resources. I
11 would invite the Court's attention to Section 4-26 of the
12 federal -- of the final environmental impact statement,
13 especially pages 4-187 to 191. Then finally, let me turn
14 to the Court's question to defendants' counsel about 4(f)
15 and the standards under 4(f).

16 And, of course, we start with arbitrary and
17 capricious test. But it's not the "take a look" test.
18 This is not NEPA alternatives. This is more -- more
19 demanding. It's not even take the hard look that NEPA
20 requires. It is, "Thou shalt avoid." And it has two
21 separate aspects to it: One, is there a prudent and
22 reasonable alternative? If so, it must be chosen. And,
23 two, that all possible mitigation must be applied. Those
24 are strict, tough tests.

25 And here we're dealing with a situation where over

1 the years people had raised issues of managed lane
2 alternatives, bus alternatives, light rail alternatives,
3 monorail alternatives, all sorts of different
4 alternatives. And when they got to their FEIS and 4(f)
5 document, they limited literally to steel wheels on steel
6 rails two routing alternatives. That was it. They just
7 dropped all those other alternatives. How can you tell
8 whether there is a prudent and feasible alternative if
9 they didn't even look at it?

10 Thank you, Your Honor. I have some further
11 questions.

12 THE COURT: Thank you.

13 I'll give the defense, I think, a brief reply.
14 All right?

15 MR. THORNTON: Thank you, Your Honor. Just a
16 couple of comments in response to plaintiffs' counsel.
17 Plaintiffs' rubric that if a project is big that the legal
18 claims are obvious and therefore individuals don't have to
19 participate in the process, it seems to me, would
20 eviscerate the notion of exhaustion of administrative
21 remedies and requirement established by the Supreme Court
22 in Vermont Yankee and Public Citizen. It's not enough for
23 folks to say a project is big, gee, it has impacts. The
24 Ninth Circuit made that clear in the Great Basin Mine
25 watch decision. That's not sufficient.

1 Mr. Yost uncuts his own argument by then going on
2 to talk about the specific requirements of 4(f). And as
3 we articulated, 4(f) is different than NEPA. So it's not
4 sufficient for plaintiffs just to make vague references
5 about impacts.

6 Under Vermont Yankee and Public Citizen, they were
7 obligated to explain specifically why they thought the
8 Federal Transit Administration determination regarding use
9 of those properties was -- was flawed or somehow in error.
10 And again, because the courts have advised us, the purpose
11 of the process is so that the agency is put on notice so
12 it can turn around and respond to those notices. And as
13 the Court has noted in the record of decision, the Federal
14 Transit Administration did an extremely diligent job
15 responding to each and every comment that was made even at
16 the stage, that late stage of the proceeding.

17 Finally, with regard to the representations by
18 counsel today that Mr. Cayetano wrote op-ed articles,
19 spoke out against the rail, all I would say, Your Honor,
20 is they had an opportunity to submit those documents and
21 they didn't. So if they exist, then for whatever reason
22 plaintiffs chose not to present those to the Court today
23 would suggest to me that those documents are not in
24 record, but I guess we'll find out when we see the record.

25 Thank you, Your Honor.

1 THE COURT: All right.

2 MR. YEE: One point briefly, Your Honor?

3 THE COURT: Yes.

4 MR. YEE: Thank you, Your Honor.

5 I take issue with Mr. Yost's argument wherein he
6 cites Liliuokalani Coalition versus Rumsfeld in support of
7 plaintiffs' position that the three named plaintiffs in
8 Small Business Enterprise Hawaii are entitled to be in
9 this proceeding. In that case, Your Honor, I actually
10 argued part of the motion for preliminary injunction in
11 that case. And there was evidence before Judge Ezra in
12 this court that there was not a full and complete
13 opportunity for everybody in the community be heard in
14 this case. And I think that's a important distinction to
15 make from this case, where there has been five years of
16 significant opportunity before both the City and County
17 and the Federal Transit Administration.

18 Thank you, Your Honor.

19 THE COURT: All right. Okay, perhaps it can't be
20 avoided, but obviously a lot of the argument today is
21 really on the merits and the scope of judicial review,
22 issues of that nature. But what I'm really struggling
23 with on this motion is whether or not based only on the
24 allegations of the complaint the matter as asserted by
25 defendants by way of defense or by way of standing are

1 proper, is a proper subject of judicial notice. I mean,
2 that's really the only question I think on this motion,
3 you know. And so kind of put aside the merits, and I'm
4 sure we'll get back to it again and again.

5 But nonetheless, your arguments have been useful.
6 I thank counsel for it in all. But as I said at the
7 beginning, you know, this -- whatever the ruling on the
8 motion for partial judgment on the pleading is not going
9 to make the case go away. So we'll have to -- all of us
10 have to contend with the ongoing case anyway. So on that
11 basis I'm going to -- I'm going to submit the motion for
12 partial judgment on the pleadings. I'll have a ruling
13 before I hope too long, but I don't think it's going to
14 affect our further schedule.

15 Because, you know, it might add some to the work
16 depending how early that motion is decided and which way
17 it's decided. But still, I think the basic judicial
18 review process is going to have to take its course.

19 So with that then I'm going to appoint -- I'm
20 going to shift to the -- to the scheduling conference that
21 I called, which is really the primary reason for our being
22 here, I think. And I think it's obviously important that
23 this case be decided on as timely a basis as possible. I
24 would like to avoid, for instance, having to decide a
25 motion for preliminary injunction. And, you know, I'd

1 like to work toward that end, you know. I know that a lot
2 of that is beyond the control of those of us in the front
3 of the courtroom; but, you know, if it comes to that, it
4 comes to that. But still, that's something we may have to
5 consider later.

6 But I think a timely resolution is important. I
7 think the one thing everybody seems to agree on -- or one
8 of the things everybody seems to agree on is that this
9 case should be decided on the administrative record; that
10 is, I think they contemplate the -- for which I say --
11 well, the submission of some evidence outside the record.
12 But as far as I can tell from what I've read so far, that
13 evidence would, you know, consist only of I'll call it
14 standing issues, I think what you call jurisdictional
15 issues. But I don't think, you know, it'll go to the
16 merits or the scope of review or anything like that. I
17 don't believe from what I know at this stage.

18 So first question is -- because everything else
19 depends on this -- how soon the administrative record can
20 be prepared and filed, and I'll say settled. You know, in
21 the usual case -- when I say "the usual case," in most
22 environmental review cases, it's not a problem to -- to
23 settle the record. I mean, everybody agrees on what the
24 record is and maybe because it's not as large as this one
25 is represented to be. But still, the parties should have

1 recognized that there could be some issues with respect to
2 the -- the accuracy and the scope of the administrative
3 record and whether it's complete, things of that nature.
4 And the parties have, I think, represented that they'll
5 try to confer and agree on that. But --

6 So I'm going to start with asking -- well, I guess
7 I don't know who -- I don't know who knows better, the
8 City and County or the FTA. But as to defendants, give me
9 a ball park estimate on when the administrative record
10 will be ready.

11 MR. THORNTON: Your Honor, I'll make a stab at
12 that because the defendants obviously have been
13 coordinating with regard to the preparation of the record.
14 And as we indicated in the joint case management
15 statement, rough ballpark estimate, we think we're about
16 75 percent of the way through compiling the documents;
17 that we think as of the middle of January, we suggested
18 January 13th for further report back to the Court on the
19 status of the record at that point in time and a more
20 precise date as to when the record might be lodged with
21 the Court. And as we've indicated, we've worked out with
22 the plaintiffs a process for defendants to provide the
23 plaintiffs with an index at that point so that we can then
24 meet and confer of the contents of the record and see if
25 we can agree if there -- that we can avoid the need for

1 further proceedings about the contents of the record. And
2 we've suggested a timetable then for -- for -- for
3 supplementary motion.

4 THE COURT: First thing is, how long do you think
5 it'll take to settle the record?

6 MR. THORNTON: Again, it's hard for me to predict,
7 Your Honor, as to whether the plaintiffs are going to
8 disagree with the contents of the record or not, but I
9 would hope that in -- you know, in time of February time
10 frame we should have our arms around the complete record
11 at that point in time and then be able to kick off the
12 briefing schedule.

13 THE COURT: Does that sound reasonable to you,
14 Mr. Yost?

15 MR. YOST: Your Honor, yes, it does. Defendants
16 are not going to be starting construction in the interim,
17 and the most recent letter from -- from Mr. Thornton to --
18 to us, dated October 26, referred to -- very obliquely to
19 February of 2012, the west Oco (phonetic) Farrington
20 Highway guideway foundations, and maintenance and storage
21 facility, utility, slash, grading, slash, drainage, slash
22 roads issues being -- the construction starting in
23 February. So that, to me, is the only imponderable.

24 THE COURT: All right. So the plaintiffs'
25 position is that -- I mean, even you, you don't want even

1 the first shovelful to be turned; is that right?

2 MR. YOST: Well, Your Honor, actually looking for
3 guidance in the CEQ regulations, 40 CFR 1506.1, there are
4 two tests: One, that there not be significant
5 environmental impact during the pendency of a NEPA
6 proceeding; and two, that alternatives not be disclose --
7 foreclosed. A shovelful is not an issue. It's when
8 serious ground-disturbing activities of the sort that
9 either themselves have a major environmental impact or
10 which commit the agency in a way which it can't back off
11 from, commit the agency to a particular alternative. And
12 frankly, from Mr. Thornton's letter, I can't tell whether
13 these projected actions amount to that or not, but they
14 certainly raised a red flag in my mind.

15 THE COURT: Well, I guess what I'm getting at is,
16 is your challenge that this project should not go ahead at
17 all, or you think you might be satisfied with some
18 changes, re-alignments and things like that?

19 MR. YOST: Well, our challenge --

20 THE COURT: Or can't you say?

21 MR. YOST: Our challenge is more basic than that,
22 than not just re-alignments, though that is a possible
23 alternative outcome. But alternatives such as the managed
24 busway alternative, in which case there would be -- toward
25 the west there would be an elevated access system. But

1 then it would not come through the downtown areas,
2 Chinatown and so on.

3 THE COURT: I'll tell you what I'm getting at.

4 MR. YOST: Excuse me.

5 THE COURT: At least a lot of your objections seem
6 to focus on the project when it gets closer to downtown,
7 right?

8 MR. YOST: That's correct, Your Honor.

9 THE COURT: So, I mean, would you be -- I mean,
10 would construction -- I'll say, you know, out toward
11 Kapolei -- would that bother you in the sense that it
12 represents to you a -- the type of commitment that can't
13 be reversed and so you'd seek a preliminary injunction
14 against, you know, that kind of start?

15 MR. YOST: If it is of the sort that represents a
16 commitment to steel wheels on steel rails, as distinct
17 from alternate means of transit, yes.

18 THE COURT: When you say steel wheel on steel
19 rails, you mean for the entire route or for any part?

20 MR. YOST: Well, I think there has not been
21 discussion of different systems for different -- different
22 portions of the entire route.

23 THE COURT: So it's all or nothing?

24 MR. YOST: Yes, Your Honor.

25 THE COURT: All right. So then once construction

1 starts on the rail project, I mean, that's it; isn't it?

2 MR. YOST: That -- that is it. Serious
3 construction. Again, you know, Your Honor started off by
4 saying a shovel full. And, you know, no problem with a
5 shove full but something which commits them to the
6 alternative, which we think they should be re-examining.

7 THE COURT: Well, part of the conundrum, too, is
8 since it's in a sense a cooperative project between the
9 FTA and the City and County, part of the commitment
10 includes the commitment to -- by the FTA to I assume
11 furnish X percent of the financing, and I assume that
12 financing has to be based on something concrete. And it's
13 'cause, well, we'll give you five billion dollars. You
14 can either build a rail or you can build a bus line. You
15 take a pick, right? It's not that kind of agreement to
16 finance, is it? I mean, it's based upon, I assume, a
17 specific proposal. Isn't that right?

18 MR. YOST: I think that is an accurate statement,
19 Your Honor.

20 when -- in the prior letter, the June 23 letter to
21 me from Mr. Thornton, which is attached to my declaration,
22 there was discussion of funding and it -- none of it
23 looked like it was imminent construction sort of funding,
24 so it didn't -- you know, it didn't raise our hackles.
25 But -- but this most recent communication, which I alluded

1 before, just a month ago, you know, that looks like
2 serious construction is going to start, and that's the
3 sort of thing which 4(f) and NEPA compliance, full
4 compliance must proceed.

5 THE COURT: All right. Well, it seems to me --
6 okay, I think I've heard enough on that. It seems to me
7 then, you know, we should construct the schedule today, at
8 least a tentative schedule on going ahead with this
9 lawsuit. And just bear in mind that at some point that
10 schedule may be interrupted or further burdened by a
11 motion for preliminary injunction, right? That's just a
12 judgment that plaintiffs will have to make depending on,
13 you know, what their perception is as to what's going on;
14 isn't that right?

15 MR. YOST: I think that is accurate, Your Honor,
16 absent a representation on the part of the defendants that
17 they would not do anything which would either involve
18 significant environmental impact or which would
19 irreparably wed them to one alternative in the end.

20 THE COURT: I think those -- I don't want to call
21 it concession. But those agreements are hard to come by.

22 MR. YOST: I've seen the government doing it
23 before, Your Honor.

24 THE COURT: Okay. So --

25 MR. THORNTON: Your Honor, might I speak to a

1 couple of these points?

2 THE COURT: Sure.

3 MR. THORNTON: I think we can help a little bit by
4 clarifying what has been proposed. First of all, as Your
5 Honor appreciates, this a very large, complex project. A
6 lot of things have to happen in the correct sequence. But
7 just to make it real clear, we've been in regular
8 communication with plaintiffs' counsel, as Mr. Yost has
9 indicated. So we're not hiding the ball in terms of the
10 status of construction.

11 All of the construction activities during the
12 first phase, which would be through the entirety of 2012,
13 is going to be on the Kapolei end of the project, as the
14 Court referenced. So there will be nothing done --

15 THE COURT: Say it again.

16 MR. THORNTON: All --

17 THE COURT: Say it again. Phase I is all through,
18 around Kapolei?

19 MR. THORNTON: All through 2012, through 2012 will
20 all be during construction activities in the first phase,
21 which is all on the Kapolei end of the project. Now --

22 THE COURT: Yes, but it -- it's going to be -- I
23 don't know what you contemplate doing there, but it's
24 going to be rail-oriented, right?

25 MR. THORNTON: That's --

1 THE COURT: Are you going to start laying
2 foundation for --

3 MR. THORNTON: That's correct, Your Honor. The
4 work in the course -- again, as to the current sequence,
5 we've done an analysis, and we're prepared to sit down
6 with plaintiffs. And we've indicated to that as most
7 recently as the meet and confer and the case management
8 statement, that we're prepared to sit down with them and
9 go through with them in detail what is proposed. But from
10 our perspective, and we've mapped out, there are no
11 sensitive resources that would be impacted --

12 THE COURT: No, but that --

13 MR. THORNTON: -- through the period of briefing
14 on cross-motion for --

15 THE COURT: But that doesn't address the
16 plaintiffs' concern about in the sense an irrevocable
17 commitment to a rail project, right?

18 MR. THORNTON: It doesn't address their concern,
19 Your Honor.

20 THE COURT: Right.

21 MR. THORNTON: But that's -- that's not the
22 standard, as the Court is aware.

23 THE COURT: What I'm getting at is the likelihood
24 we'll get a motion for preliminary injunction. That's
25 what I'm worried about.

1 MR. THORNTON: We'll endeavor -- I would say on
2 behalf of the City and County defendants we'll endeavor to
3 work with the plaintiffs to attempt to avoid that but --
4 what I do want to make clear, Your Honor, that this is a
5 project that does have to occur in appropriate
6 construction phasing process. Very complex matter. We've
7 advised the plaintiffs, in fact. And so the Court is
8 aware, there are certain activities going on today, and
9 the plaintiffs are well aware of that. There is
10 pre-construction activity. There is utility relocation
11 work. There are geotechnical investigations ongoing.
12 They've been aware of that for months. And if they
13 thought there was a problem, they could have come in and
14 sought some form of injunctive relief.

15 But we're not prepared to sit here today to
16 concede that we're not going to proceed with --

17 THE COURT: Right.

18 MR. THORNTON: -- construction on a very large
19 project. But I just want to make the point, Your Honor,
20 that the standard under winters, the plaintiffs have to --

21 THE COURT: No, we're not there yet.

22 MR. THORNTON: Understood, Your Honor.

23 THE COURT: You know, I don't want to hear your
24 argument about why they're not entitled to preliminary
25 injunction. I don't even want to hear that motion, all

1 right? You don't have to address winters to me, not at
2 this stage.

3 All right. So the question, all I'm asking is:
4 Is there some likelihood we're going to get a motion?
5 That's what I'm talking about. I don't want you to tell
6 me why he shouldn't win the motion, because he's going to
7 tell me why you shouldn't win it.

8 MR. THORNTON: Again, Your Honor, my
9 representation in Court is we'll endeavor to work with the
10 plaintiffs. We don't believe we're going to engage in any
11 activities that would warrant a motion for preliminary
12 injunction. But at the end of the day, as the Court
13 noted, that's the plaintiffs' call to make.

14 THE COURT: Right. Okay, so I think we'll just
15 have to contemplate the poss -- you know, we should -- we
16 should read the schedule, but we have to contemplate at
17 some point that could be interrupted by a motion for --
18 interrupted or burdened by a motion for preliminary
19 injunction.

20 So the first issue is the settlement -- the
21 preparation, filing, and settlement of the administrative
22 record, right? And I think if we get the schedules
23 correctly that's within -- that's in the status report,
24 you know, you're you talking about, let's see, from that
25 point, in effect, four months of briefing time, right? To

1 get to a motion for -- motions and cross-motions for
2 preliminary injunction being briefed, without any time --
3 and we'll get to that, you know, for -- I forgot -- I
4 guess what the defendants call jurisdictional discovery,
5 which I assume you may want before certain briefs are due,
6 right? I would think.

7 So all I'm getting at is that, you know, we're
8 talking about for, you know, at least, well, five to six
9 months after the administrative record is prepared. So
10 you're talking about the end of summer, you know, maybe
11 early fall before we can even have a hearing on these
12 motions. That's a -- you know, that's a long way off and
13 a lot may -- a lot may happen on the project, right, with
14 respect to, you know, securing funding and then going
15 ahead with certain construction activity.

16 So, you know, I don't think we can construct --
17 you know, construct a tight schedule at this point. I
18 think, you know, all we can do is sort of get some target
19 dates to shoot for; and then there'll be, I think, things
20 in between that have to be addressed, things such as --
21 well, we can address summary today -- discovery, of
22 whether or not the defendants want to -- I think they
23 speak in the scheduling report about maybe filing some
24 motions for summary adjudication ahead of other motions on
25 the merits, things like that. You know, all this is going

1 to just stretch out the record.

2 But my aim still is to move this case as
3 expeditiously as possible, you know, keeping in mind
4 that -- and I understand this, you know -- the people that
5 are planning the project and trying to secure funding for
6 it, I mean, they, you know, have a commitment to go ahead
7 with the construction of the project, right? So all those
8 things I think we have to address.

9 So the first thing, though, is to, you know, what,
10 maybe look for the federal defendants -- or I guess both
11 defendants because they're both involved in this -- to
12 complete some form of the administrative record by mid
13 January, right? And then -- well, I don't know -- and
14 then the parties, say, within a month, by mid February,
15 try to agree on whether or not that record is accurate and
16 complete. Because both parties have agreed that this case
17 should be decided factually on the administrative record,
18 which I think is, you know, correct as a matter of law.
19 Because I don't see this so far, at least, as the kind of
20 case where the Court would want, I would say, extra record
21 evidence on the merits.

22 All right. So that takes us to mid -- if we get
23 to mid February. Now, the next thing is I think
24 defendants indicated they want some discovery, right? Am
25 I correct?

1 MR. THORNTON: We want to reserve the right for
2 discovery depending on what we see in terms of the
3 plaintiffs' affidavit.

4 THE COURT: So you want to reserve that right
5 until -- you want to wait until plaintiffs file their
6 declaration in support of their motion for summary
7 judgment?

8 MR. THORNTON: Right. We had suggested in the
9 case management statement, Your Honor, that ahead of the
10 cross-motions that plaintiffs would provide standing
11 affidavits and that there is a time frame set out for us
12 to decide whether or not to seek discovery.

13 THE COURT: Well, that's before --

14 MR. YOST: Either -- pardon me. If I might
15 interject, Your Honor? But your -- the statement which
16 Your Honor made earlier on analogizing the standing issue
17 to the exhaustion issue at least might raise in
18 defendants' mind the question whether given the assumed
19 standing of certain of the plaintiffs, whether it is worth
20 their time and the Court's time to debate the standing of
21 others of the plaintiffs.

22 MR. THORNTON: Your Honor, all I would say in
23 response is it is plaintiffs' obligation in the first
24 instance to provide standing affidavits. I don't think
25 defendants have to assume the plaintiffs have standing,

1 but that the mere allegations in the complaint are not
2 sufficient to support a motion for summary judgment.

3 THE COURT: Oh, but you agree generally the law on
4 standing is that -- is that if one plaintiff is standing,
5 it's good enough. But I think what you're saying is,
6 well, you have to show at least one plaintiff is standing
7 say, for instance, for each 4(f) property, right?

8 MR. THORNTON: That's correct.

9 THE COURT: I mean, you're carrying the standing
10 argument that far?

11 MR. THORNTON: Yes, Your Honor.

12 THE COURT: Standing is, I don't know, maybe
13 standing to bring a claim. So you construe an attack --
14 I'll call it an attack on each 4(f) property, it's a
15 separate claim?

16 MR. THORNTON: We do construe 4(f) that way, Your
17 Honor.

18 THE COURT: Well, obviously I can't rule on that
19 now. I don't know the law on 4(f). I'll admit that.

20 But, well, I did make, you know, that kind of
21 comment earlier, but obviously it's not a ruling in the
22 context of 4(f) because I said I never had a 4(f) case.
23 So I think I just have to go ahead, and both sides will
24 have to develop their case.

25 So is it correct that plaintiffs are willing to

1 supply, I'll call them, standing affidavits if requested
2 by the defendants? Are you planning to do that anyway
3 or --

4 MR. YOST: We will do so if requested by the
5 defendants.

6 THE COURT: All right. So that's a process you --
7 and then once the defendants see the -- see the standing
8 affidavits or declaration, then you'll decide whether
9 you'll want to depose the plaintiff on that, right?

10 MR. THORNTON: That's correct, Your Honor.

11 THE COURT: Is that right?

12 MR. THORNTON: That's correct, your Honor.

13 THE COURT: Okay. How much time -- well, you can
14 do that. I don't know how many plaintiffs there are.
15 There aren't that many?

16 MR. THORNTON: I think we suggested a period of
17 time in the case management statement, but I would think
18 that we would be able to conduct, complete the discovery
19 in a month.

20 THE COURT: All right.

21 MR. THORNTON: Assuming the parties are
22 cooperating.

23 THE COURT: Okay. And I think this is, by the
24 way, a good case in which to cooperate, you know? I think
25 you're both obviously acknowledged environmental lawyers,

1 and you both know what you're doing. The government, I
2 have to assume -- although I always don't -- knows what
3 it's doing.

4 MR. YEE: We try to, Your Honor.

5 THE COURT: So, you know, I don't see why this
6 can't be a case, though, where there is, you know,
7 professional cooperation, which is in the best interest of
8 everybody in moving this case along.

9 So -- all right. So we may need a time for
10 discovery, which might extend the period for filing, say,
11 like in an opposition to a motion for summary judgment,
12 right? Based upon --

13 MR. YEE: Correct, Your Honor.

14 THE COURT: -- standing? And then we may need a
15 detour if the defendant decides -- well, to follow up on
16 the motion today, decides to try to get some of the
17 standing issues addressed before a hearing on the merits,
18 right? He may -- he may pursue that. Although you're
19 not --

20 MR. THORNTON: Correct, Your Honor.

21 THE COURT: You're not sure. Okay, so then there
22 might be that detour. But then ultimately we'll get to a
23 hearing, a merits hearing. And both sides agree it should
24 be decided on summary judgment, right?

25 MR. THORNTON: That's correct.

1 MR. YOST: Yes, Your Honor.

2 THE COURT: And again, we could be interrupted or
3 the schedule could be extended by a motion for preliminary
4 injunction, which no one can say today whether it will be
5 filed or not. But all this takes us at least into late
6 summer/early fall of next year. Okay.

7 By the way, one of the things I noticed is, I know
8 Mr. Yost is from California. I know of the old Nossaman
9 firm. Isn't this the continuation of the old Nossaman
10 Waters?

11 MR. THORNTON: It is, Your Honor.

12 THE COURT: Well, Waters was a friend of mine.
13 And I know the Nossaman firm's at least headquartered in
14 California.

15 MR. THORNTON: And I live in California, Your
16 Honor.

17 THE COURT: Are you -- are you in the northern
18 office or --

19 MR. THORNTON: I'm in the Southern California
20 office.

21 THE COURT: Southern California office, okay. So
22 we have two lawyers from California. Mr. Yee's calling is
23 from Washington, D.C.

24 MR. YEE: Yes, Your Honor.

25 THE COURT: Of course, for this case the Judges

1 sure felt prudent -- felt it prudent to get an outside
2 judge. And they got me and, of course, I'm from
3 California. So what I'm saying is I think some of these
4 hearings -- not the final hearing on the merits, which I
5 think should be here, but I think some of these, if we
6 have to hold some hearings in between in the interim, I
7 think we should hold them in California because, you know,
8 we're not going to have a jury. I'm talking about on
9 these standing motions or things like that, all right? We
10 need another conference, I think it'll be more efficient
11 for everybody, all right? Including the government.

12 MR. THORNTON: Yes, Your Honor.

13 MR. YOST: Yes, Your Honor.

14 THE COURT: So, anyway, I want you to keep that in
15 mind. Although, I think obviously the hearing on the
16 merits should be here and maybe the hearing on -- if there
17 is a motion for preliminary injunction, I don't know, but
18 we'll get to that later.

19 So the reason I mention that is I'm going to ask
20 counsel to see if we can agree, all right, see if you can
21 draft the scheduling order, all right? Together. And
22 submit it to me. And I don't expect that to be airtight.
23 I don't expect those, you know, deadlines to be set in
24 concrete because a lot of things are going to happen. For
25 instance, we don't even know how long it's going to take

1 to get the administrative record, right?

2 So I think we need to start on it. There should
3 be at least target dates, all right? And then that's the
4 reason I think we may have a couple of status conferences
5 as we go along, and I don't see why we can't hold those in
6 California. All right? And then we'll see where that --
7 where that takes us.

8 So we -- and so these are the dates you need: The
9 target date for the completion of the administrative
10 record, a date for the -- I'll call it the settlement of
11 the administrative record. Then for the filing of the
12 initial -- I think the contemplation in the status report
13 is that the plaintiffs would file the initial motion for
14 summary judgment, and then the defendants will file a
15 cross-motion. And, now, maybe in between there, before
16 their cross-motion, the defense may want some discovery.
17 I don't know. Right? That may be the place, but at some
18 point defense may want some discovery.

19 And then I think the -- the scheduling order
20 should embody essentially what the agreement here is, that
21 the plaintiffs will, you know, furnish, I'll call them,
22 standing affidavits on the request or standing
23 declarations on request. Okay? And -- and then I think
24 there should be some time after that those declarations
25 furnished for the defendant to decide whether it needs

1 discovery or not. Then after that we'll complete the
2 briefing -- well, then after that the defendants may want
3 to set some earlier motion for summary adjudication. I'll
4 call them non-merits motions, all right?

5 And then after that there'll be the reply briefs
6 and then we'll -- and then, you know, we should -- we'll
7 have to set the -- the summary judgment motion on the
8 merits for hearing. Right? which would conclude the
9 process. And then somewhere in between -- we can't decide
10 now what we're going to do; but somewhere in between,
11 plaintiffs may find it necessary to file a motion for
12 preliminary injunction.

13 Okay. Now -- all right. Try to get together and
14 put that in an order. I think --

15 MR. YOST: We shall.

16 THE COURT: -- it'll be a good exercise. And
17 speaking of good exercise, I don't know if there's any
18 possibility, you know, you people can settle this case or
19 not. Have you thought about mediation of some kind? Not
20 yet? Too early? Or you see your opponent set in
21 concrete? I don't know. Anyway --

22 MR. THORNTON: We're always happy to entertain
23 discussions with plaintiffs, Your Honor.

24 THE COURT: I'm sure you are. All right. But
25 keep that in mind.

1 All right. Anything else we need to discuss
2 today?

3 MR. THORNTON: No, Your Honor.

4 MR. YOST: No, Your Honor.

5 THE COURT: All right.

6 MR. YEE: Just one point of clarification, Your
7 Honor? Is the Court anticipating that the next status
8 conference, which is tentatively scheduled for January
9 13th, that's going to be in Your Honor's courtroom in
10 Pasadena?

11 THE COURT: The next status conference for what?

12 MR. YEE: For this case.

13 THE COURT: Oh, for this? I don't know. See, I'm
14 just -- I was just sort of speculating that, you know,
15 we'll probably need a status conference or two on --
16 right? On certain, I'll call them, you know, routine
17 scheduling matters, things like that.

18 MR. THORNTON: Might I suggest, Your Honor, that I
19 think in the context of the parties meeting on the
20 scheduling order that we can try to agree on the date for
21 a subsequent status conference, and we'll obviously
22 coordinate that with your clerk?

23 THE COURT: That's fine.

24 MR. YOST: I agree, Your Honor.

25 THE COURT: That's good. And then we should have

1 it in either Pasadena or San Francisco.

2 MR. YOST: Wonderful, Your Honor.

3 THE COURT: You'll like it there, Mr. Yee.

4 MR. YEE: I do like it there, Your Honor. Thank
5 you.

6 MR. THORNTON: Pasadena would be fine for me.

7 THE COURT: Okay. Is that it?

8 MR. YEE: Yes.

9 MR. YOST: Yes, Your Honor. Thank you.

10 THE COURT: I appreciate your attendance. I
11 appreciate your cooperation and the argument. The
12 motion's under submission. I expect in due course a
13 proposed scheduling order from counsel. I hope we can
14 have it in the next week, ten days, something like that.
15 All right?

16 MR. YOST: We can do that.

17 THE COURT: Thank you very much.

18 MR. THORNTON: Thank you, Your Honor.

19 (Concluded at 11:30 a.m.)
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COURT REPORTER'S CERTIFICATE

I, Ann B. Matsumoto, Per Diem Court Reporter,
United States District Court, District of Hawaii, do
hereby certify that the foregoing is a full, true, and
complete transcript from the record of proceedings in the
above-entitled matter.

DATED at Honolulu, Hawaii, December 12, 2011.

/s/ Ann B. Matsumoto
Ann B. Matsumoto, CSR 377
Registered Professional Reporter