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**UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII**

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

Plaintiffs,

vs.

FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; and MICHAEL FORMBY, in his official capacity as Director of the City and County of Honolulu Department of Transportation Services,

Defendants,

FAITH ACTION FOR COMMUNITY EQUITY; PACIFIC RESOURCE

Civ. No. 11-0307 AWT

**ORDER ON OBJECTION  
TO NOTICE OF COMPLIANCE**

1 PARTNERSHIP; and MELVIN UESATO,  
2 Intervenor - Defendants.

3  
4 Now pending before the court is Plaintiffs' Objection to Notice of Compliance.  
5 The Objection has been fully briefed and argued and, on February 6, 2014, was taken  
6 under submission. For the reasons set forth below, Plaintiffs' Objection is denied. The  
7 court, therefore, grants summary judgment to Defendants on all claims subject to the  
8 court's remand. The court's injunction of Phase 4 activities is terminated.

9 **I. Background**

10 On November 1, 2012, the court issued its Order on Cross-Motions for Summary  
11 Judgment. (ECF Doc. 182). The court granted summary judgment to Plaintiffs on three  
12 claims arising under § 4(f) of the Department of Transportation Act, 49 U.S.C. § 303  
13 (2006): (1) the City and County of Honolulu (the "City") and the Federal Transit  
14 Administration ("FTA") (collectively, "Defendants") arbitrarily and capriciously failed to  
15 complete reasonable efforts to identify above-ground traditional cultural properties  
16 ("TCPs"); (2) Defendants failed adequately to consider the Beretania Street Tunnel  
17 alternative ("Tunnel Alternative" or "Alternative"); and (3) Defendants failed adequately  
18 to consider whether the approved project design ("Project") would constructively use  
19 Mother Waldron Park. The court granted summary judgment to Defendants on all other  
20 claims.

21 The court issued a remedy on December 27, 2012 (ECF Doc. 202), awarding  
22 partial injunctive relief and remanding to the FTA for further review pertaining to  
23 Plaintiffs' three remaining claims. The court specified that its injunction would terminate  
24 – absent Plaintiffs' objection – thirty days after Defendants filed with the court notice and  
25 evidence of compliance with the Summary Judgment Order.<sup>1</sup>

26  
27 <sup>1</sup> Plaintiffs appealed the Summary Judgment Order, but only with respect to  
28 claims not subject to the court's remand. See *HonoluluTraffic.com v. Fed. Transit Admin.*,

1 On October 8, 2013, Defendants filed with the court a Notice of Compliance (ECF  
2 Docs. 250-251), containing a Final Supplemental Environmental Impact  
3 Statement/Section(f) Evaluation (“SEIS”) and Amended Record of Decision (“AROD”).  
4 Those documents and accompanying exhibits addressed the three deficiencies identified  
5 in the court’s Summary Judgment Order. Specifically, Defendants found: (1) no adverse  
6 effect on any previously unidentified TCPs; (2) that the Tunnel Alternative is not a  
7 feasible and prudent avoidance alternative; and (3) no constructive use of Mother  
8 Waldron Park.

9 Plaintiffs timely filed an Objection to Defendants’ Notice of Compliance (ECF  
10 Doc. 257), effectively staying the automatic termination of the injunction. The Objection  
11 challenged only Defendants’ determination under § 4(f) that the Tunnel Alternative is not  
12 a feasible and prudent avoidance alternative.<sup>2</sup> The court and parties agree (ECF Doc.  
13 264) that Plaintiffs’ Objection is, in effect, a challenge to final administrative action under  
14 the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

## 15 **II. The Legal Standard**

16 “The [APA] provides authority for the court’s review of decisions under . . .  
17 Section 4(f) of the Department of Transportation Act.” *N. Idaho Cmty. Action Network v.*  
18 *U.S. Dep’t of Transp.*, 545 F.3d 1147, 1152 (9th Cir. 2008). “Under the APA, the district  
19 court may only set aside agency actions that are ‘arbitrary, capricious, an abuse of  
20 discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)(A)).  
21 A decision is arbitrary and capricious

22 only if the agency relied on factors Congress did not intend it to consider,

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23  
24 No. 13-152777, slip op. at 12 (9th Cir. Jan. 31, 2014). Thus, Plaintiffs’ appeal did not divest  
25 this court of jurisdiction over the claims remanded to the FTA. *See Armstrong v.*  
*Schwarzenegger*, 622 F.3d 1058, 1064 (9th Cir. 2010).

26 <sup>2</sup> As Plaintiffs acknowledged at the February 6, 2014, hearing, they do not object  
27 to Defendants’ analyses of the TCPs or Mother Waldron Park. The court thus concludes that  
28 Defendants have complied with the Summary Judgment Order with respect to those claims.

1 entirely failed to consider an important aspect of the problem, or offered an  
2 explanation that runs counter to the evidence before the agency or is so  
3 implausible that it could not be ascribed to a difference in view or the  
4 product of agency expertise.

5 *Id.* at 1152-53 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en  
6 banc)). An agency has discretion to rely on the reasonable opinions of its own qualified  
7 experts even if, as an original matter, a court might find contrary views more persuasive.  
8 *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

### 9 **III. Merits**

10 Only § 4(f) claims remain at this stage of the proceedings. Section 4(f) provides  
11 that the Secretary of Transportation (the “Secretary”) may approve a transportation  
12 project requiring the “use” of a public park or historic site of national, state, or local  
13 significance only if: (1) “there is no prudent and feasible alternative” to using the site;  
14 and (2) the project includes “all possible planning” to minimize harm to the site resulting  
15 from the use. 49 U.S.C. § 303. Section 4(f) therefore imposes a substantive mandate on  
16 agencies implementing transportation improvements. *N. Idaho Cmty. Action Network*,  
17 545 F.3d at 1158.

18 When a court reviews a § 4(f) determination, it must ask three questions:

19 First, the reviewing court must determine whether the Secretary acted  
20 within the scope of his authority and whether his decision was reasonably  
21 based on the facts contained in the administrative record. Second, the  
22 reviewing court must determine whether the Secretary’s decision was  
23 arbitrary, capricious or an abuse of discretion because he failed to consider  
24 all relevant factors or made a clear error of judgment. Third, the reviewing  
25 court should decide whether the Secretary complied with the applicable  
26 procedural requirements.

27 *Ariz. Past & Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1425 (9th Cir. 1983) (citing  
28 *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)); *see also Adler v.*  
*Lewis*, 675 F.2d 1085, 1091 (9th Cir. 1982).

Relevant to this proceeding, a feasible and prudent avoidance alternative “avoids  
using Section 4(f) property and does not cause other severe problems of a magnitude that  
substantially outweighs the importance of protecting the Section 4(f) property.” 23

1 C.F.R. § 774.17 (2013). An alternative is not feasible if it cannot be built as a matter of  
2 sound engineering judgment. *Id.* An alternative is not prudent if, among other things, it  
3 “compromises the project to a degree that it is unreasonable to proceed with the project in  
4 light of its stated purpose and need” or it “results in additional construction, maintenance,  
5 or operational costs of an extraordinary magnitude.” *Id.* Where there is no feasible and  
6 prudent avoidance alternative, the Secretary may approve only the alternative that  
7 “[c]auses the least overall harm in light of the statute’s preservation purpose.” 23 C.F.R.  
8 § 774.3(c).

9 Plaintiffs contend that Defendants acted arbitrarily and capriciously in rejecting the  
10 Tunnel Alternative.<sup>3</sup> Plaintiffs argue, first, that the Tunnel Alternative is a “prudent and  
11 feasible alternative” because it both avoids using § 4(f) properties and is feasible and  
12 prudent. Alternatively, Plaintiffs argue that the Alternative poses the “least overall  
13 harm,” even if it is not a prudent and feasible avoidance alternative. The court considers  
14 each argument *seriatim*.

#### 15 **A. Avoidance Alternative**

16 An alternative cannot qualify as a “feasible and prudent avoidance alternative” if it  
17 uses any § 4(f) properties. *See* 23 C.F.R. § 774.17; *id.* (describing in the definition of “all  
18 possible planning” that a feasible and prudent avoidance alternative “avoid[s] Section 4(f)  
19 properties *altogether*” (emphasis added)); FHWA Section 4(f) Policy Paper 11, 13 (2012)  
20 (“Feasible and prudent avoidance alternatives are those that avoid using *any* Section 4(f)  
21 property . . . .” (emphasis added)).

22 Defendants determined that the Tunnel Alternative would directly use the NRHP-  
23 eligible Oahu Rail & Land Company (“OR&L”) parcel, among other properties, because

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24  
25 <sup>3</sup> Plaintiffs also argued in their moving papers that Defendants acted arbitrarily  
26 and capriciously by failing to consider new information in the SEIS. Defendants moved to  
27 strike that argument as improper. *See* (ECF Doc. No. 271). Plaintiffs retracted the argument  
28 and filed a statement of non-opposition to the motion to strike. *See* (ECF Doc. No. 276). In  
light of that retraction, the court grants Defendants’ Motion to Strike.

1 the Alternative requires construction of a station (the Ka'aahi Street Station) inside of the  
2 parcel boundary. AR000153906-09 [SEIS 40-43]. Plaintiffs challenge that determination  
3 based on their belief that the Ka'aahi Street Station would fall within 1,500 feet of  
4 another station (the Iwilei Station). Plaintiffs argue that it is arbitrary and capricious to  
5 construct the Ka'aahi Street Station – and thus to use the OR&L parcel – because no other  
6 stations along the project corridor fall within a half of a mile of each other. (Pls. Obj. at  
7 9-10).

8 Plaintiffs' belief is misplaced. Defendants state, and the record shows,<sup>4</sup> that the  
9 Iwilei Station *would not be built* if Defendants were to implement the Tunnel Alternative.  
10 (City Defs. Resp. at 8; Fed. Defs. Resp. at 6-7). Only the Ka'aahi Street Station would be  
11 built, therefore no two stations would fall within 1,500 feet of one another. Defendants  
12 have also provided a reasonable explanation of why the Ka'aahi Street Station could not  
13 be moved in order to avoid the OR&L parcel. *See* AR00154077 (stating the station could  
14 not be moved west because the grade of the track would be too steep to comply with the  
15 Americans with Disabilities Act and could not be moved east because it would use A'ala  
16 Park, another § 4(f) resource); AR00153907 [SEIS 41] (same). In any case, Plaintiffs do  
17 not challenge the location of the Ka'aahi Street Station on any basis other than their belief  
18 that it would fall within 1,500 feet of the Iwilei Station. Because the Iwilei Station would  
19 not be built if the Tunnel Alternative were implemented, and because Plaintiffs have not  
20 challenged Defendants' apparently reasonable conclusion that the Ka'aahi Street Station

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22 <sup>4</sup> A map displaying the connection of the Dillingham alignment to the Tunnel  
23 Alternative shows only the Ka'aahi Street Station without a station at the intersection where  
24 the Iwilei Station is proposed to be. *Compare* AR00153908 [SEIS at 42] (Tunnel  
25 Alternative) *and* AR00155256 (detailed map and profile of Ka'aahi Street area), *with*  
26 AR00000715, AR00000355 [FSEIS at 5-36, 2-40] (Project). The Tunnel Alternative maps  
27 indicate that the Beretania Street tunnel begins to descend at Ka'aahi Street, where the Iwilei  
28 Station would be located. *See* AR00153908 [SEIS at 42]; AR00155256; AR00049571  
(describing the tunnel alignment as “descend[ing] to a tunnel portal in the vicinity of Ka'aahi  
Street”). Iwilei does not appear on the maps, and the Tunnel Alternative cannot begin to  
descend into a tunnel portal at the location of an above-grade station.

1 could not be relocated, the court finds no basis on which to overturn the agency decision.  
2 It was not arbitrary and capricious for Defendants to have concluded that the Tunnel  
3 Alternative would use the OR&L parcel; therefore, the Tunnel Alternative is not a  
4 feasible and prudent avoidance alternative. For this reason, the court need not address  
5 Plaintiffs' challenges to Defendants' use determinations of McKinley High School and  
6 the King Florist Building, or their challenge to Defendants' prudence analysis. The  
7 Tunnel Alternative's use of the OR&L buildings renders it incapable of qualification as a  
8 feasible and prudent *avoidance* alternative.

9 **B. Least Overall Harm**

10 Where there is no feasible and prudent avoidance alternative, the Agencies may  
11 approve only the alternative that causes the "least overall harm in light of the statute's  
12 preservation purpose." 23 C.F.R. § 774.3(c). The regulations specify seven factors that  
13 an agency must consider. 23 C.F.R. § 774.3(c)(1)(i)-(vii). Defendants determined that  
14 the Project poses the least overall harm in light of § 4(f)'s preservation purpose because  
15 the Tunnel Alternative increases costs by \$960 million (in year-of-expenditure, or YOE,  
16 dollars), causes more severe harm to § 4(f) properties, and causes greater construction-  
17 related and other disruption to non-§ 4(f) resources.<sup>5</sup> See AR00153941 [SEIS at 75].  
18 None of these determinations is arbitrary and capricious.

19 **1. Cost**

20 Defendants must consider "[s]ubstantial differences in costs among the  
21 alternatives" as a factor in the "least overall harm" analysis. 23 C.F.R. § 774.3(c)(1)(vii).  
22 Defendants calculate this difference in cost between the alternatives by comparing the  
23 cost of the Project (which ends at the Ala Moana Center, with a planned future extension  
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25 <sup>5</sup> Defendants determined that three of the "least overall harm" factors are "about  
26 equal": (1) the ability to mitigate adverse impacts on § 4(f) properties; (2) the views of  
27 relevant officials; and (3) the degree to which the Project and Tunnel Alternative meet the  
28 purpose and need of the Project. AR00153941 [SEIS at 75].

1 to the University of Hawaii at Manoa) with the cost of the Tunnel Alternative (which  
2 extends to the University of Hawaii at Manoa). (Pls. Obj. at 15-18); AR00154082.  
3 Plaintiffs contend that Defendants are comparing apples and oranges: the “shortest and  
4 least costly version” of the Project with the “longest and costliest version” of the Tunnel  
5 Alternative. (Pls. Reply at 16).

6 While the proper cost comparison in this case is not immediately self-evident, the  
7 Court concludes that Defendants did not act arbitrarily and capriciously by comparing the  
8 Project (ending at the Ala Moana Center) to the Tunnel Alternative (ending at UH  
9 Manoa). There are, in fact, a number of potentially relevant comparisons: (1) the Project  
10 to the “long” tunnel (ending at UH Manoa); and (2) the Project to a “short” tunnel (ending  
11 at Ala Moana Center or elsewhere). To these two might be added: (3) the Project  
12 (ending at Ala Moana Center) to the “long” Project (ending at UH Manoa). Each of the  
13 alternatives in these comparisons has its potentially prohibitive disadvantages. The  
14 “long” tunnel adds \$960 million (YOE) in costs. AR00153931-32 [SEIS at 65-66]. The  
15 “short” tunnel does not end at a logical terminus and fails to meet the Purpose and Need  
16 of the Project. AR00153977 [SEIS at 111]. And the “long” Project adds \$820 million  
17 (YOE) in costs. AR00153977-79 [SEIS at 111-13].

18 Plaintiffs point to the cost of the “long” Project and implore the court to compare it  
19 to that of the Tunnel Alternative, yielding a difference in cost of only 2 percent. (Pls.  
20 Obj. at 17). But the difference in cost between the two “long,” hypothetical alternatives is  
21 not the relevant comparison; the relevant comparison is between *the approved Project*  
22 and *any other alternative*, be it a “long” tunnel or a “long” project. Although there is a  
23 surface appeal to Plaintiffs’ comparison (alternative (1) comparing the Project to the  
24 “long” tunnel Alternative), a closer analysis of its implications reveals its flaws. For one,  
25 if non-approved alternatives were relevant comparators, Defendants would need to  
26 compare those alternatives along all other dimensions, not just cost — the number of  
27 historic properties affected, environmental impacts, construction-related disruption, and  
28



1 so on. Plaintiffs do not suggest that Defendants need conduct that analysis for the “long”  
2 Project. Indeed, Defendants explicitly left analysis of Project extensions for another day,  
3 if ever, because no funding could be identified for them. AR00000791 [FEIS at 8-12].  
4 Furthermore, if § 4(f) plaintiffs could cherry-pick from rejected alternatives to find more  
5 favorable comparisons to their desired alternative, plaintiffs’ alternatives would never  
6 appear unfavorable.

7 Moreover, the Court’s Summary Judgment Order of November 1, 2012, held that  
8 Defendants had “fail[ed] adequately to consider the Beretania Street Tunnel alternative  
9 prior to eliminating it as imprudent.” On the basis, *inter alia*, of that holding, the matter  
10 was remanded to the FTA “to comply with the court’s Summary Judgment Order,”  
11 subject to a partial injunction enjoining Phase 4 pending full compliance. This order “to  
12 consider the Beretania Tunnel Alternative” fairly could be read, consistent with §  
13 774.3(c)(1), as requiring a comparison of the Project with the Tunnel Alternative along all  
14 of their axes, including cost. And while this reading does not make all other comparisons  
15 irrelevant, it does support that the comparison made by Defendants is not arbitrary or  
16 capricious. Thus, the most principled baseline for comparison is the Project-as-designed,  
17 that the agency approved, despite the fact that, in this case, the approved design and  
18 contested alternative end at different termini. Just as it was not arbitrary and capricious  
19 for Defendants not to analyze the Project’s impact on historic properties and the like with  
20 respect to the proposed Project *extension*, it was not arbitrary and capricious for  
21 Defendants to compare only the Project’s cost, not the Project extension’s cost.

22 As the court’s Summary Judgment Order observed, prior case law provides little  
23 guidance on when a cost increase becomes excessive enough to make an alternative  
24 imprudent. Order at 24-25 (citing *Citizens for Smart Growth v. Sec’y of the Dep’t of*  
25 *Transp.*, 669 F.3d 1203, 1217 (11th Cir. 2012); *Concerned Citizens Alliance, Inc. v.*  
26 *Slater*, 176 F.3d 686, 703 (3d Cir. 1999)). Although the court’s previous discussion of  
27 cost increases may not be law of the case because it involved consideration of another  
28

1 tunnel than the Tunnel Alternative, the discussion's underlying logic is still sound. The  
 2 court cannot conclude that it was arbitrary and capricious for Defendants to conclude that  
 3 \$960 million (YOE) added cost is a "substantial difference[] in cost[]."

4 **2. Severity of harm to the protected activities, attributes, or**  
**features that qualify each Section 4(f) property for protection**

5 Defendants concluded that the Project would inflict less severe harm to § 4(f)  
 6 properties, AR00153935-38 [SEIS at 69-72], even though the Project would use a greater  
 7 number of § 4(f) properties than the Tunnel Alternative and even though some of those  
 8 properties are particularly historically significant, (Pls. Obj. at 24). Defendants'  
 9 conclusion is based on the fact that the Project would use only non-contributing elements  
 10 of § 4(f) properties while the Tunnel Alternative would require removal, relocation,  
 11 alteration, or demolition of certain properties. *See* AR00153935-38 [SEIS at 69-72].

12 The court again cannot conclude that it was arbitrary and capricious for  
 13 Defendants to have balanced the severity of harm to § 4(f) resources in this way.  
 14 Plaintiffs are correct to note that the Project would use a greater number of § 4(f)  
 15 properties and that the Chinatown District and Dillingham Transportation Building are  
 16 significant historic resources. But the Project would physically affect only non-  
 17 contributing elements of those properties<sup>6</sup> and would not substantially impair the  
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19  
 20 <sup>6</sup> *See* AR00000721 [FEIS at 5-42] (describing use of a non-contributing plaza  
 21 next to the Dillingham Transportation Building for a station entrance); AR00152908  
 22 (describing in Dillingham NRHP listing only the building and immediate landscaping around  
 23 the building); AR00000727 [FEIS at 5-48] (stating that the Project would involve destruction  
 24 of a metal roof extension that is a non-contributing element of the Downtown HECO Plant  
 25 and Leslie A. Hicks Building); AR 00039884 (describing use of non-contributing parking  
 26 lot and trees adjacent to buildings); AR00000718 [FEIS at 5-39] (describing use for  
 27 Chinatown Station of non-contributing parking lot adjacent to non-contributing modern  
 28 buildings); AR00039840 (more detailed map of the Project structures in Chinatown);  
 AR00000714 [FEIS at 5-35] (describing use by an access easement of a "an area behind the  
 [OR&L] buildings and their associated parking lots that has been cleared and paved");  
 AR00153938 (describing this area as a "non-contributing element[]").

1 properties' settings.<sup>7</sup> By contrast, the Tunnel Alternative would require removal,  
2 relocation, or alteration of the OR&L Document and Storage Building and the former  
3 filling station on the OR&L parcel. It was not unreasonable for Defendants to have  
4 prioritized the severe harm to the OR&L resources over the harm to non-contributing  
5 elements of the Chinatown District and Dillingham Building in determining that the  
6 Project posed less severe harm "to the *protected* activities, attributes, or features that  
7 qualify each § 4(f) property for protection." 23 C.F.R. § 774.3(c)(1)(ii) (emphasis  
8 added). The Tunnel Alternative's severe impact on the OR&L buildings is therefore  
9 sufficient to support Defendants' conclusion, even assuming that Defendants erred in  
10 determining that the Tunnel Alternative would use McKinley High School or the King  
11 Florist building. *Cf. Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 684  
12 F.3d 1002, 1022-23 (10th Cir. 2012) (holding that omissions of even "material fact[s]" do  
13 not require invalidation of agency action where "the legitimate factors considered by the  
14 [agency] provide[] sufficient justification to conclude that alternatives to the selected  
15 [project] [are] imprudent" (internal quotation marks omitted)); *KPMG, LLP v. SEC*, 289  
16 F.3d 109, 126 (D.C. Cir. 2002) (stating remand is warranted "only when we conclude that  
17 there is a significant chance that but for [an] error the agency might have reached a  
18 different result" (alteration in original) (internal quotation marks omitted)). Because  
19 Defendants relied on factors Congress intended them to consider, did not fail to consider  
20 important aspects of the problem, and did not offer an implausible explanation running

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21  
22 <sup>7</sup> Plaintiffs also correctly note (Pls. Reply at 27-28) that the Project would have  
23 "visual and setting effects" on the Dillingham Building, Chinatown, and elsewhere,  
24 AR00153938 [SEIS at 72]. But the agencies determined in the final analysis — after  
25 consultation with qualified architectural historians and Hawaii's State Historic Preservation  
26 Officer, *see* AR00153923 [SEIS at 57]; AR00153985 [SEIS at 119] — that those visual and  
27 setting effects would not "substantially impair[]" the historically significant features of the  
28 properties. AR00153938 [SEIS at 72]. The agency is entitled to rely on the reasonable  
opinions of its own qualified experts. *See HonoluluTraffic.com*, slip op. at 23 (citing *Marsh*  
*v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

1 counter to the evidence, Defendants' conclusion was not arbitrary and capricious. *See N.*  
2 *Idaho Cmty. Action Network*, 545 F.3d at 1152-53.

### 3 **3. Harm to non-§ 4(f) resources**

4 Defendants concluded that this factor weighs in favor of the Project because the  
5 Tunnel Alternative would result in greater construction-related congestion and impacts to  
6 "historic architecture."<sup>8</sup> AR00153940 [SEIS at 74]; *see also* AR00153924 [SEIS at 58].  
7 Whether or not these factors could independently support an imprudence finding, *see* (Pls.  
8 Obj. at 25), Defendants did not act arbitrarily and capriciously by weighing them in the  
9 "least overall harm" analysis and finding them to weigh against the Tunnel Alternative.  
10 Construction of the Alternative would require nine more acres of construction easements  
11 than the Project and two more years of construction, AR00153927-31 [SEIS at 61-65],  
12 resulting in significant roadway closures, AR00153940 [SEIS at 74]. Perhaps, as  
13 Plaintiffs suggest, construction-related disruption and delays attend any construction  
14 project. (Pls. Reply at 20). But such impacts still qualify as "harms" that  
15 disproportionately affect the Tunnel Alternative and that Defendants may rightly consider  
16 as part of the "least overall harm" analysis.

17 The only impact to a non-§ 4(f) resource that Plaintiffs identify as having escaped  
18 Defendants' attention is an impact on safety at the U.S. Courthouse. *See* (Pls. Obj. at 25;  
19 Pls. Reply at 29). But Defendants — in consultation with the U.S. General Services  
20 Administration, U.S. Marshals Service, and U.S. Federal Protective Service —  
21 determined that the Project would "not pose any additional threat to the Courthouse  
22 beyond that of surface traffic." AR00154051. As in the earlier summary judgment  
23 proceedings, *see* Order at 39, Plaintiffs' claim of increased safety risks to the U.S.  
24 Courthouse is unsupported by the record.

### 25 **4. Summary of factors**

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26  
27 <sup>8</sup> Presumably, this reference to "historic architecture" refers to historic properties  
28 that are not protected by § 4(f).

1 In sum, Defendants did not act arbitrarily and capriciously by concluding that  
2 these factors — the Tunnel Alternative’s cost, severe impact to § 4(f) properties, and  
3 harm to non-§ 4(f) resources — weigh in favor of the Project. Plaintiffs are correct that  
4 Defendants must consider the “least overall harm *in light of the statute’s preservation*  
5 *purpose.*” (Pls. Reply at 25) (emphasis added) (citing 23 C.F.R. § 774.3(c)(1)). But  
6 Defendants’ balancing of the severe harm to the OR&L properties against the relatively  
7 less severe harm to non-contributing elements of Chinatown and elsewhere indicates that  
8 Defendants shined the proper preservative light. The weight of the foregoing factors  
9 supports Defendants’ analysis; therefore, Defendants’ balancing of the “least overall  
10 harm” factors was not arbitrary and capricious.<sup>9</sup> *See N. Idaho Cmty. Action Network*, 545  
11 F.3d at 1153.

12  
13 **IV. Conclusion**

14 For the reasons set forth above,

15 **IT IS ORDERED:**

16 1. The court rejects Plaintiffs’ challenge to Defendants’ compliance with the  
17 Summary Judgment Order. Thus, the court **GRANTS** summary judgment to Defendants  
18 on all remaining claims.

19 2. Defendants’ Motion to Strike IS **GRANTED.**

20 /////  
21 /////  
22 /////  
23 /////  
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25 <sup>9</sup> The record shows that Defendants used “all possible planning” to minimize  
26 harm along the Tunnel Alternative. 23 C.F.R. § 774.3(a)(2); AR00153935 [SEIS at 69].  
27 Plaintiffs do not challenge the point; thus, the court finds that Defendants satisfied the “all  
28 possible planning” requirement.

