

was not materially false, and the jury's role in making these determinations should have been preserved.

Emma Tauchman

Honolulutraffic.com v. Federal Transit Admin., 742 F.3d 1222 (9th Cir. 2014) (holding that the granting of summary judgment in favor of the FTA was proper because the FTA followed NEPA in preparing a FEIS and because the FTA reasonably and in good faith complied with § 4(f) in identifying and studying historic sites along the proposed route).

A consortium of interest groups filed suit to prevent construction of an elevated rail line across greater Honolulu, Hawai'i, raising issues under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4312–47, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470–470x-6, and the Department of Transportation Act, 49 U.S.C. § 303(4)(f).

The Federal Transportation Administration ("FTA") published a notice of intent to prepare an environmental impact statement on December 7, 2005 to begin studying a corridor linking Kapolei, Waikiki, and the University of Hawai'i at Manoa. A fixed guideway system was recommended, and a second notice of intent was issued on March 15, 2007 to prepare an environmental impact statement to select the preferred technology to be used. The public was requested to comment on five potential technologies: light rail, rapid rail, rubber tire, magnetic levitation, and monorail. Rapid rail technology was selected. The FTA then prepared a final environmental impact analysis which selected a preferred route. This preferred route runs close to several historic sites, implicating the Department of Transportation Act § 4(f), which says that use of an historic site is only allowed if there is no "prudent and feasible alternative" and the project minimizes all possible harm to the site. The FTA approved the project on January 18, 2011 in a Record of Decision.

The plaintiffs were not satisfied with the planning process because the FTA did not consider their preferred alternative: managed lanes to be used by busses, car pools, and toll-paying single-occupant vehicles. The district court granted summary judgment to the defendants on all but some of the 4(f) claims, allowing the first three phases of construction to commence. The court ultimately enjoined construction on the fourth phase of the project pending further study. Neither party appealed the ruling as to the fourth phase, so the Court of Appeals did not consider it.

The United States Court of Appeals for the Ninth Circuit first considered whether it had jurisdiction to hear the appeal. The defendants

first argued that the since some of the (4)(f) claims were remanded to the agency, the district court's order was not final. The court noted that the dismissed claims were finally disposed, therefore reviewable under 28 U.S.C. § 1291. The defendants also argued that the injunctions were not final orders, therefore they were not appealable. The court disagreed, noting that 28 U.S.C. § 1292(a)(1) allows the review of a grant or refusal of injunctive relief.

The court then turned to the plaintiffs' claim that NEPA was not followed because the defendants "unreasonably restricted the Project's purpose and need" and "did not consider all reasonable alternatives." The court found that the project's purpose and need were not defined too narrowly because more than one alternative project would be able to accomplish the project's objectives. The court also rejected the reasonable alternatives argument because a planning agency does not need to reconsider alternatives rejected in prior studies so long as the prior studies received federal guidance and gave the public the opportunity to comment. Here, the state of Hawai'i had previously studied possible routes and alternatives with federal guidance and a public comment period. This prior study rejected many alternatives, including the plaintiffs' proposed alternative.

The court next analyzed the plaintiffs' appeal of the dismissal of some of the § 4(f) claims. Here, the plaintiffs complained that by dismissing certain technologies, the FTA was unable to produce a plan that completely avoided the use of various historic sites along the corridor. The plaintiffs cited a study suggesting that their preferred technology, managed lanes, would completely avoid the historic sites and would bring greater public benefits than the chosen rapid rail technology. The court found that the FTA was not required to rely on the plaintiffs' study and could rely on its own studies, and that the FTA did not need to formally document its decision that certain technologies were imprudent under § 4(f).

Finally, the plaintiffs argued that the FTA violated § 4(f) by not identifying all potential historical sites before approving the project. The court found that the FTA was in compliance with §4(f) because it only requires protection of known sites. The court found that the FTA made "a reasonable and good faith effort" to identify known sites along the corridor and had planned to survey for other potential sites before construction began. The court noted that requiring complete surveys before a final plan is approved would result in the potential for more damage to historical sites because the surveying itself could damage these sites and without a final route in place, sites that would otherwise not be impacted might be damaged.

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Accordingly, the court affirmed the district court's holding that the plaintiff's claims under NEPA and § 4(f) should be dismissed.

Joel Heiny

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