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Attorneys for Plaintiffs

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

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

Plaintiffs,

v.

FEDERAL TRANSIT  
ADMINISTRATION; LESLIE  
ROGERS, in his official capacity  
as Federal Transit Administration  
Regional Administrator; PETER  
M. ROGOFF, in his official

Case No. 11-00307 AWT

**DECLARATION OF  
NICHOLAS C. YOST IN  
SUPPORT OF  
PLAINTIFFS'  
OPPOSITION TO MOTION  
TO INTERVENE**

Hon. A. Wallace Tashima

Action Filed: May 12, 2011  
Trial Date: None Set

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

Defendants.

and

FAITH ACTION FOR  
COMMUNITY EQUITY; THE  
PACIFIC RESOURCE  
PARTNERSHIP; MELVIN  
UESATO

Intervenor Defendants.

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I, Nicholas C. Yost, declare as follows:

1. I am a partner in the law firm of SNR Denton LLP. I have personal knowledge of the matters stated herein and if called as a witness I could testify competently thereto.
2. From 1977 to 1981, I served as the General Counsel for the Council on Environmental Quality ("CEQ"), and, in that capacity, was the lead draftsman for CEQ's National Environmental Policy Act ("NEPA") regulations, 40 C.F.R. parts 1500 to 1508. CEQ's NEPA regulations are applicable to all federal agencies, including Defendants in this case.

3. Since that time, my practice has continued to focus on federal environmental impact assessment laws, including NEPA, the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act. In my 30 years of post-government practice (as a public interest lawyer and as a private practitioner), I have personally handled numerous NEPA cases on behalf of clients, have served as an expert witness in multiple cases where NEPA compliance was at issue, have provided testimony on NEPA issues to Congress, and have been retained by federal agencies to both teach their personnel about NEPA compliance and to guide agency NEPA practice.
4. I am counsel of record for the Plaintiffs in this case, and am familiar with the parties, their positions, and the various documents filed (or otherwise exchanged) in support thereof. Among other things, I am aware that Defendants have indicated an interest in conducting discovery, in filing motions for summary adjudication prior to the parties' cross-motions for summary judgment. In my experience (summarized above), these actions are quite unusual and extremely aggressive in an Administrative Procedure Act (APA) case such as this one. Because APA cases are normally decided on the basis of a fixed administrative record, they usually do not involve discovery.
5. During this case, counsel for Plaintiffs, counsel for the City and County of Honolulu, and counsel for the federal Defendants have periodically met and conferred regarding the construction schedule for the Honolulu High-Capacity Transit Corridor Project (the "Project"). During those conversations, counsel for

the City have made it clear that the City do not plan to delay or abandon construction of the Project.

6. My office obtained a copy of the reporter's transcript for the November 30, 2011 hearing held in this case. Portions of the transcript are attached hereto as Exhibit A.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed January 26, 2012  
at San Francisco, California



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NICHOLAS C. YOST

# **EXHIBIT A**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM, et al.,	)	CIVIL NO. 11-00307AWT
	)	
Plaintiffs,	)	Honolulu, Hawaii
	)	November 30, 2011
vs.	)	10:00 a.m.
	)	
FEDERAL TRAFFIC	)	VARIOUS MOTIONS and
ADMINISTRATION, et al.,	)	STATUS/SCHEDULING
	)	CONFERENCE
Defendants.	)	

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

APPEARANCES:

For the Plaintiffs Honolulutraffic.com, et al.:	MICHAEL JAY GREEN, ESQ. 841 Bishop Street, Suite 2201 Honolulu, Hawaii 96813
	NICHOLAS C. YOST MATTHEW G. ADAMS SNR Denton US LLP 525 Market Street, 26th Floor San Francisco, California 94105
For the Defendants Federal Transit Administration, et al.:	HARRY YEE Office of the United States Attorney Prince Kuhio Federal Building 300 Ala Moana Boulevard, Suite 6100 Honolulu, Hawaii 96850
	ROBERT D. THORNTON, ESQ. Nossaman LLP 18101 Van Karman Avenue, Suite 1800 Irvine, California 92612
	JOHN P. MANAUT, ESQ. Carlsmith Ball LLP American Savings Bank Tower 1001 Bishop Street, Suite 2200 Honolulu, Hawaii 96813

1 APPEARANCES: (Continued)

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3 GARY Y. TAKEUCHI,  
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6 Honolulu, Hawaii 96813

7 COURT REPORTER: ANN B. MATSUMOTO, CSR 377  
8 P.O. Box 235215  
9 Honolulu, Hawaii 96823  
10 (808) 521-1877

11 Proceedings recorded by machine shorthand, transcript  
12 produced with computer-aided transcription (CAT).  
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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

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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