One-Way Track to Desecration: Implications of the Honolulu Rail’s Failure to Comply with Protections Mandated for Native Hawaiian Burials

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INTRODUCTION

A little over ten years ago, the Interstate H-3 Freeway\(^1\) (“H-3” or “H-3 Freeway”) opened for public use on O‘ahu, Hawai‘i.\(^2\) For some O‘ahu residents, completion of this project meant traffic relief;\(^3\) for many Native Hawaiians,\(^4\) it was sacrilege.\(^5\) The project’s completion marked a

\(^1\) The H-3 freeway is the largest and most expensive public works project ever completed in Hawai‘i. Barbara J. Braswell, Pride and Partnership: Completing the Interstate H-3, PUBLIC ROADS, May/June 1998. It also has the distinction of being the most controversial public works project in Hawai‘i’s history and the most delayed highway in U.S. history. Mike Gordon, H-3 Freeway, HONOLULU ADVERTISER, July 2, 2006, available at http://www.honoluluadvertiser.com/150/sesq5h3. Construction of the project was authorized by the Statehood Act of 1960 with funds coming from the Federal Highway Administration (“FHWA”). \(\text{Id.}\) H-3 was initially designed to be a six-lane highway through Moanalua Valley at a cost of $250 million. \(\text{Id.}\) Thirty-seven years later, the freeway was completed through the Hālawa Valley at a cost of $1.3 billion. \(\text{Id.}\) The H-3 freeway is 16.1 miles long and connects Pearl Harbor to the Kāne‘ohe Marine Corps Base via North Hālawa Valley. Mike Yuen, Open Road, HONOLULU STAR-BULLETIN, Dec. 3, 1997, available at http://archives.starbulletin.com/1997/12/03/news/story2.html.

\(^2\) Yuen, \textit{supra} note 1.

\(^3\) \textit{Id.}

\(^4\) The author acknowledges that there are multiple terms for the Indigenous People of Hawai‘i including: “kānaka maoli,” “‘ōiwi,” “Native Hawaiian,” and “native Hawaiian.” Unfortunately, however, the use of these terms is inconsistent. To avoid confusion, the author will use the term “Native Hawaiian,” and will modify or substitute other references or quotes as appropriate. For purposes of this paper, “Native Hawaiian”
milestone in a thirty seven year history of protests, expert and legal battles, costly delays, and the utter failure to prevent the desecration of many significant Native Hawaiian sacred burials and sites.\(^6\)

In 1997, at the time of H-3’s opening, the majority of the archaeological surveys\(^7\) – the fundamental protection for iwi kūpuna is inclusive of all Indigenous Hawaiians and is not limited to “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778” as defined in the Hawaiian Homes Commission Act of 1921, 25 U.S.C. § 4221 et seq. (2009).

\(^5\) Pat Omandam, *Rocky Road*, HONOLULU STAR-BULLETIN, Dec. 4, 1997, available at [http://archives.starbulletin.com/97/12/04/news/story3.html](http://archives.starbulletin.com/97/12/04/news/story3.html). In fact, some Native Hawaiians continue to refrain from using the H-3 freeway. Interview with Lehua Kauhane, Graduate Assistant, Kamakakūokalani Center for Hawaiian Studies, University of Hawai‘i (“U.H.”) in Honolulu, Haw. (Mar. 25, 2010). The H-3 project “drew more protest and opposition than any other construction project in Hawai‘i’s history. . . . H-3 was symbolic of what many in the community did not want Hawai‘i to become: an extension of a constantly and rapidly urbanizing and commercially developing continental United States. Those who wanted to stop the freeway wanted to preserve qualities of life and land that were unique qualities of life and land that were unique to Hawai‘i: its Hawaiian heritage and sacred sites, its natural environment, and its rural character.” Dennis Kawaharada, *E Luku Wale E: Photos of the H-3 Construction/Destruction* by Kapulani Landgraf and Mark Hamasaki, [http://www2.hawaii.edu/~dennisk/texts/h32007.html](http://www2.hawaii.edu/~dennisk/texts/h32007.html) (last visited Apr. 5, 2010). The H-3 fight was “a training ground for [N]ative Hawaiians and environmentalists, since it was the first project in Hawai‘i requiring a federal environmental impact statement.” Yuen, *supra* note 1 (Statement of Bob Nakata, community activist and former Bishop Museum anthropologist and state senator). Bishop Museum is the “largest museum in [Hawai‘i] and the premier natural and cultural history institution in the Pacific, recognized throughout the world for its cultural collections, research projects, consulting services and public educational programs. . . . Serving and representing the interests of Native Hawaiians is a primary purpose of the Museum.” See Bishop Museum, *About Us*, [http://www.bishopmuseum.org/aboutus/aboutus.html](http://www.bishopmuseum.org/aboutus/aboutus.html) (last visited Apr. 5, 2010).


\(^7\) The archaeological reports required for the H-3 project serve the same purpose as archaeological inventory surveys. Telephone Interview with Kēhau Abad, Ph.D., Archaeologist and O‘ahu Island Burial Council Member, in Honolulu, Haw. (Mar. 5, 2010) (hereinafter “Abad Interview Mar. 5, 2010”). These reports have yet to be completed. *Id.* Archaeological inventory surveys (“AISs”) refer to “the process of
identifying and documenting the archaeological historic properties and burial sites in a delineated area, gathering sufficient information to evaluate the significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by the department.” HAW. ADMIN. R. § 13-276-2 (2009). AISs are significant because they: “(1) Determine if archaeological historic properties are present in the project area and, if so, identify all such properties and (2) gather sufficient information to evaluate each historic property’s significance in accordance with the significance criteria in subsection 13-275-6(b).” Id. § 13-276-3. The completed reports for the H-3 freeway by Bishop Museum are available at Bishop Museum, Archaeological Projects Conducted by Bishop Museum for the Hawai‘i State Department of Transportation and Federal Highways Administration for the Interstate Route H-3, http://www.bishopmuseum.org/research/cultstud/h3reports.html (last visited Apr. 5, 2010).

8 “Iwi kūpuna” can be loosely translated as “ancestral bones.” “Iwi” means “bone . . . The bones of the dead [are] considered the most cherished possession, [and] were hidden.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 104 (1986 ed.) [hereinafter PUKUI & ELBERT]. “Kūpuna” is the plural of “kupuna” meaning “grandparent, ancestor.” Id. at 186.

9 Omandam, supra note 5.

10 The State of Hawai‘i established the State Historic Preservation Division (“SHPD”) in 1976 as part of the State Historic Preservation Program. HAW. REV. STAT. § 6E-3 (2009). Originally, SHPD was organized within the Department of Land and Natural Resources’ (“DLNR’s”) State Parks Division. Today, SHPD is an independent division within DLNR and must administer a State Historic Preservation Program that includes the “[d]evelopment of an on-going program of historical, architectural, and archaeological research and development, including surveys, excavations, scientific recording, interpretation, and publications on the State’s historical and cultural resources”; the “[d]evelopment of a statewide survey and inventory to identify and document historic properties, aviation artifacts, and burial sites, including all those owned by the State and the counties”; “Coordination of the evaluation and management of burial sites as provided in section 6E-43”; and the “[d]evelopment and adoption, in consultation with the office of Hawaiian affairs native historic preservation council, of rules governing permits for access by native Hawaiians and Hawaiians to cultural, historic, and pre-contact sites and monuments,” among other statutory mandates. Id. § 6E-3.

11 The Hawai‘i State Department of Transportation is responsible for “establish[ing], maintain[ing], and operat[ing the] transportation facilities of the State, including highways, airports, harbors, and such other transportation facilities and activities as may be authorized by law.” Id. § 26-19 (2009).
construction. By the time the project was completed, both sides agreed that comprehensive archaeological surveys should have been conducted before ground was broken. Those responsible for H-3’s planning and construction ignored or failed to anticipate the objections of environmental and cultural groups, resulting in years of delay and outrageous cost overruns. Despite the inordinately difficult lessons that should have been learned from the H-3 debacle, many government decision makers fail to apply those lessons in the present.

As one of the largest public works projects in Honolulu’s history, the planning failures of the Honolulu High-Capacity Transit Corridor Project (“Rail Project”) threaten to retread H-3’s rocky path and will force archaeologists to work mere steps ahead of bulldozers, risking the same fate of costly delays, litigation, public outcry, and the desecration of iwi kūpuna. This comment examines the Rail Project in the context of federal and state protections mandated for Native Hawaiian burials, analyzing the planning failures of the City and County of Honolulu (“City”) to prevent the disturbance of iwi kūpuna. Part II overviews the historical and cultural significance of iwi kūpuna, contemporary litigation involving iwi kūpuna, and a chronology of the City’s Rail Project. Part III provides the legal framework of federal and state laws mandating

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12 Barry Nakamura, then a Bishop Museum assistant archaeologist, publicly accused the Bishop Museum of concealing the significance of sacred sites in Hālawa Valley. Ross Cordy, the State Historic Preservation Office’s chief of archaeology, responded that “all this stuff about Luakini heiau that appeared, that was nonsense.” Omandam, supra note 5. A “heiau” is a “pre-Christian place of worship, shrine.” PUKUI & ELBERT, supra note 8, at 64. “Luakini” means a “temple . . . large heiau where ruling chiefs prayed and human sacrifices were offered.” Id. at 213. See also William Kresnak, ‘Major’ Archaeological Site in H-3 Path?, HONOLULU ADVERTISER, Mar. 24, 1992, at A1.

13 Omandam, supra note 5.


15 Id.

16 See infra Part IV.


18 See infra Part II(B).

19 See infra Part IV.

20 See infra Part II.
procedural and substantive results in iwi protection and preservation. Part IV analyzes the implications of the City’s effort to fast track the project and circumvent the letter and spirit of federal and state historic preservation laws. Part V provides key recommendations for the City to implement informed planning decisions in favor of proper preservation of iwi kūpuna and rectify the Rail Project’s one-way track to desecration.

I. LAYING THE FOUNDATION: UNDERSTANDING THE CULTURAL FRAMEWORK OF IWI AND RAIL

Iwi o kuʻu iwi  
Koko o kuʻu koko  
Pili ka moʻo  
A mau loa  

Bones of my bones  
Blood of my blood  
Our stories are one  
For ever and ever

A. Iwi’s Cultural and Historical Significance to Native Hawaiians

As the lyrics of Oli Kuamoʻo poignantly illustrate, the cultural significance of iwi kūpuna is deeply rooted in Native Hawaiian oral traditions, language, sovereignty, and customs. Native Hawaiian oral

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21 See infra Part III.

22 See infra Part IV.

23 See infra Part V.

24 Oli Kuamoʻo, Hakipuʻu ‘Ohana (1995). An “oli” is a “chant that was not danced to, especially with prolonged phrases chanted in one breath.” PUKUI & ELBERT, supra note 8, at 285.

25 This section was inspired by and is roughly modeled after Moses Haia & Sunny Greer, Iwi Kūpuna: Native Hawaiian Burial Rights, in NATIVE HAWAIIAN LAW (NATIVE HAWAIIAN RIGHTS HANDBOOK 2ND ED), (Melody MacKenzie, Susan Serrano & D. Kapua’ala Sproat eds., forthcoming 2010) (hereinafter NATIVE HAWAIIAN LAW) and Erline A. Greer, Kaleikini v. Theilen: Deconstructing Hawaiʻi’s Burial Laws to Look Beyond Removal and Reburial (May 1, 2008) (unpublished manuscript, on file with author).

26 See NATIVE HAWAIIAN LAW, supra note 25.
traditions confirm that the care and protection of one’s ancestors is a fundamental part of the identity of living descendants.\textsuperscript{27}

According to the Kumulipo,\textsuperscript{28} the Native Hawaiian creation chant, the first burial in Hawai’i occurred when Wākea (father-sky)\textsuperscript{29} and his daughter Ho’ohōkūkalani (star-of-heaven)\textsuperscript{30} produced a stillborn offspring, Hāloanakalaukapali (quivering long stalk).\textsuperscript{31} A taro plant emerged from Haloānakalaukapali’s burial site.\textsuperscript{32} The second child born to Wākea and Ho’ohōkūkalani, Hāloa, is revered as the progenitor of the Native Hawaiian people.\textsuperscript{33} This traditional narrative “establishes the interconnection, the interdependent relationship between the gods, the land, and the people. The burial of iwi [bones] results in the physical growth of plants and the spiritual growth of mana [life force].”\textsuperscript{34} Thus, the Native Hawaiian people, as descendants of Hāloa, “receive physical nourishment from the land they care for and spiritual sustenance from the knowledge that the iwi kūpuna (ancestral bones) are well cared for and in their rightful place.”\textsuperscript{35}

\textsuperscript{27} \textit{Id.} at 16-3.

\textsuperscript{28} Kumulipo means “origin, genesis, source of life, mystery.” \textsc{Pukui} & \textsc{Elbert}, \textit{supra} note 8, at 104. The Kumulipo is paramount to Native Hawaiian culture because “Hawaiian identity is, in fact, derived from the Kumulipo, the great cosmogonic genealogy.” \textsc{Lilikalā Kame’elehiwa}, \textsc{Native Land and Foreign Desires Pehea Lā E Pono Aī?} 2 (1992). See generally \textsc{The Kumulipo: A Hawaiian Creation Chant} (Martha Warren Beckwith trans., & ed., 1951).

\textsuperscript{29} “Wākea” is the “mythical ancestor of all Hawaiians.” \textsc{Pukui} & \textsc{Elbert}, \textit{supra} note 8, at 381.

\textsuperscript{30} Ho’ohōkūkalani also translates to “to generate stars in the sky.” \textsc{Kame’elehiwa}, \textit{supra} note 28, at 23.

\textsuperscript{31} \textsc{David Malo}, \textsc{Ka Mo’olelo Hawai’i: Hawaiian Traditions}, 201 (Malcolm Nāea Chun, trans., First People’s Productions 1996) (1898) (Translations are \textit{sic}). References to modern translations of Malo’s accounts are intended to offer a Native Hawaiian perspective as opposed to an earlier missionary-influenced translation.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} “Mana” means “supernatural or divine power.” \textsc{Pukui} & \textsc{Elbert}, \textit{supra} note 8, at 235. See also Kunani Nihipali, \textit{Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality}, 34 \textsc{Ariz. St. L.J.} 27, 36-37 (2002) (Translations are \textit{sic}).

\textsuperscript{35} Nihipali, \textit{supra} note 34, at 37.
Native Hawaiians to care for iwi kūpuna “to maintain harmony between the living, the dead and the ‘āina (land).”

ʻŌlelo Hawaiʻi (Hawaiian language) also illuminates the “interconnection between ancestral bones, nature, and the identity of Native Hawaiians” as demonstrated by the use of the word “ʻiwi,” “ʻiwi” translates to “bones” but can also refer to demarcations of stone or ridges signifying land boundaries. “Kulāiwi” is the term for “homeland” and “ōiwi” means “native.” One’s homeland is significant because it “provides the basis for self determination[,] [and] self expression. It is a source of identity.”

Native Hawaiian practices of burying and protecting iwi “strengthen the ancestral foundation, continue the interdependence between past and present[,] and re-infuse the land with mana necessary to sustain the ancestors, the living and the generations to come.” Kēhau Abad, Ph.D., a Native Hawaiian archaeologist, elaborated on this connection, explaining, “these kūpuna offer us the mana of their whole existence. Think of them collectively . . . they are the foundation on which we stand . . . if we turn our backs, then we break a fundamental understanding of our role as ‘ōiwi.”

Belief in the interconnection of mana and the care of iwi kūpuna “is the highest form of sovereignty” a

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36 Id. at 36-37.

37 “ʻŌlelo Hawaiʻi” contains the words “ʻōlelo” and “Hawaiʻi,” which loosely translate as “Hawaiian language.” See PUKUI & ELBERT, supra note 8, at 284.

38 NATIVE HAWAIIAN LAW, supra note 25, at 16-3.

39 PUKUI & ELBERT, supra note 8, at 105.

40 Id. at 179. Kulāiwi literally translates to “land of bones. Used as birthplace, with the idea that ‘here my bones began.’” Id.

41 The word loosely translates to “of the bone.” Id. at 280. The word also translates to “native son; native of the land. Very close to the meaning of kula ʻiwi.” Id. See also MARY KAWENA PUKUI et al., NĀNĀ I KE KUMU (LOOK TO THE SOURCE) Vol. I, 112 (1972) [hereinafter PUKUI] (Translations are sic.); Greer, supra note 25, at 4 n.29.


43 Nihipali, supra note 34, at 36-37.

Native Hawaiian can practice, because ultimately, “rebuilding a Hawaiian nation may well depend upon fulfilling the kuleana [responsibility] of caring for and protecting that ancestral foundation.”

In Native Hawaiian culture, the death of a loved one is a “powerful, emotional, and spiritual event grounded in centuries old beliefs and customs that continue to permeate modern Native Hawaiian life.”

Following the journey to Pō (Eternity), Native Hawaiians believe that the ‘uhane (spirit) remains close to nā iwi (the bones). Thereafter, the ‘uhane can depart and enter Pō to unite with the ‘aumākua (family gods). Burial of iwi imparts the decedent’s mana to Haumea (Earth) and to “that particular ground, to that specific ahupua‘a (land division) and eventually to the island. The entire area, therefore, becomes sacred with mana.”

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45 Nihipali, supra note 34, at 37.

46 “Kuleana” means “right, privilege, concern, responsibility.” Pukui & Elbert, supra note 8, at 179.


49 Pukui & Elbert, supra note 8, at 228.

50 Id. at 363.

51 Id. at 104.

52 Pō also means “night, darkness, obscurity; the realm of the gods.” Id. at 333.

53 “Aumākua” are “family or personal gods, deified ancestors.” Id. at 104.

54 Native Hawaiian Law, supra note 25, at 16-4. Haumea is the ancient female god of “childbirth, source of all life. She was a sister of the [gods] Kāne and Kanaloa, who arrived early in Hawai‘i, and her name is often interchanged with Papa-hānau-moku, Earth Mother. In O‘ahu traditions, she is a [god] prayed to (under the name Kāmeha‘ikana) for war and political control and for abundance of fish in the fishponds.” Kame‘elehiwa, supra note 28, at 34-35.

55 Ahupua‘a is a “[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pu‘a‘a), or because a pig or other tribute was laid on the altar as tax to the chief.” Pukui & Elbert, supra note 8, at 9.

56 Affidavit of Pualani Kanakaʻole Kanahaele regarding the significance of Honokahua, Maui in Native Hawaiian Law, supra note 25, at 16-4 (citation incomplete in original). Honokahua was a catalyst for the legislative protection of iwi kūpuna when in 1988, “over 1,100 ancestral [N]ative Hawaiian burials consisting of men, women, children, and infants were systematically excavated and removed from their resting
“The bones of the dead were guarded, respected, treasured, venerated, loved, or even deified by relatives; coveted and despoiled by enemies”57 because they represent the “essential physical material of a person.”58 Nā iwi and the ‘uhane are “necessary for the makeup of a complete person.”59 Nā iwi also symbolize the link between kūpuna (ancestors) and the eventual immortality of living Native Hawaiians because nā iwi survived after death and were the lasting embodiment of an individual.60 For these reasons, nā iwi were highly respected and guarded by loved ones.61 The essence of that veneration was the Native Hawaiian practice of ‘unihipili,62 deification of bones, which sustained the spirit of the deceased within nā iwi.63

Native Hawaiians believe that the ‘uhane always hovers near nā iwi.64 Desecration of bones results in the spirit being insulted as well as injury and spiritual trauma to the living descendants of the dishonored dead.65 Bone desecration may occur in various ways.66 Leaving bones places” in the sand dunes overlooking Honokahua Bay on Maui to make way for construction of the Ritz-Carlton Kapalua Resort. Hawai‘i State Historic Preservation Division, Nā Iwi Kūpuna The Bones of Our Ancestors, http://hawaii.gov/dlnr/hpd/naiwikupuna.htm (last visited Apr. 7, 2010) [hereinafter Nā Iwi Kūpuna]. See also infra Part II(B).

57 PUKUI, supra note 41, at 107.

58 Affidavit of Pualani Kanakaʻole Kanahele regarding the significance of Honokahua, Maui in NATIVE HAWAIIAN LAW, supra note 25, at 16–4 (citation incomplete in original).

59 Id.

60 See PUKUI, supra note 41, at 107. “In the pre-Christian creeds of Hawaii, man’s immortality was manifest in his bones. Man’s blood, even bright drops shed by the living, was haumia (defiled and defiling). Man’s body, when death made flesh corrupt, was an abomination and kapu (taboo). The iwi survived decaying flesh. The bones remained, the cleanly, lasting portion of the man or woman who once lived.” Id.

61 PUKUI & ELBERT, supra note 8, at 104.

62 ‘Unihipili is the deification of bones in which “ritual practices kept the spirit of the dead alive in the bones. The ‘unihipili spirit could be summoned to perform services for its kahu (master or keeper).” PUKUI, supra note 41, at 108 (Translations are sic.).

63 Id. “Just short of ‘unihipili was the practice of secretly exhuming the body of a beloved, cleaning the bones, and keeping them in the home, even near bedside when sleeping.” See also NATIVE HAWAIIAN LAW, supra note 25, at 16-4.

64 PUKUI, supra note 41, at 109. (Translations are sic.).

65 Id. (Translations are sic.).
uncovered and exposed to sunlight is disrespectful and sacrilegious. The worst act of desecration is the destruction of nā ʻiwi, “which prevent[s] the ‘uhane from joining the ‘aumākua in eternity.” For the reasons state above, burial sites were chosen by Native Hawaiians for symbolic purposes. The western side of each island was the “most desirable because it symbolized the sunset of life (death).” Spiritual beliefs associated with nā ʻiwi “led to practices designed to protect them from coming into the possession of adversaries.” Safekeeping nā ʻiwi was an important motivation in choosing burial sites. Nā ʻiwi were hidden in caves, cliffs, sand dunes, or even placed in the ocean. “The burial of ‘ohana (family) members [was] often near the home, in close proximity to living relatives, so as to ensure the decedent’s care and participation in family affairs.” The burial site was often kept hūnākele (secret) to avoid abuse or disturbance of nā ʻiwi. Native Hawaiian living

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66 Id. (Translations are sic.). For example, turning bones into fishhooks or using them as arrowheads or needles was “the most dreaded insult.” The use of a skull, the dwelling place of the spirit, as a spittoon or even a container for discarded food was “infinitely worse.” Id. (Translations are sic.).

67 Id. (Translations are sic.).

68 Id. (Translations are sic.).

69 NATIVE HAWAIIAN LAW, supra note 25, at 16-5.

70 Western locations such as Honokahua on Maui, Moʻomomi on Molokaʻi, and Kaʻena on Oʻahu are prominent Native Hawaiian burial sites. Affidavit of Pualani Kanakaʻole Kanahele regarding the significance of Honokahua, Maui in NATIVE HAWAIIAN LAW, supra note 25, at 16-4 (citation incomplete in original). On every island, a place was designated as a “leina a ka ‘uhane,” a location where “spirits leaped into the nether world.” PUKUI & ELBERT, supra note 8, at 200. The literal translation of “leina a ka ‘uhane” is “leap of the soul.” Id.

71 NATIVE HAWAIIAN LAW, supra note 25, at 16-5.

72 Id. at 16-4.

73 Id. at 16-5.

74 Id.

75 PUKUI & ELBERT, supra note 8, at 276.

76 NATIVE HAWAIIAN LAW, supra note 25, at 16-5.

77 Hūnākele means “[t]o hide in secret, as the body of a loved one in a secret cave; conceal.” PUKUI & ELBERT, supra note 8, at 91.

78 Affidavit of Pualani Kanakaʻole Kanahele regarding the significance of Honokahua, Maui in NATIVE HAWAIIAN LAW, supra note 25, at 16-4 (citation incomplete
descendants honor “those who placed the iwi in their resting places with the intent that they remain undisturbed.” Fulfilling this responsibility affirms “who we are as a people – that we too have a place here, and it comes from the bones of our ancestors.”

B. Continuing Challenges in the Protection of Sacred Sites and Burials

Ka ‘uhane o ke kūpuna lives on
Ka ‘uhane o ke kūpuna sing your songs
Oh, please, just leave our bones alone

As the haunting refrain from a popular local song illustrates, the battle to protect Native Hawaiian sacred sites and burials stirs emotion and passion. Reliable estimates of the Native Hawaiian population prior to Western contact vary between roughly 800,000 to over one million people. Over centuries, hundreds of thousands of Native Hawaiians were laid to rest. “The result is that unmarked Native Hawaiian burial sites can be encountered almost anywhere, from the highest mountains to


79 Dana Naone Hall, Sovereign Ground, in THE VALUE OF HAWAII KNOWING THE PAST, SHAPING THE FUTURE 196 (CRAIG HOWES & JON OSORIO EDs., 2010).

80 Id.

81 Excerpt from song by Big Island Conspiracy, Honokahua, on Street Tapestry Vol. 1: Reflective but Unrepentant (Deep Ka’a Ka’a Records 1999). A rough translation of this song is: The spirit of our ancestors lives on, the spirit of the ancestors sing your songs, oh, please just leave our bones alone. This song was written with reference to the events that transpired in 1988 in Honokahua, Maui when “over 1,100 ancestral native Hawaiian burials consisting of men, women, children, and infants were systematically excavated and removed from their resting places” in the sand dunes overlooking Honokahua Bay on Maui to make way for construction of the Ritz-Carlton Kapalua Resort. See Nā Iwi Kūpuna, supra note 56.

82 See generally DAVID STANNARD, BEFORE THE HORROR THE POPULATION OF HAWAI’I ON THE EVE OF WESTERN CONTACT (1989) (providing population estimates for Native Hawaiians at the time of Western contact); see also KAME’ELEHIWA, supra note 28, at 81 (explaining that Stannard’s conservative methodologies underestimate the number of people inhabiting Hawai’i at the time of Western contact and a figure of “at least one million Hawaiians in 1778” is more appropriate); see also ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAI’I 1778-1965 (1977) (for additional discussion of the decline of the Native Hawaiian population in the nineteenth century).

83 Nā Iwi Kūpuna, supra note 56.
the shoreline … and from the most remote regions to the most developed areas in the State.”

84 The influx of foreigners and increasing development disturbed a myriad of unmarked burials. This destruction has continued repeatedly throughout history.

85 In more recent times, the construction of the H-3 freeway has been characterized as a “travesty that destroyed dozens of cultural sites in both Hālawa and Kāne‘ohe and forever compromised those [sites] that were saved.”

86 In 1905, David Forbes, William Wagner, and an unnamed third man entered formerly secret burial caves in Kawaihae, Hawai‘i and removed countless sacred funerary objects. An extensive comment on the implications of these actions and the Native American Graves Protection and Repatriation Act is available by Craig W. Jerome, Comment, Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, Hawai‘i, 29 U. HAW. L. REV. 163 (2006). The largest excavation of pre-contact Native Hawaiian bones took place in 1938, in preparation for the construction of the Kane‘ohe Marine Corps Base. Over 1,600 iwi kūpuna were removed from sand dunes on the Mōkapu peninsula by Bishop Museum archaeologist Kenneth Emory and University of Hawai‘i’s Gordon Bowles. Hui Malama, supra note 78.

87 Omandam, supra note 5 (The author added the necessary ‘okina to the quote). See also HĀLAWA-LULUKU INTERPRETATIVE DEVELOPMENT, CULTURAL LANDSCAPE INVENTORY REPORT VOL. 2 STRATEGIC PLAN HĀLAWA-LULUKU INTERPRETATIVE DEVELOPMENT PLAN 5-8 (Jan. 5, 2006) available at http://www.oha.org/pdf/hlid/CLIRJan2006.pdf (“[t]he presence of the H-3 with its footprint in the [taro patch] would have been a terrible offense to the traditions of Kāne and the [farmers] who cultivated the land and depended on their relationship with those things associated with Kāne for the health of their crops.”). In North Hālawa Valley alone, at least sixty-eight ancient site complexes have been identified thus far. Kāwika Makanani in PANA O’AHU SACRED STONES, SACRED LAND (Jan Becket et al. eds., 1999).

88 Kukuikāne heiau is also spelled “Kukui o Kāne.” Hawaiian Studies Professor Lilikalā Kame’eleihiwa explained that Kukuiokāne was “probably the island’s largest heiau, dedicated to the Hawaiian agricultural god Kāne, who in earlier times was associated with large temples and human sacrifices.” Conversely, the State of Hawai‘i argued that the large stone structures and burials discovered at the site were likely part of a large dryland agricultural terrace. Omandam, supra note 5. This heiau was destroyed by
construction of the freeway and lies beneath tons of concrete. University of Hawai‘i at Mānoa Hawai‘ian Studies Professor Lilikalā Kame‘eleihiwa, Ph.D., lamented, “We lost an incredible treasure of the Hawai‘ian ancestors. Every time somebody drives over it, they are driving over the bones that have been buried at that heiau.” The State of Hawai‘i contracted for over $22 million in archeological work related to that project, but two-thirds of the final archaeological surveys weren’t complete at the time of the freeway’s opening. In fact, at the date of this publication, the archaeological surveys are still not complete for that project.

H-3 freeway planners put the cart before the horse by not completing archaeological surveys before design and construction of the freeway began... with surveys in hand, officials could have determined if certain sites needed to be preserved thereby avoiding the costly physical realignments done at Kukuiokalane, Hale O Papa and Luakini heiau sites.

Following years of litigation, unnecessary delay, and desecration, SHPD — the principal agency charged with protecting iwi kūpuna — in 1990 bulldozers were allowed to “level the top of it, cover it with dirt, and pave it over for the H-3 freeway.” Kēhau Abad, Introduction: What Is a Heiau? in PANA O‘AHU SACRED STONES, SACRED LAND (Jan Becket et al. eds., 1999).

89 Omandam, supra note 5.

90 Id.

91 Id. Archaeological reports conducted by Bishop Museum for the Hawai‘i State Department of Transportation and Federal Highways Administration for the Interstate Route H-3 available at http://www.bishopmuseum.org/research/cultstud/h3reports.html.


93 Omandam, supra note 5 (Statement of Ross Cordy, then SHPD branch chief of archeology). Cordy further explained that “historic preservation wasn’t integrated into the project until after August 1987, when the Federal Highways Administration, state Transportation Department, State Historic Preservation Office, the Advisory Council on Historic Preservation and the Office of Hawaiian Affairs signed a memorandum of agreement on archaeological resources on the H-3 project.” Id.

proclaimed “we [are] not going to approve any project until we have an actual survey report in our hands.”

As the H-3 freeway was being constructed, the catalyst for legislative protection of iwi kūpuna emerged in 1988 when “over 1,100 ancestral [N]ative Hawaiian burials consisting of men, women, children, and infants were systematically excavated and removed from their resting places” in the sand dunes overlooking Honokahua Bay on Maui to make way for construction of the Ritz-Carlton Kapalua Resort. “The exumation activities drew significant attention to Native Hawaiian burial issues and a kāhea [call to action] resulted in a deeper consciousness among Native Hawaiians regarding their cultural and moral obligation to protect and care for nā iwi kupuna.”

The Hawai‘i State Legislature responded by taking a series of steps to better protect iwi kūpuna. In 1989, Act 324 removed SHPD from the State Parks Division and established SHPD as a separate division of the Department of Land and Natural Resources (“DLNR”). SHPD obtained the additional mandate of evaluating and managing burial sites. In

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95 Omandam, supra note 5.

96 Archaeologists estimated that the remains of over 1000 individuals represented approximately half of those buried there. Hall, supra note 79.

97 Nā Iwi Kūpuna, supra note 56. See also Statement of Cliff Naeole, (translations and emphasis are sic), available at http://hawaii.gov/dlnr.hpd/naiwikupuna.htm. (last visited on Apr. 7, 2010) (“Honokahua changed the history of Hawai‘i. They have set precedent that we will never ever go back to this complacency and complete disregard for the iwi of our kupuna. Honokahua has created the laws, Honokahua IS the law, this stands as the kahili (feather standard, a sign of royalty) for all burial sites from here on to perpetuity. This is the battleground, this is the piko (navel, umbilical cord) of these new laws.”).

98 “Kāhea” means “to call, cry out.” PUKUI & ELBERT, supra note 8, at 111.

99 NATIVE HAWAIIAN LAW, supra note 25, at 16-5.


101 Act 324, Sess. Laws Haw. (1989) (codified in HAW. REV. STAT. § 6E-3 (2009)). DLNR is a state agency charged with “manag[ing] and administ[ing] the public lands of the State and minerals thereon and all water and coastal areas of the State except the commercial harbor areas of the State, including the soil conservation function, the forests and forest reserves, aquatic life, wildlife resources, state parks, including historic sites, and all activities thereon and therein including, but not limited to, boating, ocean recreation, and coastal areas programs.” HAW. REV. STAT. § 26-15(b) (2009).

1990, Act 306\textsuperscript{103} was passed to augment these procedures with respect to the proper protection and care of Native Hawaiian burial sites.\textsuperscript{104} This Act was carefully designed to “ensure[,] input by Native Hawaiians in the consultation and decision-making process,”\textsuperscript{105} and most notably, Act 306 established island burial councils as “vehicles for effective communication between the [SHPD] and the community regarding the protection, treatment and management of Native Hawaiian burial sites.”\textsuperscript{106}

C. Kaka'ako: Ground Zero for Native Hawaiian Burials

Kaka'ako lies in the greater Honolulu area on the island of O'ahu,\textsuperscript{107} it is a 600-acre district bounded by Pi'ikoi, King, and Punchbowl Streets, and Ala Moana Boulevard.\textsuperscript{108} The district also includes the waterfront area from Kewalo Basin to Forrest Avenue.\textsuperscript{109} This district has been a site of contention in recent years, and a battleground between new development needs and the protection of iwi kūpuna.\textsuperscript{110} In fact, over the last twenty years, thousands of Native Hawaiian burials have been discovered in the greater Kaka'ako area.\textsuperscript{111}
“Kaka’ako was once a thriving community, with agricultural terraces, residents of ali‘i [royalty] and docks for foreign ships.” It “was a place of recreation – particularly around the shoreline. The waters were used for cleansing, fishing, canoe landings and religious practices.” In 1853, sailors arriving on a foreign ship brought smallpox, infecting thousands of Native Hawaiians. Large numbers of Native Hawaiians succumbed to the illness and were buried in shallow graves in the Kaka’ako area.

111 The most significant finds to date were the Honuakaha Smallpox Cemetery at South Street and Quinn Lane, where more than 1,000 iwi kūpuna were unearthed. Nina Wu, Kakaako Rich with Hawaiian History, HONOLULU ADVERTISER, Aug. 3, 2007, available at http://archives.starbulletin.com/2007/08/03/business/story03.html (the author notes that the article title lacks the necessary ‘okina).


113 Wu, supra note 111 (Statement of Lurline Naone-Salvador, Native Hawaiian cultural consultant). The first king to unite the Hawaiian Islands, Kamehameha I, had a residence in Kaka‘ako, “along with his family, and personal kahuna [(priest, minister)], Hewahewa, who was his chief advisor.” Id. See also PUKUI & ELBERT, supra note 8, at 114; see infra Exhibit 3 (Pictures of historic Kaka‘ako).

114 Wu, supra note 111 (Statement of Lurline Naone-Salvador, Native Hawaiian cultural consultant) (“Selected individuals were drowned in the waters of Kewalo and then taken to Punchbowl and offered as sacrifices.”).

115 Id.

116 Id. Archaeological records reveal that “bodies were packed close, in the later stages of the epidemic[,] graves were just dug wide enough to admit the corpse lying on its side. In many places the sandy earth settled, with promise of even more sinking to come with the rainy season and graves averaged only three feet deep.” Rosemarie Bernardo, The Kakaako Fire Houses: Are They Haunted?, HONOLULU STAR-BULLETIN, Aug. 18, 2002, available at http://archives.starbulletin.com/2002/08/18/news/story1.html (the author notes that the article title lacks the necessary ‘okina).
According to the district’s development guidance policy, Kaka‘ako’s “historic sites and culturally significant facilities, settings, or locations shall be preserved.”

Today, Kaka‘ako is described by some as a “hotbed of development, and home to several shiny, high-rise residential towers and retail centers.” As a result of this economic influx, developers have repeatedly unearthed Native Hawaiian burial sites during construction in this area, which has led to litigation, delay, and controversy.

D. Basic Overview of Rail Project

Rail transit on O‘ahu has a long history beginning with the O‘ahu Railway and Land Company system, which operated between 1890 and 1947, and connected ‘Ewa and Honolulu. Subsequent attempts to


118 Wu, supra note 111 (Statement of Lurline Naone-Salvador, Native Hawaiian cultural consultant). HCDA plays an important role in the revitalization and redevelopment of the Kaka‘ako area. It envisions itself as “the creator and leader to establish Kaka‘ako as the most desirable urban place in Hawai‘i in which people can work, live, visit, learn, and play.” HCDA’s mission with respect to Kaka‘ako is “to ensure that the Kaka‘ako District is invigorated and established as a dynamic urban neighborhood, one which will accommodate a mix of people with a wide spectrum of activities and commerce. In doing so, HCDA serves as an infrastructure developer, landowner, city planner, regulator, and property manager to expeditiously implement Kaka‘ako’s master plan.” Hawai‘i Community Development Authority, About Kaka‘ako, available at http://hcdaweb.org/kakaako/about-kakaako-1/ (last visited Apr. 10, 2010).

119 See Kelly v. State, 111 Haw. 205, 140 P.3d 985 (2006) (holding that the public trust duties imposed on the State of Hawai‘i are also applicable to the counties); Hui Mālama i Nā Kūpuna o Hawai‘i Nei v. Wal-Mart, Inc., Civ. No. 03-1-0011-12 (Haw. 1st Cir. 2003) (holding that Wal-Mart was not liable for any alleged violations of State burial laws during the construction, where the site of the store had been previously developed); Kaleikini v. Thielin, Civ. No. 07-1-067-01 (Haw. 1st Cir. Jan. 10, 2007) (where sixty-five burials were found in Kaka‘ako at the site of a proposed Whole Foods supermarket); Brescia v. Edens-Huff, Civ. No. 08-1-0107 (Haw. 5th Cir. Oct. 2, 2008) (Order Granting in Part and Denying in Part Defendant’s Motion for Preliminary Injunction).


121 For a more detailed history of the conditions that led to the Rail Project on O‘ahu see CITY AND COUNTY OF HONOLULU, HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT DRAFT ENVIRONMENTAL IMPACT STATEMENT, CHAPTER ONE, BACKGROUND, PURPOSE AND NEED, 1-1 to 1-3 (2008), available at http://www.honolulutransit.org/library/files/chapter%201.pdf [hereinafter RAIL DEIS BACKGROUND]. See also infra Part IV(A). Honolulu also had an extensive trolley system. See MACKINNON SIMPSON & JOHN BRIZDLE, STREETCAR DAYS IN HONOLULU BREEZING THROUGH PARADISE (JLB Press, 2000).
revive a rail transit system on O‘ahu failed for various reasons. In 2005, the passage of Act 247 by the State Legislature enabled the City and County of Honolulu (“City”) to move forward with plans for a new rail system. “With dedicated, secure local funding established for the first time, the City began the Alternatives Analysis [“AA”] process to evaluate high-capacity transit alternatives in the study corridor between Kapolei and UH Mānoa” (the University of Hawai‘i at Mānoa) and has continued the environmental and historic preservation review processes ever since.

Currently, the proposed Rail Project’s initial route will occupy an approximately twenty-mile corridor from Kapolei to Ala Moana Center in Honolulu. The proposed route passes through Kaka‘ako via Halekauwila Street.


123 Act 247, Sess. Laws Haw. (2005) (codified in HAW. REV. STAT. § 46-16.8 (2009)). See also RAIL DEIS BACKGROUND, supra note 121 at 1-3 to 1-4 (“The Act authorized the County [of Honolulu] to levy a GET surcharge to construct and operate a mass transit project serving O‘ahu. The City Council subsequently adopted Ordinance 05-027 to levy a tax surcharge to fund public transportation.”).

124 Pursuant to the National Environmental Policy Act and the Hawai‘i Environmental Policy Act, the City’s AA phase “evaluated a range of transit mode and general alignment alternatives in terms of their cost, benefits, and impacts.” CITY AND COUNTY OF HONOLULU, HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT DRAFT ENVIRONMENTAL IMPACT STATEMENT, CHAPTER TWO, ALTERNATIVES CONSIDERED, 2-1(2008), available at http://www.honolulutransit.org/library/files/chapter%202.pdf [hereinafter RAIL DEIS ALTERNATIVES].

125 RAIL DEIS BACKGROUND, supra note 121 at 1-1 to 1-3. See infra Exhibit 4 (Map of proposed rail route).

126 City and County of Honolulu, Honolulu Rail Transit, Frequently Asked Questions, http://www.honolulutransit.org/faqs/ (last visited Apr. 10, 2010) (“The first line will run from Kapolei to Ala Moana Center, with stops including U.H. West O‘ahu, Waipahu, Leeward Community College, Pearl City, Pearlridge, Aloha Stadium, Honolulu International Airport, Kalihi, Honolulu Community College, downtown, and Kaka‘ako. Expansions may include service to Salt Lake, UH Manoa, Waikiki, and Kalaeloa.”) (The prior quote lacks the necessary kahakō).

127 CITY AND COUNTY OF HONOLULU, ARCHAEOLOGICAL RESOURCES TECHNICAL REPORT HONOLULU HIGH-CAPACITY TRANSIT PROJECT A-22 (2008) [hereinafter ARCHAEOLOGICAL REPORT].
II. LEGAL PROTECTIONS FOR IWI KŪPUNA

The Federal Transit Administration ("FTA") is the lead federal agency on the Rail Project. Due to the City’s receipt of federal funding for this project, its planning and construction must comply with both State and Federal historic preservation regulations, including Section 106 of the National Historic Preservation Act ("NHPA"), the National Environmental Policy Act ("NEPA"), Section 4(f) of Department of Transportation Act of 1966, State of Hawai‘i environmental and historic preservation review legislation, State of Hawai‘i burial laws, and the . . . Archaeological Resource Protection Act (“ARPA”) and the Native American Graves Protection and Repatriation Act (“NAGPRA”) if applicable.

The legal framework concerning the Rail Project is extremely complex, which makes it nearly impossible to survey all applicable laws. For purposes of this analysis, the relevant portions of the laws that are most directly implicated in the protection of iwi kūpuna are analyzed. See infra Part III(A).

Lead agencies are “responsible for managing the environmental review process and the preparation of the appropriate environmental review documents.” 23 C.F.R. § 771.109(c)(1) (2010). The FTA is an administration within the U.S. Department of Transportation. 49 U.S.C. § 107 (2010).

See Letter from Leslie T. Rogers, Regional Administrator, U.S. Department of Transportation, Federal Transit Administration, to Peter T. Young, State Historic Preservation Officer and Chairperson, Department of Land and Natural Resources (June 6, 2006) (on file with author). Specifically, the City’s Department of Transportation Services (“DTS”) is “responsible for implementing activities associated with the [Rail] project including historic preservation act regulations. FTA has delegated DTS the authority work directly with [DLNR] on FTA’s behalf, pursuant to 36 C.F.R. 800.3-4.” Id. However, FTA remains “legally responsible for all findings and determination[s] pursuant to 36 C.F.R. 800.” Id.

ARPA is the primary federal statute governing the regulation of archaeological resources and “protects archaeological resources that are at least 100 years old and located on tribal and public lands, including U.S. military installations.” See Archaeological Resources Protection Act, 16 U.S.C. § 470aa-470mm (2010). This law also “establishes a permitting procedure to regulate the excavation and investigation of applicable archaeological resources.” Id. See also Roberto Iraola, The Archaeological Resources Protection Act – Twenty Five Years Later, 42 DU Q. L. REV. 221 (2004). The City concluded that “although possible, it is less likely that [Rail] [P]roject-related archaeological investigations would require an [ARPA] permit because these investigations would likely be completed under the aegis of a Federal contract.” ARCHAEOLOGICAL REPORT, supra note 127, at 2-2.

NAGPRA provides comprehensive requirements for the treatment of Native American and Native Hawaiian graves and other cultural items such as funerary objects, religious objects, and objects of cultural patrimony found on federal and tribal lands. Most notably, this law provides for the repatriation, disposition, and protection of these
A. Federal Legal Framework

The principal federal legal framework applicable to the Rail Project includes NEPA, NHPA, and Section 4(f) of the Department of Transportation Act of 1966. An overview of the function of the National Register of Historic Places and the concept of “traditional cultural properties” is also essential for a complete understanding of the federal historic preservation regulatory framework. This section will discuss the relevant portions of these federal laws with particular emphasis on their application regarding the protection of iwi kūpuna.  

1. National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (“NEPA”) is the federal government’s principal environmental disclosure law. NEPA is

- Compliance with ARPA and NAGPRA may be required because the Rail Project “may involve investigation, use, and/or appropriation of Federal lands (e.g., land from U.S. military installations).” ARCHAEOLOGICAL REPORT, supra note 127, at S-1.

133 See infra Parts III(A)(i)-(iii-iv).

134 See infra Parts III(A)(i)-(iii-iv).

135 See infra Part III(A)(iii).

136 See infra Part III(A).

137 See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2010). In the context of the Rail Project and its effect on iwi kūpuna, the expansive NEPA process will be focused to emphasize NEPA’s requirement of scoping and the use of NEPA documents to satisfy compliance with other historic preservation laws implicated in the protection of iwi kūpuna, such as NHPA and Section 4(f) of the Department of Transportation Act of 1966.

138 See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370. See also THOMAS F. KING, CULTURAL RESOURCE LAW & PRACTICE 55 (AltaMira Press 3rd ed. 2008). Hawai‘i’s environmental disclosure law, the Hawai‘i Environmental Policy Act (“HEPA”), is set forth in HAW. REV. STAT. chapter 343. The main difference between HEPA and NEPA is HEPA applies to projects that are subject to state or county funding or permits and NEPA applies to projects that are subject to federal funding or permits. Compare 42 U.S.C. § 4332(2)(C) (stating that an environmental impact statement is required for “every Federal action significantly affecting the quality of the
an expansive umbrella that provides a process to address cultural resource management, pollution prevention, clean water, and “all types of resources having anything to do with the way people relate to the built and natural environment.” It establishes a mandate for federal agencies, such as the FTA, to consider the possible environmental consequences of a proposed project, document this analysis, and make this information publicly available for comment prior to implementation. Specifically, NEPA provides that all federal agencies shall “include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official” on:

(i) the environmental impact of the proposed action;
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
(iii) alternatives to the proposed action;
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

environment”) with HAW. REV. STAT. § 343-5 (outlining the applicability and requirements of HEPA, which includes both private and public projects subject to state or county funding or permits). See generally HAW. REV. STAT. Chapter 343. For more background information about HEPA requirements, see generally Jordon J. Kimura, The Environmental Assessment: Issues Surrounding the Exclusion of Projects Significantly Affecting Hawai'i’s Fragile Environment, 10 ASIAN-PAC. L. & POL’Y J. 168 (2008) (discussing HEPA generally and in the context of environmental assessments).


To comply with NEPA’s mandates, the FTA promulgated policies and procedures with the Federal Highway Administration (“FHWA”), which are set forth in 23 C.F.R. §§ 771.101-771.139. FTA’s policy is that “public involvement and a systematic interdisciplinary approach [are] essential parts of the development process for proposed actions.” In implementing NEPA mandates, FTA employs “a wide range of partners including the public, businesses, interest groups, and agencies at all levels of government, [to] provide input into project and environmental decisions.”

FTA also recognizes that “early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements.”

To comply with NEPA’s mandates, the City must prepare an Environmental Impact Statement (“EIS”) for the Rail Project, and a “Class I” action under FTA’s regulations. Once FTA decides that it will proceed with an EIS for a proposed project, a “Notice of Intent,” pursuant to 40 C.F.R. § 1508.22, should be published in the Federal Register. After this publication, the lead agency (the FTA), in cooperation with the applicant (the City & County of Honolulu), will begin a scoping process in accordance with 23 C.F.R. §§ 450.212 and 771.105(c).


An EIS is a “detailed written statement as required by section 102(2)(C) of [NEPA].” 40 C.F.R. § 1508.11. “The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined [by NEPA] are infused into the ongoing programs and actions of the Federal Government.” Id. § 1502.1.

Class I actions include “new construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).” 23 C.F.R. § 771.115(a)(4).

“Notice of Intent” means “a notice that an [EIS] will be prepared and considered. The notice shall briefly: (a) Describe the proposed action and possible alternatives. (b) Describe the agency’s proposed scoping process including whether, when, and where any scoping meeting will be held. (c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.” 40 C.F.R. § 1508.22.

23 C.F.R. § 771.123(a).
The scoping process, which must occur openly and early, is essential “to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve other objects of 40 C.F.R. § 1501.7.” Within FTA, “scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings.”

In November 2008, the City prepared a Draft Environmental Impact Statement (“DEIS”) for the Rail Project. The DEIS “evaluate[d] all reasonable alternatives to the action and discuss[ed] why other alternatives, which may have been considered, were eliminated from detailed study.” It also “summarize[d] the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate.” When a DEIS is approved by the FTA as satisfying all NEPA requirements, it will be circulated for comment to many bodies, including the public and “[f]ederal, state, or local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action.” Next, FTA will hold a public hearing in accordance with 23 C.F.R. § 771.123(h).

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149 Id. § 771.123(b).

150 See 40 C.F.R. § 1501.7. To comply with NEPA’s mandates, “there shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” Id.

151 Id. § 771.123(b).

152 23 C.F.R. § 771.123(b) (emphasis added). “If a scoping meeting is to be held, it should be announced in the Administration’s Notice of Intent and by appropriate means at the local level.” Id.

153 The City’s DEIS for the Rail Project can be accessed at http://www.honolulustransit.org/library/files/chapter%201.pdf (last visited Apr. 18, 2010).

154 23 C.F.R. § 771.123(c).

155 Id.

156 Id. § 771.123(g)(2).

157 “Whenever a public hearing is held, the [DEIS] shall be made available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the [DEIS] shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for [FTA] funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the [DEIS] is available for review, how many copies may be obtained, and where the comments should be sent.” Id. § 771.123(h).
For projects such as the Rail, FTA “may give approval to begin preliminary engineering on the principal alternative(s) under consideration after circulation of a [DEIS] and consideration of comments received.”\textsuperscript{158} After the DEIS is circulated and comments are received, the City begins preparation of a Final Environmental Impact Statement (“FEIS”), which “shall identify the preferred alternative and evaluate all reasonable alternatives considered.”\textsuperscript{159} The FEIS will be “reviewed for legal sufficiency prior to” FTA approval.\textsuperscript{160} Following this approval, a record of decision (“ROD”) is issued, which will “present the basis for the decision as specified in 40 C.F.R. § 1505.2,[\textsuperscript{161}] summarize any mitigation measures that will be incorporated in the project, and document any required Section 4(f) approval.”\textsuperscript{162}

Federal agencies “shall integrate the NEPA process with other planning at the earliest possible time to ensure planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”\textsuperscript{163} The Rail Project’s planning and construction must comply with a myriad of state and federal regulatory frameworks, therefore, streamlining and integrating the requirements of the various laws, when possible, is especially useful.\textsuperscript{164}

\textsuperscript{158} Id. § 771.125(a)(1).

\textsuperscript{159} Id. The FEIS should also “discuss substantive comments received on the [DEIS] and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action.” Id.

\textsuperscript{160} Id. § 771.125(b).

\textsuperscript{161} 40 C.F.R. § 1505.2 requires that RODs: (1) “[s]tate what the decision was”; (2) “[i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision”; (3) “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.” Id.

\textsuperscript{162} 23 C.F.R. § 771.127(a). For more detail on Section 4(f) requirements, see infra Part III(A)(iv).

\textsuperscript{163} 40 C.F.R. § 1501.2.

\textsuperscript{164} See id.
2. National Register of Historic Places and Traditional Cultural Properties

The National Register of Historic Places ("National Register") is the primary vehicle to identify and protect historic resources in the federal historic preservation framework. It is the official list of historic resources at the national level and "includes districts, sites, buildings, structures, and other objects that are significant in American history, archaeology, engineering, and culture" with national, state, or local significance. National Register and National Register-eligible sites trigger review under state and federal historic preservation laws.

A traditional cultural property ("TCP") is a property that may be "eligible for inclusion on the National Register because of its association with cultural practices or beliefs of a living community that: (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community." This concept is

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166 See 36 C.F.R. § 60.2 (2010) ("[t]he National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation’s cultural resources and to indicate what properties should be considered for protection from destruction or impairment."). The counterpart in the state historic preservation regulatory framework is the Hawai‘i Register of Historic Places. See HAW. ADMIN. R. §13-198 (2010).

167 See 1-2 JULIA HATCH MILLER & DOROTHY M. MINER, ENVIRONMENTAL LAW PRACTICE GUIDE § 2.02 (2009). See also 36 C.F.R. §§ 60.1-60.15 (2010).

168 See 36 C.F.R. § 60.2(a), which provides that "[f]ederal agencies undertaking a project having an effect on a listed or eligible property must provide the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment pursuant to section 106 of [NHPA]." NHPA enabled the establishment of the ACHP, an independent federal agency charged with oversight and implementation of the federal program governing historic properties. See 16 U.S.C. § 470(i)(a). See also Advisory Council on Historic Preservation, http://www.achp.gov (last visited Apr. 17, 2010). The triggering criteria for state review under HAW. REV. STAT. § 6E is more expansive than the federal standard. See infra note 179.

169 PATRICIA L. PARKER & THOMAS F. KING, NAT’L PARK SERV., GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES, NATIONAL REGISTER BULLETIN # 38 1 (1998), available at http://www.nps.gov/history/nr/publications/bulletins/pdfs/nrb38.pdf [hereinafter TCP Bulletin]. The U.S. Department of Interior acknowledges that “properties to which traditional cultural value is ascribed often take on this kind of vital significance, so that any damage to or infringement upon them is perceived to be deeply offensive to, and even destructive of, the group that values them.” Id. The purpose of Bulletin #38 was “to guarantee for traditional communities the right to use the National Register and the Section 106 process to make sure that such communities had access to the same planning tools that everybody else has.” THOMAS KING, PLACES THAT COUNT 36 (Alta Mira Press
especially important to Native Hawaiian burials and other sacred sites.\textsuperscript{170} TCPs “should be considered carefully in planning; hence, it is important that such properties, when they are eligible for inclusion in the National Register, be nominated to the Register or otherwise identified in inventories for planning purposes.”\textsuperscript{171}

A TCP must be a tangible property.\textsuperscript{172} The “relationship between the property and the beliefs or practices associated with it should be carefully considered . . . since it is the beliefs and practices that may give the property its significance and make it eligible for inclusion in the National Register.”\textsuperscript{173} When evaluating a potential site as a TCP, it is important to understand that “a property may retain its traditional cultural significance even though it has been substantially modified” and “some kinds of cultural significance also may be retained regardless of how the surroundings of a property may be changed.”\textsuperscript{174} In addition, the integrity of a TCP, “must be considered with reference to the views of cultural practitioners; if its integrity has not been lost in their eyes, it probably has sufficient integrity to justify further evaluation.”\textsuperscript{175}

In addition to evaluating whether a TCP has retained its integrity, a site must also be evaluated with reference to the four National Register criteria to be eligible for inclusion on the National Register.\textsuperscript{176} “If a property meets one or more of the criteria, it may be eligible [for inclusion

\begin{footnotes}
\footnote{2003) \textit{hereinafter PLACES THAT COUNT}.}

\footnote{\textsuperscript{170} See \textit{PLACES THAT COUNT}, \textit{supra} note 169 (“[t]here are populations who need more help in protecting their TCPs than others do. Among those populations are . . . Native Hawaiian groups . . . because their cultural interests . . . are easily bowled over by the interests of the majority society.”).}

\footnote{\textsuperscript{171} TCP Bulletin, \textit{supra} note 169, at 2. Further, the Bulletin provides that “[TCPs], and the beliefs and institutions that give them significance, should be systematically addressed in programs of preservation planning and in the historic preservation components of land use plans.” \textit{Id}.}

\footnote{\textsuperscript{172} \textit{Id}.}

\footnote{\textsuperscript{173} \textit{Id}. at 11 (emphasis added). A TCP must also have “integrity of location, design, setting, materials, workmanship, feeling, and association.” \textit{Id}. Integrity includes integrity of relationship and integrity of condition. \textit{Id}. In evaluating the integrity of relationship prong, if the property “is known or likely to be regarded by a traditional cultural group as important in the retention or transmittal of a belief, or to the performance of a practice, the property can be taken to have an integral relationship with the belief or practice, and vice-versa.” \textit{Id}. at 11-12.}

\footnote{\textsuperscript{174} \textit{Id}. at 11.}

\footnote{\textsuperscript{175} \textit{Id}. at 12.}

\footnote{\textsuperscript{176} \textit{Id}.}
in the National Register]; [however,] if it does not, it is not eligible" and does not trigger historic preservation review.  

As mentioned above, there are four National Register criteria for evaluating properties, labeled “A” through “D.” Criterion D is described as the “archaeologist’s fave” because it makes clear that “a place is eligible if it contains – or may contain – information significant in history or prehistory.” Within the federal historic preservation framework, criterion D is particularly applicable to Native Hawaiian burial sites, although according to Native Hawaiians, this is not the sole reason for a burial’s significance.

The FTA, in consultation with SHPD, determined that the Rail Project may adversely affect archaeological sites listed or eligible for

177 Id.

178 See id.

179 See 36 C.F.R. § 60.4. The criteria and procedures for evaluating properties for addition to the National Register were promulgated by the Secretary of the Interior. Id. “The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, periods, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.” Id. The criteria for listing on the Hawai‘i Historic Register is expanded to include the National Register criteria (a) through (d), as well as: (1) the “environmental impact, i.e., whether the preservation of the building, site, structure, district, or object significantly enhances the environmental quality of the State; and (2) the “social, cultural, educational, and recreational value of the building, site, structure, district, or object, when preserved, presented, or interpreted, contributes significantly to the understanding and enjoyment of the history and culture of Hawai‘i, the pacific area or the nation.” HAW. ADMIN. R. § 13-198-8 (2010).

180 KING, supra note 138, at 92.

181 Id.

182 Letter from Kāwika McKeague, Chair, O‘ahu Island Burial Council, Hinaleimoana Falamei, Vice Chair, O‘ahu Island Burial Council, and Kēhaunani Abad, Ph.D., Rail Transit Task Force Chair, O‘ahu Island Burial Council, to Leslie T. Rogers, Regional Administrator, U.S. Department of Transportation (Oct. 18, 2009) (on file with author) [hereinafter OIBC Objection Letter to USDOT]. See also TCP Bulletin, supra note 169, at 14 (noting that “a [TCP’s] history of yielding, or potential to yield, information, if relevant to its significance at all, is secondary to its association with the traditional history and culture of the group that ascribes significance to it.”). See generally, supra Part II.
listing in the National Register.\textsuperscript{183} The City will undertake a TCP study to determine the presence of TCPs within the Area of Potential Effects (\textquotedblleft APE\textquotedblright\textsuperscript{184}) for the Rail Project.\textsuperscript{185}

3. Section 106 of the National Historic Preservation Act

The National Historic Preservation Act\textsuperscript{s} (\textquotedblleft NHPA\textquoteright s\textquotedblright) passage in 1966 established the federal government\textquoteright s policy on historic preservation\textsuperscript{186} and acknowledged that \textquotedblleft historic properties significant to the Nation\textquoteright s heritage [we]re lost or substantially altered, often inadvertently, with increasing frequency.\textsuperscript{187} The NHPA directs the federal government to actively promote historic preservation by providing financial and technical assistance in the preservation of prehistoric and historic resources, and by assisting other units of government, including other nations as well as state and local governments, and private organizations and individuals, in their preservation efforts.\textsuperscript{188}

NHPA Section 106 (\textquotedblleft Section 106\textquotedblright) provides a review process that attempts to square historic preservation concerns with the needs of federal undertakings\textsuperscript{189} by addressing the effects\textsuperscript{190} of those undertaking on

\begin{itemize}
  \item Programmatic Agreement between U.S. Department of Transportation Federal Transit Administration, Hawai\textut{`}i State Historic Preservation Officer, and the Advisory Council on Historic Preservation regarding the Honolulu High-Capacity Transit Corridor Project in the City and County of Honolulu, Haw. (Nov. 17, 2009) (on file with author) [hereinafter Programmatic Agreement].
  \item \textsuperscript{184} “Area of Potential Effects” means “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if such properties exist. The [APE] is influenced by the scale and a nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” 36 C.F.R. § 800.16 (2010).
  \item Programmatic Agreement, \textit{supra} note 183.
  \item 16 U.S.C. § 470-1.
  \item \textit{Id.} § 470(b)(3).
  \item MILLER \& MINER, \textit{supra} note 167. NHPA also makes the Secretary of the Interior accountable for maintaining the National Register. 16 U.S.C. §§ 470a(a)-(j).
  \item The term “undertaking” means “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y).
  \item “Effect” means “alteration to the characteristics of a historic property
\end{itemize}
historic properties through early consultation\textsuperscript{191} among agency officials\textsuperscript{192} and other parties.\textsuperscript{193} It “requires that federal agencies take into account the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation [(“ACHP”)]\textsuperscript{194} a reasonable opportunity to comment regarding such undertakings.”\textsuperscript{195} The agency official “shall involve the consulting parties . . . in findings and determinations made during the [S]ection 106 process” and plan those consultations “appropriate to the scale of the undertaking and the scope of the [f]ederal involvement and coordina[t]e with other requirements of other statutes, as applicable, such as [NEPA], [NAGPRA], the American Indian Religious Freedom Act, [ARPA], and agency-specific legislation.”\textsuperscript{196}

qualifying it for inclusion in or eligibility for the National Register.” \textit{Id.} § 800.16(i).

\textsuperscript{191} Consultation is defined as, “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.” \textit{Id.} § 800.16(f). “Consultation” is “an active exchange of ideas and information between a federal agency and other Section 106 participants that seeks consensus about what eligible or listed archaeological sites may be affected by an undertaking; why those properties are significant and of value, and to whom; and how any adverse effect to them might be avoided, minimized, or mitigated.” \textsc{Advisory Council on Historic Preservation, Section 106 Archaeological Guidance 7} (2009), available at http://www.achp.gov/archguide [hereinafter ACHP GUIDANCE].

\textsuperscript{192} An “agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with [S]ection 106 in accordance with Federal law.” \textit{36 C.F.R.} § 800.2(a).

\textsuperscript{193} \textit{Id.} § 800.1.

\textsuperscript{194} NHPA enabled the establishment of the ACHP, an independent federal agency charged with oversight and implementation of the federal program governing historic properties. \textsc{See 16 U.S.C.} § 470(i)(a). \textsc{See also} Advisory Council on Historic Preservation, http://www.achp.gov (last visited Apr. 17, 2010).

\textsuperscript{195} Specifically, the law provides, “the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, to take into account the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the [ACHP] established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.” \textit{16 U.S.C.} § 470(f).

\textsuperscript{196} \textit{36 C.F.R.} § 800.2(a)(4).
Consulting parties under Section 106 include the State Historic Preservation Officer (“SHPO”), Indian tribes and Native Hawaiian organizations, representatives of local governments, applicants for federal assistance, permits, licenses, and other approvals, and the public. Section 106 is the “doorway through which consultation between federal agencies and Native Hawaiian individuals and organizations occur[s] regarding the effects of an agency’s undertaking and potential mitigation.” Agency officials must consult with any Native Hawaiian organization “that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” Specifically, the “agency official shall ensure that consultation in the [S]ection 106 process provides the . . . Native Hawaiian organization a reasonable opportunity” to:

i. “identify its concerns about historic properties[,]”

ii. provide advice on the “identification and evaluation of historic properties, including those of traditional and cultural importance[,]”

iii. “articulate its views on the undertaking’s effects on such properties[,]” and

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197 Hawai‘i’s SHPO is appointed by the governor. HAW. REV. STAT. § 6E-5 (2010). The SHPO is responsible “for the comprehensive historic preservation program” and serves as the “state liaison officer for the conduct of relations with the federal government and the respective states with regard to matters of historic preservation.” Id. In relation to Section 106, the SHPO “reflects the interests of the State and its citizens in the preservation of their cultural heritage” and “advises and assists [f]ederal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development.” 36 C.F.R. § 800.2(c).

198 Native Hawaiian organization means “any organization which serves and represents the interests of Native Hawaiians; has a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.” 36 C.F.R. § 800.16(s)(1). “Native Hawaiian” in the context of the federal Section 106 regulatory framework means “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i.” Id. § 800.16(s)(2).

199 See id § 800.2(c).


201 36 C.F.R. § 800.2(c)(2)(ii).
iv. “participate in the resolution of adverse effects.”

The ACHP recognizes that, “only through consultation, which is the early and meaningful exchange of information, can a federal agency make an informed and defensible decision about the treatment of burial sites, human remains, and funerary objects.” The ACHP takes the position that “burial sites, human remains, and funerary objects should not be knowingly disturbed unless absolutely necessary, and only after the federal agency has consulted and fully considered avoidance of impact and whether it is feasible to preserve them in place.”

Moreover, “it is the responsibility of the agency official to make a reasonable and good faith effort to identify . . . Native Hawaiian organizations that shall be consulted in the [S]ection 106 process.”

This consultation should “commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.” In addition, like NEPA, Section 106 compliance should be coordinated, as appropriate, with the “overall planning schedule for the undertaking and with any other authorities such as the [NEPA], [NAGPRA], American Indian Religious Freedom Act, the [ARPA] and agency-specific legislation, such as [S]ection 4(f) of the Department of Transportation Act.”

This coordination is critical for the public as well

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202 Id. § 800.2(c)(2)(ii)(A). Consultation with Native Hawaiian organizations and Indian tribes is important because they “may have important ideas about how best to do identification; they may know something about the area, and in any event, it’s wiser to involve them than to leave them carping on the sidelines.” King, supra note 138, at 124.


204 Id.

205 36 C.F.R. § 800.2(c)(2)(ii)(A). See also id § 800.3(f)(2) (an “agency official shall make a reasonable and good faith effort to identify any . . . Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the [APE] and invite them to be consulting parties.”).

206 Id. § 800.2(c)(2)(ii)(A). The Section 106 process seeks solutions “through consultation between the agency and other interested parties, and it has to start early if it’s going to be effective.” King, supra note 138, at 114.

207 36 C.F.R. § 800.3(b). “Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.” Id. Compare 40 C.F.R. § 1501.2 (requiring federal agencies to “integrate the NEPA process with other planning at the earliest possible time”) with 36 C.F.R. § 800.3(b) (encouraging coordination of Section 106 with NEPA, Section 4(f) of the Department of Transportation Act, and other laws).
as the consulting parties. The “public can be fully informed about the results of Section 106 review through its review of draft NEPA material, and the consulting parties under Section 106 can be fully informed of public views obtained by the agency through the NEPA process.”

Once a federal agency determines that Section 106 compliance is required, it satisfies its obligations by “following the review process set forth by the [ACHP], procedures set forth under a ‘programmatic agreement’ [(“PA”)], or an alternate process adopted by an individual agency that is consistent with the [ACHP’s] regulations.”

A PA is the most “extensively tested” Program Alternative and is a substitute for the usual Section 106 review process. A federal agency may negotiate a PA “to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.”

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208 See KING, supra note 138, at 186.

209 Id.

210 Obligations under Section 106 are satisfied by federal agencies by following the regulations set forth in 36 C.F.R. §§ 800.1-800.16. To determine whether Section 106 applies, the agency must decide whether it is engaged in an “undertaking” that could affect historic properties. Id. § 800.3(a).

211 The normal Section 106 process is set forth in 36 C.F.R. §§ 800.3-800.13 (2010).

212 36 C.F.R. § 800.16(t) (A “PA” is “a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a [f]ederal agency program, complex undertaking or other situations in accordance with § 800.14(b).”).

213 Id. § 800.14.

214 KING, supra note 138, at 191; see also Advisory Council on Historic Preservation, Programmatic Agreements, http://www.achp.gov/progalt/ (last visited Apr. 17, 2010) (This alternative “allows federal agencies to govern the implementation of a particular agency program or the resolution of adverse effects from complex projects or multiple undertakings similar in nature through negotiation of an agreement between the agency and the ACHP.”).

215 The normal Section 106 review process is very complex and contains multiple steps that are outlined in 36 C.F.R. §§ 800.3-800.13 (2010). For purposes of this comment, this review process will not be discussed in detail because for the Rail Project, the City decided to forgo the normal Section 106 process in favor of a PA pursuant to 36 C.F.R. §800.14(a)(4), which provides: “alternative procedures adopted pursuant to this subpart substitute for [ACHP’s] regulations for purposes of the agency’s compliance with section 106.”

A PA may be used:

i. When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

\[ \text{\textit{ii. When effects on historic properties cannot be fully determined prior to approval of an undertaking;}} \]

iii. When nonfederal parties are delegated major decision-making responsibilities;

iv. Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

v. Where other circumstances warrant a departure from the normal section 106 process.\(^\text{217}\)

The process of developing a PA must include consultation with Native Hawaiian organizations if the PA has the “potential to affect historic properties of religious or cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands.”\(^\text{218}\)

A PA takes effect when executed by the ACHP, the agency official, and the SHPO.\(^\text{219}\) In the context of the Rail Project, compliance with Section 106 will take place via a PA between the FTA, the Hawai‘i SHPO, the City, and the ACHP.\(^\text{220}\)

\(^{217}\) Id. (emphasis added).

\(^{218}\) Id. § 800.14(f)(1). Specifically, the results of such a consultation must be provided by the ACHP agency official as part of the documentation for the proposed program alternative and “the agency official and the [ACHP] shall take those views into account in reaching a decision on the proposed program alternative.” Id. § 800.14(f)(2). To date, ACHP has not yet accepted the November 2009 version of the Rail Project’s PA. Abad Interview Mar. 5, 2010, supra note 7.

\(^{219}\) 36 C.F.R. § 800.14(b)(2)(iii).

\(^{220}\) Programmatic Agreement, supra note 183. In October 2009, the Honolulu City Council voted 5-4 to authorize the City to enter into a PA for the project. B.J. Reyes. Rail ‘Programmatic’ Agreement Ok’d, HONOLULU STAR-BULLETIN, Oct. 28, 2009, available at http://www.starbulletin.com/news/20091028_Rail_programmatic_agreement_OKd.html. A major point of contention between the Council members was whether it was appropriate to authorize the City to sign the agreement before all of the terms of the agreement have been worked out. Id. City Councilman Romy Cachola stated, “I believe that by passing it, when we know that this agreement is incomplete, is not doing justice - especially to the Hawaiians.” Id. However, City Councilman Gary Okina, who voted to authorize the City’s signature to the PA, voiced concerns regarding further delay of the project, stating, “What's important here is any delay will cost the project money -- it will delay the project further.” Id. The City Council took such action via Resolution 09-036. Programmatic Agreement, supra note 183.
Section 106 also allows a phased approach, which defers the identification and evaluation of historic properties for undertakings where large land areas would be affected and access to potential historic properties would be restricted.\(^{221}\) The final identification and evaluation of historic properties may be deferred by an agency official only if it is specifically provided for in a Memorandum of Agreement,\(^{222}\) a PA,\(^{223}\) or the documents used by an agency official to comply with NEPA.\(^{224}\)

This phased process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties.  

The FTA, in consultation with SHPD, “determined that the [Rail] Project may adversely affect archaeological sites listed in or eligible for listing in the [National Register], but \textit{effects cannot be fully assessed prior to the approval of FTA financial assistance.}\(^{226}\)” Thus, the City, the SHPO, the ACHP, and FTA elected to defer the identification and protection of archaeological sites and burials and will employ a phased approach.\(^{227}\)

The City divided the Rail route into four construction phases.

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\(^{221}\) See 36 C.F.R. § 800.4(b)(2) (“[w]here alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts.”).

\(^{222}\) Memoranda of agreement must be executed pursuant to 36 C.F.R. § 800.6.

\(^{223}\) PA must be executed pursuant to 36 C.F.R. § 800.14.

\(^{224}\) NEPA documents must be executed pursuant to 36 C.F.R. § 800.8.

\(^{225}\) 36 C.F.R. § 800.4(b)(2).

\(^{226}\) Programmatic Agreement, \textit{supra} note 183 (emphasis added).

\(^{227}\) \textit{Id.}

\(^{228}\) The four construction phases are: Phase 1 – East Kapolei to Pearl Highlands (estimated construction to be commenced in 2010); Phase 2 – Pearl Highlands to Aloha Stadium (estimated construction to be commenced in 2011); Phase 3 – Aloha Stadium to Middle Street (estimated construction to be commenced in 2012); and Phase 4 – Middle
Archaeological fieldwork will be completed before each phase begins construction, however, construction will be ongoing in the preceding phase.229

4. Section 4(f) of the Department of Transportation Act of 1966230

Section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)") addresses federally-assisted transportation-related projects or programs and focuses specifically on actions by the U.S. Department of Transportation, including FHWA and FTA, which affect historic properties.231 Specifically, Section 4(f) provides:

The Secretary of Transportation may approve a transportation program or project requiring the use[232] of land of a historic site ... only if:

(1) there is no prudent[233] or feasible[234] alternative to

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229 Id.

230 49 U.S.C. § 303(c) (2010). Most notably, in the context of the Rail Project, concerns exist regarding the sufficiency of the City’s compliance with Section 4(f), given that identification of historic properties is deferred by the PA. Abad Interview Mar. 5, 2010, supra note 7. This may leave the Rail Project legally vulnerable under Section 4(f)’s demanding mandates. See generally Letter from Brian Turner, Regional Attorney, National Trust for Historic Preservation, to Leslie T. Rogers, Regional Administrator, Federal Transit Administration, and Wayne Yoshioka, Department of Transportation Services (Oct. 22, 2009) (on file with author) (“The City has already stated publicly that it expects a final decision approving the transit project will be challenged in court. In light of this prediction, it is surprising that the City would not act to reduce this legal vulnerability by completing the AIS prior to making a final decision on the project. We urge the [FTA] to consider this issue in the context of its own legal sufficiency review for this project . . . . If a determination of National Register eligibility would influence the agency’s selection of alternatives under Section 4(f) (and Section 106 and NEPA as well), then the identification of those historic properties, and the project’s potential effects on them, must be evaluated at a time when they can actually inform the selection of alternatives, rather than being deferred to a later date after alternatives have been foreclosed.”). The extent of this legal vulnerability is beyond the scope of this paper.

231 See MILLER & MINER, supra note 167.

232 See 23 C.F.R. § 774.17 (2010) (“Use of a [S]ection 4(f) property occurs: (1) when land is permanently incorporated into a transportation facility; or (2) when there is a temporary occupancy of land that is adverse in terms of the statute’s preservation purpose; or (3) when there is a constructive use” (a project’s proximity impacts are so severe that the protected activities, features, or attributes of a property are substantially impaired)). Constructive use determination regulations are set forth in 23 C.F.R. § 774.15 (2010).

233 See 23 C.F.R. § 774.17 (An alternative is not prudent if: “(i) It
using that land; and

(2) the program or project includes all possible planning[*235] to minimize harm to the … historic site resulting from the use.[*236]

The term “historic site” includes sites “in or eligible for inclusion” in the National Register, including properties of “traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization.”[*237]

To determine whether Section 4(f) applies to historic sites, “the [FTA], in cooperation with the applicant [(the City)], will consult with the SHPO and ACHP[*238] to identify all properties in or eligible for inclusion in the [National Register].”[*239] Section 4(f) applies to all archaeological sites in or eligible for inclusion in the National Register, including those discovered during construction, with a few exceptions.[*240] Archaeological sites in or eligible for inclusion in the National Register may be excluded from Section 4(f) applicability only if the FTA “concludes that the

compromises the project to a degree that it is unreasonable to proceed in light of its stated purpose and need; (ii) It results in unacceptable safety or operational problems; (iii) After reasonable mitigation, it still causes (A) Severe social, economic, or environmental impacts; (B) Severe disruption to established communities; (C) Severe disproportionate impacts to minority or low income populations; or (D) Severe impacts to environmental resources protected under other Federal statutes; (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude; (v) It causes other unique problems or unusual factors; or (vi) It involves multiple factors in [23 C.F.R. § 774.17(3)(i)-3(v)], that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.”).  

[*234] See id. (“An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.”).

[*235] See id. (“All possible planning” means that “all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.”); Id. § 774.17(2) (For historic sites, “measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.”).


[*238] See id. (“In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located . . . . When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource.”).

[*239] See id.

[*240] See id. § 774.13(f).
archaeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place … and the officials(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the [FTA]’s finding.” In the context of the Rail Project, such a conclusion by the FTA would be inappropriate given the deeply rooted and extensive cultural and historical significance of iwi kūpuna.

B. State Legal Framework

Although the PA, once executed, will be the primary legal authority to protect archaeological resources impacted by the Rail Project, such as iwi kūpuna, a description of Hawai‘i’s historic preservation legal framework is necessary to understand the roles and responsibilities of state entities such as the O‘ahu Island Burial Council (“OIBC”) once iwi kūpuna are unearthed during the Project’s construction. These protections include a myriad of constitutional and statutory provisions, such as Hawai‘i Revised Statutes Chapter 6E, which provides the principle framework for the protection of iwi kūpuna at the state level.


The Constitution of the State of Hawai‘i contains provisions regarding the protection of iwi kūpuna. The significance of cultural resources is recognized in the state’s “power to preserve and develop the cultural, creative, and traditional arts of its various ethnic groups.”

See id. § 774.13 (“[t]he portion of the document governing Section 4(f) compliance is referred to as the "section 4(f) statement.").

See supra Part II.

Because of the Rail Project’s potential to affect burial sites, prior to approving any permits for the Rail Project, the City is required to advise DLNR and allow DLNR an opportunity to review and comment on the effect of the project on burial sites. HAW. REV. STAT. § 6E-42 (2009).


See infra Part III(B)(ii)(2).

See infra Part III(B)(ii).

See generally HAW. CONST. art. IX, § 9; HAW. CONST. art. XII, § 7.

HAW. CONST. art. IX, § 9.
Further, state and county agencies are mandated to “protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”

2. Hawai‘i’s Burial Laws: Hawai‘i Revised Statutes Chapter 6E

Hawai‘i Revised Statutes Chapter 6E is the principal statutory framework for historic preservation at the state level, and implements the State’s public policy to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property.

The State Historic Preservation Program is designed to implement this important policy. In the context of protecting iwi kūpuna, program performance must “coordinat[e] the evaluation and management of burial sites as provided in section 6E-43.”

a. “Burial Sites” Defined

A burial site is “any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods if any, are interred, and its immediate surrounding archaeological context, including any associated surface or subsurface features, deemed a unique class of historic property, and not otherwise included in section 6E-41, HRS.” Hawai‘i Revised Statutes § 6E-43 mandates that “[a]ll burial

249 HAW. CONST. art. XII, § 7. The Office of Hawaiian Affairs (“OHA”), a state government agency, takes the position that this constitutional provision not only protects the practice, but also protects the resource. Therefore, the practice of visiting one’s ancestral burial site is as equally protected as the burial site itself. Interview by Noe Tanigawa and Wayne Kaho‘onei Panoke with Kai Markell, Director of Native Rights, Land and Culture, OHA, in Honolulu, Haw. (Oct. 31, 2009).


251 Id. § 6E-3.

252 Id. § 6E-3(10).

253 HAW. ADMIN. R. § 13-300-2 (2009). This definition was amended in Act 306 “in response to concerns raised by Native Hawaiians, which are consistent with the common law, and specify that human remains are not considered property in the ordinary commercial sense.” NATIVE HAWAIIAN LAW, supra note 25, at 16-13.
sited sites are significant and shall be preserved in place until compliance with this section is met, except as provided [in the statute relating to inadvertent discoveries].”

As a part of Hawai‘i’s historic and cultural property, marked and unmarked Native Hawaiian burial sites are public trust resources entitled to significant protection.

b. Island Burial Councils: Native Voices in the Disposition of Native Hawaiian Burials

In response to the tragic events at Honokahua, the Hawai‘i legislature created five Island Burial Councils (“IBCs”), which were established and administratively attached to DLNR. The governor appoints IBC members from a list produced by DLNR, following consultation with “appropriate Hawaiian organizations,” on the condition that a minimum of twenty percent of the regional representatives are derived from a list created by the Office of Hawaiian Affairs (“OHA”). It is the statutory duty of IBCs to:

(1) Determine the preservation or relocation of previously identified native Hawaiian burial sites;
(2) Assist [SHPD] in the inventory and identification of native Hawaiian burial sites;

254 HAW. REV. STAT. § 6E-43. As a result of Act 306, Native Hawaiian burial sites were categorized as either “previously identified” or “inadvertently discovered.” See infra Part III(B)(i)(3).

255 See id. § 6E-1 (“The legislature further declares that it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in the spirit of stewardship and trusteedship for future generations . . . .”) (emphasis added); Id. § 6E-13(b) (“Any person may maintain an action in the trial court . . . for restraining orders or injunctive relief . . . upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration or transfer of the property or burial site”) (emphasis added).

256 See id. §§E-43.5(a) (The burial councils include the Hawai‘i, Maui/Lāna‘i, Moloka‘i, O‘ahu, and Kaua‘i/Ni‘ihau Burial Councils).

257 Id. § 6E-43.5.

258 HAW. ADMIN. R. § 13-300-2 (“Appropriate Hawaiian organization” means “a group recognized by the council that is comprised of a majority of Hawaiians and has a general understanding of Hawaiian culture, in particular, beliefs, customs, and practices relating to the care of ancestral Native Hawaiian skeletal remains, burial goods, and burial sites.”).

259 HAW. REV. STAT. § 6E-43.5.
(3) Make recommendations regarding appropriate management, treatment, and protection of [N]ative Hawaiian burial sites, and on any other matters relating to [N]ative Hawaiian burial sites;

(4) Elect a chairperson for a four-year term who shall serve for not more than two consecutive terms; and

(5) Maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of remains.\(^{260}\)

The primary responsibility of an IBC is to “determine preservation or relocation of previously identified Native Hawaiian burial sites.”\(^{261}\)

c. Differences in the Treatment of Iwi Kūpuna: “Previously Identified” vs. “Inadvertent Discoveries”

DLNR and IBCs jurisdictions are limited to sites where human skeletal remains are discovered or known to be buried and appear to be more than fifty years old.\(^{262}\) The decision-making jurisdiction of IBCs is even more narrowly defined to decisions regarding the disposition of “previously identified” Native Hawaiian burial sites.\(^{263}\)

“Previously identified” means “burial sites containing human skeletal remains and any burial goods identified during archaeological inventory survey and data recovery of possible burial sites, or known through oral or written testimony.”\(^{264}\) Previously identified burial sites include those “encountered in areas documented in missionary accounts and native testimony,” as well as “oral testimony by Native Hawaiians at IBC meetings which provides information on the location of a burial that is subsequently documented in written minutes.”\(^{265}\)

An “inadvertent discovery” is an “unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity.”\(^{266}\)

\(^{260}\) Id. § 6E-43.5(f)(1-5).

\(^{261}\) HAW. ADMIN. R. § 13-300-24.

\(^{262}\) HAW. REV. STAT. § 6E-43(a) (The DLNR and IBC’s jurisdiction does not extend to known, actively maintained cemeteries).

\(^{263}\) Id. § 6E-43.5(f)(1).

\(^{264}\) HAW. ADMIN. R. § 13-300-2.

\(^{265}\) NATIVE HAWAIIAN LAW, supra note 25, at 16-12.

\(^{266}\) HAW. ADMIN. R. § 13-300-2.
discovery must be reported to the DLNR immediately, which will notify the appropriate IBC and OHA. Hawai‘i Revised Statutes § 6E-43.6 authorizes DLNR and SHPD staff to determine whether to remove the iwi kūpuna or preserve it in place. “Inadvertent discoveries” occur only after the commencement of construction and often as a result thereof. In the case of the inadvertent discovery of a single skeleton on O‘ahu, SHPD has one working day to make a determination on its disposition. If the single skeleton is discovered on any other island, SHPD has two working days to make the determination. If the discovery involves multiple skeletons, SHPD has two working days to make a determination if the discovery is on O‘ahu and three working days if the discovery is on any of the other islands. Any and all activity, including construction, within the immediate area of the discovery or discoveries must immediately cease and desist until the requirements of Hawai‘i Revised Statutes § 6E-43.6(b), (c), and (d) are met. In determining whether to preserve in place or to relocate an “inadvertent discovery” of Native Hawaiian remains, DLNR must consult with the “appropriate council members, the landowner, and any known lineal or cultural descendants.” Thus, the role of Native Hawaiians in

267 HAW. REV. STAT. § 6E-43.6(b). See also HAW. ADMIN. R. § 13-300-40(c)(6) (stating that DLNR has to give notice to only the appropriate IBC member who represents the geographic region where the remains are discovered).

268 DLNR also has the authority to determine the disposition of “inadvertent discoveries” regardless of whether or not the remains are Native Hawaiian. See HAW. ADMIN. R. § 13-300-40.

269 Interview with Moses Haia, Director, Native Hawaiian Legal Corporation, in Honolulu, Haw. (Mar. 31, 2010) [hereinafter Haia Interview Mar. 31, 2010].

270 HAW. REV. STAT. § 6E-43.6(d).

271 Id.

272 Id. § 6E-43.6(c).

273 Id. § 6E-43.6(a).

274 HAW. ADMIN. R. § 13-300-2 (“‘Lineal descendant’ means with respect to Native Hawaiian skeletal remains, a claimant who has established to the satisfaction of the council, direct or collateral genealogical connections to certain native Hawaiian skeletal remains.”).

275 Id. (“‘Cultural descendant’ means with respect to Native Hawaiian skeletal remains, a claimant is recognized by the council after establishing genealogical connections to Native Hawaiian ancestors who once resided or are buried or both, in the same ahupua‘a or district in which certain Native Hawaiian skeletal remains are located or originated from.”).
the disposition of “inadvertently discovered” iwi kūpuna is diminished and merely advisory. The review procedure for “inadvertent discoveries” assumes that due diligence was carried out through, among other efforts, a good faith search for historic sites and burials.

DLNR, through its administrative rules, developed criteria for determining whether iwi kūpuna will be given greater consideration for preservation in place. Specifically, “previously identified” and “inadvertently discovered Native Hawaiian human skeletal remains that meet any one of the following criteria shall be given greater consideration for preservation” by IBCs and DLNR:

1. When located in areas with a concentration of skeletal remains;

276 Events unfolding in Naue, Kaua’i on the property of Joseph Brescia symbolize the current struggle between private developers and Native Hawaiians’ efforts to properly preserve and protect iwi kūpuna as well as highlight systematic problems between the OIBC and SHPD. See generally Joan Conrow, Cut to the Bones, HONOLULU WEEKLY, Apr. 7-13, 2010, at A6-7; Kēhau Abad, Ph.D. & Camille Kalama, Esq., Attorney, Native Hawaiian Legal Corporation, Remarks at the Auwē in Naue: The Future of Hawai’i’s Burial Laws Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009). The controversy erupted when on March 8, 2010, Pua Aiu, SHPD Administrator, overruled a unanimous vote of the Kaua’i/Ni’ihau Island Burial Council and approved a Burial Treatment Plan for landowner Brescia. Conrow, at A6. This Burial Treatment Plan was rejected over a dozen times, because it involved concrete caps placed over previously identified burial sites and a home already constructed above dozens of Native Hawaiian burials. Id. Aiu’s unilateral decision to overrule the IBC has undercut the authority of IBCs in determining the disposition of previously identified burials because it is the first time SHPD has overridden an IBC and permitted construction on a previously identified burial site. Id. Unfortunately, Aiu claimed that “financial constraints during a period of economic downturn will likely continue to affect the way sites like Brescia’s are handled.” Id. She explained, “We will find more burials. There’s a strong sense in the Hawaiian community not to move iwi, but if we can’t prevent construction, that doesn’t leave us with a lot of options.” Id. The bitter battle continues in court, where cultural descendants are attempting to stop iwi desecration. See Brescia v. Edens-Huff, Civ. No. 08-1-0107 (Haw. 5th Cir. Oct. 2, 2008) (Order Granting in Part and Denying in Part Defendant’s Motion for Preliminary Injunction). Brescia, however, is fighting back by aggressively filing lawsuits against more than a dozen Hawai’i residents who challenged his home construction, claiming they caused him to suffer “financial damages due to slander of title, construction delays and the need to hire security.” Conrow, at A7.


278 See HAW. ADMIN. R. § 13-300-36.

279 Uncertainty exists because the laws relating to burial sites fail to define the term “concentration.” Interview with Moses Haia, Director, Native Hawaiian Legal Corporation, in Honolulu, Haw. (Mar. 4, 2010) [hereinafter Haia interview Mar. 4, 2010]. A “concentration” of iwi kūpuna could be any number more than one in the same area. Id.
(2) Pre-contact or historic period burial sites associated with important individuals and events as recommended by the council following consultation with known lineal or cultural descendants, appropriate Hawaiian organizations, knowledgeable individuals, or any other appropriate source of information;

(3) When located in areas within a context of historic properties, as defined by section 6E-42, HRS;

(4) Where known lineal descendants request preservation in place; or

(5) Where the landowner agrees to preservation in place.\textsuperscript{280}

Where appropriate, IBCs and DLNR “shall give due consideration”\textsuperscript{281} to:

(1) The cultural appropriateness of any proposal to preserve in place or relocate;

(2) Any possible harm to the Native Hawaiian skeletal remains if the burial site is left in place;

(3) The request of known lineal or cultural descendants to relocate;

(4) And any reason presented by the landowner or developer to relocate.\textsuperscript{282}

The state and federal historic preservation frameworks, if utilized properly, can be useful tools to protect iwi kūpuna. As the painful lessons of Honokahua and H-3 repeat themselves in more recent developments in Kaka’ako, however, the planning of the City’s Rail Project brings to life the continuing struggle between the “needs” of development and infrastructure and the legal protections afforded to iwi kūpuna.\textsuperscript{283}

III. ANALYSIS & IMPLICATIONS

This section will highlight some of the City’s failures to respect existing protections for iwi kūpuna in planning for the Rail, and provide recommendations aimed at avoiding the unnecessary desecration of iwi kūpuna.\textsuperscript{284}

\textsuperscript{280} HAW. ADMIN. R. § 13-300-36(a).

\textsuperscript{281} Id. § 13-300-36(b).

\textsuperscript{282} Id.

\textsuperscript{283} See infra Part IV(A).

\textsuperscript{284} See infra Parts IV-V.
A. Laying the Tracks – A Chronology of the Rail Project

Because FTA funds will be expended on the Rail Project, the planning and project development process must comply with the U.S. Department of Transportation (“USDOT”) and FTA requirements. On December 7, 2005, FTA published a Notice of Intent to Prepare an Alternatives Analysis (“AA”) in the Federal Register. On December 8, 2005, the Honolulu Department of Transportation Services published an EIS Preparation Notice in the “State of Hawai‘i Environmental Notice.”

A series of scoping meetings took place in December 2005, in which “the public was asked to comment on the proposed alternatives, the [p]urpose and [n]eed for the Project, and the range of issues to be evaluated.” The City did not consult with the OIBC as a whole, but rather consulted with members in their individual capacities.

The City evaluated and screened four alternatives to determine options “that would provide the most improvement to person-mobility and travel reliability in the study corridor, while minimizing adverse social, economic, and environmental effects.” The Rail Project’s AA was completed in October 2006.

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285 City and County of Honolulu, Department of Transportation Services, Environmental Process, http://www.honolulutransit.org (last visited Feb. 21, 2010).


288 See RAIL DEIS BACKGROUND, supra note 121, at 1-1 (“Scoping activities related to the [AA] and the Hawai‘i Revised Statutes (HRS) Chapter 343 EIS preparation notice were completed between December 2005 and January 2006.”).

289 Interview with Kirk Caldwell, Managing Director, City and County of Honolulu, in Honolulu, Haw. (Feb. 17, 2010) [hereinafter Caldwell Interview]. There is no legal authority for such action, which was unusual, therefore, OIBC members objected to this lack of communication. See OIBC Objection Letter to USDOT, supra note 182.

290 See RAIL DEIS BACKGROUND, supra note 121, at 1-1 to 1-3 (The four alternatives to transit service in the study corridor between Kapolei and UH Mānoa are: “(1) No build; (2) Transportation System Management; (3) Express Buses Operating in Managed Lanes; and (4) Fixed Guideway Transit System.”).

291 Id. For more information on the Alternative Analysis, see RAIL DEIS ALTERNATIVES, supra note 124, at 1-1 to 1-3. To comply with Hawai‘i’s Environmental Impact Statement Law, also known as “HEPA,” the City completed a Cultural Resources Technical Report that “identify[d] the cultural resources, practices, and beliefs that may be affected by the Project.”
Cultural Surveys Hawai‘i, Inc. (“CSH”) prepared a preliminary archaeological resources technical report in support of the AA process. Available archaeological information was synthesized “to evaluate potential impacts to archaeological resources along the various alignments under consideration during the [AA] process.”

On October 22, 2006, “after review of the [AA] report and consideration of nearly 3,000 comments received from the public, the City Council selected the Fixed Guideway Transit System Alternative, including an alignment extending from Kapolei to UH Mānoa with a branch to Waikīkī, as the Locally Preferred Alternative (“LPA”).” The LPA passes through Kaka‘ako via Halekauwila Street. According to City officials, other alternative routes were discounted because they would not generate sufficient ridership or “would have greater impacts on adjoining properties.” On January 6, 2007, the City Council’s selection became law when Ordinance 07-001 was promulgated.

On March 15, 2007, a Notice of Intent to prepare an EIS was published in the Federal Register and scoping was completed in April

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293 ARCHAELOGICAL REPORT, supra note 127, at 3-1.

294 Id.

295 Id. at 3-2.

296 The Fixed Guideway Alternative presented in the AA included “the construction and operation of a fixed guideway system between Kapolei and UH Mānoa.” RAIL DEIS ALTERNATIVES, supra note 124, at 2-6.

297 See RAIL DEIS BACKGROUND, supra note 121, at 1-4.

298 RAIL DEIS ALTERNATIVES, supra note 124, at 2-14.

299 Sean Hao, Burials Along Rail Route a Concern, HONOLULU ADVERTISER, Oct. 20, 2009, at A2 [hereinafter Hao, Burials Along Rail Route].

300 Ordinance 07-001 “authorized the City to proceed with planning and engineering a fixed guideway project within [the aforementioned] limits and following the alignment defined in the ordinance.” The ordinance also required that a First Project be selected that is fiscally constrained to anticipated funding sources. HONOLULU, HAW., REV. ORDINANCES, 07-001 (2010). City Council Resolution 07-039 defined the First Project as extending from East Kapolei to Ala Moana via Salt Lake Boulevard (the Project). See RAIL DEIS BACKGROUND, supra note 121, at 1-4.
In November 2008, the City and FTA issued the DEIS. Also in November 2008, the FTA approved the commencement of the preliminary engineering phase on the LPA segment extending from East Kapolei to Ala Moana Center to commence in November 2009.

On October 27, 2009, the City Council voted 5-4 to allow the City to sign a PA “over how to address the discovery of burials and other cultural artifacts during the building” of the Rail Project. This PA has not yet been finalized by the ACHP. The Final EIS (“FEIS”) was issued by the City and approved by the FTA in June 2010. Shortly after taking his oath of office in October 2010, Honolulu’s new Mayor, Peter Carlisle, stated that supporting the Rail Project is first on his agenda. He hopes to break ground on the project in March 2011.

B. Analysis and Implications

1. The City’s Failure to Coordinate NEPA and Section 106 Resulted in Deficient Consultation with OIBC

The City’s chosen Rail route is expected to disturb a significant number of iwi kūpuna, especially in Kaka’ako. Archaeologist, OIBC

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301 Id. at 1-1 to 1-3.


303 Id.


309 Hao, Burials Along Rail Route, supra note 299, at A1. See also
member, and Rail Transit Task Force Chair Dr. Kēhau Abad noted that “when it comes to th[is] issue we’re [(the OIBC)] concerned with [iwi issues], [the City] picked one of the worst possible alignments.”

Despite the high prevalence of iwi kūpuna buried throughout the Kaka‘ako area, the City failed to coordinate NEPA scoping and Section 106 consultation, which would have greatly reduced any potential interference with iwi kūpuna.

Consultation, in varying degrees, is required to comply with both NEPA and NHPA. The goal of Section 106 consultation is “to identify properties potentially affected by the undertaking, assess [ ] effects and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties.” Under NEPA, the scoping requirement “should involve whatever consultations are necessary with authorities and stakeholders as well as background research.” In particular,

scoping may reveal issues – impacts on traditional land uses, lifeways, hunting, gathering, or agricultural practices, social interactions, religious practices, historic places – that affect what kinds of people make up the study team that will perform the NEPA analysis and in designing the analysis itself.

The Section 106 process should begin early “so that a broad range of alternatives may be considered during the planning process for the undertaking.” Likewise, NEPA scoping should also occur openly and

ARCHAEOLOGICAL REPORT, supra note 127, at 3-2 (“The potential for discovering archaeological resources increases within the Project’s Koko Head portions, particularly within the area Koko Head of Dillingham Boulevard, within Downtown, and within Kaka‘ako.”) (emphasis added).

310 Hao, Burials Along Rail Route, supra note 299, at A1.

311 See infra Exhibit 2 (Map of numerous known burial sites in Kaka‘ako).

312 For NEPA scoping requirements, see supra Part III(A)(ii). For NHPA consultation requirements, see supra Part III(A)(iii). See also KING, supra note 138, at 128 (“Consultation is the main thing to do throughout the [section] 106 process.”). This includes asking the following questions throughout: “What do people think might be there, and why? What can be said by extrapolation from other areas, or based on sociological, anthropological, or other theory?” Id.

313 36 C.F.R. § 800.1.

314 KING, supra note 138, at 75.

315 Id.

316 36 C.F.R. § 800.1(c).
Federal agencies, such as the FTA, are “encouraged to coordinate compliance with section 106 and [its] procedures … with any steps taken to meet the requirements of [NEPA].” In particular, the FTA should “consider [its] [S]ection 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” Usually, this means that SHPD and Native Hawaiian organizations and consulting parties “who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process.” This early coordination is encouraged to help agencies avoid delays and head off potential conflicts by addressing concerns “when the purpose of and the need for the proposed action, as well as the widest possible range of alternatives, are under consideration.”

In a well coordinated process for Section 106 and NHPA compliance, “scoping, identification, evaluation, and initial effect determination are coordinated with … [DEIS] preparation[.] [C]onsultation to resolve adverse effects takes place as needed before the … EIS is finalized and the … ROD is issued.”

This way the public can be fully informed about the results of [S]ection 106 review through its review of draft NEPA material, and the consulting parties under [S]ection 106 can be fully informed of public views obtained by the agency through the NEPA process. Everything moves smoothly, there’s no redundancy, nothing falling through the cracks.

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317 See 40 C.F.R. § 1501.7. To comply with NEPA mandates, “there shall be an early and open process for determining the scope of issues to be addressed for identifying the significant issues related to proposed actions.” Id.

318 36 C.F.R. § 800.8(a)(1).

319 Id. See supra Part III(A) for requirements.

320 36 C.F.R. § 800.8(a)(2).

321 ARCH GUIDANCE, supra note 191.

322 KING, supra note 138, at 184-86. See infra Exhibit 5 (Diagram depicting model coordination between NEPA and Section 106 processes).

323 KING, supra note 138, at 186.
During the Rail Project’s early planning stages, the City determined the technology and route alignment before any meaningful consultation took place with OIBC.\(^{324}\) City representatives initiated contact with OIBC in 2005 when the Rail Project planning commenced, but failed to continue that consultation throughout the Project’s planning.\(^{325}\) In particular, the City neither invited OIBC to NEPA-required scoping meetings nor was OIBC briefed about the progress of the Rail Project via written correspondence.\(^{326}\) OIBC members explained that “[t]hough the [Rail] Project team held public meetings regarding their selected LPA, the OIBC did not receive an invitation to these and was never briefed about the hearings through written correspondence or through a representative sharing such information at an OIBC monthly meeting.”\(^{327}\) The OIBC is also notably absent from a list of dozens of agencies the City communicated with in early coordination meetings.\(^{328}\) OIBC members were “astounded to discover the gross lack of consultation with the OIBC in the interim between when City representatives first came to OIBC in 2005 to initiate consultation with the OIBC and when the OIBC leadership requested City representatives to appear before the OIBC on July 9, 2008, to update [the OIBC] body.”\(^{329}\) The lack of consultation is most evident in the Rail Project team’s ignorance of respectful treatment of iwi kūpuna, as displayed in PA consultation meetings.\(^{330}\)

According to Faith Miyamoto, Chief Environmental Planner for the City, “[h]istoric and native Hawaiian burial resources are very important to the City.”\(^{331}\) However, the City’s failure to consult or

\(^{324}\) OIBC Objection Letter to USDOT, supra note 182 (“In the interim, the City selected an LPA absent OIBC consultation.”).

\(^{325}\) Id.

\(^{326}\) Id.

\(^{327}\) Id.


\(^{329}\) OIBC Objection Letter to USDOT, supra note 182.

\(^{330}\) Id. (“During PA consultation meetings, the Project team members commented several times that cultural perspectives relating to iwi kūpuna that OIBC members brought forth were completely new to them and that they had not previously understood [OIBC’s] full concerns.”).

\(^{331}\) E-mail from Faith Miyamoto, Chief Environmental Planner, City and County of Honolulu Rapid Transit Division, to author (July 30, 2010) (on file with author) [hereinafter Miyamoto Email].
regularly communicate with OIBC calls this entire consultation process into question.\textsuperscript{332} The City could and should have engaged OIBC early in its planning, especially when the City conducted NEPA scoping, completed its AA, and chose an LPA.\textsuperscript{333} Although the City appears to have complied with the plain language of applicable statutes, its behavior demonstrates a lack of effort to ensure that iwi kūpuna are adequately and appropriately addressed.

2. A “Records Check” Was Inadequate to Determine Route Alignment

CSH produced a second Archaeological Resources Technical Report\textsuperscript{334} for the Rail Project by employing methods\textsuperscript{335} “for archaeological resource identification and geographic synthesis using existing archaeological data and proxy historical and environmental data sets.”\textsuperscript{336} The City discussed their proposed “methods” with OHA in late January 2006 and with SHPD in early February 2006.\textsuperscript{337} Yet again, the City did not even give OIBC an opportunity to comment on the report or its methodology.\textsuperscript{338}

This document supported the DEIS and served as the primary vehicle to address the Rail’s potential effects on iwi kūpuna and other archaeological resources.\textsuperscript{339} In summary, this report claimed that:

\begin{enumerate}
\item \textsuperscript{332}See id.
\item \textsuperscript{333}See id.
\item \textsuperscript{334}ARCHAEOLOGICAL REPORT, supra note 127, at S-1 (This report was designed to “identify likely impacts to archaeological resources within the archaeological study area, which is divided and described in ten sub-areas from Kapolei to Waikīkī.”).
\item \textsuperscript{335}Id. at 3-2 (“CSH compiled a substantial amount of archaeological information about the study corridor. This information was synthesized from U.S. Department of Agriculture (USDA) soils survey data, previous archaeological investigation results, previously recorded archaeological resources, historic land records, and previously recorded burial locations.”).
\item \textsuperscript{336}Id. at 3-2. The report employed the following methods/data sources: (1) Inspection of USDA soil survey data; (2) Inspection of tax maps and historic maps and other documents as indicators of past land use and settlement; (3) Review of Geographic Information System data (SHPD’s records of previous archaeological reports), as available; (4) Inspection of historic maps and early land survey maps to locate areas of potential archaeological concern; (5) “Field observations of portions of the study area to evaluate the study area’s relationship to possible surface and subsurface archaeological resources”; and (6) consultation with SHPD to make use of its resources and expertise. Id.
\item \textsuperscript{337}Id. at 3-9.
\item \textsuperscript{338}Abad Interview Mar. 5, 2010, supra note 7.
\item \textsuperscript{339}See ARCHAEEOLOGICAL REPORT, supra note 127, at i.
\end{enumerate}
With few exceptions, the archaeological resources that could be affected by the [Rail] Project are subsurface features and deposits that have not been previously identified. Such impacts would occur during construction. Once negative impacts from construction (e.g., archaeological resource destruction) and positive impacts from construction (e.g., an increase in archaeological knowledge about Oʻahu’s south shore) have occurred, no long-term project-related impacts are expected on archaeological resources.\(^{340}\)

This report’s conclusion highlights fundamental flaws, including questionable methodology and a lack of knowledge and cultural sensitivity regarding the significance of iwi kūpuna to Native Hawaiians.\(^{341}\) This conclusion misses the mark by suggesting that no long-term impacts from the Rail’s construction are expected because negative impacts such as destruction will balance out positive impacts such as data recovery.\(^{342}\) Concerns regarding iwi kūpuna aside, this report’s conclusion overlooks the likely occurrence of archeologically rich deposits and intact cultural layers that would be harmed during the Rail Project’s subsurface intrusions.\(^{343}\)

The City commissioned an archaeological technical report, which amounted to a “records check” of previous archaeological surveys done in each sub-area, and relied on this report to guide their decision making with respect to archaeological resources potentially impacted by the Project.\(^{344}\) “Records checks will tell you, not surprisingly, what’s already been recorded, but they won’t give you a basis for imagining what’s not been recorded, and that’s what you need to do.”\(^{345}\) The City’s selection of a

\(^{340}\) Id. at S-1.

\(^{341}\) Abad Interview Mar. 5, 2010, supra note 7. See also supra Part II for a detailed summary of cultural significance of iwi and desecration.

\(^{342}\) See ARCHAEOLOGICAL REPORT, supra note 127, at S-1.

\(^{343}\) Abad Interview Mar. 5, 2010, supra note 7.

\(^{344}\) See KING, supra note 138, at 129 (“One caution about background research: don’t reduce it to a records check. This happens a lot . . . where people seem to think that if they’ve just gone to the local records center and checked previous archaeological surveys, they’ve done their job.”). For purposes of the Archaeological Resources Technical Report, CSH divided the Rail route into ten subareas: Honolulu; Farrington Highway; Kamehameha Highway; Salt Lake; Airport; Dillingham; Downtown; Kaka’ako; Mānoa; and Waikīkī. ARCHAEOLOGICAL REPORT, supra note 127, at 3-4.

\(^{345}\) Abad Interview Mar. 5, 2010, supra note 7.
Rail route through Kaka‘ako “was based on a fallacy of assuming that a lack of previous archaeological studies in the LPA alignment was an indicator of a lesser number of iwi kūpuna being present in that alignment as compared to other possible alignments.”

Had the City consulted OIBC during the LPA selection process, OIBC would have “pointed out to the City’s decision makers the error of the aforementioned fallacy and conveyed the OIBC’s archaeological and Hawaiian cultural expert opinion that the selected LPA would certainly threaten a large number of iwi kūpuna.” The OIBC “maintains that a more mauka (inland) route for the rail line, along King or Beretania streets, would avoid subsurface sandy deposits likely to contain burials.” Regardless, at this point, the City is unwilling to adjust the route, and instead continues its track through Kaka‘ako, which is “an area that sits on a band of sandy deposits that’s expected to contain high concentrations of burials.”

The City’s resistance to do any site surveys or consult with OIBC, the principal body charged with making recommendations regarding the appropriate management, treatment, and protection of iwi kūpuna early-on in the process, calls the report’s conclusions into question. Although this report appears to comply with the plain language of FTA regulations on DEIS preparation, it falls short in satisfying the spirit of those laws, which require good faith consultation with OIBC. Moreover, the environment of the area, its history, its ethnography, its prehistory — what kinds of historic properties might be out there in the APE, what they might look like, and what you may have to do to find them. Generate predictions, think about how to test them. Then design the actual scope of work to test the predictions.”

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346 OIBC Objection Letter to USDOT, supra note 182.

346 Id.

347 Id. See also Hao, Burials Along Rail Route, supra note 299, at A2 (Statement of Thomas Dye, President of T.S. Dye & Colleagues Archaeologists) (“The [burial] council is absolutely right that you should expect to find burials on Halekauwila Street. There are burials all over Kaka‘ako. If you go further mauka you get off the sand, which is a good thing if you’re trying to miss burials.”).

348 “Mauka” means “inland.” PUKUI & ELBERT, supra note 8, at 242.

349 Hao, Burials Along Rail Route, supra note 299, at A2.

350 Id.

351 See OIBC Objection Letter to USDOT, supra note 182.

352 See generally supra Part III(A)(i).

353 Id.
repeated refusal to include OIBC reflects poorly on the integrity of the entire process.\textsuperscript{354} Had the City properly coordinated NEPA scoping and Section 106 consultation, it would have been mandated to contact and consult with OIBC, which would likely have revealed the shortcomings in both the City’s Archaeological Resources Technical Report and its preferred Rail route through Kaka‘ako.\textsuperscript{355}

3. City’s Current Rail Track Forecloses Options to Avoid Iwi Kūpuna

Following years of litigation, unnecessary delay, and the desecration of iwi kūpuna, SHPD vowed to never approve another project without an AIS in its possession first.\textsuperscript{356} The City expects that the Rail construction will affect iwi kūpuna,\textsuperscript{357} however, it will utilize phased AISs, which enables construction to commence in phases as soon as an AIS is done for that particular phase.\textsuperscript{358} Although this satisfies Section 106’s federal mandates, Hawai‘i’s historic preservation framework is silent regarding whether this process is acceptable to comply with the protections state law affords Native Hawaiian burials.\textsuperscript{359} In fact, this is the first time that SHPD has ever approved the use of phased AISs in an area with high concentrations of Native Hawaiian burials, such as Kaka‘ako.\textsuperscript{360} An AIS is normally required in cases like this one where adverse effects

\textsuperscript{354} See supra Part IV(B)(i).

\textsuperscript{355} See supra Part IV(B)(i).

\textsuperscript{356} See Omandam, supra note 5 (Statement of Ross Cordy, then SHPD branch chief of archaeology).

\textsuperscript{357} Archæological Report, supra note 127, at 5-12 (“All of the available information indicates that further archaeological resources exist in [Kaka‘ako] and are almost certainly present in the remaining 60 percent of the subarea. Based on these considerations, the Kaka‘ako sub-area of the archaeological study area is determined to have a High potential to affect burials and pre-contact and post-contact archaeological resources such as fish/salt ponds, cultural layers, and historic trash pits.”) (emphasis added).

\textsuperscript{358} Pursuant to 36 C.F.R. § 800.14. See generally Programmatic Agreement, supra note 183.

\textsuperscript{359} See generally Haw. Rev. Stat. § 6E; Haw. Admin. R. § 13-275. Attempts were made to contact SHPD Administrator Pua Aiu on this issue. When asked if SHPD has ever approved a phased AIS for a project before and if this is acceptable according to Hawai‘i’s historic preservation legal framework, namely Haw. Rev. Stat. § 6E, Pua responded that she would forward my questions on to Laura Theilen, Chair of the DLNR, “who could answer [the] questions better than she [could].” At the date of this publication, this author has not received a response. E-mail from Pua Aiu, Administrator, State Historic Preservation Division, to author (May 11, 2010) (on file with author).

\textsuperscript{360} Abad Interview Mar. 5, 2010, supra note 7.
on iwi kūpuna are expected.\textsuperscript{361} AISs are done to determine a project’s design, and are “in keeping with the spirit of the law and our commitment to protecting iwi, which can best be carried out by having the proper lead time to make meaningful decisions.”\textsuperscript{362}

A deferral of AISs – the fundamental protection to respect and preserve iwi kūpuna – potentially forecloses avoidance options such as design changes and route re-alignment because route re-alignment and/or redesign will become cost prohibitive or perhaps impossible the instant that construction begins.\textsuperscript{363} On the contrary, completing all AISs before any construction begins allows modification and design alternatives if necessary to avoid disturbing iwi kūpuna or other archeological features.\textsuperscript{364}

\textsuperscript{361} See HAW. REV. STAT. 6E-8; HAW. ADMIN. R. § 13-275. AISs refer to “the process of identifying and documenting the archaeological historic properties and burial sites in a delineated area, gathering sufficient information to evaluate the significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by the department.” HAW. ADMIN. R. § 13-276-2. AISs are significant because they: “(1) Determine if archaeological historic properties are present in the project area and, if so, identify all such properties and (2) gather sufficient information to evaluate each historic property’s significance in accordance with the significance criteria in subsection 13-275-6(b).” Id. § 13-276-3.

\textsuperscript{362} Liza Simon, \textit{Burial Council Ramps Up On Iwi Protection Along Rail Route}, K\textit{A WAI OLA LOA}, Dec. 2008, available at http://www.oha.org/kwo/loa/2008/12/story06.php. See also Wu, \textit{supra} note 111 (Statement of Alan Murakami, attorney, Native Hawaiian Legal Corporation) (“It is always better to do the right advance archaeological work first before committing to construction which must be stopped to protect those cultural resources which could have been identified earlier.”).

\textsuperscript{363} See OIBC Objection Letter to USDOT, \textit{supra} note 182; Camille Kalama, Esq., Attorney, Native Hawaiian Legal Corporation, Remarks at the Auwê in Naue: The Future of Hawai’i’s Burial Laws Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009); Abad Interview Mar. 5, 2010, \textit{supra} note 7. The OIBC unanimously voted to request that DLNR Director and State Historic Preservation Officer Laura Theilen reject any version of a PA that “allows for a phased archaeological inventory survey approach” given that state law does not provide for a phased approach to AISs and that the State Historic Preservation Officer “has the ability to safeguard the full authority of State historic preservation laws and the integrity of historic properties and burial sites.” Sean Hao, Honolulu Rail Project Facing Pressure to Protect Native Burials, H\textit{ONOLULU ADVERTISER}, May 5, 2010, available at http://the.honoluluadvertiser.com/article/2010/May/05/ln/hawaii5050356.html.

\textsuperscript{364} See Conrow, \textit{supra} note 276 (Statement of Dana Naone-Hall, former IBC member) (“Appropriate survey and inventory affects mitigation . . . . Everything is dependent on the backbone of inventory and survey.”). See also Hao, \textit{Iwi Likely Along Rail Route}, H\textit{ONOLULU ADVERTISER}, June 22, 2008, at A1, A13 [hereinafter Hao, \textit{Iwi Likely}] (Statement of Moses Haia, Director, Native Hawaiian Legal Corporation) (“That’s why it’s so important about doing this sort of analysis up front before you begin digging, because you want to still have the flexibility . . . and you’re able to look at design alternatives.”).
The City’s phased approach to AISs allows for the “bulk of the archaeological investigation, documentation, and associated mitigation decisions [to be] deferred and carried out subsequent to the conclusion of the Project’s Federal environmental and historic preservation review.”

The City justifies its AIS deferral due to the cost and potential delay that extensive subsurface archaeological investigations may impose, the relative inaccessibility of the archaeological resources beneath in-use roadways and sidewalks, and the current uncertainty regarding the actual location of the project footprint. Lawrence Spurgeon of New York based engineering firm Parsons Brinckerhoff, the Rail Project’s contracting firm, explained that “a comprehensive AIS along the entire corridor would involve extensive and intrusive excavation, which would be the cause of inadvertent iwi disturbance.” The City maintains that this approach was discussed with SHPD archaeologists and the OIBC in October 2007 and both parties concurred; however, there is no record of any concurrence by the OIBC in either the agenda or minutes for OIBC’s October 2007 monthly meeting. In fact, when the City’s Rail Project planners next appeared before the OIBC at its July 2008 monthly meeting, OIBC members were “very concerned that the Section 106 process was being ‘skirted by postponing the AIS.’” More significantly, those OIBC meeting minutes highlight the inadequacies of a phased AIS approach:

Without a complete survey, the extent of the effect cannot

365 ARCHAEOLOGICAL REPORT, supra note 127, at 3-3.

366 Id. See also OIBC Meeting Minutes, July 9, 2008, at 4, available at http://hawaii.gov/dlm/hpd. (Statement of Lawrence Spurgeon (“[T]he problem with doing the AIS at this point would be costly and cause inconvenience to the general public.”)).

367 Parsons Brinckerhoff, a New York based engineering firm, has been active in Hawai‘i since the 1960s. This firm played a significant role in designing the H-3 freeway. Sean Hao, Only One Company Bid to Manage Hawai‘i Rail Project, HONOLULU ADVERTISER, Mar. 16, 2010, available at http://www.honoluluadvertiser.com/article/20100316/NEWS01/3160347/Only-one-company-bid-to-manage-Hawaii-rail-project.

368 Simon, supra note 362.

369 ARCHAEOLOGICAL REPORT, supra note 127, at 3-3.

370 OIBC Meeting Minutes, Oct. 10, 2007, available at http://hawaii.gov/dlm/hpd (Matt McDermott of CSH stated that the Rail Planning Team “would like to consult with the council and other native Hawaiian groups for their input and have them agree to postpone the archaeological inventory survey.”).

be adequately determined in making a decision in the choice of alignment. [Dr.] Abad was concerned that the alignment had been determined in advance of the AIS and therefore the process has been short circuited. The impact on this project needs to be known in its entirety and not segment by segment.  

The City’s proposed solution is to conduct the AIS for Phase 4 (the Kaka’ako area) about two years earlier than planned. Spurgeon praises this approach because “if we [the City] have any substantial finds that will really require redesign or anything of that type, we’ll [the City] have a fair amount of time to look at what those options are.” The City will “consider moving train guideway footings and altering utility relocations plans to avoid iwi. However, it’s unlikely that the discovery of human remains in Kaka’ako will cause the [C]ity to alter the route.” In fact, the City requires “a fairly high threshold” in order to abandon the current route. The City will “go through every design option first to be able to avoid those resources [(iwi kūpuna)] and anticipates that it will avoid those resources “through refinements in design” including relocating or removing columns. However, according to the City, changing the project alignment is a last resort.

Without the benefit of a properly executed AIS, the City selected an LPA that traverses “ground zero” for high concentrations of iwi

372 Id.

373 Hao, Burials Along Rail Route, supra note 299, at A2. See also Programmatic Agreement, supra note 183; Caldwell Interview, supra note 289.

374 Hao, Burials Along Rail Route, supra note 299, at A2 (Statement of Lawrence Spurgeon, supervising environmental engineer for New-York based project manager Parsons Brinckerhoff).

375 Id.

376 Id.


378 Miyamoto Email, supra note 331.

kūpuna. A crucial decision on the LPA was made without information that should have been provided via a preliminary AIS or OIBC’s consultation pursuant to NEPA or NHPA. This scenario positions the City to argue that any redesign of the final phase (the Kaka’ako area) to preserve iwi kūpuna found therein would be cost prohibitive, given the financial outlay related to completion of nearly 75% of the project. By effectively preventing the discovery of iwi kūpuna prior to construction, the City succeeds in (1) denying OIBC its proper role in ameliorating cultural conflicts over the protection of Hawaiian burials, (2) allowing iwi disposition to be determined hastily in accordance with procedure for “inadvertently discovered” iwi, and (3) claiming that burials discovered after near completion of the alignment now cause it serious financial harm.

The City’s approach does not sit well with OIBC and places that administrative body in a difficult position. Dr. Abad opined,

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380 OIBC Objection Letter to USDOT, supra note 182.
380 Id.
381 Id.
381 Id.
382 Haia Interview Mar. 31, 2010, supra note 269 (“This argument is sort of hybrid justification for looking at and treating these burials as ‘inadvertent discoveries’ and, given these circumstances, any such discoveries should be relocated.”).
383 Id. (“Setting the stage for this scenario mocks the State’s intent to protect native Hawaiian burials and sanctions a clearly unjustifiable interpretation of the applicable law and rules. This will only encourage similar inadequate surveying and promote the destruction and desecration of this State’s public trust assets to accommodate development . . . [and] enforce the belief that the participants in historic preservation need not take constitutional and statutory obligations related to burials seriously.”).
384 Interview by Noe Tanigawa and Wayne Kaho’onei Panoke with Hinaleimoana Falemei, Vice-Chair, O’ahu Island Burial Council, in Honolulu, Haw. (Oct. 31, 2009) [hereinafter Falemei Interview]. See also Hao, Burials Along Rail Route, supra note 299, at A2. (Statement of Kēhau Abad, archaeologist, OIBC member, and Rail Transit Task Force Chair) (“What we’re concerned about is the public is going to turn around and point to us as the cause of those increases in costs (and) as the cause of delays. Beyond just us, they’re going to turn to the whole Hawaiian community and say it’s those Hawaiians who are increasing the costs of this project for everyone. It is the Hawaiians who are holding up progress. We’re going to get blamed for something that we knew well in advance would have been coming, but nobody asked us.”); Camille Kalama, Esq., Attorney, Native Hawaiian Legal Corporation, Remarks at the Auwē in Naue: The Future of Hawai‘i’s Burial Laws Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009) (“. . . there is no mitigation in desecration. The best we can do is to try to avoid [iwi] up front. If you wait until the very end, then there’s always the excuse to say, it’s really too expensive to redesign.”).
It’s hard for me to wrap my mind around the solution that’s going to allow for us to have our kūpuna handled in a way that maintains the integrity of their sacred burial spots and for this project to go forward – all in the same corridor . . . . Something’s got to give. What we all know is . . . that which gives is our concerns, our values (and what we hold dear). That’s what everybody asks us to give.\(^{385}\)

Although phased AISs may appear to be allowed under Section 106, the City’s decision to use them does not provide the best available information necessary to protect and preserve iwi kūpuna.\(^{386}\) Given the cultural significance of iwi to Native Hawaiians and the City’s capacity to coordinate legal obligations under NEPA, Section 106, and Hawai‘i Revised Statutes § 6E, the City has failed to demonstrate its commitment to do what’s necessary to respect and safeguard iwi kūpuna.\(^{387}\) Earlier generations saw this painfully play out in the construction of the H-3 freeway; hopefully, the City will avoid such desecration and heartache.\(^{388}\) The following recommendations aim to steer the City away from its one way track to desecrating iwi kūpuna.\(^{389}\)

### IV. Recommendations

#### A. Increased Priority to Identify and Characterize Iwi Kūpuna as TCPs

Given the City’s repeated failures to consult with OIBC thus far, a thoroughly executed AIS for the Kaka‘ako area is one of the City’s last remaining opportunities to adequately protect iwi kūpuna.\(^{390}\) The City should be prepared to ensure that as many iwi kūpuna as possible can be characterized as “previously identified” and, thus, placed under the direct management of OIBC, an entity with special expertise in the proper treatment and management of iwi kūpuna.\(^{391}\) If burials are found during construction, they will be classified as “inadvertently discovered” and thus their disposition will be determined entirely by SHPD, a department

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385 See also Hao, *Burials Along Rail Route*, supra note 299, at A2 (Statement of Lawrence Spurgeon, supervising environmental engineer for New-York based project manager Parsons Brinckerhoff.).


387 See generally *supra* Part IV(B).

388 See *supra* Parts I and II(B).

389 See *infra* Part V.


391 See *supra* Part III(B)(ii).
severely short-staffed,\textsuperscript{392} plagued with internal problems, and currently at risk of losing its federal funding.\textsuperscript{393}

If the Rail continues along its current route, OIBC is confident that historic properties will be disturbed and, therefore, is forced to sit and wait patiently for iwi to show up.\textsuperscript{394} At this stage in the Rail Project’s planning, the quality and timing of the AIS for Kaka’ako is the most promising opportunity for the respectful treatment of iwi kūpuna because it will affect whether iwi: (1) may be classified as a TCP; and (2) are characterized as “previously identified” (and, thus, under the jurisdiction of OIBC), or “inadvertent discoveries” (under the jurisdiction of SHPD).\textsuperscript{395}

It is inappropriate for the City to either purposefully avoid or give short shrift to protections for iwi kūpuna by not committing to a


\textsuperscript{393} In March 2010, based on findings in its most recent audit of SHPD, the National Park Service (“NPS”) designated SHPD as a “high risk grantee.” Letter from Jonathan B. Jarvis, Director, National Park Service, to Laura H. Thielen, Chairperson, Department of Land and Natural Resources (Mar. 19, 2010) (on file with author). NPS states that “this action is not taken lightly, and comes only after multiple attempts to help the SHPD correct serious deficiencies identified in audits going back as far as 2002.” \textit{Id.} The NPS audit revealed that SHPD has “significant operation problems in several mandated activities, including Survey & Inventory, Review & Compliance, National Register of Historic Places, Certified Local Government administration, and Historic Preservation Planning.” \textit{Id.} This led NPS to conclude that SHPD is “not meeting its obligations” under NHPA, and is in serious risk of losing federal funding for its program. \textit{Id.} As a result of this designation, NPS delineated several “corrective actions” required to address SHPD’s problems with a two-year timeline for implementation. \textit{Id.} Failure to meet those “milestones” will result in suspension of SHPD’s annual federal grant. \textit{Id.} This will result in a unapproved state historic preservation program with the following consequences: (1) “matching grant agreements between [NPS] and [SHPD] in excess of $1.1 million could be jeopardized”; (2) “uncertainty in how government agencies operating in Hawaii would comply with Federal and state laws could cause serious delays in economic stimulus and other Federally-funded construction projects”; (3) “Federal assistance provided through the SHPD could be restricted or unavailable to the citizens and property owners of Hawaii”; (4) “Delays could occur in properties nominated to the National Register of Historic Places, which could adversely affect their eligibility for Federal and state historic preservation tax incentives, and/or for historic preservation grant programs”; and (5) “There could be irreparable harm to locally and nationally significant historic properties of importance to the people of Hawaii and the nation.” \textit{Id.}

\textsuperscript{394} Falemei Interview, supra note 384.

\textsuperscript{395} Haia Interview Mar. 31, 2010, supra note 269. See also Abad Interview Mar. 5, 2010, supra note 7 (The triggering of 4(f) protection at a point when avoidance is still a possibility, as Section 4(f) envisions should be the case).
thoroughly executed AIS for the Kaka'ako area before any construction begins.\footnote{396}{Haia Interview Mar. 31, 2010, \textit{supra} note 269; Abad Interview Mar. 5, 2010, \textit{supra} note 7.} The high likelihood of encountering iwi kūpuna in Kaka'ako makes it critical that the City conduct AISs at each location where ground disturbance will occur.\footnote{397}{Sean Hao, \textit{Iwi Likely Along Rail Route}, \textit{HONOLULU ADVERTISER}, June. 22, 2008, at A1, A13 (Statement of Moses Haia, Director, Native Hawaiian Legal Corporation). Nina Wu, \textit{Kakaako Rich with Hawaiian History}, \textit{HONOLULU STAR-BULLETIN}, Aug. 3, 2007, available at http://archives.starbulletin.com/2007/08/03/business/story02.html (this author notes that the article title lacks the necessary 'okina) (Statement of Alan Murakami, attorney, Native Hawaiian Legal Corporation) (“It is always better to do the right advance archaeological work first before committing to construction which must be stopped to protect those cultural resources which could have been identified earlier.”).} Although the supportive columns for the Rail will be approximately six feet in diameter, they will be sunk 120 feet into the soil.\footnote{398}{Simon, \textit{supra} note 362.} In addition to constructing massive rail stations, this project will also likely require repositioning of water lines and other utilities.\footnote{399}{Caldwell Interview, \textit{supra} note 289; Kēhau Abad, Ph.D., Archaeologist and O‘ahu Island Burial Council Member, Remarks at the Auwē in Naue: The Future of Hawai‘i’s Burial Laws Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009).} “The likelihood of encountering iwi depends on the depths, locations and amount of digging needed to build the [Rail].”\footnote{400}{Hao, \textit{Iwi Likely}, \textit{supra} note 364, at A13 (Statement of Thomas Dye, President of the Society for Hawaiian Archaeology).}

In cases where construction has already commenced after the completion of a comprehensive AIS, circumstances may justify relocation of inadvertently discovered remains.\footnote{401}{This is particularly true when the criteria for greater preservation in place set forth at HAW. ADMIN. R. §13-300-36 are not met. \textit{See generally} Haw. Admin. R. § 13-300-36.} Here, a comprehensive AIS will provide any currently unknown burials a fighting chance at being identified prior to construction.\footnote{402}{Haia Interview Mar. 31, 2010, \textit{supra} note 269.} As “previously identified burials,” they would be subject to the more extended OIBC review process prior to construction with the opportunity to revise design and construction plans before ground is broken.\footnote{403}{\textit{See generally supra} Part III(B)(ii).}
Rather than delaying the Rail Project in a piecemeal fashion as iwi kūpuna are encountered during construction, it would be more prudent for the City to complete thorough AISs now. The City can avoid both delays and unnecessary disturbance of iwi kūpuna by committing to include in the AIS Plan a thorough 100 percent subsurface investigation by archaeological excavation (rather than ground penetrating radar that would be ineffective in sand deposits) of every area to be affected by ground disturbance, including, but not limited to the locations of columns, stations, traction power substations, and utility relocations.

This will allow Rail planners to fully understand the concentration of iwi that may be affected, prioritize accordingly with reference to the historic preservation value of TCPs, and apply appropriate mitigation and avoidance measures with the greatest amount of flexibility.

B. Increased Clarity of the Role of OIBC in Determining the Quality and Timing of the AIS for Kaka‘ako

The PA commits the City to consult with “OIBC, lineal and cultural descendants, and other interested parties that are identified in discussion with OIBC, about the scope of investigation for the AIS Plan for construction of Phase 4.” Although this sounds promising, the PA includes two seemingly contradictory statements regarding the AIS’s scope. First, the PA explains the “AIS Plan will provide for investigation of the entire Phase 4 area.” The PA later states that “in the portion of the Phase 4 with the greatest potential for resources, the AIS Plan will evaluate all areas that will be disturbed by the Project.” It is unclear how the City, without any preliminary AIS, will know which portions of Phase 4 will have the greatest potential for resources. It is imperative

Falemē Interview, supra note 384 (emphasis added).


OIBC Objection Letter to USDOT, supra note 182.

Id.

Id.

Programmatic Agreement, supra note 183.

Id.

Id.

See generally Programmatic Agreement, supra note 183.
that the City revise this section of the PA to provide clear guidance in the implementation of a thoroughly executed AIS, to be determined by OIBC.\textsuperscript{412}

V. CONCLUSION

Mai kaula‘i ‘oe i kou iwi i ka wela o ka lā.

Do not place your bones and let them bake and be exposed to the sun, lest the mana that they are imbued with be disbursed and scattered with the wind.\textsuperscript{413}

As detailed throughout this comment, Hawai‘i has an extensive and depressing history of destroying iwi kūpuna and other sacred sites.\textsuperscript{414} Despite legal and moral requirements,\textsuperscript{415} the tracks for the Honolulu Rail are about to be laid in a fashion that will pit Native Hawaiians against developers to protect the sanctity of traditional burials.\textsuperscript{416}

The Rail Project presents a unique opportunity for the City to demonstrate its respect for the significance of iwi kūpuna and its commitment to honor both the letter and spirit of the myriad of laws mandating appropriate planning and protection.\textsuperscript{417} Although only time will tell, the City will be judged on how it elects to handle this process for generations to come.\textsuperscript{418} Hopefully, the ancient wisdom of Native Hawaiians and the lessons learned from travesties such as H-3 will resonate in the minds of City Rail planners. It is imperative that those planners implement appropriate measures, such as those detailed in Part V, \textit{now} to protect and respect Hawai‘i’s iwi kūpuna.\textsuperscript{419} Unless the City takes immediate action, the mana of those kūpuna will be forever disbursed and scattered with the wind.\textsuperscript{420}

\textsuperscript{412} \textit{Id.}

\textsuperscript{413} ‘Ōlelo nō‘eau stated by Hinaleimoana Falamei. Falamei Interview, \textit{supra} note 384. Falamei explained further that when one exposes bones, it signifies disrespect to the legacy that was given to you. To place our bones in the sun is to turn our back on them. \textit{Id.}

\textsuperscript{414} \textit{See supra} Part II(B).

\textsuperscript{415} \textit{See generally supra} Part III.

\textsuperscript{416} \textit{See supra} Part IV(B)(iii).

\textsuperscript{417} \textit{See generally supra} Part V.

\textsuperscript{418} \textit{See generally supra} Parts I and I(B).

\textsuperscript{419} \textit{See supra} Part V.

\textsuperscript{420} \textit{See generally supra} Parts II(A) and IV.
EXHIBITS

EXHIBIT 1: Photo of Kaka'ako District

The 600-acre Kaka'ako District is bounded by Pi‘ikoi, King, Punchbowl Streets and Ala Moana Boulevard. The District also includes the waterfront area from Kewalo Basin to Forrest Avenue. Hawai‘i Community Development Authority, Discover Kaka‘ako, http://hcdaweb.org/kakaako (last visited Apr. 10, 2010).
EXHIBIT 2: Map of Known Iwi Sites in Kakaʻako

NATIVE HAWAIIAN REMAINS
Greater Kakaako is home to numerous native Hawaiian burial sites, from the historical Honuakaha Smallpox Cemetery on South Street to dozens of others recently uncovered at the Ward Village Shops site.

EXHIBIT 3: Pictures of Historic Kaka'ako

The area from Kuloloia Beach to Kakaako as described by lī. Map by Paul Rockwood.

JOHN PAPA ʻĪʻĪ, FRAGMENTS OF HAWAIIAN HISTORY 90 (1959).
EXHIBIT 4: Map of Proposed Route for Rail Project

EXHIBIT 5: Coordinating Section 106 and NHPA “Consultation” In the Context of Rail Project

Section 106

- Establish whether subject to review
- Coordinate; contact consulting parties; Plan public participation
- Scope identification
- Identification, Evaluation, Agency effect determination

NEPA

- Determine type of NEPA document - EIS
- Scope NEPA Analysis
- Perform NEPA analysis - DEIS