CONSULTING PARTY – SUMMARY DISCUSSION FOCUSED ON NATIVE HAWAIIAN ORGANIZATIONS

What is a "consulting party"?

36 CFR Part 800.2 defines consulting parties to include the (c)(1)SHPO, (c)(2)(ii)Native Hawaiian organizations (that attaches religious and cultural significance to historic properties that may be affected by an undertaking). Sections 800.2 and 800.3(f) set forth clear standards for who should be a consulting party, and a clear process for who makes the determination and when. In the context of 36 CFR 800, historic properties are properties that have been determined eligible for listing in the National Register of Historic Places (NRHP).

"[T]he act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking…The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." [36 CFR 800.2(c)(2)(ii)]

Why add consulting parties?

Standards for adding consulting parties adequately balance the project's need for expediency and the right of those with defined interests in getting involved in the process. To ensure this provision is not abused, the rule gives the FTA the ultimate discretion to invite additional consulting parties or not. The ACHP believes the FTA is in a better position to balance the benefits of including these parties against the costs of so doing. The FTA will be able to do this on a case by case basis, according to the particulars of the specific undertaking at issue

How are "other consulting parties" to be identified and involved (§800.3(f))?

The FTA should make a "reasonable and good faith effort" to include…Native Hawaiian organizations that might attach religious and cultural significance to historic properties that may be affected by the undertaking at an early point. While Section 800.3(f) requires that this be done at the initiation of the review, the FTA should also be sensitive to the need to involve additional consulting parties at later stages in the process, as potential project impacts become better understood and the interests of other parties become clearer. The objective is to ensure that the Federal agency has adequately consulted with those who have significant interests in historic preservation issues.

ACHP guidance, *Consultation with Native Hawaiian Organizations in the Section 106 Review Process, A Handbook* (June 2011) states "If a Native Hawaiian organization has not been invited by the agency to consult, that organization may request in writing to be a consulting party. The NHPA and the Section 106 regulations require that the agency grant consulting party status to any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the undertaking."

Regarding Burials

Any burial encountered by the rail project would be protected by and treated according to State burial law. To also be addressed under the Federal Section 106 consultation process, the site would have to be determined to be eligible for nomination to the National Register of Historic Places (NRHP). Not all burial sites are eligible for nomination. It is the responsibility of the Federal Transit Administration, in consultation with the State Historic Preservation Division and consulting parties, to make that determination. National Register Bulletin 41 provides guidance on when burials are NRHP eligible and when they are not.