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May 21, 2010 RT2/09-297862R

Ms. Camille K. Kalama
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813

Dear Ms. Kalama:

Subject: Honolulu High-Capacity Transit Corridor Project
Comments Received on the Draft Environmental Impact Statement

The U.S. Department of Transportation Federal Transit Administration (FTA) and the City and County of Honolulu Department of Transportation Services (DTS) issued a Draft Environmental Impact Statement (EIS) for the Honolulu High-Capacity Transit Corridor Project (Project). This letter is in response to substantive comments received on the Draft EIS during the comment period, which concluded on February 6, 2009. In your letter, you raise various issues specifically and generally. Your overarching concern appears to be related to the possibility that the Project may encounter native Hawaiian burials, the process that DTS followed regarding these resources, and whether sufficient information has been provided to decisionmakers regarding these resources. The following discussion addresses these concerns and others raised in your letter. In your letter, you also provided a bullet-point list of specific recommendations. Those are addressed on the last page of this letter.

The Final EIS identifies the Airport Alternative as the Project and is the focus of this document. The ~~selection~~ identification of the Airport Alternative as the Preferred Alternative was made by the City to comply with the National Environmental Policy Act (NEPA) regulations that state that the Final EIS shall identify the Preferred Alternative. (23 CFR § 771.125 (a)(1)). This selection was based on consideration of the benefits of each alternative studied in the Draft EIS, public and agency comments on the Draft EIS, and City Council action under Resolution 08-261, identifying the Airport Alternative as the Project to be the focus of the Final EIS. ~~The selection is described in Chapter 2 of the Final EIS~~Chapter 2 of the Final EIS describes this identification process. The Final EIS also includes additional information and analyses, as well as minor ~~revisions~~ refinements to the Project that were made to address comments received from agencies and the public on the Draft EIS.

The purpose of the Project is to provide high-capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and UH Mānoa, as specified in the O'ahu Regional Transportation Plan (O'ahu MPO 2007). *See* Sections 1.7 and 1.8 of the Final EIS. The need for the Project is based on the following goals: Improve corridor mobility, Improve corridor travel reliability, Improve access to planned development to support City policy to develop a second urban center, and Improve transportation equity.

~~The following paragraphs address comments regarding the above-referenced submittal:~~

As discussed in Section 2.5.10 and shown in Figure 2-41 of the Final EIS, DTS proposes constructing the Project in four phases East Kapolei to Pearl Highlands, Pearl Highlands to Aloha Stadium, Aloha Stadium to Middle Street, and Middle Street to Ala Moana Center. As shown in Figure 2-42 of the Final EIS, each construction phase will start in the following years 2010, 2011, 2012, and 2013, respectively. As discussed below, an archaeological inventory survey (AIS) will be completed for each phase prior to construction, as stipulated in the Project's Programmatic Agreement (PA), prepared pursuant to Section 106 of the National Historic Preservation Act of 1966 (NHPA). *See* Section 5.4 of the Final EIS. An AIS has already been completed for the first construction phase between East Kapolei and Pearl Highlands in consultation with the State Historic Preservation Division (SHPD) and the Oahu Island Burial Council (OIBC).

The Project is unlike the facts in *Hui Malama I Na Kupuna O Nei v. Wal-Mart*, 223 P.3d 236 (Haw. Ct. App. 2009), *cert. rejected*, 2010 WL 1973594, May 17, 2010, which you cited in your letter. In that case, the Intermediate Court of Appeals (ICA) of the State of Hawaii affirmed the trial court's holding. The trial court held that the City Department of Planning and Permitting's (DPP) determination that a property slated for construction of a Wal-Mart and Sam's Club was not likely to affect historic property or burial sites; and therefore, DPP did not need to consult with SHPD prior to issuing grading and grubbing permits under HRS § 6E-42. DPP's determination was based on a review of its comprehensive computer database of historic sites and known burials, and knowledge that the Wal-Mart/Sam's Club property had been extensively developed and used for commercial and industrial purposes for over fifty years. The Project is doing much more than what the ICA allowed in *Hui Malama*. Unlike *Hui Malama*, the Project has already conducted archaeological and cultural reports, as discussed below. In addition, the Project will conduct an AIS prior to ~~construction for~~ each construction phase. The City has consulted with, and continues to consult with~~,~~ SHPD and OIBC. Any native Hawaiian burials discovered during the AIS will be treated as previously identified burial sites. This ensures that OIBC remains intimately involved in any discussion related to the treatment of native Hawaiian burials.

Under HRS § 6E-42, the provision you cite in your letter, the City must consult with SHPD prior to the issuance of state or county land use entitlements if the Project "may affect historic property . . . or a burial site." In addition to the studies already prepared and the consultation with SHPD and OIBC already conducted and ongoing, the City will conduct an AIS for each construction phase of the Project. As discussed herein, this is the best approach for identifying native Hawaiian burials that may be affected by the Project. ~~The comment only seems to identify two stages to the process. NEPA and construction. In reality there are multiple steps in the FTA process prior to construction starting. There are also specific items regarding the phasing of this particular project that should be described. This would respond to the timing of identification, timing of designs, and where things are in the process.~~

~~The response should go into describing construction phases and how there are four design and construction phases. It should describe the preliminary engineering, and final engineering design stages, and the construction process. It should mention that FTA has specific definitions for each of these stages and it is a formal approval step to enter into final design for FTA. Because of the NEPA process, only a certain level of engineering is allowed.~~

~~The FTA and the City, in consultation with numerous consulting parties, developed a PA in compliance with the Section 106 process recognizing that there is a high potential for discovering Native Hawaiian burials in phase 4 of the construction area. The PA specifies specific project milestones for archeological investigations. The plans and the investigations themselves would be conducted in close coordination with the SHPO and OIBC and will take place prior to final design and therefore prior to construction. Therefore, a construction contractor should not have to move Native Hawaiian burials in the midst of construction for that phase.~~

During the NEPA and Section 106 process, the FTA limits the level of design and engineering that project sponsors can conduct on their projects so as to not prejudice the consideration of alternatives, including the no action alternative. Consequently, the placement of column foundations is a design activity that requires a level of design that typically takes place after the NEPA and Section 106 processes conclude. To balance the current level of project design, the desire to limit disturbance of native Hawaiian burials and residences in Phase IV of the project area, and the potential transportation benefits that would accrue from the proposed Project, a detailed approach for conducting archaeological investigations for Phase IV for the Project was developed in the PA. As part of the Section 106 consultation process and preparation of the PA, there was extensive consultation with various parties including the following: OIBC, the Office of Hawaiian Affairs, Hui Malama in Na Kupuna O Hawaii Nei, the Royal Order of Kamehameha, the Ahahui Kaahumanu, The Daughters and Sons of the Hawaiian Warriors, the Association of Hawaiian Civic Clubs, the Ahahui Siwila Hawaii O Kapolei, the Alii Pauahi, the Ewa-Puuloa Hawaiian Civic Club, the Honolulu Hawaiian Civic Club, the King Kamehameha Hawaiian Civic Club, the Kalihi-Palama Hawaiian Civic Club, the Pearl Harbor Hawaiian Civic Club, the Merchant Street Hawaiian Civic Club, the Nanaikapono Hawaiian Civic Club, the Princess Kaiulani Hawaiian Civic Club, the Waianae Hawaiian Civic Club, the Wahiawa Hawaiian Civic Club, and the Waikiki Hawaiian Civic Club.
~~Should discuss that the intent of this strategy is to limit the unnecessary disturbance of Native Hawaiian burials in the corridor and to limit the cost. See the FTA response to the NPS for language.~~

DTS recognizes in Figure 4-73 of the Final EIS that the area of the Project with the highest likelihood of encountering native Hawaiian burials is in Phase IV. The proposed schedule for starting Phase IV construction is 2013. Although the development of more detailed design, and therefore archaeological investigations, for the last construction phase would have typically been delayed until closer to the anticipated construction start date, DTS has committed to starting the process much earlier. As stated in the PA,

> Within 60 days of execution of this PA, the City shall consult with the OIBC, lineal and cultural descendents, 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. The City shall provide Preliminary Engineering plans and existing utility maps to assist in the scoping process. The AIS Plan will provide for investigation of the entire Phase 4 area, including from Waiakamilo Road to Ala Moana Center. In the portion of Phase 4 with the greatest potential for resources, the AIS Plan will evaluate all areas that will be disturbed by the Project. The AIS Plan will include a review of historical shoreline location, soil type, and, where indicated by conditions, the survey measures listed in Stipulation III.C, including subsurface testing, for each column location, utility relocation, and major features of each station and traction power substation location based on Preliminary Engineering design data.

The plan developed through this consultation, would need to be submitted to SHPD within four months of execution of the PA. Archaeological investigations would start after SHPD approves the plan within 30 days of receipt. The City would be required to complete the archaeological investigations during a period of time where there is still flexibility in project design. In addition, within six months of the execution of the PA, the City, in coordination of the OIBC, shall complete a draft protocol for consultation regarding treatment of any native Hawaiian burials identified during the AIS. The protocol would also include a workflow of avoidance alternatives, which might include the relocation of columns, change in column design from a center alignment to a straddle bent or other alternatively supported design, modification of span length, and alternate utility locations.

~~The PA developed in consultation with the OIBC and the other consulting parties, would treat the burials that are discovered during preliminary engineering and inadvertent discoveries during construction as "previously identified" burials. This would give the burial council and the SHPD's office as much information as early as possible in the project development, while not disturbing the entire corridor unnecessarily, so that both entities can properly exercise their role.~~

~~The first paragraph on page 3 of the letter discusses the role of the environmental review process. Not sure whether it is understood that the decisionmaker and the public are fully aware of the potential impacts. I think the discussion should be that we have sufficient levels of information to be informed about the potential impacts of the project.~~

~~The third paragraph discusses engaging in advance consultation. Should describe the City and FTA's consultation process with the OIBC. It goes back several years. Should describe the consultation process with the other consulting parties. The end of the process is working on the Section 106 PA. Discuss how the consulting parties would be involved moving forward with the process.~~

~~Pages 4 and 5 discuss the history of burial discoveries in the downtown area. The city should acknowledge this discussion and how that information helped inform the current project approach to Native Hawaiian burials. Investigations will take place prior to the construction phase. As stated before, this approach is intended to maintain the role of the OIBC. Could also discuss the other elements of the PA such as the draft protocol and archeological investigation plan.~~

~~Page 6 continues the discussion of lessons learned. Should say that this information informed the development of the 2006 and 2008 technical reports and the development of the PA.~~

~~Page 7, to respond to the columns approach, the City needs to provide more detail on the plans to identify column locations, search for burials, and then describe the potential options for relocating columns. Specifically discussed the planned flexibility to avoid impacts. Also state if discovered, would need to comply with Section 4(f).~~

~~Page 8, there should be a point by point response on how the FEIS addresses the comments in the bullets. If these are not addressed, then they need to be addressed in the document.~~

The Final EIS discussion on native Hawaiian burials was compiled in good faith and sets forth sufficient information to enable the decision maker to make an informed decision regarding the significant impacts on the environment, including native Hawaiian burials and cultural resources, as discussed in Section 4.16 of the Final EIS entitled, *Archaeological, Cultural, and Historic Resources*. The evaluation of impacts to native Hawaiian burials discussed in the Final EIS is supported by various studies including the *Honolulu High-Capacity Transit Corridor Project Archaeological Resources Technical Report* (RTD 2008n), the *Honolulu High-Capacity Transit Corridor Project Historic Resources Technical Report* (RTD 2008o), the *Honolulu High-Capacity Transit Corridor Project Cultural Resources Technical Report* (RTD 2008p), the *Honolulu High-Capacity Transit Corridor Project Addendum 01 to the Historic Resources Technical Report* (RTD 2009c), and the *Honolulu High-Capacity Transit Corridor Project Historic Effects Report* (RTD 2009d). All technical reports referenced in this letter and in the Final EIS are available from DTS and on the Project website at www.honolulutransit.org.

~~Efforts to address the possibility of encountering iwi kupuna began during the Alternatives Analysis phase of the Project and are ongoing in coordination with the State Historic Preservation Division, Oahu Island Burial Council, and other interested parties. The *Archaeological Technical Report*, dated August 28, 2006 (see Pages 2 and 3), was prepared to support the Alternatives Analysis and specifically evaluated potential impact to burials and the potential impact of various proposed alternatives summarizing the available information pertaining to the previous identification of burials (see, for example, the following pages in this technical report: 4-1, 4-2, 4-11, 4-13, 4-14, 4-15, 4-25, 4-27, 4-28, 4-41, 4-43, 4-44, 4-51, 4-53, 4-54, 4-56, 4-61, 4-62, and 4-64 to 4-75). The data on the presence of iwi kupuna was a specific category of analysis taken into consideration in route and alternative selection (page 5-113; see also pages 5-94, 5-96, 5-97, 5-99, 5-101, 5-102, 5-104, 5-105, 5-106, 5-108, 5-112, 5-114, 5-116, 5-123, and 5-133). This study took into account available data on soil types, previously recorded archaeological resources, historic land records, and previously recorded burial locations. All technical reports referenced in this letter are available from the City and County of Honolulu and the Department of Transportation Services offices and on the Project website.~~

~~Further consideration for the i~~Identification and protection of ~~iwi kupuna~~native Hawaiian burials was carried out in the *Cultural Resources Technical Report*, dated August 1, 2008, prepared for and referenced in the Draft and Final EISs. The *Cultural Resources Technical Report* was prepared by Lani Ma'a Lapilio. Ms. Lapilio ~~is an attorney~~earned her juris doctorate and is the former Principal of Ku'iwalu, a Native Hawaiian business specializing in cultural resource compliance, community outreach, and public affairs. Her former positions include executive director of the Judiciary History Center and legal counsel for the Office of Hawaiian Affairs, Native Hawaiian Historic Preservation Council. Ms. Lapilio currently serves as the

Hawai'i Advisor to the National Trust for Historic Preservation and is the at-large member on the National Trust's Executive Committee. The *Cultural Resources Technical Report* was prepared in large part to ~~specifically address~~ identify traditional and customary ~~rights~~ practices of ~~Native~~ native Hawaiians within the Project area. The extensive efforts to identify, contact, and consult with individuals, organizations, and agencies specifically sought to develop data on ~~iwi kupuna~~native Hawaiian burials and ~~iwi kupuna~~native Hawaiian burial concerns. *See, e.g., Cultural Resources Technical Report* at ~~(see~~ Sections 4.3.2, 5.2.1, and ~~and~~ 5.2.4 ~~of the Cultural Resources Technical Report)~~. Several cultural informants ~~related~~ provided information regarding ~~iwi kupuna~~native Hawaiian burials. *See, e.g., Cultural Resources Technical Report* at F-4, F-8 (~~(see c~~comments of Louis Agard, Jr.), ~~, pages F-4, F-8; Claire Pruet, page~~ F-10 (comments of Claire Pruet); and F-24, F-25 (comments of Shad Kane ~~, pages F-24 and F-25~~). Land documents were examined to identify any accounts of ~~iwi kupuna~~native Hawaiian burials. *See, e.g., Cultural Resources Technical Report* at ~~(pages~~ 5-7, H-5, and H-6~~)~~.

Comment [eaz1]: Need to mention the professional qualifications of the individuals preparing the reports and the professional qualifications of individuals conducting future studies.

The *Archaeological Resources Technical Report*, dated August 15, 2008, prepared for and referenced in the Draft and Final EISs, lists burials as the first category of resources to be identified. *See, e.g., Archaeological Resources Technical Report* at ~~(see Page~~ S-1, Table S-1, and Section 3.4~~)~~.

The *Archaeological Resources Technical Report* identifies (Section 6.2) a number of steps to protect ~~iwi kupuna~~native Hawaiian burials, including a multi-step approach of: ~~-~~(1) preparation of an Archaeological Inventory Survey Plan, (2) use of Ground Penetrating Radar, (3) completion of an Archaeological Inventory Survey, (4) Archaeological Data Recovery (as appropriate), and (5) an Archaeological Monitoring Program (to begin with an Archaeological Monitoring Plan). Each of these additional archaeological studies is to be reviewed and accepted by ~~the State Historic Preservation Division~~SHPD prior to groundbreaking for ~~that~~ each construction phase. ~~*In addition, the preparation of a Programmatic Agreement has been completed that has included consultation with Native Hawaiian groups and organizations, including Hui Malama, the Office of Hawaiian Affairs, Hawaiian Civic Clubs, and the Oahu Island Burial Council (see*~~ *See Archaeological Resources Technical Report* at Section 3.5.2~~)~~.

~~As part of the National Historic Preservation Act Section 106 consultation, there has been extensive consultation, including the Oahu Island Burial Council, the Office of Hawaiian Affairs, Hui Malama in Na Kupuna O Hawaii Nei, the Royal Order of Kamehameha, the Ahahui Kaahumanu, The Daughters and Sons of the Hawaiian Warriors, the Association of Hawaiian Civic Clubs, the Ahahui Siwila Hawaii O Kapolei, the Alii Pauahi, the Ewa-Puuloa Hawaiian Civic Club, the Honolulu Hawaiian Civic Club, the King Kamehameha Hawaiian Civic Club, the Kalihi-Palama Hawaiian Civic Club, the Pearl Harbor Hawaiian Civic Club, the Merchant Street Hawaiian Civic Club, the Nanaikapono Hawaiian Civic Club, the Princess Kaiulani Hawaiian Civic Club, the Waianae Hawaiian Civic Club, the Wahiawa Hawaiian Civic Club, and the Waikiki Hawaiian Civic Club. A standing sub-committee of the Oahu Island Burial Council has been established with consultation ongoing monthly. Specific recommendations by the Oahu Island Burial Council have been incorporated within project plans.~~

~~Additionally, the City is moving forward, in consultation with the State Historic Preservation Division and the Oahu Island Burial Council, with preparing a draft burial treatment plan.~~

~~The City has specifically evaluated potential impact to burials and specifically evaluated the potential impact of various proposed alternatives in consideration of the data provided in the *Archaeological Technical Report* dated August 28, 2006. Follow-through with and implementation of the approaches codified in the *Archaeological Resources Technical Report* and summarized above will provide the City with adequate information on the risks of encountering ancient Hawaiian burial remains prior to the beginning of the construction work. The preparation of the *Cultural Resources Technical Report* for the Draft EIS and the extensive and continuing consultation with Native Hawaiian individuals, groups, and agencies has been a good faith effort to assess cultural impacts.~~ Even prior to the preparation of the EIS, efforts to address the possibility of encountering native Hawaiian burials began during the Alternatives Analysis phase of the Project. As discussed in Chapter 2 of the Final EIS, environmental factors that were considered during the Alternatives Analysis phase included land use and economic activity, displacements, neighborhoods and communities, farmlands, visual and aesthetic resources, air quality and energy, noise and vibration, water resources, natural resources, and cultural, historic, and archaeological resources. During the Alternatives Analysis phase, the City consulted with SHPD regarding historic properties and evaluated the likely effect to historic properties of each alternative. The outcome is documented in the *Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Historic and Archaeological Technical Report* (DTS 2006e). The Federal undertaking was defined by selection of the Locally Preferred Alternative (LPA). Following the selection of the LPA, the City and FTA initiated consultation under Section 106.

The *Archaeological Technical Report*, dated August 28, 2006 (see Pages 2 and 3), was prepared to support the Alternatives Analysis and specifically evaluated potential impacts to burials and the potential impact of various proposed alternatives summarizing the available information pertaining to the previous identification of burials. *See, e.g., Archaeological Technical Report* at 4-1, 4-2, 4-11, 4-13, 4-14, 4-15, 4-25, 4-27, 4-28, 4-41, 4-43, 4-44, 4-51, 4-53, 4-54, 4-56, 4-61, 4-62, and 4-64 to 4-75. The data on the presence of native Hawaiian burials was a specific category of analysis taken into consideration in route and alternative selection. *See, e.g., Archaeological Technical Report* at 5-94, 5-96, 5-97, 5-99, 5-101, 5-102, 5-104, 5-105, 5-106, 5-108, 5-112, 5-113, 5-114, 5-116, 5-123, and 5-133. This study took into account available data on soil types, previously recorded archaeological resources, historic land records, and previously recorded burial locations.

The City specifically evaluated potential impacts to burials and specifically evaluated the potential impacts of various proposed alternatives in consideration of the data provided in the *Archaeological Technical Report* dated August 28, 2006. Follow-through with and implementation of the approaches listed in the *Archaeological Resources Technical Report* and summarized above will provide the City with information on the risks of encountering native Hawaiian burials prior to the beginning of the construction work. The preparation of the *Cultural Resources Technical Report* for the Draft EIS and the extensive and continuing consultation with native Hawaiian individuals, groups, and agencies has been a good faith effort to assess cultural impacts.

~~The extensive and ongoing advance consultation with Native Hawaiian individuals, groups, and agencies has been in keeping with the letter and spirit of NHPA Section 106 consultation.~~

~~A program of archaeological inventory survey investigations has begun with the State Historic Preservation Division review and approval of an archaeological inventory survey plan for the first construction phase. The archaeological inventory survey is ongoing and will be taken into account in final plans prior to construction.~~

As you have noted, Land Commission Award (LCA) claims associated with the ~~project~~ Project corridor indicate the possibility of burials within the project corridor—specifically in two cases. In the case of LCA 247 to Charles Kanaina, this is a ~~huge~~vast alii claim involving many lands; and it in fact appears most likely that the burials referred to were in a former alii mausoleum on the grounds of the present Iolani Palace (well away from the project corridor). In the second case, LCA 30 to Kahoowaha, it appears there were two apana located mauka of Nimitz Highway between Kekaulike Street and Maunakea Street. Our studies to date indicate that one of the two LCA 30 apana did indeed have a narrow flaglot extension as far south as the Nimitz Highway right-of-way. This general area has indeed been associated with a number of burial finds. We certainly agree that this specific area of LCA 30 extending to Nimitz Highway merits consideration of avoidance. Certainly, intensive subsurface testing well in advance of construction in the vicinity will be in order to allow for relocation of column foundations away from any sensitive areas.

In addition to the issues raised in your letter, we address your bullet-point suggestions as follows:

- The Final EIS includes information regarding the impact of the Project on burial sites and a discussion on how to avoid those sites if encountered, as discussed above. Based on the various studies identified above, no cemeteries or known burial sites will be affected by the Project. However, the City does recognize the likelihood of encountering native Hawaiian burials in certain areas of the Project. As discussed above, pre-construction AISs for each construction phase will allow the Project to identify native Hawaiian burials during final design and prior to construction for each construction phase.

- Section 4.1 of the Draft EIS, is now Section 4.2 of the Final EIS. This section describes the existing land uses, including farmlands, development trends, and long-term plans for the study corridor. It also evaluates the Project's consistency with the longterm plans for the study corridor. ~~Your suggestion that this section should state, "burial sites are an existing land use along this corridor," is not appropriate for this section. However, y~~Your concern regarding the identification of native Hawaiian burial sites is addressed in Section 4.16.2 of the Final EIS, which identifies three general categories of archaeological resources that could be affected: burials, pre-contact archaeology, and post-contact archaeology. These resources are shown by area and rated by probability of occurrence in Figure 4-73 of the Final EIS.

- Section 4.3 of the Draft EIS is now Section 4.4 of the Final EIS. This section documents the effects on properties from necessary right-of-way acquisition for the Project. Your

suggestion that this section should "discuss whether the City plans to displace and relocate existing burial sites and give details about the timing, location and process related to each of these relocations and displacements" is unrelated to property acquisition described in Section 4.4. However, the following language was added to 4.16.1 of the final EIS:

"The City will develop an archaeological inventory survey (AIS) plan for the APE for each construction phase in accordance with 36 CFR 800.4, which allows for phased identification of archaeological resources to limit disturbance of potential resources during the investigation. The City will use PE plans to focus the investigation in locations where there is the potential to affect archaeological resources by project construction. The AIS plans will follow the requirements of HAR Chapter 13-276. The City will conduct the archaeological fieldwork as presented in the AIS plan for each construction phase. The archaeological fieldwork will be completed in advance of the completion of final design so that measures to avoid and/or minimize adverse effects to the historic properties can be incorporated into the design. **The O'ahu Island Burial Council will have jurisdiction to determine the treatment of previously identified Native Hawaiian burial sites in accordance with HAR Chapter 13-300. Any 'iwi kupuna (Native Hawaiian burials) discovered during the AIS shall be treated as previously identified burial sites.**"

(Emphasis added.) Under HRS § 6E-43(b), the OIBC has jurisdiction to "determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted[.]"

- Section 4.6 of the Draft EIS is now Section 4.7 of the Final EIS. While the City is sensitive to the issues related to native Hawaiian burials, it is not an issue of environmental injustice. Hawaii's burial laws and federal historic preservation laws (for burials that qualify for the National Register of Historic Places) allow development in areas where native Hawaiian burials are located subject to the procedural requirements of those state and federal regulations. As discussed above and in the Final EIS, the City has made a good faith effort to avoid, minimize, and mitigate impacts to areas where native Hawaii burials may be present throughout the EIS preparation process and will continue to avoid, minimize, and mitigate impacts during final design.

- In your last bullet-point, you state "Section 4.17 should be revised in the same manner sections 4.1, 4.3 and 4.6 should be." The Draft EIS did not have a Section 4.17, but we assume you mean Section 4.15 of the Draft EIS, entitled, *Archaeological, Cultural, and Historic Resources*. Section 4.15 of the Draft EIS is now Section 4.17 of the Final EIS. Since you have not specified your concerns regarding Section 4.17, here are some of the general changes we made to that section based on comments and continued ~~consolation.~~consultation:

  The Area of Potential Effects (APE) was reevaluated following publication of the Draft EIS as a result of ongoing Section 106 consultation. The *Historic Effects Report* (RTD 2009d) was completed, and the FTA accepted the effect determination recommended by SHPO. The effect determinations of the 81 historic resources are presented; the discussion of Section 106 consultation has been updated; and mitigation was added in accordance with

the signed PA. In addition, this section included additional discussion on Act 50, which requires a HRS Chapter 343 EIS to "include the disclosure of the effects of a proposed action on the cultural practices of the community and State." This section also included consideration of the Hawai'i Supreme Court decision in *Ka Pa'akai*, which you cited in your letter, wherein the Court held that native Hawaiian rights are a subset of culture protected by Act 50. Cultural resource assessment and findings are based in part on the *Cultural Resources Technical Report* (RTD 2008p).

The extensive and ongoing advance consultation with native Hawaiian individuals, groups, and agencies is in keeping with the letter and spirit of the NHPA and Section 106. As you know, a standing sub-committee of the OIBC has been established with consultation ongoing monthly. ~~Specific recommendations by the OIBC have been incorporated within Project plans. The City is moving forward, in consultation with SHPD and OIBC, with preparing a draft burial treatment plan as provided for in the PA.~~ In addition, as discussed above, AIS investigations have begun. The AIS program is ongoing and will be taken into account in final plans prior to construction.

The FTA and DTS appreciate your interest in the Project. The Final EIS, a copy of which is included in the enclosed DVD, has been issued in conjunction with the distribution of this letter. Issuance of the Record of Decision under NEPA and acceptance of the Final EIS by the Governor of the State of Hawaii are the next anticipated ~~actions~~steps in the environmental review process ~~and will conclude the environmental review process for this Project~~.

Very truly yours,

WAYNE Y. YOSHIOKA
Director

Enclosure