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SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAULETTE KA`ANOHIOKALANI)	CIVIL NO. 11-1-0206-01 GWBC
KALEIKINI,)	
	)	APPEAL FROM: A) Final Judgment, filed
Plaintiff-Appellant,	)	on August 8, 2011; B) July 5, 2011 Order
vs.	)	Granting DEFENDANTS WAYNE
	)	YOSHIOKA in his official capacity as
WAYNE YOSHIOKA in his official capacity as	)	Director of the City and County of
Director of the City and County of Honolulu's	)	Honolulu's Department of Transportation
Department of Transportation Services, CITY	)	Services, CITY AND COUNTY OF
AND COUNTY OF HONOLULU,	)	HONOLULU, HONOLULU CITY
HONOLULU CITY COUNCIL, PETER	)	COUNCIL, PETER CARLISLE in his
CARLISLE in his official capacity as Mayor,	)	official capacity as Mayor, CITY AND
CITY AND COUNTY OF HONOLULU	)	COUNTY OF HONOLULU
DEPARTMENT OF TRANSPORTATION	)	DEPARTMENT OF TRANSPORTATION
SERVICES, CITY AND COUNTY OF	)	SERVICES, and CITY AND COUNTY OF
HONOLULU DEPARTMENT OF PLANNING	)	HONOLULU DEPARTMENT OF
AND PERMITTING, WILLIAM J. AILA JR. in	)	PLANNING AND PERMITTING's Motion
his official capacity as Chairperson of the Board	)	to Dismiss Complaint and/or for Summary
of Land and Natural Resources and state historic	)	Judgment filed February 9, 2011; C) July 5,
preservation officer, PUAALAOKALANI AIU	)	2011 Order Granting Certain State
in her official capacity as administrator of the	)	Defendants' Substantive Joinder in
State Historic Preservation Division,	)	Defendants WAYNE YOSHIOKA, CITY
BOARD OF LAND AND NATURAL	)	AND COUNTY OF HONOLULU,
RESOURCES, DEPARTMENT OF LAND	)	HONOLULU CITY COUNCIL, PETER
AND NATURAL RESOURCES, NEIL	)	CARLISLE, CITY AND COUNTY OF
ABERCROMBIE in his official capacity as	)	HONOLULU DEPARTMENT OF
Governor, and O`AHU ISLAND BURIAL	)	TRANSPORTATION SERVICES, and
COUNCIL,	)	CITY AND COUNTY OF HONOLULU
	)	DEPARTMENT OF PLANNING AND
Defendants-Appellees.	)	PERMITTING's Motion to Dismiss
	)	Complaint and/or for Summary Judgment
	)	filed February 9, 2011 [Joinder Filed

) February 18, 2011]; D) Denial of Plaintiff's
) Hawai'i Rules of Civil Procedure Rule 56(f)
) request; E) July 5, 2011 Order Denying
) Plaintiff's Motion for Reconsideration of this
) Court's March 23, 2011 Oral Rulings, Filed
) on April 4, 2011
)
)
) FIRST CIRCUIT COURT
)
) HONORABLE GARY W.B. CHANG
) Judge

PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

MEMORANDUM IN SUPPORT OF MOTION

NATIVE HAWAIIAN LEGAL CORPORATION
DAVID KIMO FRANKEL 5791
ASHLEY K. OBREY 9199
1164 Bishop Street Suite 1205
Honolulu HI 96813
Phone: 808-521-2302

Attorneys for Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAULETTE KA`ANOHIOKALANI	)	CIVIL NO. 11-1-0206-01 GWBC
KALEIKINI,)	
	)	PLAINTIFF-APPELLANT’S MOTION
Plaintiff-Appellant,	)	FOR INJUNCTIVE RELIEF PENDING
vs.	)	APPEAL
)	
WAYNE YOSHIOKA in his official capacity as)	
Director of the City and County of Honolulu’s)	
Department of Transportation Services, et. al.,)	
)	
Defendants-Appellees.)	
)	

PLAINTIFF-APPELLANT’S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

Pursuant to Rules 8 and 27 of the Hawai`i Rules of Appellate Procedure (HRAP), Plaintiff-Appellant Paulette Ka`anohiokalani Kaleikini (“Plaintiff”) moves for injunctive relief pending appeal. She specifically asks that this Court enjoin the Defendants-Appellees (“Defendants”) from commencing, continuing or engaging in any ground disturbance or land alteration for the Honolulu High-Capacity Transit Corridor Project (except for those activities that are necessary for the completion of the archaeological inventory survey) during the course of this appeal.

This motion is supported by the accompanying memorandum in support, Plaintiff’s previously filed opening and reply briefs, the exhibits and declarations referred to therein, and the entire record on appeal in this matter.

DATED: Honolulu, Hawai`i, March 9, 2012.

/s/ DAVID KIMO FRANKEL
DAVID KIMO FRANKEL
ASHLEY K. OBREY
Attorneys for Plaintiff-Appellant

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IN THE SUPREME COURT OF THE STATE OF HAWAII

PAULETTE KA`ANOHIOKALANI)
KALEIKINI,)
)
Plaintiff-Appellant,)
vs.)
)
WAYNE YOSHIOKA in his official capacity)
as Director of the City and County of)
Honolulu’s Department of Transportation)
Services, et. al.,)
)
Defendants-Appellees.)

CIVIL NO. 11-1-0206-01 GWBC
MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

Plaintiff-Appellant Paulette Ka`anohiokalani Kaleikini (“Plaintiff”) asks this Court to enjoin the City (collectively: Peter Carlisle, Wayne Yoshioka, City and County of Honolulu, Honolulu City Council, City and County of Honolulu Department of Transportation Services, and City and County Department of Planning and Permitting) from commencing, continuing, or engaging in any non-archaeological ground disturbance for the Honolulu High-Capacity Transit Corridor Project (“rail project”) in the course of this appeal. The relief requested is similar to the relief granted in *Natatorium Preservation Comm. v. Edelstein*, 55 Haw. 55, 515 P.2d 621 (1973).

“The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all[.]” 1990 Haw. Sess. Laws Act 306 § 1. An archaeological inventory survey (AIS) is used by citizens, island burial councils and other agencies to identify and protect burial sites. HAR Title 13 chapters 276, 300, 275, and 284. A timely AIS allows for: (a) informed decisionmaking that allows for the preservation of historic properties (including burial sites); (b) consideration of all options before they are foreclosed and agency commitments are set in concrete; and (c) a meaningful opportunity to protect identified burials. HAR Title 13 chapters 300, 275, and 284. In order to fast-track the rail project, the City and DLNR Defendants (collectively, Department of Land and Natural Resources (DLNR), Board of Land and Natural Resources, William Aila, and Puaalaokalani Aiu) agreed to postpone completion of the AIS along the entire corridor until after approval and

commencement of the rail project. They refused to fully assess the adverse impacts of the rail project on archaeological sites, including burial sites. HRS chapters 6E and 343 require the early preparation of an AIS to determine the location and quantity of burials that the rail project is likely to impact before options are closed and agency commitments are set in concrete.

I. FACTS

A. The Rail Project

The rail project involves the construction of an approximately 20-mile fixed guideway rail system from West O`ahu to Ala Moana Center. JEFS #50 RA: 10 at ¶ B(1). It is proposed to be constructed in four phases: phase 1 (East Kapolei to Pearl Highlands), phase 2 (Pearl Highlands to Aloha Stadium), phase 3 (Aloha Stadium to Middle Street), and phase 4 (Middle Street to Ala Moana Center). *Id.* at ¶ B(2). All four phases are connected and part of a single project. JEFS #50 RA: 111 ¶ 3. Ground disturbance includes redirection of underground electrical, water and sewer lines, and groundwork for the pillars and stations. *Id.* ¶ 5; JEFS #50 RA: 112 ¶ 6; JEFS #50 RA: 11-12 ¶ 10(b) and 105.

B. Burials

Since 1986, over four hundred burials have been found in the area bordered by River Street, Ke`eaumoku Street, Nimitz/Ala Moana Boulevard, and King Street. JEFS #44 RA: 61 ¶ 28. Over sixty Native Hawaiian burials have been discovered at **each** of these three development projects in Kaka`ako over the past decade: General Growth's Ward Village Shops Project, the Wal-Mart site on Ke`eaumoku Street, and Kawaiaha`o Church's Multi-Purpose Center project. JEFS #44 RA: 61-62 ¶ 29.

The rail project has a high likelihood of affecting burials and other archaeological resources in Kaka`ako. JEFS #46 RA: 205, 222; JEFS #48 RA: 27. The final environmental impact statement (EIS) for the rail project acknowledges that the probability of encountering burials in the later phases (downtown and Kaka`ako) is high. JEFS #50 RA: 10 ¶ 4. The City and DLNR Defendants are aware that the rail project may adversely affect archaeological sites, including burial sites. *Id.* ¶ 3.

C. AIS

An AIS is the process used to locate burials and other archaeological features. The purpose of an AIS is to: (a) conduct a thorough ethnohistorical study of archival and archaeological documents related to the project area to inform upon the presence/absence, nature

of, location of, distribution of, and significance of historic properties in the project area (including burial sites); (b) conduct surface and subsurface investigations to determine the presence/absence, nature of, location of, distribution of, and significance of historic properties in the project area (including burial sites) and to gather additional field data to allow for reasoned predictions of the presence/absence, nature of, location of, distribution of, and significance of historic properties in the project area (including burial sites); (c) engage in consultation with interested parties regarding the identification, interpretation, significance evaluation, and treatment of historic properties; and (d) provide information to decision makers to enable them to preserve significant historic properties (including burial sites). JEFS #44 RA: 62 ¶ 32. An AIS that is prepared early in the decisionmaking process allows for a better informed and meaningful process of addressing potential finds of cultural or historic significance. *Id.* at 62-63 ¶ 33. According to expert testimony, if a project commences before an AIS is completed, it becomes difficult for the project to both move forward and protect burials in a meaningful way. JEFS #44 RA: 63 ¶ 34. Significant negative consequences result when an AIS is not completed before construction commences. JEFS #50 RA: 151 ¶ 6.

D. Decisionmaking and Construction Start Prior to Completing AIS for the Project.

The City and DLNR Defendants acknowledge the need to perform an AIS along the entire corridor of the rail project. JEFS# 50 RA: 12 ¶¶ 11-12. Despite their acknowledgement that the rail project had a high likelihood of affecting burial sites, however, the City and DLNR Defendants – along with the Federal Transit Administration (FTA) – agreed to a “phased approach” to the preparation of an AIS for the project. JEFS #40 RA: 103-143; JEFS #50 RA: 11 ¶ 9. Pursuant to this “phased approach,” the City is not planning on completing the AIS for all phases of the project until after construction on phase one has commenced. JEFS #50 RA: 12-13 ¶ 15 and 20. Although they determined that that the project may adversely affect archaeological sites, they concluded that these effects could not “be fully assessed prior to the approval of FTA financial assistance.” JEFS #40 RA: 105.

The City approved the project and broke ground prior to completing an AIS for the entire project (*i.e.*, all four construction phases). It granted a special management area (SMA) permit for the project. JEFS #40 RA: 401-13. It held a ceremonial groundbreaking. JEFS #50 RA: 13 ¶ 18. The City planned to commence construction on the first phase of the project prior to completion of an AIS for the entire project. *Id.* ¶ 19-20.

Final EISes often include an AIS. JEFS #42 RA: 46-47; JEFS #50 RA: 13 ¶ 21. Yet, an AIS for the rail project was not prepared prior to the completion and acceptance of the final EIS for the rail project. JEFS #50 RA: 13 ¶¶ 16 and 20, 125 ¶ 38.

E. Plaintiff

Plaintiff is a Native Hawaiian who engages in traditional and customary practices that her parents and other ancestors taught her. JEFS #42 RA: 44 ¶ 2-3; *see also Kaleikini v. Thielen*, 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010). Plaintiff's traditional and customary practices include, but are not limited to, mālama iwi. One of the critical tenets of Native Hawaiian traditional and customary practices is the obligation to ensure that iwi remain undisturbed and that they receive proper care and respect. Protection of iwi in place and prevention of relocation is a traditional and customary practice of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778. JEFS #42 RA: 44 ¶ 4-5. Plaintiff is a recognized cultural descendant to iwi found in Kaka'ako. *Id.* ¶ 6. The unnecessary removal of iwi causes Plaintiff great pain and suffering. *Id.* ¶ 7. Plaintiff relies on information contained in archaeological inventory surveys to advocate for the protection of iwi. Although the law may not allow Plaintiff to unilaterally decide the fate of ancestral remains, Plaintiff brought this action to ensure that all proper procedures are followed for a project that will impact iwi. An AIS along the entire corridor of the rail project would allow Plaintiff to better ensure the appropriate protection of iwi. *Id.* ¶ 8-10.

On January 30, 2009, Plaintiff, through counsel, timely commented on the draft EIS for the rail project. JEFS #42 RA: 44-5 ¶12; JEFS # 46 RA: 57; JEFS #50 RA: 273-74. In her comments, Plaintiff notified Defendants Yoshioka and Aiu that the proposed rail project would impact iwi. She pointed out that an AIS should be prepared prior to decisionmaking. JEFS #42 RA: 45 ¶ 13-14; JEFS #40 RA: 174-181.

F. O`ahu Island Burial Council

On October 14, 2009, the O`ahu Island Burial Council¹ (OIBC) voted to point out unanimously to the City and the FTA that an AIS needed to be completed before acceptance of the final EIS and to outline its objections to the programmatic agreement for the rail project. JEFS #50 RA: 236 and 241. On October 27, 2009, the OIBC presented testimony to the

¹ Island burial councils are statutorily charged with assisting the DLNR in the inventory and identification of native Hawaiian burial sites and in providing recommendations regarding appropriate treatment and protection of burial sites. HRS § 6E-43.5(f).

Honolulu City Council, which included correspondence to the FTA that highlighted the importance of early identification of iwi through an inventory survey prior to decisionmaking. *Id.* at 257-272. On April 14, 2010, the OIBC unanimously adopted a resolution in which it took the position that HRS chapters 6E-8 and 6E-42 preclude a phased approach to AISes. *Id.* at 252.

G. Harm

By failing to ensure preparation of an AIS along the entire transit corridor, the City and State Defendants failed to fully consider the impact of the rail project on iwi prior to decision-making. An AIS prepared after decisionmaking significantly increases the likelihood that burials will be disturbed and removed. JEFS #50 RA: 151-52. JEFS #42 RA: 47 ¶ 37 and at 60.

Plaintiff's expert, Dr. Abad, pointed out that: (1) the uncovering of burial remains is an alteration of a burial site; (2) early identification of burial sites allows for all options to be considered (including scope, size, location, and design) so that burial sites can be protected; (3) there is a very high likelihood of discovering burials in the urban portions of the rail project; (4) an AIS provides information to decisionmakers to enable them to preserve burial sites; (5) early preparation of an AIS allows for a better informed and meaningful process of addressing potential finds; (6) given the number of burials likely to be encountered and the extent of excavation, the relocation of piers will not adequately protect burials; (7) more fundamental options – including the route and the technology – need to be considered to protect burials; and (8) significant negative consequences have resulted when an AIS was not completed before decisionmaking – including limiting options available for the protection of burials. JEFS #44 RA: 60-63; JEFS #50 RA: 151-52.

As shown by Plaintiff's expert's testimony, an alteration of the route or technology is essential in order to protect burials. JEFS #44 RA: 63 ¶ 37. But the City has already rejected alteration of the route. The City is willing to redesign columns to protect burials; “[h]owever, radical measures such as moving the alignment to a different street or area would not be available.” JEFS #48 RA: 333. The City's approvals prohibit it from changing the route. The FTA's Record of Decision (ROD) requires the City to “design and build” the rail project “as presented in the Final EIS and this ROD. Any proposed change by the City . . . must be approved by FTA[.]” JEFS #48 RA: 288. The preferred alternative, referred to in the ROD allows for only one route and only one technology. *Id.* at 293-94. As the City acknowledges, “the City and County of Honolulu must immediately notify the FTA of any proposed change to

the project that would differ in any way from what the Final EIS states.” JEFS #48 RA: 302. The SMA permit for the rail project states: “Any changes in the size or the nature of the approved Project which have a significant effect on coastal resources . . . shall require a new application and permit.” JEFS #40 RA: 401.

H. Procedural History

Plaintiff filed her Complaint on January 31, 2011. JEFS #40 RA: 21. A week after the City was served, the City filed its motion to dismiss complaint and/or for summary judgment. *Id.* at 64. The DLNR Defendants joined. JEFS #42 RA: 14-15. The hearing was scheduled for March 14, 2011. In the mean time, Plaintiff filed a motion for preliminary injunction, which was scheduled to commence after the hearings on the City’s motion. JEFS #42 RA: 18-69, JEFS #40 RA: 11. On March 23, 2011, the Court granted Defendants’ motions. JEFS # 36 TRANS. On July 5, 2011, the Circuit Court filed four orders, granting the City’s motion for summary judgment, granting the DLNR Defendants’ joinder, denying Plaintiff’s motion for preliminary injunction as moot, and denying Plaintiff’s motion for reconsideration. JEFS #52 RA: 273-89. Final Judgment was entered on August 8, 2011. *Id.* at 290-93.

II. LEGAL STANDARD

Pursuant to Rules 8 and 27 of the Hawai`i Rules of Appellate Procedure Rule 8, this Court may grant injunctive relief pending appeal if the moving party shows that: (1) she is likely to prevail on the merits; (2) the balance of irreparable harms favors the issuance of an injunction; and (3) the public interest supports granting such an injunction. *See Stop Rail Now v. De Costa*, 120 Hawai`i 238, 243, 203 P.3d 658, 663 (ICA 2008).

III. ARGUMENT

A. PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS.

The merits are fully addressed in Plaintiff’s opening and reply briefs that are currently before this Court. The arguments in those briefs are incorporated herein by reference. A summary of those arguments is provided here. HRS chapters 6E and 343 require the early preparation of an AIS of the entire rail project to determine the location and quantity of burials that the rail project is likely to impact prior to decisionmaking and construction.

1. Legal Context

a. HRS chapter 6E

To facilitate the constitutional mandate of Article IX § 7 and Article XII § 7 of the

Hawai`i State Constitution, the legislature enacted HRS Chapter 6E. The legislature found:

The Constitution of the State of Hawaii recognizes **the value of conserving and developing the historic and cultural property** within the State for the public good. The legislature declares that **the historic and cultural heritage of the State is among its important assets** and that the **rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage**. The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. 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 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**.

HRS § 6E-1 (emphases added). HRS §§ 6E-42(a) and 6E-8(a) as well as HAR Title 13 chapters 284, 275, and 276 mandate procedures be followed to analyze the effects upon historic resources.

b. Hawai`i burials law

The historic review process is fully integrated with the State’s effort to protect burial sites. In 1990, when the State Legislature enacted Act 306 to protect burials, it declared:

The full recognition and protection of the unique cultural values of the multi-ethnic peoples of Hawai`i are **directly affected by historical preservation decisions**. Of particular sensitivity to each group is the impact and response of governmental decisions on the cultural values related to the treatment and protection of burials.

The legislature further finds that **native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance**.

All human skeletal remains and burial sites within the State are entitled to equal protection under the law regardless of race, religion, or cultural origin. The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all, and, therefore the legislature reaffirms the common law rule that a land owner knowingly in possession of human skeletal remains cannot own the remains but merely holds the same in trust for cultural descendants, who have the right to possession for purposes of proper cultural preservation or reinterment.

1990 Haw. Sess. Laws Act 306 § 1 (emphases added).

The burials law draws a distinction between “previously identified” burial sites and “inadvertently discovered” burial sites. Burial sites identified in an AIS are “previously identified.” HAR § 13-300-2. Island burial councils determine whether previously identified

Native Hawaiian burial sites should be preserved in place or relocated. HRS § 6E-43, HAR §§ 13-300-3(b), 13-300-33(a). Inadvertent discoveries are found from unintentional disturbance. HAR § 13-300-2. DLNR, through SHPD, makes decisions regarding inadvertently discovered human skeletal remains. *See* HRS § 6E-43.6; HAR § 13-300-40(a).

c. AIS

The AIS is the key tool used by citizens, the island burial councils, and government agencies to identify and protect burial sites. *See* HAR Title 13 chapters 276, 300, 275, 284. The AIS includes a “consultation process” that involves “notifying interested organizations and individuals that a project could affect historic properties of interest to them; seeking their views on the identification, significance evaluations, and mitigation treatment of these properties; and considering the views in a good faith and appropriate manner during the review process.” HAR §§ 13-276-2, 13-276-5(a), 13-275-2, 13-284-2. Interested persons include those organizations, such as the island burial councils, “that are concerned with the affect of a project on historic property.” HAR §§ 13-284-2, 13-275-2, 13-284-8(d) and 13-275-8(d).

An AIS: (a) determines if archaeological historic properties (including burials) are present; (b) identifies them; and (c) gathers information regarding them in order to evaluate their significance. HAR § 13-276-3. A timely AIS allows for: (a) informed decisionmaking that allows for the preservation of historic properties (including burial sites); (b) consideration of all options before they are foreclosed and agency commitments are set in concrete; and (c) a meaningful opportunity to protect identified burials. HAR Title 13 chapters 300, 275, and 284. After all, if consultation involves “considering the views in a **good faith** and appropriate manner during the review process,” HAR §§ 13-276-2, 13-284-2, 13-275-2 (emphasis added), then decisionmaking must take place **after** such consultation has taken place.

2. Counts 1 - 4: The City and DLNR Defendants Failed to Comply with HRS Chapter 6E and Its Implementing Rules.

HRS § 6E-42(a) requires that government agencies give the DLNR the opportunity to review and comment on the effect of a proposed project **prior** to granting any land use approval:

Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including

those listed in the Hawaii register of historic places.

HRS § 6E-42(a). The procedures outlined in HAR title 13 chapter 284 “define how agencies meet this statutory requirement,” and “itemizes the review process that the SHPD shall follow.” HAR §§ 13-284-1(a) and (b). Similarly, HRS § 6E-8(a) requires that the DLNR concur with a project **before** it may commence:

Before any agency or officer of the State or its political subdivisions commences any project which may affect historic property, aviation artifact, or a burial site, the agency or officer shall advise the department and allow the department an opportunity for review of the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, especially those listed on the Hawaii register of historic places. The proposed project shall not be commenced, or in the event it has already begun, continued, until the department shall have given its written concurrence. . . .

HRS § 6E-8(a). HAR Title 13 chapter 275 “itemizes the process to obtain concurrence.” HAR § 13-275-1(b). The historic review process pursuant to HRS § 6E-8 and HAR Title 13 chapter 275 is virtually identical to the process pursuant to HRS § 6E-42 and HAR Title 13 chapter 284.

- a. The rail project has not completed the HRS §§ 6E-42 and 6E-8 and HAR Title 13 Chapters 284 and 275 Processes.

The rail project cannot be approved until an AIS for the rail project is completed, which has not been done. The City and DLNR Defendants have argued that the project could be approved without completion of an AIS because they entered into a programmatic agreement, which serves as an interim protection plan – a form of mitigation. JEFS #40 RA: 81. They argue that DLNR determined that the rail project “may adversely affect archaeological sites” and therefore all applicable requirements were met. *Id.* at 82. Their position, however, is inconsistent with HAR Title 13 chapters 284 and 275.

A thorough understanding of the historic review process reveals why an AIS for the rail project was required prior to decisionmaking. The process of reviewing and commenting on the effect of a proposed project is complex, but easily understood as sequential. It “may involve up to six procedural steps.” HAR § 13-284-3(a). The agency “shall consult with the SHPD and shall obtain the written comments of the SHPD **at each step of the review.**” *Id.* See also HAR 13-275-3(a) and SHPD’s Historic Preservation Review Process flow chart at JEFS #50 RA: 228.

First, historic property must be identified. “If SHPD concludes an inventory survey needs to be done, this survey **shall** identify all historic properties[.]” HAR §§ 13-284-5(b)(5)

and 13-275-5(b)(5). “**Once** a historic property is identified, then an assessment of significance will occur.” HAR § 13-284-6(a) and 13-275-6(a) (emphasis added). “**When** significant historic properties are present, **then** impacts of the proposed action on these properties shall be assessed, and mitigation commitments shall be devised as needed.” HAR § 13-284-6(e) and 13-275-6(e) (emphasis added). “**If** a project will have an ‘effect’ (impact) on significant historic properties, **then** a mitigation commitment proposing the form of mitigation to be undertaken for each significant historic property shall be submitted by the agency to the SHPD for review and approval.” HAR § 13-284-8(a) and 13-275-8(a) (emphases added). “**Once** the detailed mitigation plans are carried out, a request for verification shall be submitted by the agency to the SHPD.”² HAR § 13-284-9(a) and 13-375-9(a) (emphasis added). This sequence demonstrates that measures taken to minimize the impacts to significant historic properties cannot be developed until the significant historic properties are actually identified and located. In fact, the rules are explicit that mitigation measures cannot be developed until historic sites have first been identified in an AIS. Specifically,

[t]he goal of the review process is to **identify** significant historic properties in project areas, assess any effects, **and then** to develop and execute plans to avoid, minimize, or **mitigate** adverse effects to the significant historic properties in the public interest. The process supports the policy of chapter 6E, HRS, to **preserve, restore and maintain historic properties for future generations**.

HAR § 13-284-1(a) (emphases added). “The review process is designed to identify significant properties in project areas **and then** to develop and execute plans to handle impacts to the significant historic properties in the public interest.” HAR § 13-275-1 (emphasis added).

The first step in this historic review process is to determine “whether historic properties are present in the project area.” HAR §§ 13-284-5(a) and 13-275-5(a). *See also* HAR § 13-276-3 (“An [AIS] shall . . . [d]etermine if archaeological historic properties are present in the project area[.]”). The inventory step (preparation of the AIS) cannot be skipped – particularly when the Defendants all acknowledge that an inventory survey is necessary. HAR §§ 13-284-5(a), (b)(5), 13-275-5(a) and (b)(5); JEFS #50 RA:10-11 at ¶¶ 3, 4, 9; JEFS #40 RA: 103-143. SHPD’s own flowchart provides for no skipping of this step where significant historic sites are likely to be

² A project may commence prior to completion of all the mitigation commitments if the data recovery fieldwork, architectural recordation or interim protection measures for properties to be preserved have been successfully completed. HAR §§ 13-284-9(d) and 13-284-3(a).

present. JEFS #50 RA: 228. The AIS must be prepared to inform decisionmaking. After all, if SHPD is to be given an opportunity to review and comment on the effect of the proposed project on burial sites prior to approval, HRS § 6E-42(a), and if HAR chapter 13-284 defines how agencies meet this requirement, HAR § 13-284-1(a), and itemizes the review process that the SHPD shall follow, HAR § 13-284-1(b), then SHPD and the agencies must have the information from an AIS before rendering a decision. Because there is strong evidence that historic sites exist subsurface along the transit corridor in Kaka`ako, SHPD cannot review and comment on a project until an AIS is completed. An AIS must precede approval of the rail project.

The City and DLNR Defendants can point to no rule that allows the historic review process to be completed other than the specific procedures described in the rules. The rules provide that the historic process ends – *i.e.*, that SHPD has reviewed and commented on the effect of a proposed project on historic properties – only in accordance with the specific procedures outlined in HAR Title 13 chapter 284 and 275. HAR §§ 13-284-1(a) and (b), 13-284-3, 13-284-10; 13-275-1(a) and (b), 13-275-3 and 13-275-10. The entire process must be concluded to ensure that agencies thoroughly consider the affect of a subdivision on historic sites “prior to any approval,” HRS § 6E-42(a). A project cannot commence until SHPD has given its written concurrence – which can only occur under five circumstances:

- (1) before conducting an AIS, when facts show that “no significant historic sites are likely to be present,” and SHPD writes a “no historic properties affected” letter, HAR §§ 13-275-5(b)(1) or (b)(2), 13-284-5(b)(1) or (b)(2);
- (2) after completing an adequate AIS, when the AIS shows that no historic sites are present, and SHPD writes a “no historic properties affected” letter, HAR §§ 13-275-5(f) and 13-284-5(f);
- (3) when there is an agreement that none of the historic properties are significant, and SHPD issues a “no historic properties affected” letter, HAR § 13-275-6(e), 13-284-6(e);
- (4) when the historic properties are significant, but the project will not have a significant effect upon them, HAR § 13-275-7(e), 13-284-7(a)(1); or
- (5) when the project will have an effect and the mitigation commitments are made and completed, HAR §§ 13-275-7(a)(2), 13-275-9(c), 13-284-7(a)(2), 13-284-9(c).

See also HAR §§ 13-275-10, 13-284-10. A special exception is carved out allowing construction to commence when the project will have an effect, interim protection plans are adequately in

place, or data recover fieldwork has been adequately completed, HAR §§ 13-275-3(a), 13-275-9(d) and (e), 3-284-3(a), 13-284-9(d) and (e).

The first four circumstances did not take place here. All parties agree that the rail project may have effects on archaeological resources, including burial sites, and that the project has a high likelihood of having “potential” effects on archaeological resources in Kaka`ako. JEFS #50 RA:10 at ¶¶ 3 and 4. In fact, in this case, SHPD has concluded that the inventory survey shall be done. JEFS #40 RA: 103-143; JEFS #50 RA: 11 ¶ 9. HAR § 13-284-5(b)(5) provides that “[i]f SHPD concludes an inventory survey needs to be done, this survey **shall** identify all historic properties[.]” Yet, an AIS for the entire project has not been done – and the City has nevertheless granted the SMA permit and commenced construction.

The City appears to argue that the fifth circumstance is what has taken place here. The City’s final EIS (FEIS) suggests that the programmatic agreement itself is mitigation. JEFS # 66 SR (hardbound volume transmitted to the Intermediate Court of Appeals) at 4-195. In fact, the FEIS goes one step further and claims that the rail project “will have an ‘effect, with proposed mitigation commitments’ under State law.” *Id.* at 4-185. This citation is a clear reference to HAR § 13-284-7(a)(2). The City’s position, however, conflicts with HAR title 13 chapters 275 and 284, which allow for mitigation plans and commitments to be made only **after** an AIS is done. Not only is it logical that one can only develop mitigation options after one knows where the sites are, JEFS #50 RA: 151 ¶5, but the rules are explicit. HAR § 13-284-1(a), 13-275-1. HAR § 13-284-3(a) provides that:

A historic preservation review may involve up to six procedural steps, in order to **determine if significant historic properties are present and, if so, to develop and execute a detailed mitigation plan** and thereby satisfactorily take into account the impact of the project on such historic properties. Any agency involved in this review shall consult with the SHPD and shall obtain the written comments of the SHPD at each step of the review. In cases where any interim protection plans are adequately in place **and** any data recovery fieldwork has been adequately completed, the project may commence from a historic preservation perspective.

(Emphases added).

For the department to provide a letter of determination, an agency proposing a project which may have an effect upon historic properties shall notify the department of the proposed project and request a letter of determination. Upon the request of the department, the agency **shall provide** the department with information as to **the number of historic properties within a proposed project area**, their significance, the impact of the proposed project on the historic properties, and any proposed mitigation measures.

HAR § 13-275-3(a) (emphases added).

Thus, historic sites must be identified (through an AIS) before the impact of a project and its mitigation can be analyzed. Furthermore, HAR § 13-284-3(a) explicitly authorizes project commencement only if the plans are in place “and any data recovery fieldwork has been adequately completed.” Data recovery fieldwork for the rail project was not completed prior to decisionmaking and groundbreaking. JEFS #50 RA: 12 ¶ 13.

In this case, SHPD could not properly give its concurrence when it does not know what the effect of the rail project will be on historic sites.³ It could not know because the City has not bothered to identify the location and number of burial sites in an AIS. Delaying the AIS runs contrary to the sequential historic review process.

b. A “phased approach” for the rail project is not authorized.

The City also argues that it can piecemeal or phase its AIS for the rail project. A plain reading of the rules demonstrates that an AIS must study all phases of a project.

First, unlike the rules for the National Historic Preservation Act that explicitly allow the identification of historic properties and the analysis of a project’s effects to be undertaken in a phased manner, 36 CFR § 800.4(b)(2), explicit authorization for such a phased approach is entirely missing from the State’s counterpart. This difference alone is enough to demonstrate that a “phased approach” (or segmentation) is inappropriate under Hawai`i law.

Second, HAR § 13-284-2 and 13-275-2 define “project area” to mean “the area the proposed project may potentially affect, either directly **or indirectly**. It includes not only the area where the proposed project will take place, but also the proposed project’s area of **potential effect**.” (Emphases added). The first step in the historic review process is to determine “whether historic properties are present in the **project area**.” HAR §§ 13-284-5(a) 13-275-5(a). *See also* HAR §§ 13-284-3(b)(1), 13-284-1(a), and 13-276-3 (“An archaeological inventory survey shall . . . [d]etermine if archaeological historic properties are present in the project area[.]”). Thus, an

³ This Court should not defer to SHPD’s opinions because, as discussed in Plaintiff’s Brief in Reply to the State Defendants’ Answering Brief (a) a heightened degree of scrutiny is required in considering burial issues; (b) SHPD’s interpretation is inconsistent with the legislative purpose of HRS chapter 6E and its implementing rules; (c) SHPD’s interpretation is plainly erroneous and/or unreasonable; and (d) the interpretation of the OIBC, which has a statutory role to play, differs from SHPD’s.

AIS must search in areas that may be directly or indirectly affected, including areas that may be only potentially impacted. Clearly, the area impacted by a later phase of a project must be studied not only because the entire project itself will directly affect it, but it also because the area affected by the later phase is one that will be potentially affected by an earlier phase. In other words, the area of potential effect is **not** confined to areas within a particular phase. A phased approach would violate the requirement to find sites in the project area.

In this case, the rail project involves the construction of an approximately 20-mile fixed guideway rail system. JEFS #50 RA: 10 at ¶B(1). The City admits that “[a]ll four phases of the [rail project] are connected and part of **a single project**.” JEFS #50 RA: 111 ¶ 3. There is only one project at issue in this case: the entire 20-mile fixed guideway rail system. While construction may take place in four phases, there is no evidence that each phase is a separate “project.” The construction phases “are connected and part of a single project.” *Id.* It is uncontested that the “potential effect” of the project includes ground disturbed by the project in Kaka`ako for which there is a high likelihood of having potential effects. JEFS #46 RA: 205, 222, JEFS #48 RA: 27; JEFS #50 RA: 10 ¶ 4. Thus, an AIS must search for archaeological sites in the **entire** project area, not simply one phase at a time.

Furthermore, Defendants admit that the area of potential effects for archaeological resources is defined as all areas of direct ground disturbance by the rail project. JEFS #50 RA: 11-2 ¶ 10(b). In other words, the area of potential effect is **not** confined to areas within a particular phase. Yet, there has been no AIS completed that identifies the location of burials and other historic properties in Kaka`ako that will be affected – directly or indirectly – by the project.

- c. Delaying or segmenting an AIS is inconsistent with the purposes of HRS Chapter 6E and HAR Title 13 Chapters 284 and 275.

Postponing completion of an AIS for an entire project until after decisionmaking and construction is inconsistent with the purposes of HRS chapter 6E and HAR Title 13 chapters 284 and 275. Delaying information gathering until after a decision is made is inconsistent with “the public policy of this State to provide leadership in preserving, restoring and maintaining historic and cultural property.” HRS § 6E-1. A “comprehensive program of historic preservation” cannot preserve historic property by delaying efforts to identify and protect those sites until after decisions regarding the scope and location of a project are set in concrete. Similarly, the purpose of the rules is to “conserve” historic properties with the goal “to preserve, restore and maintain

historic properties for future generations.” HAR §§13-284-1(a) and 13-275(a). This goal is turned on its head when historic sites are identified **after** (1) plans are developed to mitigate adverse effects and (2) decisions are made to approve the project.

The Legislature intended that the State treat historic property “in a spirit of stewardship and trusteeship.” *Id.*; see also HRS § 6E-13(b) (“for the protection of an historic property or a burial site and the **public trust** therein”); 1990 Haw. Sess. Laws Act 306 (“The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a **sacred trust** for the benefit of all[.]”) (emphases added). A trustee must act with “a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000). A trustee must take a “global, long-term perspective” and consider cumulative impacts. *Id.* Identifying historic properties that may be affected by a project **after** approval of the project is inconsistent with the principle of administering “historic and cultural property in a spirit of stewardship and trusteeship for future generations.” HRS § 6E-1.

A primary reason for the historic review process is to protect Native Hawaiian burials. When HRS § 6E-42 was first enacted, its purpose was to “improve the State’s historic preservation program by establishing rules for the protection, preservation, reinterment, and archaeological examination of significant prehistoric and historic burial sites.” Conf. Com Rep. No. 168, 1988 Senate Journal 650. Two years later, in amending HRS chapter 6E and clarifying HRS § 6E-42 to emphasize that SHPD must be given an opportunity to review and comment on a project’s effect on burial sites “prior to any approval,” the Legislature found that “native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance.” 1990 Haw. Sess. Laws Act 306 §§ 1 and 12. When burials are not identified prior to decisionmaking, they are vulnerable to disinterment. JEFS #44 RA: 60-63, JEFS #50 RA: 151-52; JEFS #42 RA: 60 and 44-47 ¶ 8, 10, 37. As Plaintiff’s expert pointed out:

Significant negative consequences resulted when an AIS was not completed before decision making for H-3, the Wal-Mart site on Ke`eaumoku Street, General Growth's Ward Village Shops Project, and Kawaiaha`o Church's Multi-Purpose Center project. In each of these cases, archaeological investigations occurred when construction had already begun. Because burials were discovered in these projects late in the process, the burial finds created delays, redesign needs, and concomitant cost overruns. Most importantly, the late-stage finds limited the viable options of the developer, the State Historic

Preservation Division, the O'ahu Island Burial Council, and cultural descendants in identifying and implementing cultural appropriate treatment of those burials.

JEFS #50 RA: 151-52.

Delaying completion of the AIS by phasing or other means prevents the AIS from functioning practically. *Cf. Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 105, 979 P.2d 1120, 1131 (1999) (holding that environmental review must occur early enough to function practically as an input into the decision making process); *Ka Pa`akai O Ka `Āina v. Land Use Comm'n*, 94 Hawai'i 31, 52 7 P.3d. 1068, 1089 (2000) (“Allowing a petitioner to make such after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the petitioner's part. After all, once a project begins, the pre-project cultural resources and practices become a thing of the past.”). An AIS prepared after some options are closed and agency commitments are set in concrete reduces its functionality, impairing the ability of decisionmakers to protect burial sites.

Courts frequently rely on legislative intent to prohibit segmentation, piecemealing, or phasing when laws do not explicitly ban the practice. For example, in *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department*, 446 F.2d 1013, 1023 (5th Cir. 1971), the Fifth Circuit Court of Appeals ruled that a highway project could not be segmented. First, the Court concluded that nothing in section 4(f) of the Federal Aid to Highway Act specifically authorized separating a project into segments. *Id.* at 1022-23. Second, the Court noted that the project in question had never been anything but one project for purposes of receiving approval. *Id.* at 1023. Third, the Court recognized: “The frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see.” *Id.* at 1023. In *Thompson v. Fugate*, 347 F. Supp 120, 124 (VA 1972), a federal district court rejected an attempt to segment a portion of a highway project because it would result “in the subversion of the announced Congressional policy.” The Court condemned the segmenting of the project as an impermissible “bureaucratic exercise” that would frustrate the Congressional policy in enacting the National Environmental Policy Act. In *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1142 (S.D. Cal. 2006), a federal court focused on the purpose and spirit of the Endangered Species Act to bar the incremental-step evaluation of a project’s impacts on endangered species. *See also Merkel v. Port of Brownsville*,

509 P.2d 390, 395 (Was. App. 1973) (striking down effort to divide up a project into segments because it would have a “frustrating effect” upon the vitality of environmental laws).

In sum, neither the structure, nor the plain language, nor the purposes of HRS § 6E-42 and HAR Title 13 Chapter 284 allow a decision on the rail project before the completion of an AIS for the entire project.

3. Count 5: The FEIS is Inadequate Pursuant to HRS Chapter 343.

The environmental disclosure process governed by HRS Chapter 343 and HAR Title 11 chapter 200 also precedes decisionmaking and project commencement. *See Kepo`o v. Kane*, 106 Hawai`i 270, 292, 103 P.3d 939, 961 (2005); *Citizens*, 91 Hawai`i at 105, 979 P.2d at 1131; *Sierra Club v. Office of Planning*, 109 Hawai`i 411, 126 P.3d 1098 (2006). This environmental disclosure must come early in the process to ensure that informed decisions are made. *Citizens*, 91 Hawai`i at 105, 979 P.2d at 1131; *Sierra Club v. DOT*, 115 Hawai`i 299, 326, 167 P.3d 292, 319 (2007) (“*Superferry*”) (“The main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken.”).

The disclosure of “environmental” impacts includes impacts to cultural and social conditions and objects of historic significance. HAR §§ 11-200-2 (definition of “environment”), 11-200-12(B)(1). After all, “the historic and cultural heritage of the State is among its important assets.” HRS § 6E-1. Indeed, the State has determined that “[a]ll burial sites are significant.” HRS § 6E-43(b).

“The EIS process shall involve at a minimum . . . conducting necessary studies.” HAR § 11-200-14. The EIS shall include a description of the “resources of historic, archaeological, or aesthetic significance.” HAR § 11-200-17(G). An acceptable EIS is one that adequately discloses sufficient information and describes all identifiable environmental impacts. HAR § 11-200-23. The courts use the “‘rule of reason’ to determine whether the EIS is legally sufficient in adequately disclosing facts to enable a decision-making body to render an informed decision.” *Price v. Obayashi Hawaii Corp*, 81 Hawai`i 171, 182, 914 P.2d 1364, 1375 (1996). It must set **“forth sufficient information to enable the decision-maker** to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.” *Id.* (emphasis added).

The FEIS for the rail project does not include an AIS. JEFS # 66 SR (hardbound volume

transmitted to the Intermediate Court of Appeals, table of contents at v –xiii). The “rule of reason” requires that the FEIS for the rail project include an AIS because: (1) the City and Certain State Defendants admit that an AIS is a necessary study, JEFS #50 RA: 11-12 ¶ 9, 11 and 12, JEFS #50 RA: 124 ¶36, HAR § 11-200-14; (2) EISes often include AISes, JEFS #42 RA: 46-47, JEFS #50 RA: 13 ¶ 21; (3) the City has prepared EISes for other projects that include AISes, JEFS #42 RA: 46-47; (4) in the course of other projects, hundreds of burials have been found in the downtown and Kaka`ako areas that the rail project will cross, JEFS #44 RA: 61-62 ¶¶ 28, 29; and (5) the City acknowledges the likelihood of encountering burials in the course of the project is high. JEFS #46 RA: 205, 222, JEFS #48 RA: 27, and JEFS #50 RA: 10 ¶ 4.

This case differs from the *Price* case in two important respects. First, in that case, where Plaintiff challenged the adequacy of an EIS because it failed to locate “native Hawaiian archaeological sites in the proposed project area,” *Price*, 81 Hawai`i at 183 n.13, 914 P.2d at 1376 n.13, the developer had actually prepared an archaeological field reconnaissance report, and the EIS contained information about “every finding, its location and value.” *Id.* at 185, 914 P.2d at 1378. In fact, that EIS identified four burial sites.⁴ JEFS #42 RA: 55. Because the rail project’s final EIS fails to disclose the location of burial sites, it does not disclose as much information as was judged adequate in *Price*. Second, unlike *Price*, Plaintiff does **not** seek to contradict a conclusion in the final EIS. Rather, she seeks to ensure that the final EIS discloses information now rather than after decisionmaking. Plaintiff and Defendants **all** agree that an AIS should be conducted. The only question is when this AIS should be done – before or after substantive decisions have been made?

Delaying preparation of the AIS for the entire rail project until after decisionmaking and after construction defeats both the purpose of the AIS and the EIS. The number of burials in the project area could affect the entire project’s viability. The rule of reason demands that this study be prepared prior to decisionmaking; “environmental review must occur early enough to function practically as an input into the decision making process.” *Citizens*, 91 Hawai`i at 105, 979 P.2d at 1131. This should occur “before options are closed, and before agency commitments are set in concrete.” *Id.* (citing *Rodgers*, ENVIRONMENTAL LAW § 9.7 at 921 (2d.ed. 1994)). The failure of the final EIS for the rail project to include AIS violated the requirements of HRS Chapter 343

⁴ That survey took place **before** DLNR adopted HAR Title 13 chapters 275 and 284 and does not meet modern archaeological standards. Nevertheless, it identified the four burial sites.

and HAR Title 11 chapter 200.

B. THE BALANCE OF IRREPARABLE HARM FAVORS THE ISSUANCE OF AN INJUNCTION.

The procedural and substantive harms are more fully discussed in Plaintiff's reply to the City. The rail project and the failure to prepare an AIS prior to decisionmaking and project commencement inflicts an irreparable injury as that term is defined by *Klausmeyer v. Makaha Valley Farms, Ltd.*, 41 Haw. 287, 339-40 (1956).

Irreparable procedural harm takes place when an agency acts without considering potentially significant effects of its actions that it is required by law to consider. *Superferry*, 115 Hawai'i at 322-5, 167 P.3d 315-18. "After major investment of both time and money, it is likely that more environmental harm will be tolerated." *Citizens*, 91 Hawai'i at 105, 979 P.2d at 1131 (1999) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir.)). Allowing after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the petitioner's part. *Ka Pa`akai*, 94 Hawai'i at 52, 7 P.3d. at 1089. An uninformed decision increases the risk that the rail project will adversely impact burial sites along the rail corridor. See *Pyramid Lake Paiute Tribe of Indians v. BLM of the United States DOI*, 2007 U.S. Dist. LEXIS 31766, 4-5 (D. Nev. Apr. 29, 2007); *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. Me. 1989). Furthermore, Plaintiff's ability to consult and obtain information before decisionmaking on the rail project has been irreparably harmed. JEFS #42 RA: 44 ¶ 8-10. HRS Chapter 6E and its rules establish procedural and informational requirements. Cf. *Kepono v. Watson*, 87 Hawai'i 91, 101, 952 P.2d 379, 389 (1998) ("Both HRS ch. 343 and HAPA primarily establish procedural and informational requirements."). They specifically mandate procedures be followed to analyze the effects upon historic resources and allow the public to participate in these processes. The AIS includes a "consultation process" that seeks the views of individuals in "a good faith and appropriate manner." HAR §§ 13-276-2, 13-276-5(a). Injunctive relief ensures that proper procedures are followed so that decisionmakers can make informed decisions and so that Plaintiff can use that information to protect historic sites. Injunctive relief prevents the irretrievable expenditure of public funds and irreversible progress of the project toward completion.

Although the City will argue that there will be no harm to burials from construction of the first phase of the rail project, the analysis of the irreparable harm must consider the entire

project. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985). In that case, the Army Corps of Engineers granted a permit to a developer to build riprap along a river bank – the first step in allowing a 156-acre residential and commercial development. *See id.* at 1428. In so doing, the Army Corps refused to inventory the cultural resources in the area slated for subsequent development and instead examined only the area directly affected by the riprap. The Court declined to limit its inquiry to the direct effects of the riprap, stating that “[t]he injury that must be focused upon in a motion for preliminary injunction must be the injury that is threatened by the defendant's improper conduct” and holding that “the improper conduct, the violation of NEPA and NHPA, poses a possibility of irreparable injury to the historical and archeological sites.” *Id.* at 1440. The federal court further concluded that “[t]he granting of the permit without such consideration [of the harm to archaeological sites] forecloses the taking of any steps to alleviate potential harm.” *Id.* In this case, the City has admitted that the rail project will likely have an adverse effect on burials. JEFS #46 RA: 205, 222; JEFS #48 RA: 27; JEFS #50 RA: 10; JEFS #40 RA: 105; JEFS # 42 RA: 360, 362 and 367.

C. THE PUBLIC INTEREST FAVORS INJUNCTIVE RELIEF

Finally, the public interest favors injunctive relief. The legislature has recognized that the public has a vital interest in: (1) the proper disposition of the bodies of its deceased persons, 1990 Haw. Sess. Laws Act 306 § 1; (2) the preservation of our cultural heritage, HRS §§ 6E-1, 205A-2(b)(2)(A), 226-12(b)(1) and 226-12(b)(4); and (3) the ability to participate in decision-making. HRS §§ 205A-2(c)(8)(A), 92-1, 226-3(3) and 344-4(10)(B). The public interest would be best served by an injunction that halts work on a project that (1) was approved and started prematurely; (2) threatens burial sites; (3) undermines our cultural heritage; and (4) excluded meaningful public participation. It is, therefore, in the public interest to bar all non-archaeological groundwork during the pendency of this appeal.

IV. CONCLUSION

Plaintiff respectfully requests that this Court grant her motion for injunctive relief.

DATED: Honolulu, Hawai`i, March 9, 2012.

/s/ DAVID KIMO FRANKEL
DAVID KIMO FRANKEL
ASHLEY K. OBREY
Attorneys for Plaintiff-Appellant