CAAP-11-0000611

IN THE INTERMEDIATE COURT OF APPEALS

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

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

PLAINTIFF-APPELLANT'S BRIEF IN REPLY TO THE STATE DEFENDANTS-APPELLEES' ANSWERING BRIEF

I. INTRODUCTION

The Board of Land and Natural Resources, Department of Land and Natural Resources and William Aila Jr., Puaalaokalani Aiu and Neil Abercrombie in their official capacities (collectively "Certain State Defendants") focus exclusively on Counts 1- 4 of Plaintiff's complaint.[1] They argue that this Court must defer to the interpretation of the State Historic Preservation Division (SHPD) and that phasing of an archaeological inventory survey (AIS) is permissible. This Court should not defer to SHPD's erroneous interpretation of the law.

II. DEFERENCE SHOULD NOT BE GIVEN TO SHPD'S ERRONEOUS INTERPRETATION OF THE LAW.

This Court should not rubber stamp a decision made by Certain State Defendants because: (a) a heightened degree of scrutiny is required in considering burial issues; (b) SHPD's interpretation is inconsistent with the legislative purpose of Hawai`i Revised Statutes (HRS) Chapter 6E and its implementing rules; (c) SHPD's interpretation in plainly erroneous and/or unreasonable; and (d) the interpretation of the O`ahu Island Burial Council (OIBC), which has a statutory role to play, differs from SHPD's.

A. Heightened Scrutiny is Needed When Considering Burial Issues.

Where public trust resources are involved, Hawai`i courts take a "close look" to ensure compliance with public trust principles and "will not act merely as a rubber stamp for agency or legislative action." *In Re Water Use Permit Applications*, 94 Hawai`i 97, 144, 9 P.3d 409, 456 (2000) ("*Wai`āhole*").

Hawaiian burial sites and remains are part of the public trust. The Legislature has declared 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."

[1] Certain State Defendants incorrectly argue on page 7 of their Answering Brief that HRS § 6E-8 only applies to government projects and HRS § 6E-42 only applies to nongovernmental projects. This is demonstrably false by the plain language of HRS §§ 6E-8 and 6E-42 and the definitions found in HRS § 6E-2.

HRS § 6E-1 (emphasis added). HRS § 6E-13(b) states in relevant part:

> Any person may maintain an action in the trial court . . . for restraining orders or injunctive relief . . . upon a showing of irreparable injury, for the protection of an historic property or a burial site and the **public trust therein** from unauthorized or improper demolition, alteration or transfer of the property or burial site.

(Emphasis added). In amending HRS Chapter 6E to provide further protection of burials, the legislature observed: "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 (emphasis added).

The State Legislature's conclusions are supported in other jurisdictions. A Texas appeals court held:

> No particular instrument or ceremony is required to dedicate a tract of land to cemetery purposes. Actual use of land for burial purposes is a sufficient dedication. Property once dedicated to cemetery purposes and in use as a burial ground for the dead may not be sold either voluntarily or through judicial proceedings in such a manner as to interfere with the uses and purposes to which it has been dedicated and devoted. When once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust.

Davis v. May, 135 S.W.3d 747, 749-750 (Tex. App. 2003) (citations omitted). Similarly, the Tennessee Supreme Court observed:

> When once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust. The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.

Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911).

As the Department of Land and Natural Resources (DLNR) proclaims in its very own rules, "burials are held in **trust** for their descendants. Treatment of burials must meet this **trust** with the utmost sensitivity." Hawai`i Administrative Rule (HAR) § 13-283-1(a) (emphases added). DLNR declares that its mission is to "enhance, protect, conserve and manage Hawaii's unique and limited natural, **cultural and historic resources held in public trust**[.]" JEFS #50 RA: 229 (emphasis added). Because burials are a part of the state's public trust, this Court must take a "close look" at SHPD's determination and not simply rubber stamp its action.

Furthermore, the court "must ensure that the agency has taken a 'hard look' at environmental factors." *Sierra Club v. DOT*, 115 Hawai`i 299, 342, 167 P.3d 292, 335 (2007). The "environment" includes objects of historic significance. HAR §§ 11-200-2 (definition of "environment"); *see also* HAR § 11-200-12(B)(1).

B. SHPD'S Interpretation is Inconsistent with the Legislative Purpose.

The rule of judicial deference also "does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose." *Wai`āhole*, 94 Hawai`i at 145, 9 P.3d at 457; *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984).

Phasing, segmentation, and piecemealing are inconsistent with the purposes of HRS Chapter 6E and its rules. HRS § 6E-1 provides:

> The legislature declares that the historic and cultural property 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 is 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.

(Emphases added). HAR chapter 13-284 provides:

> The goal of the historic 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, t**o preserve, restore and maintain historic properties for future generations**.

HAR 13-284-1(a) (emphases added). Similar language is found in HAR § 13-275-1(a).

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.

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 Chapter 284. 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. The government does not provide leadership in preserving and maintaining historic and cultural property by postponing investigation until after decisionmaking. 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). 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." HRS § 6E-1*; see also* HRS § 6E-13(b) ("for the protection of an historic property or a burial site and the **public trust** therein") (emphasis added); 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[.]") (emphasis 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." *Wai`āhole*, 94 Hawai`i at 143, 9 P.3d at 455. 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.

Courts have relied on legislative purpose to prohibit segmentation, piecemealing, or phasing. In 1973, the Court of Appeals of Washington examined the recently enacted State Environmental Policy Act of 1971 and the Shoreline Management Act of 1971 and concluded

that dividing up a project into segments would have a "frustrating effect . . . upon the vitality of these acts." *Merkel v. Port of Brownsville*, 509 P.2d 390, 395 (Was. App. 1973). 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 that "[t]he frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see." *Id.* Certain State Defendants incorrectly argue on page on page 13 of their Answering Brief that the segmentation principle is derived from the National Environmental Policy Act's (NEPA) statute and regulations. Actually, the bar to segmentation initially arose from the federal court's interpretation of legislative intent. Soon after NEPA was enacted and before the code of federal regulations explicitly barred segmentation, federal courts barred segmentation because of the legislative intent in enacting NEPA. *Thompson v. Fugate*, 347 F. Supp 120, 124 (VA 1972); *see also Named Individual Members*, 446 F.2d 1013. In *Thompson*, 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. After these and other rulings, the prohibition against segmentation was written into the federal regulations.

When the Hawai`i Supreme Court has struck down efforts at segmentation, besides considering the relevant rules, it has considered the legislative purpose as well as the impact of segmentation on functional practicality. *See Citizens for the Protection of the North Kohala Coastline v. County of Hawai`i*, 91 Hawai`i 94, 104-05, 979 P.2d 1120, 1130-31(1999); *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai`i 66, 947 P.2d 378 (1997); *Sierra Club v. Office of Planning*, 109 Hawai`i 411, 126 P.3d 1098 (2006). The Court has looked to the "spirit and intent of HEPA," relying on the legislative "findings and purpose" articulated in HRS 343-1. *Citizens*, 91 Hawai`i at 104, 979 P.2d at 1130. *See also Kahana Sunset*, 86 Hawai`i at 71, 947 P.2d at 383 ("This court must read statutory language in the context of the entire statute and

construe it in a manner consistent with its purpose."); *Sierra Club*, 109 Hawai`i at 418, 126 P.3d at 1105 ("[R]equiring early environmental assessment comports with the purpose of HEPA[.]"). The Court recognized that "to function practically as an input into the decision making process," environmental review would need to take place early. *Citizens*, 91 Hawai`i at 105, 979 P.2d at 1131. Citing other courts, the Hawai`i Supreme Court noted that, "[a]fter major investment of both time and money, it is likely that more environmental harm will be tolerated," and, as such, "the appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options[.]" *Id.* (internal citations and quotation marks omitted). *See also Kahana Sunset*, 86 Hawai`i at 72, 947 P.2d at 384 ("[I]n the absence of the preliminary environmental assessment, the legislative intent that potential effects be studied and the public be notified is undercut."). Early preparation of an environmental assessment "provides a safeguard against a '*post hoc* rationalization to support action already taken.'" *Sierra Club*, 109 Hawai`i at 418, 126 P.3d at 1105 (internal citation and brackets omitted). In *Ka Pa`akai O Ka `Āina v. Land Use Comm'n*, 94 Hawai`i 31, 7 P.3d. 1068 (2000), the Hawai`i Supreme Court struck down efforts to delay the consideration of impacts on traditional and customary practices. It held that, "[a]llowing 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." *Id.* at 52, 7 P.3d at 1089.

Phasing, segmentation, and piecemealing the AIS for the rail project would undermine the vitality of HRS Chapter 6E, including its clarion call for "leadership in preserving, restoring and maintaining historic and cultural property." HRS § 6E-1.

C. <u>SHPD'S Interpretation is Plainly Erroneous and/or Unreasonable.</u>

The court must reject "an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation." *Wai`āhole*, 94 Hawai`i at 145, 9 P.3d at 457.

Except for a brief mention on page 9 of their Answering Brief, Certain State Defendants fail to discuss the complex and detailed rules laid out in Title 13 Chapters 275 and 284. 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 § 13-276-3 ("[A]n archaeological inventory survey [(AIS)] shall . . . [d]etermine if archaeological historic properties are present in the project area[.]"). Thus, an AIS must search in and evaluate areas that may be directly or indirectly affected, including areas that may be only potentially impacted.[2] 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 also because the later area is one that will be potentially affected. 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. SHPD's interpretation allowing phasing directly contradicts the requirements inherent in the definition of "project area" and how that term is used in SHPD's rules.

On page 9 of their Answering Brief, Certain State Defendants argue that HAR §§ 13-275-3 and 13-284-3 allow for commencement of a project absent full completion of the historic review process where appropriate interim protection plans are in place. They badly misread these rules. First, they overlook the fact that an interim protection plan and data recovery are forms of mitigation. HAR §§ 13-284-8(a)(1), 13-284-8(e), 13-275-8(a)(1), and 13-275-8(h). They are only used "in cases involving preservation, archaeological data recovery, or architectural recordation." HAR §§ 13-284-9(d), 13-275-9(d). Second, they overlook the sequential nature inherent in the rules. HAR § 13-284-3(a) provides:

> 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 completed, the project may commence from a historic preservation perspective.**

(Emphases added). An interim protection plan and data recovery can only take place **after** an AIS has been completed. Not only is it logical that one can only develop mitigation options after

[2] In this manner, the definition of "project area" parallels the definition of "secondary impacts" in HAR § 11-200-2. These "secondary impacts" are effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* An EIS cannot be segmented because it would fail to consider secondary impacts. The "impacts" studied pursuant to HRS Chapter 343 include effects that are secondary. *See id.*

one knows where historic properties are, JEFS #50 RA: 151 ¶ 5, but the rules are explicit. Mitigation – in the form of interim protection plans or data recovery – can only take place after an AIS has been prepared. "The 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." HAR § 13-284-1(a) (emphasis added). Similarly, HAR § 13-275-3(a) reads:

> 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. Upon receipt of **adequate information** the department will provide a determination letter within ninety days. Any agency involved in the historic preservation review process shall consult and obtain the written approval of the SHPD at each step of the review. Once concurrence is received, the agency may begin the project. **In cases where interim protection plans are adequately in place or any data recovery fieldwork has been adequately completed, a determination letter may be issued.**

(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 historic review process is sequential. 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), 13-275-5(b)(5). "**Once** a historic property is identified, then an assessment of significance will occur." HAR §§ 13-284-6(a), 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), 13-275-6(a) (emphases 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 §§ 13-384-8(a), 13-275-8(a) (emphases added). "The 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." HAR § 13-284-1(a)

(emphasis 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).

Certain State Defendants would have this Court believe that preparation of an AIS – as required in the programmatic agreement – is itself mitigation! It is not. See HAR §§ 13-284-8(a)(1), 13-275-8(a)(1). Actually, an AIS is the first step in determining what mitigation is necessary as well as what effect a project will have on historic property. Certain State Defendants have turned the process upside down. Instead of requiring an AIS before mitigation is determined and before a decision is made regarding the project, they are requiring an AIS as mitigation after decisionmaking.

Furthermore, an AIS for the rail project that includes a "consultation process" – as this one will (as Certain State Defendants point out on pages 8-9 of their Answering Brief) – must consider "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. This process cannot be conducted in good faith if decisions are made **before** consultation takes place. Good faith consultation may conclude that, given the impact on burials, the rail project should not be built using the chosen technology along the chosen route.

D. <u>OIBC's Interpretation Differs from SHPD's.</u>

The OIBC is statutorily charged with assisting SHPD "in the inventory and identification of native Hawaiian burial sites." HRS §43.5(f)(2). This assistance is provided through the consultation process undertaken during an AIS. HAR § 13-276-5(a) and (g). "If identified unmarked burial sites are present, the relevant island burial council of the department must approve the proposed mitigation commitments" for "native Hawaiian burials, following chapter 6E-43, HRS, and section 13-300-33." HAR §§ 13-284-8(d), 13-275-8(d). The OIBC can also "make recommendations . . . on any . . . matters relating to native Hawaiian burial sites." HRS § 43.5(f)(3). Rules for the burial council adopted by DLNR provide that the "council shall be authorized to take any other appropriate actions in furtherance of this chapter." HAR § 13-300-24(h).

On October 14, 2009, the OIBC voted unanimously to point out 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 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 AISs. *Id.* at 252. Undue deference to SHPD is inappropriate where the OIBC, which has a statutory role to play in identifying, inventorying, and preserving burial sites, disagrees with SHPD's approach to the identification and protection of burial sites.

III. CONCLUSION

There is no reason to give SHPD the "considerable deference" it requests on page 6 of its Answering Brief. Its interpretation is inconsistent with the OIBC's interpretation, erroneous and inconsistent with the legislative purpose of HRS Chapter 6E. The State Legislature 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**.

1990 Haw. Sess. Laws Act 306 § 1 (emphases added). The AIS is the key tool used by the island burial councils, citizens, and government agencies to identify and protect burial sites. *See* HAR Title 13 chapters 276, 300, 275, 284. The rail project cannot be approved or commence until an AIS for the rail project is completed.

This Court should reverse the Circuit Court's decision granting summary judgment to the Defendants – especially when reviewing all the evidence that the Court had before it, including the evidence that Plaintiff submitted in her motion for reconsideration. This Court should hold that summary judgment should have been granted to Plaintiff pursuant to *Flint v. MacKenzie*, 53 Haw. 672, 501 P.2d 357.

DATED: Honolulu, Hawai`i, January 11, 2012.

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