



U.S. Department
of Transportation
**Federal Highway
Administration**

Hawaii Federal-Aid Division

September 2, 2020

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In Reply Refer To:
HDA-HI

Mr. John Fowler
Executive Director
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001

Subject: National Historic Preservation Act Section 106 Memorandum of Agreement Objection
Queen Ka'ahumanu Highway Widening, Phase 2
Federal-aid Project No. NH-019-1(038)R

Dear Mr. Nelson,

Thank you for your letter dated August 20, 2020, in response to the Federal Highway Administration's (FHWA) July 8, 2020, letter requesting the Advisory Council on Historic Preservation's (AHP) comments on Makani Hou O Kaloko-Honokōhau's (MH) objections to the implementation of the Memorandum of Agreement (MOA) for the subject project. This letter provides the FHWA's response in accordance with Stipulation 18 of the *Memorandum of Agreement Among the Advisory Council on Historic Preservation, Federal Highway Administration, and the Hawai'i State Historic Preservation Officer Regarding the projects in the vicinity of the District of North Kona, Island of Hawai'i, State of Hawai'i which are known as the Queen Ka'ahumanu Highway Intersection Improvements for the Kaloko-Hononkōhau National Historical Park and the Queen Ka'ahumanu Highway Widening, Kailua to Ke'āhole*, executed on March 17, 2015, and amended on March 5, 2020.

General Objections

AHP Advice

"MH raised concerns regarding the overall consultation process, including an abbreviated consultation prior to the MOA's execution, a lack of engagement during the MOA's implementation, and the potential lack of coordination with the National Environmental Policy Act and Section 4(f) of the Department of Transportation Act (Section 4(f)). The AHP reaffirms that timely and meaningful consultation is necessary in reaching successful Section 106 outcomes. The regulations at 36 CFR 800.1(c) require the agency official to ensure that the Section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

In our review of this consultation, it is evident that FHWA would have benefitted from earlier and more robust outreach to Native Hawaiian Organizations (NHOs). Accordingly, FHWA should develop a plan for engaging NHOs and consulting parties early in project planning and continue consultation throughout the design and construction phases of an undertaking.

FHWA should also take steps to improve the way it manages, completes, and reports on the progress of consulting about and implementing MOAs. While the opportunity to take these steps may have passed for this particular undertaking, FHWA would benefit from considering such steps in future consultations. While we appreciate the MH's concerns regarding other environmental laws, the ACHP is unable to comment on this specific issue as our statutory authority is limited to Section 106 of the National Historic Preservation Act."

FHWA Response

FHWA and the Hawaii Department of Transportation (HDOT) will develop NHO Consultation Protocols within 3 years of this letter. These will include steps for early and continued engagement with NHOs.

Stipulation 3 – Professional Standards

ACHP Advice

"MH raises a concern regarding FHWA's adherence to the Secretary of the Interior's Professional Qualifications Standards when conducting Section 106 compliance efforts. The ACHP recommends that FHWA work with the Hawaii Department of Transportation (HDOT) to ensure all historic preservation work meets or exceeds applicable professional standards. Further, FHWA should ensure that review and comment periods contained within MOAs contain reasonable and achievable timeframes for NHOs and other consulting parties to ensure their continued and active participation."

FHWA Response

Thank you for your recommendation. We will work to ensure MOAs contain reasonable and achievable timeframes in the future.

Stipulation 4 – Archeological Preservation and Mitigation Plan

ACHP Advice

"MH objects to this stipulation because historic properties were damaged during the undertaking's implementation, and consulting parties were not notified within 72 hours as required by Stipulation 17. FHWA should ensure that all consulting parties receive the archaeological reports, and schedule a meeting to discuss the unanticipated effects on historic properties if requested by the consulting parties. In the future, FHWA should take steps to ensure that these sorts of damages are reported to consulting parties promptly for their review."

FHWA Response

Archeological reports were distributed to consulting parties as summarized in the Stipulation 4 Closeout Memo. (Enclosure 1). The closeout memos were distributed to consulting parties on May 20, 2020, and discussed at the May 29, 2020, consulting party meeting (Enclosure 2). Further comments received after the meeting were summarized with responses and distributed via email to consulting parties on July 2, 2020 (Enclosure 3). FHWA is currently conducting an After Action Analysis for the unanticipated effects on historic properties.

This analysis will include recommendations to improve communication with consulting parties. Additionally, the NHO Consultation Protocols will address timely communication with NHOs.

Stipulation 5A – Project Redesign

ACHP Advice

“While consulting parties requested that FHWA avoid effects to a historic boundary wall, FHWA widened the median north of Hina Lani Street. The ACHP is unclear if FHWA considered whether additional identification efforts would be appropriate, particularly if the original surveys did not take this modification into account in developing the MOA. As MH questions the consideration of avoiding this impact under Section 4(f), the ACHP advises FHWA to follow up with all consulting parties regarding this portion of the project and Section 4(f) compliance.”

FHWA Response

As ACHP stated under *General Objections*, ACHPs statutory authority is limited to Section 106 of the National Historic Preservation Act. MH emailed FHWA on May 20, 2020, regarding the area between Hina Lani Street and Keahole International Airport. FHWA responded via email on May 28, 2020 (Enclosure 4).

Stipulation 5B – Native Hawaiian Cultural Outreach and Education

ACHP Advice

“MH has objected to the execution of a memorandum of understanding (MOU) with the University of Hawaii at Hilo without any opportunities for consulting parties to comment. ACHP recommends that FHWA meet with MH, the University of Hawaii at Hilo, and other consulting parties to discuss the MOU, the scope of work for carrying out this stipulation, and any necessary amendments to the MOU. FHWA should incorporate the views of the consulting parties in any kind of work plan and define specific ways they will be engaged as this stipulation is implemented. Further, during this consultation effort, FHWA should explore whether an NHO communication protocol would be a benefit to FHWA and NHOs in establishing agreed upon expectations and methods for consulting on all FHWA undertakings.”

FHWA Response

The MOU referenced is a contractual relationship between HDOT and University of Hawaii Hilo. FHWA agrees to the development of NHO Consultation Protocols as is stated under *General Objections* which may include establishing agreed upon expectations and methods for consulting on all FHWA undertakings.

Stipulation 6 – Cultural Monitors

ACHP Advice

“While MH has not made a specific objection to this stipulation, they express disappointment for the conditions in which the cultural monitors performed their duties. The ACHP suggests that to avoid such concerns being raised in the future, FHWA should work with MH and other NHOs to draft protocols for cultural monitor involvement.”

FHWA Response

Thank you for your recommendation. We will address it when developing the NHO Consultation Protocols.

Stipulation 8 – Noise Study

ACHP Advice

“MH has requested an additional noise study to determine if the results from the noise modeling study previously conducted for the undertaking is consistent current traffic noise. FHWA has determined that this stipulation is complete. While FHWA did meet the stipulation’s requirements, we urge it to provide a clearer and more complete explanation to consulting parties regarding the nature of a noise study and its rationale for declining the request from MH and the consulting parties.”

FHWA Response

The Closeout Memo for Stipulation 8 (Enclosure 5) summarized the noise study and identified the regulatory requirements. Additionally, the FHWA and HDOT answered questions regarding the noise study at the meeting on May 29, 2020 (Enclosure 2).

Stipulation 10B – Underpass Feasibility Study

ACHP Advice

“MH has raised several questions to HDOT that remain unanswered pertaining to the Underpass Feasibility Study and the potential liability issues resulting from the underpass’s maintenance. MH further objected that consulting parties and the community were not provided adequate time to review and discuss the study. Accordingly, the ACHP recommends that FHWA work with HDOT to answer the questions raised by MH as well as develop design guidelines for future projects. Regardless of whether FHWA considers this stipulation complete, it should share with the consulting parties how this Feasibility Study will be used to inform future undertakings.”

FHWA Response

Design Guidelines for Highway Widening Projects was included in Appendix B of the Underpass Feasibility Study. Questions raised by MH were answered, as summarized in the Stipulation 10B Closeout Memo (Enclosure 6). The closeout memos were distributed to consulting parties on May 20, 2020, and discussed at the May 29, 2020, consulting party meeting (Enclosure 2). Further comments received after the meeting were summarized with responses and distributed via email to consulting parties on July 2, 2020 (Enclosure 3).

Stipulation 12 – Ahupua’ā Signs

ACHP Advice

“MH is concerned that no consulting party input was sought by FHWA when creating the Ahupua’ā signs. While two signs have been replaced after recent consultation took place to determine the appropriate names, it is unclear why this consultation did not take place prior to installing the signs. Accordingly, for future FHWA undertakings, FHWA should consult with NHOs prior to the creation of any signage designating Hawaiian cultural and historic sites.”

FHWA Response

Native Hawaiian Organizations (NHOs) were consulted on Stipulation 12- Ahupua'a signs, as summarized in the Stipulation 12 Closeout Memo (Enclosure 7). Further comments received after the meeting were summarized with responses and distributed via email to consulting parties on July 2, 2020 (Enclosure 3).

Stipulation 14 – Relationship Building Workshop

ACHP Advice

“While MH objected that this stipulation was not carried out in the timeframe specified by the MOA, FHWA did hold the Relationship Building Workshops in 2017 and 2018. When drafting MOAs, FHWA should ensure that it can meet the timeframes it is proposing for their completion. Should deadlines need to be adjusted for mitigation deliverables, FHWA should develop and execute an amendment. The ACHP encourages FHWA to continue to hold similar workshops in the future, incorporating Section 106 training, to improve and maintain relationships with NHOs, outside of the consultation for specific undertakings”

FHWA Response

Thank you for your recommendations. We will work to ensure MOAs contain reasonable and achievable timeframes in the future. FHWA plans to develop of NHO Consultation Protocols as is stated in our response under *General Objections* which may include workshops including Section 106 training.

Stipulation 15 – Terrain Model

ACHP Advice

“MH believes there was a lack of appropriate consultation on the Terrain Model, although FHWA considers this stipulation complete. This objection could have been avoided had the MOA’s stipulation contained more specificity regarding the Terrain Model’s contents. To resolve this concern, FHWA should consider convening a consultation meeting to better understand the consulting parties’ vision for this item as well as its proposed location and potential modifications.”

FHWA Response

Consultation for the terrain model was summarized in the Stipulation 15 Closeout Memo. The closeout memos were distributed to consulting parties on May 20, 2020, and discussed at the May 29, 2020, consulting party meeting (Enclosure 2). Further comments received after the meeting were summarized with responses and distributed via email to consulting parties on July 2, 2020 (Enclosure 3).

Stipulation 17 – Post-Review Discoveries

ACHP Advice

“As noted earlier, MH objects to this stipulation because they were not notified of the damages to historic properties as a result of construction within the 72 hours prescribed by the MOA. Further, when consultation did take place, a significant period of time had passed since the damages occurred.

FHWA should consider the circumstances that led to its inability to meet the terms of this stipulation. Further, FHWA should, in coordination with HDOT and the other consulting parties, develop internal procedures and guidance for post-review discoveries on future undertakings.

The ACHP notes that several of these objections are similar to concerns raised by MH and consulting parties on other FHWA undertakings within Hawaii. Communication, transparency, accountability, and timeliness appear to be recurring themes that need to be addressed and improved upon by FHWA. As such, the ACHP recommends that FHWA work closely with MH and other NHOs to establish guidance and protocols for consulting with NHOs throughout the Section 106 process, including in the implementation and completion of agreement documents. Establishment of consultation protocols between NHOs and FHWA could be memorialized in the newly proposed program Programmatic Agreement for FHWA projects in Hawaii or could be an individual guidance document developed in close coordination with NHOs. FHWA should also provide detailed training to staff, including those from HDOT, on consultation with Native Hawaiians and the Section 106 process. The ACHP is available to assist FHWA in its training needs, and has several resources available on its website (<https://www.achp.gov/indian-tribes-and-native-hawaiians/training-guidance>). The ACHP is also available to review any draft guidance and protocols that FHWA may develop. Finally, FHWA should consider how it manages the commitments made in agreement documents to ensure accountability as well as timely and thorough completion of stipulations.

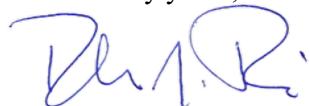
In accordance with Stipulation 18 of the subject project's MOA, FHWA is required to consider the ACHP's comments in reaching a final decision for the undertaking, and provide its decision-making rationale to the ACHP, the Makani Hou O Kaloko-Honokōhau, and the consulting parties."

FHWA Response

FHWA agrees to the development of NHO Consultation Protocols as stated in our response under *General Objections*. FHWA is also leading an After Action Analysis on the historic sites inadvertently damaged during construction. This analysis will include recommendations on improving processes and procedures. We appreciate any assistance ACHP can provide on both these endeavors.

If you have any questions, please feel free to contact Lisa Powell at (808) 541-2305 or via email at lisa.powell@dot.gov.

Sincerely yours,



Ralph J. Rizzo
Division Administrator

Enclosures

cc: David Clarke, FHWA