

Ho‘i Hou I Ka Iwikuamo‘o

A Legal Primer for the Protection of Iwi Kūpuna in Hawai‘i Nei



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Mahalo to Kahikūkālā Hoe for providing a name for this primer. We translate Ho‘i Hou I Ka Iwikuamo‘o as return to the family; it also references the arrival of a trusted relative who cares for the needs of ali‘i. In much the same way, Kānaka Maoli must care for our iwi kūpuna, which connect us to the past, present, and future.

Mahalo ke Akua, to our ‘ohana who sustained us on this journey, our kūpuna, past and present, who guide our steps, and to the keiki and generations yet unborn who will safeguard our iwi. Lastly, mahalo to those who will take this primer forward as their kuleana to mālama i nā iwi kūpuna.

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I. INTRODUCTION

**Iwi o ku‘u iwi
Koko o ku‘u koko
Pili ka mo‘o
Ā mau loa**

*Bones of my bones
Blood of my blood
Our stories are one
For ever and ever¹*

Aloha mai kākou!

This primer provides an introduction to the laws governing iwi kūpuna (ancestral bones) for those wanting to better understand their rights and the overall legal and cultural landscape affecting iwi (bones). While it cannot resolve all questions regarding the protection and preservation of iwi kūpuna, this legal primer is designed to summarize major Hawai‘i and Federal laws and issues, and direct those with additional questions to available resources, legal or otherwise. Although this primer provides helpful information, it is not a substitute for and does not provide individualized legal advice. If you have legal questions, please consult an attorney who specializes in this area.

Part II of this primer provides the cultural and spiritual underpinnings that guide Kānaka Maoli (Native Hawaiians) in the protection and care of iwi kūpuna. Part III briefly describes historical abuses of Native burials both in Hawai‘i and nationally, and parallel efforts to redress these wrongs through Federal and State legislation. Part IV describes actors and stakeholders in iwi kūpuna protection, particularly Kānaka Maoli lineal and cultural descendants, culturally affiliated Native Hawaiian organizations, museums, governmental agencies, landowners, developers, and archaeologists. Parts V and VI address legal protections of iwi kūpuna, moepū (funerary objects), and other cultural items in both the State and Federal arena. Part VII surveys a number of tools that Kānaka Maoli may employ as advocates for the care and preservation of iwi kūpuna while they navigate through the legal landscape.

¹ Oli Kuamo‘o, Hakipu‘u ‘Ohana (1995). An “oli” is a “chant that was not danced to, especially with prolonged phrases chanted in one breath.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 285 (1986 ed.).

A glossary of terms is included at the end for the reader’s convenience. Appendix A contains contact information for legal services, resources, government entities, and organizations that directly or indirectly address matters affecting iwi kūpuna, moepū, and other cultural items. Appendix B is a CD containing relevant constitutional provisions, statutes, administrative regulations, cases, and forms.



Photo: Kai Markell

This photo depicts ‘apu (cups) filled with ‘awa, a traditional drink prepared for various types of gatherings among Native Hawaiians and other Pacific peoples. The cover photo also represents the preparation of ‘awa. For Kānaka Maoli, ‘awa may serve as an important ceremonial drink that calls forth the divine presence of the akua (god or gods). In the drinking of ‘awa and in the act of ho‘omana, those present empower themselves and place authority in the akua to seal their words and commitment to pono (moral and righteous) dealings. It is our hope that this primer will similarly empower those who share the kuleana and commitment to protect iwi kūpuna and ensure their peaceful rest.

II. E MĀLAMA I NĀ IWI KŪPUNA: OUR SACRED RESPONSIBILITY TO CARE FOR IWI KŪPUNA

‘Ia wahi kapu nā kupuna e.

It shall not be disturbed, this place where our ancestors sleep.²

A. Hawaiian Genealogy & the First Burial Rite



Photo: Kai Markell

**Kapu ka haloa ku ma ka pe‘a
Kanu ia Haloa ulu hahaloa
O ka lau o Haloa i ke ao la
Pu - ka - ³**

-
- 2 PANDANUS CLUB, HONOKAHUA NANI E (Bluewater Records 1989). The lyrics were written by Charles Kauluwehi Maxwell, Sr. and translated into Hawaiian by Malia Craver to music by Kenneth Makuakane.
 - 3 THE KUMULIPO: A HAWAIIAN CREATION CHANT 233 (Martha Warren Beckwith trans., & ed., 1951). The Hawaiian rendition lacks the ‘okina (glottal stop) and kahakō (macron), which are diacritical marks that assist in the correct pronunciation of Hawaiian words.

*Taboo the taro stalk that stood by the woman’s taboo house
Haloa was buried [there], a long taro stalk grew
The offspring of Haloa [born] into the day
Came forth⁴*

The cultural significance of iwi kūpuna is deeply rooted in Kānaka Maoli oral traditions, language, and customs. The Kumulipo, a Hawaiian creation chant, recounts the story of Hāloanaka (quivering long stalk), the stillborn offspring of Wākea (father-sky) and his daughter Ho‘ohōkūkalanī (star-of-heaven). Hāloanaka was laid to rest within the earth, the first burial in Hawai‘i.⁵ A taro plant emerged from Hāloanaka’s burial site. The second child Hāloa was born and became the progenitor of all Kānaka Maoli. This story illustrates a symbiosis between the gods, land, and Kānaka Maoli. To kanu (bury) iwi kūpuna in the earth is to transfer mana (life force) to growing plants that in turn nourish Kānaka Maoli. The burial act also acknowledges the natural cycles of life and death, and the spiritual sustenance kūpuna offer present generations. This is reciprocated by caring for the ancestors’ iwi and sacred resting places. This fundamental kuleana perpetuates harmony between the living, the dead, and the ‘āina (land).⁶

The Hawaiian language also reveals the interconnection between ancestral bones, nature, Kānaka Maoli identity, and sovereignty. For example, the word “iwi” does not refer merely to bones, but also land boundaries demarcated by stone or earth ridges. “Iwi honua” describes a shoal or rock projecting on a coral reef. Moreover, the Maoli word for “homeland” is “kulāiwi,” and a term for “native” is “ōiwi.” One’s homeland provides the fundamental underpinning for self determination and serves as a source of identity. By reburying and protecting the sanctity of the iwi, Kānaka Maoli strengthen our ancestral foundation, maintain the interdependence between past and present, and re-infuse the land with mana essential to sustain our ancestors, the living, and future generations. Therefore, the care of iwi kūpuna is the highest form of sovereignty Kānaka Maoli can practice.⁷

4 THE KUMULIPO: A HAWAIIAN CREATION CHANT, *supra* note 3, at 125. The authors note that this quote lacks a kahakō (macron).

5 David Malo, KA MO‘OLELO HAWAI‘I: HAWAIIAN TRADITIONS, 201 (Malcolm Naea Chun, trans., First People’s Productions 1996) (1898). Translations contain some error in that they lack the ‘okina and kahakō. Citations to more recent translations of Malo’s accounts are intended to provide a Native Hawaiian perspective rather than an earlier missionary-influenced translation.

6 Kunani Nihipali, *Stone By Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 36-37 (2002).

7 Kunani Nihipali, *supra* note 6, at 36-37.

B. Hala (Death) & the Significance of Iwi

A loved one's death is a powerful, emotional, and spiritual event grounded in centuries old beliefs and customs that continue to permeate the modern life of Kānaka Maoli.⁸ At the time of hala (death), the 'uhane (spirit) remained nearby and connected to the iwi. Eventually the 'uhane departed to Pō (Eternity) and joined the 'aumākua (family or personal gods).⁹

Iwi were “guarded, respected, treasured, venerated, loved, or even deified by relatives” in traditional society. They were also “coveted and despoiled by enemies[,]”¹⁰ for mana remained in the bones and their mistreatment offended the 'uhane. Iwi are vital to the perpetuation of living Kānaka Maoli, as they are a lasting embodiment of our ancestors and continuous genealogical link from the past, to the present, and future generations.



Photo: Lokelani Brandt

C. Ke Kanu (Burial) & Nā Wahi Kanu (Burial Sites)

Kānaka Maoli were very strict about who could handle a corpse. For instance, only highly trusted, blood-related retainers had the authority to touch the body of an ali'i (chief) and only close family members had the authority to handle the body of a maka'āinana (person of the land). Often, an appointed person or group of relatives of the deceased conducted the actual interment, which occurred at night in a designated burial area.

8 SAMUEL MANAIAKALANI KAMAKAU, KA PO'E KAHIKO: THE PEOPLE OF OLD 33-35, 43-44 (1987 ed.).

9 Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 245, 247 (Melody Kapilialoha MacKenzie ed., 1991).

10 1 MARY KAWENA PUKUI *et al.*, NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 107 (1972).

The exact burial location, however, remained hūnākele (secret) except to those who participated in the interment. These sites were kept secret for their own safekeeping and protection from abuse or disturbance. Some Kānaka Maoli hid iwi in caves, cliffs, or sand dunes, or deposited them in the ocean. Sand, cave, and rock burials were preferable to dirt because they left no evidence of ground disturbance.

Kānaka Maoli selected burial sites for symbolic purposes. The western side of each island was most desirable, as it represented the sunset of life (death). Therefore, places such as Honokahua on Maui, Mo‘omomi on Moloka‘i, and Ka‘ena on O‘ahu are considered significant resting places for our Kānaka Maoli ancestors. The burial of iwi impart the mana of the deceased to that particular ground, to that specific ahupua‘a (land division), and to the island itself. Therefore, an entire burial area is considered sacred with mana.

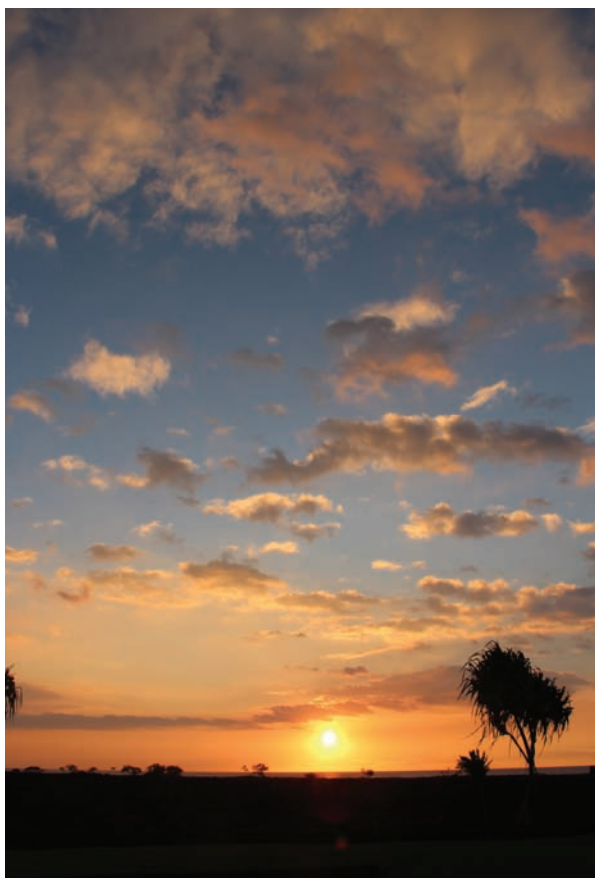


Photo: Lokelani Brandt

‘Ohana (family) graves were located near the home and in close proximity to living relatives to serve as a comforting presence and assure the kūpuna’s care and spiritual participation in family affairs. Following burial, family members purified themselves through rituals called pīkai (sprinkling of sea or salted water for purification) or kapu kai (ceremonial bath in the sea).

Traditionally, moepū accompanied kūpuna to support them on their journey to Pō. This is evident in the expression “e ho‘omoe pū” which means to “put to sleep together.” These items usually included food, ornaments, and/or items special to kūpuna in life.

Occasionally, iwi and their funerary objects were put under the care of a kahu (Hawaiian priest). This task remained within the family for generations until the last kahu died, sometimes without naming a successor. Over time, Indigenous rituals surrounding the care of iwi kūpuna began to change.

D. Western Influence on Kānaka Maoli Burial Practices

The documented arrival of foreigners to Hawaiian shores, beginning in 1778, affected everything in Hawai‘i, including the beliefs and practices surrounding iwi kūpuna. Two traditional funerary

practices, pūholoholo and kākū'ai,¹¹ were gradually discontinued under the weight of Western influence. Pūholoholo was the practice of removing a corpse's flesh by steaming, and the subsequent disposal of the flesh in the deepest part of the ocean. Kākū'ai involved the supernatural transfiguration of iwi into a form of 'aumākua.

The use of wooden coffins and morticians to prepare corpses for burial replaced these traditional practices. It is not surprising that Kānaka Maoli accepted coffin burials, as it was a common practice in earlier times to bury ali'i in canoes made of koa (*Acacia koa*) or kukui (*Aleurites moluccana* or candle nut tree).

E. Forms of Iwi Desecration¹²

Burial practices centered around protecting iwi from falling into the possession of adversaries. For Kānaka Maoli, the desecration of iwi insults the spirit and injures and inflicts spiritual trauma on the living descendants of the dishonored dead.

Iwi desecration can occur in various ways. For example, leaving iwi uncovered and exposed to sunlight is considered disrespectful and sacrilegious. The worst act of desecration is the physical destruction of iwi because this act prevents the 'uhane from joining the 'aumākua in eternity. In addition, contemporary Kānaka Maoli perceive unnecessary scientific analysis as disturbance and abuse of iwi.

F. Kō Ka 'Uhane (Spiritual Matters)

Lawe i ka wā make

*Take in time of death.*¹³

Traditionally, Kānaka Maoli believed that kūpuna took intangible matters with them beyond the grave. The 'uhane retained promises, requests, reconciliations, or other emotional or spiritual matters on behalf of the family. In addition, the 'uhane could take family grudges, curses, or a name that carried harmful connotations. Moreover, unless the deceased's mana passed to another individual, the 'uhane could take its special talent back to the 'aumākua.

11 1 MARY KAWENA PUKUI *et al.*, NĀNĀ I KE KUMU (LOOK TO THE SOURCE), *supra* note 10, at 134, 115.

12 1 MARY KAWENA PUKUI *et al.*, NĀNĀ I KE KUMU (LOOK TO THE SOURCE), *supra* note 10, at 109. This part is adapted primarily from this source.

13 1 MARY KAWENA PUKUI *et al.*, NĀNĀ I KE KUMU (LOOK TO THE SOURCE), *supra* note 11, at 137-38.

Iwi are the surviving repositories of the ‘uhane. The cultural responsibility to protect iwi from desecration is firmly in the hands of living Kānaka Maoli. Disturbance of iwi kūpuna in the wake of modern development has introduced new challenges. Necessity demands the evolution of new customs and practices of kanu hou (reburial) and the formal passage of laws that better mitigate harm to iwi kūpuna. Kānaka Maoli are tasked with adapting new funerary practices for relocation and reinterment of disturbed iwi while retaining the essence of traditional values and beliefs.¹⁴

14 Members of Hui Mālama I Nā Kūpuna O Hawai‘i Nei were taught six ceremonial pule (prayers) to repatriate 80 kūpuna from the Smithsonian Institute Museum of Natural History. Some prayers were borrowed, while others were created by Kumu Pualani Kanaka‘ōle Kanahēle. *See also* Kunani Nihipali, *supra* note 6, at 29. “I give credit to my kumu – my mentors and my teachers – Pualani and Edward Kanahēle, for allowing all of us to be part of their lives. They were the ones who stepped forward to help us to relearn cultural protocols, to ho‘ala hou (reawaken) ourselves to take on this enormous kuleana (responsibility) – the protection of our kupuna (ancestors), their iwi (bones), moepu (funerary objects) buried with them, and their wahi pana (sacred burial grounds).”

III. HISTORICAL ABUSES OF NATIVE BURIALS & THE IMPETUS FOR THEIR PROTECTION IN HAWAII & ON THE NATIONAL STAGE

*Ka 'uhane o ke kūpuna lives on
Ka 'uhane o ke kūpuna sing your songs
Oh, please, just leave our bones alone.¹⁵*



Photo: Kai Markell

A. Negative & Disparate Treatment of Native Burials Throughout the United States and Hawaii

1. Universal Burial Protections Denied to Native Peoples

English and American common law do not treat the dead as property. The ground upon which the dead are buried is deemed hallowed and the disinterment of remains requires a showing of “compelling circumstances.”¹⁶ Likewise, funerary objects are not considered “abandoned” property,

15 Excerpt from song by BIG ISLAND CONSPIRACY, HONOKAHUA (Deep Ka'a Ka'a Records 1999). A rough translation of this song is: the spirit of our ancestors lives on, the spirit of the ancestors sing your songs, oh, please, just leave our bones alone. This song was written with reference to the events that transpired in 1988 in Honokahua, Maui, which are detailed in Part III(B)(1).

16 Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act Background and Legislative History*, in REPATRIATION READER, WHO OWNS AMERICAN INDIAN REMAINS? 125 (Devon A. Mihesuah ed., 2000). Jack F. Trope is the Executive Director of the Association of American Indian Affairs, which has long been involved in implementation of the Native American Graves Protection and Repatriation Act (NAGPRA) to return ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony to Native communities on the continent. Walter R. Echo-Hawk is a Pawnee Indian and serves as a justice on

but are intended to “remain . . . perpetually” with the deceased rather than be “available for someone to recover and possess as owner.”¹⁷ Kānaka Maoli burial traditions employed similar reasoning. Samuel Kamakau, noted Maoli scholar of the 1800s, wrote:

According to the opinion of learned men the land belongs to the common people, and property rights are to be vested in the commoners. In old days the inheritance of the family burial place, the caves and secret burial places of our ancestors was handed down from these to their descendants without the intrusion of a single stranger unless by consent of the descendant, so that wherever a death occurred the body was conveyed to its inheritance. These immovable barriers belonged to burial rights for all time. The rule of kings and chiefs and their land agents might change, but the burial rights of families survived on their lands.¹⁸

In addition to English and American common law constructs, Hawai‘i has adopted the “Hawaiian usage” standard as an integral part of State law and judicial interpretation. Haw. Rev. Stat. § 1-1. Maoli traditional understandings qualify human remains as sacred and not private property.

Historically in the United States, Native Peoples and our ancestral remains have been treated inhumanely and have not enjoyed common law protections. Early court decisions prevented access to justice and equal protection for First Nations people. Some notable decisions found prohibitions against grave-robbing and desecrating cemeteries as inapplicable to Indigenous remains and burial sites because Native Americans did not meet the legal definition of “human beings.”¹⁹

Discriminatory land use decisions and government policies resulted in the systematic removal and relocation of both Kānaka Maoli and Indian tribes from our ancestral lands. This situation hampered efforts to maintain traditional stewardship of ancestral burial grounds, and any removal of Native remains and funerary objects were supposedly a permissible taking of “abandoned” goods.²⁰

the Supreme Court of the Pawnee Nation, chairman of the Native Arts and Cultures Foundation, a national and permanently endowed foundation to support Native art and culture, of counsel at Crowe & Dunlevy, Oklahoma’s oldest and largest law firm, and an adjunct professor at Tulsa University School of Law.

17 *Charrier v. Bell*, 496 So. 2d 601, 605 (La. Ct. App. 1986) (“While the relinquishment of immediate possession may have been proved, an objective viewing of the circumstances and intent of the relinquishment does not result in a finding of abandonment. Objects may be buried with a decedent for any number of reasons. The relinquishment of possession normally serves some spiritual, moral, or religious purpose of the descendant/owner, but is not intended as a means of relinquishing ownership to a stranger.”).

18 SAMUEL M. KAMAKAU, *RULING CHIEFS OF HAWAII* 376 (rev. ed. 1992) (citation omitted).

19 Jack F. Trope & Walter R. Echo-Hawk, *supra* note 16, at 130, 132.

20 Jack F. Trope & Walter R. Echo-Hawk, *supra* note 16, at 130, 132.

2. A History of Abuses

As detailed above, protections that most people take for granted historically have not been shared with America’s Indigenous Peoples. Thousands of Native American skeletal remains were dug up for display in museum exhibitions in accordance with the Federal 1906 Antiquities Act, which determined Indian remains to be “archaeological resources” and “federal property” rather than belonging to the human race. Over four thousand human heads were collected from graves, prisoner of war camps, hospitals, and battlefields for “scientific research” of Indian crania (skulls) to “prove” their inferiority to whites and thereby justify policies for mass tribal relocations onto reservations.²¹ Even today, a lucrative black market for the sale and trade of items looted from Indian graves continues to exist.²²

The experience of Kānaka Maoli and our iwi kūpuna is astonishingly similar. As the haunting refrain from a popular local song at the beginning of this section illustrates, the battle to protect Kānaka Maoli sacred sites and burials stirs much emotion and passion. Reliable estimates of the Maoli population prior to Western contact range between roughly 800,000 to over one million people.²³ Over centuries, hundreds of thousands of Kānaka Maoli passed on and thus unmarked Native burials can be encountered almost anywhere, from the mountains to the shoreline and in the most remote as well as highly urbanized areas throughout the Islands. The influx of foreigners and increasing development disturbed a myriad of iwi. As development continues in new areas as well as along urbanized corridors, and stringent building regulations require more extensive excavation work, an increased number of iwi kūpuna are at risk of disturbance.²⁴ This pattern of

21 Jack F. Trope & Walter R. Echo-Hawk, *supra* note 16, at 126-27.

22 S. REP. NO. 101-473, at 3 (1990); *see also* Julie Cart, *Looting Indian Grave Sites is Big Business in Utah/BLM agents fight continuing battle against robbers*, LOS ANGELES TIMES, April 8, 2001, *available at* <http://www.sfgate.com/news/article/Looting-Indian-Grave-Sites-Is-Big-Business-in-2933483.php> (“Diggers roam rugged areas of the Southwest in search of prehistoric baskets, pots and even bones to sell. Experts estimate that more than 80 percent of American Indian archaeological sites, some dating back 17 centuries, have been looted.”); News Release, U.S. Department of the Interior, Office of the Secretary, Federal Agents Bust Ring of Antiquity Thieves Looting American Indian Sites for Priceless Treasures: Largest Ever Undercover Operation Nabs Diggers, Dealers and Collectors Operating in Four Corners Region (June 10, 2009) (on file with authors).

23 *See generally* DAVID E. STANNARD, *BEFORE THE HORROR THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT* (1989) (providing population estimates for Kānaka Maoli at the time of Western contact); *see also* LILIKALĀ KAME‘ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES PEHEA LĀ E PONO AI?* 81 (1992) (explaining that Stannard’s conservative methodologies underestimate the number of people inhabiting Hawaii at the time of Western contact and a figure of “at least one million Hawaiians in 1778” is more appropriate); *see also* ROBERT C. SCHMITT, *DEMOGRAPHIC STATISTICS OF HAWAII 1778-1965* (1968) (additional discussion of the decline of Hawaii’s Indigenous population in the nineteenth century).

24 Interview with Moses Haia, Executive Director, and Camille Kalama, Staff Attorney, Native Hawaiian Legal Corporation, in Honolulu, Haw. (Oct. 16, 2012). Many of the old buildings located in Downtown Honolulu were typically single story structures and as new high rises replace them, stringent building codes require extensive excavation work to put in foundations, resulting in discoveries of mass Hawaiian burials. *See generally* Rick Daysog, *Kawaiiahao*

destruction has been repeated throughout history. Moreover, thousands of iwi kūpuna, moepū, and culturally significant items remain in museums around the world and are part of substantial museum and Federal agency collections here in Hawai‘i and abroad. Their repatriation and disposition lingers in dispute.²⁵

B. Redressing Wrongs Through Legislation: Struggles to Protect Indigenous Ancestral Burials in Hawai‘i & Beyond

1. The Battle of Honokahua, Maui



Photo: Natasha Baldauf

In 1988, over 1,100 iwi of men, women, and children were excavated and removed to accommodate the proposed oceanside construction of the Ritz-Carlton Kapalua Hotel in Honokahua, Maui. Concerned Kānaka Maoli from every island banded together and committed to a round-the-clock vigil at the State Capitol. Within twenty-four hours, agreement was reached to pass

Church unearths nearly 600 burials, HAWAII NEWS NOW, Aug. 29, 2012, <http://www.hawaiinewsnow.com/story/19413914/kawaiahao-church-unearths-nearly-600-burials> (detailing the recent excavation of nearly 600 sets of remains on Kawaiaha‘o Church grounds).

- 25 Interview with Keola Lindsey, Lead Compliance Specialist, Everett Ohta, Compliance Specialist, Jerome Yasuhara, Compliance Specialist, and Kamaile Maldonado, Public Policy Advocate, Office of Hawaiian Affairs, in Honolulu, Haw. (Oct. 9, 2012). The “Mokapu Collection” from the mid-1950s to late 1970s is estimated to consist of at least 1,500 sets of Hawaiian skeletal remains and associated funerary objects. This collection is held by Bishop Museum. As the Kaneohe Marine Corps Air Station base continues to expand, the military has developed a new collection of iwi removed from the 1980s to present. Efforts toward repatriation and final disposition of these iwi are pending.

legislation that would affirmatively protect Kānaka Maoli burials, where no such protections had existed before. Governor John Waihe'e successfully negotiated the relocation of the hotel and the State purchased a 13-acre parcel of land nearby for reinterment of the iwi. Subsequently, the Kānaka Maoli community took part in the arduous and sacred task of reintering all 1,100 kūpuna at Honokahua. Hui Mālama I Nā Kūpuna O Hawai'i Nei (Group Caring for the Ancestors of Hawai'i) was born out of this struggle and took on the kuleana of protecting iwi kūpuna.²⁶ Today, the reinterment site is marked with a stone memorial and plaque.



Photo: Natasha Baldauf

Honokahua catalyzed the adoption of new State laws aimed at preventing future harm to iwi. Those laws now provide a legal framework that balances the interests of Kānaka Maoli with the needs of the greater Hawai'i community.

2. A Call to Action in Indian Country

Around the same time period, upset rocked Indian country after the revelation that 34,000 sets of human remains were housed at the Smithsonian Institution, with more than half of its collection belonging to Native American and Alaskan peoples.²⁷ Tribal leaders joined forces,

²⁶ Kunani Nihipali, *supra* note 6, at 27-28.

²⁷ S. REP. NO. 101-473, *supra* note 22, at 1 (1990).

insisting on the repatriation of the remains.²⁸ These efforts first culminated in the passage of the National Museum of the American Indian Act in 1989 (Museum Act). The Museum Act required the Smithsonian to inventory and repatriate Indian remains and funerary objects in consultation with lineal descendants, culturally affiliated Indian tribes, and their religious leaders.²⁹ The Museum Act became an important precursor to the Native American Graves Protection and Repatriation Act (NAGPRA), landmark Federal legislation that provides a legal framework for the treatment and repatriation of Indigenous remains.

Parts V and VI of this primer provide further detail on the important State and Federal legal frameworks for iwi protection.

28 S. REP. NO. 101-473, *supra* note 22, at 1 (1990).

29 Jack F. Trope & Walter R. Echo-Hawk, *supra* note 16, at 137.

IV. ACTORS & STAKEHOLDERS IN THE DISPOSITION OF IWI KŪPUNA, MOEPŪ, & OTHER SIGNIFICANT CULTURAL ITEMS

Ola nā iwi.

The bones live.

(Said of a respected elder who is cared for by his family)³⁰

Insight into key players (agencies, individuals, and organizations) and their special roles in the treatment and disposition of iwi kūpuna, moepū, and other cultural items is integral to understanding the necessary legal and cultural landscape. This part identifies those key players and the functions they perform, and examines the various interests these entities represent. Their roles will become clearer in Parts V and VI, which explain the State and Federal legal frameworks surrounding the treatment and disposition of iwi kūpuna and moepū.



Photo: Kai Markell

30 MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 272 (1983).

A. Kānaka Maoli

As outlined in Part II, Kānaka Maoli possess a fundamental responsibility to care for and preserve iwi kūpuna. Generally, Kānaka Maoli recognized as lineal and cultural descendants of iwi are afforded additional consultation and participation in decisionmaking.

1. Lineal Descendants

The term “lineal descendant” is used in both Federal and State law governing iwi. NAGPRA recognizes lineal descendants as persons who are able to trace their lineage directly to specific individuals whose remains, funerary objects, or sacred objects are held in museum collections or found on Federal lands. 43 C.F.R. § 10.2(b)(1).

State law recognizes lineal descendants as individuals who have established “direct or collateral genealogical connections” to certain iwi kūpuna. The respective burial council (defined below) makes a final determination as to whether a person has adequately established lineal descent to be recognized. Haw. Admin. R. § 13-300-2, -35(f). Like NAGPRA, Hawai‘i law affords lineal descendants certain consultation rights and decisionmaking preference on the disposition of iwi.

2. Cultural Descendants

Hawai‘i law recognizes cultural descendants as individuals who have established “genealogical connections to Native Hawaiian ancestors who once resided or are buried or both, in the same ahupua‘a or district” in which the iwi are located or originated from. Haw. Admin. R. § 13-300-2. Like lineal descendants, the respective burial council makes a final determination as to whether a person has adequately established cultural descent. Haw. Admin. R. § 13-300-35(h). Like lineal descendants under State law, cultural descendants are afforded certain consultation rights in decisionmaking regarding iwi kūpuna. For more detailed information about the role of lineal and cultural descendants under Hawai‘i law and of lineal descendants under NAGPRA, see Parts V and VI, respectively.

B. Native Hawaiian Organizations

1. Hui Mālama I Nā Kūpuna O Hawai‘i Nei

Hui Mālama is a Native Hawaiian organization dedicated to the proper treatment of iwi kūpuna. Hui Mālama was founded in 1988 following the mass excavation of iwi at Honokahua and the subsequent outcry of Kānaka Maoli throughout the Islands to restore pono (rightness) by returning those kūpuna to their resting places. Members of Hui Mālama trained under the direction of respected

cultural experts Edward and Pua Kanahale of Hilo in traditional protocols surrounding the care of iwi kūpuna. Over the course of its twenty-year history, Hui Mālama has repatriated and reinterred iwi and moepū from over thirty museums and institutions throughout the nation and across the globe.

Federal law recognizes Hui Mālama as a “Native Hawaiian organization” (NHO) with the right to make claims to the repatriation and disposition of iwi, moepū, and other significant cultural objects. 43 C.F.R. § 10.2(b)(3)(ii).

State law requires consultation with Hui Mālama on petitions for the adoption, amendment, and/or repeal of the administrative rules on burial sites. Haw. Admin. R. § 13-300-11(d).

2. Office of Hawaiian Affairs

The Office of Hawaiian Affairs (OHA) is a State agency that works to mālama (protect) Hawai‘i’s people and environmental resources. OHA’s leadership and assets are directed toward ensuring cultural perpetuation, improving lives, and protecting Kānaka Maoli entitlements. Part of OHA’s kuleana is the protection of iwi kūpuna as a direct link to Maoli spiritual and emotional well-being. OHA plays a notable role in the disposition of iwi kūpuna. It must be notified when iwi are discovered during construction. Haw. Admin. R. § 13-300-40(c). Like Hui Mālama, OHA must be consulted when administrative rules regarding burial sites are proposed for adoption, amendment, or repeal. Haw. Admin. R. § 13-300-11(d). OHA also provides a list of at least nine candidates to the governor for appointment as regional representatives of the burial councils (defined below). Additionally, it publishes important notices regarding iwi in its publication, *Ka Wai Ola*, and houses a Native Hawaiian Historic Preservation Council, which provides cultural expertise to advise OHA on historic preservation matters.³¹

Federal law also recognizes OHA as an NHO with rights to make claims to the repatriation and disposition of iwi, moepū, and other significant cultural objects. 43 C.F.R. § 10.2(b)(3)(ii).

C. Government

1. Federal Government

a. Museums

NAGPRA broadly defines a museum as “any institution or State or local government agency

³¹ Members of this council serve on a volunteer basis and meet regularly. The council consists of staff from OHA’s Compliance division, and also includes a non-voting member of the OHA Board.

(including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.” 43 C.F.R. § 10.2(a)(3). Hundreds of thousands of Indigenous remains and cultural items are currently in museum collections, many of which were originally procured in improper and objectionable ways. NAGPRA mandates that museums and other repositories provide a “summary” or list describing the contents of their collections of unassociated funerary objects, sacred objects, and objects of cultural patrimony; make a good faith effort to provide an item-by-item “inventory” or description of iwi and associated moepū in their possession; and work in consultation with culturally affiliated Indian tribes, NHOs, traditional and religious leaders, and lineal descendants in their inventory, repatriation and disposition work.

b. Federal Agency/Federal Agency Officials

A Federal agency is generally any “department, agency, or instrumentality of the United States.” 43 C.F.R. § 10.2(a)(2). A Federal agency can be considered a “museum” and thus subject to NAGPRA’s mandates if it holds any iwi, moepū, and other significant cultural objects. Federal agencies and their designated officials may also be subject to NAGPRA if iwi, moepū and/or other protected cultural items are discovered inadvertently or excavated intentionally on lands within their management. In Hawai‘i, iwi kūpuna and moepū are often found on National Park Lands and military bases. These Federal entities have a duty to consult with lineal descendants, Indian tribes, and NHOs on the reinterment, relocation, and final disposition of iwi and moepū. For more detailed information about the role of Federal Agencies and Federal Agency Officials, see Part VI.

c. Review Committee

NAGPRA established a Review Committee, which is a seven-member body appointed by the Secretary of the Interior (Secretary) comprised of representatives from national museums, scientific organizations, NHOs, Indian tribes, and their traditional religious leaders. 25 U.S.C. § 3006(b). The Review Committee serves as an advisory body to the Secretary to monitor repatriation efforts and ensure Federal agency and museum compliance in documenting iwi, moepū, and/or other cultural items. 25 U.S.C. § 3006(a). The Review Committee also hears informal disputes between Native claimants, museums, and Federal agencies. 25 U.S.C. § 3006(c). For more detailed information about the role of the Review Committee, see Part VI.

d. Secretary of the Interior

The Secretary oversees NAGPRA implementation and authorizes deadline extensions for entities that have made a good faith effort to complete their work, but need additional time. 43 C.F.R. § 10.9(f). The Secretary may also impose civil penalties on museums who fail to comply

with NAGPRA’s provisions (e.g., failure to complete necessary documentation, failure to consult with lineal descendants, Indian tribes, and NHOs, refusal to repatriate, etc.). See 43 C.F.R. § 10.12. For more detailed information about the role of the Secretary with respect to NAGPRA, see Part VI.

e. Manager, National NAGPRA Program

The Manager of the National NAGPRA Program is a designee of the Secretary and is responsible for administering NAGPRA. 43 C.F.R. § 10.2(c)(3). The Manager receives documentation provided by entities subject to NAGPRA as well as copies of important notices regarding iwi kūpuna, moepū, and/or other cultural objects from Federal agencies and museums. See 43 C.F.R. § 10.6(c). For more detailed information about the role of the Manager of the National NAGPRA Program, see Part VI.

2. State Government

a. Hawai‘i State Legislature

The Hawai‘i State legislature is currently the primary vehicle for the creation and modification of laws affecting iwi kūpuna. Legislators serve an important role in responding to community members’ needs, including those that pertain to the protection of iwi kūpuna. In response to the outcry from Kānaka Maoli to end the unnecessary desecration of iwi at Honokahua, State legislators amended Hawai‘i Revised Statutes chapter 6E to provide protection for iwi. For more detailed information about Statewide protections for iwi kūpuna, see Part V.

b. Department of Land and Natural Resources & State Historic Preservation Division

The Department of Land and Natural Resources (DLNR) is a State agency charged with managing and administering Hawai‘i’s public lands and all water and coastal areas of the State, including the historic sites located therein. The State Historic Preservation Division (SHPD) is an independent department within DLNR and must administer a State Historic Preservation Program that includes ongoing historical, architectural, and archaeological research with surveys, excavations, scientific recording, interpretation, and publications on the State’s historic and cultural resources. Haw. Rev. Stat. § 6E-3(1). Further, SHPD must develop a statewide survey and inventory of historic properties and burial sites and manage the statewide burial sites program.³² Haw. Rev. Stat. § 6E-3(3), (10).

32 In 2010, an audit by the National Park Service opined that SHPD suffers from serious operational deficiencies that hinder its ability to fulfill its mandates under State and Federal law and threaten its receipt of the program’s Federal funding. See generally Letter from Jonathan B. Jarvis, Director, National Park Service, to Laura H. Theilen, Chairperson, Department of Land and Natural Resources (Mar. 19, 2010) (on file with authors). In 2011, SHPD hired a consultant firm to assist in bringing the department into compliance. See Gary T. Kubota, State Hires Firm to Fix Preservation Division, *STAR-ADVERTISER*, June 9, 2011, *available at* ProQuest, <http://search.proquest.com/docview/871146582?accountid=3083>. In 2012, SHPD submitted its final report to the National Park Service

c. Island Burial Councils

Five Island Burial Councils (Hawai‘i, Maui/Lāna‘i, Moloka‘i, O‘ahu, and Kaua‘i/Ni‘ihau) exist as entities administratively attached to DLNR. Members of these councils are appointed by the governor. A minimum of nine and maximum of fifteen members serve on each burial council. These members typically represent the voices and interests of Kānaka Maoli and other stakeholders in the proper care and treatment of iwi and play an integral role in the disposition of iwi kūpuna. It is the burial council members’ statutory duty to determine the preservation or relocation of iwi kūpuna discovered during archaeological surveying prior to construction. Further, burial council members assist SHPD in the inventory and identification of burial sites; maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of iwi; and make recommendations regarding the appropriate management, treatment, and protection of iwi. Haw. Rev. Stat. § 6E-43.5(f)(1) to (5). Burial council members gather regularly in monthly public meetings to discuss and determine the treatment of iwi found at various sites across the State. For more detailed information about the role of burial councils, see Part V.

3. Land Use Planning & Permitting Agencies

In Hawai‘i, County and State planning and permitting departments play a critical role in iwi protection. SHPD concurrence (approval or authorization) is required as a precondition to project approvals involving a permit, license, certificate, land use change, subdivision, or entitlement for use, which *may affect* burial sites. Haw. Rev. Stat. § 6E-42(a) (emphasis added). State and County permitting agencies consult registered burials, historical records and land grants, burials known through previous excavation or archaeological investigations, and SHPD records to determine whether a proposed project may affect burial sites. According to the Hawai‘i Intermediate Court of Appeals, if there is no indication that iwi may exist in a proposed development area, the permitting agency is not mandated to consult SHPD regarding the proposed development site.³³ For more detailed information about the process of consultation between permitting agencies and SHPD, see Part V.

stating that it has addressed problems and instituted corrective action plans to the satisfaction of the National Park Service. See Andrew Gomes, Protector of Old Sites Says It Has Improved, STAR-ADVERTISER, Oct. 22, 2012, available at Proquest, <http://search.proquest.com.ezproxy.librarieshawaii.org:2048/docview/1114279255/13CFFAEB5D41A1C2E43/5?accountid=3083>.

33 See *Hui Malama I Na Kupuna o Hawai‘i Nei v. Wal-Mart*, 122 Hawai‘i 171, 179, 223 P.3d 236, 244 (App. 2009) (noting that Haw. Rev. Stat. § 6E-42 “does not require review and comment from SHPD on *all* proposed projects ‘involving a permit, license, certificate, land use change, subdivision, or other entitlement for use’ – only for those ‘which *may affect* historic property, aviation artifacts, or a burial site.’”).

D. Landowners & Developers

Landowners and developers wishing to utilize and improve their properties must do so in accordance with land use, environmental, and historic preservation laws. In addition to contractors, architects, and other professionals who assist in a project’s planning and development, landowners may be required to hire an archaeologist to perform various site surveys. Iwi identified as part of a site survey during the pre-construction phase triggers SHPD and burial council involvement. A burial treatment plan is prepared and the appropriate burial council in consultation with lineal and cultural descendants makes a determination as to whether the iwi will be preserved in place or relocated. Haw. Rev. Stat. § 6E-43(b). If iwi are discovered during construction, Hawai‘i law requires that all activity in the immediate area cease until SHPD determines the disposition of the disturbed iwi. Haw. Rev. Stat. § 6E-43.6(a). This process can be extremely expensive and time consuming, especially if multiple sets of iwi are uncovered and comprehensive surveys are not undertaken prior to the commencement of ground-altering activities. For more detailed information about the process required by Hawai‘i law when iwi are discovered, see Part V.

E. Business Industries

Construction is a major driver of Hawai‘i’s economy. Consequently, pressure remains high to keep projects progressing smoothly. As mandated by State law, construction activity in the immediate area that could damage discovered iwi must halt while SHPD staff promptly determine whether to remove the iwi or preserve in place. This decision is made in consultation with the landowner, burial council members, and any known lineal or cultural descendants. Haw. Rev. Stat. § 6E-43.6(a). Longer delays may threaten a project’s viability and create unanticipated costs for the landowner or developer. Therefore, prudent construction companies and landowners/developers rely on comprehensive archaeological reports prepared for them to avoid needless disturbance of iwi, unnecessary delay, and cost overruns.³⁴

F. Archaeologists & Consultants

If a permitting agency determines that a project may affect burial sites, SHPD requires a “qualified archaeologist” to conduct an archaeological inventory survey (AIS). A “qualified archaeologist” must have a graduate degree in archaeology (or a related area) and several years of field experience. Haw. Admin. R. § 13-281-3. An AIS identifies and documents archaeologically historic properties, including burial sites, and their significance. When done properly, an AIS is an excellent tool to prevent the disturbance of iwi kūpuna by construction. One cannot sufficiently underscore the

³⁴ Telephone Interview with Hinano Rodrigues, Cultural Historian, State Historic Preservation Division, Maui Office (Oct. 1, 2012).

fact that the safeguarding of iwi kūpuna hinges greatly on the quality of the archaeological reports prepared during the planning stages of any development. For more detailed information about the significance of AISs, see Part V.



Above, Puanani Kanemura Van Dorpe adds kapa to the other ceremonial offerings at the burial site at Honokahua, Maui. For the ali‘i burials, the kapa pieces were dyed black and watermarked with the maka ūpena pūpū (“netted eyes of the fish”) pattern. For binding, coconut fiber was woven into sennit. Photograph by Franco Salmoiraghi, 1990.

V. STATE LEGAL FRAMEWORK

I ulu no ka lālā i ke kumu.

*The branches grow because of the trunk.
(Without our ancestors we would not be here)³⁵*



Photo: Elyse & Matt Mallams

Burial mound located at TJ Maxx store, Kaka'ako, O'ahu

The legal framework for iwi protection and preservation in Hawai'i includes the Hawai'i Constitution, the Historic Preservation Chapter of Hawai'i Revised Statutes (Hawai'i Revised Statutes chapter 6E), the Hawai'i Administrative Rules implementing those statutes (primarily Hawaii Administrative Rules section 13-300, among other sections), and court decisions interpreting and enforcing these provisions.

35 MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS, *supra* note 30, at 137.

A. Constitutional Mandates

Hawaii’s Constitution mandates the protection of iwi kūpuna. In 1978, Hawaii’s people elevated resource preservation to a constitutional mandate by adding specific provisions protecting Hawaii’s natural resources and Indigenous culture. In particular, article IX, section 9 recognizes the significance of Hawaii’s cultural resources by granting the State the power to preserve such resources.

Hawaii Revised Statutes chapter 6E classifies historic properties and burial sites as part of Hawaii’s public trust:

Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person 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.

Haw. Rev. Stat. § 6E-13 (emphasis added). Moreover, according to the State legislature, the public has a vital interest in the proper disposition 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 at 956. Because burial sites are part of the public trust, one cannot own a burial site — not even a landowner who owns the land upon which iwi are situated can claim ownership over that burial.

The public trust doctrine is a fundamental principle of constitutional law in Hawaii. When anyone, including the State and its political subdivisions, takes action that may impact iwi and moepū, regardless of whether they are known to exist, that individual or entity must do so “pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our State.” See In re Waiāhole Combined Contested Case Hearing, 94 Hawaii 97, 118, 132, 9 P.3d 409, 444, 455 (2000).

Additionally, article XII, section 7 of Hawaii’s Constitution recognizes and protects customary rights to engage in Kānaka Maoli religious and cultural practices, subject to the State’s ability to reasonably regulate these rights.³⁶ Significantly, Hawaii’s highest court has acknowledged that this

36 See e.g., Haw. Const. art. XII, § 7 (holding that the State shall protect all customary and traditional rights exercised for subsistence, cultural, and religious purposes of ahupua‘a tenants who are descendants of native Hawaiians who inhabited Hawaii before 1778); Haw. Rev. Stat. § 1-1 (noting the common law of England is the common law of Hawaii except for when it conflicts with an established Hawaiian usage); Haw. Rev. Stat. § 7-1 (“people shall not be deprived of their right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live”); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982) (affirming the right of Kānaka

constitutional provision protects the cultural and religious practice of preserving iwi kūpuna. See Kaleikini v. Theilen, 124 Hawai‘i 1, 26, 237 P.3d 1067, 1092 (2010). In that case, the court also upheld a Native practitioner’s claim that the desecration of iwi kūpuna caused cultural and religious injury.

B. Statutory Regime & Administrative Regulations

Hawai‘i Revised Statutes chapter 6E provides the overarching regime for historic preservation and the protection of iwi kūpuna at the State level. This chapter implements the State’s public policy 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.

Haw. Rev. Stat. § 6E-1.³⁷

1. State Historic Preservation Program & SHPD

In 1976, the State of Hawai‘i established its own State Historic Preservation Program, codified in Hawai‘i Revised Statutes section 6E-3, within the DLNR’s State Parks Division.

Maoli to practice traditional gathering rights on undeveloped lands within their ahupua‘a); Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) (holding that traditional and customary rights may be practiced beyond the boundary of the ahupua‘a so long as the practice was traditionally exercised in this manner); Public Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Comm’n, 79 Hawai‘i 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995) [hereinafter “PASH”] (holding that the State and its agencies are “obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible”); Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n, 94 Hawai‘i 31, 46-47, 7 P.3d 1068, 1083-84 (2000) (holding that when reviewing a petition for reclassification of district boundaries, the State must make specific findings and conclusions regarding: “(1) the identity and scope of ‘valued cultural, historical, or natural resources’ in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist”); State v. Hanapi, 89 Hawai‘i 177, 970 P.2d 485 (1998) (establishing a three factor test to prove defense of constitutionally protected conduct: (1) he or she must be a Native Hawaiian; (2) the claimed right must be constitutionally protected; and (3) the right must be practiced on undeveloped lands).

37 Iwi protection and preservation are often categorized as part of “historic preservation,” which is defined by the Hawai‘i Revised Statutes as the “research, protection, restoration, rehabilitation, and interpretation of buildings, structures, objects, districts, areas, and sites, including underwater sites and burial sites, significant to the history, architecture, archaeology, or culture of this State, its communities, or the nation.” Haw. Rev. Stat. § 6E-2.

Today, SHPD is an independent department within DLNR, which administers the State Historic Preservation Program. This program is charged with implementing the following directives:

- (1) Development of an on-going program of historical, architectural, and archaeological research and development, including surveys, excavations, scientific recording, interpretation, and publications on the State’s historic and cultural resources;
- (2) Acquisition of historic or cultural properties, real or personal, in fee or in any lesser interest, by gift, purchase, condemnation, devise, bequest, land exchange, or other means; preservation restoration, administration, or transference of the property; and the charging of reasonable admissions to that property;
- (3) *Development of a statewide survey and inventory to identify and document historic properties, aviation artifacts, and burial sites, including all those owned by the State and the counties;*
- (4) Preparation of information for the Hawai‘i register of historic places . . .
- (5) Preparation, review, and revisions of a State historic preservation plan . . .
- (6) Application for grants . . .
- (7) Provision of technical and financial assistance to the counties . . .
- (8) Coordination of activities of the counties in accordance with the State plan for historic preservation;
- (9) Stimulation of public interest in historic preservation . . .
- (10) *Coordination of the evaluation and management of burial sites as provided in section 6E-43;*
- (11) *Acquisition of burial sites in fee or in any lesser interest, by gift, purchase, condemnation, devise, bequest, land exchange, or other means, to be held in trust;*
- (12) Submittal of an annual report to the governor and legislature . . .
- (13) Regulation of archaeological activities throughout the State;
- (14) Employment of sufficient professional and technical staff . . .
- (15) The charging of fees to at least partially defray the costs . . .
- (16) Adoption of rules in accordance with chapter 91, necessary to carry out the purposes of this chapter; and
- (17) *Development and adoption, in consultation with the [OHA] native historic preservation council, of rules governing permits for access by native Hawaiians and Hawaiians to cultural, historic, and pre-contact sites and monuments.*

Haw. Rev. Stat. § 6E-3(1) to (17) (emphases added).

2. Island Burial Councils

As described above, there are five burial councils, which are administratively attached to

DLNR.³⁸ Haw. Rev. Stat. § 6E-43.5(a). The five burial councils include the Hawai‘i, Maui/Lāna‘i, Moloka‘i, O‘ahu, and Kaua‘i/Ni‘ihau burial councils and range from nine to fifteen members. Haw. Rev. Stat. § 6E-43.5(a) to (b). The burial councils’ primary responsibility is to determine whether to preserve in place or relocate iwi kūpuna discovered during archaeological surveying. Haw. Admin. R. § 13-300-24. Burial councils must also:

- Assist SHPD in the inventory and identification of Kānaka Maoli burial sites;
- Make recommendations regarding appropriate management, treatment, and protection of Kānaka Maoli burial sites, and on any other matters relating to the same;
- Elect a chairperson for a four-year term who shall serve for not more than two consecutive terms; and
- Maintain a list of appropriate Hawaiian organizations,³⁹ agencies, and offices to notify regarding the discovery of remains.

Haw. Rev. Stat. § 6E-43.5(f)(2) to (5); see also Haw. Admin. R. § 13-300-24.

Burial council members also decide whether to recognize a claimant as a lineal or cultural descendant based on SHPD’s written assessment. Haw. Admin. R. § 13-300-24(g).

The governor appoints burial council members from a list produced by DLNR, following consultation with “appropriate Hawaiian organizations” and a minimum of twenty percent of the regional representatives are derived from a list submitted by OHA. Haw. Rev. Stat. § 6E-43.5; Haw. Admin. R. § 13-300-22(d). All burial councils must also have representation from development and large property owner interests. The membership ratio of burial councils, however, must always favor regional representatives. Haw. Rev. Stat. § 6E-43.5(b). Regional representatives must be selected from the Maoli community and must demonstrate an understanding of Kānaka Maoli cultural beliefs, practices, customs, and history regarding iwi and moepū. Haw. Rev. Stat. § 6E-43.5(b). Burial council members serve without compensation, but can be reimbursed for air and ground transportation and parking. Haw. Rev. Stat. § 6E-43.5(c); Haw. Admin. R. § 13-300-22(h). Each burial council holds regular public meetings to discuss the disposition of iwi discovered during surveying and during construction at various projects. Decisions on iwi disposition are made by majority vote. Haw. Admin. R. § 13-300-26. The criteria for such decisionmaking are discussed in

38 The burial councils were created to ensure “cooperative and shared decisionmaking with representatives of the Hawaiian community.” H. R. Stand. Comm. Rep. No. 379, 15th Leg., Reg. Sess. (1990), *reprinted in* 1990 Haw. House J. 987.

39 “Appropriate Hawaiian organizations” means a group recognized by the burial council that is “comprised of a majority of Hawaiians and has a general understanding of Hawaiian culture, in particular, beliefs, customs, and practices relating to the care of ancestral Native Hawaiian skeletal remains, burial goods, and burial sites.” Haw. Admin. R. § 13-300-2.

detail later in this chapter. For more information on how to be considered for appointment as a burial council member, see Part VII(A)(5).

3. Lineal & Cultural Descendants

Following the mass excavation of over 1,100 iwi kūpuna at Honokahua, it became clear that Kānaka Maoli must be involved in decisionmaking to properly care for iwi kūpuna. The State legislature created a vehicle for this participation by establishing burial councils and granting explicit roles for lineal and cultural descendants, who must be consulted and make recommendations for the disposition of iwi kūpuna encountered during archaeological surveying or discovered inadvertently during construction.

As detailed in Part IV(A), a “lineal descendant” is a person “who has established to the satisfaction of the [burial council], direct or collateral genealogical connections to certain native Hawaiian skeletal remains.” Haw. Admin. R. § 13-300-2. A “cultural descendant” is a person recognized by the burial council “after establishing genealogical connections to Native Hawaiian ancestors who once resided or are buried or both, in the same ahupua‘a or district” in which the iwi are located or originated from. Haw. Admin. R. § 13-300-2. The varying capacities in which each type of descendant can participate in caring for iwi are discussed in detail later in this part.

4. What is a Burial Site under Hawai‘i Law?

In the context of Hawai‘i law, a burial site is “any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods if any, are interred, and its immediate surrounding archaeological context, including any associated surface or subsurface features, deemed a unique class of historic property, and not otherwise included in section 6E-41, HRS.” Haw. Admin. R. § 13-300-2.

The area surrounding a burial is sacrosanct and should be distinguished from other types of historic properties, in part due to Kānaka Maoli cultural beliefs and the State legislature’s affirmation of the common law rule that “a landowner knowingly in possession of human skeletal remains cannot own the remains but merely holds the same in trust for cultural descendants, who have right to possession for purposes of proper cultural preservation or reinterment.” H.R. Stand. Comm. Rep. No. 664, 15th Leg., Reg. Sess. (1990) *reprinted in* 1990 Haw. House J. 1087.

5. Triggering SHPD Involvement & Archaeological Inventory Surveys

AISs, when properly conducted, detect the presence of iwi and moepū at a time when appropriate measures can be taken to allow the iwi to remain in place and reduce disturbance by construction

or other activities. See Haw. Admin. R. § 13-276-3. Not every project requires an AIS. For all projects that a permitting agency determines “may” affect iwi (whether the project proponent is a government agency or a private developer/landowner), however, the proponent must allow for SHPD review. See Haw. Rev. Stat. §§ 6E-7, -8, -42. When the project proponent is the government, SHPD must provide a written concurrence *before the project can commence*. This review and comment procedure is governed by two sections of the administrative rules: 13-275 (government initiated projects) and 13-284 (other projects involving a permit, license, certificate, land use change, subdivision, or other entitlement for use). Generally speaking, this process begins with the government or developer/landowner notifying DLNR of the proposed project and SHPD responding as to whether an AIS is necessary to identify and inventory historic properties, including iwi and moepū present in the project area. See generally Haw. Admin. R. §§ 13-275-5, 13-284-5.

Permitting agencies generally consult registered burials, historical records and land grants, burials known through previous excavation or archaeological investigations, and SHPD records to make an initial determination regarding whether a proposed project may affect iwi. According to the Hawai'i Intermediate Court of Appeals, if there is no indication that iwi may exist in a proposed development area, a permitting agency is not required to consult SHPD regarding the proposed development site and a landowner need not prepare an AIS. See Hui Malama I Na Kupuna o Hawaii Nei v. Wal-Mart, 122 Hawai'i 171, 179, 223 P.3d 236, 244 (App. 2009).

In that case, Wal-Mart purchased 10.5 acres in Kaka'ako, O'ahu for its planned construction of a retail complex featuring Wal-Mart and Sam's Club. In determining whether Wal-Mart was required to obtain a written concurrence from SHPD pursuant to Hawai'i Revised Statutes section 6E-42 before issuing a grading and grubbing permit, the City Department of Planning and Permitting (DPP) reviewed old topographical maps from the 1920s, historical records, and previous development records of the site available in its computer database. These reports noted that only one burial had been discovered at the proposed development site. Hence, DPP did not seek approval from SHPD before issuing the permit to Wal-Mart based on its determination that there was no reason to believe that historic properties, including iwi kūpuna, existed on the property or would be affected by the construction.

However, during construction, extensive sand banks not revealed in the topographical maps were discovered. Previous development at the location did not excavate down to the depths of the current development. As a result of relying on outdated and faulty historical records, sixty-four sets of iwi were discovered during construction, removed from their resting places, and stored in a trailer on site for several years. In a lawsuit challenging these actions, the Hawai'i Intermediate Court of Appeals ruled that DPP's record search was legal because there was no evidence of a possible effect on iwi at the proposed site at the time DPP granted the construction permit.

An AIS is the most important tool to protect iwi kūpuna from disturbance due to construction. Hawai‘i Administrative Rules section 13-281 outlines the professional qualifications of individuals who may prepare an AIS. Typically, an archaeologist undertakes this work. The land developer or owner is responsible for hiring and compensating this professional or the archaeological consulting firm.

Hawai‘i Administrative Rules section 13-276 sets forth the State’s standards for AISs and identifies what should be included in an AIS. Hawai‘i statutes and administrative rules, however, do not provide minimum standards for acceptable *techniques or methods* to be utilized by archeologists for burial site identification. Instead, methods used need to be rationally explained and accepted by SHPD. See Haw. Admin. R. § 13-276-5(c). In practice, archaeologists work closely with SHPD staff in determining how they will conduct an AIS.

Commonly, archaeologists conducting AISs will use test pits for subsurface sites. They utilize trenches of varying dimensions to view the underlying stratigraphy (rock layers) of a site and retrieve soil samples, etc. Based on SHPD’s determination, these test pits may be dug by hand or by machine, e.g., backhoe. Test pits generally do not cover 100 percent of the site, as this would require significant ground disturbance, which may not be logistically or financially feasible. Regardless, SHPD must approve the proposed sampling strategy. The AIS must set out “in careful discussion,” the reasoning for the sampling design, any factors which limited the survey, and the techniques employed in the survey. Haw. Admin. R. § 13-276-5(c). The rules do not provide minimum standards for sampling strategies.

If an individual fails to comply with the standards and procedures for completing an AIS, SHPD may order the project proponent not to proceed with any ground disturbance. SHPD may also deny or revoke its concurrence with the project, and/or impose penalties as provided in Hawai‘i Revised Statutes section 6E-11, and other applicable laws. Haw. Admin. R. § 13-276-9.

The importance of adequate AIS standards and procedures regarding iwi protection is illustrated by the case of the Ward Villages Development in Kaka‘ako, O‘ahu. Kaleikini v. Thielen, Civil No. 07-1-0067-01 (Haw. 1st Cir. Feb. 15, 2008). SHPD required the developer, General Growth Properties, to complete an AIS. Archaeologists hired by the developer sampled only 2.3 percent of the site, justifying this sample size as the general standard for the Waikīkī/Kaka‘ako area and gaining SHPD’s approval. The AIS identified eleven sets of iwi kūpuna. The AIS noted that it was highly likely that more iwi would be discovered during construction. SHPD, however, declined to require additional archaeological analysis to locate and protect any iwi that may be unearthed. As a result, over sixty sets of iwi were discovered during construction and the project was halted

for a significant period of time.⁴⁰ Howard Hughes Corporation eventually purchased this parcel. A parking structure and TJ Maxx store were constructed and more development is planned for the area. The O‘ahu Island Burial Council has described the new landowner as “more receptive” to addressing iwi concerns because it conducted early consultation with the burial council regarding its development plans.⁴¹

In its recent ruling on a controversial project involving the Honolulu High-Capacity Transit Corridor Project (rail project) on O‘ahu, the Hawai‘i Supreme Court addressed whether Hawai‘i law permits AIS surveying in phases for a single project. See *Kaleikini v. Yoshioka*, 128 Hawai‘i 53, 283 P.3d 60 (2012). In this case, the City & County of Honolulu (City) planned to build a fixed guideway rail system spanning an estimated twenty-mile stretch from West O‘ahu to Ala Moana Center. The project was divided into four phases, with the final phase traveling through the downtown Honolulu and Kaka‘ako area. The project’s Environmental Impact Statement acknowledged that the project in its final phase would have “a high likelihood of encountering archaeological resources, including burials.” The City, after consulting with and gaining SHPD’s approval, entered into a programmatic agreement (PA) that permitted a phased approach to identifying and evaluating archaeological resources coincident with phased construction. The O‘ahu Island Burial Council (OIBC) declined to sign the PA, citing a “gross lack of consultation” with the City that impeded its ability to make an “early identification of iwi kūpuna” and thereby “facilitate a strategy of avoidance through the consideration of alternate alignments” for the project. The City took the position that adequate protection for discovered iwi would be provided because it could relocate guideway columns to avoid burial sites and, if relocation was required, City officials would consult with the OIBC for appropriate disposition of the discovered iwi. The OIBC criticized the City for employing a strategy that focused “on early commitment to a given alignment and later identification of iwi kūpuna.”

Paulette Kaleikini, a Native Hawaiian cultural descendant of iwi in the Kaka‘ako region of O‘ahu, filed suit against the City and the State regarding its approval of the rail, arguing in part that Hawai‘i historic preservation law provides sequential steps that must be completed before a project may commence, including the completion of an AIS for the *entire* project. Kaleikini relied in part on the Hawai‘i Administrative Rules, which explain that “[t]he review process is designed to identify significant historic properties in project areas *and then* to develop and execute plans to handle impacts to the significant properties in the public interest.” Haw. Admin. R. § 13-275-1(a)

40 See Gordon Pang, *Don’t move the bones, families say*, HONOLULU ADVERTISER, July 13, 2006, available at <http://the.honoluluadvertiser.com/article/2006/Jul/13/ln/FP607130348.html>; Eloise Aguilar, *More Native Hawaiian bones unearthed at site*, HONOLULU ADVERTISER, Oct. 24, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Oct/24/ln/hawaii710240417.html>.

41 See Joan Conrow, *Kakaako: Core Density*, HONOLULU WEEKLY, Feb. 13, 2013, available at <http://honoluluweekly.com/cover/2013/02/kaka%E2%80%98ako-core-density/>.

(emphasis added). The Hawai‘i Supreme Court ruled for Kaleikini on this issue and rejected the City and State’s approval of a phased AIS approach, holding that Hawai‘i law requires completion of a full AIS before SHPD can provide its written concurrence for the project. See Kaleikini v. Yoshioka, 128 Hawai‘i 53, 283 P.3d 60 (2012).

That decision also informed the outcome in the Kawaiaha‘o Church construction project and the excavation of hundreds of sets of iwi. See Hall v. Dep’t Land & Natural Res., 2012 WL 4478547 (Haw. Ct. App. Sept. 28, 2012). On September 28, 2012, the Intermediate Court of Appeals granted Dana Naone Hall, a recognized cultural descendant of iwi found on Kawaiaha‘o Church grounds, a preliminary injunction⁴² stopping further construction that may affect iwi during her appeal of underlying court rulings. A few months later on December 14, 2012, the Intermediate Court of Appeals relied on Kaleikini v. Yoshioka to rule that the church failed to do an AIS prior to starting construction of the project in violation of Hawai‘i Revised Statutes Chapter 6E. See Hall v. Dep’t Land & Natural Res., 128 Hawai‘i 455, 290 P.3d 525 (App. 2012).

6. Previously Identified & Inadvertently Discovered Iwi Kūpuna

Hawai‘i law limits the jurisdiction of DLNR and the burial councils to burial sites with iwi that appear to be more than fifty years old (being deceased more than fifty years). See Haw. Rev. Stat. § 6E-43(a). All other burials and cemeteries are the kuleana of the State Department of Health.

Hawai‘i law makes an important distinction in decisionmaking authority between iwi characterized as “previously identified” and those characterized as “inadvertently discovered.” “Previously identified” iwi and moepū are those discovered during AIS and data recording, or known through oral or written testimony.⁴³ See Haw. Admin. R. § 13-300-2. They include iwi encountered in areas documented in missionary accounts and Native testimony as well as oral testimony by Kānaka Maoli at burial council meetings, which are documented in written minutes and provide information on burial location. Generally, from the perspective of Kānaka Maoli wishing to preserve iwi, it is more favorable for iwi to be characterized as previously identified because the law provides a longer timeframe for decisionmaking and greater participation by Kānaka Maoli in that process.

42 An “injunction” is a “court order commanding or preventing an action.” A “preliminary injunction” is a “temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” BLACK’S LAW DICTIONARY 800 (8th ed. 2004).

43 “Previously identified” means “burial sites containing human skeletal remains and any burial goods *identified during archaeological inventory survey and data recording of possible burial sites, or known through oral or written testimony.*” Haw. Admin. R. § 13-300-2 (emphasis added).

An “inadvertent discovery” is an unanticipated finding of iwi and moepū “resulting from unintentional disturbance, erosion, or other ground disturbing activity.” Haw. Admin. R. § 13-300-2. In the context of ground disturbing activity, inadvertent discoveries of iwi occur only after the commencement of construction and often as a result of it. By law, an inadvertent discovery immediately halts construction in the immediate vicinity of the iwi. See Haw. Rev. Stat. § 6E-43.6(a). The discovery must be immediately reported to SHPD (or to the DNLR Division of Conservation and Resource Enforcement if the discovery occurs on Saturday, Sunday, or a holiday), the County medical examiner or coroner, and the County police department. Haw. Admin. R. § 13-300-40(b). After reporting, DLNR must:

- Assure that all activity in the immediate area of the iwi ceases and that appropriate action to protect the integrity and character of the iwi from damage is undertaken;
- Assure that a representative of the County medical examiner or coroner’s office and a qualified archaeologist determines whether the iwi are over fifty years old;
- Conduct a site inspection where necessary;
- Gather sufficient information, including oral tradition, by seeking individuals who may have knowledge about the families possibly connected lineally or culturally with the inadvertently discovered iwi, to help document the nature of the burial context and determine appropriate treatment;
- Complete departmental inadvertent discovery forms;
- Notify OHA and the burial council member who represents the geographic region where the iwi were discovered;
- Inform the landowner or its agent of the discovery if different from the person making the report; and
- Determine whether to preserve in place or relocate the iwi.

Haw. Admin. R. § 13-300-40(c); see also Haw. Rev. Stat. § 6E-43.6(b). According to SHPD, the division currently responds to approximately two to three inadvertent discoveries of iwi per week.⁴⁴ In comparison to previously identified iwi, the decisionmaking process of inadvertently discovered iwi is expedited and the role of Kānaka Maoli in the process is limited. The decisionmaking process for inadvertent discoveries will be discussed in detail later in Part V(B)(7), below.

In practice, an AIS is the principal way to ensure that iwi are “previously identified.” This enables the best chance for iwi to be preserved in place, allows maximum flexibility and foresight to mitigate additional disturbance, and affords recognized lineal and cultural descendants an opportunity for full participation in decisionmaking. The case of Kelly v. 1250 Oceanside Partners, which concerned

⁴⁴ State of Hawai‘i, Department of Land & Natural Resources, SHPD Burial Sites Program, *available at* <http://hawaii.gov/dlnr/shpd/history-culture/burial-sites-program>.

the Hokuli‘a Development in South Kona on Hawai‘i Island, illuminates how an inadequate AIS can affect whether iwi are previously identified or inadvertently discovered. See Kelly v. 1250 Oceanside Partners, Civil No. 00-1-0192K, Amended Findings of Fact; Conclusions of Law; and Order as to Count V Regarding Paragraphs 138(b), 139(a) and 139(b) and Count VI (Burial Sites) (Haw. Third Cir. Ct. Mar. 17, 2003).

In that case, a developer, 1250 Oceanside Partners (Oceanside), sought various County and State permits to develop a 1,550-acre parcel and was required by the County to conduct an AIS. Oceanside contracted with an archaeology firm to conduct the AIS, which SHPD reviewed in 1994. The AIS revealed the presence of over four hundred significant historic sites, including thirty-one burial sites in one of the planned development areas mauka of a designated Shoreline Park. During its review period from 1995 to 1996, SHPD informed Oceanside that a burial treatment plan (BTP) was needed to address the disposition of discovered iwi. The completed BTP would then be reviewed by the Hawai‘i Island Burial Council (HIBC) prior to construction approval.

Following project design and during construction and cultural monitoring, Oceanside’s consultant began to encounter numerous sites not previously inventoried in the original AIS. Thereafter, the consultant conducted regular archaeological “sweeps” to account for newly encountered sites not recorded in the AIS. In the development area mauka of the Shoreline Park alone, the consultant discovered forty additional burial sites containing at least seventy-three sets of iwi. An archaeologist employed by the consultant testified that the “sweeps” were done in a manner that was technically no different than the methodology utilized in a proper AIS. On this basis and given the apparent inadequacy of the original AIS, the Third Circuit Court ruled that the archaeological “sweeps” would be incorporated into the entire AIS process from its inception, thereby qualifying any new discoveries as previously identified iwi, rather than inadvertent discoveries.

As a result, the court ordered Oceanside to submit to the HIBC a revised BTP that included the additional burial sites discovered during the archaeological “sweeps.” The court also halted further construction and ground disturbance activities until reasonable protective measures were established to support descendants’ traditional and religious practices in caring for the iwi. The court’s firm stance in this case underscores the importance of a thorough and professionally sound AIS. Good faith efforts on the developer’s part also save time and expense in the long run.

7. Iwi Discovery & Decisionmaking Authority

Other cases highlight an ambiguity in how “burial sites” are defined. In one case, multiple remains unearthed during a construction project were considered “previously identified.” However, when subsequent remains were found in the vicinity within the same project area during construction, these later discovered iwi were deemed “inadvertent discoveries.” See Kaleikini v. Theilen, Civil No.

07-1-0067-01 (Haw. 1st Cir. Jan. 10, 2007). Should these burials as a collective be considered one burial site, or separate burial sites? And what if the full extent of these burials was not discovered until construction proceeded? Would the initial discovery made at the pre-construction phase be deemed “previously identified” burials while the latter discovery fall under the label of “inadvertent discoveries” even though they collectively comprised a single burial site? For the presiding judge in this case, the terms “burial site” and “concentration of burials” remained troublesome and required careful interpretation.⁴⁵ This distinction is especially important when considering that decisionmaking authority for the disposition of iwi differs depending on whether the iwi is deemed inadvertently discovered or previously identified. Best practices dictate a professionally sound AIS, which can resolve most of the confusion over this issue by ensuring adequate, early identification of iwi.

Typically, if iwi are identified during surveys at a proposed development site, an applicant (individual with an interest in the real property where iwi are located) may request that DLNR either preserve in place or relocate the iwi in the form of a BTP. The applicant is required to consult with DLNR in its development of a BTP, which must include:

- Evidence of a good faith search for lineal and cultural descendants;
- Names of any known lineal or cultural descendants recommended by SHPD and recognized by the burial council, and their preferences regarding iwi treatment;
- A description of the proposed treatment of all burial sites including a statement of preservation in place or relocation;
- Maps clearly indicating the location of all identified burial sites on the property, including where applicable, the spatial relationship between the burial sites and any proposed construction activities, drawn to scale;
- The name and mailing address of the applicant (usually project proponent or landowner);
- The landowner’s name and mailing address (if different from applicant);
- The property’s tax map key number;
- The name of the ahupua’a, district, and island;
- A description of the present condition of all previously identified iwi on the property;
- Any project plans requested by the burial council, including, but not limited to, construction and grading plans;
- A copy of the AIS (upon request by the burial council);
- Proof that the AIS has been accepted by SHPD (where applicable);
- Reports of any additional archaeological inventory level testing recommended by the burial council, reviewed and approved by SHPD (where applicable); and

⁴⁵ Nina Wu, *Court Hears Final Arguments in Ward Iwi Dispute*, HONOLULU STAR-BULLETIN, Oct. 26, 2007, available at <http://archives.starbulletin.com/2007/10/26/business/story02.html>.

- Any other information the burial council deems necessary to make a fully informed determination (provided that all burial council requests for additional information shall be done in a timely manner).

See Haw. Admin. R. § 13-300-33(b)(1) to (14). Evidence of a good faith search for lineal and cultural descendants includes:

- Research of relevant land conveyance documents including identification of land commission awards at or near the burial site;
- An inquiry to any person who may have knowledge of families possibly affiliated with the iwi;
- Publication of notice in a newspaper of general circulation in the County in which the iwi are located and a newspaper in statewide circulation for a minimum of three days, including Sunday and Wednesday.

Haw. Admin. R. § 13-300-33(b)(1). At a minimum, this public notice should contain: (1) a general description of the property (identifying features, tax map key, ahupua'a, district, island); (2) names of individuals or families including any land commission awardee possibly associated with the iwi or property where iwi are located; (3) the applicant's name, address, and telephone number, and a contact person in SHPD; (4) a brief statement of the proposed treatment for the iwi; and (5) a statement that interested persons shall respond within thirty days and provide information to SHPD adequately demonstrating lineal or cultural descent from the iwi or ahupua'a where the iwi are located, respectively. This notice may also be placed in OHA's publication, *Ka Wai Ola*. Haw. Admin. R. § 13-300-33(b)(1)(C).

If the applicant proposes to preserve the iwi in place, then its BTP must provide statements describing: (1) short term measures to immediately protect all burial sites, including, but not limited to, fencing, buffers, and site restoration; and (2) long term measures to properly manage and protect all burial sites including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants. See Haw. Admin. R. § 13-300-33(b)(3)(A).

If the applicant proposes to relocate iwi, then its BTP must provide statements describing: (1) the reasons that warrant relocation; (2) the methods to be utilized to conduct disinterment; (3) the location and manner by which iwi and moepū will be curated where reburial will not occur immediately following disinterment; (4) the proposed reburial site location mutually agreed upon by the landowner and any recognized lineal descendant; (5) short term measures to immediately protect the reburial site, including but not limited to fencing and buffers; and (6) long term measures to properly manage and protect the reburial site including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants. See Haw. Admin. R. § 13-300-33(b)(3)(B).

Following DLNR’s (SHPD’s) approval that the applicant’s BTP meets the statutory criteria, the burial council receives a copy and the applicant submits a written request to SHPD to place a presentation on the proposed BTP on the agenda of the upcoming burial council meeting. Prior to making a determination, the burial council may request site inspections of the property at the iwi location. Haw. Admin. R. § 13-300-33(d).

The burial council, by majority vote, decides the disposition of previously identified iwi and moepū, with preference given to the recommendation of known lineal descendants. Haw. Rev. Stat. § 6E-43.5(f)(1); Haw. Admin. R. § 13-300-35(f). The burial council has forty-five days after referral by DLNR to determine whether to preserve in place or relocate the iwi kūpuna.⁴⁶ Haw. Rev. Stat. § 6E-43(b). That timeframe may be extended only by agreement between the landowner and DLNR/SHPD. Haw. Admin. R. § 13-300-33(f).

In deciding whether to relocate previously identified iwi kūpuna or preserve them in place, burial councils must fully consider all provisions of the BTP, weigh all other written and oral evidence, assess the credibility of witnesses, carefully consider and apply preservation criteria (see below), and fully consider any other relevant factors concerning appropriate treatment. Haw. Admin. R. § 13-300-38(a)(1) to (4). Intentional removal of iwi and moepū from a previously identified burial site is prohibited until a determination to relocate is made by the burial council, unless the council authorizes temporary removal to protect the iwi from imminent harm. See Haw. Admin. R. § 13-300-33(h).

In the case of an inadvertent discovery of a single skeleton, SHPD has one working day (if the burial is discovered on O‘ahu) or two working days (if the burial is discovered on other islands) to make a determination on its disposition. Haw. Rev. Stat. § 6E-43.6(d); Haw. Admin. R. § 13-300-40(d). If the discovery involves multiple skeletons, SHPD has two working days (if the discovery is on O‘ahu) or three working days (if the discovery is on other islands) to make a determination on iwi disposition. Haw. Rev. Stat. § 6E-43.6(c); Haw. Admin. R. § 13-300-40(d). Again, the landowner may voluntarily extend this timeframe. In deciding whether to preserve in place or relocate iwi within these short timeframes, SHPD must apply the preservation criteria (see below) and need only *consult* with the “appropriate council members, the landowner, and any known lineal or cultural descendants.” Haw. Admin. R. § 13-300-40(e). Thus, the role of descendants in the decisionmaking process for inadvertently discovered burials is advisory. The expedited process for inadvertent discoveries assumes that reasonable efforts were taken to discover iwi and other historic sites *prior to* groundbreaking activities. Therefore, an AIS’s quality is crucial

46 “Referral” means the first date the burial council officially convenes *following*: (1) acceptance by SHPD of a complete or revised BTP; (2) receipt by SHPD of a written request to place the BTP on the agenda; (3) placement of the matter on the agenda; and (4) posting of a notice of burial council meeting agenda with the lieutenant governor’s office. Haw. Admin. R. § 13-300-33(f).

in determining whether iwi are the kuleana of the burial councils or SHPD under an expedited review process.

Intentional removal of inadvertently discovered iwi and moepū is prohibited until DLNR/SHPD makes a determination to relocate, unless DLNR/SHPD authorizes temporary removal to protect the iwi from imminent harm. See Haw. Admin. R. 13-300-40(k).

8. Preserve in Place or Relocate?



Photo: Elyse & Matt
Mallams

Burial mound at Wal-Mart, Ke'eaumoku Street, O'ahu

Once iwi kūpuna are identified (either before construction during an AIS, or when unearthed inadvertently during construction), SHPD or a burial council must make the important decision as to whether to preserve the iwi in place or relocate the iwi. Hawai'i Administrative Rules section 13-300 does not define "preservation in place." However, the definition of "preservation" in other related historic preservation regulations does provide limited guidance. "Preservation" is "the mitigation form in which a historic property is preserved." Haw. Admin. R. §§ 13-275-2, -277-2. When preservation in place is the proposed disposition for previously identified iwi, no osteological (scientific study of bones) or disturbing archaeological investigation is permitted, unless authorized by SHPD. Haw. Admin. R. § 13-300-31(h). Previously identified and inadvertently discovered iwi that meet any one of the following criteria shall be given *greater consideration for preservation* by the burial councils and SHPD:

- *When located in areas with a concentration of skeletal remains* (any location where multiple human skeletons are present);
- *Pre-contact* (prehistoric) *or historic period* (period after 1778) *burial sites associated with important individuals and events* as recommended by the burial council following consultation with known lineal or cultural descendants, appropriate Hawaiian organizations, knowledgeable individuals, or any other appropriate source of information;
- *When located in areas within a context of historic properties*, as defined by Hawai‘i Revised Statutes section 6E-42;
- *Where known lineal descendants request preservation in place*; or
- *Where the landowner agrees to preservation in place.*

Haw. Admin. R. § 13-300-36(a).

“Relocation” is the “careful disinterment or collection” of iwi or moepū utilizing means that are least intrusive and destructive to the items and their reburial, except where known lineal descendants decide otherwise. *See* Haw. Admin. R. § 13-300-2. If relocation is warranted, a qualified archaeologist must oversee the removal, and SHPD must prepare or concur with a mitigation plan. Haw. Rev. Stat. § 6E-43.6(c)(3). A “mitigation plan” sets forth the appropriate treatment of burial sites. Haw. Admin. R. § 13-300-2. Relocation may be accompanied by traditional ceremonies determined by lineal descendants, or if no lineal descendants are identified, the appropriate council or Hawaiian representatives (as representatives of the relevant ethnic group) may recommend appropriate traditional protocol. Haw. Rev. Stat. § 6E-43.6(f). Lineal or cultural descendants may make special reinterment requests, provided that they pay any additional expenses incurred. Haw. Rev. Stat. § 6E-46.5(f). It is the common practice of SHPD staff members to work with lineal and cultural descendants, providing them deference regarding the selection of appropriate ceremonial rites for reinterment, if necessary.⁴⁷ According to SHPD, since 1991, approximately 3,000 sets of iwi have been reinterred with the involvement of SHPD, descendants, various Kānaka Maoli organizations, and property owners.⁴⁸

When determining whether to preserve in place or relocate iwi, the burial councils and SHPD, where appropriate, “shall give due consideration” to:

- The cultural propriety of any proposal to preserve in place or relocate;
- Any possible harm to the iwi if left in place;

47 Telephone Interview with Hinano Rodrigues, Cultural Historian, State Historic Preservation Division, Maui Office (Oct. 1, 2012), *supra* note 34.

48 State of Hawai‘i, Department of Land & Natural Resources, SHPD Burial Sites Program, *available at* <http://hawaii.gov/dlnr/shpd/history-culture/burial-sites-program>, *supra* note 44.

- The request of any known lineal or cultural descendants to relocate; and
- Any reason presented by the landowner or developer to relocate.

Haw. Admin. R. § 13-300-36(b). Once a determination is made to either preserve in place or relocate iwi, whether the decision is made by SHPD or the burial council, Hawai‘i law requires that the determination be recorded in the Bureau of Conveyances⁴⁹ to “provide perpetual protection.” See Haw. Admin. R. §§ 13-300-38(g), -40(i)(3), -40(j)(3).

Following a **burial council determination to preserve iwi in place**, the burial council will then recommend whether or not SHPD should accept the BTP. After SHPD notifies the applicant of the burial council’s determination, the applicant must then develop a burial site component of the preservation plan consisting of:

- Short term measures to immediately protect all burial sites including, but not limited to, fencing, buffers, landscaping and access by known lineal or cultural descendants;
- Long term measures to properly manage and protect all burial sites including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants; and
- Any accepted recommendations relating to burial treatment.

Haw. Admin. R. §§ 13-300-38(e), -33(b)(3)(A). After consultation with any known lineal and cultural descendants,⁵⁰ the burial council, and appropriate Hawaiian organizations, SHPD must approve this plan within ninety days of the burial council’s determination. Haw. Admin. R. § 13-300-38(e).

Following a **burial council determination to relocate** iwi, the burial council will recommend whether or not SHPD should accept the BTP. The applicant must then develop a burial site component of the archaeological data recovery plan, consisting of:

- Reasons that warrant relocation;
- The methods to be utilized to conduct disinterment;
- The location and manner by which iwi and moepū will be curated where reburial will not occur immediately following disinterment;

49 The Bureau of Conveyances is Hawai‘i’s statewide recording office, responsible for “[m]aintaining an accurate, timely and permanent record system for title to real property.” The Bureau examines, records, indexes, and microfilms over 344,000 Regular System and Land Court documents and maps annually, issues Land Court Certificates of Title, and certifies copies of matters of record, among other things. State of Hawai‘i, Bureau of Conveyances, <http://dlnr.hawaii.gov/boc/>.

50 Although not required by statute or regulation, consultation typically occurs with cultural descendants in addition to lineal descendants.

- The proposed reburial site location mutually agreed upon by the landowner and any recognized lineal descendant;
- Short term measures to immediately protect the reburial site, including but not limited to fencing and buffers;
- Long term measures to properly manage and protect all burial sites including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants; and
- Any accepted recommendations relating to burial treatment.

Haw. Admin. R. §§ 13-300-38(f), -33(b)(3)(B). Following consultation with known lineal and cultural descendants, the burial council, and any appropriate Hawaiian organizations, SHPD must approve this plan within ninety days of the burial council's determination. Haw. Admin. R. § 13-300-38(f).

Following a **SHPD final determination to preserve iwi in place**, SHPD or the applicant (with SHPD concurrence) must prepare the burial site component of the preservation plan and consult with:

- Burial council members representing the geographic region in which the inadvertent discovery occurred;
- The affected landowner or landowner's representative; and
- Any known lineal or cultural descendants.

Haw. Admin. R. § 13-300-40(i)(1). At a minimum, the burial site component must consist of:

- The location of all inadvertently discovered iwi and moepū slated for preservation in place;
- Short term measures to immediately protect all burial sites including, but not limited to, fencing, buffers, landscaping and access by known lineal or cultural descendants; and
- Long term measures to properly manage and protect all burial sites including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants.

Haw. Admin. R. § 13-300-40(i)(2).

Following **SHPD final determination to relocate** iwi, SHPD or the applicant (with SHPD concurrence) must prepare the burial site component of the archaeological data recovery plan and consult with:

- Burial council members representing the geographic region in which the inadvertent discovery occurred;
- The affected landowner or landowner's representative; and

- Any known lineal or cultural descendants.

Haw. Admin. R. § 13-300-40(j)(1). At a minimum, the burial site component must consist of:

- All inadvertently discovered iwi and moepū determined to be relocated;
- The archaeological methods utilized to conduct disinterment;
- The location and manner by which the iwi and moepū will be curated where reburial will not occur immediately following disinterment;
- The reburial site location mutually agreed upon by the landowner and any recognized lineal descendant;
- The manner in which the reburial site will be prepared;
- Short term measures to immediately protect the reburial site including, but not limited to, fencing and buffers; and
- Long term measures to properly manage and protect the reburial site including, but not limited to, buffers, landscaping, and access by known lineal or cultural descendants.

Haw. Admin. R. § 13-300-40(j)(2).



Photo: Elyse & Matt Mallams

Fenced burial mound at TJ Maxx, Kaka'ako, O'ahu

If a landowner or its authorized representative knowingly fails to comply with any of the provisions of the preservation plan or archaeological data recovery plan, and directly or indirectly causes the taking, appropriation, excavation, injury, destruction, or alteration of any burial or reburial site,

the action may be considered a violation of Hawai'i's burial laws, Hawai'i Revised Statutes chapter 6E and subject to statutory and administrative penalties. Haw. Admin. R. § 13-300-40(n). More detailed information on such penalties and enforcement is provided in Parts V(B)(12)(c) and (e), respectively.

Events in Nauē, Kaua'i on a landowner's private beachfront property highlight various challenges in the operation of Hawai'i burial laws. During litigation surrounding this matter, professional archaeologist and former O'ahu Island Burial Council member Dr. Kēhaulani Cachola-Abad produced an expert report regarding the thirty iwi kūpuna located on the property.⁵¹

Dr. Cachola-Abad attested to the meaning of a "burial site" in accordance with industry archaeological standards. She explained that "[a]rchaeologists would not separate as distinct sites the individual burials within a limited area such as a typical cemetery, because each burial would be closely related both spatially and functionally to one another." Individually, they would constitute "features or components within a single site." Dr. Cachola-Abad concluded that the thirty burials located at Nauē collectively comprised a high concentration of iwi within a single burial site and that the individual remains represented functional features likely in a familial relationship to one another. She identified the site as a "native Hawaiian cemetery" and "part of a spiritual complex associated with a Leina-a-ke-akua and Leina-a-ka-'uhane, or leaping off place for the 'uhane or spirits of the kūpuna." She confirmed that it would be inappropriate to consider the thirty burials as "separate, disconnected units."

Dr. Cachola-Abad took issue with the AIS as well as the BTP. SHPD's staff archaeologist treated each individual skeleton as a separate and distinct burial when overseeing the AIS process. The State archaeologist requested that the Kaua'i Planning Commission pre-approve the landowner's design plan for the residence and then limited the AIS to within the approved house footings.⁵² Dr. Cachola-Abad expressed alarm at this procedure and criticized the testing as a "highly skewed, non representative" sampling that failed to account for "the historic properties (including burials) within the study area." Rather than using a standard "stratified layer" sampling protocol, the contract archaeologist conducted an 80 cm depth excavation test into a culturally sterile layer where "direct or indirect trace of human activity" would remain undetected, let alone evidence of additional iwi. She concluded that an "artificial restrict[ion] [to] the vertical extent of the excavations" likely "missed numerous burials below the 80 cm boundary." Dr. Cachola-Abad opined that SHPD's complicity with this testing technique controverted the entire purpose for an AIS.

51 Expert Report of Kēhaulani Cachola-Abad (2010) (on file with authors).

52 Minutes of the Kaua'i Planning Commission Regular Meeting, Dec. 11, 2007; Interview with Moses Haia, Executive Director, and Camille Kalama, Staff Attorney, Native Hawaiian Legal Corporation, in Honolulu, Haw. (Oct. 16, 2012), supra note 24.

Moreover, the BTP did not specify any horizontal buffer zones, which according to Dr. Cachola-Abad, contradicted standard protections for previously identified iwi. Several iterations of the BTP were rejected by the Kaua‘i/Ni‘ihau Island Burial Council, which insisted on preserving the burials in place. In this case, SHPD narrowly construed the definition of “preservation in place” to allow for a “vertical buffer,” a clearance area between the upraised house and the dozens of iwi below and concrete caps placed at the foundation. Dr. Cachola-Abad perceived that absent a horizontal buffer, the vertical buffer was atypical and provided inadequate protection. She noted that “the threat of irreparable physical, cultural, emotional, and spiritual harm to the iwi kūpuna and Native Hawaiians witnessing such harm is extremely high” and that “both under the footprint of the house and on the rest of the . . . property, over which a residence is being built, [the iwi kūpuna] are undergoing harm, injury, and desecration.”



Photo: Joan Conrow

Ultimately, the landowner was allowed to build his home over the iwi in the manner proposed in the BTP. The SHPD administrator subsequently overruled a unanimous vote of the burial council and approved the BTP that had been rejected over a dozen times. The burial council viewed the administrator’s unilateral and controversial decision as an act that undercut its statutory authority over the disposition of previously identified burials. The SHPD administrator explained that “financial constraints during a period of economic downturn will likely continue to affect the way sites like [this landowner’s] are handled.”⁵³

9. Appeal of Burial Council Decisions

Applicants have the option of requesting reconsideration within ten business days following written notice of a burial council’s determination. Haw. Admin. R. § 13-300-38(c). However, requests for reconsideration shall be granted only on the basis of newly discovered information not available at the time the council made its determination. Moreover, the council has the sole

53 Joan Conrow, *Cut to the Bones*, HONOLULU WEEKLY, Apr. 7-13, 2010, at A6-7.

discretion to grant or deny a reconsideration request. After consultation and approval by the council chairperson, SHPD will notify the applicant of the council’s decision regarding reconsideration. See Haw. Admin. R. § 13-300-38(c)(1) to (3).

Burial council determinations to preserve in place or relocate iwi kūpuna may be administratively appealed as a contested case.⁵⁴ Hawai‘i Administrative Rules section 13-300-52 governs requests for contested case hearings. A written petition for a contested case hearing shall be filed (mailed and postmarked) within forty-five days following receipt of written notification of the council determination (except that where a request for reconsideration of a council determination is made, the forty-five day period to file a petition commences following action by the council to either deny the request for reconsideration or reaffirm its original decision following reconsideration). Haw. Admin. R. § 13-300-52(a). A petition requesting a contested case hearing must consist of concise statements of:

- The legal authority by which appeal is requested (generally will be Hawai‘i Revised Statutes section 6E-43 and Hawai‘i Administrative Rules sections 13-300-51 and 52);
- The council determination being appealed and the date of the determination;
- The nature of the interest that may be adversely affected by the council determination;
- The relevant facts and issues raised;
- The relief being sought; and
- Any other information deemed applicable.

Haw. Admin. R. § 13-300-52(b).

DLNR’s chairperson determines whether a contested case is required. Haw. Admin. R. § 13-300-53(a). In doing so, the chairperson is not permitted to substitute his or her judgment for that of the appeals panel, especially as to the substantive merits of the claimant’s petition for contested case hearing. The chair’s assessment is limited to whether the above-mentioned procedural requirements have been met. See Kaleikini v. Thielen, 124 Hawai‘i 1, 19-20, 237 P.3d 1067, 1085-86 (2010).

Contested cases are brought before a panel of three members of the Board of Land and Natural Resources (BLNR) and the three burial council chairs. DLNR’s chairperson may participate and vote in the event of a tie. Haw. Rev. Stat. § 6E-43(c); Haw. Admin. R. § 13-300-55(c). The appeals panel must hold an administrative trial or “contested case proceeding” in accordance with section 13-300-55 of the Hawai‘i Administrative Rules and the Hawai‘i Administrative Procedures Act, Hawai‘i Revised Statutes chapter 91.

54 A “contested case hearing” is a quasi-judicial proceeding before an agency that is similar to a civil trial in court; the purpose of such hearings is to protect the legal rights of persons who will be affected by the agency’s decision. M. Casey Jarman, *Making Your Voice Count: A Citizen Guide to Contested Case Hearings* 5 (William S. Richardson School of Law, Environmental Law Program 2002).

Within ninety days after the contested case hearing, the appeals panel must render written findings of fact, conclusions of law, and a decision and order upholding or reversing a burial council determination. Haw. Admin. R. § 13-300-64(c). Parties⁵⁵ affected by the decision of the appeals panel may obtain judicial review in the courts pursuant to Hawai‘i Revised Statutes section 91-14. In those instances, the court can reverse or modify the panel’s decision so long as it “appears to be contrary to the clear preponderance of the evidence.”⁵⁶ Haw. Admin. R. § 13-300-66(a).

10. Protection of Burial Caves

Hawai‘i law defines a “cave” as any “naturally occurring void, cavity, recess, or system of interconnected passages large enough for human entry, occurring beneath the surface of the earth or within a cliff or ledge, including the cave resources therein, whether or not an entrance exists or is natural or artificial, and that is of archaeological, geological, biological, or cultural significance.” This includes lava tubes, natural pits, sinkholes, underwater caves, or other features that are an extension of the entrance.⁵⁷ Haw. Rev. Stat. § 6D-1.

Hawai‘i Revised Statutes chapter 6D provides that anyone who discovers a burial site within a cave must immediately stop what they are doing, leave the cave, and contact DLNR for follow-up pursuant to chapter 6E. Haw. Rev. Stat. § 6D-8. In addition, government records regarding the cave location or resources contained therein may be kept confidential if DLNR or the landowner believes that the release of such information would be detrimental to the protection of the cave and its resources. Haw. Rev. Stat. § 6D-10.

Hawai‘i law prohibits access, disturbance, and pollution of burial caves and their resources. See Haw. Rev. Stat. §§ 6D-7, -2, -3. Notably, these prohibitions *do not apply* to caves “inadvertently encountered within the normal course of a construction context;⁵⁸ provided that any cave protection measures imposed through the environmental review process under [Hawai‘i Revised

55 If a burial council is aggrieved by a decision of the appeals panel and seeks judicial review, DLNR must provide special counsel to represent the burial council to prevent a conflict of interest since the State Attorney General’s office represents the appeals panel in these circumstances. Haw. Admin. R. § 13-300-66(a).

56 “Preponderance of the evidence” is a legal term meaning “[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force[.]” BLACK’S LAW DICTIONARY 1220 (8th ed. 2004).

57 In Passing Act 241 in 2002, the State legislature recognized that caves and “the cultural and spiritual resources [within them], including human burials and other evidence of [N]ative Hawaiian use and their associated traditions, [we]re in need of greater protection.” 2002 Haw. Sess. Laws Act 241.

58 “Construction context” means “all permitted land-altering activities necessary to construct any and all manner of improvements on the surface of a property including but not limited to foundations, basements, roads, and buildings” and “all permitted land-altering activities necessary to construct tunnels for highways and utilities.” Haw. Rev. Stat. § 6D-1.

Statutes] chapter 343 or any land use permit conditions shall be followed.” Haw. Rev. Stat. § 6D-2(e). Administrative as well as criminal penalties may be imposed for violations of this chapter. See Haw. Rev. Stat. §§ 6D-11, -12. The law does, however, authorize BLNR to issue permits for commercial entry into a cave. Haw. Rev. Stat. § 6D-6.

11. State Title to Historic Properties, Including Burial Sites

The State holds known burial sites located on land or under water in trust for preservation or proper disposition by lineal or cultural descendants. Haw. Rev. Stat. § 6E-7(c). Further, before transferring control or management of any burial site under its jurisdiction, the State must first consult with the appropriate burial council. Haw. Rev. Stat. § 6E-7(d).

12. Other Protections for Iwi Kūpuna

a. Prohibition Against Scientific Analysis

To prevent unnecessary disturbance or destruction, State law prohibits x-ray, radio carbon dating, and mitochondrial DNA analysis on iwi without prior written approval from DLNR. Haw. Admin. R. § 13-300-32(c). Likewise, photographing iwi kūpuna is prohibited during any examination, unless the burial council grants written consent. Haw. Admin. R. § 13-300-32(c). Failure to comply with these prohibitions may result in penalties.

b. Recordation & Confidentiality of Sensitive Records

To provide perpetual protection for burial sites, the location of all previously identified and inadvertent burial discoveries preserved in place are recorded in the Bureau of Conveyances. Haw. Admin. R. §§ 13-300-38(g), -40(i)(3), -40(j)(3). Government records relating to historic sites and burial sites must be made available for public inspection at SHPD during regular business hours, except when such records are deemed sensitive. Haw. Admin. R. § 13-300-4(a). State burial regulations allow for the exemption of records relating to the location and description of iwi and moepū from public disclosure if burial councils deem them sensitive. Haw. Admin. R. § 13-300-4(a)(1)(C). This is an extension of the State’s recognition of cultural protocols prohibiting the disclosure of the location of iwi kūpuna. Any person may request that the burial council or the Hawai’i Historic Places Review Board (review board) deem a specific location or description record sensitive. Haw. Admin. R. § 13-300-4(a)(1)(A). When considering such a request, the burial council or review board may close its meeting to discuss the potential sensitivity of the record. Haw. Admin. R. § 13-300-4(a)(1)(A).

c. Penalties

It is unlawful for any person to knowingly take, appropriate, excavate, injure, destroy, or alter any burial site or its contents located on private or public lands, except as permitted by Hawai‘i Revised Statutes chapter 6E. It is also unlawful to knowingly fail to reinter iwi discovered in a reasonable period of time as determined by SHPD, or to knowingly violate the conditions of an approved mitigation plan. Haw. Rev. Stat. § 6E-11(b); Haw. Admin. R. § 13-300-43(a).

With respect to government-sponsored projects, it is a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic site or burial site during the course of land development or land alteration activities without obtaining required approvals. Haw. Rev. Stat. § 6E-11(c). It is also a civil and administrative violation for any person who inadvertently discovers iwi to fail to stop work in the immediate area and report the discovery as required by Hawai‘i law. Haw. Rev. Stat. § 6E-11(d).

As detailed earlier, during the construction of a Wal-Mart store in Ke‘eaumoku, O‘ahu, countless iwi were discovered. Contract archaeologists allegedly desecrated the bones by gluing the remains, writing on a child’s skull with indelible ink, failing to report the burial discoveries to SHPD, and disinterring the iwi without SHPD authorization. As a result, the Hawai‘i legislature passed Act 128 in 2005, which created specific civil and administrative penalties for gluing together or labeling any iwi with any type of marking pen, or conducting any tests that destroy iwi (without SHPD approval). Haw. Rev. Stat. § 6E-11(e).

A civil penalty of \$10,000 may be imposed for each separate offense. Haw. Rev. Stat. § 6E-11(f). If other loss occurs, the violator shall be fined an amount equal to the damage caused. Haw. Rev. Stat. § 6E-11(f). Each day of continued violation constitutes a distinct and separate violation for which the violator may be punished. Haw. Rev. Stat. § 6E-11(f). Equipment used for the violation or for the transportation of the violator to the historic or burial site may be seized and sold by the State without compensation to the owner. Haw. Rev. Stat. § 6E-11(f). Moreover, any person found in violation of this section with respect to iwi shall also be prohibited from participating in the construction of any State- or County-funded project for ten years. Haw. Rev. Stat. § 6E-11(g).

Violators are also subject to criminal prosecution, the penalties for which shall be imposed in addition to, and not in lieu of, any penalties imposed by Hawai‘i Revised Statutes section 6E-11. Any person who defaces, damages, pollutes, or otherwise physically mistreats a burial in a manner that one knows will outrage the sensibilities of persons likely to observe or discover the action is subject to imprisonment of not more than one year, a fine of not more than \$10,000, or both. Haw. Rev. Stat. § 711-1107 (desecration).

A person commits the criminal offense of failure to stop work upon discovery of iwi if the person discovers iwi and knowingly fails to stop work in the immediate area and report the discovery as required by Hawai'i law. Haw. Rev. Stat. § 6E-73(a). The fact that any discovery of iwi was inadvertent is not a defense. Haw. Rev. Stat. § 6E-73(b). Failure to stop work upon discovery of iwi is a misdemeanor subject to a fine not to exceed \$25,000, in addition to any other penalty authorized by Hawai'i Revised Statutes chapter 706 for a misdemeanor. Haw. Rev. Stat. § 6E-73(c). Similar to the civil penalties, each day of a continued violation shall constitute a distinct and separate criminal offense. Haw. Rev. Stat. § 6E-73(d).

A person commits the criminal offense of taking, appropriating, excavating, injuring, destroying, or altering a burial site if s/he:

- knowingly takes, appropriates, excavates, injures, destroys, or alters any burial site or the contents thereof, located on private land or land owned or controlled by the State or any of its political subdivisions, except as permitted by DNLR; or
- knowingly takes, appropriates, excavates, injures, destroys, or alters any burial site or the contents thereof during the course of land development or land alteration activities for a government sponsored project, without obtaining required approval.

Haw. Rev. Stat. § 6E-72(a). This offense is a misdemeanor subject to a fine not to exceed \$25,000, in addition to any other penalty authorized by Hawai'i Revised Statutes chapter 706 for a misdemeanor. Haw. Rev. Stat. § 6E-72(b). Each day of a continued violation constitutes a distinct and separate offense. Haw. Rev. Stat. § 6E-72(c).

d. Reproductions, Forgeries, and Illegal Sales

It is unlawful to offer for sale or exchange any exhumed iwi or moepū, or remove them from the jurisdiction of Hawai'i without a permit from DLNR. Haw. Rev. Stat. § 6E-12(b); Haw. Admin. R. § 13-300-42. The penalty for violations does not exceed \$10,000; however, each object or iwi or moepū part offered for sale or trade or removed from the jurisdiction constitutes a distinct or separate offense for which the offender may be punished. Haw. Rev. Stat. § 6E-12(d).

e. Enforcement

If BLNR determines that any person has violated or is violating Hawai'i Revised Statutes chapter 6E, or any rule adopted pursuant to the chapter, the board shall serve written notice by certified mail or personal service to the alleged violator(s) specifying the alleged violation and may include with the notice:

- An order specifying a reasonable time during which that person is required to take such measures as may be necessary to correct the violation and to give periodic progress reports;
- An order imposing civil penalties provided in Hawai‘i Revised Statutes section 6E-11.6; and
- An order that the alleged violator(s) appear before the BLNR for a hearing at a time and place specified in the notice or to be set later and answer the charges complained of.

Haw. Rev. Stat. § 6E-10.5(a). If BLNR determines that any person is **continuing to violate** Hawai‘i Revised Statutes chapter 6E or any administrative rules (after having received a notice of violation), it must serve written notice by certified mail or personal service upon the alleged violator(s) specifying the alleged violation. With the notice, the board:

- Shall order the alleged violator(s) to submit a written schedule within thirty days specifying the measures to be taken and the time within which the measures shall be taken to bring that person into compliance. The BLNR shall accept or modify the submitted schedule within sixty days of receipt of the schedule. Any schedule not acted upon after sixty days of receipt by the board shall be deemed accepted by the board;
- Shall order the alleged violator(s) to cease and desist from the activities that violate chapter 6E or relevant administrative rules, if that person does not submit a written schedule to the board within thirty days. The cease and desist order shall remain in effect until the board accepts the written schedule;
- May impose penalties as provided in Hawai‘i Revised Statutes section 6E-11.6; and
- May order the alleged violator(s) to appear before the board for a hearing to answer the charges issued, at a time and place specified in the notice or otherwise set by the board.

Haw. Rev. Stat. § 6E-10.5(b).

If BLNR determines that any person has **violated an accepted schedule or an order issued by BLNR**, the board is required to impose penalties by sending a notice in writing, either by certified mail or by personal service to that person, describing such non-adherence or violation. Haw. Rev. Stat. § 6E-10.5(c).

These BLNR enforcement orders are final unless the violator(s) request(s) a hearing before the board within twenty days after being served with a notice of violation. Haw. Rev. Stat. § 6E-10.5(d). Any penalty imposed by BLNR in this manner shall become due and payable twenty days after notice of penalty is served, unless a hearing is requested. Haw. Rev. Stat. § 6E-10.5(d). If the amount of any penalty is not paid to DLNR within thirty days after it becomes due and payable, the BLNR may institute a judicial proceeding in the name of the State to collect the administrative penalty. Haw. Rev. Stat. § 6E-10.5(f).

f. Injunctive Relief

The State Attorney General has the power to bring an action for restraining orders and injunctive relief to stop violations or threatened violations of Hawai'i Revised Statutes chapter 6E. Haw. Rev. Stat. § 6E-13(a). In addition, any person may maintain an action for restraining orders or injunctive relief against the State, its political subdivisions, or any individual, to protect a burial site from unauthorized disturbance. Haw. Rev. Stat. § 6E-13(b).

The injunction granted to Dana Naone Hall with respect to construction at Kawaiha'ō Church demonstrates how this statute may be utilized. As mentioned earlier, Hall was successful in obtaining a ruling from the Hawai'i Intermediate Court of Appeals that ordered the church to stop disinterring iwi from church grounds and halt all construction activities related to its project that could result in further disinterment of iwi pending a decision on the merits of her underlying appeal. See Hall v. Dep't Land and Natural Res., 2012 WL 4478547 (Haw. Ct. App. Sept. 28, 2012).

Additional information on how to protect iwi kūpuna is included in Part VII.

VI. FEDERAL FRAMEWORK

*NAGPRA [is] a double-edged sword.
It has been healing and contentious, helpful and conflicting.⁵⁹*

At around the same time Kānaka Maoli successfully banded together to advocate for the protection of unmarked iwi kūpuna throughout Hawai‘i following Honokahua, federal legislators passed the Native American Graves Protection and Repatriation Act (NAGPRA or the Act), 25 U.S.C. section 3001 et. seq., which, along with its corresponding regulations, 43 C.F.R. part 10, provides a range of federal law protections for iwi kūpuna, moepū, and other cultural items.



Photo: Kai Markell

A. Overview of NAGPRA

1. NAGPRA's Historic Passage: Remedying Past Wrongs & Honoring Trust Obligations to Native Peoples

Much like the impetus for substantial revisions to Hawai‘i Revised Statutes chapter 6E, Congress passed NAGPRA in direct response to Native Peoples’ longstanding protests against the desecration of human remains and cultural items. In 1987, the U.S. Senate Select Committee on Indian Affairs

⁵⁹ Kunani Nihipali, *supra* note 6, at 37.

convened a hearing to discuss the protection of Native American burials and the repatriation of remains taken from their original resting places. During these hearings, the Smithsonian Institute testified before Congress about its possession of 18,584 sets of remains collected from Eskimo, Aleut, Koniag, and North American Indian tribes.⁶⁰ The responding outcry from the Native community prompted the passage of the National Museum of the American Indian Act in 1989 (National Museum Act), which created a process for the inventory, treatment, repatriation, and disposition of these remains as well as funerary objects.⁶¹ The National Museum Act’s provisions were eventually extended to all museums, Federal agencies, and institutions receiving Federal funds through the passage of NAGPRA. NAGPRA also applies to discoveries of NAGPRA-protected objects (defined below), such as iwi and moepū, on Federal and tribal lands.

Significantly, the Act applies not only to Indigenous iwi and moepū, but also to other items important to the cultural identity and wellbeing of a people (objects of cultural patrimony), and items vital to the perpetuation of traditional, religious ceremonies (sacred objects). NAGPRA enables claimants, which include lineal descendants, Indian tribes, and Native Hawaiian organizations (defined below) with a cultural connection to the objects, to seek the return of these items.

During the process that led to NAGPRA’s enactment, a panel of Native American tribal and religious leaders, museum representatives, and university professors with expertise in archaeology and anthropology gathered to make recommendations. A majority of this panel strongly believed that “[r]espect for Native human rights is the paramount principle” to guide the resolution of claims.⁶² To this end, the Act seeks to “prevent many of the past instances of cultural insensitivity to Native American peoples” that occurred when museums acquired human remains, funerary objects, and other culturally important items without consultation or consent and refused to return those items when asked.⁶³ In other words, NAGPRA respects the “civil rights of America’s first citizens[,]”⁶⁴ acknowledges and restores dignity to ancestral remains and items crucial to sustaining Native Peoples’ culture, and attempts to remedy past wrongs and honor the United States’ trust obligations to Native Americans and Kānaka Maoli.⁶⁵

60 S. REP. NO. 101-473, *supra* note 22, at 1 (1990).

61 S. REP. NO. 101-473, *supra* note 22, at 2 (1990).

62 H.R. REP. NO. 101-5237, at 10 (1990).

63 S. REP. NO. 101-473, *supra* note 22, at 3 (1990).

64 136 CONG. REC. S17, 174 (daily ed. Oct. 26, 1990) (statement of Senator Daniel K. Inouye).

65 Jack F. Trope & Walter R. Echo-Hawk, *supra* note 16, at 140. Additionally, NAGPRA strikes a balance by allowing scientific research to learn about Native American genetics, diet, and disease only when it would significantly benefit the United States, and guarantees repatriation at the end of the study. 43 C.F.R. § 10.10(c)(1); *see also* S. REP. NO. 101-473, *supra* note 22, at 3 (1990).

2. NAGPRA’s Main Features

Generally speaking, NAGPRA’s provisions address: (1) the ownership and control of culturally significant items (including iwi kūpuna and moepū) encountered on Federal or tribal lands; and (2) the repatriation of such items housed in museums to Indigenous peoples.

a. Items Protected by NAGPRA

NAGPRA is a legal vehicle for the return of specific items, including human remains (iwi), funerary objects (moepū), sacred objects, and objects of cultural patrimony, to the Indigenous Peoples of the Continental United States, Alaska, and Hawai‘i.⁶⁶ 43 C.F.R. § 10.1(b)(2). NAGPRA’s regulations provide a specialized definition for each of these items, which are explained below.

1) Funerary Objects

“Funerary objects,” known to Kānaka Maoli as moepū, are objects “reasonably believed to have been placed intentionally” with the deceased as part of a culture’s “death rite or ceremony[.]” 43 C.F.R. § 10.2(d)(2). Under NAGPRA, funerary objects are distinguished as “associated” or “unassociated.” Associated funerary objects are linked directly to an identified set of iwi, which are located together in a museum or in the possession of a Federal agency. 43 C.F.R. § 10.2(d)(2)(i). “Unassociated” funerary objects are not accompanied by iwi but are likely funerary in nature based on available records and information provided by Indigenous peoples. 43 C.F.R. § 10.2(d)(2)(ii).

2) Sacred Objects

“Sacred objects” are used for religious and ceremonial activities, or are important for the renewal of these practices by traditional religious leaders of Indian tribes as well as Kānaka Maoli. See 43



Photo: Kai Markell

66 Detailed information for tribes, museums, agencies, and members of the public about NAGPRA, including frequently asked questions, laws, and regulations, trainings, updates, reports, and notices can be found online at the National Park Service’s National NAGPRA website at <http://www.nps.gov/nagpra/>.

C.F.R. § 10.2(d)(3).⁶⁷

3) Objects of Cultural Patrimony

“Objects of cultural patrimony” maintain “ongoing historical, traditional, or cultural” value and cannot be appropriated by a single individual as “property” *per se*, but belong to a culture and its people as a whole. 43 C.F.R. § 10.2(d)(4). Objects of cultural patrimony are of “such great importance to an Indian tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member.”⁶⁸ Not all objects are considered those of cultural patrimony; for instance, items manufactured by Native artisans and crafters for sale or trade are not objects of cultural patrimony.⁶⁹ Rather, sacred objects and objects of cultural patrimony are critical to the perpetuation of Indigenous cultures and religions.

The words of Pualani Kanaka‘ole Kanahale, founder of Hui Mālama and an expert practitioner of hula and Kānaka Maoli religion, provide invaluable insight beyond these sterile legal terms. In response to Rhode Island museum officials’ vehement opposition to repatriation of the Ki‘i La‘au⁷⁰ to Hawai‘i, Kanahale explained:

[T]he relationship between the kaula ali‘i [(warrior chief)] and the ki‘i la‘au was one of interdependency and responsibility rather than of ownership. The kaula ali‘i would tend to the ‘aumakua within the ki‘i la‘au; in return, the ‘aumakua would bestow benefits on not only the kaula ali‘i, but all of his people as well. . . . [It] is harmful to us and our culture [to be] reduced to buying and selling an ancestor Native Hawaiians, past and present, must always have a place to go to, to have a sense of being needed, of being useful That is what the ki‘i la‘au represents. Because if we lose these connections and fail to do all within our power to bring them home, then they are truly dead, and we have lost something that can never be regained.⁷¹

67 In early Congressional deliberations regarding the definition of “sacred objects,” the scientific community and museum representatives raised concerns that all native objects could potentially be identified as “sacred.” The Senate Select Committee on Indian Affairs analyzed this issue from the vantage point of the respective Native American tribe or Kānaka Maoli group as being “in the best position to have full access to information regarding whether an object is sacred” to their particular culture. The same rationale was offered for all cultural items protected under NAGPRA. *See* S. REP. NO. 101-473, *supra* note 22, at 4 (1990).

68 S. REP. NO. 101-473, *supra* note 22, at 5 (1990).

69 S. REP. NO. 101-473, *supra* note 22, at 5 (1990).

70 A ki‘i la‘au is a sacred carving imbued with an ‘aumakua (family or personal god, deified ancestor) spirit that protected a kaula ali‘i (warrior chief).

71 Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian “Cultural Property” Repatriation*, 20 U. HAW. L. REV. 261, 295 (1998) (internal footnotes and quotations omitted). The Rhode Island museum officials principally argued that NAGPRA did not apply because the Ki‘i La‘au was merely a

NAGPRA defers determination of what items are sacred and what care is appropriate for these protected objects to Indigenous Peoples. For ease of reading, throughout this part of the primer, Indigenous human remains, funerary objects, objects of cultural patrimony, and sacred objects will be referred to collectively, where appropriate, as “protected objects.”

b. The Role of Claimants under NAGPRA

Simply put, NAGPRA requires that: (1) Federal agencies engage in certain procedures upon the discovery of protected objects on their lands; and (2) museums holding NAGPRA-protected objects prepare documentation and follow NAGPRA procedures for repatriation. Principally by way of meaningful consultation, museums and Federal agencies determine what to do with the protected objects they currently hold or recently encountered on their lands. To this end, NAGPRA entitles claimants to consult regarding decisionmaking on protected objects and allows them to make claims for the repatriation of these items. Like the classifications of protected objects, each type of claimant recognized by NAGPRA has its own definition.

1) Lineal Descendants

A “lineal descendant” is a person who can trace his or her ancestry to a specific individual whose remains and/or cultural items are being claimed. Lineal descent is proved through the “traditional kinship system” of that person’s culture or by more modern and conventional ways for determining genealogy. 43 C.F.R § 10.2(b). NAGPRA recognizes a number of sources to establish lineal descent, including “[g]eographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.” 43 C.F.R. § 10.14(e). Additionally, NAGPRA acknowledges that Indigenous knowledge systems have their own validity and accepts such evidence.

2) Indian Tribes

An “Indian tribe” is “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village” that is recognized by the United States. 25 U.S.C. § 3001(7).

3) Native Hawaiian Organizations

Because Native Hawaiians comprise one group of people and are not separated into tribes, NAGPRA recognizes “Native Hawaiian organizations” (NHOs) as having standing to make

“utilitarian object,” and therefore not subject to NAGPRA’s repatriation provisions.

claims under its provisions. NHOs are groups of Native Hawaiians⁷² that possess “expertise in Native Hawaiian affairs” and were established to “serve and represent[] the interests of Native Hawaiians.” 43 C.F.R. § 10.2(b)(3)(i). NAGPRA specifically recognizes Hui Mālama and OHA as NHOs.⁷³ 43 C.F.R. § 10(b)(3)(ii). In the past, OHA and Hui Mālama have worked together to facilitate the return of NAGPRA-protected objects. According to the U.S. Department of the Interior, the burial councils and various ‘ohana may also comprise an NHO.⁷⁴

4) Cultural Affiliation & Priority of Ownership

The strength of an NHO’s or Indian tribe’s claim is measured by its “cultural affiliation” to certain protected objects. Cultural affiliation is a “shared group identity” that is “reasonably traced historically or prehistorically between a present-day Indian tribe or [NHO] and an identifiable earlier group.” 43 C.F.R. § 10.14(c). Cultural affiliation can be demonstrated using the same types of information used to determine lineal descent, such as oral history, geographical information, and archaeology. 43 C.F.R. § 10.14(e).

NAGPRA delineates a priority list of ownership or control based on which claimant possesses the strongest claim and connection to the protected objects. These priority of custody lists are described in further detail in Part VI(B)(4).

B. Handling Intentionally Excavated & Inadvertent Discoveries of Protected Objects on Federal Lands

NAGPRA’s provisions apply to activities on Federal or tribal lands that lead to or may lead to inadvertent discoveries or intentional excavations of protected objects. Federal lands are those lands either owned or managed by the United States government, 43 C.F.R. § 10.2(f)(1), such as Hawai‘i’s national parks and military bases. Tribal lands include Indian reservations, dependent Indian communities, and Hawaiian Home Lands. 43 C.F.R. § 10.2(f)(2); 25 U.S.C. § 3001(15).

72 Under NAGPRA, a Native Hawaiian is defined as “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai[‘i].” 43 C.F.R. § 10.2(b)(3)(ii).

73 As detailed previously in Part IV(B)(1), Hui Mālama was formed in response to the mass desecration of over 1,000 graves at Honokahua. Hui Mālama’s members are trained in traditional protocols on the care of iwi kūpuna. OHA is a State agency that seeks to improve the lives and future of all Kānaka Maoli. This kuleana includes the protection of iwi kūpuna. OHA also houses the Native Hawaiian Historic Preservation Council, which advises OHA on historic preservation and stewardship issues.

74 See *National NAGPRA Frequently Asked Questions*, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, <http://www.nps.gov/nagpra/FAQ/INDEX.HTM>. Recognition of burial councils as potential NHOs is likely due to Hawai‘i’s well-established State burials protection framework (discussed in Part V) and the need to harmonize both the Federal and State processes where feasible.

“Inadvertent discoveries” are unanticipated encounters of protected objects while “intentional excavations” involve the planned archaeological removal of such items. The procedures mandated by NAGPRA in each context are provided in detail below. Regardless of the context, however, NAGPRA requires consultation with claimants to determine an object’s ownership and disposition.

1. Procedures for Inadvertent Discoveries

Inadvertent discoveries of NAGPRA-protected objects may occur in the course of agricultural, land clearing, and construction activities. In the context of lands held by the Department of Hawaiian Home Lands (DHHL), inadvertently discovered iwi have been encountered in the following instances:

- Where existing homestead lessees dig up their back yards;
- Where iwi are exposed by erosion on vacant DHHL lands;
- During DHHL housing development activities;
- During grading, grubbing, and farming activities on DHHL agricultural and pastoral lands; and
- During land utilization activities of commercial entities with general leases, licenses, and revocable permits on DHHL lands.⁷⁵

Upon such a discovery, all work must stop immediately and reasonable efforts must be taken to protect those objects, including iwi, from further harm and disturbance. 43 C.F.R. § 10.4(c). Moreover, the person making the discovery (informant) must notify DHHL, if the discovery is made on DHHL lands, or the responsible Federal or tribal official by phone and in writing. Within three days of this notice, the responsible official (or DHHL official in the case of discoveries made on DHHL lands) must:

- Send a written confirmation to the informant that s/he has received notice of the inadvertent discovery;
- Undertake further necessary protective measures including covering, securing, and stabilizing the protected items;
- Notify by telephone, with written confirmation, the tribes or NHOs likely to be culturally affiliated with the inadvertently discovered protected objects, the tribes or NHOs which aboriginally occupied the area, and any other tribe or NHO that is reasonably known to have a cultural relationship to the protected objects;
- Initiate consultation on the inadvertent discovery pursuant to 43 C.F.R. section 10.5;
- Follow the requirements and procedures of 43 C.F.R. section 10.3(b) if the protected objects must be excavated or removed; and

⁷⁵ Interview with Kamana‘o Mills, Special Assistant, Office of the Chairman, DHHL, in Honolulu, Haw. (Jan. 7, 2013).

- Ensure disposition of all inadvertently discovered protected objects is carried out pursuant to 43 C.F.R. section 10.6.

43 C.F.R. § 10.4(d).

Generally speaking, through consultation with potential claimants, the agency discusses and develops a written, binding agreement with known lineal descendants, culturally affiliated Indian tribes, or NHOs to either: (1) keep the protected objects *in situ* (preserved in place), or (2) excavate and remove the objects under a recovery plan. 43 C.F.R. § 10.4(d)(2). Often times, in the case of DHHL involvement, DHHL will seek the expertise of SHPD and the relevant burial councils as a best practice.⁷⁶ Activity may resume thirty days after the agency or tribal official certifies receipt of notice regarding the inadvertent find, or may start sooner if a written agreement or recovery plan is already in place. 43 C.F.R. § 10.4(d)(2).

2. Procedures for Intentional Excavations

NAGPRA also provides procedures for intentional excavations of protected objects.⁷⁷ As a policy, DHHL prohibits the intentional excavation of iwi kūpuna.⁷⁸ In other contexts not involving DHHL, however, Federal agencies must take reasonable steps to determine whether a planned activity may result in the excavation of protected objects and must engage in consultation with the appropriate Indian tribe or NHO prior to such excavation.⁷⁹ To this end, prior to issuing any permits, the agency must first notify in writing known lineal descendants and potentially culturally affiliated Indian tribes or NHOs of the planned activity and must initiate consultation if it appears that protected objects are threatened.⁸⁰ 25 U.S.C. § 3002(c)(2).

This notice mechanism ensures that as many lineal descendants and culturally affiliated Indian tribes or NHOs are informed and able to participate in consultation prior to the excavation. In

76 Interview with Kamana‘o Mills, Special Assistant, Office of the Chairman, DHHL, in Honolulu, Haw. (Jan. 7, 2013), supra note 75.

77 Intentional excavations are conducted pursuant to a valid archaeological research permit, which is covered by the Archaeological Resources Protection Act (ARPA), the details for which are beyond the scope of this primer. See 25 U.S.C. §§ 3002(c), (d)(1). The full text of ARPA is provided in this primer’s companion CD in Appendix B.

78 Interview with Kamana‘o Mills, Special Assistant, Office of the Chairman, DHHL, in Honolulu, Haw. (Jan. 7, 2013), supra note 75.

79 Furthermore, excavation of items must be in accordance with ARPA standards, which includes removal utilizing scientific methods and techniques, recording, and analysis of cultural items, with a descriptive and interpretive report of the excavation.

80 This initial notice must contain a description and general location of the planned activity; the basis for determining that protected objects may be excavated; and the basis for determining the ownership of the protected objects likely to be excavated. 43 C.F.R. § 10.3(c)(1).

fact, prior to issuance of a permit to conduct excavation work, proof of consultation with the appropriate Indian tribes or NHOs must be shown to the Federal agency (or DHHL) that issues the permit. 25 U.S.C. § 3002(c)(4).

3. Consultation on Written Plan of Action

Following its initial notice, the appropriate Federal agency must also provide written notice of proposed times and places for meetings or consultation to consider, among other things, the proposed transfer of control of the objects. The parties entitled to this notice include any known lineal descendants, Indian tribes, and NHOs likely to be culturally affiliated with the objects, or have a demonstrated cultural relationship to the objects. During this time, a general exchange of information occurs between the Federal agency and the potential claimants. See 43 C.F.R. § 10.5(c). The goal of this process is to identify the appropriate claimant entitled to ownership and control of the protected objects.

Following this consultation process, the Federal agency must prepare, approve, and sign a “written plan of action,” and provide a copy of the same to consulting parties. 43 C.F.R. § 10.5(e). A written plan of action must include:

- Types of objects considered to be cultural items;
- Kinds of analysis planned for each object;
- Planned treatment, care, and handling of protected objects;
- Steps to be followed to contact Indian tribe officials at the time of excavation or inadvertent discovery;
- Kinds of traditional treatment, if any, to be afforded the protected objects by members of the Indian tribe or NHO;
- Nature of the reports to be prepared;
- Specific information used to determine the ownership and control of the protected objects; and
- Planned transfer of control of protected objects.

43 C.F.R. § 10.5(e). A written plan of action is typically connected to a specific activity on federally managed land. For example, if the U.S. Military were to plan the installation of a water line at Mōkapu and there was a possibility of encountering iwi, the military would enter into consultation with NHOs and descendants to create a written plan of action. This plan of action would be applicable only to the water line project, not any other activity.⁸¹

⁸¹ Interview with Keola Lindsey, Lead Compliance Specialist, Office of Hawaiian Affairs, in Honolulu, Haw. (Jan. 28, 2013).

Proactive Federal agencies and land managers initiate this consultation early to prepare a “comprehensive agreement” in anticipation of likely encounters of protected objects. 43 C.F.R. § 10.5(f). A comprehensive agreement addresses land management activities overall on Federal lands and should address:

- All federal agency land management activities that could result in the intentional excavation or inadvertent discovery of protected objects;
- A standard consultation process;
- Ownership and control determinations; and
- Treatment and transfer of control.

43 C.F.R. § 10.5(e).

OHA’s coordination with the U.S. Military to develop a comprehensive agreement for the Pacific Missile Range Facility (PMRF) on Kaua‘i provides one such example. In that case, OHA worked with cultural descendants⁸² to draft provisions for a comprehensive agreement with PMRF for circumstances where iwi kūpuna are discovered inadvertently during PMRF activities.⁸³

Often times, compliance with NAGPRA’s consultation requirements overlaps with mandates of other Federal laws, such as the National Historic Preservation Act (NHPA). NHPA generally requires agencies to consider the effect of any kind of Federally funded or initiated project (or one that requires a Federal permit or license) on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Sites. 16 U.S.C. § 470f. NHPA mandates agency consultation with the same parties identified by NAGPRA – including, but not limited to Indian tribes and NHOs. To this end, NAGPRA and NHPA both encourage Federal agencies to coordinate their overlapping consultation requirements. 43 C.F.R. § 10.4(f) (NAGPRA); 36 C.F.R. § 800.3(b) (NHPA).

82 Cultural descendants are recognized under State burial laws as individuals having established genealogical connections to Kānaka Maoli ancestors who once resided or are buried in the same ahupua‘a or district in which certain iwi kūpuna are located or originated from. *See* Haw. Admin. R. § 13-300-2. While this is a State designation and cultural descendants are not officially recognized under NAGPRA, the Secretary of Interior has allowed as a practice the inclusion of Hawai‘i State burial councils and extended ‘ohana to be included in the definition of an NHO. *See National NAGPRA Frequently Asked Questions*, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, <http://www.nps.gov/nagpra/FAQ/INDEX.HTM>.

83 Interview with Keola Lindsey, Lead Compliance Specialist, Everett Ohta, Compliance Specialist, Jerome Yasuhara, Compliance Specialist, and Kamaile Maldonado, Public Policy Advocate, Office of Hawaiian Affairs, in Honolulu, Haw. (Oct. 9, 2012), *supra* note 25.

4. Custody

NAGPRA requires that the appropriate Federal agency ensure that “disposition of the objects is consistent with their custody[.]” 43 C.F.R. § 10.3(b)(3). NAGPRA defines “custody” as “ownership or control” of NAGPRA-protected objects. 43 C.F.R. § 10.6(a). The procedure for determining who should have permanent custody is addressed by the provisions of 43 C.F.R. section 10.6. That regulation focuses on restoring possession to individuals, NHOs, or tribes that can demonstrate having the closest relationship through a hierarchy.

With respect to iwi and associated moepū, first priority is given to known lineal descendants. 43 C.F.R. § 10.6(a)(1). In cases where there are no known lineal descendants and no lineal descendant has come forward or where unassociated moepū, sacred objects, and objects of cultural patrimony are involved, the priority for custody is afforded first to the Indian tribe or NHO whose ancestral lands the protected objects originate from, then to the closest culturally affiliated Indian tribe or NHO. 43 C.F.R. § 10.6(a)(2)(i), (iii).

If no claimants come forward, or, if custody remains unresolved, the agency retains the protected objects to ensure their safety. If multiple claimants come forward, and the agency is unable to make a definitive determination as to who is entitled to custody, then transfer of custody cannot take place until the issue is resolved. 43 C.F.R. § 10.6(c). This is a significant drawback of NAGPRA



Photo: Kai Markell

because competing custodial claims halt the repatriation process altogether and agencies may elect to retain protected objects indefinitely until the matter is resolved administratively or through the judicial system.⁸⁴ 43 C.F.R § 10.10(c)(2).

For example, at Mōkapu, O'ahu, the location of the Kaneohe Marine Corps Air Station, thousands of iwi kūpuna have been unearthed over many years. Bishop Museum holds the first portion of these iwi, while the remainder is held by the U.S. Military. Because multiple claimants have been unable to reach consensus on the disposition of these iwi, reinterment and repatriation efforts have stalled for decades. Additionally, turnover in leadership at the military base and a lack of institutional memory further delays resolution of this important matter.⁸⁵

5. Disposition

Disposition is the transfer of control over the protected objects to the appropriate claimant.⁸⁶ Before transferring control, the Federal agency must publish several notices about the proposed transfer of the objects in a newspaper of general circulation in the area where the items have been discovered or excavated. Following two notices published a week apart and a thirty-day waiting period from the time of the second publication, transfer may occur. 43 C.F.R. § 10.6(c). This notice process is specifically designed to allow ample time for additional claimants to come forward. As mentioned earlier, however, if additional claimants come forward and the Federal agency is unable to clearly determine the appropriate claimant entitled to control of the objects, then no transfer may occur until a proper recipient is determined. 43 C.F.R. § 10.6(c).

In the context of NAGPRA disposition, OHA often works alongside cultural descendants and other NHOs to facilitate and support processes that lead to appropriate treatment and disposition of NAGPRA-protected objects. For example, OHA worked with the U.S. Military at Schofield Barracks on O'ahu at the site of a Stryker Brigade training area where iwi were inadvertently discovered. OHA, cultural descendants, and eight other NHOs entered into consultation with the U.S. Military. During that time, OHA provided support and guided the families and the military

84 This dilemma also applies to competing claims for items held in museums and other repositories, which is described further in Part VI(C).

85 Interview with Keola Lindsey, Lead Compliance Specialist, Everett Ohta, Compliance Specialist, Jerome Yasuhara, Compliance Specialist, and Kamaile Maldonado, Public Policy Advocate, Office of Hawaiian Affairs, in Honolulu, Haw. (Oct. 9, 2012), *supra* note 25.

86 In the context of NAGPRA, “control” means having a “legal interest” in human remains and cultural items. 43 C.F.R. § 10.2(a)(3)(ii). Thus, disposition conveys not only physical custody to the claimant, but also a legal interest or “right of possession.” Final disposition is determined in accordance with the respective customs and traditional practices of the claimant. *See* 43 C.F.R. § 10.2(g)(5).

in adopting a plan of action reflecting their consensus to preserve the iwi kūpuna in place.⁸⁷

C. Handling NAGPRA-Protected Objects in Museums and Federal Collections

In addition to NAGPRA’s procedures for protected objects encountered on Federal or tribal lands, the statute also sets forth comprehensive requirements for museums and other repositories housing iwi and other protected cultural items.

Generally speaking, NAGPRA requires museums to: (1) provide a “summary” or list describing their unassociated moepū, sacred objects, and/or objects of cultural patrimony; and (2) to make a good faith effort to provide an item-by-item “inventory” or description of iwi and associated moepū in their possession. The purpose of these documents is to allow claimants to come forward to request repatriation of these items. Again, consultation is crucial in this process. The details of these obligations are provided below.

1. Museums & Other Repositories

Under NAGPRA, “museum” is defined broadly as “any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.” 43 C.F.R. § 10.2(a)(3). Thus, private museums and collections not receiving Federal funds are exempt. In some cases, the gifting of a private collection to an institution receiving Federal funds, such as a publicly funded university, triggers these provisions. Hawai‘i’s State Museum of Natural and Cultural History at the Bishop Museum holds the largest collection of heritage resources. In some cases, SHPD also meets the definition of a museum or non-Federal institution because it receives Federal funds via the National Park Service’s Historic Preservation Grant and SHPD is a repository for NAGPRA-protected objects when it addresses relocation and reinterment decisions for inadvertent discoveries of iwi kūpuna and moepū.⁸⁸

NAGPRA requires museums to record protected items within their collections in two different ways. First, museums must draft a **“summary” of unassociated funerary objects, sacred objects,**

87 Interview with Keola Lindsey, Lead Compliance Specialist, Everett Ohta, Compliance Specialist, Jerome Yasuhara, Compliance Specialist, and Kamaile Maldonado, Public Policy Advocate, Office of Hawaiian Affairs, in Honolulu, Haw. (Oct. 9, 2012), *supra* note 25.

88 For example, when iwi kūpuna are exposed along eroded shorelines and removed to prevent further disturbance, the iwi are temporarily stored at SHPD while a determination is made on where to safely relocate them. Telephone Interview with Hinano Rodrigues, Cultural Historian, State Historic Preservation Division, Maui Office (Oct. 1, 2012), *supra* note 34.

and/or objects of cultural patrimony.⁸⁹ 43 C.F.R. § 10.8(a). Second, museums must create an “inventory” of Native human remains and associated funerary objects. 43 C.F.R. § 10.9(a).

2. Summaries & Consultation Regarding Unassociated Funerary Objects, Sacred Objects and/or Objects of Cultural Patrimony

As mentioned above, “summaries” pertain to unassociated funerary objects, sacred objects, and/or objects of cultural patrimony. 43 C.F.R. § 10.8(a). Summaries provide information about the collections to potential claimants who may wish to request repatriation. 43 C.F.R. § 10.8(a). Summaries must contain:

- An approximate number of objects in a collection;
- A description of the kinds of unassociated funerary objects, sacred objects, and objects of cultural patrimony in possession;
- Notations on known dates, locations, and means by which the items were acquired; and
- Other available information that could assist in identifying lineal descendants or determining cultural affiliation.

43 C.F.R. § 10.8(b). While preparing a summary, NAGPRA requires museums and Federal agencies to initiate consultation by letter, and encourages follow-up by telephone or face-to-face dialogue with claimants or potential claimants. 43 C.F.R. § 10.8(d)(2). During this process, the museum or Federal agency must provide copies of the summary to lineal descendants, where known, and to officials and leaders representing Indian tribes or NHOs that are, or are likely to be, culturally affiliated with the objects. 43 C.F.R. § 10.8(d)(3). This process generally allows an exchange of information between potential claimants and the museum. Upon request, museums and Federal agencies must provide lineal descendants, Indian tribe officials, and NHO leaders with access to additional records, catalogues, relevant studies and other data related to geographic origin, cultural affiliation, and basic facts surrounding acquisition as to the objects included in the summary. 43 C.F.R. § 10.8(d)(3). However, these requests for additional documentation do not authorize or justify the initiation of new scientific research on the objects. 43 C.F.R. § 10.9(e)(5) (iii). In turn, museums may also request information from consulting parties, including:

- Names and contact information for tribal officials to act as representatives in consultations related to particular objects;
- Suggested protocol for conducting the summary consultation process;⁹⁰ and

⁸⁹ If a more detailed object-by-object inventory already exists, then it may serve as substitute documentation, in lieu of a summary. 43 C.F.R. § 10.8(a).

⁹⁰ This includes: (1) the names and appropriate methods to contact any lineal descendants, if known, of individuals

- Types of objects in the museum or agency’s collection that the consulting parties consider objects of cultural patrimony, funerary objects, and sacred objects.

43 C.F.R. § 10.8(d)(4). In some cases, agencies with NAGPRA obligations do not post all the required information in their notices; thus, potential claimants and consulting parties should be aware that they can ask for more detailed information as set forth above. Prior to repatriation of unassociated moepū, sacred objects, and objects of cultural patrimony to a claimant, the museum or Federal agency must submit a notice of intent to repatriate to the Manager of the National NAGPRA Program, who then publishes this notice in the Federal Register, which is the Federal government’s official daily publication for public notices of Federal agencies, among other things.⁹¹ Repatriation may occur thirty days after publication of this notice. 43 C.F.R. § 10.8(f).

3. Inventories & Consultation Regarding Iwi and Associated Funerary Objects

As mentioned earlier, museums must also prepare an “inventory” of iwi and associated moepū. 43 C.F.R. § 10.9(a). An inventory facilitates repatriation by providing clear descriptions and establishing cultural affiliation with present-day Indian tribes and NHOs. 43 C.F.R. § 10.9(a). Inventories must contain: catalogue and accession entries; descriptions of each set of iwi and/or associated moepū; a summary of the evidence, including the results of consultation, used to determine the cultural affiliation of the iwi and moepū; and information related to the acquisition of each object.⁹² 43 C.F.R. § 10.9(c).

A completed inventory should result in two documents: (1) a list of iwi and associated moepū for which lineal descent and/or cultural affiliation has been established; and (2) a list of “culturally unidentifiable” iwi and moepū for which lineal descent and cultural affiliation is unknown. 43 C.F.R. § 10.9(d).

whose unassociated moepū or sacred objects are included in the summary; and (2) names and appropriate methods to contact any leaders that the Indian tribe or NHO thinks should be consulted regarding the collections. See 43 C.F.R. § 10.8(d)(4)(ii).

- 91 This notice must contain: a description of the objects being claimed in sufficient detail so as to enable other potential claimants to determine their interest in the claimed objects; identifying information for each object; the circumstances surrounding acquisition; a description of the objects that are clearly identifiable as to cultural affiliation; and, a description of the objects that are not clearly identifiable as being culturally affiliated with a particular Indian tribe or NHO, but which, given the totality of the circumstances surrounding the objects’ acquisition, are likely to be culturally affiliated with a particular Indian tribe or NHO. 43 C.F.R. § 10.8(f).
- 92 This information should include: acquisition dates for each set of iwi and associated moepū and information on location of origin (i.e., known site number or name in a State, County, or Federal agency); the name of person or organization from which the objects were procured; and, a description of the manner in which these items were acquired (e.g., as part of an excavation, by gift or purchase). 43 C.F.R. § 10.9(c).

While preparing an inventory and investigating the cultural affiliation of the iwi and associated moepū, museums and Federal agencies must initiate consultation by letter, and encourage follow-up by telephone or face-to-face dialogue. 43 C.F.R. § 10.8(d)(2). During this process, the museum or Federal agency must provide certain information to lineal descendants, where known, and to officials and leaders representing Indian tribes or NHOs that are, or are likely to be, culturally affiliated with the objects. 43 C.F.R. § 10.9(b)(3). In particular, museums must provide the following information:

- A list of all Indian tribes and NHOs that are, or have been, consulted regarding the particular iwi and associated moepū;
- A general description of the inventory;
- The projected time frame for conducting the inventory; and
- An indication that additional documentation used to identify cultural affiliation will be supplied upon request.

43 C.F.R. § 10.9(b)(4). Like summaries, this process generally allows an exchange of information between potential claimants and the museum.

Known lineal descendants and culturally affiliated Indian tribes or NHOs must be directly informed of inventory results and this notice must be given within six months of completion by publication in the Federal Register. 43 C.F.R. § 10.9(e). The notice of inventory completion must: contain a synopsis of the inventory report sufficient to assist recipients to claim an interest in the items inventoried; identify the sets of iwi and moepū in the collection and detail the circumstances of their acquisition; describe inventoried items that are likely to be culturally affiliated with a specific tribe or NHO; and, describe iwi with or without associated moepū that are “culturally unidentifiable.” 43 C.F.R. § 10.9(e). For ease of access, OHA reprints these notices in its monthly *Ka Wai Ola* newspaper. Because it can be difficult to locate these notices in the Federal Register, *Ka Wai Ola* is an excellent resource for this information and can be found online at OHA’s website. This information is provided in Appendix A.

4. Repatriation & Disposition

NAGPRA’s procedures for repatriation of protected objects are covered in 43 C.F.R. section 10.10. Generally speaking, claimants may make **repatriation requests for unassociated moepū, sacred objects, and objects of cultural patrimony** when:

- Kinship or cultural affiliation is established during the consultation process;⁹³
- The claimant presents evidence that would support a finding that the museum or Federal agency does not have a “right of possession” (defined below) to the protected objects;

93 Details on the establishment of kinship and cultural affiliation are provided in 43 C.F.R. section 10.14.

- The agency or museum is not able to present evidence to the contrary proving that it does have a right of possession; and
- None of the exceptions to repatriation apply (explained below).

See 43 C.F.R. § 10.10(a). NAGPRA defines “right of possession” as “possession obtained with the voluntary consent of an individual or group that had authority of alienation.”⁹⁴ 43 C.F.R. § 10.10(a)(2).

Claimants may make **repatriation requests for iwi and associated moepū** when:

- Kinship or cultural affiliation is established;⁹⁵ and
- None of the exceptions to repatriation apply (explained below).

See 43 C.F.R. § 10.10(b).

In both cases, repatriation must occur within ninety days from receipt of a valid written repatriation request, but not before thirty days after publication in the Federal Register of the notice of intent to repatriate (in cases of unassociated moepū, sacred objects, and objects of cultural patrimony) or the notice of inventory completion (in cases of iwi and associated moepū). 43 C.F.R. § 10.10(b)(2).

Notably, lineal descendants, Indian tribes, and/or NHOs who fail to make a timely claim before a final determination on repatriation or disposition is made will be “deemed to have irrevocably waived any right to claim” the iwi kūpuna, moepū, and other cultural items. 43 C.F.R. § 10.15. This means that they cannot make a legal claim to those items via NAGPRA in the future. NAGPRA defines a “timely claim” as a written claim filed with the responsible museum or Federal agency official **prior to the time the protected objects are duly repatriated**. 43 C.F.R. § 10.15(a). Thus, once repatriation occurs, subsequent claims are no longer timely.

Lineal descendants, culturally affiliated NHOs and Indian tribes work with museums to determine the appropriate place and manner of repatriation, which may include special ceremonial and religious protocols. 43 C.F.R. § 10.10(d).

Additionally, museums must inform repatriation recipients of potentially hazardous pesticides,

94 NAGPRA also mandates that “[t]he original acquisition of a Native American unassociated funerary object, sacred object, or object of cultural patrimony from an Indian tribe or [NHO] with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession to that object.” 43 C.F.R. § 10.10(a)(2).

95 Details on the establishment of kinship and cultural affiliation are provided in 43 C.F.R. section 10.14.

preservatives and other substances used as treatment applications on protected objects, 43 C.F.R. § 10.10(e), and establish an internal system for recording repatriations while keeping confidential certain sensitive information at the request of repatriation recipients. 43 C.F.R. § 10.10(f).

Sometimes, the museum inventory process does not yield an identifiable lineal descendant or culturally affiliated Indian tribe or NHO for iwi and associated moepū. These objects are referred to as culturally unidentifiable human remains and associated funerary objects, for which NAGPRA delineates separate repatriation procedures at 43 C.F.R. sections 10.10(g) and 10.11(d).

5. Exceptions to Repatriation

a. Disagreement Among Multiple Claimants

There are several exceptions to NAGPRA's general rule of prompt repatriation, which are explained below. Similar to contested claims arising from iwi and/or cultural items found on Federal lands, a museum's transfer of custody can be stalled where multiple claimants disagree on repatriation. 43 C.F.R. § 10.10(c)(2). The museum is authorized to hold onto the objects until the claimants mutually agree on an appropriate recipient or a court with jurisdiction decides the issue. 43 C.F.R. § 10.10(c)(2). To this end, NAGPRA encourages good faith negotiations between contesting claimants and offers informal and formal dispute resolution alternatives. Claimants can request that the NAGPRA Review Committee hear the matter and informally resolve the dispute. However, the Committee's findings are advisory and non-binding.⁹⁶ Parties may also elect to bring the disputed matter before a Federal District Court in the case where violations of NAGPRA are alleged.

One of the most heated controversies in Hawai'i between multiple claimants to NAGPRA-protected objects centered around the Kawaihae Caves collection located at the Bishop Museum. This collection includes eighty-three moepū that were originally stolen from a cave on Hawai'i Island, and later sold and/or donated to the Bishop Museum in the early 1900s. Following NAGPRA's passage in 1990, the Bishop Museum proceeded to develop an inventory of these items to initiate the repatriation process. Hui Mālama exercised its rights as a recognized NHO and made a repatriation request for these items, which were then loaned to Hui Mālama by the museum. Thereafter, Hui Mālama reinterred these items in the same burial caves at Kawaihae. In the meantime, additional claimants came forward, who expressed concern that the items would be looted again and sold on the black market and advocated for the return of the artifacts to the museum where they could be kept safe and honored appropriately by Kānaka Maoli. The NAGPRA Review Committee ruled

⁹⁶ The role of the Review Committee is described further in Part VI(D).

that the consultation process was incomplete and that repatriation was premature without all claimants being given the opportunity to reach mutual agreement on the final disposition of the artifacts. Hui Mālama resisted the Review Committee's findings. Upon review by the U.S. District Court for the District of Hawai'i, the court agreed with the Review Committee that consultation between all claimants should be reconvened and ordered Hui Mālama to return the moepū. The director of Hui Mālama refused to comply with the court's orders and was held in jail for contempt of court for several weeks. Ultimately, the Bishop Museum retrieved the items from the Kawaihae caves and now holds them for safekeeping. Consultation on repatriation and final disposition of these items is ongoing but remains unresolved.

b. Illegal "Taking" of Property

A court's finding that the return of NAGPRA-protected objects to a claimant constitutes a property taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution is another exception to repatriation. 43 C.F.R. § 10.10(c)(3). A "taking" occurs when the government physically seizes private property without adequate compensation to a private owner, or essentially renders the enjoyment of that property useless by application of laws and regulations.

While this exception to repatriation seems contradictory to NAGPRA itself, Congress inserted this language to avoid NAGPRA being struck down altogether as unconstitutional. The spirit of NAGPRA lies in fundamental human rights principles. In particular, NAGPRA mandates museums to repatriate cultural items, which they may "own" in one sense, but have no real "right of possession" in a moral sense because these items are linked to Indigenous Peoples as belonging to their ancestors. Upon a challenge to repatriation by a museum, courts ultimately decide whether this exception to repatriation applies.

NAGPRA's first takings challenge involved a dispute as to the rightful owner of the Ki'i La'au, a sacred Kānaka Maoli object held in a Rhode Island museum. The museum and archaeological experts described the object as a spear rest that was mounted on a fishing or war canoe and appraised the object at over \$200,000. To finance needed improvements to its facilities and exhibits, the museum decided to auction the Ki'i. OHA and Hui Mālama learned of the upcoming auction and intervened before its sale by requesting repatriation of the Ki'i La'au pursuant to NAGPRA. The museum refused, stating that the Ki'i was merely utilitarian in nature and a decorative object. Upon review, the NAGPRA Review Committee determined that the Ki'i La'au was a sacred object and that consultation pursuant to NAGPRA should be initiated. The City ignored this decision and filed a lawsuit in the Rhode Island Federal district court against OHA, Hui Mālama, and the U.S. Department of Interior for committing an illegal taking of private property without just compensation. OHA and Hui Mālama filed counterclaims against the City, asking the court to

block the sale and enforce NAGPRA's provisions by mandating consultation and a process for repatriating the Ki'i La'au. Ultimately, the parties settled before the court could rule on the merits of the case. As a result of the settlement, the Ki'i La'au returned to Hawai'i and OHA made a generous contribution to the Museum's Pacific Collection where other Maoli objects remain. The agreement between the parties makes clear that the NHOs were in no way purchasing the Ki'i La'au from the City. This settlement is considered to be a win-win compromise because it prevented a potentially disastrous takings challenge to NAGPRA that could have threatened future repatriations efforts nationwide.

c. Importance to Science

The last exception to immediate repatriation occurs when NAGPRA-protected objects are considered "indispensable to the completion of a specific scientific study" that would be "of major benefit to the United States." 43 C.F.R. § 10.10(c)(1). Regardless, in such circumstances, the protected objects must be returned no later than ninety days after the scientific study. 43 C.F.R. § 10.10(c)(1). In Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) decided a controversial case that pitted science against Indigenous perspectives on the dignity of iwi and the need to return them to the earth.

In Bonnichsen, the Ninth Circuit held that NAGPRA did not apply to ancient human remains located on Federal lands along the Columbia River in Kennewick, Washington. These remains were carbon dated to 8,340 to 9,200 years ago and preliminary testing revealed that the skull had Caucasoid features. Scientists speculated that the skull belonged to an early European settler and were eager to study the remains due to its ancient origins, which could shed light on early populations in the Americas. Indian tribes in the area came forward to claim the Kennewick Man as their ancestor, deserving of an immediate burial per their religious traditions. The U.S. Army Corps of Engineers (Corps), having jurisdiction over the matter, ordered a halt to DNA testing and seized the remains. The Corps, with concurrence from the Secretary of the Interior, found the remains to be Native American and filed a Notice of Intent to repatriate the remains to the tribes. Scientists filed suit to intervene.

The Ninth Circuit rejected the Corps' decision and found the remains were not Native American and therefore, NAGPRA did not apply. In a controversial move, the Ninth Circuit did not defer to the Corps' determination on the origins of the remains because, according to the court, by virtue of their ancient origins and merely "incidental genetic resemblance to modern-day American Indians," the remains did not "bear a significant relationship to a *presently existing tribe*, people, or culture to be considered Native American." 367 F.3d at 878-79.

NAGPRA recognizes that there may be "some gaps in the record" that should not preclude a

positive determination of cultural affiliation between present-day Indian tribes and an earlier group from which NAGPRA-protected objects originated. 43 C.F.R. § 10.14(d). In this case, however, the Ninth Circuit failed to analyze tribal oral tradition, geographic orientation, and anthropological information that would have shed light on the Kennewick Man’s burial. Unfortunately, the court also failed to consider tribal folklore or other expert opinion from tribal elders as wisdom keepers, which are key evidentiary sources for establishing cultural affiliation pursuant to NAGPRA. See 43 C.F.R. § 10.14(e). Ultimately, the Ninth Circuit prevented the immediate repatriation of these remains by way of this controversial decision.⁹⁷

D. Dispute Resolution, Civil Penalties, Illegal Trafficking

NAGPRA includes various provisions regarding informal and formal dispute resolution as well as penalties for NAGPRA violations. As an initial matter, any person may contest actions taken by museums, Federal agencies, Indian tribes, and NHOs, but NAGPRA encourages informal negotiation to achieve a fair result. The NAGPRA Review Committee may serve as an informal venue for dispute resolution and good faith negotiation. See 43 C.F.R. § 10.17. Formal actions relating to NAGPRA violations may also be brought before U.S. District Courts. 43 C.F.R. § 10.17(a).

Museums that fail to comply with NAGPRA’s provisions may be subject to civil penalties imposed by the Secretary of the Interior. 43 C.F.R. § 10.12(a). Instances of non-compliance include:

- Unlawful sale or transfer of protected objects;
- Failure to complete summaries within set deadlines;
- Failure to complete inventories within set deadlines and granted extension periods;
- Failure to inform culturally affiliated Indian tribes and NHOs within six months after inventory completion;
- Refusal to repatriate, absent exception;
- Failure to publish notice of repatriation in the Federal Register prior to repatriation;
- Failure to consult with lineal descendants, Indian tribe officials, and traditional religious leaders, as required;

⁹⁷ Following Bonnichsen, Congress made key amendments to NAGPRA in 2010 regarding the priority of custody for culturally unidentifiable remains. These amendments allow for the transfer of such remains to Indian tribes or NHOs from whose tribal lands the remains were removed; or, in the alternative, to other non-federally recognized Indian groups from whose aboriginal lands the remains were found. See 43 C.F.R. § 10.11(c)(2). This provision was designed to remove backlogs in the disposition and reinterment of culturally unidentifiable remains. Objections from the scientific community center on the impact that this provision may have on future opportunities to study culturally unidentifiable remains. Matthew H. Birkhold, *Note: Tipping NAGPRA’s Balancing Act: The Inequitable Disposition of “Culturally Unidentified” Human Remains Under NAGPRA’s New Provision*, 37 WM. MITCHELL L. REV. 2046 (2011). NAGPRA does not, however, foreclose all scientific study, especially if such study is deemed “indispensible” and significantly “beneficial” to the United States. See 43 C.F.R. § 10.10(c)(1).

- Failure to inform repatriation recipients of dangerous pesticides, preservatives, and other potentially hazardous substances used to treat protected objects; and
- Refusal to transfer control of culturally unidentifiable iwi and associated moepū upon inability to prove right to possession of the same.

43 C.F.R. § 10.12(b)(1). Each occurrence of non-compliance constitutes a separate NAGPRA violation. 43 C.F.R. § 10.12(b)(2). Any person can notify the Secretary of Interior in writing about a museum's failure to comply with NAGPRA, but such notice should include supporting evidence. 43 C.F.R. § 10.12(c). The Secretary must acknowledge receipt of the allegations and may follow-up with a request for more information, such as books, papers, declarations, and other documentation relevant to the allegations of non-compliance, from the person submitting the complaint, the museum, and other sources. 43 C.F.R. § 10.12(d). Additionally, the Secretary must provide written notice to the person making the allegations and the museum if review of the evidence does not demonstrate a failure to comply with NAGPRA. 43 C.F.R. § 10.12(d)(3). More detailed information on making such a claim is provided in Part VII(B)(4), below.

Civil penalties imposed by the Secretary of Interior for NAGPRA violations are assessed at .25% of the museum's annual budget or \$5,000, whichever is less. 43 C.F.R. § 10.12(g)(2). Additional fines may be levied depending on the "archaeological, historical, or commercial value" of the protected objects; "economic and non-economic damages" suffered by the injured person/entity; and the number of violations. 43 C.F.R. § 10.12(g). Additional fines can run up to \$1,000 per day for museums who have been placed on notice but nonetheless continue to violate NAGPRA. Under certain circumstances, the Secretary can also reduce the penalty amount.

Additionally, the sale, purchase, use for profit, or transport for sale or profit of Native human remains knowingly and intentionally without right of possession is a federal crime punishable by fine and imprisonment. 18 U.S.C. § 1170. Violators can be fined and also may serve up to twelve months in jail for the first violation and five years for a second violation. Those who knowingly sell, purchase, use for profit, or transport for sale or profit any Native cultural items are also subject to the same fines, penalties, and possible imprisonment.

The Archaeological Resources Protection Act (ARPA) also provides similar prohibitions against the excavation, removal, damage, alteration, defacement, sale, purchase, exchange, or receipt of any archaeological resource located on public lands or Indian lands. 16 U.S.C. § 470ee. NAGPRA's provisions, however, specifically address the theft and sale of Indigenous human remains and cultural items.

Despite these strict prohibitions, violations occur. In 2005, Jerry David Hasson of Huntington Beach, California, pled guilty to violating ARPA for attempting to sell for \$2,500 a skull that he

took from a Maui beach construction site to an undercover Bureau of Indian Affairs agent. Hasson previously offered the skull on eBay for an immediate purchase price of \$12,500, but removed the item when a member of Hui Mālama warned him that the sale of the skull violated Federal law. Hasson was charged with a federal crime and sentenced to thirteen months home detention, 600 hours of community service, and ordered to pay a \$15,000 criminal fine, in addition to nearly \$10,000 for investigation costs and the return of the skull to Maui for reburial.⁹⁸

While some controversies inevitably arise in NAGPRA's implementation and enforcement, the Act is responsible for restoring justice for America's Indigenous Peoples through many successful repatriations. Statistics reported by the National NAGPRA Program establish that as of September 2009, a total of 38,671 Native human remains, 998,731 associated funerary objects, 144,163 unassociated funerary objects, 4,303 sacred objects, 948 objects of cultural patrimony, and 822 objects that were both sacred and patrimonial have been repatriated.⁹⁹

98 Associated Press, *Plea Deal for Man Who Tried to Sell Skull*, LOS ANGELES TIMES, Jan. 13, 2005, <http://articles.latimes.com/2005/jan/13/local/me-skull13>.

99 *National NAGPRA Frequently Asked Questions*, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, <http://www.nps.gov/nagpra/FAQ/INDEX.HTM>.

VII. TOOLS FOR KĀNAKA MAOLI

Na wai e ho'ōla i nā iwi?

*Who will save the bones?
(Who will care for one in old age and in death?)*¹⁰⁰



Photo: Kai Markell

Part seven overviews various tools that provide a range of strategies and opportunities for Kānaka Maoli to participate in iwi kūpuna issues at the State and Federal level. As detailed below, one of the most useful approaches Kānaka Maoli can employ is monitoring public meetings of burial councils and other agencies that authorize ground disturbing or other activities that may impact iwi. The tools outlined below enable Kānaka Maoli to not only access valuable information regarding the presence and proposed treatment of iwi kūpuna, but to also engage meaningfully in agency decisionmaking. Additionally, this part introduces several legal mechanisms to intervene at the agency level and in court when direct legal action must be taken to protect or prevent further harm to iwi kūpuna.

100 MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY, *supra* note 1, at 104.

While some legal tools are identified here, they can be complex and difficult to utilize. Before doing so, consider consulting with the Office of Hawaiian Affairs or attorneys who regularly practice in this area, such as the Native Hawaiian Legal Corporation.

A. Strategies at the State Level

1. Register a Burial Site for Protection

Notwithstanding the sensitive nature of the location of iwi kūpuna, the registration of a burial site provides several key benefits. It increases the likelihood that ‘ohana are alerted early about a proposed development’s impact on the registered iwi and are given the opportunity to participate in the burial treatment planning process. Additionally, registration enables SHPD to provide more definitive information to project proponents on the likelihood of encountering iwi and, thus, appropriately require an AIS, which is crucial to protect iwi (known or unknown) from destruction on land slated for development.

SHPD’s Burial Registration Form can be found online at: <http://hawaii.gov/dlnr/shpd/forms/burial-registration-form.pdf> and a copy is provided in this primer’s companion CD in Appendix B. The form requests the following information, if available:

- Applicant’s name and contact information;
- Burial location (by address, island, district, sub-district, Tax Map Key No.);
- Landowner’s name and contact information;
- Specific location information regarding the burial context (i.e., family cemetery, mountain cave, sand dune, under house, etc.);
- Maps and photographs of burial(s), where available;
- Burial descriptions (headstone inscription(s) if any, name(s) and death date(s) of buried individual(s));
- Genealogy of deceased, relationship of applicant to deceased, surviving descendants of the deceased;
- Condition of the burial(s), whether there is an immediate possibility of disturbance, suggestions for protecting the burial(s), and whether the land on which the burial(s) is/are located is currently owned by the descendants of the deceased; and
- Other knowledgeable contact persons.

SHPD keeps the information in this registration form confidential.

2. Report Violations



Photo: Kai Markell

As detailed extensively in Part V(B)(12), violations of Hawai'i Revised Statutes chapter 6E carry heavy civil, administrative, and criminal penalties. These consequences, however, cannot be levied without attentive Kānaka Maoli prepared to report violations of Hawai'i's burial laws. Maoli wishing to make such reports should contact DLNR's enforcement hotline (808) 643-DLNR(3567) or SHPD's burial sites program at (808) 692-8015. All callers should document the date, time, and substance of the report made, as well as the name of the person who handled the report. Additionally, one should follow-up with the agency a day or two after reporting to inquire about what action was taken.

3. Acquire Status as a Lineal Descendant under State Law

Status as a lineal descendant is significant because it enables Kānaka Maoli to enjoy broader participation in decisionmaking regarding the treatment of iwi. In particular, the project proponent, as part of the BTP for previously identified iwi, must conduct a good faith search for lineal and cultural descendants.¹⁰¹ Haw. Admin. R. § 13-300-33(b)(1). Moreover, State law provides that the burial council decides the disposition of previously identified iwi and

¹⁰¹ Moreover, as discussed earlier, the BTP must include names of any known lineal or cultural descendants and their respective positions regarding iwi treatment as well as propose long term measures to provide access to any known lineal or cultural descendants to the iwi. See Haw. Admin. R. § 13-300-33(b).

moepū by a majority vote, **with preference given to the recommendation of known lineal descendants**. Haw. Rev. Stat. § 6E-43.5(f)(1); Haw. Admin. R. § 13-300-35(f). Additionally, with respect to inadvertently discovered iwi and moepū, SHPD must **at least consult** with any known lineal or cultural descendants, among other individuals. Haw. Admin. R. § 13-300-40(e).

Once recognized by the appropriate burial council, a lineal descendant is entitled to certain rights, including but not limited to:

- Mandatory consultation regarding photography of iwi kūpuna (Haw. Admin. R. § 13-300-1);
- Notice by DLNR when a permit is being reviewed for a parcel where a related burial or reburial site is located; or, where activity is known that may cause harm to a related burial or reburial site (Haw. Admin. R. § 13-300-31(f));
- The burial council's due consideration of any request to relocate iwi (Haw. Admin. R. § 13-300-36(b)(3));
- The opportunity to propose a reburial site location in the BTP for previously identified iwi in mutual agreement with the landowner (Haw. Admin. R. § 13-300-33(b)(3)(B)(iv));
- Mandatory consultation by project proponent or DLNR/SHPD in the development of a burial site component of a preservation plan following a determination to preserve in place (Haw. Admin. R. §§ 13-300-38(e), -40(i));
- Mandatory consultation regarding the development of the burial site component of an archaeological data recovery plan following a determination to relocate (Haw. Admin. R. §§ 13-300-38(f), -40(j));
- Mandatory consultation regarding iwi reburial location (Haw. Rev. Stat. § 6E-43.6(f));
- The right to request special or specific reburial cultural practices beyond those routinely facilitated by SHPD (Haw. Rev. Stat. § 6E-43.6(f)).

To establish lineal descent, one must submit to SHPD information and records that will establish a lineal connection to the iwi kūpuna or moepū. All information is confidential and will be returned to the claimant unless the claimant indicates otherwise. Duplication of these records is prohibited unless the claimant provides prior written consent. A claimant may submit the following to establish descendency:

- The name of the deceased individual;
- Family genealogy;
- Birth certificates;
- Death certificates;
- Obituaries;
- Marriage certificates;
- Probate records;

- Church records;
- Census records;
- Tax records;
- Land conveyance documents including, but not limited to, deeds and land commission awards;
- Oral family history; or
- Any other applicable information or records that help establish a lineal connection between the claimant and the iwi.

Haw. Admin. R. § 13-300-35(a). Applicants should keep a complete copy of the information submitted to SHPD because such information may be difficult to acquire. SHPD compares the submitted information to records at appropriate repositories such as the state archives, Department of Health, and Bureau of Conveyances, among others, and has thirty days from receipt of a written application to review and assess the information submitted. Haw. Admin. R. § 13-300-35(d). Subsequently, SHPD provides to the respective burial council a written assessment and a recommendation regarding recognition of the claimant as a known lineal descendant. Haw. Admin. R. § 13-300-35(f). The respective burial council makes the final determination for recognition. Haw. Admin. R. § 13-300-24(g).

4. Acquire Status as a Cultural Descendant under State Law

Due to the high standard for proving lineal descent, most claimants are deemed cultural descendants. A cultural descendant is a claimant recognized by the burial council after establishing genealogical connections to Kānaka Maoli ancestors who once resided or are buried in the same ahupua'a or district in which certain iwi kūpuna are located or originated from. See Haw. Admin. R. § 13-300-2.

As mentioned earlier, the project proponent, as part of the BTP for previously identified iwi, must conduct a good faith search for lineal and cultural descendants. Haw. Admin. R. § 13-300-33(b)(1). Once recognized by the appropriate burial council, a cultural descendant is entitled to certain rights, including but not limited to:

- The burial council's due consideration and appropriate weight given to testimony



Photo: Elyse & Matt Mallams

- concerning proper treatment of iwi and moepū (Haw. Admin. R. § 13-300-35(h));
- The burial council’s due consideration regarding any request to relocate iwi (Haw. Admin. R. § 13-300-36(b)(3));
- Consultation by project proponent or DLNR/SHPD in the development of the burial site component of a preservation plan following a determination to preserve in place (Haw. Admin. R. §§ 13-300-38(e), -40(i));
- Consultation in the development of a burial site component of an archaeological data recovery plan following a determination to relocate (Haw. Admin. R. §§ 13-300-38(f), -40(j));
- The right to request special or specific reburial cultural practices beyond those routinely facilitated by SHPD (Haw. Rev. Stat. § 6E-43.6(f))

The process to become a cultural descendant is identical to the one to establish lineal descent: a claimant submits to SHPD information and records (such as those listed above) to establish a cultural connection between the claimant and the iwi kūpuna. Again, it is recommended that applicants keep a complete copy of the submitted information because it may be difficult to acquire. Those records are compared to data from appropriate repositories and SHPD has thirty days to review and assess the application. Subsequently, SHPD provides the appropriate burial council with a written assessment and recommendation regarding whether the claimant is a cultural descendant. If an application is originally submitted for recognition as a lineal descendant, but instead establishes cultural descent, SHPD will provide its assessment and recommendation of the claimant as a cultural descendant, rather than lineal. Haw. Admin. R. § 13-300-35(h). Ultimately, the appropriate burial council determines whether to recognize a claimant as a lineal or cultural descendant.

In the event that SHPD does not endorse formal recognition, the recommendation is deferred pending submission of additional information. Haw. Admin. R. § 13-300-35(i).

5. Apply for Burial Council Membership

The burial councils play a crucial role in the care of iwi kūpuna especially because members are required by statute to determine the preservation or relocation of previously identified iwi kūpuna. Haw. Rev. Stat. § 6E-43.5(f). Further, members assist SHPD in the inventory and identification of burial sites, maintain a list of appropriate Native Hawaiian organizations, agencies, and offices to notify regarding the discovery of iwi, and make recommendations regarding the appropriate management, treatment, and protection of Kānaka Maoli burial sites and other related matters. Haw. Rev. Stat. § 6E-43.5(f). As previously mentioned, members also decide whether to recognize a claimant as a lineal or cultural descendant. Haw. Admin. R. § 13-300-24(g). Burial council members convene a public meeting, typically monthly, to acquire information relating to Kānaka Maoli burial sites and to discuss and determine the treatment of iwi found across Hawai‘i nei.

Each burial council is comprised of at least one representative from each geographic region of the island and representatives from development and large property owner interests. Haw. Admin. R. § 13-300-22. Regional representatives must satisfy the following criteria:

- Be a member of the Hawaiian community and represent one of the following geographic regions:
 - o Hawai'i island: Kohala, Kona, Ka'ū, Puna, Hilo, and Hāmakua
 - o Maui: Lāhainā, Wailuku, Makawao, and Hana
 - o Lāna'i
 - o Moloka'i: West Moloka'i, Central Moloka'i, East Moloka'i, and Kalawao
 - o O'ahu: Wai'anae, 'Ewa, Kona, Ko'olaupoko, Ko'olauloa, and Waialua
 - o Kaua'i: Waimea, Kōloa, Līhu'e, Kawaihau, Hanalei, and Nā Pali
 - o Ni'ihau; and
- Possess an understanding of Hawaiian culture, history, customs, practices, and in particular, beliefs and practices relating to the care and protection of Kānaka Maoli burial sites, iwi kūpuna, and moepū; and
- Not simultaneously serve on another state board or commission.

Hawai'i law requires SHPD to request that appropriate Hawaiian organizations submit names of candidates for the regional representatives to SHPD for consideration, along with statements demonstrating the candidates' understanding of Kānaka Maoli culture. Haw. Admin. R. § 13-300-22(c). Moreover, twenty percent of regional representatives must be appointed from a list of at least nine candidates provided by OHA, when such a list is provided. Haw. Admin. R. § 13-300-22(d).

OHA has established an internal process to fulfill this requirement. According to OHA's website, its goal is to ensure that all regional representative positions are filled so that the burial councils are able to meet quorum¹⁰² requirements. Those interested in being considered for OHA's list of recommended candidates should fill out an application (see below). OHA evaluates candidates based on their ability to represent a given region and to demonstrate an "understanding of Hawaiian culture, history, customs, practices, and in particular, beliefs and practices relating to the care and protection of Native Hawaiian burial sites and ancestral remains and burial goods." Those interested in being recommended by OHA must also affirm their commitment to participating actively in monthly burial council meetings and occasional site visits. While OHA will only recommend candidates it deems to be qualified, it will nonetheless transmit all applications it receives to DLNR/SHPD for its independent review and consideration. Therefore, candidates should be mindful that information included in applications to OHA will also be reviewed by DLNR/SHPD.

¹⁰² According to Hawai'i law, a majority of the burial council constitutes a quorum to conduct business and a majority of the members present at the meeting is necessary to approve any burial council action. Haw. Admin. R. § 13-300-26.

Those interested in being included on OHA’s list of candidates for the burial council should consult Appendix A, which includes contact information for OHA. Otherwise, an application for Hawai‘i State Boards and Commissions is online at: <http://hawaii.gov/dlnr/shpd/forms/IBC-app.pdf> and provided in this primer’s companion CD in Appendix B.

Development and large property owner representatives on the burial councils must meet the following criteria:

- Currently employed by or associated with either a developer who conducts large scale land development activities, or a large property owner who owns or leases at least one hundred acres of land on the respective island;
- Able to represent the interests of development or large property owners or both; and
- Not simultaneously serve on another state board or commission.

Haw. Admin. R. § 13-300-22(e). DNLR requests that developers and large property owners submit names of candidates for consideration, along with statements demonstrating that the candidates meet the above criteria. Haw. Admin. R. § 13-300-22(f).

Council members serve a term assigned by the governor, unless the member voluntarily resigns, or is removed or suspended by the governor pursuant to Hawai‘i Revised Statutes section 26-34.¹⁰³ Haw. Admin. R. § 13-300-23. Council members serve without compensation, but may be compensated by DLNR for expenses incurred in the course of their duties, including air and ground transportation and parking expenses. Haw. Admin. R. § 13-300-22(h).

A list of current burial council members and vacancies can be found online at <http://www6.hawaii.gov/dlnr/hpd/councils.htm> or one can inquire with SHPD utilizing the contact information provided in Appendix A.

6. Monitor Burial Treatment Plans

Another effective way to participate in iwi issues is to actively monitor burial treatment plan notices and burial council meetings. OHA’s monthly publication, *Ka Wai Ola*, includes a section entitled “Ho‘olaha Lehulehu: Public Notice,” with information on burial treatment plans as well as calls for claimants under NAGPRA, with background and contact information. *Ka Wai Ola*

¹⁰³ Removal or suspension of a council member may occur for: (1) health concerns; (2) failure to carry out duties and responsibilities as provided by Hawai‘i Administrative Rules section 13-300; (3) unexcused absences from three consecutive council meetings; or (4) appointment to another state board or commission. Haw. Admin. R. § 13-300-23(b).

is available, free of charge, online or via First-Class U.S. Mail. Appendix A includes contact information for OHA for those interested in a subscription to *Ka Wai Ola*.

Maoli can also monitor and participate in iwi issues by attending burial council meetings, which are open to the public and typically occur each month. During these meetings, burial council members acquire information relating to Kānaka Maoli burial sites and discuss and determine the treatment of iwi found at various sites on their respective island(s). Following recognition by the burial council chair, any person (whether or not recognized as a lineal/cultural descendant) may submit oral or written testimony to the council regarding a matter under consideration. Haw. Admin. R. § 13-300-25(c).

Upcoming meeting dates, times, and agendas are available online at <http://hawaii.gov/dlnr/shpd/meetings>. Meeting agendas allow Kānaka Maoli to proactively gather background information about current or past iwi issues. If you miss a meeting or want to learn more about a particular project's impact on iwi, meeting minutes are available online at the same website. SHPD maintains a postal and email list of persons interested in receiving burial council meeting agendas and minutes.¹⁰⁴ One can be included on these lists either by providing such information on burial council meeting sign-in sheets or by contacting SHPD directly. Appendix A includes contact information for SHPD for those interested in being included on SHPD's postal and email list.

¹⁰⁴ Telephone Interview with Kawika Farm, O'ahu and Moloka'i Burial Sites Specialist, State Historic Preservation Division, O'ahu Office (Dec. 14, 2012).

◀ HO'OLAHA LEHULEHU ▶
PUBLIC NOTICES

Mauna Kea

NOTICE TO INTERESTED PARTIES IS HEREBY GIVEN that 32 historic properties believed to be traditional Native Hawaiian burial sites were documented by Pacific Consulting Services, Inc. during the course of archaeological inventory surveys of the Mauna Kea Science Reserve at Tax Map Key (3) 4-4-015:009 and in the Mauna Kea Access Road Corridor at TMK: (3) 4-4-015:por. 001. Both survey areas are located in the arid upland portions of Ka'ohē Ahupua'a, Hāmākua District, Hawai'i Island, and are managed by the Office of Mauna Kea Management for the University of Hawai'i, which holds a lease issued by the landowner, the State of Hawai'i.

Background research indicates that Ka'ohē Ahupua'a was designated as Crown Lands at the time of the Mahele; no claims were made or awarded for these areas within Ka'ohē Ahupua'a. Following the procedures of Hawai'i Revised Statutes (HRS) Chapter 6E-43, and Hawai'i Administrative Rules (HAR) Chapter 13-300, the burials are believed to be over 50 years old. The Office of Mauna Kea Management would prefer to preserve all burials in place. However, the decision to preserve in place or relocate these previously identified burials shall be made by the Hawai'i Island Burial Council and the State Historic Preservation Division (SHPD) in consultation with any recognized lineal and/or cultural descendants, per the requirement of HAR Chapter 13-

300-33. Proper treatment of the burials shall occur in accordance with HAR Chapter 13-300-38 or 13-300-39. SHPD requests persons having any knowledge of the identity or history of these burials to contact the following individuals within thirty days to provide information regarding appropriate treatment of the unmarked burials: Ms. Pua Aiu at SHPD, located at Suite 555, Kakuhihewa Building, 601 Kamokila Boulevard, Kapolei, Hawai'i 96707 [Tel: (808)692-8015/Fax(808)692-8020/Email Pua.Aiu@hawaii.gov], OR Mr. Steve Clark at Pacific Consulting Services, Inc., located at 720 Iwilei Road, Suite 424, Honolulu, Hawai'i 96817 [Tel: (808)546-5557x202/Fax(808)546-5557/Email steve.clark@pcsihawaii.com.

All interested parties should respond to this notice by filing descendant claim forms with the SHPD and/or by providing information to SHPD that adequately demonstrates lineal descent from these specific burials or cultural descent from ancestors buried in the vicinity of the Ka'ohē survey area. ■

Pā'au'au

CULTURAL IMPACT ASSESSMENT NOTICE

Information requested by SCS of cultural resources or ongoing cultural practices on or near Ka'ū High School, Pā'au'au 1 Ahupua'a, Pāhala, Ka'ū District, Island of Hawai'i, TMK: (3) 9-6-05:08. Please respond within 30 days to SCS at (808) 938-0968. ■

Kānaka Maoli should also monitor permit applications and other required environmental or historic preservation assessments to stay abreast of potential activities that may impact iwi and thus, warrant further attention and participation. A number of these applications and assessments are highlighted below.

7. Monitor Section 106 Consultation

Hawai‘i’s historic preservation process is designed to afford SHPD the opportunity to review and comment on a proposed project’s effects on historic properties, including iwi kūpuna, prior to the issuance of a permit, license, certificate, land use change, subdivision, or other entitlement of use. See Haw. Admin. R. §§ 13-284-1(a), -275-1(a). Interested organizations and individuals concerned about a proposed project’s impacts on iwi kūpuna or other historic sites have a role and are participants in this review process, along with SHPD, the government agency with jurisdiction over the project, and the project proponent. Haw. Admin. R. §§ 13-284-1(c), -275-1(c). This part focuses solely on the potential areas of involvement for Kānaka Maoli and is not a comprehensive overview of the entire historic preservation review process. For more detailed information about this process, consult Hawai‘i Administrative Rules section 13-284 (for projects involving permits, licenses, etc.) and section 13-275 (for government-sponsored projects), which are included in this primer’s companion CD in Appendix B.

Generally, the State historic preservation review framework involves six steps:

1. Identification and inventory, to determine if historic properties (including iwi) are present in the project’s area and, if so, to identify and document (inventory) them;
2. Evaluation of significance;
3. Determination of effect (impact);
4. Commitment to acceptable forms of mitigation in order to properly handle or minimize impacts to significant properties;
5. Preparation of a detailed mitigation plan and scope of work to properly carry-out general mitigation comments; and
6. Verification of completion of the detailed mitigation plan.¹⁰⁵

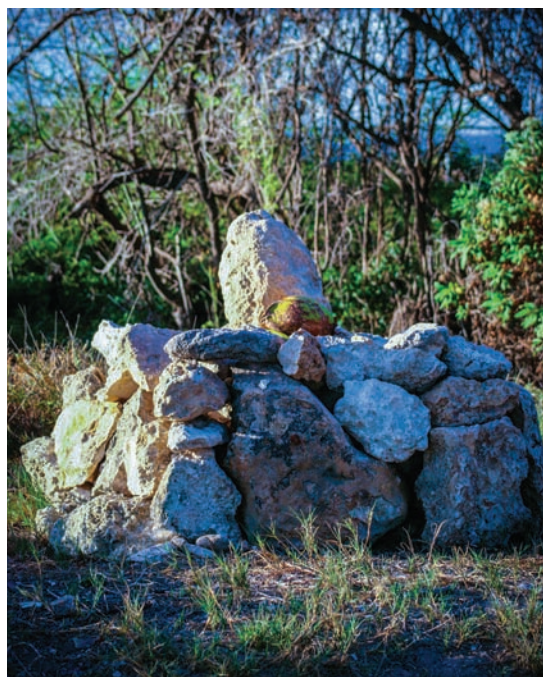


Photo: Kai Markell

An ahu (shrine) built in ‘Ewa, O‘ahu to honor ali‘i burials in the area, which was destroyed by unknown individuals.

¹⁰⁵ Detailed information about each of these steps is available in Hawai‘i Administrative Rules section 13-284-5

Haw. Admin. R. § 13-284-3(b). Any permitting agency involved in this review process must consult with SHPD and obtain written comments from SHPD **at each step**. Haw. Admin. R. § 13-284-3(a) (emphasis added). Opportunities exist for Kānaka Maoli participation and consultation during several steps, which are outlined below.

During the **identification and inventory step**, the permitting agency must determine whether historic properties (defined below) are present in the project area and, if so, verify that they are properly identified and inventoried. Haw. Rev. Stat. § 13-284-5(a). Generally, the agency will consult with SHPD as to whether an AIS is required for identification and inventory. Haw. Rev. Stat. § 13-284-5(b). If SHPD concludes that no historic properties will be affected, this conclusion must be made available to interested persons (including Kānaka Maoli) by posting notice of all such “no historic properties affected” comments at SHPD’s office and website every Friday. Haw. Admin. R. § 13-284-5(b)(3). Thereafter, interested persons, including Kānaka Maoli, have the opportunity to submit written comments to SHPD on such determinations within thirty days of the notice’s posting. Haw. Admin. R. § 13-284-5(b)(3). If historic properties, including iwi, are reported to SHPD during these thirty days, SHPD must reconsider its response under the provisions of Hawai‘i Administrative Rules section 13-284-12. Contact information for SHPD is provided in Appendix A.

Additionally, in cases where SHPD requires an AIS and finds the report adequate, seven copies of the AIS must be made available to the public. These copies may be located at: SHPD’s O‘ahu library; the relevant SHPD neighbor island office library; the University of Hawai‘i Hamilton Library Pacific Collection; the Bishop Museum library; University of Hawai‘i at Hilo Library; University of Hawai‘i Maui College Library; and Kaua‘i Community College Library. Haw. Admin. R. § 13-284-5(e)(3).

During the **evaluation of significance step**, either the permitting agency or SHPD assesses the significance of identified historic properties, and this information is submitted with the AIS report to SHPD. Haw. Admin. R. § 13-284-6(a). To be considered significant, a historic property must possess integrity of location, design, setting, materials, workmanship, feeling, and association and shall meet one or more of the following criteria:

- **Criterion A:** be associated with events that have made an important contribution to the

(identification and inventory); section 13-284-6 (evaluation of significance); section 13-284-7 (effect determination); section 13-284-8 (mitigation commitments and plans); section 13-284-9 (verification of completion of detailed mitigation plan). This part primarily cites to Hawai‘i Administrative Rules section 13-284, which applies generally to projects that require a permit, license, certificate, land use change, subdivision, or other entitlement to use. The review process is essentially the same for government projects under Hawai‘i Administrative Rules section 13-275.

broad patterns of our history;

- **Criterion B:** be associated with the lives of persons important in our past;
- **Criterion C:** embody the distinctive characteristics of a type, period, or method of construction; represent the work of a master; or possess high artistic value;
- **Criterion D:** have yielded, or is likely to yield, information important for research on prehistory or history; or
- **Criterion E:** have an important value to Kānaka Maoli or to another ethnic group of the State due to associations with cultural practices once carried out, or still carried out, at the property or due to associations with traditional beliefs, events or oral accounts – these associations being important to the group's history and cultural identity.

Haw. Admin. R. § 13-284-6(b)(1) to (5). A group of sites are arguably significant under any of the criteria. Haw. Admin. R. § 13-284-6(b).

Prior to submitting significance assessments for Kānaka Maoli historic properties, the permitting agency must consult with knowledgeable Kānaka Maoli and OHA. Haw. Admin. R. § 13-284-6(c). This consultation requirement presents an opportunity for Kānaka Maoli to inform the agency of a property's cultural significance and thereby advocate for its preservation. Agencies submit to SHPD their significance assessments, which must include evidence of any consultation, including a description of the consultation process used, a list of individuals or organizations contacted, and a summary of the views and concerns expressed. Haw. Admin. R. § 13-284-6(d)(1). SHPD then has forty-five days from receipt to agree or disagree with the evaluation. Haw. Admin. R. § 13-284-6(d). Once an agreement is reached on the significance of the properties, SHPD must enter such determination in the Hawai'i inventory of historic places. Haw. Admin. R. § 13-284-6(d)(4). When significant historic properties are present in the project area, then the proposed action's impacts must be assessed and mitigation commitments (see below) must be devised as necessary. Haw. Admin. R. § 13-284-6(e).

During the **mitigation step**,¹⁰⁶ a mitigation commitment proposing the form of mitigation to be undertaken for each significant historic property must be submitted by the agency to SHPD for review and approval. Haw. Admin. R. § 13-284-8(a). If properties with significance to Kānaka Maoli under criterion "E" are involved, the agency must initiate a consultation process with relevant Kānaka Maoli organizations and OHA to seek their views on the proposed forms of mitigation. Haw. Admin. R. § 13-284-8(a)(2). Like the evaluation step, this consultation requirement presents an opportunity for Kānaka Maoli to advocate for appropriate mitigation measures. Additionally,

¹⁰⁶ Mitigation means "the measures taken to minimize impacts to significant historic properties." Mitigation may take various forms, including but not limited to "preservation, archaeological data recovery, reburial, ethnographic documentation, historic data recovery, and architectural recordation." Haw. Admin. R. § 13-284-2.

a description of this consultation process, a list of those consulted, and a summary of views and concerns expressed must be included in the proposed mitigation commitment, which is normally submitted concurrently with the AIS, significance evaluation, and effect determination. Haw. Admin. R. § 13-284-8(a)(3). If unmarked iwi are present, the relevant burial council must approve the mitigation commitments pursuant to Hawai'i Revised Statutes chapter 6E and Hawai'i Administrative Rules section 13-300-33. Haw. Admin. R. § 13-284-8(d).

If SHPD accepts the mitigation commitments, the agency must provide detailed plans for the mitigation work to SHPD for review and approval. Haw. Admin. R. § 13-284-8(e). For preservation plans involving significant Kānaka Maoli historic properties under criterion “E,” the agency must consult with interested Kānaka Maoli individuals, organizations, and OHA. Haw. Admin. R. § 13-284-8(e)(5). This provides an additional opportunity for concerned Kānaka Maoli to participate in consultation and provide feedback on whether the mitigation plans are appropriate. The plan must describe the consultation process, list the individuals and organizations consulted, and summarize the views and concerns expressed. Haw. Admin. R. § 13-284-8(e)(5). Additionally, any interested person may comment on the detailed mitigation plans by submitting comments in writing to SHPD within thirty days of SHPD posting notice of the receipt of the detailed mitigation plans. Haw. Admin. R. § 13-284-8(e)(6). SHPD must take all comments into consideration when issuing its letter of acceptance or non-acceptance of the plans. Haw. Admin. R. § 13-284-8(e)(6). If unmarked iwi are involved, the detailed mitigation plan must be covered under a BTP, as specified in Hawai'i Administrative Rules section 13-300 and detailed in Part V(8)(7). Haw. Admin. R. § 13-284-8(e)(9).



Photo: Elyse & Matt Mallams

Burial mound at Wal-Mart, Ke'eaumoku Street, O'ahu

In sum, SHPD's concurrence is required for the commencement of any project that may affect historic properties, including burial sites. See Haw. Rev. Stat. § 6E-8. For example, SHPD's concurrence is required before a County may issue grading and grubbing permits for ground-altering activities that excavate fill, sand, gravel, soil, rock, and other similar material, as well as uproot and remove vegetation such as trees, shrubs, and plants. The Counties' internal process also includes a stamping on all approved grading and grubbing permits with language to this effect:

It shall be unlawful for any person to take, appropriate, excavate, injure, destroy or alter any historic property or burial site during the course of land development or land alteration activities to which § 6E -42 applies, without obtaining the required approval.¹⁰⁷

Specific procedures and requirements vary from County to County and, thus, Kānaka Maoli should consult their ordinances and permit provisions directly for specific information.¹⁰⁸ The Resources section in Appendix A includes County contact information.

8. Monitor Other Permit Applications, Environmental & Cultural Impact Assessments

Land use decisionmaking can have a direct impact on iwi kūpuna and the integrity of their resting places. Various land use activities invariably increase the chances of encountering iwi. For example, land currently zoned agricultural and rural once supported dense populations of maka‘āinana in early Hawai‘i. Many of these lands were also former kuleana lands,¹⁰⁹ small agricultural and house lots, where family graves are also located.

Various legal procedures exist, in part, to assess and mitigate harm to important cultural sites, including iwi kūpuna. These legal mechanisms are embedded in permit conditions and environmental and cultural impact analyses required by law. Generally speaking, Kānaka Maoli can offer written and oral testimony at various agency hearings (where most land use decisions are made) and provide comments for projects that trigger environmental and cultural review. Kānaka Maoli knowledgeable about burial sites at risk should urge agencies involved in land use decisionmaking to impose permit conditions that prevent and mitigate harm to iwi kūpuna. Kānaka Maoli can offer direct oral or written testimony during agency deliberations or provide comment letters during public review periods. This part covers various strategies to navigate some of these important environmental and cultural impact reviews and land use permitting processes.¹¹⁰

107 Telephone Interview with Ty Fukuroku, Civil Engineer, Department of Public Works’ Development Services Administration, County of Maui (Dec. 14, 2012).

108 See generally Hawai‘i County Code chapter 10; Kaua‘i County Code § 22-7; Maui County Code § 20.08; Revised Ordinances of Honolulu chapter 14.

109 “The term kuleana originally referred to a right of property in any business or other matter but afterwards was applied to the land holding of the tenant or hoaina residing in the ahupuaa.” *Territory v. Bishop Trust Co., Ltd.*, 41 Haw. 358, 362 (1956). “The Hawaiian term ‘kuleana’ means a small area of land such as were awarded in fee by the Hawaiian monarch, about the year 1850, to all Hawaiians who made application therefor.” *Palama v. Sheehan*, 50 Haw. 298, 299 n.1 (1968) (citations omitted). “Kuleanas are small parcels of land within an ahupuaa.” *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 182 n.6 (1973) (citations omitted).

110 For a comprehensive study of these legal processes as related to Kānaka Maoli traditional and customary cultural practices, see DAVID M. FORMAN & SUSAN K. SERRANO, HO‘OHANA AKU, A HO‘OLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAII (2013).

a. Hawai'i Environmental Protection Act (HEPA)

Hawai'i Revised Statutes chapter 343, sometimes called HEPA for Hawai'i's Environmental Policy Act, establishes a review process to “ensure that environmental concerns are given appropriate consideration in decisionmaking along with economic and technical considerations.” Haw. Rev. Stat. § 343-1. This process must also consider impacts on cultural resources, including those that support Kānaka Maoli traditional and customary practices, such as the protection of iwi kūpuna. The preparation of an Environmental Assessment (EA) is required for a number of proposed actions including but not limited to:

- Use of State or County lands or funds (except for feasibility or planning studies);
- Use of lands within a conservation district;
- Uses within a shoreline area;
- Uses within any historic site; or
- Reclassification of any land designated as a conservation district by the State Land Use Commission under chapter 205.¹¹¹

Haw. Rev. Stat. § 343-5(a)(1) to (4), (7). When a public agency proposes an action, it must prepare an EA “at the earliest practicable time” to determine whether the project’s impacts may be significant. Haw. Rev. Stat. § 343-5(b). When a private applicant proposes an action, the agency receiving the request for approval determines whether the action may have a significant effect on the environment and whether a more detailed Environmental Impact Statement (EIS) is required. Haw. Rev. Stat. § 343-5(e). Although the responsibility for complying with chapter 343 rests with the agency, environmental review documents such as EAs and EISs are often prepared by the developer or consultant seeking the permit or approval.

To ensure that agencies consider a proposed action’s potential impacts on iwi kūpuna, Kānaka Maoli should closely monitor this process as well as provide comments on draft EAs and EISs. The State Office of Environmental Quality Control (OEQC) publishes “the Environmental Notice,” a bi-monthly bulletin of draft and final EAs and EISs that are available for public review. The Environmental Notice can be found online on the OEQC website at <http://hawaii.gov/health/environmental/environmental/oeqc/index.html>. The OEQC website also includes helpful information and guides on chapter 343. Anyone can sign up for notification of new editions of the Environmental Notice by emailing oeqchawaii@doh.hawaii.gov. Additional contact information for OEQC is included in Appendix A.

Kānaka Maoli can send comment letters to the agency designated as the approving authority

¹¹¹ Hawai'i Administrative Rule section 11-200-8 identifies actions that are exempt from this process.

on specific projects. The Environmental Notice posts deadlines for the public comment period and provides the mailing address and other contact information for both the EA/EIS approving agency and project applicant where letters must be transmitted. Kānaka Maoli should pay special attention to the significance criteria provided in the administrative rules for HEPA. Haw. Admin. R. § 11-200-12. These administrative rules are provided in this primer’s companion CD in Appendix B. Relevant criteria for assessing whether a project may have a significant effect, such that a more comprehensive and detailed EIS is required, include “an irrevocable commitment to loss or destruction of any . . . cultural resource,” Haw. Admin. R. § 11-200-12(b)(1), and actions that may impact “cultural practices.” See Haw. Rev. Stat. § 343-2. Where burial sites and traditional practices associated with mālama of iwi kūpuna are at risk, Kānaka Maoli can identify these risks and insist upon the preparation of an EIS through providing written comments.

Additionally, Kānaka Maoli can access environmental and cultural impact review documents through OEQC’s online library in preparation for other agency review of land use permits and for burial council proceedings. These reports are rich in information and may contain ethnographic interviews and oral histories about a particular area. They also cover geographical information; existing archaeological and historical resources; associated cultural practices and beliefs that may be impacted; and the people’s historical and genealogical relationships to the land. This valuable information may aid Kānaka Maoli as they seek to protect sensitive burial sites in their area. OEQC provides an online library of environmental review documents that are searchable by title or by island map: <http://oeqc.doh.hawaii.gov/default.aspx>. These documents are also available at all local public libraries throughout Hawai‘i.

b. Conservation District Use Permits

Conservation areas may include forested and high elevation regions where burial caves may be located and, thus, proposed activity in these areas should be closely monitored. BLNR and DLNR have jurisdiction over lands in the Conservation District. Haw. Rev. Stat. §§ 183C-3, -6. This includes land zoned P-1 (preservation) by the City and County of Honolulu. Conservation lands are classified into five subzones: protective; limited; resource; general; or special. Haw. Admin. R. § 13-5-10(b)(1) to (5). DLNR’s Office of Conservation and Coastal Lands (OCCL) is responsible for overseeing approximately two million acres of private and public lands within the Conservation District. Kānaka Maoli practitioners often raise concerns about potential impacts to cultural practices, including measures to mālama iwi kūpuna in these districts.

Proposed uses of land in the Conservation District are allowed only if they are specifically identified and approved by DLNR and/or BLNR. Haw. Rev. Stat. § 183C-4(d); Haw. Admin. R. § 13-5-10(c); see also Haw. Admin. R. § 13-5-22 (protective); Haw. Admin. R. § 13-5-23 (limited); Haw. Admin. R. § 13-5-24 (resource); Haw. Admin. R. § 13-5-25 (general). Identified land

uses require either: (i) no permit; (ii) a DLNR-approved site plan; (iii) a departmental permit approved by the DLNR Chairperson; or (iv) a board permit approved by the BLNR. Where required, a Conservation District Use Permit (CDUP) may be obtained by submitting a Conservation District Use Application (CDUA) to DLNR’s OCCL.

CDUAs must include a draft EA or EIS consistent with the requirements described in the Part VII(A)(8)(a). Haw. Admin. R. § 13-5-31(a) (1). Kānaka Maoli should closely monitor CDUA submissions in case iwi may be affected by the proposed land uses. If impacts are anticipated, or if the agency or a permit applicant has failed to identify potential impacts, Kānaka Maoli should consider whether to submit testimony or even request a contested case hearing.¹¹² Kānaka Maoli practitioners who “can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.”¹¹³ Haw. Admin. R. § 13-1-31(b)(2). DLNR must hold a hearing to determine parties to such contested cases.¹¹⁴ Haw. Admin. R. §§ 13-1-31(a), (f). Although practitioners are not required to obtain legal representation, these legal processes can be difficult to navigate; therefore, it may be helpful to consult with the Office of Hawaiian Affairs or attorneys who regularly practice in this area.

DLNR must also hold a hearing on an application to change the boundaries of any zone. Haw.



Photo: Malia Akutagawa

112 These are quasi-judicial proceedings, which often resemble civil trials and require well-organized parties who can gather needed information, arrange for witnesses, and meet deadlines for submission of material all in a timely manner. M. Casey Jarman, *Making Your Voice Count: A Citizen Guide to Contested Case Hearings* 6, *supra* note 54, at 8.

113 See Haw. Admin. R. § 13-5-34(d) (providing that a “person who has demonstrated standing to contest the board action may request a contested case hearing pursuant to chapter 13-1”). An oral or written request to hold a contested case hearing must be made to BLNR no later than the close of the board meeting at which the subject matter of the request is scheduled for disposition. Haw. Admin. R. § 13-1-29(a). The request must be accompanied by a \$100.00 nonrefundable filing fee or a request for waiver of the fee. Haw. Admin. R. § 13-1-30.

114 A person whose request to be admitted as a party is denied may appeal that decision to the circuit court. Haw. Rev. Stat. § 91-14; Haw. Admin. R. § 13-1-31(h). In addition, any final order by DLNR may also be appealed to the circuit court. Haw. Rev. Stat. §§ 91-14, 183C-8; Haw. Admin. R. § 13-5-3.

Rev. Stat. § 183C-4(f); Haw. Admin. R. § 13-5-40(a)(2). If a boundary amendment petition is approved because the agency exceeded the maximum time period for acting upon the application, one of the mandatory conditions imposed is that the “[p]etitioner shall preserve and protect any established gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural, and religious practices on the reclassified area.” Haw. Admin. R. § 15-15-90(e)(24).

DLNR is also required by law to hold a hearing: on applications requiring a board permit in the protective subzone, Haw. Admin. R. § 13-5-40(a)(3); if the BLNR chair determines that the scope of the proposed use or the public interest requires a public hearing on the application, Haw. Admin. R. § 13-5-40(a)(4); and on proposals to use land for commercial purposes. Haw. Rev. Stat. § 183C-6(c); Haw. Admin. R. § 13-5-40(a)(1).

Agencies are responsible for protecting Kānaka Maoli traditional and customary rights and must complete the analysis outlined by the Hawai‘i Supreme Court in Ka Pa‘akai O Ka ‘Āina v. Land Use Commission, 94 Hawai‘i 31, 46-47, 7 P.3d 1068, 1083-84 (2000). That process ensures that proposed uses of land and water resources are pursued in a culturally appropriate way. The framework introduced in Ka Pa‘akai assists state and county agencies in balancing their obligations to protect traditional and customary practices against private property (as well as competing public) interests, by requiring specific findings and conclusions about:

- the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- the feasible action, if any, to be taken by the agency to reasonably protect native Hawaiian rights if they are found to exist.

This means that agencies may not delegate this constitutional responsibility to others by, for example, directing the permit applicant to independently attempt to protect traditional and customary practices. Instead, agencies must actively research and consider the cultural, historical and natural resources of a subject property as they relate to Native Hawaiian rights, when determining what restrictions should be placed on land or water use. An agency’s failure to condition permitted uses upon protection of Kānaka Maoli traditional and customary practices, such as the practice of caring for iwi kūpuna, is sufficient grounds for invalidating that agency’s decision to grant the underlying permit.

If the proposed uses in any of these hearings may affect known iwi or access to iwi by

those caring for and protecting them, or if the agency or a permit applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even request a contested case hearing. Again, although practitioners are not required to obtain legal representation, these legal processes can be difficult to navigate; therefore, it may be helpful to consult with the Office of Hawaiian Affairs or attorneys who regularly practice in this area (including the Native Hawaiian Legal Corporation, among others).

d. Special Management Area Permits

The Special Management Area (SMA) is “the land extending inland from the shoreline as delineated on maps filed with the” County planning commissions and the Honolulu City Council. Haw. Rev. Stat. § 205A-22. The events at Nauē, Kaua‘i and Honokahua, Maui tell us that mass burial sites are commonly encountered near the shoreline. Thus Kānaka Maoli should closely monitor permit applications for land uses within the SMA.

The State Office of Planning administers the Coastal Zone Management Act (CZMA), Hawai‘i Revised Statutes chapter 205A. The Act imposes “special controls on developments within an area along the shoreline . . . to avoid permanent losses of valuable resources . . . and to ensure that adequate access . . . to public owned or used beaches, recreation areas, and natural reserves is provided.” Haw. Rev. Stat. § 205A-21. Shared responsibility is given to the Counties to implement the SMA permitting system and enforce CZMA policies to preserve, protect, and restore the natural resources of the coastal zone of Hawai‘i.

The County land use decisionmaking authorities have the power to issue “use” permits for SMAs. Haw. Rev. Stat. § 205A-29. An SMA use permit is required if the cost of the activity exceeds \$500,000 and may have a substantial adverse environmental effect, if the proposal involves:

- Placing or erecting any solid material or any gaseous, liquid, solid or thermal waste;
- Grading, removing, dredging, mining or extracting any materials;
- Changing the density or intensity of use of land (including subdivision of land);



Photo: Elyse & Matt Mallams

- Changing the intensity of use of water, ecology related thereto, or of access thereto; and
- Constructing, reconstructing or altering of the size of any structure.

These activities require only an SMA minor permit if the cost of the activity is less than \$500,000 and there is no substantial adverse effect. Haw. Rev. Stat. § 205A-22.

Before an SMA use permit application will be accepted, environmental review is required under Hawai‘i Revised Statutes chapter 343 along with either issuance of a Finding Of No Significant Impact (FONSI),¹¹⁵ or acceptance of an EIS. The Hawai‘i, Kaua‘i and Maui County Planning Commissions issue SMA use permits. The Moloka‘i Planning Commission reviews and makes decisions on both SMA minor and major permits. Maui County Code §§ 12-302-14, -15. On O‘ahu, both SMA major and minor permits are processed initially by the City and County of Honolulu’s Department of Land Utilization (DLU)—except in Kaka‘ako, where the state Office of Planning has permitting authority.¹¹⁶ The DLU transmits its findings and recommendations to the Honolulu City Council for action.¹¹⁷ See Revised Ordinances of Honolulu § 33-1.3. The planning departments on the neighbor islands process and issue SMA minor permits, except for Moloka‘i (as noted above). The Kaho‘olawe Island Reserve Commission handles SMA decisions for Kaho‘olawe. Haw. Rev. Stat. § 6K-6(7).

Agencies must fully consider cultural and historic values in addition to economic development concerns. Haw. Rev. Stat. § 205A-4, *cited in PASH*, 79 Hawai‘i 425, 435, 903 P.2d 1246, 1256 (1995). Hawai‘i courts have also recognized that Kānaka Maoli exercising such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes have an interest in an SMA Permit proceeding for the development of lands within the ahupua‘a and such interests are clearly distinguishable from that of the general public. *PASH*, 79 Hawai‘i 246, 252, 900 P.2d 1313, 1319 (Haw. Ct. App. 1993); see *PASH*, 79 Hawai‘i at 434, 903 P.2d at 1255. Thus, Kānaka Maoli seeking to protect and mālama ancestral burials that may be impacted by proposed activities within the SMA may bring their concerns before the planning commission or other relevant agency and have standing to do so.

As stated previously, agencies are also obligated under Ka Pa‘akai to affirmatively protect Maoli

115 See Haw. Rev. Stat. § 343-2. An agency that issues a FONSI briefly presents the reasons why an action for which an EA has been prepared will not have a significant effect on the environment and, therefore, will not require preparation of an EIS.

116 See Haw. Rev. Stat. § 206E-8.5; Haw. Admin. R. §§ 15-150-1 to -38. The Hawai‘i Community Development Authority has jurisdiction over Kaka‘ako.

117 In *Sandy Beach Defense Fund v. City Council of City & County of Honolulu*, 70 Haw. 361, 372-73, 773 P.2d 250, 258 (1989), the court held that the Honolulu City Council was not required by law to conduct a hearing when acting on individual SMA permits because it is a legislative body exempt from the Hawai‘i Administrative Procedures Act.

traditional and customary practices. While many State and County agencies have not formally updated their administrative rules to reflect this court decision, the Hawai‘i County Planning Commission (HPC) explicitly incorporates the language of Ka Pa‘akai’s three-part review in its rules.

Traditional and customary practitioners, including those who engage in the protection and care of iwi kūpuna, should closely monitor permit proceedings affecting SMAs for any potential effects on iwi or access to iwi. If impacts are anticipated, Kānaka Maoli should consider requesting that an AIS be conducted as a condition to SMA permit approval and/or that a cultural monitor be present during grading, grubbing, and excavation work. If the agency or a permit applicant has failed to identify potential impacts to iwi kūpuna practices, Kānaka Maoli should consider whether to intervene as a part of a contested case hearing on the application. Consultation with competent legal counsel is highly recommended.

d. Shoreline Certification Process



Photo: Lokelani Brandt

Counties have jurisdiction to determine shoreline setback requirements and issue SMA permits in the shoreline area. These permits should be closely monitored because as development continues to take place along this corridor, mass graves of iwi kūpuna are increasingly encountered.

The term “‘shoreline’ means the upper reaches of the wash of the waves, other than storm or seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, . . . or the upper limit of debris left by the wash of the waves [i.e., the ‘debris line’].” Haw.

Admin. R. § 13-222-2. In Hawai‘i, the shoreline certification process is often used to determine which portions of the shoreline are available for public use, such as fishing, gathering, swimming, or sunbathing. In addition, this process is necessary to decide how far a house or other building must be set back from the beach. The public must be notified about applications for shoreline certification via the Environmental Notice. Haw. Rev. Stat. § 205A-42(b); Haw. Admin. R. § 13-222-12(a). It is helpful to monitor the Notice for applications that may impact known burial sites. Anyone can send a written request to be added to DLNR’s mailing list for notifications of applications for proposed shoreline certifications/rejections. Haw. Admin. R. § 13-222-12(b). Appendix A includes contact information for DLNR. Applications for shoreline certification are available for public inspection at the district office where the property is located, at DLNR’s main office, and at the State land surveyor’s office. Haw. Admin. R. § 13-222-7(e). Comments on the application must be submitted to the State land surveyor postmarked no later than fifteen calendar days from the date of public notice. Haw. Admin. R. § 13-222-12(c).

Native Hawaiian cultural practitioners, including those who care for iwi kūpuna located in the shoreline area, who can “demonstrate that they will be so directly and immediately affected by the proposed shoreline certification or denial, that their interest is clearly distinguishable from that of the general public” may appeal from a shoreline certification decision. Haw. Admin. R. § 13-222-26(a)(3). A notice of appeal must be filed with BLNR no later than twenty calendar days from the date of public notice concerning the proposed shoreline certification or rejection. Haw. Admin. R. § 13-222-26(c). A notice of appeal form is available online at <http://www.state.hi.us/dlnr/land/Forms/SC-NoticeOfAppeal.pdf>, and should be submitted to the contact information listed in Appendix A. Again, although representation by legal counsel is not required, consultation with attorneys who regularly practice in this area is highly recommended.

e. Shoreline Setback Requirements

Kānaka Maoli concerned about iwi kūpuna buried along the eroding shoreline should monitor shoreline setback determinations and Shoreline Setback Variance (SSV) applications reviewed by the various Counties. If impacts to burials are anticipated, Kānaka Maoli should consider submitting written or oral testimony to the applicable planning commission. Contact information for the various County authorities is provided in Appendix A.

As a general matter, DLNR’s OCCL is responsible for determining shoreline setback lines between twenty and forty feet inland from the shoreline, which define areas where houses or other buildings may be built. Haw. Rev. Stat. § 205A-43(a). However, the Counties are permitted to establish larger shoreline setbacks. Haw. Rev. Stat. § 205A-45. More restrictive requirements will apply in case of a conflict between State law and County ordinance. Haw. Rev. Stat. § 205A-48.

DLNR or the designated County authority must review the plans of all applicants who propose any structure, activity, or facility that would be prohibited without a variance. Haw. Rev. Stat. § 205A-43(b)(2). The prohibitions are listed in Hawai'i Revised Statutes section 205A-44. Variances may be granted for the purposes listed in Hawai'i Revised Statutes section 205A-46. However, no variance may “be granted unless appropriate conditions are imposed” to “maintain safe lateral access to and along the shoreline or adequately compensate for its loss” and “to minimize adverse impacts on public views to, from, and along the shoreline.” Haw. Rev. Stat. §§ 205A-46(c)(1), (4).

The relevant County authority must hold a hearing on an SSV application. Haw. Rev. Stat. § 205A-43.5(a). However, that requirement may be waived for:

- Stabilization of shoreline erosion by the moving of sand entirely on public lands;
- Protection of a legal structure costing more than \$20,000; provided the structure is at risk of immediate damage from shoreline erosion;
- Other structures or activities; provided that no person or agency has requested a public hearing within twenty-five calendar days after public notice of the application; or
- Maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or water sports recreational facilities, which result in little or no interference with natural shoreline processes.

Haw. Rev. Stat. §§ 205A-43.5(a)(1) to (4) (emphasis added). Among other things, SSV applications must include a draft EA or EIS consistent with the requirements described in section 8(a) above.

If an SSV application may affect cultural resources or access to those resources, including iwi kūpuna burial sites, or if the agency or applicant has failed to identify potential impacts, Kānaka Maoli should consider whether to submit testimony, request a contested case hearing, or intervene in an appeal. Although practitioners are not required to be represented by counsel in such proceedings, the legal process can be difficult to navigate. So, before doing so, consider consulting with the Office of Hawaiian Affairs or attorneys who regularly practice in this area (including the Native Hawaiian Legal Corporation, among others).

9. Monitoring Legislative Proposals

Kānaka Maoli should stay informed about legislative issues affecting iwi kūpuna by subscribing to the mailing, fax, or email list for relevant legislative committees, including, but not limited to the Senate Committee on Hawaiian Affairs; House Committee on Hawaiian Affairs; Senate Committee on Water, Land, and Housing; and House Committee on Water, Land, & Ocean Resources. Concerned individuals without internet access may call or write a letter to the appropriate committee chair's office to be placed on the committee's mailing list or call the Senate

Sergeant-at-Arms Office at (808) 586-6725 to be placed on the committee’s mailing or fax list. For those with internet access, an email notification system is available through the Hawai‘i State legislature website at www.capitol.hawaii.gov. Click on the icon with a bullhorn marked “Hearing Notification.” You will be asked to provide your email address and a password. Once registered, you can create personalized measure tracking lists, submit testimony without the need to re-enter required information, and receive hearing notices by snail mail.

A Citizen’s Guide to Participation in the Legislative Process (9th ed. 2011), is available online at <http://www.capitol.hawaii.gov/citizensguide.aspx>. The Public Access Room (PAR) is another helpful resource, which is also free of charge. PAR is equipped with computer terminals, telephones, access to legislative documents and reference materials, a fax machine, and a copy machine. PAR Staff are available to assist those who come in for assistance or call in with questions. Classes and workshops are also given on the legislative process, reading legislative documents, writing and presenting testimony, and using relevant legislative websites. State Capitol contact information is provided in Appendix A.

Moreover, OHA tracks bills and sends email alerts regarding legislative measures impacting the protection of iwi kūpuna, among other things. OHA’s contact information is provided in Appendix A.

10. Intervene to Enforce the Law

As the cases discussed in Part V illustrate, any person may bring an action before the appropriate circuit court for restraining orders or injunctive relief against the State, its political subdivisions, or any individual, “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.” Haw. Rev. Stat. § 6E-13(b).

In presiding over a case, the court will first determine whether the person bringing the lawsuit has “standing” or the ability to make a claim. Generally, standing requires that a plaintiff show an “actual or threatened injury” that can be traced to a defendant, and that the plaintiff would be provided “relief” from his/her injury if the court ruled in his/her favor. Hawai‘i Revised Statutes chapter 6E provides a basis for “irreparable injury,”¹¹⁸ which is a component of proving one’s standing in a case. To illustrate, in *Kaleikini v. Yoshioka*, the Hawai‘i Supreme Court ruled that Paulette Kaleikini made a sufficient showing of standing because of her status as a cultural descendant of iwi in Kaka‘ako where the rail line would be constructed. Kaleikini established standing, in part, by explaining that “[t]he unnecessary removal of iwi causes [her] great pain and suffering.”

¹¹⁸ “Irreparable injury” is a legal term, defined as “[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction.” BLACK’S LAW DICTIONARY 801 (8th ed. 2004).

128 Hawai'i 53, 69, 283 P.3d 60, 76 (2012). The Hawai'i Supreme Court also acknowledged that burial intrusions are “extremely offensive and disrespectful – an act of violence and degradation directed at the deceased individual, the living family members, and the larger community associated with the burial.” 128 Hawai'i at 69, 283 P.3d at 76. Thus, the court considered Kaleikini's cultural and religious beliefs regarding the protection of iwi in making its final determination that she successfully established standing.

While legal intervention is an important tool and may sometimes be the only option to protect iwi kūpuna from immediate or continued harm, Kānaka Maoli must also be cognizant of the high costs associated with litigation and of the necessity of hiring a skilled attorney in this specialized field of law. In this regard, the Native Hawaiian Legal Corporation has a strong track record of litigating these types of cases.

B. Strategies at the Federal Level

1. Review Notices in the Federal Register & Ka Wai Ola

In the context of Federal law, active monitoring of NAGPRA notices published by Federal agencies and museums is the most efficient avenue to ensure timely claims to iwi kūpuna, moepū, or other cultural items. These notices are provided in the Federal Register, which is available online, free of charge at www.thomas.gov. Those who are tech savvy can also subscribe to daily highlights of the Federal Register. Instructions for online subscription to these daily highlights can be found at <https://www.federalregister.gov/blog/2011/04/email-notifications-now-available>.

The Federal Register can be difficult and cumbersome to navigate. Thus, the easiest way to monitor such notices is to browse OHA's monthly publication, *Ka Wai Ola*, which includes a section titled “Ho'olaha Lehulehu: Public Notice.” This part regularly includes calls for claimants under NAGPRA, including background and contact information. *Ka Wai Ola* is available, free of charge, online or via First-Class U.S. Mail. Appendix A includes contact information for OHA for those interested in a subscription to *Ka Wai Ola*. One may also visit the National Park Service's National NAGPRA website at <http://www.nps.gov/nagpra/> for links to comprehensive databases of published notices submitted by agencies and museums from across the country for publication in the Federal Register.

2. Acquire Status as a Lineal Descendant under NAGPRA

Kānaka Maoli can make claims to specific iwi kūpuna and moepū found on Federal land or held in museums if they can trace their “ancestry directly and without interruption by means of the traditional kinship system” of the Hawaiian culture or by modern, conventional

means of descendance (e.g., genealogical documentation) to the iwi and moepū. 43 C.F.R. § 10.14(b). Sources of information that Kānaka Maoli can use to prove that they are more likely lineal descendants than not include “[g]eographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.” 43 C.F.R. § 10.14(e).

Lineal descendants are entitled to notice and consultation at many stages of NAGPRA decision-making. These points include consultation in the preparation and completion of summaries and inventories, in repatriation and transfers of custody, and final disposition. In essence, lineal descendants assist in the final disposition and repatriation of NAGPRA-protected objects.

Significantly, NAGPRA affords lineal descendants the highest priority for transferring custody of iwi kūpuna, moepū, and other cultural items from both museums and Federal lands. 43 C.F.R. § 10.6(a)(2)(i), (iii). Lineal descendants may elect to take physical custody of the iwi, moepū, and cultural items of their kūpuna; work with the appropriate officials to rebury or safeguard them; or completely relinquish custody so that these items may be cared for by other claimants.

It is important that Kānaka Maoli come forward right away to be recognized as lineal descendants because a failure to make a timely claim before a final determination on repatriation or disposition may prevent a lineal descendant from doing so. Under NAGPRA, this person will be “deemed to have irrevocably waived any right to claim” the iwi kūpuna and moepū from which s/he is lineally descended. 43 C.F.R. § 10.15.

Lineal descendants should consider collaborating with OHA, Hui Mālama, and other NHOs who have expertise with these matters. Federal agency and museum officials, lineal descendants, and NHOs can achieve efficient resolution of claims by consensus and agreement that the overriding priority is the prompt repatriation of the protected objects.

3. Participate in NAGPRA Consultation Processes as a Cultural Descendant or NHO

A person may not need be recognized as a lineal descendant to become a consulting party. The NAGPRA website’s “Frequently Asked Questions” section explains that an NHO is broadly interpreted by the Department of Interior to also include Hawai‘i’s burial councils and various extended ‘ohana. Thus, Kānaka Maoli wishing to be part of the consultation process who are not recognized as lineal descendants may still be able to take part in the consultation process. On a practical level, extended ‘ohana may mean “cultural descendants” within the understanding of Hawai‘i’s State burial law. For example, in its consultation with the U.S. Military where iwi kūpuna have been encountered as well as with the Bishop Museum and DHHL, OHA works

closely with Maoli families who have come forward to mālama their iwi kūpuna.¹¹⁹ This is a collaborative process aimed at consensus; OHA is mindful that repatriation and reinterment can be stalled for years due to competing claims and disagreement on final disposition and reinterment locations for iwi kūpuna. In the past, OHA and Hui Mālama have conferred with each other regarding repatriation claims so that they are not viewed as competing claims that would delay repatriation of cultural items and reinterment of iwi kūpuna and moepū.

In sum, the key to successful repatriation and reinterment efforts is approaching the consultation process with an intention to achieve consensus and cooperation among all parties. Putting kūpuna first and honoring iwi, moepū, and objects sacred and central to Kānaka Maoli identity most often leads to outcomes that are pono for all.

4. Report NAGPRA Violations

As noted earlier, any person may bring an allegation to the Secretary of the Interior regarding a museum's failure to comply with NAGPRA. Written allegations should be sent to the attention of the Director, National Park Service, 1849 C Street, NW, Washington, D.C. 20240. Allegations must be accompanied by supporting evidence that the museum has possession or control of Kānaka Maoli iwi or cultural items, receives Federal funds, and has failed to comply with specific provisions of NAGPRA. 43 C.F.R. § 10.12(c).

The Secretary then acknowledges receipt of the allegations and may follow-up with a request for information such as books, papers, declarations, and other documentation relevant to the allegation of non-compliance from the complainant, the museum, and other parties. 43 C.F.R. § 10.12(d).



Photo: Kai Markell

If the Secretary finds that a museum failed to comply with NAGPRA, the Secretary may impose civil penalties, which are discussed in more detail in Part VI(D). These actions should not be taken

¹¹⁹ Interview with Keola Lindsey, Lead Compliance Specialist, Everett Ohta, Compliance Specialist, Jerome Yasuhara, Compliance Specialist, and Kamaile Maldonado, Public Policy Advocate, Office of Hawaiian Affairs, in Honolulu, Haw. (Oct. 9, 2012), *supra* note 25.

lightly, and thus, one should seek legal counsel to assist in these interventions. Collaboration with NHOs such as OHA can be a critical tool because OHA represents Kānaka Maoli on these issues and has a proven track record in legal advocacy and intervention work on NAGPRA issues. By joining forces with other NHOs, Kānaka Maoli can gain stronger leverage in insisting that non-compliant museums take corrective action and that appropriate penalties are levied so that similar violations do not occur in the future.

VIII. CONCLUSION

Ho'ī Hou I Ka Iwikuamo'o

Return to family.

A trusted relative who cares for the chief's needs.

This primer overviews the legal framework and tools for advocacy on behalf of the kūpuna who have gone before us, and their iwi, moepū, and sacred resting places. Ho'ī Hou I Ka Iwikuamo'o entrusts all of us with the kuleana of caring for our ancestors. Each vertebra of our iwikuamo'o links our 'ohana from past to present and solidifies our collective responsibility to speak for those who no longer can speak for themselves. As we lift their voices and are guided by their wisdom, we are also renewed. Iwi o ku'u iwi, koko o ku'u koko, pili ka mo'o, ā mau loa: Bones of my bones, blood of my blood, our stories are one, for ever and ever!



Photo: Elyse & Matt Mallams

GLOSSARY OF TERMS

Ahupua‘a	“Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (<i>ahu</i>) of stones surmounted by an image of a pig (<i>pua‘a</i>), or because a pig or other tribute was laid on the altar as tax to the chief.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 9 (1986 ed.) [hereinafter HAWAIIAN DICTIONARY].
‘Āina	“Land, earth. Cf. ‘ <i>ai</i> , to eat.” HAWAIIAN DICTIONARY, <u>supra</u> , at 11.
Ali‘i	“Chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander; royal, regal aristocratic, kingly; to rule or at as a chief, govern, reign; to become a chief.” HAWAIIAN DICTIONARY, <u>supra</u> , at 20.
Appeals Panel	“[T]he panel comprised of three members from the board of land and natural resources and three [burial] council chairpersons that administratively adjudicates an appeal of a council determination as a contested case.” Haw. Admin. R. § 13-300-2.
Applicant	A person representing a sufficient ownership interest in real property or a lineal descendant who requests the burial council or SHPD to determine appropriate treatment of iwi and/or moepū located at or originating from the real property. <u>See</u> Haw. Admin. R. § 13-300-2.
Appropriate Hawaiian Organization	A group recognized by the burial council that is comprised of a majority of Native Hawaiians and has a general understanding of Hawaiian culture, in particular, beliefs, customs, and practices relating to the care of ancestral Native Hawaiian skeletal remains, burial goods, and burial sites. <u>See</u> Haw. Admin. R. § 13-300-2.
Archaeological Data Recovery Plan	A plan that, as a form of mitigation, archaeologically records and/or recovers a reasonable and adequate amount of information (as determined by SHPD), from a significant historic property. With respect to a burial site, this plan

follows a relocation determination and may include the disinterment of iwi and/or moepū and may involve the recording of a reasonable amount of information from the site if specifically authorized by the burial council or SHPD, whichever is applicable, following a relocation determination. See Haw. Admin. R. § 13-300-2.

**Archaeological Inventory
Survey / AIS**

“[T]he process of identifying and documenting historic properties and burial sites in a delineated area, gathering sufficient information to evaluate significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by [SHPD].” Haw. Admin. R. § 13-300-2.

**Archaeological Resources
Protection Act of 1979 / ARPA**

A Federal law “to secure . . . the protection of archaeological resources and sites which are on public lands and Indian lands.” 16 U.S.C. § 470aa. The Act provides criteria for issuing Federal permits for the excavation or removal of archaeological resources where “the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest.” 16 U.S.C. § 470cc(b).

**Areas with a Concentration of
Skeletal Remains**

“[A]ny location where multiple human skeletons are present.” Haw. Admin. R. § 13-300-2.

Associated funerary objects

Under NAGPRA, “those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency” as well as “those funerary objects that were made exclusively for burial purposes or to contain human remains.” 43 C.F.R. § 10.2(d)(2)(i).

‘Aumakua / ‘Aumākua (plural)

“Family or personal gods, deified ancestors who might assume the shape of sharks (all islands except Kaua‘i), owls (as at Mānoa, O‘ahu and Ka‘ū and Puna, Hawai‘i), hawks (Hawai‘i), ‘*elepao*, ‘*iwi*, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants. A symbiotic relationship existed; mortals did not harm or eat ‘*aumākua* (they fed sharks), and ‘*aumākua* warned and reprimanded mortals in dreams, visions, and calls.” HAWAIIAN DICTIONARY, *supra*, at 32.

Board of Land and Natural Resources / BLNR

A board comprised of the DLNR Chair and six other volunteer members appointed by the Governor. BLNR meets twice a month, accepts public testimony, reviews and approves land leases, licenses, and permits for use of public lands. Haw. Rev. Stat. § 171-4, -7. For more information, visit <http://hawaii.gov/dlnr/boards>.

Bureau of Conveyances

The Bureau of Conveyances is Hawai'i's statewide recording office, responsible for “[m]aintaining an accurate, timely and permanent record system for title to real property.” The Bureau examines, records, indexes, and microfilms over 344,000 Regular System and Land Court documents and maps annually; issues Land Court Certificates of Title; and certifies copies of matters of record, among other things.” State of Hawai'i, Bureau of Conveyances, <http://dlnr.hawaii.gov/boc/>.

Burial Good

“[A]ny item reasonably believed to have been intentionally placed with the human skeletal remains of an individual or individuals at the time of burial.” Haw. Rev. Stat. § 6E-2; Haw. Admin. R. § 13-300-2.

Burial Site

State law defines a burial site as “any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods are interred, and its immediate surrounding *archaeological context*, deemed a unique class of historic property and not otherwise included in section 6E-41.” Haw. Rev. Stat. § 6E-2. Archaeological context includes “any associated surface and subsurface features.” Haw. Admin. R. § 13-300-2.

Federal law defines a burial site as “any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.” NAGPRA, 25 U.S.C. § 3001(1).

Burial Treatment Plan

A plan that meets all necessary requirements as set forth in Haw. Rev. Stat. § 6E and which proposes treatment of burial sites, including preservation in place or relocation, submitted to SHPD or the burial council, whichever is appropriate, for a

determination. See Haw. Admin. R. § 13-300-2.

C.F.R.

Code of Federal Regulations. A collection of the rules adopted by federal agencies and departments. The CFR is available online, free of charge at: <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

Coastal Zone Management Area

“[A]ll land of the State and the area extending seaward from the shoreline to the limit of the State’s . . . management authority[.]” Haw. Rev. Stat. § 205A-1.

Comprehensive Agreement

Under NAGPRA, an agreement between Federal agencies and culturally affiliated Indian tribes or NHOs regarding human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be intentionally excavated or discovered inadvertently on federally managed lands. The agreement addresses all Federal land management activities that might result in an intentional excavation or inadvertent discovery and describes a process for consultation, treatment, and disposition. See 43 C.F.R. § 10.5(f).

Conservation District

One of four major land use districts in which all lands in the State are placed and shall include “areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept.” Haw. Rev. Stat. § 205-2(e).

Contested Case Hearing

A legal procedure similar to a trial in “which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.” Haw. Admin. R. § 13-300-2.

Control	<p>Under NAGPRA, having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of NAGPRA regulations whether or not the objects are in the physical custody of the museum or Federal agency. Generally, a museum or Federal agency that has loaned these objects to another individual, museum, or Federal agency is considered to retain control of those objects for purposes of NAGPRA’s regulations. <u>See</u> 43 C.F.R. § 10.2(a)(3)(ii).</p>
Cultural Affiliation	<p>Under NAGPRA, “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” NAGPRA, 25 U.S.C. § 3001(2). Cultural affiliation is established when “the preponderance of the evidence – based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion – reasonably leads to such a conclusion.” 43 C.F.R. § 10.2(e)(1).</p>
Cultural Descendant	<p>For Kānaka Maoli iwi kūpuna, a claimant recognized by the burial council after establishing genealogical connections to Kānaka Maoli ancestors who once resided and/or are buried in the same ahupua‘a or district in which certain iwi are located or originated from. <u>See</u> Haw. Admin. R. § 13-300-2.</p>
Cultural Impact Assessment	<p>In 2000, the Hawai‘i State legislature passed Act 50 amending Hawai‘i’s Environmental Impact Statement Law, Haw. Rev. Stat. chapter 343, to require that Environmental Assessments and Environmental Impact Statements include the disclosure of the proposed action on the cultural practices of the community and State and amending the definition of “significant effect” to include adverse effects on cultural practices. Act 50, § 1, 2000 Haw. Sess. Laws 93, 93 (codified as amended at Haw. Rev. Stat. § 343-2 (2005)).</p>
Cultural Items	<p>Under NAGPRA, this term refers to human remains, associated funerary objects, unassociated funerary objects,</p>

sacred objects, and cultural patrimony. NAGPRA, 25 U.S.C. § 3001(3).

Cultural Patrimony

Under NAGPRA, “[a]n object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American[.]” Therefore, objects of cultural patrimony cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and must have been considered inalienable by its culturally affiliated group at the time the object was separated from such group. *See* NAGPRA, 25 U.S.C. § 3001(3)(D). Examples of such items include Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole. *See* 43 C.F.R. § 10.2(d)(4).

Culturally Unidentifiable

Under NAGPRA, “human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process.” 43 C.F.R. § 10.2(e)(2).

Custody

Under NAGPRA, custody refers to “ownership or control of human remains, funerary objects, sacred objects or objects of cultural patrimony excavated intentionally or discovered inadvertently” on federally managed, tribal, or DHHL lands. 43 C.F.R. § 10.6(a). The procedure for determining who should have permanent custody of NAGPRA-protected objects is addressed by 43 C.F.R. § 10.6.

Department of Hawaiian Home Lands / DHHL

State agency responsible for carrying out the Hawaiian Homes Commission Act. <http://dhhl.hawaii.gov/>.

Department of Interior / DOI

The Federal agency responsible for NAGPRA’s administration, <http://www.doi.gov>.

Department of Land and Natural Resources / DLNR

The State agency responsible for overseeing the State Historic Preservation Division, <http://hawaii.gov/dlnr>.

Disposition	Under NAGPRA, the transfer of control over NAGPRA-protected objects by a museum or Federal agency. Custody of NAGPRA-protected objects excavated intentionally from, or discovered inadvertently on, Federal or tribal lands after November 16, 1990, is set forth in 43 C.F.R. § 10.6. Repatriation of NAGPRA-protected objects in museum and Federal agency collections to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization is set forth in 43 C.F.R. § 10.10. Disposition of culturally unidentifiable human remains, with or without associated funerary objects, in museum or Federal agency collections is set forth in 43 C.F.R. § 10.11. <u>See</u> 43 C.F.R. § 10.2(g)(5).
Environmental Assessment / EA	“[A] written evaluation to determine whether an action may have a significant effect.” Haw. Rev. Stat. § 343-2.
Environmental Impact Statement /EIS	“[A]n informational document prepared in compliance with the rules adopted under [Haw. Rev. Stat.] section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.” Haw. Rev. Stat. § 343-2.
Federal Agency	Under NAGPRA, “any department, agency, or instrumentality of the United States,” not including the Smithsonian Institution. 43 C.F.R. § 10.2(a)(1). NAGPRA applies to all Federal agencies.
Federal Agency Official	Under NAGPRA, “any individual authorized by delegation of authority within a Federal agency to perform the duties” relating to NAGPRA regulations. 43 C.F.R. § 10.2(a)(2). NAGPRA applies to all Federal agency officials.
Federal Lands	Under NAGPRA, “any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 USCS §§ 1601 et seq.]. NAGPRA, 25 U.S.C. § 3001(5); 43 C.F.R. § 10.2(f)(1).

United States “control” refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person. 43 C.F.R. § 10.2(f)(1). NAGPRA applies to excavation and discovery on these Federal lands.

Federal Register

Notices under NAGPRA are required to be published in the Federal Register, the official daily publication for final rules, proposed rules, public notices of Federal agencies and organizations, and Presidential actions such as executive orders. The Federal Register is available online, free of charge at <http://www.thomas.gov>.

Finding of No Significant Impact / FONSI

“[A] determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.” Haw. Rev. Stat. § 343-2.

Funerary Objects

A type of object protected by NAGPRA, referring to “items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains.” 43 C.F.R. § 10.2(d)(2).

Government Record

Information maintained by DLNR in written, auditory, visual, electronic, or other physical form. Haw. Admin. R. § 13-300-2.

Hala

In the context of this primer, to pass away or die. HAWAIIAN DICTIONARY, *supra*, at 50.

Historic Preservation

“[T]he research, protection, restoration, rehabilitation, and interpretation of buildings, structures, objects, districts, areas, and sites, including underwater sites and burial sites, significant to the history, architecture, archaeology, or culture

of this State, its communities, or the nation.” Haw. Rev. Stat. § 6E-2.

Historic Property

“[A]ny building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old.” Haw. Admin. R. § 13-300-2.

Ho‘i Hou

“To go or come back, return.” HAWAIIAN DICTIONARY, supra, at 75.

**Hui Mālama I Nā Kūpuna
O Hawai‘i Nei**

Under NAGPRA, a recognized Native Hawaiian Organization. See NAGPRA, 25 U.S.C. § 3001(6).

Under State law, a recognized “Native Hawaiian organization whose purpose is to provide cultural and spiritual care to ancestral Native Hawaiian skeletal remains and burial goods through repatriation and reburial, and by protecting known burial sites.” Haw. Admin. R. § 13-300-2.

Human Remains

Under NAGPRA, the physical remains of the body of a person of or relating to a tribe, people, or culture indigenous to the United States, including Alaska and Hawai‘i. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. See 43 C.F.R. § 10.2(d).

Human Skeletal Remains

“[T]he body or any part of the body of a deceased human being.” Haw. Rev. Stat. § 6E-2; Haw. Admin. R. § 13-300-2.

Hūnākele

“To hide in secret, as the body of a loved one in a secret cave; to keep a secret, conceal.” HAWAIIAN DICTIONARY, supra, at 91.

Inadvertent Discovery

Under State law, “the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity.” Haw. Admin. R. § 13-300-2.

Under NAGPRA, “the unanticipated encounter or detection” of NAGPRA-protected objects “found under or on the

surface of Federal or tribal lands[.]” See 43 C.F.R. § 10.2(g)(4).

Indian Tribe

Under NAGPRA, “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act []), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” NAGPRA, 25 U.S.C. § 3001(7).

Indian Tribe Official

Under NAGPRA, “the principal leader of an Indian tribe or Native Hawaiian organization or the individual officially designated by the governing body of an Indian tribe or Native Hawaiian organization or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to [NAGPRA] regulations.” 43 C.F.R. § 10.2(b)(4).

Injunction

“A court order commanding or preventing an action.” BLACK’S LAW DICTIONARY 800 (8th ed. 2004).

In Situ Burial Agreement

In Situ means in its original place. An In Situ Agreement is one that is “recorded with the bureau of conveyances, between the State and the landowner which establishes the protection of the burial site in place as a preservation easement in perpetuity.” Haw. Admin. R. § 13-300-2.

Intentional Excavation

Under NAGPRA, the planned archeological removal of NAGPRA-protected objects found under or on the surface of Federal or tribal lands. See 43 C.F.R. § 10.2(g)(4).

Inventory

Under NAGPRA, “the item-by-item description of human remains and associated funerary objects.” 43 C.F.R. § 10.2(g)(2).

Island Burial Councils

Five voluntary councils attached to SHPD and established to handle Maoli burial concerns for Hawai‘i Island, Maui/ Lāna‘i, Moloka‘i, O‘ahu, and Kaua‘i/Ni‘ihau. Members are appointed by the governor. A minimum of nine and maximum of fifteen members serve on each council. These members are large landowner and regional representatives

with specific expertise in Hawaiian “culture, history, burial beliefs, customs, and practices.” Burial councils determine the preservation or relocation of iwi kūpuna discovered during archaeological surveying prior to construction; assist SHPD in the inventory and identification of burial sites; maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of iwi; and make recommendations regarding the appropriate management, treatment, and protection of iwi. See Haw. Rev. Stat. § 6E-43.5.

Iwi

“Bone; carcass (as of a chicken); core (as of speech). The bones of the dead, considered the most cherished possession, were hidden, and hence there are many figurative expressions with *iwi* meaning life, old age: *Na wai e ho‘ōla i nā iwi?* Who will save the bones? [Who will care for one in old age and in death?] . . . stones or earth ridge marking land boundary.” HAWAIIAN DICTIONARY, supra, at 104-05.

Iwi Honua

“Rock or shoal projecting on a coral reef.” HAWAIIAN DICTIONARY, supra, at 105.

Iwikuamo‘o

“1. Spine, backbone. 2. Near and trusted relative of a chief who attended to his personal needs and possessions . . . family. *Ho‘i hou i ka iwikuamo‘o*, return to the family [as after long absence . . .].” HAWAIIAN DICTIONARY, supra, at 105.

Kahu

“Honored attendant, guardian, nurse, keeper of ‘*unihipili* bones, regent, keeper, administrator, warden, caretaker, master, mistress; pastor, minister, reverend, or preacher of a church[.]” HAWAIIAN DICTIONARY, supra, at 113.

Kākū‘ai

In the context of this primer, “to deify a dead relative by food offerings and prayer; to dedicate the dead to become family protectors (‘*aumākua*) or servants of ‘*aumākua*; to transfigure, transfiguration.” HAWAIIAN DICTIONARY, supra, at 120.

Kānaka Maoli

Historically meant “full blooded Hawaiian person.” HAWAIIAN DICTIONARY, supra, at 127. In modern times, this term is inclusive of all Native Hawaiians, regardless of blood quantum.

Kanu	“To plant, bury; planting, burial.” HAWAIIAN DICTIONARY, <u>supra</u> , at 130.
Kapu Kai	In the context of this primer, “ceremonial sea bath for purification, purification by sea water, as after contact with a corpse[.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 133.
Kulāiwi	“Native land, homeland; native.” HAWAIIAN DICTIONARY, <u>supra</u> , at 179.
Kuleana	“[R]esponsibility; . . . small piece of property, as within an <i>ahupua‘a</i> [.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 179.
Kuleana lands	“The term kuleana originally referred to a right of property in any business or other matter but afterwards was applied to the land holding of the tenant or hoaina residing in the ahupuaa.” <u>Territory v. Bishop Trust Co., Ltd.</u> , 41 Haw. 358, 362 (1956). “The Hawaiian term ‘kuleana’ means a small area of land such as were awarded in fee by the Hawaiian monarch, about the year 1850, to all Hawaiians who made application therefor.” <u>Palama v. Sheehan</u> , 50 Haw. 298, 299 n.1 (1968) (citations omitted). “Kuleanas are small parcels of land within an ahupuaa.” <u>McBryde Sugar Co. v. Robinson</u> , 54 Haw. 174, 182 n.6 (1973) (citations omitted).
Kumulipo	The Hawaiian creation chant. HAWAIIAN DICTIONARY, <u>supra</u> , at 182.
Kupuna / Kūpuna (plural)	“Grandparent, ancestor, relative or close friend of the grandparent’s generation, grandaunt, granduncle.” HAWAIIAN DICTIONARY, <u>supra</u> , at 186.
Lineal Descendant	<p>Under State law, “a claimant who has established to the satisfaction of the [burial] council, direct or collateral genealogical connections to certain Native Hawaiian skeletal remains[.]” Haw. Admin. R. § 13-300-2.</p> <p>Under NAGPRA, “an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descent to a known Native American individual</p>

whose remains, funerary objects, or sacred objects are being claimed[.]” 43 C.F.R. § 10.2(b)(1).

Maka‘āinana

“Commoner, populace, people in general[.]” HAWAIIAN DICTIONARY, supra, at 224.

Makai

“[O]n the seaside, toward the sea, in the direction of the sea.” HAWAIIAN DICTIONARY, supra, at 114.

Make

“To die, perish[.]” HAWAIIAN DICTIONARY, supra, at 228.

Mālama

“To take care of, tend, attend, care for, preserve, protect[.]” HAWAIIAN DICTIONARY, supra, at 232.

Mana

“Supernatural or divine power, mana, miraculous power[.]” HAWAIIAN DICTIONARY, supra, at 235.

Manager, National NAGPRA Program

A Department of the Interior official designated by the Secretary of the Interior as responsible for administration of matters relating to NAGPRA. See 43 C.F.R. § 10.2(c)(3).

Maoli

“Native, indigenous, aborigine[.]” HAWAIIAN DICTIONARY, supra, at 240.

Mauka

“Towards the mountains; inland.” HAWAIIAN DICTIONARY, supra, at 242.

Mitigation

In the context of the historic preservation review process, “the measures taken to minimize impacts to significant historic properties.” Mitigation may take various forms, including but not limited to “preservation, archaeological data recovery, reburial, ethnographic documentation, historic data recovery, and architectural recordation.” Haw. Admin. R. § 13-284-2.

Mitigation Plan

A plan, approved by SHPD, for the care and disposition of historic properties, aviation artifacts, and burial sites or human skeletal remains, that includes monitoring, protection, restoration, and interpretation plans. Haw. Rev. Stat. § 6E-2.

Moepū, Ho‘omoepū

“To place artifacts with the dead. *Mai lawe wale i nā mea i ho‘omoepū ‘ia*, don’t wantonly take things placed with the

dead. *Lit.*, put to sleep with.” HAWAIIAN DICTIONARY, supra, at 250.

Multiple Skeletons

“[H]uman skeletal remains representing more than one individual.” Haw. Admin. R. § 13-300-2.

Museum

Under NAGPRA, any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over NAGPRA-protected objects. This term does not include the Smithsonian Institution or any other Federal agency. NAGPRA, 25 U.S.C. § 3001(8), 43 C.F.R. § 10.2(a)(3).

Museum Official

Under NAGPRA, “the individual within a museum designated as being responsible for matters relating to [NAGPRA].” 43 C.F.R. § 10.2(a)(4).

National Historic Preservation Act / NHPA

A federal law requiring agencies to consider the effect of any project requiring a Federal permit or license; any federally initiated project; or any project supported by Federal funds on any district, site, building, structure, or object that is included in the National (and State) Register of Historic Sites. See 16 U.S.C. § 470(f). Under State law, historic sites can include Hawaiian burial sites.

Native American

Under NAGPRA, “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” NAGPRA, 25 U.S.C. § 3001(9).

Native Hawaiian

Under NAGPRA, “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” NAGPRA, 25 U.S.C. § 3001(10).

Native Hawaiian organization / NHO

Under NAGPRA, any organization which serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has expertise in Native Hawaiian Affairs, including OHA and Hui Mālama I Nā Kūpuna O Hawai‘i Nei. See NAGPRA, 25 U.S.C. § 3001(11).

Office of Conservation and Coastal Lands / OCCL	A division of DLNR responsible for overseeing approximately 2 million acres of private and public lands that lie within the State Land Use Conservation District as well as beach and marine lands out to the seaward extent of the State's jurisdiction, http://hawaii.gov/dlnr/occl .
Office of Hawaiian Affairs / OHA	The principal public agency established by the Hawai'i constitution and Hawai'i Revised Statutes chapter 10 to develop and coordinate services and programs for the betterment of the conditions of Kānaka Maoli.
‘Ohana	“Family, relative, kin group; related.” HAWAIIAN DICTIONARY, <i>supra</i> , at 276.
‘Ōiwi	“Native, native son.” HAWAIIAN DICTIONARY, <i>supra</i> , at 280.
Over Fifty Years Old	“[W]ith respect to human skeletal remains, being deceased for more than fifty years and not the age of the individual at death.” Haw. Admin. R. § 13-300-2.
Party	“[A] person properly seeking and entitled as of right to be admitted as a party in any court or agency proceeding.” Haw. Admin. R. § 13-300-2.
Person	<p>Under State burial law, “any individual, firm, association, agency, organization, partnership, estate, trust, corporation, company, or governmental unit.” Haw. Admin. R. § 13-300-2.</p> <p>Under NAGPRA, “an individual, partnership, corporation, trust, institution, association, or any other private entity, or, any official, employee, agent, department, or instrumentality of the United States, or of any Indian tribe or Native Hawaiian organization, or of any State or political subdivision thereof that discovers or discovered” NAGPRA-protected objects on Federal or tribal lands after November 16, 1990. <i>See</i> 43 C.F.R. § 10.2(a)(5).</p>
Pīkai	In the context of this primer, “[t]o sprinkle with sea water or salted fresh water to purify or remove taboo, as formerly was done after a death[.]” HAWAIIAN DICTIONARY, <i>supra</i> , at 327-28.

Pō	“Night, darkness, obscurity; the realm of the gods; pertaining to or of the gods, chaos, or hell; dark, obscure, benighted; formerly the period of 24 hours beginning at nightfall[.] HAWAIIAN DICTIONARY, <u>supra</u> , at 333.
Pono	“Goodness, uprightness, morality, moral qualities . . . equity . . . true condition or nature, duty . . . fitting, proper, righteous, right, upright, just, virtuous, fair[.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 340.
Possession	Under NAGPRA, “having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations.” Generally, a museum or Federal agency does not have “possession” of NAGPRA-protected objects it has on loan from another individual, museum, or Federal agency. 43 C.F.R. § 10.2(a)(3)(i).
Post-Contact	“[T]he period after the year 1778.” Haw. Admin. R. § 13-300-2.
Pre-Contact / Prehistoric	“[T]he period prior to and including the year 1778. Haw. Admin. R. § 13-300-2.
Preliminary Injunction	“A temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” BLACK’S LAW DICTIONARY 800 (8th ed. 2004).
Preservation Plan	“[T]he form of mitigation that sets forth appropriate treatment of historic properties, burial sites, or human skeletal remains which are to be preserved in place.” Haw. Admin. R. § 13-300-2.
Previously Identified	“[B]urial sites containing human skeletal remains and any burial goods identified during archaeological inventory survey and data recovery of possible burial sites, or known through oral or written testimony.” Haw. Admin. R. § 13-300-2.
Project	Under State law, “any activity directly undertaken by the State or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, subsidies,

loans, or other forms of funding assistance from the State or its political subdivisions or involving any lease, permit, license, certificate, land use change, or other entitlement for use issued by the State or its political subdivisions.” Haw. Rev. Stat. § 6E-2.

Public Hearing

“[A] hearing required by law in which members of the public may comment upon a proposed rule, application, or request.” Haw. Admin. R. § 13-300-2.

Pūholo / Pūholoholo

In the context of this primer, “to steam a corpse so that the flesh (*pela*) will separate from the bones.” HAWAIIAN DICTIONARY, *supra*, at 350.

Pule

“Prayer, magic spell, incantation, blessing, grace[.]” HAWAIIAN DICTIONARY, *supra*, at 353.

Quorum

According to Hawai‘i law, a majority of the burial council constitutes a quorum to conduct business and a majority of the members present at the meeting is necessary to approve any burial council action. Haw. Admin. R. § 13-300-26.

Reburial agreement

“[A]ny specific location where prehistoric or historic human skeletal remains and any burial goods removed from one or more sites are reburied, including any associated surface and subsurface features.” Haw. Admin. R. § 13-300-2.

Receives Federal Funds

Under NAGPRA, “the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds.” 43 C.F.R. § 10.2(a)(3)(iii). Entities receiving Federal funds and who serve as repositories for NAGPRA-protected objects

are subject to NAGPRA.

Recovery Plan

Under NAGPRA, a binding written agreement between a Federal agency or landowner and lineal descendants, culturally affiliated Indian tribes, and/or NHOs regarding the procedures to be undertaken in the excavation or removal of inadvertently discovered NAGPRA-protected objects. See 43 C.F.R. § 10.4(d)(2).

Relocation

“[T]he careful disinterment or collection of human skeletal remains and any burial goods utilizing procedures which are least intrusive and destructive to the human skeletal remains and any burial goods, in accordance with a department approved archaeological data recovery plan when applicable, and the reburial of the human skeletal remains and any burial goods, except where known lineal descendants decide otherwise.” Haw. Admin. R. § 13-300-2.

Review Board

The Hawai‘i historic places review board. Haw. Admin. R. § 13-300-2.

Review Committee

Under NAGPRA, the advisory committee responsible for serving as an advisory body to the Secretary of Interior to monitor repatriation efforts and ensure Federal agency and museum compliance in documenting NAGPRA-protected objects. The Review Committee also hears informal disputes between Native claimants, museums, and Federal agencies. 25 U.S.C. § 3006(c).

Right of Possession

Under NAGPRA, “possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a [NAGPRA-protected object] from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would . . . result in a Fifth Amendment taking by the United States as determined by the United States Claims Court [United States Court of Federal Claims] pursuant to 28 U.S.C. § 1491 in which event the ‘right of possession’ shall be as provided under otherwise applicable property law. The

original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.” NAGPRA, 25 U.S.C. § 3001(13).

Sacred Objects

Under NAGPRA, “items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents[.]” NAGPRA is specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. 43 C.F.R. § 10.2(d)(3).

Secretary of the Interior / Secretary

The Federal government official responsible for carrying out NAGPRA’s regulations. 43 C.F.R. § 10.2(c)(1).

Sensitive

A finding by the burial council or historic places review board “that a department record involving location and description of historic sites including burial sites or involving human skeletal remains originating from a burial site is culturally inappropriate for public disclosure and exempt from the requirements of section 92F-12, HRS.” Haw. Admin. R. § 13-300-2.

Shoreline

The “upper reaches of the wash of the waves, other than storm or seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, or the upper limit of debris left by the wash of the waves.” Haw. Rev. Stat. § 205A-1; Haw. Admin. R. § 13-222-2.

Shoreline Setback Lines

Shoreline setback lines are established at “not less than twenty feet and not more than forty feet inland from the shoreline.” Haw. Rev. Stat. § 205A-43(a). Counties may establish by ordinance shoreline setback lines at greater distances than provided by State law. Haw. Rev. Stat. § 205A-45.

Significant Effect / Impact

Where a proposed project subject to environmental review

	<p>under Hawai‘i Revised Statutes chapter 343 may cause significant effects/impacts to the environment, a detailed Environmental Impact Statement is required. A project’s impacts are significant if “the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the state’s environmental policies or long-term environmental goals and guidelines as established by law, or adversely affect the economic or social welfare[.]” Haw. Admin. R. § 11-200-2.</p>
Special Management Area / SMA	<p>“[T]he land extending inland from the shoreline.” SMA boundaries are determined by each County and designated on their maps. Haw. Rev. Stat. § 205A-22.</p>
State Historic Preservation Division / SHPD	<p>A State agency within DLNR established to administer a comprehensive historic preservation program and handle iwi issues. <u>See</u> Haw. Rev. Stat. § 6E-3.</p>
State Historic Preservation Officer / SHPO	<p>Officer appointed by the governor and responsible for the comprehensive historic preservation program and who serves as the state liaison officer for the conduct of relations with the Federal government and other states with regard to historic preservation matters. Haw. Rev. Stat. § 6E-2, -5.</p>
Summary	<p>Under NAGPRA, the written description of museum collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony. 43 C.F.R. § 10.2(g)(1).</p>
Supra	<p>“[A] citation signal to refer to a previously cited authority.” BLACK’S LAW DICTIONARY 1481 (8th ed. 2004).</p>
Tribal Land	<p>Under NAGPRA, all lands within the exterior boundaries of any Indian reservation, all dependent Indian communities, and any DHHL lands. <u>See</u> NAGPRA, 25 U.S.C. § 3001(15).</p>
‘Uhane	<p>“Soul, spirit, ghost; dirge or song of lamentation (<i>rare</i>); spiritual.” HAWAIIAN DICTIONARY, <u>supra</u>, at 363.</p>
Unassociated funerary objects	<p>Under NAGPRA, “those funerary objects for which the human remains with which they were placed intentionally</p>

are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.” 43 C.F.R. § 10.2(d)(2)(ii).

‘Unihipili

“Spirit of a dead person, sometimes believed present in bones or hari of the deceased and kept lovingly. ‘*Unihipili* bones were prayed to for help, and sometimes sent to destroy an enemy.” HAWAIIAN DICTIONARY, supra, at 372.

Unmarked location

“[W]ith regard to a human burial, any site located outside the boundaries of a known, maintained, actively used cemetery dedicated in accordance with chapter 441, HRS.” Haw. Admin. R. § 13-300-2.

Wahi Kanu

Burial site. HAWAIIAN DICTIONARY, supra, at 130, 377.

Wahi Kapu

Sacred place. HAWAIIAN DICTIONARY, supra, at 132, 377.

Wahi Pana

Legendary place. HAWAIIAN DICTIONARY, supra, at 377.

Written Plan of Action

Under NAGPRA, a plan prepared by the appropriate Federal agency or landowner in consultation with lineal descendants and culturally affiliated Indian tribes or Native Hawaiian organizations for inadvertent discoveries or intentional excavations on federally managed lands. The written plan of action must include types of objects considered to be cultural items, the types of analysis planned for each object, the planned treatment, care, and protected objects, the steps to be followed to contact Indian tribe officials at the time of excavation or inadvertent discovery, the kinds of traditional treatment, if any, to be afforded the objects or remains by members of Indian tribe or Native Hawaiian organization, the nature of the reports to be prepared, any specific information used to determine custody, and the planned disposition of protected objects. See 43 C.F.R. § 10.5(e).

APPENDIX A: RESOURCES

LEGAL RESOURCES

Ka Huli Ao Center for Excellence in Native Hawaiian Law

William S. Richardson School of Law

2515 Dole Street

Suite 203

Honolulu, Hawai'i 96822-2328

(808) 956-8411

Email: nhlawctr@hawaii.edu

<http://www.kahuliao.org>

Native Hawaiian Legal Corporation

1164 Bishop Street

Suite 1205

Honolulu, Hawai'i 96813

(808) 521-2302

(808) 537-4268 (fax)

Email: info@nhlchi.org

<http://nhlchi.org>

COUNTY AGENCIES

CITY & COUNTY OF HONOLULU

City Hall

Honolulu, Hawai'i 96813

<http://www.honolulu.gov>

Mayor

(808) 768-4141

(808) 768-5552 (fax)

Managing Director

(808) 768-6634

(808) 768-4242 (fax)

Planning & Permitting

(808) 768-8000

Department of Director

(808) 768-8063 (fax)

Office of Council Services (808) 768-3809
Director (808) 768-1370 (fax)

Honolulu Authority for Rapid Transportation (HART) (808) 768-6159
<http://www.honolulustransit.org>

Planning Commission (808) 768-8007
7th Floor, Frank F. Fasi Municipal Building (808) 768-6743 (fax)
650 South King Street
Honolulu, Hawaii‘i 96813

COUNTY OF HAWAII‘I

Physical Address:
Ben Franklin Building
333 Kilauea Avenue, 2nd Floor
Hilo, Hawaii‘i 96720
<http://www.hawaiicounty.gov>

Mailing Address:
25 Aupuni Street
Hilo, Hawaii‘i 96720

Mayor
East Hawaii‘i Office (808) 961-8211
(808)961-6553 (fax)
West Hawaii‘i Office (808) 323-4444
(808) 323-4440 (fax)

Planning Department
<http://www.cohplanningdept.com>
Email: planning@co.hawaii.hi.us
East Hawaii‘i Office (808) 961-8288
(808) 961-8742 (fax)
West Hawaii‘i Office (808) 323-4770
(808) 327-3563

COUNTY OF KAUA‘I

4396 Rice Street
Lihu‘e, Hawaii‘i 96766
<http://www.kauai.gov>

Mayor (808) 241-4900
(808) 241-6877 (fax)

Planning Department (808) 241-4050
<http://www.kauai.gov/planning> (808) 241-6699 (fax)

COUNTY OF MAUI

200 South High Street
Kalana O Maui Building, 9th Floor
Wailuku, Hawai'i 96793
<http://www.co.maui.hi.us>

Mayor (808) 270-7855
(808) 270-7870 (fax)
For Moloka'i Residents 1-800-272-0117
For Lāna'i Residents 1-800-272-0125

Planning Department Director (808) 270-7735
(808) 270-7634 (fax)

Office of Council Services (808) 270-7838
(808) 270-7686
Moloka'i Office (808) 272-0026
Lāna'i Office (808) 272-0098

STATE AGENCIES & RESOURCES

DEPARTMENT OF HAWAIIAN HOME LANDS (DHHL)

Physical Address: 91-5420 Kapolei Parkway
Kapolei, Hawai'i 96707
<http://www.hawaii.gov/dhhl>
Mailing Address: P.O. Box 1879
Honolulu, Hawai'i 96805

Chair (808) 620-9501
(808) 620-9529 (fax)

Information & Community Relations Office (808) 620-9590
(808) 620-9599 (fax)

DEPARTMENT OF LAND AND NATURAL RESOURCES (DLNR)

Physical Address:

Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawai‘i 96813
<http://www.hawaii.gov/dlnr>
Email: dlnr@hawaii.gov

Mailing Address:

P.O. Box 621
Honolulu, Hawai‘i 96809

Office of the Chairperson

(808) 587-0400
(808) 587-0390 (fax)

Public Information Officer

(808) 587-0320
(808) 587-0188 (fax)

Hotlines

DLNR Enforcement
Burials

(808) 643-DLNR
(808) 692-8015

Board of Land and Natural Resources

P.O. Box 621
Honolulu, Hawai‘i 96809

(808) 587-0404
(808) 587-0390

Office of Conservation and Coastal Lands

1151 Punchbowl Street, Room 131
Honolulu, Hawai‘i 96813

(808) 587-0377
(808) 587-0322 (fax)

State Historic Preservation Division (SHPD)

<http://hawaii.gov/dlnr/shpd>

O‘ahu Office

Kakuhihewa Building
601 Kamokila Boulevard
Suite 555
Kapolei, Hawai‘i 96707

Administrator

(808) 692-8015
(808) 692-8020 (fax)

Kaua‘i Office

Mailing Address:

(808) 692-8015

Kakuhihewa Building (808) 692-8020 (fax)
601 Kamokila Boulevard
Suite 555
Kapolei, Hawai'i 96707

Maui Office

DLNR Maui Office Annex (808) 243-1285
130 Mahalani Street (808) 243-5838 (fax)
Wailuku, Hawai'i 96793

Hawai'i Island Office

40 Po'okela Street (808) 933-7653
Hilo, Hawai'i 96720 (808) 933-7655 (fax)

Island Burial Council Meeting Minutes: <http://hawaii.gov/dlnr/shpd/meetings>

Hawai'i Historic Places Meeting Minutes: <http://hawaii.gov/dlnr/shpd/reviewboard>

OFFICE OF ENVIRONMENTAL QUALITY CONTROL (OEQC)

Leiopapa a Kamehameha Building (808) 586-4185
235 South Beretania Street, Suite 702 (808) 586-4186 (fax)
Honolulu, Hawai'i 96813
<http://hawaii.gov/health/environmental/oeqc/index.html>
Email: oeqchawaii@doh.hawaii.gov

Toll-Free Numbers:

Kaua'i (808) 274-3141 ext. 64185
Moloka'i/Lāna'i 1 (800) 468-4644 ext. 64185
Maui (808) 984-2400 ext. 64185
Hawai'i (808) 974-4000 ext. 64185

OFFICE OF THE GOVERNOR

Governor, State of Hawai'i (808) 586-0034
Executive Chambers, State Capitol (808) 586-0006 (fax)
Honolulu, Hawai'i 96813
<http://hawaii.gov/gov>

OFFICE OF THE LIEUTENANT GOVERNOR

Lieutenant Governor, State of Hawai'i (808) 586-0255

Honolulu, Hawai‘i 96813 (808) 586-0231 (fax)
<http://hawaii.gov/ltgov>

OFFICE OF HAWAIIAN AFFAIRS (OHA)

711 Kapi‘olani Boulevard
Suite 500
Honolulu, Hawai‘i 96813
<http://www.oha.org>

Administrator	(808) 594-1892
Director, Board Services	(808) 594-1974
Public Information Officer	(808) 594-1983
Director, Economic Development	(808) 594-1911
Director, Native Rights, Land and Culture	(808) 594-1945

East Hawai‘i (Hilo)

162-A Baker Avenue	(808) 920-6418
Hilo, Hawai‘i 96720-4869	(808) 920-6421 (fax)

West Hawai‘i (Kona)

75-5706 Hanama Place	(808) 327-9525
Suite 107	(808) 327-9528 (fax)
Kailua-Kona, Hawai‘i 96740	

Kaua‘i and Ni‘ihau

2970 Kele Street	(808) 241-3390
Suite 113	(808)241-3508 (fax)
Lihu‘e, Kaua‘i 96766	

Maui

33 Lono Avenue	(808) 873-3364
Suite 480	(808) 873-3361 (fax)
Kahului, Hawai‘i 96732	

Moloka‘i

P.O. Box 1717	(808) 560-3611
Kaunakakai, Hawai‘i 96748	(808) 560-3968 (fax)
Community Resource Coordinator	

Lāna'i

P.O. Box 631413

(808) 565-7930

Lāna'i City, Hawai'i 96763

(808) 565-7931 (fax)

STATE CAPITOL PUBLIC ACCESS ROOM

Room 401

(808) 587-0478

415 South Beretania St

(808) 587-0793 (fax)

Honolulu, Hawai'i 96813

TTY phone: (808) 587-0749

www.hawaii.gov/lrb/par

Email: par@capitol.hawaii.gov

Toll-free from the Neighbor Islands:

Hawai'i: 974-4000 (ext. 7-0478)

Maui:

984-2400 (ext. 7-0478)

Kaua'i:

274-3141 (ext. 7-0478)

Moloka'i/Lāna'i:

1-800-468-4644 (ext. 7-0478)

Hours:

Session: (beginning the third week of January, for sixty days)

M-F 8am - 6pm, Sat 8am - 2pm

Interim:

M-F 9am - 5pm

Senate Sergeant-at-Arms Office

(808) 586-6725

FEDERAL AGENCIES

UNITED STATES DEPARTMENT OF INTERIOR:

NATIONAL PARK SERVICE

<http://www.nps.gov/index.htm>

Headquarters

(202) 208-3818

1849 C Street NW

Washington, D.C. 20240

Pacific West Region

(415) 623-2100

333 Bush Street, Suite 500

San Francisco, CA 94104-2828

National NAGPRA Program (202) 354-2201
National Park Service (202) 371-5197
1201 Eye Street, NW (8th Floor)
Washington, D.C. 20005
<http://www.nps.gov/nagpra/>
Email: NAGPRA_Info@nps.gov

National NAGPRA Program Staff
National Park Service (2253)
1849 C Street NW
Washington D.C. 20240
Manager (202) 354-1479
Secretary (202) 354-2201
Officers
 Federal Register notices (202) 354-2204
 Inventories, summaries, databases, and
 website (202) 354-2205
 Training, NAGPRA Compliance, and
 Designated Federal Review Officer (202) 354-2108
 Grants Coordinator (202) 354-2203

OFFICE OF HAWAIIAN RELATIONS

<http://www.doi.gov/ohr>
Washington, D.C. Office: (202) 513-0712
 1849 C Street, NW (MS 3543)
 Washington, D.C. 20240

Hawai‘i Office: (808) 792-9555
Physical Address:
300 Ala Moana Boulevard, Room 5-231
Honolulu, Hawai‘i 96850

Mailing Address:
P.O. Box 50167
Honolulu, Hawai‘i 96813

OTHER RESOURCES

Bishop Museum

1525 Bernice Street

Honolulu, Hawai'i 96817

Archives

Email: archives@bishopmuseum.org

Conservation Services

Education

Email: education@bishopmuseum.org

Library

Email: library@bishopmuseum.org

(808) 847-3511

(808) 848-4147 (fax)

(808) 848-4148

(808) 847-8205

(808) 848-4168

(808) 848-4148

