

# **INTRODUCTION**

## **THE BURIAL COUNCIL LAW, GENERALLY**

The law in Hawai`i with respect to prehistoric and historic Native Hawaiian burials is primarily found in Chapter 6E, Hawaii Revised Statutes and Chapter 13-300, Hawaii Administrative Rules. The process set forth in the statutes and rules does not lend itself to summarization in a traditional western flowchart with orderly progressive steps, but instead contemplates a more collaborative process where the department, burial council, applicant, descendants, and Native Hawaiian groups interact regularly throughout the process with a goal of arriving at a result that is agreeable to all. This procedure is an attempt to combine a traditional Native Hawaiian dispute resolution process with a modern, western bureaucratic system in which each party has defined tasks and responsibilities.

This booklet provides an outline summarizing the law that directly relates to the burial councils as the law exists as of April 2009. Citations to the Hawaii Revised Statutes and Hawaii Administrative Rules are provided in the outline. Unofficial copies of the statutes and rules are included in this booklet for easy reference.

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## WHAT IS THE COMPOSITION OF THE BURIAL COUNCILS AND HOW DO THEY OPERATE AND CARRY OUT BUSINESS?

### I. Overview and Membership of the Burial Councils

- A. There are five island councils: Hawaii, Maui/Lanai, Molokai, Oahu, and Kauai/Niihau. **HRS § 6E-43.5(a); HAR § 13-300-21(a).**
- B. Each council consists of nine members, except the Moloka'i council, which shall consist of five members. Membership consists of no more than three representatives of development and large land owner interests, except for the Moloka'i council which consists of no more than one representative of development and large land owner interests. Additionally, each council shall include at least one representative for the following geographic regions:
  - (1) Hawai'i: Kohala, Kona, Ka'u, Puna, Hilo, and Hāmākua
  - (2) Maui/Lānai: Honua'ula, Lahaina, Wailuku, Makawao, Hāna, and Lāna'i
  - (3) Moloka'i: West Moloka'i, Central Moloka'i, East Moloka'i, and Kalawao
  - (4) O'ahu: Wai'ānae, 'Ewa, Kona, Ko'olaupoko, Ko'olauloa, and Waialua
  - (5) Kaua'i/Ni'i'hau: Waimea/Na Pali, Kōloa, Līhu'e, Kawaihau, Hanalei, and Ni'i'hau.

**HRS § 6E-43.5(a).**

### II. Duties of the Burial Councils

- A. The councils shall implement HRS § 6E-43. **HRS § 6E-43.5(a).** Specifically, councils are tasked with the following duties:
  - 1. The primary responsibility of the councils is to determine whether previously identified Native Hawaiian burial sites that appear to be over 50 years old should be preserved in place or relocated. **HRS § 6E-43; HAR § 13-300-24(a).**
  - 2. The **Department of Land and Natural Resources, Historic Preservation Division ("SHPD")** shall consult with the councils as to burial treatment and preservation plans, and the councils shall

- make recommendations to the SHPD regarding the appropriate management, treatment, and protection of Native Hawaiian burial sites, and on any matters related to Native Hawaiian burial sites. **HRS § 6E-43.5(f)(3); HAR § 13-300-24(c).**
3. Councils shall decide whether to recognize a claimant to Native Hawaiian burials as a lineal or cultural descendant. **HAR § 13-300-24(g).**
  4. Council members shall assist the SHPD with the inventory and identification of Native Hawaiian burial sites by providing information from families and other sources. **HRS § 6E-43.5(f)(2); HAR § 13-300-24(b).**
  5. Councils shall elect a chairperson and a vice-chairperson. **HRS § 6E-43.5(f)(4); HAR § 13-300-24(e).**
  6. Councils shall maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of Native Hawaiian burial sites. **HRS § 6E-43.5(f)(5); HAR § 13-300-24(d).**
- B. The SHPD shall provide administrative support services to the councils. **HAR § 13-300-28(a).** Specifically, the SHPD shall:
1. Post the notice of council meeting agenda with the Lieutenant Governor's office. **HAR § 13-300-28(a)(1).**
  2. Make arrangements for the council meeting location and for site inspections. **HAR § 13-300-28(a)(2).**
  3. Record and transcribe council meeting minutes. **HAR § 13-300-28(a)(3).**
  4. Acquire and verify all information necessary for the council to determine burial treatment. **HAR § 13-300-28(a)(4).**
  5. Submit to the applicant, in writing, a council's determination and recommendations accepted by the SHPD. **HAR § 13-300-28(a)(5).**
  6. Generate correspondence on behalf of the councils. **HAR § 13-300-28(a)(6).**
  7. Provide information to the councils relating to appropriate management, treatment, and protection of Native Hawaiian

burial sites and any other matters relating to Native Hawaiian burial sites. **HAR § 13-300-28(a)(7)**.

### III. Meetings of the Burial Councils

- A. All council meetings are open to the public and must be conducted under Sunshine Law. **HRS, Chapter 92**.
- B. Quorum is required to conduct a council meeting. A majority of all members to which the council is entitled constitutes a quorum. **HRS § 6E-43.5(e)**.
- C. The number of votes needed for a council to make a decision at a council meeting is the majority of members present at the meeting. **HRS § 6E-43.5(d)**.
- D. By a concurrence of the majority of members present at a meeting, a council can close its meeting to the public in order to discuss the location and description of Native Hawaiian burial sites. **HRS § 6E-43.5(d); HAR § 13-300-25(d)**.
- E. By a vote of two-thirds of the members present at a meeting, a council may meet in executive session pursuant to HRS § 92-4 for one of the purposes set forth in HRS § 92-5. **HAR § 13-300-25(b)**. No order, ruling, or decision shall be finally acted upon during executive session. **HAR § 13-300-25(b)**.

### IV. Appeals of Burial Council Decisions

A council's decision can be appealed by any person aggrieved. The appeal is made to a panel composed of three council chairpersons, three members of the Board of Land and Natural Resources ("Board"), and the Chairperson of the Board. The Chairperson only votes if there is a tie. The appeal is in the form of a contested case under chapter 91, HRS. **HRS § 6E-43(c)**.

## V. SHPD Records

SHPD records relating to burial sites shall be made available for public inspection during regular business hours, except that SHPD records relating to the location and description of burial sites, human skeletal remains, and burial goods can be deemed sensitive by a council and exempt from the public disclosure requirements. **HRS § 6E-43.5(e); HAR § 13-300-4(1).**

- A. Location records include information regarding the island, district, ahupua`a, tax map key, address, or site map where a burial site is identified. **HAR § 13-300-4(1).**
- B. Description records include information describing burial site features, human skeletal remains including genealogical information, or burial goods. **HAR § 13-300-4(1).**
- C. Access to the sensitive records shall be allowed by written consent of the council where the SHPD needs to review the record to protect the burial site from harm, notify known lineal or cultural descendants of the harm, or evaluate the ethnicity and significance of burial sites located nearby. **HAR § 13-300-4(1)(C).**

## HOW ARE BURIAL SITES AND THEIR ETHNICITY DETERMINED?

### I. Burial Site Identification

- A. A Native Hawaiian burial site may be identified by oral or written testimony in the following manner:
  - (1) The council shall evaluate the testimony presented;
  - (2) Witnesses shall provide information including the location and description of a burial site; and
  - (3) The council shall recommend to the SHPD whether to accept the testimony presented regarding a Native Hawaiian burial site. **HAR § 13-300-31(a).**
- B. Native Hawaiian burial sites that (1) are recognized by the SHPD based on oral or written testimony or (2) appear to be over 50 years old and were discovered during an archeological inventory survey are classified as "previously identified." **HAR § 13-300-31(a) &(b).**

### II. Evaluation of Ethnicity

The SHPD shall make an evaluation of ethnicity for all human skeletal remains situated at or formerly situated at a burial site. **HAR § 13-300-31(g).**

- A. Where a SHPD cultural specialist determines that oral or written evidence relating to human skeletal remains or burial sites (such as histories and traditions associated with specific places and families, and genealogies) establishes ethnicity by reasonable belief, the evaluation ends. **HAR § 13-300-31(g)(1).**
- B. If the preceding evidence does not establish ethnicity, then archaeological evidence (such as burial features, the nature of any cultural layer, and radiocarbon dates associated with the cultural layer) is evaluated by a SHPD archaeologist. If the archaeological evidence establishes ethnicity by reasonable belief, the evaluation ends. **HAR § 13-300-31(g)(2).**

- C. If the preceding evidence does not establish ethnicity, but when considered together with any oral or written testimony ethnicity is established by reasonable belief, the evaluation ends. **HAR § 13-300-31(g)(2).**
  
- D. If the preceding evidence does not establish ethnicity, then osteological evidence is gathered by a physical anthropologist. **HAR § 13-300-31(g)(3); HAR § 13-300-32.** If the osteological evidence fails to suggest ethnicity by reasonable belief, then the appropriate treatment of the human skeletal remains is determined by the SHPD. **HAR § 13-300-31(g)(3).**



## HOW ARE LINEAL AND CULTURAL DESCENDANTS RECOGNIZED BY THE BURIAL COUNCILS?

### I. Definitions of Lineal and Cultural Descendants; Criteria

- A. "'Lineal descendant' means with respect to Native Hawaiian skeletal remains, a claimant who has established to the satisfaction of the council, direct or collateral genealogical connections to certain Native Hawaiian skeletal remains,..." **HAR § 13-300-2.**
- B. "'Cultural descendant' means...with respect to Native Hawaiian skeletal remains, a claimant recognized by the 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 certain Native Hawaiian skeletal remains are located or originated from." **HAR § 13-300-2.**

### II. Burial Council's Recognition; Procedures

- A. The person ("claimant") who wants to be recognized as a lineal or cultural descendant to certain Native Hawaiian skeletal remains must submit a claim to the SHPD along with any of the following information:
  - (1) Name of deceased individual;
  - (2) Family genealogy;
  - (3) Birth certificates;
  - (4) Death certificates;
  - (5) Obituaries;
  - (6) Marriage certificates;
  - (7) Probate records;
  - (8) Church records;
  - (9) Census records;
  - (10) Tax records;
  - (11) Land conveyance documents such as deeds, land commission awards, etc.;

- (12) Oral family history; or
- (13) Any other applicable information. **HAR § 13-300-35(a).**
- B. The historic preservation division provides the council with a written assessment of the information submitted by the claimant. **HAR § 13-300-35(f); § 13-300-35(h).**
- C. The council decides whether to recognize the claimant as a lineal descendant based on the following:
  - 1. The historic preservation division's written assessment of the information submitted by the claimant; and
  - 2. The historic preservation division's recommendation that the claimant be recognized as a lineal descendant. **HAR § 13-300-35(f).**
- D. The council decides whether to recognize the claimant as a cultural descendant based on the following:
  - 1. Where the information submitted by the claimant fails to establish lineal descent but establishes genealogical connections between the claimant and Native Hawaiian ancestors who once resided or are buried, or both, in the same ahupua'a or district in which the Native Hawaiian skeletal remains and any burial goods are located or originated from; and
  - 2. The historic preservation division recommends to the council that the claimant be recognized as a cultural descendant. **HAR § 13-300-35(h).**
- E. If the information submitted by the claimant fails to establish lineal descent and the historic preservation division does not submit a recommendation to the council that the claimant be recognized as a cultural descendant, the matter shall be deferred pending the submission of additional information by the claimant. **HAR § 13-300-35(h).**

### III. **Effect of Recognition as a Lineal Descendant or Cultural Descendant**

- A. The wishes of lineal descendants shall be given preference with regard to the proper treatment of previously identified Native Hawaiian skeletal remains and any burial goods. **HAR § 13-300-35(f).**

- B. Testimony by recognized cultural descendants concerning the proper treatment of previously identified Native Hawaiian skeletal remains and any burial goods shall be duly considered and given appropriate weight by the council. **HAR § 13-300-35(h).**

## WHAT IS THE BURIAL COUNCIL'S ROLE WITH REGARD TO PREVIOUSLY IDENTIFIED BURIALS OF NATIVE HAWAIIANS?

### I. Treatment of “Previously Identified” Burials of Native Hawaiians.

- A. **HAR § 13-300-2** states: "'Previously identified' means burial 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."
- B. The councils and the SHPD have both decision making and advisory/consulting roles with regard to previously identified Native Hawaiian burials.
1. The councils determine:
    - a. Preservation in place or relocation. **HRS § 6E-43.5(f)(1); HAR § 13-300-33(a)&(f); HAR § 13-300-38(a)(1)-(5).**
    - b. Lineal descendancy. **HAR §13-300-35(f).**
    - c. Cultural descendancy. **HAR §13-300-35(h).**
  2. The councils have an advisory/consulting role as to:
    - a. Burial site component of the preservation plan. **HAR § 13-300-38(e).**
    - b. Burial site component of the archaeological data recovery plan. **HAR §13-300-38(f).**

### II. Process and Criteria.

The process and criteria for the councils and the SHPD to follow to fulfill their duties as set forth in I.B. above is as follows:

- A. Applicant submits a request to preserve in place or relocate in the form of a burial treatment plan ("BTP"). **HAR § 13-300-33(b).**
- B. Applicant consults with the SHPD in development of the BTP. **HAR § 13-300-33(c).**

- C. Once the BTP is approved by the SHPD, it is then given to the council. **HAR §13-300-33(c).**
- D. The council may request and attend a site visit. **HAR § 13-300-33(d).**
- E. Applicant may, prior to referral to the council for determination, give an informational presentation to the council. **HAR § 13-300-33(e).**
- F. Applicant may revise or withdraw the BTP prior to determination by the council. **HAR § 13-300-33(g).**
- G. Council renders a determination to preserve in place or relocate within 45 days of the council's meeting at which the matter was properly on the council's agenda after the burial treatment plan was accepted by SHPD and the applicant requested in writing that the matter be placed on the agenda. The 45 days may be extended by agreement between the landowner and SHPD. **HRS § 6E-43(b); HAR § 13-300-33(f).** The criteria for the determination is as follows:
  - 1. Primary factors. **HAR § 13-300-36(a).**
    - a. Concentration of remains. **HAR § 6E-43(b); HAR § 13-300-36(a)(1).**
    - b. Prehistoric or historic burials associated with important people or events. **HAR § 6E-43(b); HAR § 13-300-36(a)(2).**
    - c. Location within context of historic properties. **HAR § 6E-43(b); HAR §13-300-36(a)(3).**
    - d. Lineal descendants request preservation in place. **HAR § 6E-43(b); HAR § 13-300-36(a)(4).**
    - e. Landowner agrees. **HAR § 13-300-36(a)(5).**
  - 2. Secondary factors. **HAR § 13-300-36(b).**
    - a. Cultural propriety of proposal to preserve in place or relocate. **HAR § 13-300-36(b)(1).**
    - b. Possibility of harm to 'iwi' if burial is preserved in place. **HAR § 13-300-36(b)(2).**
    - c. Request of lineal or cultural descendants to relocate. **HAR § 13-300-36(b)(3).**
    - d. Any other reasons presented by the applicant to relocate. **HAR § 13-300-36(b)(4).**

- H. Once a determination is made, the applicant is notified of the determination. **HAR § 13-300-38(b).**
- I. Applicant may request reconsideration of the determination under limited circumstances. **HAR § 13-300-38(c).**
- J. Applicant may appeal the determination to the appeals panel. **HAR § 13-300-38(d); HAR chapter 13-300, subchapter 5.**
- K. The determination shall be recorded with the Bureau of Conveyances. **HAR § 13-300-38(g).**
- L. Where the determination is to preserve in place, the applicant shall develop the burial site component of the preservation plan. **HAR § 13-300-38(e).** The preservation plan shall contain:
  - 1. A description of short term measures to protect burial sites. **HAR § 13-300-33(b)(3)(A)(i).**
  - 2. A description of long term measures to protect, manage, and provide access to burial sites. **HAR § 13-300-33(b)(3)(A)(ii).**
- M. SHPD approves the preservation plan following consultation with the applicant, lineal descendants, council, and any appropriate Native Hawaiian organizations. **HAR § 13-300-38(e).** Preservation plan should set forth “appropriate treatment” of burials. **HAR § 13-300-2.**
- N. Where the determination is to relocate, the applicant shall develop the burial site component of the archaeological data recovery plan. **HAR § 13-300-38(f).**

The relocation plan shall contain:

- 1. Reasons for relocation. **HAR § 13-300-33(b)(3)(B)(i).**
- 2. Methods to be used in disinterment. **HAR § 13-300-33(b)(3)(B)(ii).**
- 3. Location where remains will be curated. **HAR § 13-300-33(b)(3)(B)(iii).**
- 4. Proposed reburial site location. **HAR § 13-300-33(b)(3)(B)(iv).**
- 5. Manner in which the reburial site will be prepared. **HAR § 13-300-33(b)(3)(B)(x).**
- 6. Short term measures to protect the reburial site. **HAR § 13-300-33(b)(3)(B)(xi).**

7. Long term measures to protect, manage, and provide access to burial sites. **HAR § 13-300-33(b)(3)(A).**
- O. SHPD approves the archaeological data recovery plan following consultation with the applicant, lineal descendants, council, and any appropriate Native Hawaiian organizations. **HAR § 13-300-38(e).**

**Note:** For more information on burial treatment plans, preservation plans, and archaeological data recovery plans, please see the last section of this outline entitled, "UNDERSTANDING BURIAL TREATMENT PLANS, PRESERVATION PLANS, ARCHAEOLOGICAL DATA RECOVERY PLANS, AND MITIGATION PLANS" on page 16.

## WHAT IS THE BURIAL COUNCIL'S ROLE WITH REGARD TO INADVERTENT DISCOVERY OF HUMAN REMAINS?

### I. Jurisdiction Over Inadvertent Discovery of Human Remains

- A. SHPD has jurisdiction over any inadvertent discovery of human skeletal remains and any burial goods over fifty years old, regardless of ethnicity. **HRS § 6E-43.6; HAR §13-300-40(a).**
- B. "'Inadvertent discovery' means the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity." **HAR § 13-300-2.**

### II. General Procedure for Inadvertent Discoveries. See HRS §6E-43.6; HAR § 13-300-40(b)

- A. Upon receipt of a report of an inadvertent discovery, SHPD shall do the following:
  - 1. Assure that all activity in the immediate area of the human skeletal remains ceases and that appropriate action to protect the integrity and character of the burial site from damage is undertaken;
  - 2. Assure that a representative of the medical examiner or coroner's office and a qualified archaeologist determines whether the human skeletal remains are over fifty years old;
  - 3. Conduct a site inspection where necessary;
  - 4. 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 human skeletal remains, to help document the nature of the burial context and determine appropriate treatment;
  - 5. Complete SHPD inadvertent discovery forms;



6. Notify the council member who represents the geographic region where the human skeletal remains were discovered and who may oversee the on-site examination and, if warranted, removal;
  7. Notify the Office of Hawaiian Affairs;
  8. Inform the landowner or its agent of the discovery if different from the person making the report; and
  9. Determine whether to preserve in place or relocate the human skeletal remains.
- B. If the inadvertent discovery consists of a single human skeleton, SHPD shall have one working day to complete the above if it is found on Oahu, and two working days on all other islands. **HRS § 6E-43.6; HAR § 13-300-40(d).**
- C. If the inadvertent discovery consists of multiple human skeletons, SHPD shall have two working days to complete the above if they are found on Oahu, and three working days on all other islands. **HRS § 6E-43.6; HAR § 13-300-40(d).**
- D. The time periods may be extended upon voluntary written consent of the landowner or its authorized representative. **HAR § 13-300-40(d).**

### III. **Determination to Preserve in Place or Relocate for Inadvertently Discovered Native Hawaiian Skeletal Remains**

- A. Where the human skeletal remains are reasonably believed to be Native Hawaiian, SHPD shall determine whether to preserve in place or relocate following the criteria in HAR § 13-300-36 and in consultation with:
1. Council members representing the geographic region in which the inadvertent discovery occurred;
  2. The landowner; and
  3. Any known lineal or cultural descendants.
- HAR §13-300-40(e).**
- B. If the ethnicity of the human skeletal remains is not established by reasonable belief, in the absence of a time extension, SHPD shall determine whether to preserve in place or relocate based on any

relevant criteria stated in HAR §§13-300-36 and 13-300-37, and in consultation with the landowner. **HAR § 13-300-40(g).**

#### IV. **Burial Site Component of the Preservation Plan or Archaeological Data Recovery Plan**

Within 90 days following a determination to preserve in place or relocate, the SHPD shall approve the burial site component of either a preservation plan or an archaeological data recovery plan. **HAR § 13-300-40(h).**

##### A. **Preserve in Place - Preservation Plan**

1. Where SHPD decides to preserve the human skeletal remains in place, the burial site component of the preservation plan shall be prepared by SHPD or with SHPD's concurrence. In preparing the burial site component of the preservation plan, the SHPD shall consult with the following:
  - a. Council members representing the geographic region in which the inadvertent discovery occurred, where human skeletal remains are reasonably believed to be Native Hawaiian;
  - b. The affected landowner or the landowner's representative;
  - c. Any known lineal or cultural descendants.

**HAR § 13-300-40(i)(1).**
2. The burial site component of the preservation plan shall, at a minimum, include:
  - a. The location of all inadvertently discovered human skeletal remains and any burial goods determined to be preserved in place;
  - b. Short term measures to immediately protect all burial sites including, but not limited to, fencing, buffers, and site restoration; and
  - c. 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.

**HAR § 13-300-40(i)(2).**

3. In order to provide perpetual protection for human skeletal remains inadvertently discovered, SHPD determinations to preserve in place shall be recorded in the Bureau of Conveyances. In addition, any affected landowner may enter into an in situ burial agreement with the State. **HAR § 13-300-40(i)(3).**

**B. Relocation - Archaeological Data Recovery Plans**

1. Where SHPD decides to relocate the human skeletal remains, the burial site component of the archaeological data recovery plan shall be prepared by SHPD or with SHPD's concurrence.

**HRS § 6E-43; HAR § 13-300-40(j).**

2. Consultation - In preparing the burial site component of the archaeological data recovery plan, SHPD shall consult with the following:
  - a. Council members representing the geographic region in which the inadvertent discovery occurred, where human skeletal remains are reasonably believed to be Native Hawaiian;
  - b. The affected landowner or the landowner's representative; and
  - c. Any known lineal or cultural descendants.

**HAR § 13-300-40(j)(1).**

3. The burial site component of the archaeological data recovery plan shall, at a minimum, include:
  - a. All inadvertently discovered human skeletal remains and any burial goods determined to be relocated;
  - b. The archaeological methods utilized to conduct disinterment;
  - c. The location and manner by which human skeletal remains and burial goods will be curated where reburial will not occur immediately following disinterment;
  - d. The reburial site location mutually agreed upon by the landowner and any recognized lineal descendant;
  - e. The manner in which the reburial site will be prepared;

- f. Short term measures to immediately protect the reburial site including, but not limited to, fencing and buffers; and
- g. 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.

**HAR §13-300-40(j)(2).**

- 4. In order to provide perpetual protection for the newly established reburial site, all SHPDal determinations to relocate human skeletal remains and any burial goods shall be recorded in the bureau of conveyances. In addition, any affected landowner may enter into a reburial agreement with the State.

**HAR § 13-300-40(j)(3).**

- 5. Reburial: SHPD shall determine the place of relocation after consultation with the appropriate council, landowner, and any identified lineal descendants. **HRS § 6E-43.6.**
  - a. Reburial shall be based on commonly accepted cultural practices as routinely recorded by SHPD or as determined by the lineal descendants, or if no lineal descendants, the appropriate council. **HRS § 6E-43.6; HAR § 13-300-40(m).**
  - b. Additional requests by lineal or cultural descendants beyond commonly accepted cultural practices, deemed specific or special by SHPD following consultation with the appropriate council, may be accommodated provided that any additional expenses incurred are paid by the descendants. **HRS § 6E-43.6; HAR § 13-300-40(m).**

## V. Inadvertent Discovery on DHHL Lands

The inadvertent discovery of Native Hawaiian skeletal remains and any burial goods on lands managed by the Department of Hawaiian Home Lands shall be governed by applicable provisions of the Native American Graves Protection and Repatriation Act (25 U.S.C. §3001). **HAR § 13-300-40(o)**.

## UNDERSTANDING BURIAL TREATMENT PLANS, PRESERVATION PLANS, ARCHAEOLOGICAL DATA RECOVERY PLANS, AND MITIGATION PLANS

### I. Helpful Definitions

- A. "'Burial good' means any item reasonably believed to have been intentionally placed with the human skeletal remains of an individual or individuals at the time of burial." **HRS § 6E-2; HAR § 13-300-2.**
- B. "'Burial site' means 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 and subsurface features, deemed a unique class of historic property, and not otherwise included in section 6E-41, HRS." **HAR § 13-300-2.**
- C. "'Burial treatment plan' means a plan that meets all necessary requirements as set forth in this chapter and which proposes treatment of burial sites, including preservation in place or relocation, submitted to the department or council, whichever is appropriate, for a determination." **HAR § 13-300-2.**
- D. As defined in HRS chapter 6E, "'Mitigation plan' means a plan, approved by the department, for the care and disposition of historic properties, aviation artifacts, and burial sites or the contents thereof, that includes monitoring, protection, restoration, and interpretation plans." **HRS § 6E-2.**

As further defined in the administrative rules relating to councils, "'Mitigation plan' means the plan setting forth appropriate treatment of historic properties, burial sites, or human skeletal remains." **HAR § 13-300-2.**

### II. Purpose of a Burial Treatment Plan (BTP)

Where unmarked Native Hawaiian burial remains are known to be present on a property, an appropriate island council "shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted." **HRS § 6E-43(b).** The type of mitigation plan which addresses the treatment of remains and must be approved by SHPD is called a burial treatment plan.

- A. Without an approved BTP:
  - 1. Known human skeletal remains over 50 years old and their associated burial goods shall not to be removed. **HRS § 6E-43.**
  - 2. Any person who knowingly takes, appropriates, excavates, injures, destroys, or alters any burial site or contents, is liable for civil and administrative penalties (**HRS § 6E-11**), or criminal penalties (**HRS § 6E-72**).
- B. As a council, you will be asked to make a determination of treatment for previously identified Native Hawaiian burial sites: preserve in place or relocate. **HAR § 13-300-33(a)**. The application for the request for determination is in the form of a burial treatment plan. To request a determination the applicant must fall within the definition of "applicant" found in **HAR § 13-300-2**, which states that "[a]pplicant" means a person representing a sufficient ownership interest in real property or a lineal descendant who requests the council or the department, whichever is applicable, to determine appropriate treatment of a burial site or human skeletal remains and any burial goods or both, located at, or originating from, the real property."

### III. Procedure in Obtaining Approval of a Burial Treatment Plan

The process begins when an applicant submits a BTP to SHPD and consults with SHPD regarding the sufficiency of the BTP application.

#### A. Required Contents of the BTP

Prior to the council's determination, an applicant submits the BTP to SHPD to gather information to aid in the council's decision. Upon receiving a BTP, SHPD checks the BTP to ensure it contains:

- 1. Evidence of good faith search for lineal & cultural descendants including:
  - a. research of land conveyance documents;
  - b. inquiry to persons with knowledge of families possibly affiliated with the remains;
  - c. publication of notice in newspaper of general circulation, for at least 3 days, containing at a minimum:

- i. general property description - identifying features, TMK, ahupua`a, district, and island;
- ii. names of individuals or families (including land commission awardees) associated with burial site or property;
- iii. name, address, telephone number of applicant and SHPD contact person;
- iv. brief statement of proposed treatment for the burial site;
- v. statement for interested persons to respond within 30 days and provide information to SHPD showing descent from the Native Hawaiian remains, or ancestors buried in same ahupua`a/district as *iwi*;
- vi. may also publish in Ka Wai Ola O OHA; and
- vii. must append proof of publication notice to BTP.

**HAR § 13-300-33(b).**

- B. Names of known lineal or cultural descendants recommended by SHPD and recognized by council, and their positions regarding burial site treatment (i.e., whether to preserve in place or relocate). **HAR § 13-300-33(b).**
- C. Proposed treatment for all burial sites on the property: whether to 1) preserve in place or 2) relocate. **HAR § 13-300-33(b).**
  1. If preservation in place proposed, the BTP should contain statements describing:
    - a. Short term measures to immediately protect all burial sites including fencing, buffers, and site restoration; and
    - b. Long term measures to manage & protect all burial sites including buffers, landscaping, and access by known lineal/cultural descendants.

**HAR § 13-300-33(b).**
  2. If relocation is proposed, the BTP should contain a statement describing:



- a. Reasons for relocation;
- b. Methods used to conduct disinterment;
- c. If no immediate reburial after disinterment, the location and curation of *iwi* and any burial goods;
- d. Proposed reburial site as agreed by landowner and any recognized lineal descendant;
- e. Manner of preparation of the reburial site;
- f. Short term immediate protection of reburial site, including fencing and buffers; and
- g. Long term measures to manage and protect the reburial site including buffers, landscaping, access by known lineal/cultural descendants.

**HAR § 13-300-33(b).**

- 3. Maps clearly indicating the location of all identified Native Hawaiian burial sites on property, including where applicable, the scale map of spatial relationship between Native Hawaiian burial sites and any proposed construction activities.

**HAR § 13-300-33(b).**

- 4. Applicant's name and mailing address (landowner's name and mailing address if different from applicant).

**HAR § 13-300-33(b).**

- 5. The property's TMK, ahupua`a, district, island.

**HAR § 13-300-33(b).**

- 6. Present condition description of all previously identified Native Hawaiian burial sites at property.

**HAR § 13-300-33(b).**

- 7. Any project plans requested by the council including construction and grading plans.

**HAR § 13-300-33(b).**

- 8. A copy of the archaeological inventory survey report where requested by the council.

**HAR § 13-300-33(b).**

Also where applicable:

9. Proof that archaeological inventory survey report has been accepted by DLNR.

**HAR § 13-300-33(b).**

10. Any additional archaeological inventory level testing reports recommended by the council, reviewed & approved by SHPD.

**HAR § 13-300-33(b).**

11. Any other information the council deems necessary to make a fully informed determination (all council requests for additional information shall be done in a timely manner). **HAR § 13-300-33(b).**

- D. The council may request a site visit.

**HAR § 13-300-33(d).**

- E. After the applicant consults with SHPD in the development of a BTP, and SHPD checks that the information is sufficient under HAR § 13-300-33(b), SHPD approves the BTP for submission to the council.

**§ 13-300-33(c).**

- F. Following SHPD's approval of the BTP, the applicant may request in writing that the BTP be placed on the council's agenda for determination. **HAR § 13-300-33(c).**

- G. Prior to making a determination, the council may request site inspections of the property where the burial site is located. **HAR § 13-300-33(d).**

- H. At any time prior to the referral of the matter to the council for determination, the applicant may submit a written request to make an informational presentation of the proposed burial treatment. **HAR § 13-300-33(e).**

- I. The applicant may also revise or withdraw the BTP at any time prior to the council's determination. **HAR § 13-300-33(g).**

- J. After SHPD accepts the BTP and the matter has been placed on the council's agenda, the council shall render a determination to preserve in place or relocate previously identified Native Hawaiian burial sites within 45 days. **HRS § 6E-43.** The 45 days may be extended by agreement between the landowner and DLNR. **HAR § 13-300-33(f).**

**IV. Acceptance by SHPD of a Council Determination on a BTP**

- A. Within 10 business days of the council's determination, SHPD notifies the applicant in writing of (**HAR § 13-300-38(b)**):
1. Any recommendations relating to burial site treatment accepted by the SHPD.
  2. If the applicant disagrees with the determination, the option to either request reconsideration to the council based on newly discovered information as per HAR § 13-300-38(c), or appeal via contested case per HRS § 6E-43 & HAR subchapter 5.
  3. If the applicant accepts the determination as final, the burial site component (to a preservation plan or archaeological data recovery plan) is to be developed by the applicant and submitted to SHPD within ninety days.
- B. For council determinations to preserve in place or to relocate, within 90 days of council determination, SHPD shall approve the plan following consultation with the applicant, any known lineal descendants, the appropriate council, and any appropriate Hawaiian organizations. **HRS § 6E-43(d); HAR § 13-300-38(e)&(f)**.
- C. All council determinations to preserve in place or relocate shall be recorded in the bureau of conveyances by SHPD following acceptance by the applicant, or upon completion of reconsideration or appeal. Any affected landowner may enter into an in situ burial or a reburial agreement with the State. **HAR § 13-300-38(g)**.

**V. Preservation Plan (a Mitigation Plan)**

- A. In the event that the council's final determination is to preserve in place, the applicant "develops" the burial site part of a preservation plan (which is a form of mitigation). **HAR § 13-300-38(e)**.
- B. "'Preservation plan' means the form of mitigation that sets forth appropriate treatment of historic properties, burial sites, or human skeletal remains which are to be preserved in place." **HAR § 13-300-2**.

VI. **Archaeological Data Recovery Plan (a Mitigation Plan)**

- A. If the final accepted determination involves relocation of burial sites, the applicant develops the burial site component of an archaeological data recovery plan (which is a form of mitigation). **HAR § 13-300-38(f)**.

The archaeological data recovery plan is prepared by a qualified archaeologist according to the requirements indicated in HAR § 13-278-3 (preparation of a data recovery plan).

- B. "'Archaeological data recovery plan' means the form of mitigation that archaeologically records or recovers or both, a reasonable and adequate amount of information as determined by the department, from a significant historic property. With respect to a burial site, this plan includes the disinterment of human skeletal remains and any burial goods and may involve the recording of a reasonable amount of information from the burial site if specifically authorized by the council or department, whichever is applicable, following a determination to relocate the contents of the burial site." **HAR § 13-300-2**.