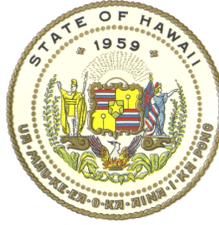


DAVID Y. IGE  
GOVERNOR OF HAWAII



SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
FIRST DEPUTY

M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
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FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHO'OLAWA ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

STATE HISTORIC PRESERVATION DIVISION  
KAKUHIHEWA BUILDING  
601 KAMOKILA BLVD, STE 555  
KAPOLEI, HAWAII 96707

**MINUTES  
HAWAI'I ISLAND BURIAL COUNCIL MEETING**

**DATE:** Thursday, July 18<sup>th</sup>, 2019  
**TIME:** 9:30 AM  
**PLACE:** Division of Forestry and Wildlife  
Conference Room  
19 E. Kāwili St.  
Hilo, HI 96720

**ATTENDANCE:**

**HIBC Members:** **Present:**  
Chair Nālei Pate-Kahakalau (Hāmākua)  
Vice-Chair Kalena Blakemore (Puna)  
Member Waiola Higa (Hāmākua)  
Member Norman Ka'imuloa (Kona)  
Member Clifford Kapono (Hilo)

**Absent:**  
Member Scott Mahoney (Ka'ū)

**SHPD Staff:** J. Kea Calpito, Burial Sites Specialist  
Chris Omerod, Burial Sites Specialist

**I. CALL TO ORDER**

*Chair Kahakalau calls to order the meeting at 9:41 AM.*

**II. ROLL CALL/PULE**

*Chair Kahakalau conducts pule.*

*Clifford Kapono, Waiola Higa, Norman Ka'imuloa, Nālei Kahakalau, Kalena Blakemore.*

**III. MINUTES**

**A. Approval of the Minutes for June 20, 2019.**

**MOTION:** To approve the minutes as is  
**MOVED BY:** Vice-Chair Blakemore

**2<sup>ND</sup> BY:**                    **Member Kapono**  
**VOTE:**                      **Motion carried unanimously**

#### **IV. BUSINESS**

- Member Kapono stated, “Chair, I’d like to, just before we schedule the business, I think there’s some business that we need as a council to address. That is when burial plans are being submitted, legally it’s a mitigation plan and so that lineal and cultural descendants have the opportunity to petition the condition of their iwi kupuna, relative to their legal status from the council. What we’ve been asking, in addition, is an audit performance-based plan. So that we would know whether or not the conditions within that burial plan is being conformed to. We had mention that either it be monthly, quarterly, bi-annually but we need a provision on an audit that we can go back to make sure there is compliance with whatever that mitigation plan composes of. Secondly, what id like to propose in a motion is that we have a performance bond mandatory by whoever submits the mitigation plan, that being the developer or the archaeological firm to ensure that any lineal or cultural descendants making an appeal to the process or as a result of mismanagement or negligence of the plan, that there are funds available for them to retain council. And, this comes because of this, recent activity on Mauna Kea, we all know what’s going on. That energy cannot be a circle thing of protest in violation of our rights that result in the arrest of kānaka maoli only to just continue. So, that serves as a blueprint. This issue on Mauna Kea, part of it is that developers have failed to meet a performance bond equal to the amount that has been budgeted, the \$1.4 billion dollars. Now, I’m not going to get into that because that’s not my concern here. But my concern here is that if that was a condition the State accepted that they have in their permit a performance bond then the performance bond criteria should be applicable here to any findings found or any deviation or negligence because of a failure to perform. This performance bond would kick in so lineal and cultural descendants would have financial resources to make their plea to the council and/or to the court. So, with your permission I would like to motion.”
- Member Blakemore asked for more clarification. Member Kapono responded, “The purpose of this is, people come and find that their iwi have been displaced, negligence, accidental findings and they come here. Now, the mitigation plan or the burial plan is simply a mitigation plan. It does not prevent any person from bringing a legal cause of action outside of that which could include litigation. So, do they have the funds or the knowledge of the process? More than likely not, that’s been my short-term experience here seeing people coming forward not really understanding their rights. What we see on Mauna Kea though there are rights alleged that we have, they are clearly being violated. Stepping outside of that argument into an economic condition is that if we have the money to pursue the question legally then that would be provided. The performance bond provides an opportunity for the plaintiff to access to funds to mitigate the condition that they’re arguing for.” Chair Kahakalau asked if everyone understood the motion. Vice-Chair Blakemore asked who pays for the performance bond.
- Member Kapono stated, “The developer or the land owner or whoever it is where that iwi is because of standing. The only people who have standing in these cases are those that are being impacted. Clearly, the kupuna iwi have been impacted by dereliction of duty or the failure to provide a safe situation based upon how kanaka maoli see the iwi. In western cognition the iwi is seen at the same level as other funerary objects, but, there’s been an exception with NAGPRA, the Federal law, that speaks specifically to how we see the iwi that it contains the mana in that iwi that cannot be disturbed. The shifting and removing of iwi changes the frequency of that energy. The federal law recognizes this. We have an exception to their thinking which is rational because that’s not us. So, were here because of what, to support the po‘e haole mana‘o about what the iwi is? And why is it that we sit here as

kānaka, to represent who? We clearly see what's going on at Mauna Kea, is our constitutional rights being violated by the current Ige administration. That's his choice of doing even though in my opinion it might be criminal. But that we not allow this to continue within our scope of authority. As I understand my presence here, I've been appointed by the Governor and confirmed by the Senate. So, I am here as a matter of law, I'm not here as an employee of DLNR, associated with them. I'm not a sub-contractor and I in my impression I represent the kānaka maoli. We are the lineal descendants of all the iwi that are here. These violations that have been occurring since god knows when, continue with no true satisfaction to the plaintiff coming forward. A lot of that is predicated upon the lack of funding to have adequate council to represent them in their plea. If money is an issue, what this motion does is eliminate that. The developer would have to provide a performance bond to meet the financial needs of those bringing the complaint forward. Any questions to that, that can be more specific or clear?"

- Vice-Chair Blakemore stated she thinks that's a good idea but is not sure how it would be operational because she thinks there is a blueprint or template for burial treatment plans that the archaeological firms go by. She added that she's wondering if a performance bond is something that has to go through legislation to have them make amendments. Member Kaponu responded, "No." Vice-Chair Blakemore added that she knows the audit provisions have been brought up a few times and she agrees with it knows Escott was willing to take a look at that and maybe be the pathfinder for setting that tone for BTPs. She said that the council can put it in, make a motion, and pass it but is just not sure how it would be executed. Member Kaponu responded, "We had a condition here by policy where it says that if we didn't have a quorum that's defined by the DLNR, we could not vote on these issues. We passed here, declaring that this council regardless of whatever, if three people are here than three people are going to vote and the majority of the votes will determine the outcome. Set outside of the practice or customary procedure that DLNR understands. What I'm arguing is that we're a council, I don't need any archaeologist approval for what I decide. I don't need the rule of the government to influence me. I will challenge that based on my own criteria and my own background. What I am expressing to you about this performance bond comes two-fold from my legal and my business background. You can verify this not with a potential plaintiff who would dissuade you but, what is to be considered true and acceptable practice."
- Member Higa asked Member Kaponu if requiring a bond is within the scope of the council's authority or mission. Member Kaponu responded, "Good question. This is what I've composed from day one. Do we understand the scope of our authority? This is why I say to you, you have to ask yourself, why are you here? Because, what? and look at the complexion of the people that are here, why are we sitting here? Given what happens in the community and in these islands, why are we here? Why was it that Prince Kūhiō had to sign off on the Hawaiian Homes Commission Act? Why did he do that? Because there is this issue of standard. Who can make a complaint about the iwi kūpuna other than a kānaka maoli. What we have to see clearly is we have to understand why we're here. I'm not asking any of your permission, I know why I'm here. I'm acting upon that scope of authority that I would like to believe to be true. Now, what I've been led to believe is not true and the total value exceeds \$750, that's criminal in intent and fraud and that's settled in criminal court. Then it comes back to civil court to take care of the administrative differences. So, what we have to realize is that we are also liable to be sued, each and every one of us, individually and collectively. Given the condition right now, if that's a function of the AG's office then that's just piss poor. Another condition still in the background from day one, I've asked where is the presence of the AG's office. Why are they continually negligent? Now to get an opinion from somebody in DLNR is not the request. As a council member my request have been maligned for no good reason, there has been no answer. We have taken that, because the AG does not answer, we have seen them as being negligent. This is all so far just the narrative in conversation. But, when there's money on the table I think that's going to get their attention."

The same way with our travel expenses, they have use and enjoyment of our funds for more than 30 days and they don't pay a penalty for that. They need to wake up. Now, I don't know jack about anthropology, but I know about business and I know about fraud and these are the answers that I want. You can do whatever you want to do based upon what you know and I'm acting the same way based upon what I want to do and what I know. I want specific answers. This performance bond puts pressure on whoever says they're going to do something and in the event that they don't, who pays for that? By example, this energy on Mauna Kea, it's got to reverberate in some type of policy or law. Otherwise, what are we going to do? Keep sending kupuna up there to get locked up and arrested. That's insane, the fact that it happened is insane. So, that activity, that cause dribbles down to this Burial Council. To this effect that I'm arguing for a performance bond to ensure any plaintiff, any person coming forward with a complaint. Money cannot be an issue to bring the complaint forward. That is the purpose, the sole purpose, and I don't need anybody's approval for that. You should be able to see clearly your brothers and sisters in the community that are coming forward, are they knowledgeable? Do they have the experience that you have about the Burial Council? No, so they are already at a disadvantage. They are counting on us. what you do with that responsibility and how you see it, that's your thing. I see it from my responsibility because I know this is a condition that will put heat on them to make sure it's done and in the event that its not done then they've got this. So, I'm going to make this motion, you can vote how you desire but, just making sure you understand what I'm making a motion for."

- Chair Kahakalau stated that he is going to second the motion because he likes the intent and thinks that the council needs to push that envelope. Member Higa asked if he though this is within the scope of their responsibility to require that someone pay money. Chair Kahakalau replied that as far as he's concerned, based upon what Member Kaponu was able to explain and knowing his expertise in those fields, he feels very confident to supporting these kanaka who come forward, to help them to have the funds if need be to support mitigation or litigation that may come down the pipe. He stated that he thinks that the scope of the burial council needs to be expanded. Member Higa said that he agrees with it but is just wondering if its within their scope or are they going to lose something because of it. Chair Kahakalau replied that they wouldn't know until they give it a shot.
- Member Kaponu stated, "To be clear this performance bond is like an insurance policy. Alright. So, it a part of the development operation. Which the developer deducts against his earnings. So, nobody's out of pocket on this action. Alright, this is just finer more professional approach from the council to deal with the issues coming forward for people who have been disadvantaged to some extent. So, that should not be the issue because the people coming forward, its their iwi that they're here talking about, not ours, but, we as lineal descendants, collectively, we have an implied responsibility."
- Member Kaimulua asked how is this going to be put in motion now, that if when the person comes to them and they get the approval to go ahead with their project, do they have to put a bond down at that time to proceed the project, to protect the project that is going to be completed as they say in the burial treatment plan, and when does this take effect. Member Kaponu responded, "So, for example, this is the mitigation plan that is being presented to us. Somewhere in this mitigation plan they would have to cite what the audit provision is for compliance, that within a certain period of time they'll make sure that they are doing what they're advocating. In the event that they don't do that then a provision for a performance bond kicks in to cover the associated cost to make this right."
- Member Kaimulua asked if the performance bond should be put down first, if it's not used then they'll always get it back. He added that he would like to see that they put the bond down first and if something happens then you got the money there and that if they don't make them put the money down and something happens, they are not going to get it. Member Kaponu replied, "What we're asking for is the performance bond to be included in the burial

plan and without the performance bond, without a compliance provision of an audit then, I know I'm not going to vote for it. I might vote on "oh yeah, yeah happily ever after, we going do em" and they no do em then what? And then like "oh, cost too much" how many times "oh, well you know the State doesn't want to move cause of this and that." Get that performance bond in there. This puts money back in the wala'au. So, you can talk whatever you want, that thing doesn't come down somebody is going to make that thing right and we're going to have the financial resources to make sure that's done. We meaning, speaking for those plaintiffs that come forward making an argument to secure their interest for their family. Protecting that iwi. So, we have to like push it out in our thinking not only protecting our iwi in the 'aina and that but now we got to protect them in the court. We've got to protect them in this legislation that though they say we have constitutional rights, where's that, that happened on Mauna Kea, people coming to pray, to gather, to speak and they're being arrested. Come on, we got to wake up. That's happening right now and you want to get an opinion from somebody else or ask somebody else. Come on, wake up."

- Member Higa asked for clarification. Member Kaponu replied, "Well, in that audit it's a compliance condition so that the proposal offered and the offer, this is part of the contract. These are the conditions they got to meet. So, this condition has got to have a compliance provision that says we're going to look at this every sixty/ninety days to make sure it's done. Somebody's going to look at it and if you breach that then the performance bond is going to cover the cost to mitigate this and it's going to be the cost of those coming forward who are making this complaint to us. Otherwise, what are we doing here? Playing secretary."
- Member Kaponu stated, "What corrects all of that, what satisfies all of that is in the offer. So, when the offer, when they say this is what we're going to do for the burial plan. They're also saying that we are going to audit this to make sure we're in compliance. Now, if they don't that's fraud. If the values over \$750 someone's going to jail then they come back to civil court, now they are going to pay. That's how that works. Ok. So that what you're saying is covered by us asking for this compliance provision. But, in addition, and we've already asked for that and we've already made the motion that we would do that. The second thing now is that we're motioning, we're asking for a performance bond to make sure that in the event that they do pale on this deal, they don't come through then the bond kicks in to give the, in this case it would be the plaintiffs."
- Member Kaimulua agreed that it's a good idea and that the council should approve it and let it kick around. Member Kaponu replied, "Well, I don't know about kick around, we going kick around how long? 200 years down the mountain, enough already. So, either we're enabling the negative condition or we're leading something that means something. Just getting arrested and going to jail and what? that's, pau already with that. We need to take this forward. So, what I'm saying, by example, the energy that's created on Mauna Kea now is pushing forward and I see it as coming out to impact us within our scope. And, what can we do other than be more professional? Have a sharper pencil to the drafting of this business and to be able to look and review this with a critical eye. Not meaning to namunamu action but, to see where this can be more efficient for everyone. Now, the developers themselves, if they want this done then that is the cost of doing business."

**MOTION:** Every burial plan presented to the Big Island Burial Council include a performance bond equal to the value of the total asset being spoken to, not specifically to the area where bones are found

**MOVED BY:** Member Kaponu

**2<sup>ND</sup> BY:** Chair Kahakalau

**VOTE:** Motion carried unanimously

**A. DRAFT Burial Treatment Plan for Burial Site #50-10-57-30593 Located in Hōlualoa 1<sup>st</sup> Ahupua‘a, North Kona District, Island of Hawai‘i, TMK: (3) 7-6-021:017.**

**Discussion/Determination:** Discussion and determination on whether to preserve in place or relocate human skeletal remains at the above location.

Recommendation to the State Historic Preservation Division whether to accept or not accept the above DRAFT Burial Treatment Plan.

**Summary:**

- Glenn Escott of SCS, Inc. informed the council about the changes that were made to the BTP based on discussion at the previous HIBC meeting.
  - The buffers were expanded to include a larger preservation area as well as the other opening to the cave;
  - Wording was added regarding the lauhala to be “locally made” at the request of Member Ka‘imuloa;
  - In the event of future development, an easement will be placed closer to the site than its current location.
  - Under maintenance, an annual inspection of the preservation measures will be conducted by the property owners and recognized descendants will be welcomed to attend and any damages will be reported to SHPD.
- Member Kaponu asked, “Is there is an audit provision plan to ensure compliances?” Escott replied there will be annual inspections as stated in maintenance. Member Kaponu asked, “What’s your definition of maintenance?” Escott responded, the upkeep of the preservation area and read the language stated, “Annual inspections of the preservation measures shall be conducted by the property owner to ensure compliance with the preservation measures outlined in this BTP. Recognized descendants are welcome to inspect the preservation measures as well. Any harm observed to the burial preservation area and preservation measures arising from intentional or unintentional acts, including neglect, will be immediately reported to SHPD.” Member Kaponu stated, “Thank you very much, now the only thing your report is missing is a performance bond. A performance bond to ensure compliance based upon the total value, the total asset, so it’s not where the bones are found but the total property so if it’s 100 acres, total value, comparable value of 100 acres will be the amount of the performance bond.”
- Chair Kahakalau asked if Nicole and Curtis were ok with current buffers around the lava tube. Vice-Chair Blakemore added that they didn’t respond. Escott replied that they didn’t, but he knows that Nicole was ok.
- Chair Kahakalau explained that there are two motions to be made, one to preserve in place or relocate and the other, to accept the Draft BTP. Member Kaponu asked, “So, how does this work then? We approve a burial plan in phases, or do we approve the plan in total?” He added, “Given now that compliance includes this performance bond, it would appear to me that we’re not able to vote on this because its incomplete.” Chair Kahakalau replied, yes, for the BTP, but we still vote on the burial, to preserve the burial in place and in the past, they’ve always voted for the two separately. Member Kaponu stated, “I know, I appreciate that but we’re changing things a bit so that, if we’re gonna include a compliance provision to this, now we need a provision to ensure that there is a performance bond, I’m of the opinion that we cant vote on this unless it is employed, that if we in fact vote on it in part, we contribute to the negligence and contribute to a potential error in the outcome which I argue it will fall back on us, so what I’m advising the Chair and the council is that we be more diligent about what it is that we accept and that we vote on something in total rather than in fragments or parts.” Member Higa agreed that now that the council voted on the performance bond, they needs to follow

through with these motions. Vice-Chair Blakemore asked Member Kapono if he thinks they shouldn't vote on preserve in place and that she feels they can vote to preserve in place. Member Kapono responded, "We're either gonna vote in total or were going to vote in part." He added, "So now we have voted as a council to accept the performance bond as part of the offer, it becomes contractual, and I would hope that we would apply by that, which we all just voted for." Vice-Chair Blakemore stated that she appreciates the diversity of the council and she's ok with what she stands for and what she does, and that she would feel better if the council voted to preserve in place because they would at least be speaking for the iwi, and the missing performance bond can be included later in the BTP. Chair Kahakalau stated that in the 90's, it was all clumped into one, and there was a lot of kuleana, but they wanted to make sure the iwi was protected in place.

- *Vice-Chair Blakemore motions to preserve in place and Member Ka'imuloa seconds.*

**MOTION:** To preserve in place  
**MOVED BY:** Member Blakemore  
**2<sup>nd</sup> BY:** Member Ka'imuloa  
**VOTE:** Motion carried by majority [YAY: 4 (Higa, Ka'imuloa, Kahakalau, Blakemore); ABSTAIN: 1 (Kapono)]

**B. DRAFT Burial Treatment Plan for Site #50-10-27-18511, Lili'uokalani Trust Lands in Keahuolū Ahupua'a, North Kona District, Island of Hawai'i, TMK: (3) 7-4-025:015.**  
**Information/Discussion:** Information and discussion on the above Burial Treatment Plan.

**Summary:**

- Mara Mulrooney from Pacific Legacy, Inc. and Mana Purdy from Queen Lili'uokalani Trust (QLT) provided background information on the project and Draft BTP.
  - The burial is located on the Kona Commons Parcel;
  - There are 30 ft. buffers that were created in back 1993. In preparation of development, a 2014 Supplemental AIS was conducted to relocate the sites identified in the area.
- Member Kapono stated, "The 2014 Supplemental Archaeological Inventory spoke to the short-term activities. So, if there was any long-term projection as to the impact and potential other iwi that might be discovered inadvertently." Mulrooney explained that this step was to document the historic properties in the area and the next step will be to develop preservation plans and data recovery plans that will include information on dealing with further inadvertent discoveries.
- Purdy explained his involvement with descendants Nicole Lui, Jimmy Medeiros, and Paulette Kaleikini and visits to the location to talk about including additional preservation measures.
  - Preservation of the entire pu'u rather than just burial location;
  - Relocation of the road at the south side of the pu'u that will allow for protection of the pu'u.
- Mulrooney stated that the plans were submitted to the descendants for review before it was submitted to the council and SHPD for review. Chair Kahakalau asked if the descendants agree with the current Draft BTP. Mulrooney replied that they are satisfied with the current Draft BTP and began to explain the protection measures.
  - Short-term protection measures include:
    - Extending the temporary buffer to include the full preservation site;
    - Information of preservation site will be included in all construction plans;
    - Archaeological and cultural monitors will be present during construction;

- Construction crews will be briefed before any ground disturbing activities.
  - Long-term measures include:
    - Sealing of the lava tube with locally sourced stone and cement;
    - 2 ½ ft. wall around the preservation site with signage;
    - Annual site visit and descendant access
- Member Higa asked if this site is going to be surrounded by commercial activity and its designated as open area, can you define open area? Purdy responded to the council that the area where the preserve is located will be a grass area with no buildings and that at the request of the descendants, there will be no buildings overlooking the site. Shade trees, a bench and a walk way may be included in that area. Member Higa questioned the foot traffic from the parking lots around the open area and asked if there will be a chain-link fence between the parking lot and the open area. Purdy informed him that there were no plans for that but he can speak with the descendants regarding a fence or shrubbery to deter foot traffic.
- Member Kaponu asked, “Could you direct me to where there is a compliance provision in the burial plan?” Mulrooney asked for clarification. Member Kaponu stated, “To make sure that what you’re saying has an audit provision to ensure that this is going to be consistent 20, 30 years from now.” Purdy replied on page 45.
- Vice-Chair Blakemore requested that the rock wall be built before construction begins and the orange fencing be removed and that she’s glad to know there will be cultural monitors present as well. Member Ka’imulua stated that in the past, he’s seen the bulldozer run over the orange fencing. Member Higa concurred, that he likes the idea of building the wall first. Purdy mentioned that the orange fencing also brings attention to the site to deter homeless from going into the site. Member Ka’imulua stated that the orange fencing won’t deter homeless from wandering into the preservation areas and nowadays, they’re going anywhere they can. Member Kaponu added, “But they have the intent to provide security by monitoring the site and the only thing that we can do is to accept them for what they are submitting and in that, thank you for doing that, but as an addition to that, I’m sure you heard from this morning that we now have a performance bond to ensure compliance with this, so in my opinion, that I cannot vote on this until the package is full.” Mulrooney stated that today was just for presentation and to discuss it with the council first and that they were not seeking a determination until next time when Nicole is present.
- Chair Kahakalau asked for clarification on the permanent buffer and stated that he has concerns with the wording on page 45, site access, “and other individuals wishing to visit the burials for cultural purposes.” He asked what the cultural purposes would be and why would non-family members want to have access to that place. He explained that the descendants have a say when it comes to other individuals and who they are and used the phrase “mai maha’oi, that’s not your place, that’s not your family burials, don’t go there unless you’re invited there.” Purdy replied that the intent of the language was to allow for beneficiaries, the keiki to be able to give ho’okupu.

**C. Discussion on Hawai‘i Island Burial Council Membership, Roles, and Responsibilities.**

**Information/Discussion:** Presentation by Kai Markell, Office of Hawaiian Affairs, on Burial Protection Laws and Rules.

**Summary:**

- Kai Markell from OHA introduced himself to the council and provided background info regarding his experiences:

- Worked at the DLNR Burial Sites Program for 10 years and it was a distinct burial sites program during that time;
- Shifted to OHA for the past 15 years and since 2010, has worked as compliance and enforcement;
- Wants this to be a basic free flowing discussion to empower the council without getting bogged down;
- The Department will help to interpret the rules and the council should have legal advice from the AG as they are Governor appointed and making decisions on people's rights – members are left defenseless without counsel and the lack of an AG has been a longstanding issue;
- In the past, Halealoha and himself (Markell) would attend IBC meetings and help interpret the rules;
- HIBC is facing similar issues with the other islands and OHA needs to help the council and do what they can.
- Markell discussed the organization and establishment of IBCs:
  - The law was changed to protect unmarked graves more than 50 years of age and that people think “unmarked” means that there's completely nothing there, such as a headstone or feature, though you can have a headstone and a name because those are in just as much jeopardy as burials where you don't know what's there. Unmarked means that it is not marked on a cemetery map at the Department of Health but they don't really maintain an active list;
  - Member Kaponō asked, “Could the Big Island Burial Council create a database for the inventory of cemeteries that we know?” Markell replied, sure, that it is one of SHPDs core functions, in 6E, to assemble an inventory, to register burials ahead of time, so the council could recommend to the Department that they want to work with them in creating this list of cemeteries. Member Kaponō asked, “As a council don't we have that fiduciary responsibility by appointment?” Markell replied that they do have a responsibility to help protect burials, just like SHPD and that they're part of this system. He says that they should also know that they are an agency within themselves and is administratively attached to DLNR. DLNR will work with them and give them advice but they're still a little separate from DLNR. He said he was told by the AG at the time (when he was working for DLNR) that the burial councils are its own agency and they can technically sue SHPD just like SHPD can sue them, it's not like they're all together in one group. Member Kaponō asked, “If in fact a council member brought a complaint, would we sue the chairman as a council because the administrative functions is handled by DLNR rather than going directly to DLNR?” You have to have some kind of legal basis for your cause of actions because you can sue anybody, but with lawsuits you always want to use the administrative processes, such as asking for a contested case, before you sue because you always want to . Member Kaponō asked, “Can we sue in federal court because of NAGPRA?” Markell replied that you have to have a federal claim, if it was a NAGPRA case, such as at for Pōhakuloa because its military land so if that was an issue that would under NAGPRA and federal jurisdiction. One of the issues is whether NAGPRA applies to SHPD because in the past, NAGPRA only applied to federal land. NAGPRA also applies to DHHL. Member Kaponō asked, “How do we leverage NAGPRA for our best interest because the HRS is a revision of NAGPRA isn't it?” Markell replied that NAGPRA and HRS both happened contemporaneously, though NAGPRA was looking at American Indian museums, Smithsonian, the collections, a movement to give the remains back to the American Indians. While this is happening on the continent, in Hawai'i at the same time was Honokāhua so they had the same

pathway and came into play and that NAGPRA was impacted by 6E more so than vice-verse. NAGPRA is going to deal with human remains and funerary objects.

- Vice-Chair Blakemore asked about Hale O Keawe and the ki'i that were stolen by officers of the H.M.S. Blonde and taken to Europe, and whether those be considered a funerary object. Markell replied that that's an active case right now and discussed other similar cases.
- Under NAGPRA, the burial council is considered an NHO, a Native Hawaiian Organization, and they have responsibility under 6E to preserve in place or relocate remains because that's their primary function. Preservation in place or relocation is their number one authority here. He said if an applicant disagrees with the determination, that there is an appeal process, a contested case hearing, which involves three burial council members and three land board members.
- Your focus is very simple...it's iwi. Why? Because all this law, 6E, is based on history and common law and common law for America and England and unfortunately were under that Western law, who has a right to go claim a body at the morgue...the next of kin, it's always family and that's recognized in common law, that the family has the right for disposition. When the council sits here, they are representing the family of the iwi when the family can't be found. You can recognize people as lineal or cultural descendants. The rules say they recognize them based on a recommendation from the Department, but not necessarily in accordance with the Department's recommendation. The council can also defer if they need more information from the applicant. Just because someone is lineal doesn't mean they have the final say, they just have more weight in their testimony. Member Ka'imuloa stated that he was told that when a person claims lineal, it's almost 100 percent guarantee that they're lineal because there was a case where a name was given by someone else in the family but someone else said they weren't family and they wanted the council to approve this person's claim but family came and said that this person was not related to them. He asks, if its true that after they do their investigation and the case is brought to the council to recognize them, is it the slam bam guarantee? Markell replied that in his experience, lineal has been rather difficult to achieve under the State. There's not many lineal descendants that get approved. The council can also vote the lineal descendant out. Member Ka'imuloa stated, a lot of cultural descendants that come forward are always the same people. How can they be cultural in so many different places and be recognized? Markell replied that that is one of the issues with cultural descendants right now, that it's great many people want to get involved with the iwi, but there are people who may have a closer connection to the iwi, even though based on the rules, all these different people can come forward by definition. He said some people might trace back to ali'i who received large tracts of land, but that didn't mean they necessarily lived or are buried on that 'āina. He posed the question, why do you want to claim this iwi, what's your mana'o? He said sometimes people will claim iwi because they want to claim land. The outcome of being recognized as a descendant is that their testimony is given more weight in the burial treatment plan, however, the it's the council who decides how they want to take the weight of that testimony and trusting their na'au.
- There are two types of site visits, the inadvertent discovery where SHPD goes out and they notify the police if they haven't already been notified and the regional burial council member for that area. That's a site visit you can go to and it will usually be short noticed, and the landowner is going to be there and that's important because SHPD kind of has police powers to access private property so

that would be the best time to go. The other is the previously identified, which are in the burial treatment plan, and council members can go to those too and if the whole council wanted to go, they it would need to follow the Sunshine Law.

- The HIBC can present a request to place the issues occurring on Maui on the HIBC agenda so that the council can discuss it. The council is not limited to Hawai‘i Island in their discussions.
- The council’s primary power and kuleana is the decision to move iwi or to preserve in place. That’s it. Everything else under the sun is recommendations. They can recommend to the Department that they do some research on Kakanilua. It’s safe to say, the council can make recommendations on any and all matters related to burials because they’re only recommendations, they’re not determining anybody’s fate. SHPD unfortunately will have to figure out who will be impacted, but the council can make motions. Member Kaponu, asked “In our scope of authority we have two functions, recommendations and the decision, and the decision is to bury in place or relocate?” Markell replied, yes, that’s the primary function, to preserve in place or relocate and everything else is recommendations, such as making a recommendation to have tī leaf at a burial site, then the Department would hopefully take it and have the landowner include that in the BTP, and though they’re only recommendations, they’re powerful recommendations. Member Kaponu asked, “So like in this compliance for an audit and now this motion to have a performance bond, these are recommendations that we vote on which are like part of the contract?” Markell replied that what the council wants to do is to make sure that everything they vote on is on the agenda because if not, the decision can be challenged and nullified.
- Member Kaponu asked, “How is it that we’ve made a plea for an AG to be here since I’ve been here for over a year and they don’t even answer?” Markell said that’s the problem we want to address, what will compel the AG to come is to start asserting their [the council’s] rights. Member Kaponu stated, “So we collectively should sue DLNR?” Markell replied that the council would need money and lawyers. Member Kaponu stated, “That’s why I was talking about NAGPRA, can we leverage NAGPRA to call the Justice Department, the feds to sit on these guys?” Markell replied that what the council needs is a methodical plan to empower themselves, which is what they’re doing by simply being present at these meetings and now moving forward with trainings.
- 6E is one of the strongest burial laws in the United States but it’s not being implemented well. There’s always underfunding and understaffing at DLNR. It’s not a priority for any administration so everyone suffers.
- In 1998, there was a summit on O‘ahu for the IBCs. The councils shared their concerns and notes were taken. Notes from Hawai‘i Island:
  - Strengthen the cultural aspects by identifying iwi as our kuleana;
  - More networking with the community;
  - More statewide conferences;
  - Education and communication, include ‘ōpio in education, networking, and decision making – invite charter schools to attend IBC meetings;
  - Establish community support groups;
  - Continue the education process from past council members;
  - More education and advocacy for shoreline burial areas, the shorelines are rising, and shoreline burials are being more affected at this time;
  - Council Chair should open communication with the AG office;
  - Dealing with iwi when the landowner changes;
  - Work with the Board of Realtors;

- Provide more access to legal opinions;
- Understanding the administrative rules;
- Improve the relationship with DLNR
- Markell shared with the council, a personal story of experience that he went through while he was working for DLNR and continues to work on today. The issue took place on O‘ahu along the ‘Ewa shoreline.

## V. ANNOUNCEMENTS

- A. **The Next HIBC Meeting is Thursday, August 15, 2019, 9:30 AM at the West Hawai‘i Civic Center Conference Room, 74-5044 Ane Keohokālole St., Kailua-Kona, HI 96740.**

## VI. ADJOURNMENT

*Meeting adjourns at 1:51 PM.*

**\*\*\*THE ABOVE MINUTES WERE APPROVED AT THE 08/15/2019 HIBC MEETING\*\*\***

Pursuant to §92-3 Hawai‘i Revised Statutes (HRS), all interested persons shall be afforded an opportunity to present oral testimony or submit data, views, or arguments, in writing on any agenda item. Additionally, pursuant to a policy adopted by the Hawai‘i Island Burial Council at its November 17, 2005 meeting, oral testimony for items listed on the agenda is limited to three minutes per person, per agenda item.

Pursuant to §92-4, §92-5(a)(8), and §6E-43.5 HRS, and upon compliance with the procedures set forth in §92-4, HRS, the council may go into a closed meeting to consider information that involves the location or description of a burial site.

A request to be placed on a burial council meeting agenda must be made with the Burial Sites Program staff at least two weeks preceding the scheduled meeting date. In addition, the request must be accompanied by all related documents. Failure to comply with this procedure will delay the item to the following month’s agenda.

Materials related to items on the agenda are available for review at the State Historic Preservation Division in room 555 of the Kākuhihewa Building located at 601 Kamokila Boulevard, Kapolei, Hawai‘i 96707. Persons with disabilities requiring special assistance should contact the division in advance at (808) 692-8015.