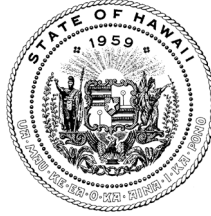


DAVID Y. IGE
GOVERNOR OF
HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

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
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

April 9, 2021

**Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii**

OAHU

**Issuance of an archaeological activities permit for calendar year 2021 to
ARCHAEOLOGICAL SERVICES HAWAII, LLC**

PURPOSE:

**Issuance of an archaeological activities permit for calendar year 2021 to
ARCHAEOLOGICAL SERVICES HAWAII, LLC**

LEGAL REFERENCE:

**Section 6E-3(13), Hawaii Revised Statutes (HRS), and Chapter 13-282, Hawaii
Administrative Rules (HAR), as amended.**

BACKGROUND AND REMARKS:

**Under HRS §6E-3(13), the Department of Land and Natural Resources has the
responsibility to administer a historic preservation program which includes the
responsibility to regulate "archaeological activities throughout the State."**

**Pursuant to this statutory authority, the Department has adopted a comprehensive
regulatory scheme with regards to the preservation of historic property and burial
sites. When a landowner seeks to develop property in a way that may involve
historic property, the government agency asked to permit or approve the project
must allow the Department's Historic Property Division (SHPD) to comment.**

**SHPD's review process can involve the identification and inventory of historic
properties, evaluation of their significance, the determination of impact upon
historic properties, mitigation steps in order to properly handle or minimize impacts**

ITEM I-1

to significant historic properties, the review and approval of detailed mitigation plans and verification of completion of mitigation plans. Such review may require the preparation and review of an architectural inventory survey, ethnographic survey and/or archaeological inventory survey.

HAR 13-284-5 requires that an archaeological inventory survey be done under a permit issued by SHPD and that such archaeological inventory survey work be "directed by a qualified archaeologist" who meets the qualifications set forth in HAR chapter 13-281. The Department has also adopted Rules Governing Professional Qualifications to regulate archaeological activities throughout the state, HAR chapter 13-282. A permit system is established to regulate archaeological fieldwork to better protect historic properties in the public's interest. Under the permit system, no alteration to historic properties in the state of Hawaii is to be performed by any individual, archaeological firm, agency or organization unless an annual permit is first obtained from the DLNR.

ASH sought such a permit for calendar years 2019 and 2020. Malama Kakanilua, an unincorporated association, Clare H. Apana, and Kaniloa Lani Kamaunu (collectively "petitioners") opposed issuance of the permits. A contested case hearing was held as to the 2020 permit. Hearing Officer Lou Chang recommended that the permit be issued. The Board agreed in a decision and order issued on February 4, 2021. Petitioners appealed the decision but have not provided notice of the appeal, either formally or informally, to the Board, the Department, SHPD, or the Department of Attorney General. So far as we know petitioners have not received or requested a stay of the Board's decision.

ASH requested a permit for calendar year 2021. Petitioners oppose the request.

ASH meets the criteria for issuance of the permit. The sole substantive requirement an organization must meet to qualify for a permit is to have an archaeologist who meets the principal investigator requirements in HAR 13-281. HAR 13-282-3 specifies that permits may only be issued to organizations "or individuals who have on staff at least one principal investigator who meets the minimal professional qualification standards for archaeologists as provided in chapter 13-281." SHPD practice has been to issue permits to organizations that have a qualified principal investigator on contract. This practice was affirmed by the Board in its decision as to ASH's 2020 permit application. ASH's 2021 permit application has a qualified principal investigator on contract.

We expect that petitioners will ask for a contested case as to the permit. Assuming (without agreeing) that petitioners have an interest entitled to due process protection, petitioners are nevertheless not entitled to another contested case. Determination of what process is due requires examination and balancing of three factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the

governmental interest, including the burden that additional procedural safeguards would entail.” Flores v. Bd. of Land & Nat. Res., 143 Hawai`i 114, 126–27, 424 P.3d 469, 481–82 (2018). Under the circumstances presented here, due process does not require any additional procedures to safeguard petitioner’s interests. Most especially, petitioners have already received a complete contested case hearing as to ASH’s 2020 request.

RECOMMENDATION: That the Board:

1. Determine any request for contested case. SHPD recommends denial.
2. After dealing with any request for contested case, authorize issuance of an archeological permit to AHS pursuant to HAR § 13-282-3
3. Alternatively, if a request for contested case is granted, the Board authorize the appointment of a Hearing Officer conduct all the hearings relevant to the subject petition for a Contested Case Hearing. Pursuant to HAR §13-1-32 (b), the Chairperson shall select such Hearing Officer once the Board has delegated the conduct of the Contested Case Hearing to a Hearing Officer.

Respectfully Submitted,

Alan Downer

Alan S. Downer, Ph.D.

APPROVED FOR SUBMITTAL:

Suzanne D. Case

Suzanne D. Case, Chairperson