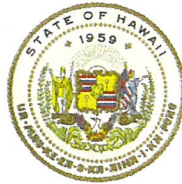


DAVID Y. IGE  
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621  
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August 13, 2021

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

**ROBERT K. MASUDA**  
FIRST DEPUTY

**M. KALEO MANUEL**  
ACTING 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

Board of Land and Natural Resources  
State of Hawai'i  
Honolulu, Hawai'i

**SUBJECT:** Enforcement Action against Nichole Kanda, Cacilie Craft, and Garcia and Associates for Unpermitted Grading and Violations of Agreed-Upon Mitigation Commitments  
Maka'ula Ahupua'a, North Kona, Hawai'i Island  
**TMK:** (3) 7-3-002:015

This Notice of Enforcement Action and Violation requests that the Board of Land and Natural Resources (BLNR) find that Nichole Kanda, Cacilie Craft, and Garcia and Associates violated Hawaii Revised Statutes §6E-11(c) by altering historic properties without a County of Hawai'i grading permit, and requests that the Board assess civil and/or administrative fines pursuant to Hawaii Revised Statutes §§ 6E-11.5 and 6E-11.6.

## **I. SUMMARY**

No later than September 24, 2019, private historic properties located in the Maka'ula Ahupua'a, North Kona, Hawai'i Island TMK: (3) 7-3-002:015 (property), were altered or destroyed during the course of land clearing activities. Prior to this incident, Ms. Kanda applied for a grubbing permit for which the State Historic Preservation Division (SHPD) reviewed and accepted a preservation plan to allow for manual grubbing across twenty acres of the property. The preservation plan explicitly specified that a permanent 5-meter buffer zone for each historic site be established and maintained, and that manual rather than mechanical grubbing be implemented. The SHPD made a "no historic properties affected" determination for the project with the implementation of the agreed-upon mitigation commitments in the preservation plan. Forty (40) historic features were altered or destroyed by the impacts and encroachment of mechanical grubbing activities within the five-meter preservation buffer zone of at least twelve of the thirteen preservation sites on the property.

The SHPD later received a second grubbing permit from Ms. Kanda for a separate five-acre portion of the property. The SHPD made a "no historic properties affected" determination for the project, predicated on the implementation of the agreed-upon mitigation commitments from the previously accepted preservation plan. The land-altering activities were

therefore not in compliance with the agreed-upon mitigation commitments and were not reviewed pursuant to Hawaii Revised Statutes (HRS) §6E-42 and its implementing regulations because Ms. Kanda failed to get a County grading permit in violation of County Code 10-9. This constitutes a potential civil and/or criminal and administrative violation under HRS §6E-11(c) and subjects Ms. Kanda, Garcia and Associates (GANDA), and GANDA's principal investigator, Ms. Craft to potential civil/criminal and administrative fines under HRS §§ 6E-11.5 and 6E-11.6.

## **II. BACKGROUND**

- a. In a letter dated March 15, 2018, SHPD reviewed Ms. Kanda's proposed grubbing activities on the property, which included grubbing twenty acres to create pastureland (Exhibit A). SHPD indicated that there was insufficient information to make a determination of effect for the proposed grubbing and that a field inspection was necessary. On April 23, 2018, the SHPD received a draft archaeological inventory survey (AIS) for the proposed project area.
- b. On May 17, 2018, SHPD received a second grubbing permit from Ms. Kanda for a smaller project area located on the same property. This submittal indicated that grubbing would be done in a five-acre portion of the property with no historic properties in its vicinity (Exhibit B). The proposed project would consist of cleaning the area for a house pad and driveway, trenching for utilities, and grubbing to clear vegetation. This submittal could not be reviewed until the SHPD reviewed and accepted the AIS submitted on April 23, 2018, and agreed upon appropriate mitigation commitments.
- c. In a letter dated May 25, 2018, the SHPD provided comments on the AIS and requested revisions. The AIS identified thirteen archaeological sites composed of fifty-seven (57) components of which thirty-one (31) were located within a single site. Nine traditional Hawaiian sites were evaluated as significant under Hawai'i Administrative Rules (HAR) § 13-284-6 Criterion d (information potential) and Criterion e (value to an ethnic community). Four sites were interpreted as post-Contact and associated with historic ranching activities and evaluated as significant under Criterion d.
- d. In a letter dated August 20, 2018, the SHPD reviewed and accepted the revised AIS. The AIS recommended a project effect determination of "Effect, with agreed-upon mitigation commitments" and mitigation in the form of archaeological preservation for all thirteen sites. The SHPD agreed with these recommendations and indicated that once the preservation plan was accepted, the permitting process could proceed. On the same date, the SHPD received a draft archaeological site preservation plan for review. In a letter dated August 31, 2018, the SHPD reviewed and accepted the preservation plan with eleven specifications, which included "[a] permanent

5-meter-wide buffer zone will be established around each site pursuant to HAR § 13-277-4,” and vegetation “removal by hand tools only.”

- e. In a letter dated August 31, 2018, the SHPD responded to a proposed grubbing permit that consisted of a 5-acre portion of the 22-acre property. The SHPD made a determination of “no historic properties affected” for the project on the condition that the agreed-upon mitigation commitments outlined in the previously accepted preservation plan be implemented. The letter stated that preservation would be in the form of avoidance and protection. The SHPD subsequently informed the County of Hawai‘i that the permitting process for Ms. Kanda’s property may continue.
- f. On September 17, 2019, the SHPD received an email from GANDA’s principal investigator, Ms. Cacilie Craft, notifying the SHPD that archaeological monitoring on the subject parcel was completed. In her email, Ms. Craft clarifies that she previously asked the SHPD if a monitoring plan was required but was told that submitting a simple letter that documented the monitoring during the grubbing activity would suffice because the grading in the project area would be minimal, limited to using hand tools and a chainsaw, and would not occur in the vicinity of any archaeological site on the property. Included in Ms. Craft’s email was a monitoring letter from the archaeological monitor on-site, Leinaala Benson. According to her letter, Ms. Benson was on-site between February 11, 2019 and March 19, 2019; all grubbing work was completed and performed in compliance with the preservation plan; and no archaeological sites were disturbed. Ms. Benson explicitly states in her letter that the archaeological sites were intact. The letter received by the SHPD was not dated nor did it contain Ms. Benson’s signature.
- g. On or about September 24, 2019, the SHPD Hilo Office received a phone call from Ms. Katherine Luga (Carlsmith Ball LLP) alerting the SHPD that her client, Ms. Kanda, may have damaged archaeological resources on her property and wanted to self-report the incident. Ms. Kanda hired an archaeological consultant, ASM Affiliates, to conduct a field inspection and document any damages and possible violations to the agreed-upon preservation plan. ASM Affiliates conducted the field report on September 23, 2019.
- h. On October 23, 2019, SHPD received a field inspection report from ASM Affiliates, which revealed that the 5-meter buffer zones for twelve of the thirteen preservation sites were encroached upon by mechanical grubbing activities. The report also indicated eleven new archaeological features that ASM Affiliates identified in its field inspection that were not previously documented in the archaeological inventory survey (AIS).
- i. On October 2, 2019 Mr. Sean Nāleimaile, the SHPD Hawai‘i Island Lead Archaeologist, received an email from Ms. Maija Jackson, a County of

Hawaii Planning Department (COH-Planning Department) planner, indicating possible violations of Chapter 6E and an agreed-upon mitigation plan at the TMK. These violations were based on a site visit conducted by County staff to the property where an area appeared to have been bulldozed and that activity possibly impacted several historic properties. Ms. Jackson's email included a report sent from Michael Yee (COH Planning Director) to Mr. Robert Triantos (Carlsmith Ball LLP) indicating that a proposed change of zoning application was being withheld until the potential violation to the County Code related to grading and HRS 6E was resolved with the appropriate agencies. The County further indicated that it would require a revised AIS and preservation plan to reflect any damage and/or destruction of historic properties and updated mitigation commitments. The change of zoning application was denied based on the County's site visit which identified the possible grading violations.

- j. In a letter dated October 14, 2019, the COH issued a notice of violation to Ms. Kanda stating that the grading work performed on the subject property was in violation of Hawai'i County Code 10-9, which requires a grading permit. Such grading permits require the prior approval of the COH Planning Department and the SHPD.
- k. Following the report of the possible violation from Ms. Luga and the notification of violation from the COH-Planning Department, the SHPD attempted several times to secure a (DOCARE) officer to accompany the SHPD to investigate the alleged damages and possible violations. DOCARE officers were not available until February 12, 2020.
- l. On February 12, 2020, Mr. Nāleimaile conducted a site visit and observed clear evidence that mechanical grading activities had taken place, several historic properties were damaged, and agreed-upon mitigation commitments were not adhered to.

### **III. INVESTIGATION**

- m. On February 12, 2020, Mr. Nāleimaile met DOCARE officer Mathew Gutierrez at the property. They were joined by DOCARE officer Dale Veloria, Matt Clark and I'o Kauhane of ASM Affiliates, Ms. Kanda, and Mr. Triantos. The site visit began with a discussion with ASM Affiliates archaeologist, Matt Clark, of the ASM Affiliates' field inspection findings, which documented the conditions of several historic properties on the property.
- n. Due to the passage of time, many of the areas were overgrown with invasive vegetation, making it difficult to document some of the areas where the alleged damages occurred. Fortunately, the report submitted by ASM Affiliates provided SHPD with clear and concise documentation of the impacts and non-compliance with the agreed-upon mitigation commitments.

- o. During the site visit, Mr. Nāleimaile observed that many areas had been significantly impacted by the removal of large trees, and areas had been graded to provide fenced areas for livestock. In comparison to the adjacent parcel, it was obvious that the graded area likely had a similar landscape of albizzia trees and Christmas berry. The extensive clearing observed would have required the use of heavy machinery and could not have been done by manual grubbing pursuant to the preservation plan.
- p. Mr. Nāleimaile conducted a limited pedestrian survey of the property with DOCARE officers and ASM Affiliates staff to examine the extent of the land clearing activities on the property. A large portion of the parcel had been extensively cleared by machine and most of the material was pushed to the southern portion of the property. Upon completion of the site visit, it was Mr. Nāleimaile's professional opinion that there was clear evidence of potential violations pursuant to Chapter 6E-11(c).

#### **IV. REGULATORY CONTEXT:**

- q. The extensive land clearing activities on the subject property were done without a County of Hawai'i grading permit. County of Hawai'i Department of Public Works staff notified Ms. Kanda of the violation based on the County's investigation of potential grading violations and possible violation of agreed-upon mitigation commitments.

According to HRS §6E-42(a) Review of proposed projects:

Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity to review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii Register of Historic Places.

- r. A County grading permit was necessary for the extensive land clearing activities, which would have triggered SHPD review pursuant to HRS §6E-42. The SHPD was not afforded the opportunity to review the effect of the proposed project on historic properties pursuant to HRS §6E-42 and therefore could not and did not approve the alteration or destruction of historic properties on Ms. Kanda's property. Accordingly, alteration or destruction of those historic properties may be assessed as violations of HRS § 6E.

According to HRS §6E-11c:

“It shall be unlawful for any person, natural or corporate, 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 section 6E-42 applies without the required approval.”

## V. ANALYSIS:

- s. Alteration of and damage to wall segment. Site 30844 was described as five wall segments, four of which (Features 1-4) extended east-west along the southern boundary of the property and the boundary between Maka’ula and Hale’ōhi’iu ahupua’a, and the fifth extended north-south across the central portion of the parcel (Feature 5). Each wall segment was assessed as significant under Criterion “d.” A portion of the north-south trending wall segment near the southern property boundary was breached to allow for the passage of a hog wire fence, which currently bisects the wall and follows its western edge along the approximate preservation buffer.

The breaching of the north-south trending wall (Feature 5) for the installation of the hog-wire fencing constitutes an injury, damage, and alteration to a historic property and is therefore a violation of HRS § 6E. (See Figure 1)

- t. Destruction of two cobble piles (Features 1 and 2). The features at site 30879 were located roughly 3.5 meters apart from one another in the makai-central portion of the project area. They were not relocated during the field inspection and are thought to have been completely destroyed by grubbing activities. The former location of features 1 and 2, as indicated by GIS data provided to the landowner by GANDA, now consists of a flattened ground surface stripped of all vegetation.

The destruction of the two features constitutes two separate violations of HRS § 6E. (See Figure 2)

- u. Destruction of a complex. Site 30882 was described as a complex consisting of four cobble mounds (Features 1-4) and a single linear retaining wall (Feature 5) constructed of dry-stacked cobbles located in the eastern portion of the project area. Site 30882 was assessed as significant under Criteria “d” and “e.” The former location of Site 30882, as indicated by GIS data provided to the landowner by GANDA, now consists of a flattened ground surface stripped of all vegetation.

The destruction of the enclosure constitutes five separate violations of HRS § 6E as each of these features 1-5 is an individual historic property as well as being components of the larger archaeological site as a whole. (See Figure 3)

- v. Destruction of a large cobble-walled enclosure. Site 30883 is situated in the mauka-central portion of the project area and measures 90.7 meters in

circumference with maximum dimensions of 37 m x 29 m. The site was assessed as significant under Criteria “d” and “e.” Site 30883 was not relocated during the SHPD field inspection and is thought to have been completely destroyed by grubbing activities. The former location of Site 30883, as indicated by GIS data provided to the landowner by GANDA, now consists of a flattened ground surface stripped of all vegetation.

The destruction of the enclosure constitutes a violation of HRS § 6E. (See Figures 4 and 5)

- w. Destruction of two well-constructed cobble cairns (Features 1 and 2). The features were located roughly 3 meters apart from one another in the mauka portion of the project area. This site (site 30885) was assessed as significant under Criteria “d” and “e.” The features were not relocated during the SHPD field inspection and they are thought to have been destroyed by grubbing activities. The former location of feature 1, as indicated by GIS data provided to the landowner by GANDA, now consists of a flattened ground surface stripped of all vegetation (Figure 13), while the location of feature 2 is completely obscured by a 10- to 15-foot-tall pile of grubbed vegetation (Figure 14). It is possible that Feature 2 is still intact beneath the pile of grubbed vegetation, but the continued existence of the feature could not be confirmed during the field inspection due to the size of the pile.

The destruction of these features constitutes two separate violations of HRS § 6E. (See Figures 6 and 7)

- x. Destruction of a complex. Site 30886 was a complex of 31 features consisting of 28 cairns, a single slab-lined pit, and two cross-slope retaining walls located in the mauka portion of the project area. Collectively, the site was assessed as significant under Criteria “d” and “e.” Only two features of Site 30886 (Features 16 and 17) were relocated during the field inspection. Feature 17 consists of a cairn and feature 16 consists of a low terrace wall located adjacent to the mauka edge of feature 17. These two features are contained within an island of vegetation surrounded by caution tape. The remaining 29 features, as indicated by GIS data provided to the landowner by GANDA, are thought to have been destroyed during grubbing activities, as the former locations of these features now consists of a flattened ground surface stripped of all vegetation.

The destruction of the complex constitutes twenty-nine (29) separate violations of HRS § 6E. (See Figures 8 and 9)

## VI. VIOLATIONS

Based on the investigation by SHPD Archaeologist Mr. Sean Nāleimaile, Ms. Kanda engaged in extensive land clearing activities without a County grading permit and in non-compliance with agreed-upon mitigation commitments. On or about October 14, 2019, the County of Hawai'i notified Ms. Kanda, that grading work performed on the

subject property was in violation of Hawai'i County Code 10-9, which requires a grading permit.

HRS §6E-11(c) states that, [i]t shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property . . . during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.

In this instance, a grading permit was needed, which would have triggered HRS §6E-42, allowing for the SHPD to review the project and reach an agreement with the landowner that the agreed-upon mitigation measures be adhered to. HRS §6E-42(a) states that:

Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, ... the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties ....

Ms. Kanda violated HRS §6E-11(c) by conducting mechanical land altering activities on the subject parcel without the appropriate grading permit and subsequent historic preservation reviews and required approvals.

The archaeological firm, GANDA and principal investigator Ms. Cacilie Craft were responsible for ensuring Ms. Kanda's compliance with agreed-upon mitigation commitments and permit conditions.

Hawai'i Administrative Rules (HAR) §13-282-5(a) states that, [s]hould a party alter an archaeological property without a permit or should not fulfill a permit's conditions, The principal investigator of the archaeological work or the firm, or both shall be subject to penalties as covered under section 6E-11, HRS[.]

Both GANDA and Ms. Craft violated HRS §6E-11(c) by failing to perform their respective duties as archaeological firm and principal investigator and failing to halt the unpermitted grubbing and grading that resulted in damage and alteration to archaeological features on the property.

## **VII. Administrative Penalties for Violations of HRS §6E-11(c):**

- y. Ms. Kanda conducted mechanical land alteration activities that altered or destroyed historic properties without obtaining the required County approval. The extent of such land altering activities triggers historic preservation review pursuant to HRS §6E-42. Therefore, because HRS §6E-42 applies to this project and the SHPD was not allowed an opportunity for review, this action constitutes a violation of HRS §6E-11(c).



- i. Any person who violates HRS §6E-11(c) shall be fined not less than \$500 or more than \$10,000 for each separate violation (HRS §6E-11(f)).
  - ii. Additionally, if the violator directly or indirectly has caused the loss of, or damage to, any historic property, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property (HRS §6E-11(f)).
  - iii. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished (HRS §6E-11(f)).
  - iv. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property, or for the transportation of the violator to or from the historic property, shall be subject to seizure and disposition by the State without compensation to its owner or owners (HRS §6E-11(f)).
  - v. The civil and administrative penalties imposed pursuant to HRS chapter 6E shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed by law (HRS §6E-11(i)).
- z. As an archaeological firm, GANDA is required to obtain an archaeological permit from the Department of Land and Natural Resources prior to performing any alteration to historic properties (HAR §13-282-3(a)). Two of the conditions of the permit are that the permittee shall ensure all personnel are capable of adequately conducting the necessary work to accomplish any scopes of work and that the permittee shall comply with all applicable statutes, ordinances, rules and regulations of the federal, state, and county governments. (HAR § 13-282-4(f)(3) and (4)). Failure of a party to obtain a permit or fulfill a permit's conditions will subject the archaeological firm and/or the firm's principal investigator to penalties, including HRS §6E-11(c) civil and administrative penalties.

In the instant case, GANDA failed to fulfill the conditions of its archaeological permit by failing to ensure that it had personnel that were capable of adequately conducting the necessary work to accomplish any scopes of work. GANDA affirmed that an archaeological monitor was onsite during the construction activity and yet they failed to halt the unpermitted grubbing and grading activities that resulted in damage and alteration to archaeological features on the property. Therefore, GANDA's failure to fulfill its archaeological permit's requirement constitutes a violation of HRS §6E-11(c).

- i. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the principal investigator of the

archaeological firm or the firm, or both shall be subject to penalties as covered under section 6E-11, HRS (HAR §13-282-5(1)).

- ii. Any person who violates HRS §6E-11(c) shall be fined not less than \$500 or more than \$10,000 for each separate violation (HRS §6E-11(f)).
  - iii. Additionally, if the violator directly or indirectly has caused the loss of, or damage to, any historic property, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property (HRS §6E-11(f)).
  - iv. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished (HRS §6E-11(f)).
  - v. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property, or for the transportation of the violator to or from the historic property, shall be subject to seizure and disposition by the State without compensation to its owner or owners (HRS §6E-11(f)).
  - vi. The civil and administrative penalties imposed pursuant to HRS chapter 6E shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed by law (HRS §6E-11(i)).
- aa. In addition to HRS §6E-11(c) civil and administrative penalties, GANDA is also subject to administrative penalties for its failure to fulfill a permit condition, as set forth in HAR §13-282-5.
- i. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the principal investigator of the archaeological work or the firm, or both shall be subject to penalties as covered under section 6E-11, HRS. (HAR §13-282-5(1)).
  - ii. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the principal investigator of the archaeological work or the firm, or both, shall forfeit all items collected and all recorded information to the SHPD (HAR §13-282-5(2)).
  - iii. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the archaeological permit may be revoked from the archaeological firm (HAR §13-282-5(3)).
- bb. Failure of a party to obtain an archaeological permit or fulfill an archaeological permit's requirements will subject the archaeological firm

and/or the firm's principal investigator to penalties, including HRS §6E-11(c) civil and administrative penalties. The principal investigator is directly responsible and accountable for assuring the quality of each aspect of a historic preservation project. As the principal investigator in the instant case, Ms. Craft failed to assure the quality of all aspects of historic preservation by not ensuring that Ms. Kanda's land altering activities were in compliance with the agreed-upon mitigation commitments and did not result in destruction or alteration to historic properties. Therefore, Ms. Craft's failed duty as a principal investigator constitutes a violation of HRS §6E-11(c).

- i. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the principal investigator of the archaeological firm or the firm, or both shall be subject to penalties as covered under section 6E-11, HRS (HAR §13-282-5(1)).
  - ii. Any person who violates HRS §6E-11(c) shall be fined not less than \$500 or more than \$10,000 for each separate violation (HRS §6E-11(f)).
  - iii. Additionally, if the violator directly or indirectly has caused the loss of, or damage to, any historic property, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property (HRS §6E-11(f)).
  - iv. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished (HRS §6E-11(f)).
  - v. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property, or for the transportation of the violator to or from the historic property, shall be subject to seizure and disposition by the State without compensation to its owner or owners (HRS §6E-11(f)).
  - vi. The civil and administrative penalties imposed pursuant to HRS chapter 6E shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed by law (HRS §6E-11(i)).
- cc. In addition to HRS §6E-11(c) civil and administrative penalties, Ms. Craft is also subject to administrative penalties for GANDA's failure to fulfill a permit condition, as set forth in HAR §13-282-5.
- i. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the principal investigator of the archaeological work or the firm, or both shall be subject to penalties as covered under section 6E-11, HRS. (HAR §13-282-5(1)).

- ii. Should a party alter an archaeological property without a permit or should not fulfill a permit's conditions, the principal investigator of the archaeological work or the firm, or both, shall forfeit all items collected and all recorded information to the SHPD (HAR §13-282-5(2)).

#### **VIII. ANALYSIS:**

- a. The legislature has declared:

That the historic and cultural heritage of the State is among its important assets and that rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage (HRS §6E-1).

- b. The legislature enacted HRS Chapter 6E and the department has adopted implementing rules. Chapter 6E creates a historic preservation program to implement, among other things, a state review process to assure that: (1) historic properties are recorded; and (2) that appropriate mitigation takes place in the event that development threatens to destroy the historic integrity of a resource.
- c. For privately owned properties, the review process is triggered when the State or a County receives a permit application. Thereafter, HRS §6E-42 affords the SHPD an opportunity to comment on the project. The rules specify that if historic properties will be affected by the project, the SHPD and the landowner should come to an agreement on mitigation before the project proceeds. In this case, HRS §6E-42 was triggered because the land altering activity on the subject parcel required a permit, which further requires allowing SHPD an opportunity to comment on the effect of the proposed project on historic properties prior to permit issuance. Ms. Kanda applied for but had not yet obtained a grading permit from the County and thereby making it impossible for SHPD comments to be part of the County's permit review and conditions. Under 6E-11(c), this is a clear violation.
- d. Based on the facts and circumstances of this case, Ms. Kanda did not comply with County requirements to obtain a grading permit prior to performing mechanical land alteration activities, nor did Ms. Kanda comply with the agreed-upon mitigation commitments. Having not obtained the required County permit, Ms. Kanda bypassed SHPD review as required by HRS §6E-42.
- e. An archaeological firm must obtain an annual permit from the department prior to performing any alteration to historic properties in the State of Hawai'i. As a requirement of the permit, the permittee must ensure that all personnel are capable of adequately conducting the necessary work to accomplish the scopes of work for the project. In this case, GANDA as the permittee was responsible for ensuring that work was being done properly,

which included compliance with the agreed-upon mitigation commitments. GANDA had a duty to ensure that Ms. Kanda's land altering activities were compliant, and that Ms. Craft was effective in her role as principal investigator. GANDA's failure to halt Ms. Kanda's mechanical land altering activities and ensure Ms. Craft's capability as a principal investigator constitute a clear HRS §6E-11(c) violation.

- f. HAR §13-281-2 defines a principal investigator as the "individual directly responsible and accountable for assuring the quality of all aspects of an historic preservation project, and the accuracy and completeness of its written documentation." As the principal investigator, Ms. Craft is responsible for project planning, oversight, and reporting. Accordingly, Ms. Craft has a duty to assure that Ms. Kanda's land altering activities were compliant with the agreed-upon mitigation commitments. A principal investigator must possess a "demonstrated knowledge of historic preservation laws, rules, and guidelines" pursuant to HAR §13-281-3(6). Ms. Craft's failure to halt Ms. Kanda's unpermitted mechanical grubbing activities resulting in alteration and destruction to historic properties is a failure of her duty as a principal investigator and demonstrates a lack of knowledge of historic preservation laws, rules, and guidelines. Any failure of the principal investigator rests on both the principal investigator and the permittee whose archaeological permit the principal investigator works under. In this case, Ms. Craft's failure to perform her duties as a principal investigator is reflected as HRS §6E-11(c) violations for both herself and GANDA as the permittee.
- g. The recent unpermitted actions resulted in alteration or destruction of forty (40) historic properties, which constitutes violations under HRS §§ 6E-42 and 6E-11(c). The individual failures of Ms. Kanda, Ms. Craft, and GANDA to comply with these statutes and rules result in a penalty of \$10,000.00 per feature, and additional administrative fees.

#### **IX. FINES ASSESSED**

- a. Damage to forty (40) individual features of the historic property assessed as forty separate violations at \$10,000 per individual feature totaling \$400,000.
- b. Overall injury and destructive impacts to the integrity of the historic feature assessed as a separate violation at \$10,000.
- c. Administrative fees of \$5,000 connected to the investigation and reporting of the violation.
- d. Total Fines \$415,000.
- e. Total Fines shall be divided between the violating parties as follows:
  - i. Ms. Kanda, as the landowner, shall be responsible for paying for one fifth of the Total Fines totaling \$83,000. The SHPD also

recommends that this amount be reduced by \$15,000. This is equivalent to the fee that Ms. Kanda paid for a supplemental AIS made necessary by the changes in the property resulting from the violation. The final amount of Total Fines to be paid by Ms. Kanda is \$68,000.

- ii. The remaining \$332,000 of the Total Fines shall assessed against the archaeology firm, GANDA, and its principal investigator, Ms. Craft, jointly and severally.
- f. Matters considered in determining the recommended allocation of the assessed damages:
- i. If not for Ms. Kanda's failure to comply with County permitting requirements and agreed-upon mitigation commitments, forty (40) historic features would not have been altered or destroyed on or before September 24, 2019. Ms. Kanda relied on GANDA to advise her on permitted land clearing activities pursuant to the SHPD's review of the proposed project. GANDA should have ensured that the required monitoring was carried out in accordance with the SHPD-approved monitoring plan.
  - ii. Accordingly, Ms. Kanda believed that her land altering activities, carried out while GANDA monitored the work, were in accordance with agreed-upon measures. GANDA nor its principal investigator failed to halt the work when it became clear that it was not being conducted in accordance with the measures agreed upon to protect the significant historic properties. Since Ms. Kanda could reasonably expect the archaeological consultant would ensure that all work was in compliance with the agreed upon conditions, the SHPD is recommending that Ms. Kanda be accountable for only 20% of the total damages.
- g. As a principal investigator, Ms. Craft is mandated by HRS § 13-281-2 to directly oversee and ensure the quality of work being performed in a historic preservation project. Accordingly, Ms. Craft is accountable for the project monitor's failure to ensure that work was carried out in accordance with the agreed-upon protective measures and failure to halt Ms. Kanda's unpermitted activities. GANDA, as the permittee, is responsible for ensuring the quality of work on a historic preservation project being conducted under its permit, including the work of its principal investigator. GANDA's failure as the permittee and Ms. Craft's failure of duty as the principal investigator directly contributed to the alteration or destruction of forty (40) individual historic features. Accordingly, GANDA and Ms. Craft are equally responsible for paying the remaining 80% of the total fines.
- h. All fines and administrative fees will be paid to the Hawai'i Historic Preservation Special Fund.

Respectfully Submitted

*Alan Downer*

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Alan S. Downer, Administrator  
State Historic Preservation Division

APPROVED FOR SUBMITTAL

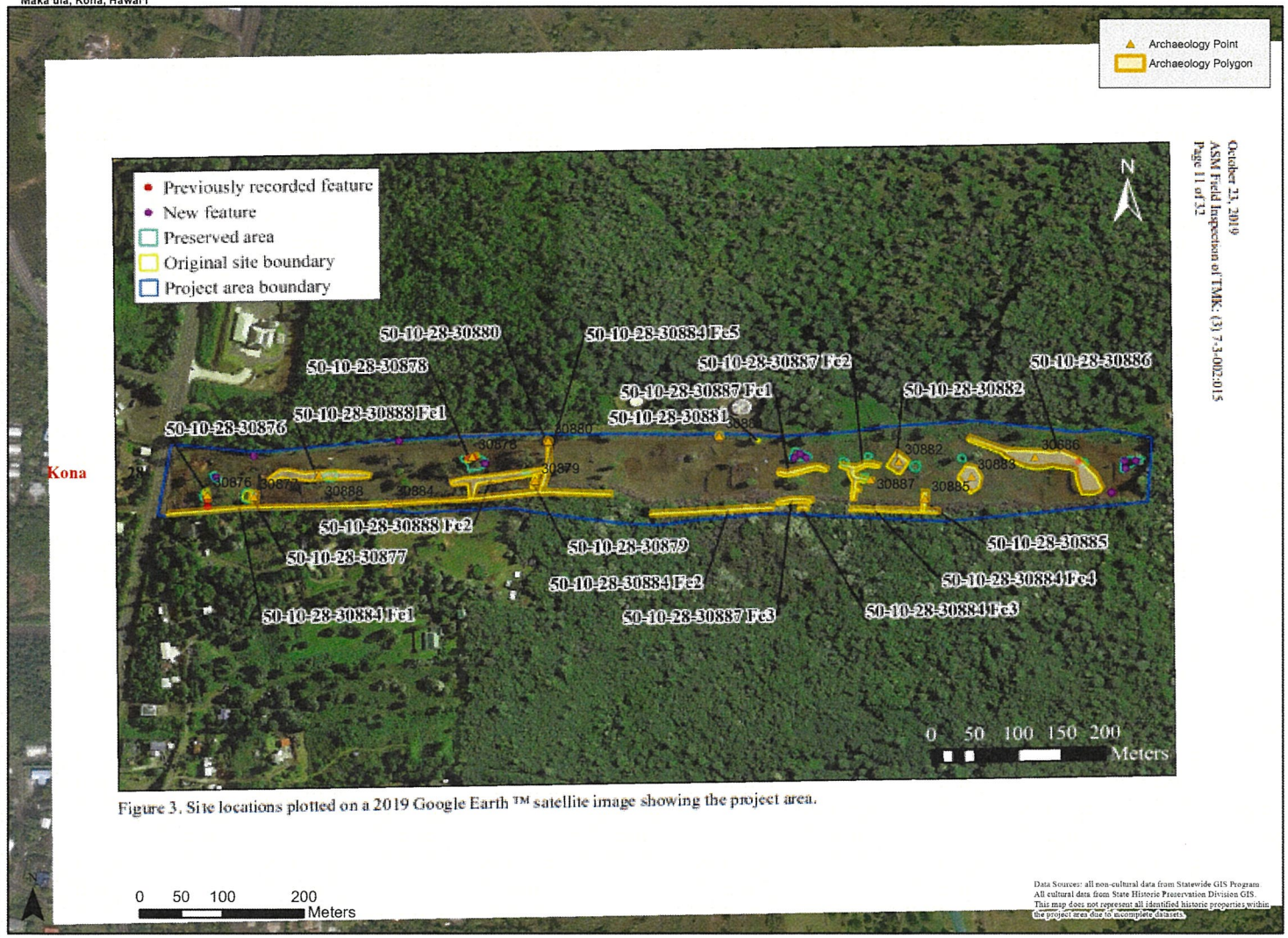
*Suzanne D. Case*

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Suzanne D. Case, Chairperson

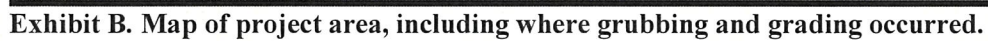
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**Exhibit A. Map of project area.**







Please Remit  
Payment To:  
ASM Affiliates  
507A E. Lanikaula St.  
Hilo, HI 96720

November 04, 2020  
Project No: 0034450.02  
Invoice No: 22015

Nicole Kanda  
73-4405 Mohoholo Street  
Kailua-Kona, HI 96740

Project 0034450.02 Kanda Makaula Update AIS at TMK: (3) 7-3-002:015  
Email Invoices to: vipdelivery.hi@gmail.com

**Professional Services Through October 31, 2020**  
**Fee**

Billing Phase	Fee	Percent Complete	Earned	Previous Fee Billing	Current Fee Billing
Initial Payment	5,000.00	100.00	5,000.00	0.00	5,000.00
Completion of Fieldwork	5,000.00	100.00	5,000.00	0.00	5,000.00
Report Submittal	5,000.00	100.00	5,000.00	0.00	5,000.00
Total Fee	15,000.00		15,000.00	0.00	15,000.00
Total Fee					
					15,000.00
Total this Task					\$15,000.00
Billing Limits					
Total Billings	Current		Prior	To-Date	
Limit:	15,000.00		0.00	15,000.00	
Total this Invoice					\$15,000.00

Project Manager Matthew Clark

Please send inquiries to: [accounting@asmallifates.com](mailto:accounting@asmallifates.com)

Exhibit C. Invoice for ASM Affiliates' supplemental AIS.





**Figure 1. Section of feature 5 at site 30884 that was breached to install a hog wire fence.**





**Figure 2. Former location of site 30879 has been grubbed and flattened.**



**Figure 3. Former location of site 30882 is now flattened ground surface stripped of vegetation.**





**Figure 4. Former location of site 30883 is now flattened ground surface stripped of vegetation.**



**Figure 5. Area to the north of site 30883 surrounded by caution tape.**





**Figure 6. Location of feature 2 of site 30885 completely obscured by a 10 to 15-foot tall pile of vegetation.**



**Figure 7. Former location of feature 1 of site 30885 is now flattened ground surface stripped of vegetation.**





**Figure 8. Former location of site 30886 is now flattened ground surface stripped of vegetation.**





**Figure 9. Former location of site 30886 is now flattened ground surface stripped of vegetation.**


# SHPD Submittal on Behalf of Kanda/GANDA/ Craft Violation for BLNR Mtg

Final Audit Report

2021-07-10

Created:	2021-07-09
By:	Randolph Lee (randolph.m.lee@hawaii.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAAAnTn6M3YAEJY88pJrW--F8EyLOT2RBH69

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# SHPD Submittal for Enforcement Action to be Approved by Chair for 8/13/21 BLNR Mtg. Agenda

Final Audit Report

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