

**HAWAII ADMINISTRATIVE RULES**

**TITLE 13**

**DEPARTMENT OF LAND AND NATURAL RESOURCES**

**SUBTITLE 13**

**HISTORIC PRESERVATION DIVISION**

**CHAPTER 300**

**RULES OF PRACTICE AND PROCEDURE  
RELATING TO BURIAL SITES AND HUMAN REMAINS**

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## SUBCHAPTER 1

### General Provisions

§13-300-1 Purpose. This chapter governs practice and procedure relating to the proper care and protection of burial sites found in the State before the island burial councils and the department of land and natural resources. These rules shall be construed to secure the just and efficient determination of every proceeding. The legislature finds that Native Hawaiian burial sites are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance (e.g. Honokahua). In order to avoid future disputes arising from the discovery of human skeletal remains fifty years or older, sections 6E-11, 6E-12, 6E-43, 6E-43.5, 6E-43.6, HRS, were amended or enacted in part to provide additional protection for Native Hawaiian burial sites of high preservation value such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals or events, that are within a context of historic properties, or have known lineal descendants. The photographing of human skeletal remains reasonably believed to be Native Hawaiian may take place only after consultation with known lineal descendants and the appropriate council.

[Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-2 Definitions. As used in this chapter, unless the context requires otherwise:

"Ahupua`a" means a traditional Hawaiian land division usually extending from the mountain to the sea.

"Appeals panel" means the panel comprised of three members from the board of land and natural resources and three council chairpersons that administratively adjudicates an appeal of a council determination as a contested case.

"Applicant" 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.

"Appropriate ethnic organization" means a group comprised of a majority of individuals of the same ethnicity recognized by the department as representing that particular ethnic group.

"Appropriate Hawaiian organization" means a group recognized by the council that is comprised of a majority of Hawaiians and has a general understanding of Hawaiian culture, in particular, beliefs, customs, and practices relating to the care of ancestral Native Hawaiian skeletal remains, burial goods, and burial sites.

"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.

"Archaeological inventory survey" means the process of identifying and documenting historic properties and burial sites in a delineated area, gathering sufficient information to evaluate significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by the department.

"Areas with a concentration of skeletal remains" means any location where multiple human skeletons are present.

"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.

"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.

"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.

"Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.

"Council" means the island burial councils.

"Cultural descendant" means with respect to non Native Hawaiian skeletal remains, a claimant recognized by the department as being the same ethnicity, or 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.

"Department" means department of land and natural resources.

"Government record" means information maintained by the department in written, auditory, visual, electronic, or other physical form.

"Historic property" means any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old.

"HRS" means Hawai`i Revised Statutes, as amended.

"Hui Malama I Na Kupuna `O Hawai`i Nei" means the Native Hawaiian organization whose purpose is to provide cultural and spiritual care to ancestral Native Hawaiian skeletal remains and burial goods through repatriation and reburial, and by protecting known burial sites.

"Human skeletal remains" means the body or any part of a deceased human being.

"Inadvertent discovery" means the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity.

"In situ burial agreement" means an agreement, recorded with the bureau of conveyances, between the State and the landowner which establishes the protection of the burial site in place as a preservation easement in perpetuity.

"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, or with respect to non Native Hawaiian skeletal remains, a claimant who has established to the satisfaction of the department, direct or collateral genealogical connections to certain non Native Hawaiian skeletal remains.

"Metric trait" means a skeletal or dental trait quantified by measurement.

"Mitigation plan" means the plan setting forth appropriate treatment of historic properties, burial sites, or human skeletal remains.

"Multiple skeletons" means human skeletal remains representing more than one individual.

"Non metric trait" means a skeletal or dental trait which is present or absent and genetic in origin, but does not include changes due to disease or injury.

"Office of Hawaiian Affairs" means the principal public agency established by the Hawai'i State constitution and chapter 10, HRS, to develop and coordinate services and programs for the betterment of the conditions of Native Hawaiians and Hawaiians.

"Over fifty years old" means with respect to human skeletal remains, being deceased for more than fifty years and not the age of the individual at death.

"Party" means a person properly seeking and entitled as of right to be admitted as a party in any court or agency proceeding.

"Person" means any individual, firm, association, agency, organization, partnership, estate, trust, corporation, company, or governmental unit.

"Post-contact" means the period after the year 1778.

"Pre-contact" means prehistoric.

"Prehistoric" means the period prior to and including the year 1778.

"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.

"Presiding officer" means the chairperson of the board of land and natural resources.

"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.

"Proceeding" means the department's consideration of the relevant facts and applicable law, and action thereupon with respect to a particular subject within the department's jurisdiction, initiated by a filing, submittal, request, application, or petition and shall include but not be limited to:

- (1) The adoption, amendment, or repeal of any rule of the department, whether initiated by order, notice or by petition of an interested person; or
- (2) The administrative adjudication by the appeals panel of an appeal of a council determination as a contested case.

"Public hearing" means a hearing required by law in which members of the public may comment upon a proposed rule, application, or request.

"Reburial agreement" means an agreement, recorded with the bureau of conveyances, between the State and the landowner which involves reburial of human skeletal remains and any burial goods, and establishes the reburial site as a preservation easement in perpetuity.

"Reburial site" means any specific location where prehistoric or historic human skeletal remains and any burial goods removed from one or more sites are reburied, including any associated surface and subsurface features.

"Regular business hours" means from 7:45 a.m. to 4:30 p.m. of each day of the week except Saturday, Sunday, and holidays.

"Relocation" means the careful disinterment or collection of human skeletal remains and any burial goods utilizing procedures which are least intrusive and destructive to the human skeletal remains and any burial goods, in accordance with a department approved archaeological data recovery plan when applicable, and the reburial of the human skeletal remains and any burial goods, except where known lineal descendants decide otherwise.

"Review board" means the Hawai'i historic places review board.

"Sensitive" means a finding by the council or the review board that a department record involving location and description of historic sites including burial sites or involving human skeletal remains originating from a burial site is culturally inappropriate for public disclosure and exempt from the requirements of section 92F-12, HRS.

"Unmarked location" means with regard to a human burial, any site located outside the boundaries of a known, maintained, actively used cemetery dedicated in accordance with chapter 441, HRS. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 92F-3, 92F-12, 441-2, 441-3)

§13-300-3 Jurisdiction. (a) This chapter applies to sites found within the boundaries of the State not situated in a known, maintained, actively used cemetery, where human skeletal remains are discovered, or known to be present, and appear to be over fifty years old. This chapter also applies to human skeletal remains and any burial goods already removed from a site which appear to be over fifty years old.

(b) Authority to determine treatment of any burial site belongs to the department, following appropriate consultations, except that where a burial site is Native Hawaiian and previously identified, authority to determine treatment belongs to the appropriate council.

(c) This chapter does not apply to:

- (1) Human skeletal remains originating outside of the State;
- (2) Human skeletal remains voluntarily donated to any medical institution in the State;
- (3) Human skeletal remains fabricated into artifacts prehistorically and intended to be removed from the State, as provided in section 6E-12(b)(2), HRS; and
- (4) Human skeletal remains curated by any federally funded museum in the State.

(d) The State historic preservation division shall implement the appropriate provisions of chapter 6E, HRS, and this chapter, on behalf of the department.

(e) To the extent possible, this chapter may coordinate with any and all appropriate federal statutes and regulations including but not limited to the applicable provisions of the Native American Graves Protection and Repatriation Act (25 U.S.C. §3001).

(f) The department is statutorily exempt from section 338-25.5(b), HRS, with regard to obtaining a permit from the department of health prior to exposure, removal, disinterment, reburial, or any other act related to human skeletal remains within the department's jurisdiction. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 6E-12, 338-25.5, 25 U.S.C. §3001)

§13-300-4 Government records. (a) Department records relating to historic sites and burial sites shall be made available for public inspection at the department during regular business hours, except:

- (1) Records relating to the location and description of historic sites including burial sites, and human skeletal remains and any burial goods, deemed sensitive by the council or review board, shall be exempt from the public disclosure requirements of section 92F-12, HRS. Location records include information regarding the island, district, ahupua`a, tax map key, address, or site map where a burial site is identified. Description records include information describing burial site features, human skeletal remains including genealogical information, or burial goods.
  - (A) Any person may request the council or review board to deem a specific location or description record sensitive. When considering a request, the council or review board may close the meeting to discuss the potential sensitivity of the record.
  - (B) Where a location or description record is deemed sensitive, the department shall undertake every reasonable effort to secure the record and restrict access.
  - (C) Access to sensitive records shall be allowed by written consent of the appropriate council or review board only where the department 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 proximately located;
- (2) Where records are open under any rule of court, the attorney general may determine which records may be withheld from public inspection when the records:
  - (A) Pertain to the preparation of the prosecution or defense of any action to which the State is or may be a party; or
  - (B) Are necessary for the protection of the character or reputation of any person; or
- (3) Government records which are exempt pursuant to section 92F-13, HRS.

(b) Photocopies of government records, certified copies of extracts from government records, or government records printed or reproduced by the department in quantity shall be given to any person requesting the same by paying the fees established by the department, or by law.

(c) Requests for information, permission to inspect official records, or for copies of government records shall be processed by the department with due regard for the dispatch of other public duties.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 91-2, 92F-12, 92F-13)

§§13-300-5 to 13-300-10 (Reserved)

## SUBCHAPTER 2

### Rulemaking

§13-300-11 Adopt, amend, repeal rules. (a) Pursuant to a petition or upon its own motion, the department shall adopt, amend, or repeal a rule which is designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice of the provisions of chapter 6E, HRS, in accordance with the procedures set forth in this chapter and in chapter 91, HRS. The petition shall be submitted in duplicate and delivered to the department.

(b) The petition shall contain the following:

- (1) A statement of the nature of the petitioner's interest in the subject matter;
- (2) A draft text of the proposed rule, or amendment, or the section of the rule to be repealed;
- (3) A designation of any existing rules or laws affected by the petition and a comprehensive explanation of the effects;
- (4) An explicit statement of the reasons petitioner is seeking the adoption, amendment, or repeal of the rule;
- (5) Any other facts, views, arguments, and data deemed relevant to the petition;
- (6) The name, address, and telephone number of the petitioner; and
- (7) The signature of the petitioner.

(c) Any petition which does not conform to the requirements of subsection (b) shall be rejected by the department.

(d) Upon receipt of a petition which fully complies with all requirements stated in subsection (b), the department shall date and accept the petition for consideration. Within one hundred eighty days, the department shall, following consultation with the councils, Office of Hawaiian Affairs, representatives of development and large landowner interests, Hui Malama I Na Kupuna `O Hawai'i Nei, and other appropriate Hawaiian organizations with respect to petitions involving Native Hawaiian skeletal remains and burial goods, and appropriate ethnic organizations when petitions involve non Native Hawaiian skeletal remains and burial goods, either deny the petition in writing stating its reasons for denial or initiate rulemaking procedures. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 91-3)

§13-300-12 Notice of hearing. (a) Notice of proposed rulemaking shall be published at least once in a newspaper of general circulation in the State and in each county affected by the proposed rule. All notices shall be issued at least thirty days prior to the date set for hearing.

(b) A notice of the proposed adoption, amendment, or repeal of a rule shall include:

- (1) A statement of the date, time, and place where the hearing shall be held;
- (2) Reference to the authority under which the adoption, amendment, or repeal of a rule is proposed;

- (3) A statement of the substance of the proposed rulemaking or a general description of the subjects involved and the purposes to be achieved by the proposed rule adoption, amendment, or repeal; and
  - (4) A statement that a copy of the proposed rule to be adopted, amended, or repealed will be mailed at no cost to any interested person who requests a copy, together with a description of where and how the requests may be made.
- (c) The notice shall be mailed to all persons who have made a timely written request to the department for advance notice of its rulemaking proceedings.
- (d) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals requires adoption, amendment, or repeal of a rule upon less than thirty days notice of hearing, and states in writing its reasons for the finding, the department may proceed without prior notice or hearing or upon such abbreviated notice and hearing as the department finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 91-3)

§13-300-13 Conduct of rulemaking. (a) Each rulemaking public hearing shall be presided over by the presiding officer or its designated hearings officer. The hearing shall be conducted in such a manner as to afford all interested persons a reasonable opportunity to submit data, views, or arguments through testimony, orally or in writing, on issues relevant to the proposed rulemaking in order to obtain a clear and orderly record. The presiding officer or hearings officer shall have the authority to administer oaths or affirmations and to take all other actions necessary for the orderly conduct of the hearing.

(b) The hearing shall be held at the time and place set in the notice of hearing, but may at such time and place be continued by the presiding officer or hearings officer from day to day, or adjourned to a later date, or to a different place, without notice other than the announcement thereof at the hearing. Where the proposed rulemaking affects only one county, the hearing shall be held in that county only.

(c) At the commencement of a hearing, the presiding officer shall read the notice of the hearing and shall outline briefly the procedure to be followed. Testimony shall then be received with respect to the matters specified in the notice of hearing in the order as the presiding officer or hearings officer shall prescribe.

(d) Before testifying, all interested persons shall state their name, address, and whom they represent at the hearing, and give any other information respecting their appearance as the presiding officer or hearings officer determines necessary to the orderly conduct of the hearing.

(e) Unless otherwise ordered by the presiding officer or hearings officer, testimony given at the hearing need not be reported verbatim. All supporting written statements, maps, charts, tabulations, or similar data offered at the hearing shall be received in evidence and made a part of the record. Unless the presiding officer or hearings officer finds that the furnishing of copies is impracticable, two copies of the exhibits shall be submitted.

(f) The department shall fully consider all written and oral submissions before taking final action in a rulemaking proceeding. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 91-3)

§§13-300-14 to 13-300-20 (Reserved)

## SUBCHAPTER 3

### Island Burial Councils

§13-300-21 Establishment. (a) The department shall establish an island burial council for Hawai`i, Maui/Lana`i, Molokai, O`ahu, and Kaua`i/Ni`ihau to carry out all applicable duties established by sections 6E-43, 6E-43.5, and 6E-43.6, HRS, and any other applicable law. The councils shall be a part of the department for administrative purposes.

(b) The governor shall appoint the members of the council, in accordance with section 26-34, HRS, from a list provided by the department and a list provided by the Office of Hawaiian Affairs. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 26-34)

§13-300-22 Composition. (a) Each council shall be composed of at least one representative from each geographic region of the island and representatives of development and large property owner interests.

(b) Regional representatives shall meet the following criteria:

(1) Be a member of the Hawaiian community and represent one of the following geographic regions:

(A) Kohala, Kona, Ka`u, Puna, Hilo, and Hamakua for the island of Hawai`i;

(B) Lahaina, Wailuku, Makawao, and Hana for the island of Maui;

(C) Lana`i;

(D) West Molokai, Central Molokai, East Molokai and Kalawao for the island of Molokai;

(E) Wai`anae, `Ewa, Kona, Ko`olaupoko, Ko`olauloa and Waialua for the island of O`ahu;

(F) Waimea, Koloa, Lihu`e, Kawaihau, Hanalei and Na Pali for the island of Kaua`i; and

(G) Ni`ihau; and

(2) Possess an understanding of Hawaiian culture, history, customs, practices, and in particular, beliefs and practices relating to the care and protection of Native Hawaiian burial sites and ancestral remains and burial goods; and

(3) Not simultaneously serve on another state board or commission.

(c) The department shall request appropriate Hawaiian organizations to submit names of candidates for regional representative to the department for consideration, along with statements demonstrating the candidates' understanding of Native Hawaiian culture.

(d) At least twenty percent of regional representatives shall be appointed from a list of at least nine candidates provided by the Office of Hawaiian Affairs, when a list is so provided.

(e) Development and large property owner representatives shall meet the following criteria:

- (1) Currently be employed by or associated with either a developer who conducts large scale land development activities, or a large property owner who owns or leases at least one hundred acres of land on the respective island;
  - (2) Represent the interests of development or large property owners or both; and
  - (3) Not simultaneously serve on another state board or commission.
- (f) The department shall request developers and large property owners to submit the names of candidates for consideration, along with statements demonstrating that the candidate meets the criteria stated in subsection (e).
- (g) The councils shall have a minimum of nine and a maximum of fifteen members, and have a ratio of not more than three to one and no less than two to one in favor of regional representatives.
- (h) Council members shall serve without compensation. The department shall compensate council members for expenses incurred during the performance of their duties including air and ground transportation and parking expenses. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-23 Term, removal, and reappointment. (a) Each council member shall serve the length of the term assigned by the governor, unless the member voluntarily resigns, or is removed or suspended by the governor pursuant to section 26-34, HRS.

(b) Removal or suspension of a member from the council may occur for any of the following reasons:

- (1) Health concerns;
- (2) Failure to carry out duties and responsibilities as provided in this chapter;
- (3) Unexcused absences from three consecutive council meetings; or
- (4) Appointment to another state board or commission.

(c) Any appointment to fill a vacancy on the council shall be in compliance with section 26-34, HRS, and article 5, section 6 of the Hawai`i State Constitution. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 26-34, Hawai`i Const. art. V, §6)

§13-300-24 Duties and responsibilities. (a) The primary responsibility of the council shall be to determine preservation or relocation of previously identified Native Hawaiian burial sites as set forth in this chapter.

(b) The council shall assist the department in the inventory and identification of Native Hawaiian burial sites by providing information obtained from families and other sources.

(c) The council shall make recommendations to the department regarding appropriate management, treatment, and protection of Native Hawaiian burial sites, and on any matters related to Native Hawaiian burial sites.

(d) The council shall maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of Native Hawaiian skeletal remains, any burial goods, and burial sites.

(e) By a concurrence of a majority of the members present, the council shall each elect a chairperson and vice chairperson for four year terms who shall serve no more than two consecutive terms. By a two-thirds vote of its members, the council may at any time replace the chairperson or vice chairperson or both.

(f) In accordance with section 13-300-4, the council shall be authorized to deem department records relating to the location and description of Native Hawaiian burial sites sensitive and thereby exempt from the requirements of section 92F-12, HRS.

(g) In accordance with section 13-300-35, the council shall decide whether to recognize a claimant as a lineal or cultural descendant based on a written assessment provided by the department.

(h) The council shall be authorized to take any other appropriate actions in furtherance of this chapter. Nothing in this section shall be construed to limit the authority of the council as to matters provided in chapter 6E, HRS. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 92F-12)

§13-300-25 Meetings. (a) The council shall hold regularly scheduled meetings at a time and place established by the council. Notice shall be given in accordance with chapter 92, HRS. The purpose of the meeting shall be to acquire information relating to Native Hawaiian burial sites, make recommendations to the department regarding Native Hawaiian burial sites, and determine the proper treatment of previously identified Native Hawaiian burial sites.

(b) All meetings by the council shall be open to the public, provided the council may meet in executive session pursuant to chapter 92, HRS, from which the public may be excluded, by a recorded vote of two-thirds of the members present. No order, ruling, or decision shall be finally acted upon during executive session.

(c) Following recognition by the chairperson, any person may submit oral or written testimony to the council regarding a matter under consideration, provided that applicants wishing to conduct an informational presentation or present a proposed burial treatment plan for determination, shall first submit a written request to the department to be placed on the council meeting agenda.

(d) The council may close a meeting whenever location or description of a Native Hawaiian burial site is under consideration. The chairperson, by concurrence of a majority of members present at the meeting, shall be authorized to require the public to leave the meeting while the confidential matter is being discussed and reopen the meeting once the confidential matter is no longer being considered.

(e) Written minutes of the council meeting shall be approved by the council. Upon request, the department shall make available to the public copies of the council minutes with the exception that the public minutes shall not reflect closed meeting discussions relating to confidential matters. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 92-3, 92-4)

§13-300-26 Quorum. A majority of the council shall constitute a quorum to conduct business and a majority of the members present at the meeting shall be necessary to approve any council action.

[Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-27 Duty of chairperson. (a) Duties of the council chairperson shall include, but not be limited to, the following:

- (1) Preside over all council meetings to ensure the orderly conduct of relevant business;
- (2) Be available to serve as an appeals panel member; and
- (3) Conduct any other duties necessary and appropriate to fulfill the responsibilities and obligations of the council.

(b) In the event the council chairperson is unable to carry out the responsibilities stated in subsection (a), the vice chairperson shall be responsible for the same. In the event the chairperson and vice chairperson are unable to preside over the council meeting, the council members shall elect from amongst those present, a member to chair the meeting. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-28 Role of the department. (a) The department shall provide all necessary administrative support services to the council which shall include but not be limited to the following:

- (1) Post a notice of council meeting agenda with the Lieutenant Governor's office;
- (2) Make necessary arrangements to reserve a place for council meetings and assist in arranging site inspections;
- (3) Record and transcribe minutes of council meetings;
- (4) Acquire and verify all information necessary for a council determination of burial treatment and refer the matter to the council for determination;
- (5) Submit to the applicant in writing the council's determination and any recommendations accepted by the department;
- (6) Generate correspondence on behalf of the council to implement the applicable provisions of chapter 6E, HRS, and this chapter;
- (7) Provide information to the council on any matters relating to appropriate management, treatment, and protection of Native Hawaiian burial sites and on any other matters relating to Native Hawaiian burial sites; and
- (8) Conduct any other administrative acts as deemed necessary.

(b) The department shall develop a statewide inventory which identifies and documents burial and reburial sites in accordance with section 13-300-31.

(c) Legal issues may be referred to the attorney general's office for appropriate action.

[Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 43.5, 43.6)

§§13-300-29 to 13-300-30 (Reserved)

## SUBCHAPTER 4

### Procedures for Proper Treatment of Burial Sites and Human Skeletal Remains

§13-300-31 Burial site identification; ethnicity evaluation. (a) A burial site may be identified by oral or written testimony in the following manner:

- (1) The council or the department where appropriate shall evaluate the testimony presented;
- (2) To the best of their ability, witnesses shall provide information including the location and description of a burial site;
- (3) The council shall recommend to the department whether to accept the testimony presented regarding a Native Hawaiian burial site; and
- (4) A burial site recognized by the department based on oral or written testimony shall be classified as previously identified.

(b) Burial sites discovered during archaeological inventory survey that appear to be over fifty years old shall be classified as previously identified for which the council or department, whichever is applicable, shall determine appropriate treatment.

- (1) Information relating to the location or description of burial sites identified during the archaeological inventory survey shall be placed in a section of the archaeological inventory report such that the section may be readily removed should the council or review board deem the information to be sensitive.
- (2) Possible burial sites identified during archaeological inventory survey shall be classified as previously identified where human skeletal remains are confirmed during the archaeological data recovery phase.
- (3) Where human skeletal remains discovered during archaeological inventory survey are not situated in a burial site context, the department shall be immediately notified.

(c) In order to develop a statewide inventory of burial sites, the department shall:

- (1) Consult knowledgeable persons regarding the location and identity of human skeletal remains in a burial or reburial site;
  - (2) Acquire authorization from the landowner for access to the property where a burial or reburial site is located;
  - (3) Inspect and document the location and description of a burial or reburial site;
  - (4) Place appropriate information on the statewide burial site inventory; and
  - (5) Provide written notification to the landowner of burial site documentation.
- (d) The department shall extrapolate relevant information from its records

relating to burial and reburial sites including location by island, district, ahupua`a, tax map key number, street address where available, and name of present landowner, and place all such information on the burial site inventory.

(e) Where known lineal descendants disagree with the recording of any information from a related burial or reburial site, no information shall be placed on the

burial site inventory provided the department maintains a record of the tax map key of the property in which the burial or reburial site is located for purposes of protection from harm.

(f) The department shall immediately notify any known lineal descendants when a permit is being reviewed by the department for the parcel in which a related burial or reburial site is located, or where an activity is known which may cause harm to a related burial or reburial site.

(g) An evaluation of ethnicity shall be made by the department for all human skeletal remains situated or formerly situated at a burial site. The following evidence shall be gathered and considered accordingly:

- (1) Oral or written evidence relating to the human skeletal remains or burial site evaluated by department cultural specialists, including but not limited to:
  - (A) Histories and traditions associated with specific places and families; and
  - (B) Genealogies.

Where oral or written evidence establishes ethnicity by a reasonable belief, the evaluation ends. Where the evidence does not establish ethnicity by reasonable belief, paragraph (2) shall apply;

- (2) Archaeological evidence relating to the human skeletal remains or burial site gathered by a professional archaeologist or archaeological firm meeting department minimal qualifications and standards. Evidence shall be evaluated by department archaeologist including but not limited to:
  - (A) Burial features including burial goods or other indicators of burial treatment;
  - (B) Where a cultural layer is associated with a burial site, the nature of its contents including artifacts and food remains; or
  - (C) The age of radiocarbon dates associated with the cultural layer in which human skeletal remains are situated.

Where the archaeological evidence establishes ethnicity by a reasonable belief, the evaluation ends. Where the archaeological evidence alone does not establish ethnicity, but when considered together with any oral or written testimony, ethnicity is established by reasonable belief, the evaluation ends. Where the evidence does not establish ethnicity by reasonable belief, paragraph (3) shall apply;

- (3) Osteological evidence, to be gathered by a physical anthropologist meeting department minimal qualifications, in accordance with section 13-300-32. Where osteological evidence fails to suggest ethnicity by reasonable belief, appropriate treatment of the human skeletal remains shall be determined by the department.

(h) Where a previously identified burial site is proposed to be preserved in place, no osteological or disturbing archaeological investigation shall occur, unless authorized by the department.

- (1) Where oral or written testimony does not establish ethnicity by reasonable belief, archaeological surface evidence and any pre-existing archaeological

- evidence from the burial site or pre-existing osteological evidence from burial sites in the surrounding area shall be reviewed by the department.
- (2) Where human skeletal remains are reasonably believed to be Native Hawaiian, the burial site shall be so classified and the council shall determine appropriate treatment.
  - (3) Where human skeletal remains are reasonably believed to be non Native Hawaiian, the burial site shall be so classified and the department shall determine appropriate treatment.
  - (4) Where existing evidence fails to clarify ethnicity by a reasonable belief, appropriate treatment of the human skeletal remains shall be determined by the department.
- [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 43.6)

§13-300-32 Physical examination of human remains. (a) In order to accomplish the purposes of chapter 6E, HRS, including the preservation and protection of all burial sites and especially Native Hawaiian skeletal remains from unnecessary disturbance, physical examination of human skeletal remains over fifty years old is prohibited, unless expressly provided for in this section.

(b) Physical examination of human skeletal remains may be authorized by the department to help evaluate ethnicity as deemed necessary by section 13-300-31. Physical examination shall be conducted in a respectful manner, with a recognition of the sensitivities associated with deceased human beings.

(c) Physical examination methods shall consist only of the observation of metric, non-metric, or other relevant traits needed to suggest ethnicity, or a combination thereof, if necessary. Any intrusive or destructive examination method including, but not limited to, x-ray, radio carbon dating, and mitochondrial DNA analysis, is prohibited unless a written request is made to the department and written approval is granted prior to the initiation of any such examination. Photography of human skeletal remains subject to examination pursuant to this subsection shall be prohibited, unless written consent is first obtained from the council where ethnicity is suggested to be Native Hawaiian, or the department, where ethnicity is suggested to be non Native Hawaiian. Failure to comply with this subsection may subject a violator to the penalties stated in section 13-300-43.

(d) Commingled human skeletal remains shall be separated by individual following the relevant methods stated in subsection (c).

(e) Upon examination completion, each set of human skeletal remains representing an individual shall be covered with clean white cloth and placed in a plain cardboard container. Each container shall be clearly marked with burial site location, names of the examiners, and dates of examination. Skeletal remains not identified to a specific individual shall be covered with clean white cloth, placed in a plain cardboard container, and the container marked accordingly.

(f) Physical examination shall be conducted at a location approved by the department on the island where the human skeletal remains originated. Inter island transportation of human skeletal remains shall occur only with prior approval of the department.

(g) Within thirty days of completion of the physical examination, a report shall be submitted to the department for review and acceptance. The report shall include the following:

- (1) Number of individuals represented; and
- (2) The suggested ethnicity of each individual or a finding that ethnicity could not be suggested by reasonable belief.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-33 Request for council determination to preserve or relocate Native Hawaiian burial sites. (a) The council shall have jurisdiction over all requests to preserve or relocate previously identified Native Hawaiian burial sites.

(b) The applicant shall submit a request to preserve in place or relocate a Native Hawaiian burial site to the department in the form of a burial treatment plan. The department shall assure that the burial treatment plan includes the following information prior to any council determination:

- (1) Evidence of a good faith search for lineal and cultural descendants, including:
  - (A) Research of relevant land conveyance documents including identification of land commission awardees located at or near the burial site;
  - (B) An inquiry to any person who may have knowledge of families possibly affiliated with the Native Hawaiian remains;
  - (C) Publication of notice in a newspaper of general circulation in the county in which the burial site is located and a newspaper of statewide circulation for a minimum of three days, including Sunday and Wednesday. At a minimum, the notice shall contain:
    - (i) A general description of the property including any identifying features and the tax map key, ahupua`a, district, and island;
    - (ii) The names of individuals or families including land commission awardees possibly associated with the burial site or property where the burial site is located;
    - (iii) The name, address, and telephone number of the applicant and a contact person in the department;
    - (iv) A brief statement of the proposed treatment for the burial site; and
    - (v) A statement that interested persons shall respond within thirty days and provide information to the department adequately demonstrating descent from the Native Hawaiian remains, or descent from ancestors buried in the same ahupua`a or district where the Native Hawaiian skeletal remains are buried.

Notice may also be placed in the next issue of Ka Wai Ola O OHA, published by the Office of Hawaiian Affairs, or any other similar

publication. The applicant shall append to the burial treatment plan proof of notice publication for each newspaper.

- (2) Names of any known lineal or cultural descendants recommended by the department and recognized by the council, and their respective positions regarding burial site treatment;
- (3) A description of proposed treatment of all burial sites including a statement of preservation in place or relocation:
  - (A) In the event preservation in place is proposed, statements describing:
    - (i) Short term measures to immediately protect all burial sites including, but not limited to, fencing, buffers, and site restoration; and
    - (ii) 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;
  - (B) In the event relocation is proposed, statements describing:
    - (i) Reasons that warrant relocation;
    - (ii) The methods to be utilized to conduct disinterment;
    - (iii) The location and manner by which Native Hawaiian skeletal remains and any burial goods will be curated where reburial will not occur immediately following disinterment;
    - (iv) The proposed reburial site location mutually agreed upon by the landowner and any recognized lineal descendant;
    - (v) The manner in which the reburial site will be prepared;
    - (vi) Short term measures to immediately protect the reburial site, including but not limited to fencing and buffers; and
    - (vii) 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;
- (4) Maps clearly indicating the location of all identified Native Hawaiian burial sites located at the property, including where applicable, the spatial relationship between Native Hawaiian burial sites and any proposed construction activities, drawn to scale;
- (5) The name and mailing address of the applicant;
- (6) The name and mailing address of the landowner if different from the applicant;
- (7) The tax map key number for the property;
- (8) The name of the ahupua`a, district, and island;
- (9) A description of the present condition of all previously identified Native Hawaiian burial sites located at the property;
- (10) Any project plans requested by the council including, but not limited to, construction and grading plans;
- (11) A copy of the archaeological inventory survey report where requested by the council;

- (12) Where applicable, proof that the archaeological inventory survey report has been accepted by the department;
  - (13) Where applicable, reports of any additional archaeological inventory level testing recommended by the council, reviewed and approved by the department; and
  - (14) Any other information the council deems necessary in order to make a fully informed determination provided that all council requests for additional information shall be done in a timely manner.
- (c) The applicant shall consult with the department in the development of the burial treatment plan. Once approved by the department, the applicant shall submit requisite copies of the completed burial treatment plan for distribution to the council, accompanied by a simple written request to be placed on the council agenda for a determination of burial site treatment.
- (d) Prior to making a determination, the council may request site inspections of the property where the burial site is located.
- (e) The applicant may, at any time prior to referral of the matter to the council for a determination, submit a simple written request to be placed on the council agenda to conduct an informational presentation of proposed burial treatment.
- (f) The council shall render a determination to preserve in place or relocate previously identified Native Hawaiian burial sites in accordance with section 13-300-38 within forty-five days of referral by the department, unless otherwise extended by agreement between the landowner and the department. Referral shall mean the first date the council officially convenes following:
- (1) Acceptance by the department of a complete or revised burial treatment plan;
  - (2) Receipt by the department of a written request to be placed on the council agenda for a determination of burial site treatment;
  - (3) Placement of the matter on the council agenda; and
  - (4) Posting of a notice of council meeting agenda with the lieutenant governor's office.
- (g) At any time prior to a determination by the council, an applicant may revise the burial treatment or withdraw the burial treatment plan from consideration by the council. In the event a withdrawn burial treatment plan is re-submitted to the department, the forty five day period shall commence following referral to the council, as provided in subsection (f).
- (h) Intentional removal of human skeletal remains or burial goods from a previously identified Native Hawaiian burial site is prohibited until a determination to relocate is made by the council pursuant to sections 6E-43 and 6E-43.5, HRS, and this chapter, except that the council shall be authorized to allow temporary removal of Native Hawaiian skeletal remains or any burial goods to protect from imminent harm, until a determination is made.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5)

§13-300-34 Request for department determination to preserve or relocate non Native Hawaiian burial sites. (a) The department shall have jurisdiction over all requests to preserve or relocate previously identified non Native Hawaiian burial sites.

(b) The applicant shall submit a request to preserve in place or relocate a previously identified non Native Hawaiian burial site to the department in the form of a burial treatment plan. The department shall assure that the burial treatment plan includes the following information prior to any determination of treatment:

- (1) Evidence of a good faith search for lineal and cultural descendants, including:
  - (A) Research of relevant land conveyance documents;
  - (B) An inquiry to any person who may have knowledge of families possibly affiliated with the non Native Hawaiian remains;
  - (C) Publication of notice in a newspaper of general circulation in the county in which the burial site is located and a newspaper of statewide circulation for a minimum of three days, including Sunday and Wednesday. At a minimum, the notice shall contain:
    - (i) A general description of the property including any identifying features and the tax map key, ahupua`a, district, and island;
    - (ii) The names of individuals or families possibly associated with the burial site or property where the burial site is located;
    - (iii) The name, address, and telephone number of the applicant and a contact person in the department;
    - (iv) A brief statement of the proposed treatment for the burial site; and
    - (v) A statement that interested persons shall respond within thirty days and provide information to the department adequately demonstrating descent from the non Native Hawaiian remains, or be the same ethnicity as the non Native Hawaiian skeletal remains.

Notice may also be placed in any publication which reaches a particular ethnic group. The applicant shall append to the burial treatment plan proof of notice publication for each newspaper.

- (2) Names of any known lineal or cultural descendants recognized by the department, and their respective positions regarding burial site treatment;
- (3) A description of proposed treatment of all burial sites including a statement of preservation in place or relocation:
  - (A) In the event preservation in place is proposed, statements describing:
    - (i) Short term measures to immediately protect all burial sites including, but not limited to, fencing, buffers, and site restoration; and
    - (ii) 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;
  - (B) In the event relocation is proposed, statements describing:

- (i) Reasons that warrant relocation;
  - (ii) The methods to be utilized to conduct disinterment;
  - (iii) The location and manner by which non Native Hawaiian skeletal remains and any burial goods will be curated where reburial will not occur immediately following disinterment;
  - (iv) The proposed reburial site location mutually agreed upon by the landowner and any recognized lineal descendant;
  - (v) The manner in which the reburial site will be prepared;
  - (vi) Short term measures to immediately protect the reburial site including, but not limited to, fencing and buffers; and
  - (vii) 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;
- (4) Maps clearly indicating the location of all identified non Native Hawaiian burial sites located at the property, including where applicable, the spatial relationship between burial sites and any proposed construction activities, drawn to scale;
- (5) The name and mailing address of the applicant;
- (6) The name and mailing address of the landowner if different from the applicant;
- (7) The tax map key number for the property;
- (8) The name of the ahupua`a, district, and island;
- (9) A description of the present condition of all previously identified non Native Hawaiian burial sites located at the property;
- (10) Any project plans requested by the department including, but not limited to, construction and grading plans;
- (11) Any other information the department deems necessary in order to make a fully informed determination provided that all department requests for additional information shall be done in a timely manner.
- (c) The applicant shall consult with the department in the development of the burial treatment plan. Once approved by the department, the applicant shall submit two copies of the completed burial treatment plan accompanied by a simple written request for a determination of burial site treatment.
- (d) Prior to making a determination, the department may request site inspections of the property where the burial site is located.
- (e) The applicant may, at any time prior to a determination, submit a simple written request to meet with the department to conduct an informational presentation of proposed burial treatment.
- (f) The department shall render a determination to preserve in place or relocate non Native Hawaiian burial sites in accordance with section 13-300-39 within thirty days of submittal of an acceptable burial treatment plan.
- (g) At any time prior to a determination by the department, an applicant may revise the burial treatment or withdraw the burial treatment plan from consideration. In

the event a withdrawn burial treatment plan is re-submitted to the department, the thirty day period shall commence following resubmittal.

(h) Intentional removal of human skeletal remains or burial goods from a previously identified non Native Hawaiian burial site is prohibited until a determination to relocate is made by the department pursuant to section 6E-43(e), HRS, and this chapter, except that the department shall be authorized to allow temporary removal of non Native Hawaiian skeletal remains or any burial goods to protect from imminent harm, until a determination is made.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §6E-43)

§13-300-35 Recognition of lineal and cultural descendants. (a) In order to establish lineal or cultural descent to human skeletal remains, a person shall submit a claim to the department together with any of the following information:

- (1) The name of the 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 including, but not limited to, deeds and land commission awards;
- (12) Oral family history; or
- (13) Any other applicable information or records that help establish a lineal connection between the claimant and the human skeletal remains.

(b) The department shall review all submitted information and assess whether direct or collateral genealogical connections can be demonstrated between the claimant and certain human skeletal remains.

(c) The department shall obtain a written statement from the claimant concerning the confidentiality of any information submitted. No information shall be duplicated by the department without prior written consent.

(d) Where possible, the department shall compare submitted information with records found at appropriate repositories including:

- (1) State archives;
  - (2) State bureau of conveyances;
  - (3) Office of health status monitoring, department of health;
  - (4) Family History Centers of the Church of Jesus Christ of Latter-Day Saints;
- or
- (5) Any other appropriate repository or source.

(e) The department shall have no longer than thirty days from receipt of a written claim to review and assess the information submitted. Upon completion, the department shall return all information, unless the claimant indicates otherwise.

(f) With regard to Native Hawaiian skeletal remains, the department shall provide the council with a written assessment of the information submitted and a recommendation regarding recognition of the claimant as a known lineal descendant. It shall be the decision of the council to recognize the claimant as a known lineal descendant. The council shall give preference for proper treatment of previously identified Native Hawaiian skeletal remains and any burial goods to known lineal descendants.

(g) With regard to non Native Hawaiian skeletal remains, the department shall provide the claimant with a written assessment of the information submitted. It shall be the decision of the department to recognize a non Native Hawaiian claimant as a known lineal descendant. The department shall give preference for proper treatment of previously identified non Native Hawaiian skeletal remains and any burial goods to known lineal descendants.

(h) Where the submitted information 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 certain Native Hawaiian skeletal remains and any burial goods are located or originated from, the department shall provide the council with a written assessment and a recommendation regarding recognition of the claimant as a cultural descendant. In the event the department does not recommend recognition as a cultural descendant, the recommendation shall be deferral pending submission of additional information. It shall be the decision of the council whether to recognize the claimant as a cultural descendant. Testimony by a recognized cultural descendant concerning proper treatment of Native Hawaiian skeletal remains and any burial goods, shall be duly considered and given appropriate weight by the council.

(i) Where the submitted information fails to establish lineal descent but establishes that the non Native Hawaiian claimant is the same ethnicity as the human skeletal remains, the department shall provide the claimant with a written assessment and a decision regarding recognition as a cultural descendant. In the event the department does not determine to recognize the claimant as a cultural descendant, the department shall defer the matter pending submission of additional information. Testimony by a recognized cultural descendant concerning the proper treatment of non Native Hawaiian skeletal remains and any burial goods shall be duly considered and given appropriate weight by the department. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 92-1) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-36 Criteria for evaluating request to preserve or relocate Native Hawaiian burial sites. (a) Previously identified Native Hawaiian burial sites and inadvertently discovered Native Hawaiian skeletal remains that meet any one of the following criteria shall be given greater consideration for preservation in place by the council and the department respectively:

- (1) When located in areas with a concentration of skeletal remains;
- (2) Pre-contact or historic period burial sites associated with important individuals and events as recommended by the council following consultation with known lineal or cultural descendants, appropriate

Hawaiian organizations, knowledgeable individuals, or any other appropriate source of information;

(3) When located in areas within a context of historic properties, as defined by section 6E-2, HRS;

(4) Where known lineal descendants request preservation in place; or

(5) Where the landowner agrees to preservation in place.

(b) When determining whether to preserve in place or relocate Native Hawaiian burial sites, the councils and the department where appropriate, shall give due consideration to the following:

(1) The cultural appropriateness of the proposal to preserve in place or relocate;

(2) Any possible harm to the Native Hawaiian skeletal remains if the burial site is left in place;

(3) The request of known lineal or cultural descendants to relocate; and

(4) Any reason presented by the applicant to relocate.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43, 6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§13-300-37 Criteria for evaluating request to preserve or relocate non Native Hawaiian burial sites. (a) Previously identified non Native Hawaiian burial sites and inadvertently discovered non Native Hawaiian skeletal remains that meet any one of the following criteria shall be given greater consideration for preservation in place by the department:

(1) When located in areas with a concentration of skeletal remains;

(2) Historic period burial sites associated with important individuals and events identified by the department following consultation with known lineal or cultural descendants, appropriate ethnic organizations, knowledgeable individuals, or any other appropriate source of information;

(3) When located in areas within a context of historic properties, as defined by section 6E-2, HRS;

(4) Where known lineal descendants request preservation in place; or

(5) Where the landowner agrees to preservation in place.

(b) When determining whether to preserve in place or relocate non Native Hawaiian burial sites, the department shall give due consideration to the following:

(1) The cultural appropriateness of the proposal to preserve in place or relocate;

(2) Any possible harm to the non Native Hawaiian skeletal remains if the burial site is left in place;

(3) The request of known lineal or cultural descendants to relocate; and

(4) Any reason presented by the applicant to relocate.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.6)

§13-300-38 Council determinations. (a) When determining appropriate treatment of a previously identified Native Hawaiian burial site, the council shall:

- (1) Fully consider all provisions of the burial treatment plan developed according to section 13-300-33;
- (2) Weigh all other written and oral evidence and assess the credibility of witnesses;
- (3) Carefully consider and apply the preservation criteria stated in section 6E-43, HRS and developed in section 13-300-36(a);
- (4) Fully consider any other relevant factors concerning appropriate treatment including those stated in section 13-300-36(b); and
- (5) Render a determination to preserve in place or relocate and make any related recommendations within forty-five days of referral by the department, unless extended by agreement between the applicant and the department.

(b) Within ten business days, the department shall notify the applicant in writing of the council determination and state:

- (1) Any recommendations relating to burial site treatment accepted by the department;
- (2) That an applicant who disagrees with the determination has the option to request reconsideration or appeal the decision as a contested case; and
- (3) That should the applicant accept the council determination as final, the burial site component of a preservation or archaeological data recovery plan, whichever is applicable, is required to be developed and submitted to the department for approval within ninety days.

(c) An applicant may request reconsideration of a council determination upon submittal of a written request within ten business days following receipt of written notice of the council determination from the department, provided that:

- (1) A request for reconsideration shall be granted only on the basis of newly discovered information not available at the time the council determined burial site treatment;
- (2) The council shall have sole discretion to grant or deny a request for reconsideration; and
- (3) The department, after consultation and approval by the council chairperson, shall notify the applicant of the council's decision regarding reconsideration.

(d) An applicant may appeal a council determination in accordance with section 6E-43, HRS, and subchapter 5.

(e) Where a council determination to preserve in place is accepted as final, the applicant shall develop the burial site component of the preservation plan consisting of the requirements of section 13-300-33(b)(3)(A) and any accepted recommendations relating to burial site treatment. Within ninety days of the council determination, the department shall approve the plan following consultation with the applicant, any known lineal descendants, the appropriate council, and any appropriate Hawaiian organizations.

(f) Where a council determination to relocate is accepted as final, the applicant shall develop the burial site component of the archaeological data recovery plan,

consisting of the requirements of section 13-300-33(b)(3)(B), and any accepted recommendations relating to burial site treatment. Within ninety days of the council determination, the department shall approve the plan following consultation with the applicant, any known lineal descendants, the appropriate council, and any appropriate Hawaiian organizations.

(g) In order to provide perpetual protection for previously identified Native Hawaiian burial sites, all council determinations to preserve in place or relocate shall be recorded in the bureau of conveyances by the department 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.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43, 6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5)

§13-300-39 Department determinations. (a) When determining appropriate treatment of a previously identified non Native Hawaiian burial site, the department shall:

- (1) Fully consider all provisions of the burial treatment plan developed according to section 13-300-34;
- (2) Weigh all other written and oral evidence and assess the credibility of witnesses;
- (3) Carefully consider and apply the preservation criteria stated in section 13-300-37(a);
- (4) Fully consider any other relevant factors concerning appropriate treatment including those stated in section 13-300-37(b); and
- (5) Render a determination to preserve in place or relocate and make any related recommendations within thirty days of submittal of an acceptable burial treatment plan, unless extended by agreement between the applicant and the department.

(b) Within ten business days, the department shall notify the applicant in writing of its determination and state:

- (1) Any recommendations relating to burial site treatment;
- (2) That the applicant has the option, should it disagree with the determination, to request reconsideration; and
- (3) That should the applicant accept the determination as final, the burial site component of a preservation or archaeological data recovery plan, whichever is applicable, is required to be developed and submitted to the department for approval within ninety days.

(c) An applicant may request reconsideration of a department determination upon submittal of a written request within ten business days following receipt of written notice of the decision from the department, provided that:

- (1) A request for reconsideration shall be granted only on the basis of newly discovered information not available at the time the department determined burial site treatment;
- (2) The department shall have sole discretion to grant or deny a request for reconsideration;

- (3) The department shall notify the applicant of its decision regarding reconsideration; and
- (d) Where a department determination to preserve in place is accepted as final, the applicant shall develop the burial site component of the preservation plan consisting of the requirements of section 13-300-34(b)(3)(A) and any accepted recommendations relating to burial site treatment. Within ninety days of its determination, the department shall approve the plan following consultation with the applicant, any known lineal descendants, and any appropriate ethnic organizations.
- (e) Where a department determination to relocate is accepted as final, the applicant shall develop the burial site component of the archaeological data recovery plan, consisting of the requirements of section 13-300-34(b)(3)(B), and any accepted recommendations relating to burial site treatment. Within ninety days of its determination, the department shall approve the plan following consultation with the applicant, any known lineal descendants, and any appropriate ethnic organizations.
- (f) In order to provide perpetual protection for previously identified non Native Hawaiian burial sites, all department determinations to preserve in place or relocate shall be recorded in the bureau of conveyances by the department 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. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §6E-43)

§13-300-40 Inadvertent discovery of human remains. (a) The department shall have jurisdiction over any inadvertent discovery of human skeletal remains and any burial goods over fifty years old, regardless of ethnicity.

- (b) The inadvertent discovery shall be immediately reported to the following persons:
  - (1) The state historic preservation division, unless discovery occurs on Saturday, Sunday, or holiday at which time the report shall be made to the division of conservation and resource enforcement;
  - (2) The medical examiner or coroner from the county in which the inadvertent discovery occurred; and
  - (3) The police department of the county in which the inadvertent discovery occurred.
- (c) Once the report of an inadvertent discovery has been made, the department 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 departmental inadvertent discovery forms;
- (6) Notify the council member who represents the geographic region where the human skeletal remains were discovered, and the Office of Hawaiian Affairs;
- (7) Inform the landowner or its agent of the discovery if different from the person making the report; and
- (8) Determine whether to preserve in place or relocate the human skeletal remains.

(d) In the event an inadvertent discovery of multiple human skeletons occurs on O`ahu, the department shall have two working days to complete the above, and three working days on all other islands. In the event the inadvertent discovery consisting of a single human skeleton occurs on O`ahu, the department shall have one working day to complete the above, and on all other islands the department shall have two working days. The statutory time periods may be extended upon voluntary written consent of the landowner or its authorized representative.

(e) Where human skeletal remains are reasonably believed to be Native Hawaiian following an evaluation pursuant to section 13-300-31, the department shall determine whether to preserve in place or relocate, following consideration and application of the criteria stated in section 13-300-36 and in consultation with appropriate council members, the landowner, and any known lineal or cultural descendants.

(f) Where the human skeletal remains are reasonably believed to be non Native Hawaiian following an evaluation pursuant to section 13-300-31, the department shall determine whether to preserve in place or relocate following application of the criteria stated in section 13-300-37, and in consultation with appropriate ethnic organizations, the landowner, and any known lineal or cultural descendants.

(g) In the event ethnicity of the human skeletal remains is not established by reasonable belief and in the absence of a time extension, the department shall determine whether to preserve in place or relocate following application of any relevant criteria stated in sections 13-300-36 and 13-300-37, and in consultation with the landowner.

(h) Within ninety days following a determination to preserve in place or relocate, the department shall approve the burial site component of either a preservation plan or an archaeological data recovery plan.

(i) Where the department determines to preserve the human skeletal remains in place, the burial site component of the preservation plan shall be prepared by the department or with the department's concurrence.

- (1) In preparing the burial site component of the preservation plan, the department 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 following an evaluation of ethnicity pursuant to section 13-300-31;
  - (B) The affected landowner or the landowner's representative;

- (C) Any appropriate ethnic organizations where human skeletal remains are reasonably believed to be non Native Hawaiian following an evaluation of ethnicity pursuant to section 13-300-31; and
  - (D) Any known lineal or cultural descendants.
- (2) At a minimum, the burial site component of the preservation plan shall include statements describing:
- (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.
- (3) In order to provide perpetual protection for human skeletal remains inadvertently discovered, departmental 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.
- (j) Where the department determines to relocate the human skeletal remains, the burial site component of the archaeological data recovery plan shall be prepared by the department or with the department's concurrence.
- (1) In preparing the burial site component of the archaeological data recovery plan, the department shall consult with the same parties as stated in subsection (i)(1).
- (2) At a minimum, the burial site component of the archaeological data recovery plan shall include statements describing:
- (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.
- (3) In order to provide perpetual protection for the newly established reburial site, all departmental 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.

(k) Intentional removal of inadvertently discovered human skeletal remains or burial goods is prohibited until a determination to relocate is made by the department pursuant to section 6E-43.6, HRS, and this chapter, except that the department shall be authorized to allow temporary removal of the remains or burial goods to protect from imminent harm, until a determination is made.

(l) The implementation of the preservation plan or archaeological data recovery plan shall be the responsibility of the following persons:

(1) The landowner, permittee, or developer, in discoveries related to development where land alteration project activities exist; and

(2) The department, in non-land alteration project contexts.

(m) Reburial shall be based on commonly accepted cultural practices as routinely recorded by the department. Additional requests by lineal or cultural descendants beyond commonly accepted cultural practices, deemed specific or special by the department following consultation with the appropriate council or ethnic organization, may be accommodated provided that any additional expenses incurred are paid by the descendants.

(n) In the event the landowner or its authorized representative knowingly fails to comply with any of the provisions of the preservation plan or archaeological data recovery plan, and directly or indirectly causes the taking, appropriation, excavation, injury, destruction, or alteration of any burial or reburial site, the action may be considered a violation of applicable provisions of chapter 6E, HRS, and this chapter and subject to statutory and administrative penalties.

(o) 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). [Eff SEP 28 1996 ] (Auth: HRS §§6E-43, 6E-43.5, 91-2) (Imp: HRS §6E-43.6, 25 U.S.C. §3001)

§13-300-41 Private possession of human remains. (a) There shall be a prohibition on the private possession of human skeletal remains over fifty years old knowingly removed or originating from a burial site in the State, except the department may authorize possession where:

(1) Private archaeological firms curate human skeletal remains temporarily until reburial occurs;

(2) A person is able to establish known lineal or cultural descent pursuant to section 13-300-35 to the human skeletal remains and wishes to possess or continue to possess the human skeletal remains or authorizes possession by a third person;

(3) Possession of human skeletal remains is an ethnically acceptable practice; or

(4) Human skeletal remains have been manufactured into artifacts prehistorically.

(b) Unauthorized possession of human skeletal remains over fifty years old knowingly removed or originating from a burial site in the State shall not amount to a

violation where the human skeletal remains are voluntarily turned over to the department within two years of the promulgation of this chapter.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6, 6E-11)

§13-300-42 Illegal sale of human remains and burial goods and removal from the State. (a) It shall be unlawful for any person to offer for sale or exchange any exhumed human skeletal remains over fifty years old, or any associated burial goods.

(b) It shall be unlawful for any person to remove from the jurisdiction of the State, any human skeletal remains over fifty years old, or any associated burial goods, without prior written authorization from the department. This section shall not apply to human skeletal remains fabricated into artifacts prehistorically.

(c) Any person intending to remove from the jurisdiction of the State, any human skeletal remains or portions thereof over fifty years old, or any associated burial goods or both, shall submit a written request to the department including:

- (1) Specific reasons for removal;
  - (2) A description of the lineal relationship if any, between the person requesting removal and the human skeletal remains; and
  - (3) Written consent of any known lineal descendants.
- (d) The department shall review the request in consultation with any known lineal descendants, the council where the human skeletal remains are Native Hawaiian, and an appropriate ethnic organization where the remains are non Native Hawaiian.

(e) The department shall have forty five days from the date of receipt of a request for removal of human skeletal remains over fifty years old or any associated burial goods or both, to grant or deny the request, unless the time is extended by mutual agreement. Where the department grants a request for removal, the written notification shall constitute the permit required by section 6E-12, HRS.

(f) Any person violating this section and section 6E-12(b), HRS, shall be fined not more than \$ 10,000, provided that for purposes of calculating a fine, each part of a human skeleton over fifty years old or associated burial good offered for sale or trade or removed from the jurisdiction of the State in violation shall constitute a distinct and separate offense for which the offender may be punished.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §6E-12)

§13-300-43 Penalty. (a) It shall be unlawful for any person, natural or corporate, to knowingly take, appropriate, excavate, injure, destroy, or alter any burial site or the contents thereof, located on private lands or lands owned or controlled by the State, or any of its political subdivisions, except as permitted by the department.

(b) Violators of this chapter and section 6E-11(b), HRS, are also subject to prosecution pursuant to section 711-1107, HRS, the penalties for which shall be imposed in addition to, and not in lieu of, any penalties imposed by section 6E-11(c), HRS, which include:

- (1) A fine of not more than \$ 10,000 for each separate offense;

- (2) If the violator directly or indirectly caused the loss of, or damage to, a burial site, a fine of an additional amount determined by the court to be equivalent to the value of the lost or damaged burial site;
  - (3) Seizure and disposition by the State without compensation to its owner or owners of all equipment used for the taking, appropriation, excavation, injury, destruction, or alteration of a burial site, or for the transportation of the violator to and from the burial site; and
  - (4) Prohibition from participating in the construction of any state or county funded project for ten years, as provided by section 6E-11(d), HRS.
- (c) Each day of continued violation of this provision shall constitute a distinct and separate offense for which the offender may be punished, as provided by section 6E-11(c), HRS.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-11, 711-1107)

§§13-300-44 to 13-300-50 (Reserved)

## SUBCHAPTER 5

### Administrative Appeals

§13-300-51 Appeal of council determination. (a) When required by law, the appeals panel shall hold a contested case hearing upon timely written petition of any person who is aggrieved by a council determination to preserve in place or relocate Native Hawaiian skeletal remains and any burial goods from a previously identified burial site and who is properly admitted as a party pursuant to section 13-300-54.

(b) Unless specifically prescribed in this chapter or by chapter 91, HRS, the appeals panel may adopt procedures that in its opinion will best serve the purposes of the hearing. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 91-9)

§13-300-52 Request for hearing. (a) A written petition for a contested case hearing shall be filed, i.e. mailed and postmarked, within forty five days following receipt of written notification of the council determination except that where a request for reconsideration of a council determination is made, the forty five day period to file a petition shall commence following action by the council to either deny the request for reconsideration or reaffirm its original decision following reconsideration.

(b) A petition requesting a contested case hearing shall contain concise statements of:

- (1) The legal authority by which appeal is requested;
- (2) The council determination being appealed and the date of the determination;
- (3) The nature of the interest that may be adversely affected by the council determination;
- (4) The relevant facts and issues raised;
- (5) The relief being sought; and
- (6) Any other information deemed applicable.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5)

§13-300-53 Notice of hearing. (a) After a determination is made by the presiding officer that a contested case hearing is required, the written notice of hearing shall be served by the department upon the parties in accordance with section 91-9.5, HRS, and shall be served on all persons admitted as a party at their last recorded address not less than fifteen days prior to the beginning of the contested case hearing.

(b) The notice shall be published as provided by law, but not less than once in a newspaper of general circulation within the State, and within the county from which appeal is being taken.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9.5)

§13-300-54 Parties. (a) The following persons shall be admitted as a party:

- (1) The applicant;
- (2) The landowner;
- (3) Any person who has been recognized by the department as a known lineal descendant to the Native Hawaiian skeletal remains; or
- (4) Any person who can show a substantial interest in the matter that is affected by the council determination, or by the outcome of the decision of the appeals panel.

(b) The presiding officer may deny an application to be a party when it appears that:

- (1) The position of the petitioner requesting participation is substantially the same as the position of a party already admitted to the contested case; or
- (2) The admission of the additional party will not add substantially new information, or the addition will render the proceedings inefficient and unmanageable.

(c) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter, by filing a written application with the department not less than twenty days prior to the beginning of the contested case hearing or at an earlier date established by the presiding officer. Except for good cause shown, late filings shall not be permitted.

(e) The application to intervene as a party shall contain the statements otherwise stated in section 13-300-52(b). In addition, the intervenor shall also address:

- (1) Whether there are other means available whereby the intervenor's interest may be protected;
- (2) The extent the intervenor's interest may be represented by existing parties;
- (3) The extent the intervenor's interest in the proceedings differs from that of the existing parties;
- (4) The extent the intervenor's participation can assist in development of a complete record;
- (5) The extent the intervenor's participation will broaden the issues or delay the proceeding; and
- (6) How the intervenor's intervention would serve the public interest.

(f) If any party opposes the intervenor's application to be a party, the party may file objections for the record no less than fifteen days prior to the beginning of the contested case hearing.

(g) All applications to intervene shall be acted upon as soon as practicable, and shall be decided not later than the commencement of the contested case hearing.

(h) A person whose application to be admitted as an intervenor has been denied, may appeal that denial to the circuit court pursuant to section 91-14, HRS. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9, 91-9.5, 91-14)

§13-300-55 Appeals panel. (a) Upon the grant of a petition to appeal a council determination, the appeals panel shall conduct the contested case hearing in accordance with this subchapter, and chapter 91, HRS, and whenever possible on the island from which the appeal is being taken.

(b) The appeals panel shall give due consideration to the determination of the council.

(c) The presiding officer shall select three members of the board of land and natural resources and three council chairpersons to serve on the appeals panel. Whenever possible, the board of land and natural resources member and the council chairperson representing the island from which the appeal is being taken, shall be selected to serve on the appeals panel.

(d) The presiding officer may consult with legal counsel from the attorney general's office on legal matters related to the contested case hearing.

(e) The presiding officer shall vote only in the event of a tie. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 6E-43.5, 91-9)

§13-300-56 Prehearing conference. (a) The presiding officer or designated representative may hold, or cause to be held, prehearing conferences with the parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed written testimony, setting of schedules, exchanging names of witnesses, limiting the number of witnesses, and any other matters as may expedite orderly conduct and disposition of the proceeding as permitted by law.

(b) The presiding officer may request briefs setting forth the issues, facts and legal arguments upon which the parties intend to rely and may fix the conditions and time for the filing

of briefs and the number of pages. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9)

§13-300-57 Conduct of hearing. (a) The presiding officer shall preside over the contested case hearing, rule on all procedural and substantive matters, and execute any other acts necessary for the orderly and just conduct of the hearing, including, but not limited to, the following:

- (1) The admission of parties;
- (2) Provide notice of the hearing to all parties;
- (3) Determine the scope of all issues on appeal;
- (4) Rule on any evidentiary issue;
- (5) Rule on any objection or motion raised by the parties;
- (6) Administer oaths;
- (7) Compel the attendance of witnesses by issuing a subpoena;
- (8) Examine and cross examine witnesses, as is deemed necessary;
- (9) Compel the production of documentary evidence;
- (10) Certify official acts;

- (11) Qualify expert witnesses;
  - (12) Rule on any offers of proof;
  - (13) Receive relevant evidence;
  - (14) Hold conferences before and during hearings;
  - (15) Fix times for submitting documents and briefs; and
  - (16) Dispose of any other matters that normally and properly arise.
- (b) The members of the appeals panel shall be authorized to examine and cross examine witnesses, as they deem necessary.
- (c) The presiding officer shall ensure that the proceedings are tape recorded. Any party may request a copy of the tapes and transcribe the proceedings at the party's own cost.
- (d) The petitioner shall make the first opening statement and the last closing argument unless the presiding officer directs otherwise. Other parties shall be heard in the order that the presiding officer directs.
- (e) Where a party is represented by more than one counsel, they may allocate witnesses between them but only one counsel shall be permitted to cross examine a witness, or state objections, or make closing arguments.
- (f) Each party shall have the right to conduct cross examination of witnesses as required for a full and true disclosure of the relevant facts, and shall have the right to submit rebuttal evidence, subject to limitation by the presiding officer.
- (g) To avoid unnecessary or repetitive evidence, the presiding officer shall, subject to applicable law, set limits on the following:
- (1) Number of witnesses;
  - (2) Extent of direct or cross examination; and
  - (3) Time for testimony upon a particular issue.
- (h) A witness may testify in the Hawaiian language, provided the witness translate the Hawaiian testimony where requested.
- (i) Any procedure in a contested case hearing may be modified or waived by stipulation of the parties. An informal disposition may be made of any contested case hearing matter by stipulation, agreed settlement, consent decree, or default. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9, 91-9.5, 91-10, 91-11, 92-16)

§13-300-58 Procedure for subpoenas. (a) Witnesses, documents, or records may be subpoenaed as set forth in this subsection:

- (1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the appeals panel, shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only parties or a member of the appeals panel may request the issuance of a subpoena;
- (2) Requests for the issuance of subpoenas for the production of documents or records shall be in writing, specify the particular document or record, or part thereof, desired to be produced, and state the reasons why the

production thereof is believed to be material and relevant to the issues involved. Only parties or a member of the appeals panel may request the issuance of a subpoena duces tecum.

(b) No subpoena shall be issued unless the party requesting the subpoena has complied with this section, giving the name and address of the desired witness, and tendered the proper witness and mileage fees.

(c) The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued. Signed and sealed blank subpoenas shall not be issued.

(d) Requests for subpoenas shall be filed not less than ten days prior to the beginning of the contested case hearing.

(e) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State and the fees and mileage shall be paid by the party at whose request the witness appears. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 92-16)

§13-300-59 Motions. (a) All motions other than those made during a hearing shall be made in writing to the appeals panel, shall state the relief sought, and shall be accompanied by an affidavit or memorandum setting forth the grounds upon which they are based.

(b) The moving party shall serve a copy of all motions on all other parties not less than five days prior to the beginning of the contested case hearing and shall file with the presiding officer the original with proof of service.

(c) A memorandum in opposition or a counter affidavit shall be served on all parties not less than two days prior to the beginning of the contested case hearing. The original and proof of service shall be filed with the presiding officer.

(d) Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing shall be deemed a waiver of objection to the granting or denial of the motion.

(e) Any party may make a motion during the course of the contested case hearing. Thereafter, all other parties who wish, shall be given an opportunity to argue the motion on the merits. The presiding officer shall set the limits on argument on the motion and shall decide whether to grant or deny the motion.

[Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9)

§13-300-60 Evidence. (a) The presiding officer may exercise discretion in the admission or rejection of evidence, and the exclusion of immaterial, irrelevant, or unduly repetitious evidence, as provided by law with a view toward serving the interests of justice.

(b) The presiding officer shall rule on the admissibility of all evidence.

(c) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained, or the submission of the evidence itself.

(e) With the approval of the presiding officer, a witness may read testimony into the record on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall deliver copies thereof to the appeals panel and all parties. Admissibility shall be subject to the rules governing oral testimony.

(f) If the presiding officer deems that substantial saving in time will result, a copy of the prepared testimony may be received into evidence without reading, provided that copies thereof shall have been served upon all parties, the presiding officer, and all members of the appeals panel, not less than five days prior to the beginning of the contested case hearing, or if prior service is waived, permit cross examination of the witness on matters contained in the prepared testimony.

(g) If a relevant and material matter is offered into evidence in a document containing other matters, the party offering it shall designate specifically the matter so offered. If the other matter in the document would burden the record, at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies of it received as an exhibit. Other parties shall be afforded opportunity at that time to examine the document and to offer into evidence, other portions believed material and relevant.

(h) Exhibits shall be prepared as follows:

(1) Documents, pleadings, correspondence, and other exhibits shall be legible and shall be prepared on paper 8 1/2 x 11 inches in size. Charts and other oversize exhibits shall be bound or folded to the appropriate size. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form; and

(2) When exhibits are offered in evidence, the original and nine copies, unless otherwise waived by the appeals panel, shall be furnished to the presiding officer for the appeal panel and the department's use with adequate copies for review by other parties, unless the copies have been previously furnished or the presiding officer directs otherwise.

(i) If any matter contained in a document on file as a government record with the department is offered in evidence, unless directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of the document are specifically identified and otherwise competent, relevant, and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

(j) Official notice may be taken of matters judicially noticed by courts of the State. Official notice may be taken of generally recognized technical or scientific facts when parties are given notice either before or during the hearing of the material so noticed and afforded opportunity to contest the facts so noticed.

(k) At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed

time. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9, 91-10)

§13-300-61 Correction of transcript. A motion to correct the transcript shall be made within five days after receipt of the transcript and shall be acted upon by the presiding officer. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9, 91-10)

§13-300-62 Disqualification. (a) No member of the appeals panel shall sit in any proceeding in which the member has any pecuniary or business interest involved in the proceeding. If, after declaring any pecuniary interest or consanguinity to the parties, the parties do not oppose the member from sitting in a proceeding, the record shall note clearly the waiver by the parties.

(b) In the event it is discovered that a member of the appeals panel has or may have a pecuniary interest or business interest in the outcome of the hearing, or with a party to the hearing, after the beginning of the hearing, the presiding officer may entertain a motion to hear evidence on the matter and shall decide whether to disqualify the member.

(c) In the event a member of the appeals panel is disqualified by the presiding officer, an alternate appeals panel member shall be selected by the presiding officer to sit in place of the disqualified member. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 84-14, 91-13)

§13-300-63 Ex parte communications. (a) No party, or person petitioning to be a party to a hearing before the appeals panel, nor their employees, representatives, or agents, shall make any unauthorized ex parte communication either oral or written concerning the appeals hearing to any member of the appeals panel who will or may be a participant in the decision-making process.

(b) The following classes of ex parte communications are permitted:

- (1) Those relating to matters which a member of the appeals panel is authorized to dispose of on an ex parte basis;
- (2) Requests for information of the status of a proceeding;
- (3) Those which all parties to the proceeding agree or which the appeals panel has formally ruled may be made on an ex parte basis; or
- (4) Those with representatives of any news media on matters intended to inform the general public. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-13)

§13-300-64 Decisions and orders. (a) A proceeding shall be deemed submitted for decision by the appeals panel after the taking of evidence, the filing of briefs, the consideration of motions, and the presentation of oral arguments permitted or prescribed by the presiding officer.

(b) A party to the proceeding may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. The proposal shall be filed with the presiding officer and mailed to each party within ten days following the date the transcript is prepared, made available to the parties, and finalized by the presiding officer, unless the presiding officer shall prescribe otherwise.

(c) Within ninety days after the hearing, the appeals panel shall render its formal written findings of fact, conclusions of law, and decision and order approving or denying the request to preserve or relocate the burial site. The vote of each member shall be recorded. If any party to the proceeding has filed proposed findings of fact, the appeals panel shall incorporate in its decision, a ruling upon each proposed finding so presented.

(d) Upon agreement by the parties, the examination and proposed decision provisions under section 91-11, HRS, may be waived pursuant to section 91-9(d), HRS.

(e) Every decision and order adverse to a party to the proceeding rendered by the appeals panel shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law.

(f) Decisions and orders shall be served by mailing copies to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy. When a party has appeared by representative, service upon the representative shall be deemed to be service upon the party. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-9, 91-11, 91-12)

§13-300-65 Reconsideration. (a) The appeals panel may reconsider a decision it has made on the merits only if the moving party can show:

(1) New information that was not previously available would affect the result;  
or

(2) That a substantial injustice would occur.

(b) In either case, a motion for reconsideration shall be made not later than ten business days after the decision or any deadline established by law for the disposition of the subject matter, whichever is earlier. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-11, 91-12)

§13-300-66 Appeals. (a) Parties to the proceedings who are aggrieved by the decision of the appeals panel may obtain judicial review of the decision in the manner set forth in section 91-14, HRS, provided that the court also reverse or modify a finding of the appeals panel if the finding appears to be contrary to the clear preponderance of the evidence.

(b) The appeals panel shall be represented by the attorney general's office in any appeals of its decision.

(c) In the event the council is the aggrieved party and seeks judicial review, the council shall be represented by special counsel provided by the department. [Eff SEP 28 1996 ] (Auth: HRS §§6E-43.5, 91-2) (Imp: HRS §§6E-43, 91-14, 91-15)

§13-300-67 Severability. If any provision, section, paragraph, sentence, clause, phrase, or term of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect any remaining provisions, sections, paragraphs, sentences, clauses, phrases, terms, or applications of the chapter which can be given full effect without the invalidity, and to this end the provisions, sections, paragraphs, sentences, clauses, phrases, and terms of this chapter are declared to be severable. [Eff SEP 28 1996 ] (Auth: HRS §6E-43.5) (Imp: HRS §§6E-43, 6E-43.5, 6E-43.6)

§§13-300-68 to 13-300-70 (Reserved)

## DEPARTMENT OF LAND AND NATURAL RESOURCES

Chapter 13-300, Hawai`i Administrative Rules, on the Summary Page dated September 2, 1996, was adopted September 13, 1996 following public hearings held on the islands of O`ahu on January 25, 1995 and May 23, 1996, Maui on January 26, 1995 and May 24, 1996, Kaua`i on January 27, 1995 and May 28, 1996, Hawai`i in Hilo January 30, 1995 and May 29, 1996 and in Kona January 31, 1995 and May 30, 1996, on Molokai February 1, 1995 and May 31, 1996, and on Lana`i February 2, 1995 and June 4, 1996, after public notice was given in the Honolulu Advertiser on December 25, 1994 and April 14, 1996, Hawai`i Tribune Herald on December 25, 1994 and April 14, 1996, West Hawai`i Today on April 14, 1996, Maui News on December 25, 1994 and April 14, 1996, and Garden Island on December 25, 1994 and April 14, 1996.

The adoption of Chapter 13-300 shall take effect ten days after filing with the Office of the Lieutenant Governor.

***Note: The Honorable Governor Benjamin J. Cayetano signed the rules on September 17, 1996 and on September 18, 1996, the rules were filed with the Office of the Lieutenant Governor. The effective date of these rules is September 28, 1996. For questions regarding these rules, please contact Kai Markell, Esq. of the State Historic Preservation Division Burial Sites Program at (808) 692-8038.***