

ACT 306

H.B. NO. 3296

A Bill for an Act Relating to Burials.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings and purpose. The legislature finds that the full recognition and protection of the unique cultural values of the multi-ethnic peoples of Hawai'i are directly affected by historic preservation decisions. Of

particular sensitivity to each group is the impact and response of governmental decisions on the cultural values related to the treatment and protection of burials.

The legislature further finds that native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance.

All human skeletal remains and burial sites within the State are entitled to equal protection under the law regardless of race, religion, or cultural origin. The public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all, and therefore the legislature reaffirms the common law rule that a land owner knowingly in possession of human skeletal remains cannot own the remains but merely holds the same in trust for cultural descendants, who have the right to possession for purposes of proper cultural preservation or reinterment.

The purpose of this Act is to augment current procedures relating to the proper care and protection of burial sites found in the State. In order to avoid future disputes arising from the discovery of human skeletal remains, this Act provides 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.

SECTION 2. In accordance with Section 9 of Article VII of the Constitution of the State of Hawaii and sections 37-91 and 37-93, Hawaii Revised Statutes, the legislature has determined that the appropriation contained in this Act will cause the state general fund expenditure ceiling in fiscal year 1990-1991 to be exceeded by \$100,000, or 0.0039 per cent. The reasons for exceeding the general fund expenditure ceiling are that the appropriation made in this Act is necessary to serve the public interest and to meet the need provided for by this Act.

SECTION 3. Chapter 6E, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

“§6E- Island burial councils; creation; appointment; composition; duties.

(a) The department shall establish island burial councils for Hawaii, Maui/Lanai, Molokai, Oahu, and Kauai/Niihau, to implement section 6E-43.

(b) Appointment of members to the councils shall be made by the governor, in accordance with section 26-34, from a list provided by the department, provided that a minimum of twenty per cent of the regional representatives shall be appointed from a list of at least nine candidates provided by the office of Hawaiian affairs. The department shall develop the list in consultation with appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei. The membership of each council shall include at least one representative from each geographic region of the island as well as representatives of development and large property owner interests. Regional representatives shall be selected from the Hawaiian community on the basis of their understanding of the culture, history, burial beliefs, customs, and practices of native Hawaiians. 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.

(c) The department, in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and

appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei, shall adopt rules pursuant to chapter 91 necessary to carry out the purposes of this section. The council members shall serve without compensation, but shall be reimbursed for necessary expenses incurred during the performance of their duties. The councils shall be a part of the department for administrative purposes.

(d) The councils shall hold meetings and acquire information as they deem necessary and shall communicate their findings and recommendations to the department. Notwithstanding section 92-3, whenever the location and description of burial sites are under consideration, the councils may hold closed meetings. Concurrence of a majority of the members present at a meeting shall be necessary to make any action of a council valid.

(e) Department records relating to the location and description of historic sites, including burial sites, if deemed sensitive by a council or the Hawaii historic places review board, are exempted from the requirements of section 92F-12.

(f) The councils shall:

- (1) Determine the preservation or relocation of previously identified native Hawaiian burial sites;
- (2) Assist the department in the inventory and identification of native Hawaiian burial sites;
- (3) Make recommendations regarding appropriate management, treatment, and protection of native Hawaiian burial sites, and on any other matters relating to native Hawaiian burial sites;
- (4) Elect a chairperson for a four-year term who shall serve for not more than two consecutive terms; and
- (5) Maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of remains.

§6E- Inadvertent discovery of burial sites. (a) In the event human skeletal remains are inadvertently discovered, any activity in the immediate area that could damage the remains or the potential historic site shall cease until the requirements of subsections (b) to (d) have been met.

(b) The discovery shall be reported as soon as possible to the department, the appropriate medical examiner or coroner, and the appropriate police department. As soon as practicable, the department shall notify the appropriate council and the office of Hawaiian affairs.

(c) After notification of the discovery of multiple skeletons, the following shall be done within two working days, if on Oahu, and three working days, if in other council jurisdictions:

- (1) A representative of the medical examiner or coroner's office and a qualified archaeologist shall examine the remains to determine jurisdiction. If the remains are the responsibility of the medical examiner or coroner, the department's involvement shall end. If the remains are historic or prehistoric burials, then the remainder of this section shall apply;
- (2) The department shall gather sufficient information, including oral tradition, to document the nature of the burial context and determine appropriate treatment of the remains. Members of the appropriate council shall be allowed to oversee the on-site examination and, if warranted, removal; and
- (3) If removal of the remains is warranted, based on criteria developed by the department, in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such

as Hui Malama I Na Kupuna O Hawai'i Nei, through rules adopted pursuant to chapter 91, the removal of the remains shall be overseen by a qualified archaeologist and a mitigation plan shall be prepared by the department or with the concurrence of the department.

(d) In cases involving the discovery of a single skeleton, the requirements of subsection (c) shall be fulfilled in one working day if on Oahu, and two working days if in other council jurisdictions.

(e) The mitigation plan developed by or with the concurrence of the department pursuant to subsection (c)(3) shall be carried out in accordance with the following:

- (1) In discoveries related to development where land alteration project activities exist, the landowner, permittee, or developer shall be responsible for the execution of the mitigation plan including relocation of remains. Justifiable delays resulting from the discovery of burials shall not count against any contractor's completion date agreement;
- (2) Project activities shall resume once necessary archaeological excavations provided in the mitigation plan have been completed;
- (3) In nonproject contexts, the department shall be responsible for the execution of the mitigation plan and the relocation of remains; and
- (4) The department shall verify the successful execution of the mitigation plan.

(f) In cases where remains are archaeologically removed, the department shall determine the place of relocation, after consultation with the appropriate council, affected property owners, representatives of the relevant ethnic group, and any identified lineal descendants, as appropriate. Relocation shall conform with requirements imposed by the department of health, and may be accompanied by traditional ceremonies, as determined by the lineal descendants, or, if no lineal descendants are identified, the appropriate council or representatives of the relevant ethnic group that the department deems appropriate. Specific or special reinterment requests from lineal or cultural descendants may be accommodated provided that the additional expenses incurred are paid by the affected descendants."

SECTION 4. Section 6E-2, Hawaii Revised Statutes, is amended:

1. By adding three new definitions to read as follows:

"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 are interred, and its surrounding context, deemed a unique class of historic property and not otherwise included in section 6E-41.

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

2. By amending the definition of "historic preservation" to read as follows:

"Historic preservation" means the research, protection, restoration, rehabilitation, and interpretation of buildings, structures, objects, districts,

areas, and sites, including underwater sites[,] and burial sites, significant to the history, architecture, archaeology, or culture of this State, its communities, or the nation.”

3. By amending the definition of “historic property” to read as follows:

“ “Historic property” means any building, structure, object, district, area, or site, including heiau and underwater site, [that is significant in the history, architecture, archaeology, or culture of this State, its communities or the nation.] which is over fifty years old.”

SECTION 5. Chapter 6E-3, Hawaii Revised Statutes, is amended to read as follows:

“**§6E-3 Historic preservation program.** There is established within the department a division to administer a comprehensive historic preservation program which shall include, but not be limited to the following:

- (1) Development of an on-going program of historical, architectural, and archaeological research and development, including surveys, excavations, scientific recording, interpretation, and publications on the State’s historical and cultural resources;
- (2) Acquisition of historic or cultural properties, real or personal, in fee or in any lesser interest, by gift, purchase, condemnation, devise, [or] bequest[;], land exchange, or other means; preservation, restoration, administration, or transference of [such] the property; and the charging of reasonable admissions to [such] that property;
- (3) Development of a statewide survey to identify and document historic properties[,] and burial sites, including all those owned by the State and its political subdivisions;
- (4) Preparation of information for the Hawaii register of historic places and for listing on the national register of historic places;
- (5) Preparation, review, and revisions of a state historic preservation plan, including budget requirements and land use recommendations;
- (6) Application for and receipt of gifts, grants, technical assistance, and other funding from public and private sources for the purposes of this chapter;
- (7) Provision of technical and financial assistance to the political subdivisions of the State and public and private agencies involved in historic preservation activities;
- (8) Coordination of activities of the political subdivisions of the State in accordance with the state plan for historic preservation;
- (9) Stimulation of public interest in historic preservation, including the development and implementation of interpretive programs for historic properties listed on the Hawaii register of historic places;
- (10) Coordination of the evaluation and management of burial sites as provided in section 6E-43;
- (11) Acquisition of burial sites in fee or in any lesser interest, by gift, purchase, condemnation, devise, bequest, land exchange or other means, to be held in trust;
- (11) (12) Submittal of an annual report to the governor and the legislature detailing the accomplishments of the year and [the] recommen-

datations for changes in the state plan or future programs relating to historic preservation;

- [(12)] (13) Regulation of archaeological activities throughout the State;
- [(13)] (14) Employment of sufficient professional and technical staff for the purposes of this chapter without regard to chapters 76 and 77; and
- [(14)] (15) Adoption of rules in accordance with chapter 91, necessary to carry out the purposes of this chapter.”

SECTION 6. Section 6E-7, Hawaii Revised Statutes, is amended to read as follows:

“§6E-7 State title to historic property. (a) All historic property located on lands or under waters owned or controlled by the State shall be the property of the State. The control and management of the historic property shall be vested in the department.

(b) The department may dispose of the historic property subject to chapter 171 and subject further to those reservations, restrictions, covenants¹, or conditions which relate to the preservation of the historic property, such as rights of access, public visitation, operation, maintenance, restoration, and repair. The department shall determine the conditions for any research affecting the historic property and may issue permits for the research.

(c) The State shall hold known burial sites located on lands or under waters owned or controlled by the State in trust for preservation or proper disposition by the lineal or cultural descendants.

[(c)] (d) The State shall not transfer any historic property under its jurisdiction without the concurrence of the department[.], and shall not transfer any burial site under its jurisdiction without consulting the appropriate island burial council.”

SECTION 7. Section 6E-8, Hawaii Revised Statutes, is amended to read as follows:

“[[§6E-8]] Review of effect of proposed state projects. (a) Before any agency or officer of the State or its political subdivisions commences any project which may affect historic property[.] or a burial site, the agency or officer shall advise the department and allow the department an opportunity for review of the effect of the proposed project on historic properties[.] or burial sites, consistent with section 6E-43, especially those listed on the Hawaii register of historic places. The proposed project shall not be commenced[.]; or, in the event it has already begun, continued, until the department shall have given its written concurrence.

If the concurrence of the department is not obtained within ninety days after the filing of a request with the department, the agency or officer seeking to proceed with [such] the project may apply to the governor who may request the Hawaii advisory council on historic preservation to report or who may take such action as the governor deems best in overruling or sustaining the department.

(b) The department of Hawaiian home lands, prior to any proposed project relating to lands under its jurisdiction, shall consult with the department regarding the effect of [any proposed] the project upon historic property[.] or a burial site.

(c) The State, its political subdivisions, agencies, and officers shall report to the department the finding of any historic property during any project and

shall cooperate with the department in the investigation, recording, preservation, and salvage of [such] the property.”

SECTION 8. Section 6E-11, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§6E-11]]~~ Penalties. (a) It shall be unlawful for any person, natural or corporate, to take, appropriate, excavate, injure, destroy, or alter any historic property located upon the private lands of any owner thereof without the owner’s written permission being first obtained. It shall be unlawful for any person, natural or corporate, to take, appropriate, excavate, injure, destroy, or alter any historic property located upon lands owned or controlled by the State or any of its political subdivisions,¹ except as permitted by the department.

(b) 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.

(c) Any person who violates this section shall be fined not more than ~~[\$1,000,]~~ \$10,000 for each separate offense. If the violator directly or indirectly has caused the loss of, or damage to, historic property[,] or burial site, the violator shall be fined an additional amount determined by the court to be equivalent to the value of the lost or damaged historic property[,] or burial site. Each day of continued violation of this provision shall constitute a distinct and separate offense for which the offender may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of historic property[,] or a burial site, or for the transportation of the violator to or from the historic property[,] or a burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners.

(d) Any person, natural or corporate, who knowingly violates this section with respect to burial sites shall also be prohibited from participating in the construction of any state or county funded project for ten years.”

SECTION 9. Section 6E-12, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§6E-12]]~~ Reproductions, forgeries, and illegal sales. (a) It shall be unlawful to reproduce, retouch, rework, or forge any historic object and to represent it or offer it for trade or sale as an original and genuine object. It shall be unlawful for any person to offer for sale or exchange any historic object with the knowledge that it has been collected or excavated in violation of any of the terms of this chapter.

(b) It shall be unlawful for any person to:

- (1) Offer for sale or exchange any exhumed prehistoric or historic human skeletal remains or associated burial goods; or
- (2) Remove those goods or remains, except those remains fabricated into artifacts prehistorically, from the jurisdiction of the State without obtaining a permit from the department.

(c) Any person violating this section shall be fined no more than ~~[\$1,000.]~~ \$10,000. Each object or part of a prehistoric or historic human skeleton or associated burial good offered for sale or trade or removed from the jurisdiction in violation of this section shall constitute a distinct and separate offense for which the offender may be punished.”

ACT 306

SECTION 10. Section 6E-13, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for the protection of [a] an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration, or transfer of [such] the property[.] or burial site.”

SECTION 11. Section 6E-15, Hawaii Revised Statutes, is amended to read as follows:

“**[[[§6E-15]] Regulations, special conditions or restrictions.** In addition to any power or authority of a political subdivision to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing body of any political subdivision may provide by regulations, special conditions, or restrictions for the protection, enhancement, preservation, and use of historic properties[.] or burial sites. [Such] These regulations, special conditions, and restrictions may include appropriate and reasonable control of the use or appearance of adjacent or associated private property within the public view, or both, historic easements, preventing deterioration by wilful neglect, permitting the modification of local health and building code provisions, and transferring development rights.”

SECTION 12. Section 6E-42, Hawaii Revised Statutes, is amended to read as follows:

“**[[[§6E-42]] Review of proposed projects.** Before any agency or officer of the State[.] or its political subdivisions[.] approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property[.] or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties[.] or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.”

SECTION 13. Section 6E-43, Hawaii Revised Statutes, is amended to read as follows:

“**[[[§6E-43]] Prehistoric and historic burial sites.** (a) At any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered[.] or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without the department’s approval[, and any activity in the immediate area which could damage the remains or the potential historic site shall cease until the requirements of subsections (b) to (d) have been met.

(b) The finding shall be reported as soon as possible to the department, the medical examiner or coroner, and the appropriate police department.

(c) After notification of the discovery of multiple skeletons, the following shall be done within two working days, if on Oahu, and three working days, if on other islands:

- (1) A representative of the medical examiner or coroner's office and a qualified archaeologist shall examine the remains to determine jurisdiction. If the remains are the responsibility of the medical examiner or coroner, the department's involvement will end. If the remains are significant historic or prehistoric burials, the remainder of this section shall apply;
- (2) The department shall gather sufficient archaeological information to evaluate the significance of the remains;
- (3) If the remains are significant, based on criteria established for the Hawaii register of historic places, the department shall prepare a mitigation plan. If this plan calls for data recovery, and the removal of the burials is warranted, then archaeological analysis must occur, along with appropriate study of the remains by a qualified physical anthropologist. If lineal descendants can be identified by the department, and if they oppose the physical anthropological study, then it shall not occur; and
- (4) The department shall notify the office of Hawaiian affairs if it is likely that the remains are those of native Hawaiians.

(d) In cases involving the discovery of a single skeleton, the requirements of subsection (c) shall be fulfilled in one working day if on Oahu, and two working days if on other islands.

(e) The mitigation plan developed by the department pursuant to subsection (c)(3) shall be carried out in accordance with the following:

- (1) In discoveries related to development where land alteration project activities exist, the landowner, permittee, or developer shall be responsible for the execution of the mitigation plan and the disposition of remains. Delays shall not count against any contractor's completion date agreement;
- (2) Project activities shall resume once necessary archaeological excavations of the mitigation plan have been completed;
- (3) In nonproject contexts, the department shall be responsible for the execution of the mitigation plan and the disposition of remains; and
- (4) The department shall verify the successful execution of the mitigation plan.

(f) In cases where remains are archaeologically removed, the department shall determine the final disposition, after consultation with representatives of the relevant ethnic group and any identified lineal descendants.

- (1) Options shall include:
 - (A) Reburial on the site;
 - (B) Reburial off the site; or
 - (C) Curation in a depository.
- (2) Disposition shall conform with requirements imposed by the department of health.
- (3) Disposition may be accompanied by traditional ceremonies, as determined by representatives of the relevant ethnic group whom the department deems appropriate.
- (4) Special disposition requests from lineal descendants may be accommodated provided that the additional expenses incurred are paid by the affected lineal descendants].

(b) All burial sites are significant and shall be preserved in place until compliance with this section is met, except as provided in section 6E-. The appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted, following criteria which shall include recognition that burial sites of high

preservation value, such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or areas that are within a context of historic properties, or have known lineal descendants, shall receive greater consideration for preservation in place. The criteria shall be developed by the department in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei, through rules adopted pursuant to chapter 91. A council's determination shall be rendered within thirty days of referral by the department.

(c) Council determinations may be administratively appealed to a panel composed of three council chairpersons and three members from the board of land and natural resources as a contested case pursuant to chapter 91. In addition to the six members, the chairperson of the board of land and natural resources shall preside over the contested case and vote only in the event of a tie.

(d) Within ninety days following the final determination, a preservation or mitigation plan shall be approved by the department in consultation with any lineal descendants, the respective council, other appropriate Hawaiian organizations, and any affected property owner.

(e) Should the burial site prove to be other than Hawaiian, the department, within thirty days shall determine whether preservation in place or relocation is warranted, and within an additional ninety days a preservation or mitigation plan shall be approved by the department in consultation with any lineal descendants, appropriate ethnic organizations, and any affected property owner."

SECTION 14. Section 338-25.5, Hawaii Revised Statutes, is amended to read as follows:

"[§338-25.5 Disinterment of human bodies.] (a) No corpse, nor the remains of any dead human body, exclusive of ashes, shall be exposed, disturbed, or removed from its place of burial, nor shall the receptacle, container, or coffin holding the remains or corpse be opened, removed, or disturbed after due interment, except upon written application made to the director of health for a permit therefor and upon the issuance and according to the terms of a permit granted therefor by the director. After any removal or disturbance the grave shall be filled at once and restored to its former condition.

(b) Notwithstanding the provisions of subsection (a), the department of land and natural resources pursuant to sections 6E-43 and 6E- may authorize exposure, removal, disinterment, or any other act without obtaining a permit from the department of health."

SECTION 15. There is appropriated out of the general revenues of the State of Hawaii the sum of \$100,000, or so much thereof as may be necessary for fiscal year 1990-1991, to carry out the purposes of this Act, including the hiring of necessary personnel.

SECTION 16. The sums appropriated shall be expended by the department of land and natural resources for the purposes of this Act.

SECTION 17. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the

invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 18. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 19. This Act shall take effect upon its approval; provided that Section 15 shall take effect upon July 1, 1990.

(Approved July 3, 1990.)

Note

1. So in original.
2. Edited pursuant to HRS §23G-16.5.