

How to Remedy the NAGPRA’s Unintended Effect on Hawai‘i after *Brown v. Hawaii*

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INTRODUCTION

Mai Kaula ‘i Wale I Ka Iwi O Na Kūpuna.
Do not dry out the bones of the ancestors.²

This note will discuss the repercussions of the *Brown v. Hawai‘i*³ decision, which classified the State Historic Preservation Division (SHPD), a Hawai‘i state agency, as a “museum” under the Native American Graves Protection and Repatriation Act (NAGPRA). The court in *Brown* required SHPD to follow the repatriation process imposed upon museums by NAGPRA.⁴ Some have argued that imposing NAGPRA’s federal heightened requirements upon a state agency will force SHPD to repatriate the hundreds of native Hawaiian remains in their possession. Others see NAGPRA as interfering with the proper treatment of human remains within the State. Despite differing views, the fact remains that after *Brown*, SHPD will have to comply with the NAGPRA requirements, or find an alternate way to evade the Act. This note makes alternative recommendations on how SHPD can either comply, or avoid compliance, with NAGPRA.

Section I will discuss the meaning of the holding with a visual aid, while section II introduces the historical and political climate in the State of Hawai‘i surrounding the *Brown* decision. Section III will discuss the laws governing remains repatriation, NAGPRA, and Hawai‘i Revised Statute Chapter 6E (Chapter 6E). Section IV examines the role of Island Burial Councils⁵ (IBCs or Councils) and how this decision affects them. The IBC remains the primary decision maker in previously identified burials.⁶ However, it only has an advisory role with respect to inadvertent discoveries.⁷ Finally, section V presents possible methods for SHPD to

² MARY KAWENA PUKUI, *‘ŌLELO NO‘EAU HAWAIIAN PROVERBS & POETICAL SAYINGS* 2069 (Bishop Museum Press 1983).

³ *Brown v. Hawaii*, 679 F.Supp.2d 1188 (D. Haw. 2009)..

⁴ *See Brown v. Hawaii*, 679 F.Supp.2d 1188, 1202-03 (D. Haw. 2009).

⁵ IBCs are unique to the State of Hawai‘i. There are five IBCs: O‘ahu, Hawai‘i, Maui and Lana‘i, Kaua‘i and Ni‘ihau, and Moloka‘i. Each IBC oversees burial treatment on each respective island. Further discussed in section II.A.3.

⁶ HAW. REV. STAT. § 6E-43(b) (2009); HAW. ADMIN. R. § 13-300-33(a) (2009).

⁷ HAW. ADMIN. R. § 6E-43.6(c)(3) (2009).

either comply, or avoid complying, with the *Brown* and NAGPRA altogether.

I. THE HOLDING'S IMPACT

The court in *Brown* held that SHPD is a museum under NAGPRA, and therefore must comply with the Act's restrictive statutory regulations for repatriation of remains.⁸ NAGPRA defines a museum as any institution, or State or local government agency that receives federal funds, and has possession⁹ or control¹⁰ over native remains or cultural objects.¹¹ In order to assist with understanding the practical repercussions of *Brown*, visual aids are provided in Appendix 1 and 2.

Prior to *Brown*, SHPD was directed by state law under Chapter 6E.¹² Under Chapter 6E, SHPD gained possession and control of remains discovered inadvertently upon private and public state lands.¹³ Previously identified remains,¹⁴ however, only came into the possession and control of SHPD if the IBCs¹⁵ decided to relocate them. Therefore, SHPD remained in control of all discovered remains upon private and state land. NAGPRA, on the other hand, governed all remains found on federal land and Hawaiian Homelands.¹⁶

This system changed drastically after *Brown*. NAGPRA currently governs all of SHPD's actions. Under the current law, if SHPD gains control (possession) of any remains, NAGPRA will supersede Chapter 6E and impose its procedure for repatriation of remains. NAGPRA, however, does not apply to the IBCs. In the case of previously identified remains, the IBCs still have control over the remains and determine whether to

⁸ *Id.*

⁹ A museum is deemed in "possession" of remains when it has physical custody of the remains. Definitions, 43 C.F.R. § 10.2(a)(3)(i) (2010).

¹⁰ The term "control" means having authority to treat the remains as part of the museum's collection and being able to make decisions upon the iwi's behalf. Definitions, 43 C.F.R. § 10.2(a)(3)(ii) (2010).

¹¹ *Id.* § 3001(8). Discussed in detail in Section II. B. 3.

¹² HAW. REV. STAT. § 6E-43 (2009).

¹³ HAW. ADMIN. R. § 13-300-40(a) (2009) [Inadvertent Discovery of Human Remains Hawai'i].

¹⁴ These include remains identified through an Archeological Assessment as part of the Environmental Impact Statement.

¹⁵ IBCs are island-specific delegations responsible for determining whether previously identified iwi or "bones" are to be relocated or preserved in place. IBCs serve only as consultants on the preferred treatment of inadvertently discovered iwi. IBCs are discussed in detail in sections III and V.

¹⁶ 25 U.S.C.A. § 3001(15)(A)-(C) (2001 & Supp. 2011).

relocate or preserve them in place, not remove them from the ground.¹⁷ If an IBC decides to preserve the remains in place, then SHPD does not gain control or possession over the remains, thereby avoiding the NAGPRA process. However, if the IBC recommends relocation, SHPD shall gain possession and control of the remains, therefore activating NAGPRA.

NAGPRA has become the governing Act for the repatriation of remains upon private, state, federal, and Hawaiian homelands. It imposes a strict repatriation process upon private landowners and commercial developments.

II. THE GOVERNING LAWS

This section will introduce the two laws governing the treatment of remains in Hawai‘i: (1) Chapter 6E and (2) NAGPRA, then discuss the requirements that each imposes upon the treatment and repatriation of human remains.

A. *Hawai‘i Revised Statutes Chapter 6E*

*‘A‘ohe e nalo ka iwi o ke ali‘i ‘ino,
o ko ke ali‘i maika‘i ke nalo.*

The bones of an evil chief will not be concealed,
but the bones of a good chief will.¹⁸

Chapter 6E is the governing section of Hawai‘i State law for the preservation of ancestral bones, or iwi kūpuna (iwi), whether previously identified or inadvertently discovered.¹⁹ Chapter 6E also governs the composition of the IBCs and their roles as advisors in the treatment of iwi and burial sites.²⁰

Congress passed the National Historic Preservation Act (NHPA) in 1966.²¹ One of NHPA’s purposes is to assist “Indian Tribes and Native Hawaiian Organizations . . . to expand and accelerate their historic preservation programs and activities.”²² The State of Hawai‘i eventually passed legislative equivalent to NHPA in 1976—codified as Hawai‘i Revised Statutes Chapter 6E—with the Department of Land and Natural Resources (DLNR) as the administering agency.²³ Chapter 6E statutorily

¹⁷ HAW. REV. STAT. § 6E-43(b) (2009).

¹⁸ PUKUI, *supra* note 1, at 135. When an evil chief died the people did not take the trouble to conceal his bones. Leaving bones exposed to the sunlight was considered the ultimate form of desecration.

¹⁹ HAW. REV. STAT. § 6E-43 (2009).

²⁰ *Id.* § 6E-43.5.

²¹ The National Historic Preservation Act, 16 U.S.C.A. § 470 (2010).

²² *See id.* § 470-1(6).

²³ HAW. REV. STAT. § 6E (2009).

articulates the State's policy to preserve, restore, and maintain historic and cultural property "in a spirit of stewardship and trusteeship for further generations, and to conduct activities and programs in a manner consistent with the preservation and enhancement of historic and cultural property."²⁴

SHPD was established within DLNR to administer Chapter 6E's historic preservation program, and currently receives two federal grants that support its operation.²⁵ SHPD's management of the preservation program entails coming into possession of Native Hawaiian iwi; SHPD's duties, obligations, and authorities are governed by H.R.S. §§ 6E-43 through 6E-43.6.²⁶ Those sections lay out a specific mechanism for the preservation of burial sites, by creating two paths – one for previously identified burials, and another for inadvertent discoveries.

1. Previously Identified Remains

Remains are considered "previously identified" for the purpose of the statute if they are discovered during an archeological assessment before a development or other land alterations occurs.²⁷ Prior to a proposed state project that may affect unmarked prehistoric or historic Hawaiian burials, SHPD must be notified and allowed to review the effect of the proposed project and provide a written concurrence or non-concurrence within ninety days after the filing of the request with the DLNR.²⁸

If burial sites are discovered during the archeological assessment on the proposed development of the property, the matter will be referred to the appropriate IBC.²⁹ Within forty-five days of referral by SHPD, the Council will determine whether the burial is to be preserved in place or relocated.³⁰ Within ninety days following the final determination of Council, a mitigation plan shall be approved by SHPD, taking into consideration the advice of lineal descendants, respective Councils, other Native Hawaiian organizations, and the affected property owner.³¹

²⁴ *Id.* § 6E-1.

²⁵ *Brown v. Hawaii*, 679 F.Supp.2d 1188 (D. Haw. 2009).

²⁶ *Id.* at 1189.

²⁷ The archeological assessment is a section of the Environmental Impact Statement (EIS), which is required by the National Environmental Policy Act (NEPA) for actions that "significantly affect the quality of the human environment." 42 U.S.C.A. § 4321 (2010).

²⁸ HAW. REV. STAT. § 6E-8 (2009).

²⁹ *Id.* § 6E-43(b).

³⁰ *Id.*

³¹ *Id.* § 6E-43(d).

2. Inadvertent Discovery Remains

Where human remains are inadvertently discovered, SHPD shall have jurisdiction over all remains fifty years or older, regardless of the ethnicity of the remains.³² The discovery shall be immediately reported to SHPD, a medical examiner, and the police department.³³ Once the report has been made, SHPD must assure that all activities in the discovery area cease and that appropriate protective measures are being taken to protect the remains.³⁴ The Office of Hawaiian Affairs (OHA) and the appropriate burial council must be contacted.³⁵ An SHPD representative then gathers information from individuals who may know about possible families – either lineally or culturally³⁶ connected with the remains.³⁷ Treatment of the remains will differ depending on whether they are categorized as Native Hawaiians.³⁸ SHPD is allowed two working days for multiple remains and one working day for a single set of remains³⁹ in order to determine whether the remains are to be preserved in place or relocated.⁴⁰ The determination shall be based upon the number of remains discovered, the importance of the location, the desires of known lineal descendants (if they are identified within the forty-eight hour limit), and the requests of the landowner.⁴¹

If relocation is warranted, a mitigation plan shall be drafted in collaboration with the Council, property owner, and Native Hawaiian organizations.⁴² SHPD shall be responsible for the execution and verification of the completion of the plan.⁴³ Reburial may be accompanied

³² *Id.* § 13-300-40(a).

³³ *Id.* § 13-300-40(b).

³⁴ *Id.* § 13-300-40(c).

³⁵ *Id.* § 13-300-40(c)(6).

³⁶ NAGPRA defines cultural affiliation as a “relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” 25 U.S.C.A § 3002 (2) (2010). Cultural affiliation is a broad term encompassing all scenarios that cannot be linked to a lineal descendant or specific Indian tribe or Native Hawaiian organization.

³⁷ *Id.* § 13-300-40(c)(4).

³⁸ *Id.* § 13-300-40(e).

³⁹ For islands other than O’ahu, SHPD shall have three working days for multiple remains, and two for single remains. *See Id.* § 13-300-40(f).

⁴⁰ *Id.* § 13-300-40(d).

⁴¹ *Id.* § 13-300-36(a) [Criteria for Evaluating Request to Preserve or Relocate Native Hawaiian Burial Sites].

⁴² HAW. REV. STAT. § 6E-43.6(c) (2009).

⁴³ *Id.* § 6E-43.6(e)(3)-(4).

by traditional ceremonies, as determined by lineal descendants, the IBC, or a representative Native Hawaiian organization.⁴⁴

3. Island Burial Councils

Chapter 6E-43.5 establishes Island Burial Councils.⁴⁵ The Governor appoints the members, and the Councils are based upon O‘ahu, Hawai‘i, Maui and Lana‘i, Kaua‘i and Ni‘ihau, and Moloka‘i to implement the burial laws.⁴⁶ The respective Councils assist SHPD with its inventory and identification of unmarked burial sites, and make recommendations regarding the appropriate treatment and protection of iwi.⁴⁷ The most important role of the Councils is to “determine the preservation or relocation of *previously* identified native Hawaiian burial sites.”⁴⁸ The decision-making role of the Councils is limited to previously identified iwi found during an archeological assessment. The Councils have only an advisory role for those iwi discovered inadvertently during construction. Where iwi are inadvertently discovered, SHPD fulfills the Council’s role and decides the iwi’s proper treatment.⁴⁹ SHPD has a choice of preserving the iwi on site, or relocating them due to the prospect of imminent harm.⁵⁰ If relocation is warranted, SHPD will determine the place for relocation, not the Councils.⁵¹

B. *Native American Graves Protection and Repatriation Act*

E ‘ao lū‘ao a kualima.

*Offer young taro leaves to the gods five times.*⁵²

On October 26, 1990, Senator John McCain asked his colleagues in the United States Senate to consider H.R. 5237, NAGPRA.⁵³ “The passage of this legislation marks the end of a long process for many Indian tribes and museums.” McCain stressed that “[t]he subject of repatriation

⁴⁴ *Id.* § 6E-43.6(f).

⁴⁵ *See id.* § 6E-43.5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ HAW. REV. STAT. § 6E-43.5(f)(1) (2009) (emphasis added).

⁴⁹ *Id.* § 6E-43.6(c)(2).

⁵⁰ *Id.* § 6E-43.6(c)(3).

⁵¹ *Id.*

⁵² PUKUI, *supra* note 1, at 263. Advice to one who erred and wishes to rectify his mistake.

⁵³ *See* C. Timothy McKeown & Sherry Hunt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLAJ. ENVTL. L. & POL’Y 153, 153 (2002-2003).

is charged with high emotions in both the Native American community and museum community. I believe this bill represents a true compromise.”⁵⁴

In essence, NAGPRA was civil rights legislation. Congress wanted to acknowledge that throughout United States history, Native American and Native Hawaiian human remains suffered from disparate treatment.⁵⁵ Senator Daniel Inouye stated, “in light of the important role that death and burial rites play in Native American cultures, it is all the more offensive that the civil rights of America’s first citizens have been so flagrantly violated for the past century.”⁵⁶ McCain’s “true compromise” went into effect on November 16, 1990.⁵⁷

NAGPRA acknowledges a government-to-government relationship between the United States and Indian tribes.⁵⁸ The Act requires federal agencies or museums receiving federal funding, with the exception of the Smithsonian Institution,⁵⁹ to consult with lineal descendants, Indian tribes, and Native Hawaiian organizations before intentional excavations and immediately following inadvertent discoveries of cultural items on federal or tribal lands.⁶⁰ It also requires federal agencies and museums that receive federal funding to inventory and, if requested, to repatriate Native American cultural items to lineal descendants or culturally affiliated Native American Tribes and Native Hawaiian organizations.⁶¹ Cultural items under NAGPRA include human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony.⁶²

Whose rights does NAGPRA protect? The Act states that it operates to vindicate the rights of disinterred persons, their lineal descendants, Native American tribes, and Native Hawaiian

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ Robert T. Willingham, *Holding States and Their Agencies Accountable Under the Museum Provisions of the Native American Protection and Repatriation Act*, 71 UMKC L. REV. 955, 958-59 (Summer 2003). For an alternate theory describing the struggle of Indians and Natives under the umbrella of sovereignty instead of civil rights movements, which are associated with immigrants, *see* Eric K. Yamamoto & Jen-L W. Lyman, RACIALIZING ENVIRONMENTAL JUSTICE, 72 U. COLO. L. REV. 311, 346 (2001).

⁵⁷ *See* 25 U.S.C.A. §§ 3001-13 (2001 & Supp. 2011).

⁵⁸ *Id.* § 3010 (2001).

⁵⁹ The Smithsonian Institution was specifically excluded from NAGPRA due to earlier passage of the National Museum of American Indian Act of 1989. 20 U.S.C.A. § 80q (2010)

⁶⁰ 25 U.S.C.A. § 3002 (2001).

⁶¹ *Id.* §§ 3003-05 (2001 & Supp. 2011).

⁶² *Id.* § 3001(3)(A)-(D) (2001 & Supp. 2011).

organizations.⁶³ The rights of the disinterred include, of course, the right to be buried according to their cultural traditions. The dead should be protected from claims of culturally unaffiliated people or groups. However, the remains themselves are not legally recognized persons and therefore have no standing to assert their rights, as NAGPRA designates human remains as “items” and not as persons.⁶⁴

NAGPRA has undoubtedly produced major successes in the repatriation context. According to the Summary of the National NAGPRA Program, 1,317 inventories have been received from 734 federal agencies and institutions receiving federal funding.⁶⁵ As of September 30, 2009, 38,671 individuals have been repatriated since the passage of NAGPRA on November 16, 1990.⁶⁶ It is estimated that up to 200,000 individual remains will eventually be accounted for through the NAGPRA process.⁶⁷

NAGPRA establishes three mechanisms to ensure the protection of Native remains and cultural objects.⁶⁸ First, it criminalizes the trafficking of native human remains and cultural items.⁶⁹ Second, it sets forth notification and consultation procedures for intentional or inadvertent excavations of native remains and cultural objects on tribal or federal lands.⁷⁰ Finally, it creates procedures through which lineal descendants, culturally affiliated Tribes, and Native Hawaiian organizations can recover human remains and funerary objects from federally funded museums and federal agencies.⁷¹

⁶³ *Id.* §§ 3001-13 (2001 & Supp. 2011).

⁶⁴ *See* *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1407 (D. Haw. 1995).

⁶⁵ NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL NAGPRA REPORTS, *available at* <http://www.nps.gov/history/nagpra/DOCUMENTS/INDEX.htm#Reports> (last visited Dec. 12, 2010).

⁶⁶ *Frequently Asked Questions*, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL NAGPRA, http://www.nps.gov/history/nagpra/FAQ/INDEX.HTM#How_many (last visited Dec. 12, 2010).

⁶⁷ Angela Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protections and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 60 (Fall 2002).

⁶⁸ 25 U.S.C.A. §§ 3000-13 (2001 & Supp. 2011).

⁶⁹ *Id.* § 3007 (2001 & Supp. 2011).

⁷⁰ *Id.* § 3011 (2001).

⁷¹ *Id.* § 3005 (2001 & Supp. 2011).

1. Criminalizing the Trafficking of Human Remains

NAGPRA criminalizes illegal trafficking of native remains and cultural objects obtained in violation of the Act.⁷² Criminal penalties include fines and imprisonment up to five years for second or subsequent offenses, or for knowingly engaging in commercial activity without the right of possession of human native remains and cultural objects in violation of NAGPRA.⁷³

2. Excavations

NAGPRA creates mandatory excavation procedures that govern the ownership and control of discovered human remains.⁷⁴ The procedures vary depending upon whether the human remains were intentionally or inadvertently excavated.⁷⁵ The Act applies only to tribal and federal lands, functioning solely within these geographical boundaries. Under the Act, “tribal lands” are defined as lands within the boundaries of a reservation, dependent Indian communities, and land administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act.⁷⁶

a. Intentional Excavations

In the case of a planned, intentional excavation, NAGPRA requires both notification and consent from the appropriate Tribe or Native Hawaiian organization prior to excavating the remains.⁷⁷ The right to control the remains will be given first to lineal descendants and then to either the appropriate Tribe or Native Hawaiian organizations.⁷⁸ Consultation and notification requirements are discussed below in section c. Responsibility for compliance with consultation procedures on federal lands lies with the appropriate land managing agency.⁷⁹ The agency will also be responsible for administering a plan of action regarding the disposition of the remains.⁸⁰

⁷² See *Illegal Trafficking in Native American Human Remains and Cultural Items*, 18 U.S.C.A. § 1170 (2000).

⁷³ *Id.*

⁷⁴ 25 U.S.C.A. § 3002(a) (2001).

⁷⁵ *Id.* § 3002(c)-(d).

⁷⁶ *Id.* § 3001(15)(A)-(C) (2001 & Supp. 2011).

⁷⁷ *Id.* § 3002(c)(2) (2001).

⁷⁸ *Id.* § 3002(a)(1)-(2)(A).

⁷⁹ *Intentional Archeological Excavation*, 43 C.F.R. § 10.3(c)(1) (2010).

⁸⁰ *Id.*

b. Inadvertent Excavations

In cases where human remains have been inadvertently discovered during the course of another activity, like construction, mining, logging, or agriculture, the person who discovers the remains must contact the appropriate agency, and cease all activity.⁸¹ The contacted agency in turn will contact the appropriate Tribe or Native Hawaiian organization.⁸² Activities can resume after thirty days of proof of notification to the appropriate Tribe or Native Hawaiian organization and Secretary of the Department of Interior.⁸³ This allows thirty days for the Tribe or Native Hawaiian organization to make a determination as to the appropriate disposition of the remains.⁸⁴ If the human remains must be excavated or removed, then the procedures for intentional excavation apply.⁸⁵

3. Recovering Human Remains From Museums

NAGPRA defines a “museum” as any institution, or State or local government agency that receives federal funds, and has possession or control over native remains or cultural objects.⁸⁶ A museum is deemed in “possession” of remains when it has physical custody of the remains.⁸⁷ The term “control” means having authority to treat the remains as part of the museum’s collection and being able to make decisions upon the iwi’s behalf.⁸⁸ This sets forth two requirements for an agency to be labeled a “museum” under NAGPRA: first, federal funding; and second, possession or control of native remains. SHPD satisfies both.

Under NAGPRA, museums must compile an inventory of all their remains in their possession, through consultation with the appropriate Tribe or Native Hawaiian organization.⁸⁹ The ultimate goal of NAGPRA is repatriation of the remains to the responsible Tribe or Native Hawaiian organization, which can be achieved through the last inventory stage of notification.⁹⁰ The inventory must be complete within five years after NAGPRA’s enactment on November 16, 1990.⁹¹ It was possible for

⁸¹ 25 U.S.C.A. § 3002(d)(1) (2001).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* § 3002(d)(2).

⁸⁶ *Id.* § 3001(8).

⁸⁷ Definitions, 43 C.F.R. § 10.2(a)(3)(i) (2010).

⁸⁸ *Id.* § 10.2(a)(3)(ii).

⁸⁹ *See* Inventories, 43 C.F.R. § 10.9 (2010).

⁹⁰ *See* 25 U.S.C.A. § 3003 (2001 & Supp. 2011).

⁹¹ *Id.* § 3003(b)(1)(B) (2001).

museums to have requested an extension as long as good faith efforts had been made to complete the inventory.⁹²

Finally, NAGPRA provides legal protection for any museum that repatriates human remains in good faith pursuant to the Act.⁹³ Under these conditions, museums shall not be found liable for claims by aggrieved parties or for claims of breach of fiduciary duty, public trust, or violation of state laws that are inconsistent with NAGPRA's provisions.⁹⁴

The steps for repatriation are consultation, inventory, notification, and repatriation.

a. Consultation

Museums should first identify the appropriate Native American Tribe, Native Hawaiian organizations, known lineal descendants, and traditional religious leaders who have an interest in the human remains present in their collection.⁹⁵ The inventory of human remains should be conducted in consultation with these groups,⁹⁶ and should begin as soon as possible.⁹⁷ It may be initiated by letter, but should be followed by telephone or face-to-face dialogue.⁹⁸

During the consultation period, a museum must provide both lineal descendants (when known) and the officials representing a Tribe or Native Hawaiian organization (1) a list of other claimants to the remains, (2) a time frame on the completion of the inventory, and (3) a brief description of the process of the inventory.⁹⁹ In turn, the museum must request from the claimants their contact information and recommendations on how the consultation process should be conducted.¹⁰⁰

b. Inventory

Once consultation has begun, the museum is responsible for creating an inventory.¹⁰¹ As noted earlier, the inventory should have been complete by November 16, 1995,¹⁰² although a museum could request an

⁹² *Id.* § 3003(c).

⁹³ *Id.* § 3005(f) (Supp. 2011).

⁹⁴ *Id.* § 3005(f).

⁹⁵ 43 C.F.R. § 10.9(b) (2010).

⁹⁶ *Id.* § 10.9(b)(1).

⁹⁷ *Id.* § 10.9(b)(2).

⁹⁸ *Id.*

⁹⁹ *Id.* § 10.9(b)(3).

¹⁰⁰ *Id.* § 10.9(b)(4).

¹⁰¹ 25 U.S.C.A. § 3003 (2001 & Supp. 2011).

¹⁰² *Id.* § 3003(b)(1)(B) (2001).

extension if a good faith effort had been made to complete the inventory.¹⁰³ Good faith efforts must include, but are not limited to, the initiation of active consultation, documentation regarding the remains, and the development of a written plan to carry out the inventory process.¹⁰⁴ The minimum requirements for the inventory plan should include: (1) a list of the remaining steps required towards completion, (2) the position titles of the individuals responsible for each step, (3) a schedule for carrying out the plan, and (4) a proposal to obtain required funding.¹⁰⁵

Each inventory shall result in an itemized list of human remains,¹⁰⁶ with documentation describing information relating the acquisition of the remains, a description of the physical characteristics of the remains, and a summary of the evidence used to determine cultural affiliation with a certain Tribe or Native Hawaiian organization.¹⁰⁷

A separate inventory would be created for unidentifiable remains where no culturally affiliated present-day Tribe or Native Hawaiian organization could be determined.¹⁰⁸

c. Notification

Once the inventory is complete, the notification process begins. If the inventory resulted in the successful identification of lineal descendants, Tribes, or Native Hawaiian organizations, then the museum must notify them no later than six months after the completion of the inventory.¹⁰⁹ The Tribe, Native Hawaiian Organization, lineal and cultural descendants shall be given the completed inventory and the notice of inventory completion, which summarizes the results of the inventory.¹¹⁰

The notice of inventory completion must summarize the contents of the inventory in enough detail to allow recipients to determine their interest in the remains.¹¹¹ It must identify each set of human remains, describe circumstances of acquisition, and describe the cultural affiliation with the Tribe or Native Hawaiian organization.¹¹²

¹⁰³ *Id.* § 3003(c).

¹⁰⁴ 43 C.F.R. § 10.9(f) (2010).

¹⁰⁵ *Id.*

¹⁰⁶ 25 U.S.C.A. § 3003(e) (2001).

¹⁰⁷ 43 C.F.R. § 10.9(c) (2010).

¹⁰⁸ *Id.* § 10.9(d)(2).

¹⁰⁹ *Id.* § 10.9(e)(1).

¹¹⁰ *Id.*

¹¹¹ *Id.* § 10.9(e)(2).

¹¹² *Id.*

The notice of inventory completion and the inventory must also be sent to the Manager at the National NAGPRA Program, who will publish it in the Federal Register.¹¹³

d. Repatriation

Under the Act, repatriation shall occur once cultural affiliation of the native remains is established. The remains will be expeditiously returned to the lineal descendants, Tribe, or Native Hawaiian organization identified in the inventory.¹¹⁴

III. NATIVE HAWAIIAN KULEANA

*Kapu ka haloa ku ma ka pe'a
Kanu ia Haloa ulu hahaloa
O ka lau o Halaoa i ke ao la
Puka.*

Taboo the taro stalk that stood by the woman's taboo house
Haloa was buried [there], a long taro stalk grew
The offspring of Haloa [born] into the day
Came forth.¹¹⁵

Native Hawaiians groups have demonstrated vigorous efforts to protect their iwi kūpuna by advocating for stronger legislation which broadens the preservation of iwi kūpuna. In an effort to illustrate the common motivations of Native Hawaiian groups, this section will explain the cultural ties and significance that human remains play within Native Hawaiian culture.

A. Genealogy

According to the Kumulipo, the Hawaiian creation chant, Hāloanaka (quivering long stalk), the stillborn child of Wākea (father-sky) and his daughter Ho'ohōkūkalani (star-of-heaven), was the first burial in Hawai'i.¹¹⁶ From Hāloanaka's burial site, a taro plant appeared.¹¹⁷ A second child named Hāloa followed.¹¹⁸ Hāloa is believed to be the

¹¹³ *Id.* §§ 10.9(e)(4), (7).

¹¹⁴ 25 U.S.C.A. § 3005(a)(1) (2001).

¹¹⁵ See Moses Haia & Sunny Greer, *Iwi Kūpuna: Native Hawaiian Burial Rights*, in *Native Hawaiian Law*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 2 (forthcoming 2012).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

progenitor of the Hawaiian people.¹¹⁹ This narrative “establishes the interconnection, the interdependent relationship between the gods, the land and the people. The burial of iwi results in physical growth of plants and spiritual growth of mana (life force).”¹²⁰ The descendants of Hāloa receive physical nourishment from the land they mālama (take care of) and spiritual sustenance by ensuring that the bones of their ancestors are properly cared for and in their rightful place.¹²¹ Therefore, the “kuleana (responsibility) to care for iwi kūpuna is a fundamental responsibility of the living[,] in order to maintain harmony between the living, the dead and the ‘aina (land).”¹²²

B. *Nā Iwi (The Bones)*

O na hōkū o ka lani i ‘ike ia Pae.

Aia a loa ‘a ka pūnana o ke kōlea, loa ‘a ‘oia ia ‘oe.

Only the stars of heaven know where Pae is.

When you find a plover’s nest, then you will find him.¹²³

The above ‘ōlelo no‘eau (proverb) is used to refer to something well hidden, which will not be found.¹²⁴ It tells the story of Pae, a priest who was a lucky fisherman.¹²⁵ His luck was renowned among the chiefs, and they desired his bones for fishhooks after his death.¹²⁶ When Pae died, his sons hid his bones so well that none of the chiefs and priests could find them.¹²⁷

The interconnection between iwi kūpuna, nature, and the identity of Kanaka Maoli (people of Hawaiian ancestry) exists within the Hawaiian language itself.¹²⁸ For example, the word “iwi” can also refer to the marks of stone or ridges signifying land boundaries, while “iwi honua” describes a shoal or rock projecting on a coral reef.¹²⁹ Also, the Hawaiian word for

¹¹⁹ *Id.*

¹²⁰ *Id.* quoting Kunani Nihipali, *Stone By Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 36-37 (2002).

¹²¹ Haia & Greer, *supra* note 110.

¹²² *Id.*

¹²³ PUKUI, *supra* note 1, at 2514.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Haia & Greer, *supra* note 110, at 3.

¹²⁹ *Id.*

“homeland” is “kulāiwi,” and the term for “native” is “ōiwi.”¹³⁰ By reburying and protecting the iwi, Native Hawaiians “strengthen the ancestral foundation, continue the interdependence between past and present[,] and re-infuse the land with mana necessary to sustain the ancestors, the living and the generations to come.”¹³¹ The mana embodied within the iwi would be imparted to their burial place, the ahupua‘a (traditional land district), and eventually to the island.¹³²

Today, iwi are found in unmarked locations because historically, burial sites were never marked. The ancient people left burial sites unmarked in order to deter enemies from manipulating and exploiting the mana within the iwi.¹³³ Desecration of iwi could occur in different ways, such as leaving the bones uncovered and exposed to sunlight, turning iwi into fishhooks, misuse of a skull, and ultimately the destruction of iwi.¹³⁴

For Native Hawaiians, iwi and the ‘uhane (spirit) were connected and the ‘uhane remained near iwi after death.¹³⁵ It was believed that the ‘uhane took three possible paths after death – it could join the ‘aumākua (ancestral gods), it could stay in the burial area and later join the gods, or it could remain with the iwi in order to serve its kahu (keeper).¹³⁶

The traditional Hawaiian beliefs on proper treatment of iwi are in conflict with modern customs of marked graves or cremation. It is through the understanding of these traditional Hawaiian customs that one can fully grasp the reasoning behind this struggle within the State of Hawai‘i for their repatriation. Repatriation of iwi is fundamental, because they re-infuse the ‘āina with their mana, they are the connection to our ancestors, and most importantly, their proper treatment is our kuleana.

IV. BROWN V. HAWAI‘I¹³⁷

On November 7, 2007, David Brown filed a complaint in the U.S. District Court for the District of Hawai‘i against the State of Hawai‘i (State) for wrongfully terminating his employment with SHPD as the

¹³⁰ *Id.*

¹³¹ Kunani Nihipali, *Stone By Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 37 (2002).

¹³² HALEALOHA AYAU, *Native Hawaiian Burial Rights*, THE NATIVE HAWAIIAN RIGHTS HANDBOOK 245, 247 (University of Hawai‘i Press 1991).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Brown v. Hawaii*, 679 F.Supp.2d 1188 (D. Haw. 2009). The case will not be discussed in detail as it addresses numerous other issues which are not relevant for the purpose of this paper.

director of the Archeological Branch.¹³⁸ Brown alleged that the State chose to not renew his contract because he described SHPD's practices as unethical, culturally insensitive, and illegally violating numerous federal laws, including non-compliance with NAGPRA.¹³⁹ Judge Alan C. Kay ruled that SHPD is a museum under NAGPRA and presently in violation of the Act; he further determined that it was not the Court's responsibility to determine the extent of the violation.¹⁴⁰

V. ANALYSIS

By forcing the application of federal regulation, *Brown* has changed the way that SHPD, State, and County agencies must treat human remains at the state level. Prior to *Brown*, NAGPRA only governed inadvertent discoveries of Native Hawaiian remains upon Hawaiian homelands and federal lands.¹⁴¹ *Brown* broadened NAGPRA apply to iwi found outside of Hawaiian homelands and federal lands. *Brown* expanded NAGPRA's reach to all iwi in the possession of SHPD, whether found upon state or private land.¹⁴²

SHPD has jurisdiction both over remains currently under SHPD's possession and control, as well as future remains that are inadvertently discovered. The Island Burial Councils retain jurisdiction over previously identified remains. However, if a Council determines that relocation of the remains is appropriate, the remains, if temporarily stored by SHPD, will become subject to NAGPRA. Therefore, SHPD might also gain possession and control of previously identified remains.

This section will discuss the struggle between Chapter 6E and NAGPRA, in determining the process that SHPD must follow when (1) complying with NAGPRA in order to (a) repatriate iwi currently in their possession, (b) in the treatment of iwi previously identified, and (c) inadvertently discovered, and (2) avoiding NAGPRA altogether through the IBC.

A. *Complying with NAGPRA*

Under *Brown*, SHPD has a duty to comply with NAGPRA upon the repatriation of iwi in its possession, whether previously identified or inadvertently discovered.

¹³⁸ *Id.* at 1191.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1202-03.

¹⁴¹ HAW. ADMIN. R. § 13-300-40(o) (2009). Refer to Appendix 2.

¹⁴² *Brown v. Hawaii*, 679 F.Supp.2d 1188 (D. Haw. 2009).

1. Repatriating Iwi Currently in Possession of SHPD

Under Chapter 6E, there are no specific guidelines requiring SHPD to repatriate¹⁴³ the iwi in their possession. Under NAGPRA, if SHPD remains in possession of iwi, then an inventory must be performed in order for repatriation to occur.

Chapter 6E requires that a mitigation plan be created for in-place preservation or for reburial after relocation when the remains are discovered.¹⁴⁴ The mitigation plan requirement is present for both previously identified iwi during an archeological assessment, and for inadvertently discovered iwi.¹⁴⁵ The iwi in SHPD's possession are not repatriated, and therefore SHPD has not complied with their approved mitigation plans (for iwi obtained after Chapter 6E enactment), and therefore SHPD is currently in violation of NAGPRA.

In order to comply with NAGPRA, SHPD must comply with the inventory requirement when repatriating iwi in their possession. The mitigation plans previously approved by SHPD will no longer have authority since NAGPRA is federal law and therefore supersedes the State's antecedent mitigation procedure.

B. *Following the NAGPRA Process*

SHPD must comply with the NAGPRA requirements of consultation, inventory, notification, and repatriation for all the iwi in their current possession. SHPD handles the majority of potential cases involving iwi. Outside the exception of private individuals, SHPD is the only public facility that houses iwi. SHPD has not confirmed the number of iwi in its possession.¹⁴⁶

1. Consultation

SHPD should first identify the appropriate known lineal descendants, and Native Hawaiian organizations that have an interest in cultural items in their collection.¹⁴⁷ NAGPRA identifies Hui Mālama I Nā Kūpuna O Hawai'i Nei (Hui Mālama),¹⁴⁸ and OHA¹⁴⁹ as two Native Hawaiian organizations with expertise in Native Hawaiian affairs.¹⁵⁰ In

¹⁴³ NAGPRA defines repatriation as the return of artifacts and remains to the original native owners. 25 U.S.C.A. § 3005 (2010).

¹⁴⁴ See HAW. REV. STAT. §§ 6E-43, 6E-43.6 (2009).

¹⁴⁵ See *id.*

¹⁴⁶ Please refer to Appendix 3

¹⁴⁷ See 43 C.F.R. §10.9(b)(1) (2010).

¹⁴⁸ See 25 U.S.C.A. § 3001(3)(D)(6) (2001).

¹⁴⁹ *Id.* § 3001(3)(D)(12).

¹⁵⁰ *Id.* § 3001(3)(D), (11)(C).

addition to Hui Mālama and OHA, SHPD may consult with any Native Hawaiian organization that serves the interests of Native Hawaiians and states a primary purpose of serving Native Hawaiians.¹⁵¹

Consultation must begin as early as possible. Consultation may be initiated by letter, but should be followed up with a telephone call or a face-to-face dialogue.¹⁵² During the consultation, SHPD must develop a list of all organization that are being consulted in the repatriation process as well as a general description and projected time-frame of the inventory process. This list must be delivered in writing to the lineal descendants, Hui Mālama, OHA, and other Native Hawaiian organizations. SHPD is mandated to supply additional information upon request.¹⁵³ In return, lineal descendants and various organizations must supply contact information and suggestions on how the consultation process should be conducted.¹⁵⁴

NAGPRA places a strong emphasis on consultation with Hui Mālama, OHA, other Native Hawaiian organizations, and known lineal descendants. Although identifying potential cultural affiliations for human remains may be a pressing concern in other contexts, this is not the case in Hawai‘i, where the primary cultural affiliation is Native Hawaiian.¹⁵⁵ In the case where an issue related to cultural affiliation might arise, then NAGPRA lists two reliable entities with whom SHPD can immediately consult, Hui Mālama and OHA.¹⁵⁶

2. Inventory

Once consultation has been initiated, inventories are created in order to assist with the distribution of the remains in possession of SHPD.¹⁵⁷ Inventories are item-by-item descriptions of human remains and associated funerary objects.¹⁵⁸ The purpose of the inventory is two-fold: to establish the cultural affiliation¹⁵⁹ between the remains and present-day Native Hawaiian organizations and to facilitate repatriation by providing clear descriptions of the human remains and associated funerary objects. The inventories are to be performed in consultation with the appropriate

¹⁵¹ *Id.* § 3001(3)(D), (11)(A)-(B).

¹⁵² 43 C.F.R. § 10.9(b)(2) (2010).

¹⁵³ *Id.* § 10.9(b)(3).

¹⁵⁴ *Id.* § 10.9(b)(4).

¹⁵⁵ *Brown v. Hawaii*, 679 F.Supp.2d 1188 (D. Haw. 2009).

¹⁵⁶ 43 C.F.R. § 10.9(b)(4) (2010).

¹⁵⁷ 25 U.S.C.A. § 3004(b)(1)(A) (2001).

¹⁵⁸ *Id.* § 3003(d)(2)(A), (e).

¹⁵⁹ In Hawai‘i, it would appear the only “cultural affiliation” involved is that of Native Hawaiians. *Brown*, 2009 WL 3818233.

Native Hawaiian organization officials.¹⁶⁰ Both during and after these inventories, the information is to be made available to the NAGPRA Review Committee.¹⁶¹ The inventories must be followed by notification to lineal descendants and Native Hawaiian organizations.¹⁶² SHPD was to have completed its inventories by November 16, 1995 and provided to the Native Hawaiian organizations, as well as the National Park Service, by May 16, 1996.¹⁶³ SHPD failed to meet this deadline.

In *Brown v. Hawai‘i*, SHPD administrator Pua Aiu testified that she understood NAGPRA’s inventory requirement to only apply to a museum’s holdings before NAGPRA’s enactment in 1990.¹⁶⁴ The statute itself does not indicate whether its provisions apply prospectively. However, the Tenth Circuit Court, when faced with this issue, found that “nothing in the express language of [the repatriation provisions] indicate that repatriation is limited by when or where the objects subject to repatriation were found.”¹⁶⁵ In her testimony, Aiu added that when SHPD was first aware that it was subject to NAGPRA, SHPD had begun consultation with federal officials who administer NAGPRA and was in the process of coming into compliance with the Act’s requirements.¹⁶⁶ Nancy McMahon,¹⁶⁷ the Deputy Administrator of SHPD, further stated that SHPD has, and maintains, a complete inventory of human remains and associated funerary objects within its custody, and has kept this inventory since 1991.¹⁶⁸ Judge Kay did not discuss the manner in which compliance with NAGPRA should be resolved, because SHPD and the NAGPRA Review Committee were already communicating.¹⁶⁹ SHPD should develop an inventory plan, which will assist in meeting its responsibilities under NAGPRA.¹⁷⁰

After *Brown*, the inventory requirements are now clearly understood by SHPD to apply to and remains currently in SHPD’s possession. The inventory requirements are further articulated in 43 C.F.R.

¹⁶⁰ 25 U.S.C.A. § 3003(b)(1)(A) (2001).

¹⁶¹ *Id.* § 3003(b)(1)(C).

¹⁶² *Id.* § 3003(d).

¹⁶³ *Id.* § 3003 (b)(1)(B).

¹⁶⁴ *Brown v. Hawaii*, 679 F.Supp.2d 1188, 1189 (D. Haw. 2009).

¹⁶⁵ *See Pueblo of San Idelfonso v. Ridlon*, 103 F.3d 936, 939 (10th Cir. 1996).

¹⁶⁶ *Brown v. Hawaii*, 679 F.Supp.2d 1188, 1190 (D. Haw. 2009).

¹⁶⁷ Nancy McMahon is also the Archeology and Historic Preservation Manager, the State Archeologist, and the Deputy State Historic Preservation Officer.

¹⁶⁸ *Brown v. Hawaii*, 679 F.Supp.2d 1188 (D. Haw. 2009).

¹⁶⁹ *Brown v. Hawaii*, 679 F.Supp.2d 1188, 1202-03 (D. Haw. 2009).

¹⁷⁰ *See generally* 25 U.S.C.A. § 3003(a) (Supp. 2011).

§ 10.9(c), which requires documentation (when available) to support the completed inventory, such as details of the acquisition, a written description and photographs of the remains, and a summary of evidence resulting from the consultation process.¹⁷¹

3. Notification

Once preliminary consultation and inventory have been completed, SHPD must formally notify culturally affiliated parties of the inventory results within six months.¹⁷² The notification must describe each set of human remains and associated funerary objects, the circumstances surrounding acquisition, and the region, and date of acquisition.¹⁷³ The notice must also list the respective iwi and objects both clearly and reasonably affiliated with the descendant or Native Hawaiian organization to which the notice is being sent.¹⁷⁴ A copy of each notification must be sent to the Manager of the National NAGPRA Program.¹⁷⁵ The Manager of the National NAGPRA Program must publish the notices of inventory completion received from SHPD in the Federal Register.¹⁷⁶ This one-time notification process is a formal manifestation of the more frequent and informal interactions that actually occur between SHPD and the affiliated organizations.¹⁷⁷ Interestingly, publication in the Federal Register serves to notify a wider audience, resulting in a possible increase in the number of claimants.

4. Repatriation

SHPD must comply with the NAGPRA requirements of consultation, inventory, notification, and repatriation for all the iwi in their current possession. Repatriation can be achieved after the processes of consultation, inventory, and notification are satisfied. However, conflict can arise during the process of repatriation. Native Hawaiian organizations are defined as any organization that serves and represents the interest of Native Hawaiians, has a primary and stated purpose to service Native Hawaiians, and has expertise in Native Hawaiian affairs.¹⁷⁸

¹⁷¹ See 43 C.F.R. § 10.9(c) (2010).

¹⁷² *Id.* § 10.9(e)(1).

¹⁷³ *Id.* § 10.9(e)(1) (referencing the requirements of 43 C.F.R. § 10.9(c)).

¹⁷⁴ *Id.* § 10.9(e)(2).

¹⁷⁵ *Id.* § 10.9(e)(4).

¹⁷⁶ *Id.* § 10.9(e)(7).

¹⁷⁷ See Francis P. McManamon & Larry V. Nordby, *Implementing the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 217, 242 (1992).

¹⁷⁸ 25 U.S.C.A. § 3001(11) (2001).

This definition is broad, allowing for the creation of numerous organizations, and therefore numerous claimants. When disputes among claimants arise, the NAGPRA Review Committee produces advisory opinions to the parties, which are encouraged to follow as a settlement for the dispute. However, the parties are not obligated to abide by the Committee's decision.¹⁷⁹ Since the orders by the Review Committee are only advisory, litigation does arise from disputes that cannot be settled among the claimants. This problem has occurred in the Kawaihae Caves (Forbes Caves)¹⁸⁰ dispute, among others, and will remain an issue until a governing a Native Hawaiian entity is established.

5. Dealing With Previously Identified Remains

Previously identified native remains are identified during an archeological assessment of the property. Once the remains are identified, a specific process begins depending upon whether the remains are on state or federal land. However, due to the *Brown* decision, State law Chapter 6E and NAGPRA both apply in Hawai'i. Chapter 6E should be the governing statute in dealing with previously identified remains, because the Councils have control of the remains during the entire process, and the landowner or a private entity, will have possession of the remains. The only time NAGPRA should apply is if SHPD gains possession or control of the remains, which can occur if SHPD is deemed the curator and repository for the remains in the mitigation plan. This section will discuss the 6E process, how NAGPRA comes into play and possible repercussions.

a. Following the 6E Process

If Native Hawaiian remains are discovered during an archeological assessment, the appropriate Island Burial Council has jurisdiction over all requests to preserve or relocate the iwi.¹⁸¹ Anyone involved may request that the Council preserve or relocate the iwi through a burial treatment plan, detailed in the Hawai'i Administrative Rules.¹⁸²

¹⁷⁹ *Id.* § 3006 (2001 & Supp. 2011).

¹⁸⁰ David Forbes removed iwi and funerary objects from the Kawaihae Caves in Kawaihae, Hawai'i Island in 1905. He later sold the artifacts and remains to the Bishop Museum, which through the NAGPRA process has attempted to repatriate them.

¹⁸¹ HAW. ADMIN. R. § 13-300-33(a) (2009).

¹⁸² *Id.* § 13-300-33(b). Burial treatment plan shall include: evidence of a good faith search of lineal and cultural descendants, names of any known lineal descendants, recognized by the Council, and their position regarding burial site treatment, description of proposed treatment of all burial sites, maps indicating the location of all Native Hawaiian burials upon the site, contact information of the applicant and landowner, tax map key number of the property, name of the ahupua'a, description of the present condition of all the previously identified burial sites upon the property, any project plans requested by council, copy of archeological inventory survey report, proof of acceptance

Once the Council has evaluated the request, it shall first consider whether to preserve the remains in place. However, one of the following conditions must be met: the iwi are located in an area with great concentration of remains; the iwi were found in a pre-contact burial site associated with important individuals and events; the iwi were located within a context of historic properties; known lineal descendants requested preservation; or the landowner agrees to preservation.¹⁸³ Only one of those factors must be present in order for the Council to give greater consideration for in place preservation.¹⁸⁴

If there are multiple Native Hawaiian remains upon the property, the Council may be asked to preserve the entire burial site. In making such a determination, the Council and SHPD shall consider the cultural appropriateness of preservation, any possible harm to the iwi if the site is left in place, the request from lineal descendants to relocate, or any reason presented from applicants to relocate.¹⁸⁵

The Council will have forty-five days to make a determination,¹⁸⁶ based upon the above guidelines, and once a determination is made SHPD shall notify within ten business days.¹⁸⁷ The Council shall suggest to SHPD whether to preserve in place or relocate the iwi.¹⁸⁸ If the Council decides to preserve the remains in place, the plan shall describe short-term and long-term measures to preserve and protect the burial sites, where the remains will be left to rest.¹⁸⁹ Otherwise, in the event of relocation, Council must submit a statement justifying the reasons for relocation, the methods utilized to conduct the disinterment, the location and manner the remains will be curated after disinterment, the proposed burial site location, the manner in which the burial site will be prepared, and short-term and long-term measures to protect the burial site.¹⁹⁰ SHPD will have ninety days to approve the Council's plan.¹⁹¹

SHPD will typically be designated as the location that will house the iwi and be responsible for their care until reburial can be processed.¹⁹²

of the report by SHPD, and any other archeological inventory level testing.

¹⁸³ *Id.* § 13-300-36(a).

¹⁸⁴ *Id.* § 13-300-36(a).

¹⁸⁵ *Id.* § 13-300-36(b).

¹⁸⁶ HAW. REV. STAT. § 6E-43(b) (2009).

¹⁸⁷ HAW. ADMIN. R. § 13-300-38(b) (2009).

¹⁸⁸ *Id.* § 13-300-33(b)(3).

¹⁸⁹ *Id.* § 13-300-33(b)(3)(A).

¹⁹⁰ *Id.* § 13-300-33(b)(3)(B).

¹⁹¹ *Id.* §§ 13-300-38(e), (f).

¹⁹² Interview with Anonymous Source.

The *Brown* decision still allows SHPD to remain the repository for the iwi. However, if SHPD gains possession and serves as a repository, then the NAGPRA process must be complied with because of SHPD's status as a museum under the Act. SHPD must walk through the consultation, inventory and notification process discussed above under NAGPRA.¹⁹³

b. When Does NAGPRA Apply?

SHPD will only gain control and possession of previously identified remains if they are deemed the curator and repository for the iwi within the preservation plans drafted by the appropriate Burial Council.¹⁹⁴ If this is the situation, then SHPD will only need to comply with 43 C.F.R. § 10.13, which offers compliance guidance for remains obtained after completion of their inventory.¹⁹⁵

Within six months of receipt of new remains, SHPD must provide a summary of the remains to the affiliated Native Hawaiian organization. Within two years of receipt, SHPD must prepare an inventory of the remains in consultation with the Native Hawaiian organization.¹⁹⁶

During the consultation process, repatriation to the appropriate Native Hawaiian organization shall be determined, and eventually the remains repatriated to the identified organization. This leads to a number of questions. What happens if the chosen Native Hawaiian organization chooses a different reburial location than the Council, or decides to donate the remains to a museum? Who has higher authority, the Burial Council or the chosen Native Hawaiian organization?

The Council's determination is made in consultation with the lineal descendants and Native Hawaiian organizations, after considering the recommendations from all proposed burial plans. The Council's decision has authority under state law, but the Council's role and power is within NAGPRA remains unclear. If the Council's decisions can be overturned by the NAGPRA process, will the Councils become obsolete in the preservation of iwi?

Possible solutions to avoid the removal of power from the Burial Councils are the avoidance of SHPD as a curator or repository for previously identified iwi that are being relocated. SHPD is affected by NAGPRA primarily when fulfilling its role as a repository, which as a recipient of federal funds turns SHPD into a museum. Alternatives can be created by assigning repositories that do not receive federal funding. The

¹⁹³ 43 C.F.R. § 10.13 (2010).

¹⁹⁴ See HAW. ADMIN. R. § 13-300-33(b)(3)(B).

¹⁹⁵ See 43 C.F.R. § 10.13 (2010). SHPD has still not completed an inventory. If it acquires remains prior to the completion of the inventory, then the remains will be included into the preliminary inventory under 43 C.F.R. 10.9.

¹⁹⁶ *Id.* §§ 10.13(b)(1)(i), (ii).

landowner itself can house the remains until reburial is decided, as was the case with Wal-Mart in 2004.¹⁹⁷

6. Dealing With Inadvertent Discoveries

Inadvertent discoveries occur when the discovered remains were not identified during the archeological assessment. Unlike previously identified remains, where NAGPRA comes into effect only if SHPD gains possession of the iwi, NAGPRA becomes the governing statute upon discovery in cases involving inadvertent discoveries. After *Brown*, Chapter 6E guidelines are overruled by NAGPRA because as a museum, SHPD gains control over the remains at their discovery. Under NAGPRA, a museum must receive federal grants, have possession, or exercise control¹⁹⁸ of remains.¹⁹⁹ SHPD fulfills all three in regards to inadvertent discoveries.

a. Following the NAGPRA Process

When remains are inadvertently discovered, SHPD would ideally be notified immediately and be given control over the remains.²⁰⁰ Three days after SHPD's receipt of the notification, SHPD must contact the affiliated Native Hawaiian organization(s), OHA, and Hui Mālama, and begin the consultation process.²⁰¹ A decision must be reached within thirty days, unless an extension is granted by the NAGPRA.²⁰²

The process that SHPD is subject to under NAGPRA is similar to the 6E process: identification, contact, consultation, and development of a mitigation plan. The main difference between NAGPRA and the 6E process is the time delay. Under NAGPRA, all activity shall cease and may not resume until after thirty days from the receipt of notification.²⁰³ Alternatively, Chapter 6E only allows SHPD forty-eight hours to make a determination and create a mitigation plan.²⁰⁴

¹⁹⁷ The Honolulu Advertiser, BONES TO STAY ON WAL-MART SITE, <http://the.honoluluadvertiser.com/article/2004/Mar/26/In/In12a.html> (last visited on Dec. 12, 2010).

¹⁹⁸ A museum is deemed in "possession" of remains when it has physical custody of the remains. Definitions, 43 C.F.R. § 10.2(a)(3)(i) (2010). The term "control" means having authority to treat the remains as part of the museum's collection and being able to make decisions upon the iwi's behalf. Definitions, 43 C.F.R. § 10.2(a)(3)(ii) (2010).

¹⁹⁹ See 25 U.S.C.A. § 3001 (2001 & Supp. 2011).

²⁰⁰ HAW. REV. STAT. § 6E-43.6(b) (2009).

²⁰¹ 43 C.F.R. § 10.4(1) (2010).

²⁰² *Id.* § 10.4(d)(2).

²⁰³ *Id.* § 10.4(d)(2).

²⁰⁴ HAW. REV. STAT. § 6E-43.6(c) (2009).

The difference in time may effect numerous construction or development projects, as delay may be increased by up to twenty-eight days. The increased delay caused by inadvertent discoveries may encourage developers to promote accurate archeological assessments, which are not only required by federal law, but will also help avoid the thirty-day delay imposed by NAGPRA.

Community groups and lineal descendants will be negatively affected by NAGPRA's role in inadvertent discoveries because the NAGPRA process will increase the time delay for repatriation, thus allowing opportunity for additional claimants to join the process. Community groups are generally comprised of members who reside within an ahupua'a (traditional Hawaiian land district) to protect and mālama any remains that might arise within the ahupua'a during a construction project. NAGPRA requires a consultation with lineal descendants, OHA, Hui Mālama, and *any* other interested Native Hawaiian organization.²⁰⁵ This requirement increases the number of claimants that have access to the iwi, and might conflict with the desires of the community groups, who are usually comprised of cultural and lineal descendants. NAGPRA attempts to limit claimants by stating that lineal descendants have priority over all other entities.²⁰⁶ However, the requirements of proof for lineal descendants are difficult to meet, as it requires one to demonstrate a genealogy that specifically links the descendant to that specific set of iwi.²⁰⁷

Despite the fact that the NAGPRA process for inadvertently discovered iwi appears to hinder repatriation (because of the thirty days delay and the increase in claimants), the lengthier process will prove to benefit the iwi in the broader picture. Construction companies will be encouraged to promote accurate archeological assessments in order to avoid delay. If the iwi are previously identified, the Island Burial Councils will have jurisdiction and, in consultation with the lineal descendants and community groups, will ultimately make the best-informed decision for the preservation of the iwi.

C. *Avoiding NAGPRA*

The NAGPRA is concerned with the repatriation of remains and cultural artifacts in a *museum's* possession, not a state agency. However, no provision within the Act allows for a state agency exemption. Chapter 6E can be amended by giving the Island Burial Councils control over the iwi in order to avoid NAGPRA.²⁰⁸

²⁰⁵ 43 C.F.R. §10.9 (2010).

²⁰⁶ *See* Custody, 43 C.F.R. § 10.6(a) (2010).

²⁰⁷ Definitions, C.F.R. § 10.2(b)(1) (2010).

²⁰⁸ Please refer to Appendix 4.

1. Amending Chapter 6E: The Island Burial Councils

IBCs are the “loophole” to NAGPRA. They cannot be classified a museum under NAGPRA as they do not (1) receive federal grants and (2) are not in possession of iwi.²⁰⁹ In order to qualify as a museum under NAGPRA, both requirements must be fulfilled.²¹⁰ IBC fulfills one related requirement: control of iwi during previously identified remains – but ultimately escapes NAGPRA because IBCs do not receive federal grants. The non-receipt of federal grants allows IBC to be the “loophole” of NAGPRA.

The IBC is taxed with the responsibility of determining the treatment of iwi. The IBC’s board members are comprised of cultural practitioners, archeologists, and respected experts in the fields of archeology, Hawaiian language and burial practices, and land developers.²¹¹ Allowing IBC to extend their decision-making role to inadvertently discovered remains will only further their purpose and allow for a focused protection of the iwi. The shifts of responsibilities from SHPD to IBC will not only improve the treatment of iwi and avoid the strict and time consuming NAGPRA process, but will permit SHPD to focus upon its other duties as the historic preservation division for the State of Hawai‘i.

H.R.S. Chapter 6E-43 must be amended in order to allow IBC to gain control upon inadvertently discovered remains. A proposed amendment would be simple: it would transfer SHPD’s responsibilities to IBC. After this amendment is made, inadvertently discovered iwi will be handled by the IBC, who will serve as the decision making body and determine whether the iwi shall remain in place or be relocated. When iwi are assigned for relocation, they should be immediately relocated to their resting spot, in order to avoid a possession issue.

IBCs were originally created as an assisting body for the treatment of iwi. It is logical that an IBC’s jurisdiction is expanded to include all iwi discovered within the State of Hawai‘i upon both private and public land.

CONCLUSION

The NAGPRA process is a taxing, strict, and difficult process for State agencies to comply with. State agencies should be exempt from NAGPRA, as the original intent of the Act was to impose a mandatory repatriation process upon museums that are in possession of human

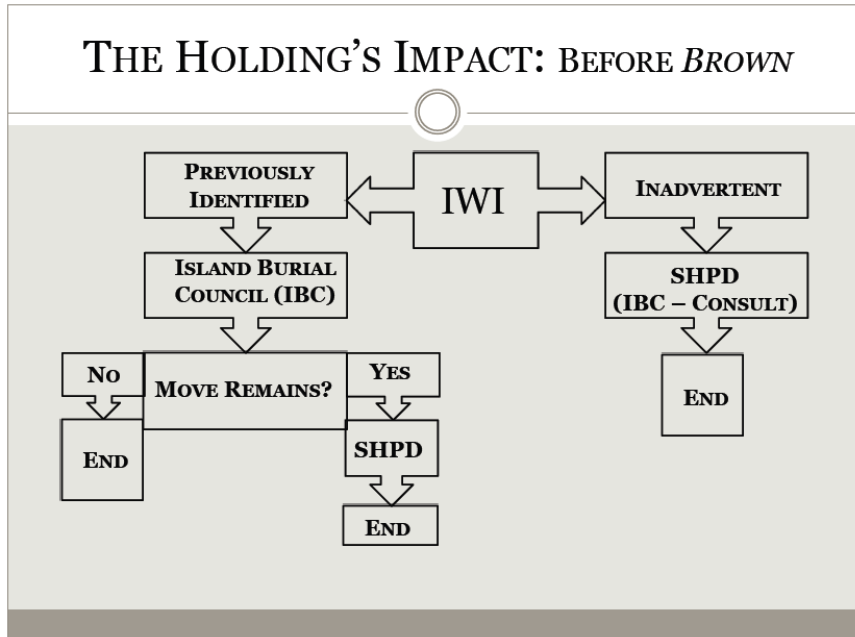
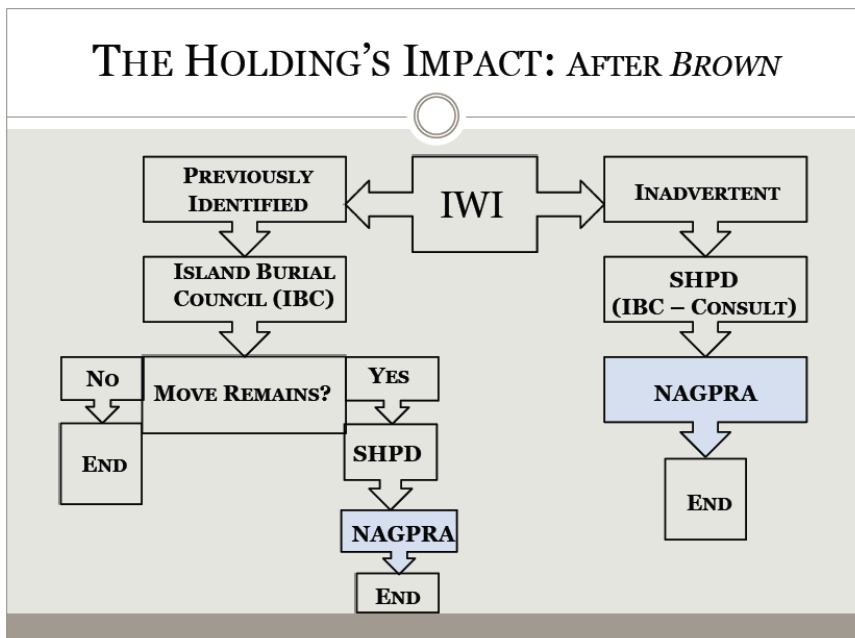
²⁰⁹ 25 U.S.C.A. § 3001(8) (2001).

²¹⁰ *Id.*

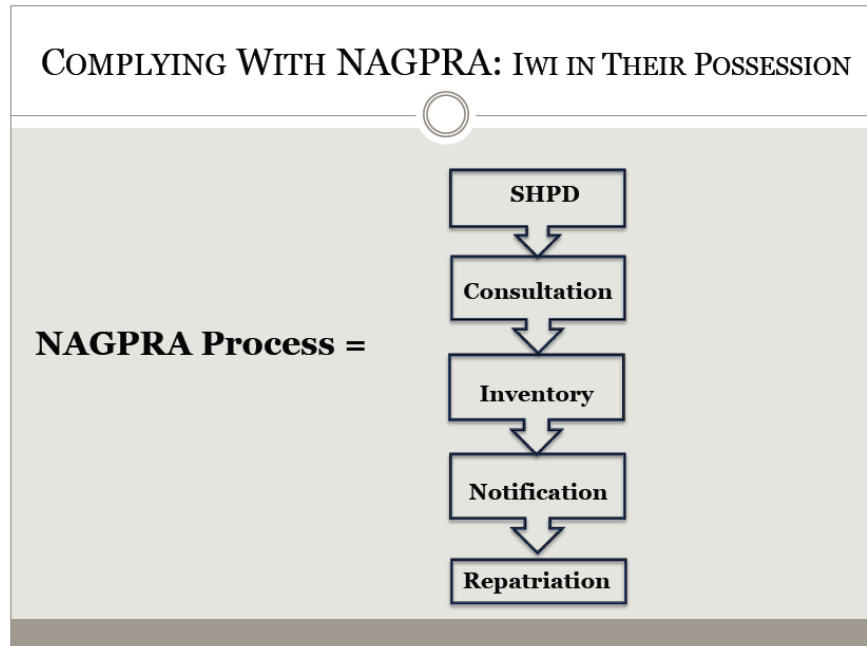
²¹¹ See *Island Burial Council Members*, STATE HISTORIC PRESERVATION DIVISION, STATE OF HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES, <http://hawaii.gov/dlnr/hpd/councils.htm> (last visited Dec. 12, 2010).

remains and certain indigenous cultural artifacts. Therefore, state agencies, such as SHPD, should not be subject to the Act.

On the other hand, NAGPRA supports positive treatment of iwi in that NAGPRA requires SHPD to repatriate all the remains in its possession. Moreover, NAGPRA mandates a halt on all construction for thirty days when iwi are inadvertently discovered. The Hawai'i Legislature should consider implementing stricter regulations similar to NAGPRA although this feature of NAGPRA makes compliance for developers more difficult. Chapter 6E should be amended to include a stricter repatriation process featuring harsher penalties in instances of non-compliance. Chapter 6E should also increase the number of days to determine the treatment of iwi when inadvertently discovered from twenty-four hours. The increased time would allow the decision-making body to properly determine the iwi's treatment in a satisfactory and respectful manner towards both the native culture and business relationship within Hawai'i. Shifting the decision making role to the Island Burial Councils will allow for better treatment of the iwi, will avoid NAGPRA, and will allow SHPD to focus its limited resources upon its other duties.

APPENDIX 1—THE HOLDING'S IMPACT: BEFORE *BROWN*APPENDIX 2—THE HOLDING'S IMPACT: AFTER *BROWN*

APPENDIX 3—COMPLYING WITH NAGPRA: IWI IN THEIR POSSESSION



APPENDIX 4—AVOIDING NAGPRA: IBC

