



**SB1411 SD2**  
RELATING TO HISTORIC PRESERVATION  
House Committee on Judiciary & Hawaiian Affairs

March 21, 2022

2:00 p.m.

Room 325

The Office of Hawaiian Affairs offers **SUPPORT** for SB1411 SD2, which would 1) create a definition for “pre-contact historic property”, 2) require the development, publication, and distribution of public informational materials regarding statutory protections for burials, historic sites, and archaeological resources, 3) change the requirement to have one person knowledgeable in traditional Hawaiian society and culture on the Hawai‘i Historic places review board to two, 4) increase the fine limit of a Hawai‘i Revised Statutes (HRS) 6E-11 violation committed against historic properties from \$10,000 to \$20,000, 5) require a separate HRS 6E-11 violation fine cap for pre-contact historic properties that shall not exceed \$30,000, and 6) require that a landowner or developer responsible for any project where HRS 6E violations have occurred execute any mitigation and preservation measures ordered by SHPD and be jointly liable for any costs of mitigation and preservation. OHA believes that the language in this measure will help better deter HRS 6E-11 violations from being committed against pre-contact historic properties and help raise awareness of the types of protections for burials and cultural sites that are currently available under existing statutes.

The Hawai‘i Historic Preservation law, codified in HRS Chapter 6E, was enacted to ensure that invaluable historic sites and archaeological resources are given appropriate consideration when they may be impacted by development activities. Historic cultural resources, burials, and sites protected under HRS Chapter 6E embody the continued physical and spiritual connections between Native Hawaiians, their ancestors, and their cultural heritage and are, therefore, of great significance to the Native Hawaiian community. Unfortunately, the historic preservation review process embodied in Chapter 6E has been undermined by limited monetary fines for violations, lack of awareness of reporting protocols for violations, weak enforcement provisions and in some cases, unscrupulous landowners and developers.

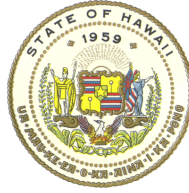
As the statute currently stands, minimal consequences for HRS 6E-11 violations may be far less than the costs of complying with historic preservation review and potential conditions to protect such iwi and sites. Furthermore, OHA frequently receives questions on how to report violations or what protections currently exist for burials and cultural sites. Countless Native Hawaiian historic sites and burials are threatened and an unknown number have likely been destroyed by individuals who knowingly commit HRS 6E-11 violations to avoid state historic preservation review processes. In some

situations, we believe individuals who want to report a violation simply don't know how to report it.

OHA believes that an increase in the fine amount as proposed in the measure for all historic property violations and a distinct higher fine amount for pre-contact historic properties would better serve as a deterrent for HRS 6E-11 violations. Notably, since the creation of HRS 6E-11, the monetary fine has never been increased and now has become outdated due to inflation. While increasing the fine would thus be appropriate, awareness and reporting are still key to ensuring violations do not occur or are properly disciplined and reported. Accordingly, additional awareness of existing burial and cultural site protections as proposed in the bill via informational materials could allow for better violation reporting and greater awareness of existing protections.

For the above reasons, OHA urges that the Committee **PASS** SB1411 SD2. Mahalo for the opportunity to testify on this measure.

DAVID Y. IGE  
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
SUZANNE D. CASE  
Chairperson**

**Before the House Committee on  
JUDICIARY & HAWAIIAN AFFAIRS**

**Monday, March 21, 2022  
2:00PM**

**State Capitol, Conference Room 325 & Videoconference**

**In consideration of  
SENATE BILL 1411, SENATE DRAFT 2  
RELATING TO HISTORIC PRESERVATION**

Senate Bill 1411, Senate Draft 2 proposes to amend Chapter 6E, Hawaii Revised Statutes (HRS), by defining and creating a separate “pre-contact historic property” category; amending the membership of the Hawaii Historic Places Review Board, increases the penalties generally for damage or destruction of historic properties and burial sites providing even higher penalties if it is “pre-contact historic property”; and substantially increases the fines for criminal damage of historic properties. **The Department of Land and Natural Resources (Department) supports this measure in part and offers comments.**

Senate Bill 1411, Senate Draft 2, SECTION 1 proposes to amend the definition of historic property in Section 6E-2, HRS, by creating a separate category for “pre-contact historic property” which would mean any building, structure, object, district, area, or site, including but not limited to heiau, unu, ahu, Mia fishing shrine, loko i‘a fishpond, agricultural complex, habitation complex, salt pond complex, and holua slide, that existed prior to 1779.

The Department believes that it is not necessary to create a separate category for pre-contact historic property. The current definition of historic property, which is any property that is more than 50-years old, clearly encompasses the places Senate Bill 1411, Senate Draft 2 defines as pre-contact historic properties. The Department also notes that the limitations of archaeological methodology and limited oral historical documentation make it all but impossible in the vast majority of instances to determine whether a place pre- or post-dates Captain Cook’s arrival in Hawaii.

The Department does believe that the definition of historic property should be amended. The Department strongly prefers the proposed amended definition in Senate Bill 570 Senate Draft 1.

Senate Bill 1411, Senate Draft 2, SECTION 2 proposes to amend Section 6E-3(7), HRS, by specifically directing the Department to consult with the various counties and public and private

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

**ROBERT K. MASUDA**  
FIRST DEPUTY

**M. KALEO MANUEL**  
ACTING DEPUTY DIRECTOR - WATER

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

entities engaged in historic preservation activities. The Department believes that this amendment is unnecessary as the Department consults on a regular basis with all individuals, organizations, and agencies involved in or having duties related to historic preservation.

SECTION 2 also proposes to insert a new subparagraph (8) in Section 6E-3, HRS, directing the Department to develop, publish, and distribute “informational materials regarding statutory protections for burials, historic sites, and archaeological resources, including the process of project reviews established by [chapter 6E].” While the Department believes it already has authority to develop, publish, and distribute educational materials, it supports this proposed amendment. The Department notes, however, that Senate Bill 1411, Senate Draft 2 does not appropriate any funds, and the Department does not have the staff or resources to develop and distribute these or other important informational resources.

Senate Bill 1411, Senate Draft 2, SECTION 3 proposes to amend Section 6E-5.5, HRS, to require that at least two members of the Hawaii Historic Places Review Board to be appointed because they are knowledgeable in traditional native Hawaiian history and culture. During the 2021 Session, the Legislature amended Section 6E-5.5, HRS, reducing the Hawaii Historic Places Review Board from ten to seven members. The Department believes that requiring at least two members be from any one of the five types of required expertise is not helpful and recommends against adoption of this provision. SECTION 3 would also amend Section 6E-5.5(b)(1), HRS, which directs the Hawaii Historic Places Review Board to “order and enter historic properties into the Hawaii Register of Historic Places on the basis of their value to Hawaii’s heritage, including but not limited to native Hawaiian culture and history.” The Hawaii Historic Places Review Board already has authority to include places important Hawaiian culture and history. The Department believes that this proposed amendment is unnecessary and should not be adopted.

Senate Bill 1411, Senate Draft 2, SECTION 4 proposes to amend Section 6E-11, HRS, by increasing the civil penalty for damage or destruction of historic property from a maximum of \$10,000 to \$20,000 per violation, and would provide a maximum penalty of \$30,000 if the property is a pre-contact historic property. The Department supports the increase in the civil penalty to \$20,000 per violation. The Department does not support the creation of a separate pre-contact historic property category; accordingly, the Department does not support the establishment of a separate penalty for damage to such properties. The Department also emphasizes that enforcement of this higher penalty for pre-contact historic properties would be extremely difficult. As noted above it is often impossible to determine with precision how old early sites are. Under the proposed definition of pre-contact historic property, a property that was created in 1780 would not be pre-contact and not subject to the highest penalty level. In nearly all instances such a site would be indistinguishable from a pre-contact site. For most early sites it is impossible to reliably determine age at that level of accuracy necessary to sustain a decision to enforce the higher penalty. The Department also notes that even at the current lower maximum penalties in Section 6E-11, HRS, in the last few years the board of land and natural resources has enforced very substantial penalties for violations of Section 6E-11, HRS.

SECTION 4 would also amend Section 6E-11, HRS, by requiring:

Any landowner or developer responsible for any project where violations are found to have

occurred shall execute any mitigation and preservation measures ordered by the department and shall be jointly and severally liable for any costs of mitigation and preservation.

The Department believes that this an important clarification and supports this amendment.

Senate Bill 1411, Senate Draft 2, SECTION 5 proposes to amend Section 6E-11.5, HRS, with increases in the maximum the civil penalties for damage or destruction of historic properties from \$10,000 to \$20,000, and to \$35,000 for damage or destruction of a pre-contact historic property. The Department supports the increase from \$10,000 to \$20,000 but cannot support the \$35,000 for damage to pre-contact historic properties for the reasons stated above. The Department also suggests Section 6E-11.5, HRS, be amended to raise the minimum penalty per violation from \$500 to \$1,500.

Finally, Senate Bill 1411, Senate Draft 2, SECTION 6 proposes to amend Section 6E-12, HRS, by increasing the penalty for offering for sale or trade or removal of historic objects or human skeletal remains and associated burial good from a maximum of \$10,000 to \$25,000. The Department supports this proposed amendment.

Thank you for the opportunity to comment on this measure.



**Department of Land and Natural Resources  
Hawaii State Aha Moku  
State of Hawaii  
Post Office Box 621  
Honolulu, Hawaii 96809**

**LATE**

Testimony of  
Hawaii State Aha Moku

Before the House Committee on Judiciary and Hawaiian Affairs

Monday, March 21, 2022  
2:00 p.m.  
Conference Room 325 & Videoconference

**In SUPPORT of  
Senate Bill 1411 SD 2  
Relating to Historic Preservation**

Senate Bill 1411 SD2 defines pre-contact historic property; Clarifies that the historic preservation program includes providing consultation to counties and public and private agencies involve in historic preservation and the development, publication and distribution of materials about protections of burials, historic sites and archaeological resources; Amends the composition and duties of the Hawaii Historic Places Review Board; Increases civil and administrative fines for certain violators of historic and preservation requirements and makes violators liable for costs associated with mitigation or restoration measures. **The Hawaii State Aha Moku (Aha Moku) supports this measure and offers comments.**

SB 1411 SECTION 1 amends the definition of historic property to be

“any building, structure, object, district, area, or site, including but not limited to heiau, unu, ahu, ko’a fishing shrine, loko I’a fishpond, agricultural complex, habitation complex, salt pond complex, and holua slide, that existed prior to 1779”.

While Aha Moku understands the currently standing definition which is any property that is more than 50 years old is considered historic. Normally government does its best to address these areas, but it is clearly not enough to the native Hawaiian communities who also strive to protect generational significant cultural areas on all eight islands. DLNR and the State Historic Preservation Division (SHPD) consistently work on archeological methodology which includes oral documentation. In the past decade, generational families and cultural practitioners have come forward to reveal their oral histories, practices including religious practices (heiau, unu, ahu, ko’a fishing shrines, loko’ia fishponds, agricultural complexes, habitation complexes, salt pond complexes and holua slides). However, while these entities are noted, there is no actual protection of these areas. (Note: Salt ponds in Hanapepe, Kaua’i, as an example).

The Hawaii State Aha Moku System encompasses the eight main Hawaiian Islands and supports the traditional and generational knowledge of the people who are connected to each of the 46 moku and 606 ahupua’a. The system was brought forward from the 9<sup>th</sup> century, a time where sustainability and protection of resources ensured existence. It was a time where the focus of the people of the land was on survival.

Today, the State of Hawaii is facing the same issues in ensuring the continued existence of native Hawaiian traditional and cultural practices with the influx of development and the constant encroachment of commercialism.

SECTION 2, sub-paragraph 8 directs DLNR to “develop, publish and distribute to the public informational materials regarding statutory protections for burials, historic sites, and archaeological resources, including the process of project reviews established by this chapter.

We are concerned with this section because DLNR already has a State Burial Council. And while we believe that the Burial Councils need strong amendments, those do not include publishing and identifying burial sites to the public that are sacred to the families of these places.

SECTION 3 (a) requires “The Hawaii Historic Review Board shall consist of seven members (ten members have been reduced to seven in legislature 2021) and shall include one qualified member of each of the following disciplines: archaeology, architecture, history, and sociology. In addition, there shall be two people knowledgeable in traditional Hawaiian society and culture.

Aha Moku supports this addition! While each of the disciplines already stated are necessary, the very nature of these disciplines is rooted in western methodology and must consult with cultural communities who are not native Hawaiian. As the host culture, we believe it is important that a stronger practical emphasis is put on the knowledge of traditional Hawaiian society and culture. We remind this committee that Hawaiian culture and its societies have been proven to be unique and different in their practices on each of the eight main Hawaiian Islands. Because much of this slowly emerging oral history within the 46 traditional moku within Hawaii, we believe it is important that two people knowledgeable in knowing the differences of each island in cultural practices be a part of this review board.

We support all further amendments and clarifications listed in Senate Bill 1411 SD 2. Mahalo for the opportunity to offer testimony on this measure

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# HISTORIC HAWAII FOUNDATION

**TO:** Representative Mark M. Nakashima, Chair  
Representative Scot Z. Matayoshi, Vice Chair  
Committee on Judiciary and Hawaiian Affairs (JHA)

**FROM:** Kiersten Faulkner, Executive Director  
Historic Hawai'i Foundation

**Committee:** Monday, March 21, 2022  
2:00 p.m.  
Via Video Conference and Conference Room 325

**RE:** **SB1411 SD2, Relating to Historic Preservation**

On behalf of Historic Hawaii Foundation (HHF), I am writing with **comments on SB1411 SD2, with support in part and opposition in part.**

The bill addresses several provisions related to the State's historic preservation program, including: defines "pre-contact historic property"; clarifies that the state's historic preservation program includes providing consultation to counties and public and private agencies involved in historic preservation and the development, publication, and distribution of materials about protections for burials, historic sites, and archaeological resources; amends the composition and duties of the Hawaii historic places review board; and increases civil and administrative fines for certain violations of historic and preservation requirements and makes violators liable for costs associated with mitigation or restoration measures.

Historic Hawai'i Foundation offers the following comments:

- SECTION 1 would amend the definition of historic property in §6E-2, HRS, by creating a separate category for "pre-contact historic property" as "any building, structure, object, district, area, or site, including but not limited to heiau, ahu, ko'a fishing shrine, loko i'a fishpond, agricultural complex, habitation complex, salt pond complex, and holua slide, that existed prior to 1779."

HHF is concerned that it is not always possible to determine with exactness whether or not a property existed prior to 1779. This definition introduces ambiguity and a loophole that could be exploited by violators. The current definition of historic property already includes any property that is over 50 years old and encompasses the proposed definition for pre-contact historic property.



If the intent is to increase awareness of and protection for this category of historically-significant sites, structures and objects, the definition of “historic property” in §6E-2 could include the list of cultural resources explicitly. **A possible amendment could read:**

**“Historic property means any building, structure, object, district, area, or site, including heiau, ahu, ko‘a fishing shrine, loko i‘a fishpond, agricultural complex, habitation complex, salt pond complex, holua slide and underwater site, [~~which~~] that is over fifty years old.”**

- SECTION 2 would insert a new subparagraph in §6E-3, HRS, directing the State Historic Preservation Division of the Department of Land and Natural Resources to develop, publish, and distribute “informational materials regarding statutory protections for burials, historic sites, and archaeological resources, including the process of project reviews established by [chapter 6E].”

**HHF supports this provision and recommends that additional funds, personnel and resources be appropriated to support SHPD’s work for public outreach and education.**

- SECTION 3 would amend, HRS, to require that at least two members of the Hawai‘i historic places review board be knowledgeable in traditional native Hawaiian history and culture.

During the 2021 session the Legislature amended chapter 6E-5.5 to reduce the historic places review board from ten to seven members. HHF was in strong opposition to the proposal in large part due to the loss of subject matter expertise. Nonetheless, the reduction in the number of positions on the Review Board was enacted.<sup>1</sup>

Given the now-limited number of positions available, HHF opposes the proposal requiring at least two members be from any one of the five types of required expertise with the current board limit of seven members.

**Instead, HHF recommends reverting to the prior composition of the Review Board with ten members. If the prior number of positions were restored, having two members selected for expertise in native Hawaiian history and culture would be beneficial.**

Otherwise, this provision would exacerbate the imbalance on the Review Board.

**A possible amendment could read:**

**“(a) There is created a review board, to be designated the Hawaii historic places review board, for the Hawaii register of historic places and the national register of historic places which shall meet the requirements of federal law. The board shall be placed within the department of land and natural resources for administrative purposes and shall consist of [~~seven~~] ten members to be appointed and removed by the governor as provided in section 26-34. The board shall include one professionally**

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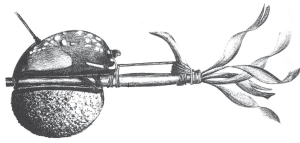
<sup>1</sup> Note that the language in SB1411 SD2 quotes the previous version of §6E-5.5 and has not been updated with the revised statutory language, which may be part of the confusion about this section.

qualified member of each of the following disciplines: archaeology, architecture, history, and sociology. In addition, there shall be [~~one person~~] two people knowledgeable in traditional Hawaiian society and culture.

- SECTION 4 proposes to amend §6E-11, HRS, by increasing the civil penalty for damage or destruction of historic property from a maximum of \$10,000 to \$20,000 per violation and would provide a maximum penalty of \$30,000 if the property is a pre-contact historic property.

**HHF supports the increase in the civil penalty to \$30,000 per violation, but does not support the creation of a separate pre-contact historic property category. Violations affecting all historic and cultural resources should be penalized at a substantial level, both to deter bad actors and to mitigate and compensate the community for losses of cultural resources and heritage properties.**

Thank you for the opportunity to comment.



## SOCIETY FOR HAWAIIAN ARCHAEOLOGY

P.O. BOX 22458 HONOLULU, HAWAII 96823

TO: Senator David Tarnas, Chair  
Senator Patrick Pihana Branco, Vice Chair  
Committee on Water & Land (WAL)

Senator Mark Nakashima, Chair  
Senator Scot Marayoshi, Vice Chair  
Committee on Judiciary & Hawaiian Affairs (JHA)

Senator Sylvia Luke, Chair  
Senator Kyle Yamashita, Vice Chair  
Committee on Finance (FIN)

FROM: Mara Mulrooney, Ph.D.  
President, Society for Hawaiian Archaeology  
membership@hawaiianarchaeology.org

HEARING: March 21, 2022, 2:00 PM, Conference Room 325 & Videoconference

SUBJECT: Testimony in **opposition** of SB 1411, Relating to Historic Preservation

**LATE**

I am Mara Mulrooney, President of the Society for Hawaiian Archaeology (SHA). We have over 150 members including professional archaeologists and advocates of historic preservation. On behalf of SHA, **we oppose SB 1411 as written.**

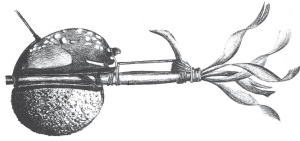
The intent of SB 1411 is to ensure better protection of vulnerable historic properties and artifacts. If developed using appropriate language, SB 1411 may provide a clearer framework outlining the regulations and standards for the State's historic preservation program. Currently, Hawai'i State Legislature Chapter 6E Section 2 identifies historic properties as "any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old." SB 1411 will revise Hawai'i State Legislature Chapter 6E Section 2 by amending a new definition to include pre-contact historic properties. The new amendment would read as follows.

""Pre-contact historic property" means any building, structure, object, district, area, or site, including but not limited to heiau, unu, ahu, Mia fishing shrine, loko i'a fishpond, agricultural complex, habitation complex, salt pond complex, and holua slide, that existed prior to 1779."

While we agree with the intent of the proposed amendments, we are concerned that the attempt to define "pre-contact historic property" is problematic. Without very specific data, archaeologists and historians cannot tell, with any certainty, if the site existed prior to 1779. This introduces ambiguity to the process and may inadvertently omit historic properties that were built and used following initial contact with

<https://hawaiianarchaeology.org/>

The Society for Hawaiian Archaeology is a registered tax-exempt organization established in 1980 to promote and stimulate interest and research in the archaeology of the Hawaiian Islands, encourage a more rational public appreciation of the aims and limitations of archaeological research, serve as a bond among those interested in Hawaiian archaeology, both professionals and non-professionals, and aid in directing their efforts into more scientific channels as well as encourage the publication of their results, advocate and assist in the conservation of archaeological data, discourage unethical commercialism in the archaeological field and work for its elimination.



## **SOCIETY FOR HAWAIIAN ARCHAEOLOGY**

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westerners (post-1779) that are reflective of continued Native Hawaiian cultural practices and lifeways during the post-contact period.

The proposed amendments to Section 3 would amend §6E-5.5, HRS, to require that at least two current members of Hawai'i historic places review board to be knowledgeable in Native Hawaiian culture and history. However, during the 2021 legislative session, Legislature amended chapter 6E-5.5 to reduce the historic places review board from ten to seven members. SHA is concerned with the drastic loss of subject matter expertise.

The proposed amendments to Section 4(f) appear to be well-intentioned, but leave loopholes for violators. In a court of law, it would be difficult to say with certainty that a historic property was in existence prior to 1779. The proposed amendment would also require proof that the Department has consulted with the Office of Hawaiian Affairs. We agree that the fines for landowners and developers who cause loss of, or damage to, historic properties should be raised, and that landowners and developers must be responsible for the execution of mitigation or preservation measures. We do not agree that this responsibility should only apply to pre-contact historic properties; instead, it should be applicable to all historic properties as currently defined under the National Historic Preservation Act (NHPA) and/or under HRS Chapter 6E.

Should SB 1411 pass out of this committee, we request to be consulted as a stakeholder in future deliberations on an amended bill. Should you have any questions, please feel free to contact me at the above email.

Mahalo for your consideration of our testimony.

Mara Mulrooney, Ph.D.  
President, Society for Hawaiian Archaeology

<https://hawaiianarchaeology.org/>

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**SB-1411-SD-2**

Submitted on: 3/18/2022 4:57:28 PM

Testimony for JHA on 3/21/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Dana Keawe	Individual	Support	Written Testimony Only

Comments:

Support