

IWI KŪPUNA: NATIVE HAWAIIAN BURIAL RIGHTS

I. Introduction: The State’s Obligation to Safeguard Native Hawaiian Burials

Under Hawai‘i law, the State and its agencies must afford Native Hawaiian traditional burials “dignity and freedom from unnecessary disturbance.”¹ Native Hawaiian burial sites are vulnerable to development activities. State decisionmakers are important gatekeepers tasked by the law to ensure the protection of iwi kūpuna (ancestral remains) and Kānaka Maoli religious and customary burial practices. Hawai‘i’s constitutional mandates and statutory scheme, described below, provide a framework to meet a critical obligation regarding burial protection: to assist Native Hawaiians preserve burial sites in place or to safely relocate them. The law also provides Kānaka Maoli opportunities to participate in the decisionmaking process at an early stage.

II. Traditional Native Hawaiian Burials: A Brief History

Hawaiians believe the bones of their kūpuna are imbued with mana (life force) and their proper care is a critical component of their well-being. Burial of iwi infused the land with the necessary mana to nourish the natural world and the living and future generations of Kānaka Maoli, and to sustain the people’s connection with the ‘āina (land). Thus, the living have a kuleana (responsibility) to protect their ancestors’ iwi.

Early Hawaiians buried the deceased in secret to protect them from disturbance. Preferred burial sites were in sand, caves, and remote areas. Acquisition of iwi by one’s enemy and the mana therein placed the ‘uhane (spirit) of the deceased in jeopardy. Exposure of iwi to sunlight or its destruction altogether constituted a desecration that brought harm to the ‘uhane’s passage into pō and eternal rest.

As in the past, Kānaka Maoli today place high importance on protecting iwi from desecration. Injury to iwi kūpuna also results in cultural, emotional, and spiritual harm to Kānaka Maoli families who witness the desecration of their ancestors in the wake of modern development activities.

In 1988, the excavation and removal of over a thousand ancient burials of men, women, and children to accommodate the proposed oceanside construction of the Ritz-Carlton Kapalua Hotel in Honokahua, Maui sent shock waves throughout the Maoli community on every island. Resulting protests galvanized the State legislature to enact new laws that acknowledged and affirmed the State’s obligation to protect iwi kūpuna.

Similarly, on the national stage, Native American tribal leaders demanded redress for wrongs committed against thousands of their ancestral remains that had been removed from gravesites and housed in museums across the country. These efforts led to the landmark passage of the 1990 Native American Graves Protection and Repatriation Act (NAGPRA)

by the U.S. Congress, which provides a legal framework for the treatment and repatriation of Indigenous remains of Native American Indian tribes, Alaska Natives, and Kānaka Maoli.

III. Sources of Legal Authority

The Hawai‘i Constitution, Hawai‘i Revised Statutes (HRS), case law, and NAGPRA comprise the pertinent legal framework for addressing the protection, treatment, and disposition of Kānaka Maoli ancestral remains.

A. Constitutional and Statutory Provisions

1. State of Hawai‘i

a. Hawai‘i Constitution Article IX Section 9 and Article XII Section 7

The Hawai‘i Constitution expressly protects traditional Native Hawaiian cultural practices. Specifically, the Hawai‘i Constitution recognizes the significance of Hawai‘i’s cultural resources and grants the State authority to preserve them.² Further, the Constitution requires “[t]he State . . . [to] protect all rights, customarily and traditionally exercised for . . . cultural and religious purposes[.]”³ This includes protection of traditional Native Hawaiian burials and associated burial practices.

b. Hawai‘i Revised Statutes Chapter 6E and Hawai‘i Administrative Rules Section 13-300

Historic and prehistoric burial sites are addressed by Hawai‘i Revised Statutes Chapter 6E and Hawai‘i Administrative Rules Section 13-300. These statutory and administrative laws are implemented by the State Historic Preservation Division (SHPD). The SHPD is responsible for maintaining an inventory of historic properties throughout the State, including burial sites. The SHPD is housed within the Department of Land and Natural Resources (DLNR) and administers the Burial Sites Program. The SHPD reviews project proposals that may affect burials and other historic sites and must provide its written concurrence before such a project can move forward. The SHPD also works with Island Burial Councils to provide valuable staff time and expertise.

The State law also established Island Burial Councils. The Burial Councils have the authority to recognize lineal and cultural descendants who may be consulting parties when burials are discovered. Lineal descendants have direct genealogical links to specific Hawaiian burials, while cultural descendants reside in or have multi-generational connections to a geographic area where Hawaiian burials are discovered. The law provides protections for iwi kūpuna based upon their status as “previously identified,” which are recorded during the time of archaeological surveying, known from prior reports or oral history or as “inadvertent discoveries,” which are “unanticipated” encounters of iwi kūpuna usually during construction or other development activity.⁴

Any deliberate taking, appropriating, excavating, injuring, destroying, or altering of iwi kūpuna is considered a civil and administrative violation.⁵ Those who knowingly cause

physical harm to iwi kūpuna; fail to re-inter remains that have been removed; or do not follow the SHPD approved mitigation plans may be fined up to \$10,000 for each separate violation.⁶ This enforcement tool is under-utilized by the SHPD,⁷ but could be an effective deterrent from future violations.

2. Federal Law: Native American Graves Protection and Repatriation Act (NAGPRA)

NAGPRA has been characterized as legislation that addresses the human rights and “civil rights of America’s first citizens.”⁸ NAGPRA and federal criminal laws are significant to Kānaka Maoli for at least three reasons. The laws (1) provide processes to repatriate Native remains held in federally funded museums and other repositories;⁹ (2) require that remains discovered on federal land (including Hawaiian Home Lands) be returned to known lineal descendants or a Native Hawaiian organization (NHO);¹⁰ and (3) prohibit trafficking in Native remains and artifacts.¹¹ NAGPRA requires consultation with known lineal descendants, culturally affiliated Indian tribes and NHOs along all decision points made by federal agencies and museums. These stakeholders are recognized for having either genealogical ties to iwi kūpuna and other NAGPRA-protected cultural items through a “traditional kinship system” or through proof of descent from an “identifiable earlier group”¹² of people. Consultation ultimately leads to the repatriation or return of NAGPRA-protected items to tribal peoples, lineal descendants, and NHOs who also help to determine their final disposition.

B. Case Law

NAGPRA litigation and administrative proceedings involving Hawaiian iwi kūpuna, moepū (funerary objects), and other cultural items underscore the need for agreement amongst multiple claimants to repatriation and final disposition.¹³

Cases adjudicating State burial laws have dealt with inadequate Archaeological Inventory Surveys (AISs), which eventually led to subsequent inadvertent discoveries of iwi kūpuna in alarmingly high concentrations as well as with projects where SHPD procedures were not appropriately followed.¹⁴

These hotspots for litigation occur particularly in urban corridors like Downtown Honolulu. Assumptions that no iwi kūpuna are present due to prior development in the area may be unreliable. Many of the old buildings located in Downtown Honolulu were typically single-story structures and as new high rises replace them, stringent building codes require extensive excavation work to put in foundations. This sometimes results in discoveries of mass Hawaiian burials.

IV. Practical Application

A. Caring for Previously Identified and Inadvertently Discovered Burials

Island Burial Councils (IBCs) must be consulted about the disposition of previously identified historic and prehistoric Native Hawaiian burials.¹⁵ These are burials that are

usually documented in the course of an AIS as part of the planning phase for a proposed development.

HRS chapter 6E gives the IBCs two options for the disposition of Native Hawaiian remains: “preservation in place or relocation of previously identified native Hawaiian burial sites[.]”¹⁶ The Burial Councils must consult with recognized lineal and cultural descendants who either have direct genealogical ties to specific iwi kūpuna or whose ‘ohana reside in geographical areas where iwi kūpuna are located.¹⁷

The law also provides protections for burials that are considered inadvertently discovered. The SHPD inspects the site, gathers sufficient information from kama‘āina (long-time residents in the area) and families who might be lineally or culturally connected to the iwi.¹⁸ The SHPD confers with the respective burial council chair and member residing in the geographic area where the iwi were discovered to assist in making a determination. The SHPD is given a narrow window of time (2-3 days) to make a decision on whether to preserve the iwi in place or relocate it to a safer area.¹⁹ It is the immediacy of the situation that places the responsibility squarely on the SHPD to respond expeditiously.

B. Repatriation under NAGPRA

NAGPRA creates a framework for the repatriation of Native Hawaiian remains, moepū and other culturally important items discovered on federal land or held in federally funded museums. The work of NHOs, such as the Office of Hawaiian Affairs and the formerly operative group Hui Mālama I Nā Kūpuna O Hawai‘i Nei, has been critical to providing needed expertise and advocacy on behalf of Kānaka Maoli families. These families are lineally or culturally tied to iwi kūpuna that are located on federal lands (including Hawaiian Home Lands) or housed in museums here and abroad. The NHOs work with descendants and interface with federal agencies and museums to facilitate a process for repatriation and reinterment.

These efforts are not always successful due to competing claimants who have had difficulty in reaching consensus. Other challenges include a lack of institutional memory when federal leadership and land management roles change.²⁰ It is important, however, to put these challenges into perspective. While some controversies inevitably arise in the implementation and enforcement of NAGPRA, the Act is responsible for restoring justice for America’s Indigenous peoples through many successful repatriations, including a significant number that are Kānaka Maoli in origin. Statistics reported by the National NAGPRA Program show that as of 2018, a total of 53,748 Native human remains, 1.4 million associated funerary objects, 245,000 unassociated funerary objects have been repatriated.²¹

V. Impacts on Native Hawaiian Practices and Culture

Despite penalties levied for illegal trafficking of iwi kūpuna, moepū, and other protected cultural items, black market sales do occur.²² This is a threat to NAGPRA repatriation efforts undertaken between museums and NHOs who seek to return iwi kūpuna

and moepū to their original resting places; particularly if those resting places are well-known and publicly documented.

While the State has taken significant steps to balance protection of Native Hawaiian burial sites with development, tensions still remain between differing interests. The SHPD experiences recurring vacancies and has been criticized for its mismanagement of the State Historic Preservation Program and Native burials overall.²³ The Burial Councils, through no fault of their own, experience inadequately staffing and lack of training.²⁴ The resulting frustration of Kānaka Maoli and the council themselves has swelled and the State legislature recently took action. Senate Resolution 171 and House Resolution 113 of the 2021 Legislative Session call for OHA to form a Burial Sites Working Group, with a report due to the Legislature 20 days prior to the 2022 Legislative Session.²⁵ Senate Resolution 171 focuses the group on addressing allegations of mismanagement at the SHPD while House Resolution 113 focuses the group on determining ways to strengthen protections and improve resources for Native Hawaiian burials, examining ways to improve the implementation of the Burial Councils' duties and responsibilities and reviewing existing laws and administrative rules pertaining to the Burial Councils and exploring ways to develop their implementation and providing recommendations on the development of a statewide survey and inventory that documents historic properties where burial sites exist or may exist, including properties owned by the State or the counties.²⁶

While these challenges certainly exist, it is heartening to know that State leaders are demanding progress in better executing and improving the legal framework for protecting unmarked, ancient Hawaiian gravesites where no law existed three decades ago and that Hawai'i's courts also have acknowledged the deep-seated need for Kānaka Maoli to assure their kūpuna rest safely in perpetuity.²⁷

¹ H.R. CONF. COMM. REP. NO. 51, 15th Leg., Reg. Sess. (1990), *reprinted in* 1990 HAW. SEN. J. 778.

² HAW. CONST. art. IX § 9.

³ HAW. CONST. art. XII § 7.

⁴ HAW. ADMIN. R. § 13-300-2.

⁵ HAW. REV. STAT. § 6E-11.

⁶ HAW. REV. STAT. § 6E-11(f).

⁷ HR 113, 2021 Hawai'i Sess. Laws.

⁸ 136 Cong. Rec. S17, 173 (daily ed. Oct. 26, 1990) (Statement of Senator Daniel K. Inouye).

⁹ 25 U.S.C.A. § 3005 (through P.L. 112-122 approved May 30, 2012).

¹⁰ 25 U.S.C.A. §§ 3002(a)(1-2(B)) (through P.L. 112-122 approved May 30, 2012).

¹¹ 18 U.S.C.A. § 1170 (through P.L. 112-122 approved May 30, 2012).

¹² 43 C.F.R. § 10.2(b) and 10.14(c).

¹³ See Craig W. Jerome, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, and Hawai'i*, 29 U. HAW. L. REV. 163 (2006).

¹⁴ See *Kaleikini v. Thielen*, Civil No. 07-1-0067-01 (Haw. 1st Cir. Jan. 10, 2007), where multiple remains unearthed during a construction project were considered “previously identified.” However, when subsequent remains were found in the vicinity within the same project area during construction, these later discovered iwi were deemed “inadvertent discoveries.” See also *Kaleikini v. Yoshioka*, 128 Hawai'i 53, 283 P.3d 60 (2012), where Paulette Kaleikini, a Native Hawaiian cultural descendant of iwi in the Kaka'ako region of O'ahu, filed suit against the City and the State regarding

its approval of the rail, arguing in part that Hawai'i historic preservation law provides sequential steps that must be completed before a project may commence, including the completion of an AIS for the *entire* project. Kaleikini relied in part on the Hawai'i Administrative Rules, which explain that “[t]he review process is designed to identify significant historic properties in project areas *and then* to develop and execute plans to handle impacts to the significant properties in the public interest.” Haw. Admin. R. § 13-275-1(a) (emphasis added). The Hawai'i Supreme Court ruled for Kaleikini on this issue and rejected the City and State's approval of a phased AIS approach, holding that Hawai'i law requires completion of a full AIS before the SHPD can provide its written concurrence for the Project.

Legislative response to this case led to the passage of the controversial Senate Bill 1171 (Act 85) on May 21, 2013 that amended Haw. Rev. Stat. § 6E-42 to allow for phased review of “proposed project[s] consist[ing] of corridors or large land areas” and where “[c]ircumstances dictate that construction be done in stages” so long as a “programmatic agreement” is in place between the SHPD and the public or private developer. Opponents from the Hawaiian community and within the archaeological profession believe this law erodes the SHPD's review process by allowing piecemeal evaluation and circumvents responsible planning and decisionmaking around the protection of burials and cultural sites.

¹⁵ See HAW. REV. STAT. § 6E-43.5(a-b).

¹⁶ HAW. REV. STAT. § 6E-43.

¹⁷ HAW. ADMIN. R. § 13-300-2.

¹⁸ HAW. ADMIN. R. § 13-300-40.

¹⁹ *Id.*

²⁰ Interview with Keola Lindsey, Lead Compliance Specialist, Everett Ohta, Compliance Specialist, Jerome Yasuhara, Compliance Specialist, and Kamaile Maldonado, Public Policy Advocate, Office of Hawaiian Affairs, in Honolulu, Haw. (Oct. 9, 2012).

²¹ National NAGPRA 2018 Annual Report, *available at* <https://irma.nps.gov/DataStore/DownloadFile/620933>.

²² In 2005, Jerry David Hasson of Huntington Beach, California, pled guilty to violating the Archaeological Resources Protection Act for attempting to sell for \$2,500 a skull that he took from a Maui beach construction site to an undercover Bureau of Indian Affairs agent. Hasson previously offered the skull on eBay for an immediate purchase price of \$12,500, but removed the item when a member of Hui Mālama warned him that the sale of the skull violated federal law. Hasson was charged with a federal crime and sentenced to thirteen months of home detention, 600 hours of community service, and ordered to pay a \$15,000 criminal fine, in addition to nearly \$10,000 for investigation costs and the return of the skull to Maui for reburial. Associated Press, *Plea Deal for Man Who Tried to Sell Skull*, LOS ANGELES TIMES (Jan. 13, 2005), *available at* <http://articles.latimes.com/2005/jan/13/local/me-skull13>.

²³ In 2010, an audit by the National Park Service revealed that the SHPD has been plagued with serious operational deficiencies that hinder its ability to fulfill its mandates under state and federal law and threaten its receipt of the program's federal funding. *See generally* Letter from Jonathan B. Jarvis, Director, National Park Service, to Laura H. Thielen, Chairperson, Department of Land and Natural Resources (Mar. 19, 2010) (on file with author).

²⁴ HR 113, 2021 Hawai'i Sess. Laws; SR 171, 2021 Hawai'i Sess. Laws.

²⁵ HR 113, 2021 Hawai'i Sess. Laws; SR 171, 2021 Hawai'i Sess. Laws.

²⁶ HR 113, 2021 Hawai'i Sess. Laws.

²⁷ Significantly, Hawai'i's highest court has acknowledged that Article XII, section 7 of Hawai'i's Constitution, recognizing the rights of Kānaka Maoli to engage in religious and cultural practices, includes the protection of cultural and religious practices of preserving iwi kūpuna burial sites. *See* Kaleikini v. Thielen, 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010). In that case, the court also upheld a Native practitioner's claim that the desecration of iwi kūpuna caused cultural and religious injury.