



**SUPPORT**  
WITH RESERVATION.

**HB 2240 RELATING TO OFFICE OF HAWAIIAN AFFAIRS**  
House Committee on Hawaiian Affairs  
House Committee on Water, Land and Ocean Resources

February 3, 2010

9:00a.m.

Room: 329

The Office of Hawaiian Affairs (OHA) **SUPPORTS WITH RESERVATIONS** House Bill 2240 which seeks to transfer the functions and duties of the historic preservation division of the Department of Land and Natural Resources (DLNR) relating to Hawaiian burial sites to the Office of Hawaiian Affairs.

OHA clearly recognizes the important kuleana our Native Hawaiian community possesses to mālama "our most cherished possession", the iwi of our beloved kūpuna. The responsibilities of the Burial Sites Program, as administered by the State Historic Preservation Division (SHPD) and DLNR, are vast and immense. The care, management, and protection of the estimated hundreds of thousands of unmarked ancestral Native Hawaiian burial sites situated throughout the State of Hawai'i can be contentious, highly emotive, and often involves complex aspects of landowner, familial, and cultural rights.

#### **Enforcement Powers**

One paramount issue would be whether the inherent police powers of the DLNR would transfer to OHA with the statutory amendments. An implied right of entry onto private property for purposes of responding to, and investigating the inadvertent discoveries of human skeletal remains, is afforded to DLNR as with the Honolulu Police Department and Office of the Medical Examiner. The efficacy of OHA's role in investigating and determining proper treatment of human remains would rest on an ability to quickly access private, County and State parcels, often prior to exhaustive determinations of land ownership and boundary lines.

#### **Ethnicity Determinations**

Another key issue centers on the shared jurisdiction between the DLNR and OHA with regards to the classification of ethnicity of the affected burial site or human skeletal remains in question. In response to concerns expressed by the Native Hawaiian community during promulgation of Chapter 13-300, Hawaii Administrative Rules (HAR) which effectively implement the portions of Chapter 6E, Hawaii Revised Statutes (HRS) pertaining to the treatment of unmarked burial sites, the handling and exposure of iwi kūpuna was kept to a minimum. This was in direct

response to the cultural attitudes and views of the sanctity of iwi in the Hawaiian culture and Native Hawaiian views on desecration and harm.

Such that Chapter 6E, HRS, made a jurisdictional distinction between ancestral Native Hawaiian remains and the remains of other ethnic groups with regards to the processes for determining appropriate treatment, methods were adopted to help clarify ethnicity of remains. Currently, in Chapter 13-300, HAR, the procedure for determining ethnicity is designed to meet the spirit and intent of the law while respecting the expressed concerns of the Native Hawaiian community. OHA remains concerned that should a clearer determination of ethnicity be required, that a process of more intrusive examination and testing may result from the best of intentions, thus creating more harm to the kūpuna.

### **Capacity**

Lastly, there are other related issues such as OHA's foreseeable effectuation of rule-making as Chapter 13-300, HAR would certainly have to be revised and amended, and public hearings pursued in accordance with the laws governing the promulgation of administrative rules. There are also serious issues regarding the budgeting and allocation of current OHA resources for a kuleana of this magnitude as well as logistical and programmatic practicalities which will need to be well-thought out for a statewide program. The transfer of duties outlined in the proposed legislation would not only envision a transfer of Burial Sites Program staff but potentially a portion of archaeological review staff as well. Unmarked burial sites are often interspersed amongst a cultural landscape which includes many other types of historic properties. Their collective treatment by SHPD often proves a better method of mitigation as opposed to segregating just the human burial sites out for disparate consideration and treatment.

DLNR possesses staffing and division expertise spread throughout the organization with various divisions assisting SHPD in fulfilling their mission such as the Division of Conservation and Resource Enforcement (DOCARE), State Parks, Land Division, Bureau of Conveyances and the Division of Forestry which provides an internal support network on all islands to help effectuate the responsibilities of fulfilling Chapter 6E, HRS. It is unclear as to the structural realignment of OHA services and functions needed to fulfill this important kuleana.

### **Liability**

OHA is concerned with the possible abrogation of the duties and responsibilities of the DLNR under the current constitutional and statutory mandates to protect the traditional and customary cultural practices of the Native Hawaiian people by simply transferring this kuleana to OHA. Through our advocacy, and in assisting a multitude of beneficiaries with historic preservation concerns, OHA may very well inherit years of serious neglect, insufficient inventories, poor record keeping and a program in such serious disarray, that OHA would be exposed

to lawsuit and serious liability by beneficiaries harmed by such previous malfeasance. In order to move forward to rehabilitate the program, the foundation must be solid and reliable; otherwise the best efforts will be set up to fail.

### **Conclusion**

OHA is extremely cognizant that to raise a beloved lāhui, the foundation must be pono and there is no greater kuleana than to care for our ancestors, our beloved iwi kūpuna. OHA is up to the challenge. However, a kuleana of this magnitude requires extreme diligence regarding all legal, economic, cultural and social facets to ensure that such a transfer of responsibilities is truly successful and not resultant in more failure and irreparable harm due to hasty implementation.

OHA remains committed to continue strongly advocating for the proper identification, protection and treatment of our beloved iwi kūpuna and stand ready to not only recommend, but to assist, and where deemed more effective, participate directly in this important kuleana. Thank you for this opportunity to testify.

TO: Representative Mele Carroll, Chair  
House Committee on Hawaiian Affairs  
And  
Representative Ken Ito, Chair  
House Committee on Water, Land & Ocean Resources

FROM: Sara L. Collins, Ph.D., Legislative Chair  
Society for Hawaiian Archaeology  
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HEARING: February 3, 2010, 9:00 AM, Conference Room 329  
SUBJECT: Comments on HBs 2240 and 2242 (Relating to the Office of Hawaiian Affairs)

No POSITION  
WITH COMMENTS  
RE: 2240

I am Dr. Sara Collins, Chair of the Legislative Committee of the Society for Hawaiian Archaeology (SHA). We have over 200 members that include professional archaeologists and advocates of historic preservation in general. On behalf of SHA, I am providing comments on House Bills 2240 and 2242 which transfer the functions and duties of the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources (DLNR) relating to Hawaiian burial sites to the Office of Hawaiian Affairs. In addition, HB 2242 establishes a special fund to finance operations through conveyance tax revenues and includes cave burials and burial sites. The subject bills contain numerous revisions to Chapters 6E and 10 of the Hawaii Revised Statutes (HRS) which will allow the transfer of functions and duties pertaining to Native Hawaiian burial sites from SHPD to OHA. In addition to amending the relevant statutes to establish direct authority for OHA over these important sites, the amendments also call for the transfer of personnel, and items such as records, maps, contracts, books, machines, and supplies from SHPD to OHA. Our reading of the subject bills suggests that they are companion bills so our comments apply to both of them.

Many of our members have decades of experience in the identification, recordation, treatment, and disposition of Native Hawaiian burial sites. Since 1990, they have also worked with SHPD and the Island Burial Councils to implement the appropriate and timely treatment of Native Hawaiian burials within the legal framework established by sections 6E-43, 43.5, and 43.6, HRS, and through the historic preservation review process established under sections 6E-8 and 6E-42, HRS.

Our organization does not have a position on whether the statutorily mandated functions and duties relating to the identification and treatment of native Hawaiian burials should remain at DLNR or be transferred to OHA. We do, however, strongly support efforts to systemically improve a process that should be providing sensitive, timely, and appropriate treatment of the *‘iwi kupuna* and burial sites. To this end, we are willing to provide any assistance appropriate to our professional expertise and experience that would help implement any major changes should they occur.

We have not had a chance to review in detail these seemingly very thorough bills but will continue to study them should they be passed by your committee. We can, however, provide the following comments in hopes that they will allow further clarifying amendments to be made to the subject bills.

- In a number of the amendments proposed for Chapter 6E, HRS, we note that the wording seems somewhat ambiguous in terms of which agency's review or concurrence

must be sought by an applicant. For example, amendments to Chapter 6E-7(b) imply a concurrent review by DLNR and OHA while amendments to 6E-8(a) suggest that one agency or the other may provide the written determination. We suggest that these responsibilities be clearly stated so that no burial site “slips through the crack” due to a confusion over which agency should be conducting review and compliance.

- We believe that attention and effort should be focused on how both agencies will have access to the records and other information each needs to carry the work mandated by the subject bills. In general, records currently maintained by the SHPD are highly integrative such that it would be difficult at best to segregate only those records pertaining to Native Hawaiian burials and burial sites. In addition, we believe that it is likely that SHPD will still need to consult such records on a regular basis in order to carry out its mandated duties. This applies both to documents submitted by agencies and applicants for review as well those generated over the last 40 years.
- In view of the preceding point, we are aware that the SHPD and Division of State Parks have recently established a digital archives to preserve and access digital copies of reports, plans, and other documents related to historic properties and generated by the federal and state-mandated historic preservation review process. Recently prepared documents can be uploaded directly into the web-based document management system (Xerox DocuShare). Authorized users within the system may quickly and easily locate information on shared server even though the paper copies of the documents may not be in the users’ office space. We believe that an expansion of this or a similar system would be critical to the success of the transfer called for by the subject bills. We would further recommend that serious consideration be given to establishing a position whose primary function will be to oversee the transfer and maintenance of records, and to ensure that all users who need them – staff of SHPD and OHA, lineal and cultural descendants, archaeologists and planners, interested members of the public – can have access. Access to specified files, those considered particularly sensitive, can be restricted to designated users.
- We agree with testimony on SB 2302 (companion bill to HB 2242) recently offered by the State Attorney General’s office in which they recommended against repealing of Chapter 6E-43.6 in its entirety. They caution against doing so since the repeal of the entire section would leave the DLNR without guidance as to how to handle the inadvertently discovered remains of non-Hawaiian burials. As it is currently written HB 2242 also proposes to repeal Chapter 6E-43.6 in its entirety, replacing it with a new Chapter 10H which only applies to historic Native Hawaiian burials. In view of these problems, we recommend amending HB 2242 in order ensure that non-Native Hawaiian burials continue to be covered by historic preservation law. We suggest that Chapter 6E-43.6 be retained but further amended to cover this omission.

Thank you for considering our comments. We look forward to working with you and other stakeholders on the important issue of treating Native Hawaiian burials and burial sites with sensitivity. Should you have any questions, please feel free to contact me at the above email address.