



**SUPPORT**  
WITH RESERVATIONS

**HB 2242 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 2242 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.



KŪKULU KE EA A KANALOA

## KAHO'OLawe ISLAND RESERVE COMMISSION

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Michael K. Nāho'opi'i  
*Executive Director*

**Testimony of  
MICHAEL K. NAHO'OPI'I  
Executive Director**

# OPPOSED

**Before the House Committees on  
HAWAIIAN AFFAIRS  
and  
WATER, LAND, AND OCEAN RESOURCES**

**Wednesday, February 3, 2010  
9:00 AM  
State Capitol, Conference Room 329**

**In consideration of  
HOUSE BILL 2242  
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS**

House Bill 2242 would transfer the functions and responsibilities for the preservation and protection of native Hawaiian burial sites to the Office of Hawaiian Affairs; these duties are currently under the purview of the Department of Land and Natural Resources, Historic Preservation Division and the Kaho'olawe Island Reserve Commission (KIRC) for the island of Kaho'olawe. KIRC opposes the inclusion of Kaho'olawe burial sites in House Bill 2242 and would prefer to retain its burial council duties.

Kaho'olawe is the only main Hawaiian island that has had an island-wide inventory survey prepared and accepted. Burial sites have been identified and a KIRC-approved burial treatment plan requires that regular surveys be conducted of all burial sites. To accomplish all that is culturally appropriate, KIRC works very closely with the Protect Kaho'olawe 'Ohana, a native Hawaiian group that has provided all necessary cultural protocols for burials on Kaho'olawe for more than thirty years. Thus, these duties and responsibilities should remain with the KIRC.

# TAXBILLSERVICE

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TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: CONVEYANCE, Disposition for burial sites special fund

BILL NUMBER: SB 2302; HB 2242 (Identical)

**OPPOSED**

INTRODUCED By: SB by Hee, Galuteria, Kidani, Sakamoto; HB by Carroll, Belatti, Bertram, Hanohano, C. Lee, Luke, and 2 Democrats

BRIEF SUMMARY: Amends HRS section 247-7 to provide that 10% of conveyance tax revenues shall be paid into the burial sites special fund established pursuant to HRS section 10-S.

Makes other nontax amendments to transfer the functions and duties of the historic preservation division and the Kaho'olawe island reserve commission relating to Hawaii burial sites to the Office of Hawaiian Affairs.

EFFECTIVE DATE: July 1, 2010

STAFF COMMENTS: The conveyance tax was enacted by the 1966 legislature after the repeal of the federal law requiring stamps for transfers of real property. It was enacted for the sole purpose of providing the department of taxation with additional data for the determination of market value of properties transferred. This information was also to assist the department in establishing real property assessed values and at that time the department stated that the conveyance tax was not intended to be a revenue raising device. The conveyance tax is imposed each time property changes title or ownership.

Prior to 1993, the conveyance tax was imposed at the rate of 5 cents per \$100 of actual and full consideration paid for a transfer of property. The legislature by Act 195, SLH 1993, increased the conveyance tax to 10 cents per \$100 and earmarked 25% of the tax to the rental housing trust fund and another 25% to the natural area reserve fund. As a result of legislation in 2005 and last year, 2009, the conveyance tax rates were substantially increased and bifurcated between nonowner-occupied residential properties and all other properties with brackets based on the amount of the value transferred. Until 2005, 50% of the receipts went into the general fund and the other half was split with the affordable rental housing program and the natural area reserve program. Beginning in 2005, another 10% was taken for the land conservation fund. Last year when the state general fund began to hemorrhage, the allocation was reshuffled after rates were again increased and the portion that went to the state general fund rose from 35% of collections in 2007 to 45% beginning in 2009. Currently, 10% of conveyance tax revenues is earmarked for the land conservation fund, 25% for the rental housing trust fund and 20% for the natural area reserve fund with the remainder deposited into the general fund.

While the proposed measure would yet again tap conveyance tax revenues for another program, it should be remembered that the collections of this tax were originally a receipt of the general fund. That is the problem with earmarking the conveyance tax. With a hot real estate market, the collections of this tax soared. However, as the market cools, as it did after the Japanese bubble burst in the mid 1990's and now in the aftermath of the subprime credit crisis, the collections of this tax will wane. The conveyance

tax is one of the least dependable sources upon which to rely for funding with collections rising and falling with the fortunes of the real estate market. Any amount collected under this tax will depend on activity in the real estate market. When the housing market slows down, revenues may not be sufficient to meet the expectations of the fund. If the additional revenues are not sufficient or another "important" program needs funding, will the conveyance tax be increased to generate even more revenue?

If the legislature deems any of the programs for which conveyance tax revenues are earmarked to be such a high priority, then it should maintain the accountability for these funds by appropriating the funds as it does with other programs. Earmarking revenues merely absolves elected officials from setting priorities. The beneficiaries of such earmarked sources look upon the receipts as "their" money and refuse to be held accountable for the use of those funds. Meanwhile, all other programs not so favored like education, public safety, health and human services are cut each day as general fund tax revenues shrink.

Instead of further clouding the financial picture of the state, all of these earmarked funds and the programs they underwrite should be brought back to the general fund table so that they can be measured against all the other pressing needs of the state. Only then will lawmakers and taxpayers be able to set priorities for what little tax resources taxpayers have to share especially in these difficult economic times. Earmarking resources that bear little relationship to the programs being funded represents poor public finance policy.

To document the last increase in conveyance tax rates which put residential-nonowner occupied transactions at \$1.25 per hundred dollars of value transferred for properties of more than \$10 million, lawmakers argued that Hawaii's conveyance tax was so very low by comparison to Vermont's conveyance tax and, therefore, there was good basis for setting such a high rate. Public testimony noted that unlike Hawaii where the median prices of a single family residential home is over \$600,000, one can purchase a five-bedroom home on half an acre of land in Vermont for less than \$35,000. And while lawmakers envisioned such purchases of non-owner occupied property transferred at the price of \$10 millions or more as the second home of some Microsoft executive, they seemed to over look the sale of the affordable housing complex of Kukui Gardens which sold for more than \$70 million. Those actions certainly indicated that lawmakers need an encounter with reality.

Digested 1/28/10

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

No POSITION  
WITH COMMENTS

FROM: Sara L. Collins, Ph.D., Legislative Chair  
Society for Hawaiian Archaeology  
[sara.l.collins.sha@gmail.com](mailto:sara.l.collins.sha@gmail.com)

RE: 2242

HEARING: February 3, 2010, 9:00 AM, Conference Room 329  
SUBJECT: Comments on HBs 2240 and 2242 (Relating to the Office of Hawaiian Affairs)

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.