



SB1411 SD1
RELATING TO HISTORIC PRESERVATION
Senate Committee on Judiciary

March 4, 2022

10:30 a.m.

Via Videoconference

The Office of Hawaiian Affairs offers **SUPPORT** for SB1411 SD1, 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.

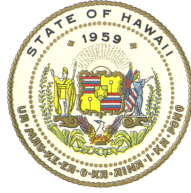
The Hawai‘i Historic Preservation law, codified in HRS Chapter 6E, was enacted to ensure that invaluable historic sites and archaeological resources are given appropriate consideration when they may be impacted by development activities. Historic cultural resources, burials, and sites protected under 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 SD1. 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 Senate Committee on
JUDICIARY**

**Friday, March 4, 2022
10:30AM
Via Videoconference**

**In consideration of
SENATE BILL 1411, SENATE DRAFT 1
RELATING TO HISTORIC PRESERVATION**

Senate Bill 1411, Senate Draft 1 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 1, 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 1 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.

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

Senate Bill 1411, Senate Draft 1, 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 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 1 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 1, 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 1, 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 1, 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 1, 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**

Testimony of
Hawaii State Aha Moku

Before the Senate Committee on Judiciary

Friday, March 4, 2022
10:30 a.m.
Videoconference

**In SUPPORT of
Senate Bill 1411 SD1
Relating to Historic Preservation**

Senate Bill 1411 SD1 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 l’ 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 9th 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 do not agree 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.

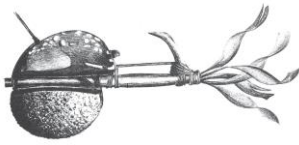
SECTION 3 (a) requires “The Hawaii Historic Review Board shall consist of seven members (ten members have been reduced to seven in legislature 2021) and shall include one qualified member of each of the following disciplines: archaeology, architecture, history, and sociology. In addition, there shall 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. Mahalo for the opportunity to offer testimony on this measure

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SOCIETY FOR HAWAIIAN ARCHAEOLOGY

P.O. BOX 22458 HONOLULU, HAWAI'I 96823

TO: Senator Lorraine R. Inouye, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair
Committee on Water & Land (WTL)

Senator Karl Rhoads (Chair)
Senator Jarrett Keohokalole (Vice Chair)
Committee on Judiciary (JDC)

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

HEARING: March 4, 2022, 10:30 AM, Videoconference

SUBJECT: Testimony regarding SB 1411, Relating to Historic Preservation

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

The proposed amendments appear to be well-intentioned but leave many 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 amendments 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 the opportunity to comment.

<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.

LATE

THE KŪPUNA CAUCUS



To: The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair
Committee on Judiciary

Re: **SB 1411 SD 1 RELATING TO HISTORICAL PRESERVATION**

Hearing: Friday, March 4, 2022, 10:30 p.m., via videoconference

Position: Strong Support

Aloha, Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee Judiciary:

The Kupuna Caucus of the Democratic Party of Hawai'i strongly supports SB 1411 SD 1. This bill defines "pre - contact historic property;" clarifies that the comprehensive 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. This bill also 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.

The Kupuna Caucus supports this bill because there is a definite need to protect and preserve pre-contact historic property. We have seen evidence of pre-contact historic property such as heiau, unu, ahu, ko`a fishing shrines, loko i`a fishponds, and other pre-contact historic properties defaced, desecrated, vandalized, and stolen by some acting with intentional, willful conduct, and others acting inadvertently and unknowingly. In any event, these national treasures need greater protection and preservation. Pre-contact historic properties have value, historically, culturally, and traditionally, rendering them priceless.

This measure also calls for the publication of informational materials to educate the general public, visitors and residents alike, to appreciate the traditional and cultural significance of pre-contact historic native Hawaiian property, a resource that is sorely needed.

To assist in curtailing criminal behavior, the increases in fines from no more than \$10,000 to \$20,000, and in certain instances to \$25,000 for violations to prehistoric or historic human skeletons or associated burials, and \$30,000 for the loss or damage to pre-contact historic property appear appropriate given the sacredness, rarity, and cultural significance and traditional importance of various pre-contact historic properties. We greatly appreciate your continuing support for the protection and preservation of pre-contact historic properties. Thank you for the opportunity to testify.

Melodie Akeja, Vice Chair, Kupuna Caucus of the Democratic Party of Hawai'i

STRONG SUPPORT for SB1411 Relating to Historic Preservation

Senator Karl Rhoads
Chair, Committee on Judiciary
Hawai'i State Capito
Room 204

Aloha Chair Rhoads, Vice Chair Keohokalole, and Members,

If we are to lose Native Hawaiian historic sites in Hawai'i itself, where else will we find them? I lament a day when children can only go to a museum to see remnants of taro cultivation practices, fishpond technology, and traditional fishing nets, yet we are already heading down that path right now. Stone agricultural terraces remain standing deep in Ahuimanu; holding their form deep in the forest due to skilled Hawaiian masonry from hundreds of years ago. Yet will they soon be paved over and lost for every generation beyond ours? There is no other Hawai'i in the world. In this universe. We must protect this heritage.

Thank you for your consideration in passing this bill.

Mahalo nui loa,

Daniel Lee