

KULEANA

HERITAGE LAW AND SOCIAL JUSTICE IN 21ST CENTURY HAWAI'I



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Historic preservation faces its most difficult challenges when pitted against other noble causes: affordable housing, sustainable energy, or much-needed public transit projects. When such a conflict is further complicated by a legacy of injustice, existing preservation law often finds itself at a loss. The controversy surrounding Native Hawaiian burials disturbed by the construction of Honolulu's new commuter train is a recent example of what some professionals refer to as "the unsatisfactory but real condition of cultural resource management in the United States today."¹ This case provides a point of departure for exploring what preservation can learn from other fields when attempting to address historical injustices.

The official narrative of Hawaii's status as a U.S. state (and pleasant holiday destination) obscures a long history of injustice, and is important to understanding Native Hawaiian attitudes towards federal preservation programs. Statehood was, and continues to be, a strategy for concealing a history of dispossession and repackaging it to resemble democracy—and preservation has a role to play.

Although "discovered" by the English Captain James Cook in 1778, many of the earliest Western settlers in Hawaii were American missionaries, who had a profound effect on Native Hawaiian culture. Traditional dance, attire, and burial

¹ King, Thomas. (2009) *Our Unprotected Heritage: Whitewashing the Destruction of Our Natural and Cultural Environment*. Walnut Creek, CA: Left Coast Press.

practices were banned as relics of heathenism, and use of Hawaiian language was discouraged. Throughout this period, Native Hawaiian artifacts and burials were subject to anthropological study or looted for curios (or both, resulting in an enduring association of archaeological excavation with theft), all in flagrant violation of kapu—the ancient Hawaiian code of ritual restrictions intended to safeguard physical and spiritual power.²

As missionaries became wealthy plantation owners with a financial stake in the island's political future, the story of Hawaii's journey to statehood essentially becomes a story of America's early experiments in imperialism. It is unsurprising that the United States, a former colony itself, would be imbued with the spirit of its own creation. The European Imperialism of the 17th and 18th centuries became the Euro-American Imperialism of the 19th and 20th centuries. In order to fuel the burgeoning industrial revolution, the nation drove westward under the gospel of "Manifest Destiny," devouring natural resources and decimating any native populations who resisted the land grab; by the late 19th century, the United States stretched all the way to the Pacific coast. Unsatisfied, the new corporate elite (and its political allies) found themselves looking beyond the coast to the untapped resources and markets of "the Orient," which were largely claimed by the old imperial powers of Europe and an emerging Japan.

² Kawelu, K. L. (2013) Native Hawaiian Perspectives on Archaeology, editor's comments. *SAA Archaeological Record*, 13, 30.

The domination of Asian markets thus necessitated a highly militarized colony in the Pacific from which to exert control. Not only did Hawaii offer a central location, but the islands were already home to a substantial population of American missionaries and plantation owners who resented the Hawaiian monarch, Queen Liliuokalani. The settlers formed their own militia and encouraged the U.S. military to collaborate in a coup against the Kingdom of Hawaii in 1893, constituting an act of war against a friendly, independent nation. A provisional government headed by Sanford Dole (of the Dole pineapple plantation family) was established to rule Hawaii until the expected annexation.

By 1898, the United States was at war with Spain, fighting for control of Spanish colonies in both the Caribbean and the Pacific. Seeking to secure a base from which to more effectively fight the Spanish in the Philippines, the U.S. used the war as an excuse to claim Hawaii by fraudulently annexing it. Under constitutional law at the time, incorporating an independent nation into the U.S. was an international agreement between two sovereign nations, and as such it required that the government of the proposed territory confirm its desire for incorporation. If so, a treaty of annexation would be sent to the Senate for a vote, requiring a two-thirds majority "yes" vote. Realizing that Native Hawaiians had no desire to cede their lands and sovereignty (in fact, almost every single Native Hawaiian adult signed petitions, known as the Ku'e petitions, against

annexation), U.S. President McKinley and his expansionist constituents convinced Congress to simply ignore the Constitution and create a joint resolution rather than an actual treaty. As a domestic law with no powers of incorporation, the joint resolution and resulting annexation were entirely illegal.

With a Pacific military base secured, the United States began building immediately, and by the end of World War II (which, for Americans, commenced with the bombing of Hawaii's Pearl Harbor) the landscape bristled with military installations. Following the Allied victory, the newly created United Nations placed Hawaii on its official list of territories in need of decolonization. In 1959, the UN prepared to pass Resolution 1514, which would provide a framework by which Hawaii's future political status could be decided by Native Hawaiians.³

With indefinite control of a valuable military base in jeopardy, the United States determined that the best method to keep Hawaii from being affected by Resolution 1514 was to make Hawaii look more like one of its other democratically incorporated states, instead of an occupied nation. The U.S. rushed a vote for statehood, violating UN regulations for fair elections. First, the government opened the vote to all Hawaii residents, knowing full well that Native Hawaiians comprised only 20% of the population [see Fig. 1], and that the

³ United Nations Publications. (1947-1959) Non-Self-Governing Territories: Summaries and analysis of information transmitted under article 73e of the Charter Report of the Secretary-General: Pacific Territories: Hawaii

remainder (American settlers and missionaries, Asian plantation laborers, U.S. military personnel) would vote in favor of statehood. Second, the ballot essentially offered only one option: integration (via statehood or continued territorial status). When statehood inevitably won, the U.S. informed the UN that Hawaii's questionable status was resolved, and that it should be removed from the UN's list of colonies.

Viewed in light of its use as a tool for denying Native Hawaiian sovereignty, statehood itself constitutes a violation of social justice. As of today, many Native Hawaiians rightly consider Hawaii an occupied nation. In 1993 (the hundredth anniversary of the initial overthrow of the Hawaiian monarchy), the government did issue an official apology to Native Hawaiians for occupation of lands and violation of sovereignty, although no lands or sovereignty were actually returned.⁴

With such a well-established history of injustice, Native Hawaiians have come to expect little from the U.S. government, particularly where the protection of culture is concerned.⁵ One of the most contentious issues involves burials, as the *iwi kupuna* (bones of the ancestors) bear special significance to Native

⁴ Kinzer, Stephen. (2006) *Overthrow: America's Century of Regime Change from Hawai'i to Iraq*. New York, NY: Times Books.

⁵ Kawelu, K. L. (2007) *A sociopolitical history of Hawaiian archaeology: Kuleana and commitment*. PhD thesis. Berkeley: University of California.

Hawaiians. The dead are not really seen as dead, but merely transformed and still able to exert a powerful influence on the living⁶:

Na makou e malama i na iwi o ko makou kupuna

Nana mo`o e malama i kou makou iwi

A ho`omau ka lokahi o kakou

We will care for the bones of our ancestors

Our children will care for our bones

As we continue this interdependency⁷

As ancestral burial places are considered sovereign ground, Native Hawaiian burials play an important role in Hawaiian sovereignty and are not to be disturbed or relocated without substantial consultation. Since most discoveries of the *iwi* are conducted in a land development context, however, these situations are ripe for conflict. Even among Native Hawaiians there are differing beliefs over whether “preservation in place” is necessary in every situation. During any development involving *iwi kupuna*, the remains are documented, and either reinterred to their original location, or relocated. This decision involves stakeholders (such as cultural and lineal descendants) and the SHPO, guided by

⁶ Gulliford, Andrew. (2000) *Sacred Objects and Sacred Spaces: Preserving Tribal Traditions*. Boulder, CO: University Press of Colorado.

⁷ translation by Hui Malama I Na Kupuna O Hawai'i Nei

that island's burial council, a volunteer committee tied to the state Department of Land and Natural Resources and charged with protecting the *iwi*.

Several federal laws govern the treatment of Native Hawaiian burials, although not all of them are deemed sympathetic by Hawaiians. The political role of Native Hawaiians is significant in this context. Unlike other Native American tribes recognized by the Secretary of the Interior, the illegal annexation of Hawaii means that no official treaty or government-to-government relationship was ever established. According to heritage activist Thomas King, "this creates a muddled legal situation in which agencies try to treat Native Hawaiian groups more or less like tribes but without much guidance in law." Some laws, like the National Historic Preservation Act (NHPA) and Native American Graves Protection and Repatriation Act (NAGPRA), simply lump Native Hawaiians in with other tribes. Other laws, like the "Indian sacred sites" executive order 13007 signed in 1996 (requiring federal agencies to accommodate access to and ceremonial use of Indian sacred sites, and to avoid adverse affect on integrity of sites) does not apply to Native Hawaiians.

Under the National Register Section 106 evaluation criteria established by the NHPA in 1966, most Native Hawaiian burial sites are classified under Criterion D (information content), which many Hawaiians feel falls drastically short of their

actual significance.⁸ An unfortunate consequence of applying this criterion alone is that many burials have been destroyed or relocated once archaeologists declare that a site has yielded sufficient information. For some Native Hawaiians, the very process of information-collecting itself may be viewed as a violation of the *iwi*'s integrity.

NAGPRA was enacted in 1989 to correct the long-standing injustice of native remains being treated as objects of curiosity and subjects of scientific examination (the law also applies to associated funerary objects, sacred objects, and objects of cultural patrimony). NAGPRA works to regulate excavation by requiring that federal agencies receive a permit, which must be coordinated with the appropriate tribal group, before burials or cultural items can be disturbed, exhumed, or removed. To streamline coordination with the agencies, each island has its own burial council, with members appointed by the governor and confirmed by the Senate for a four-year term.⁹

Outside of the burial councils, the colonial legacy has left many Native Hawaiians deeply suspicious of archaeologists' intentions, making it difficult to involve the broader community in the decision-making process.¹⁰ Proving stakeholder status can also be challenging, as a claimant can only be recognized

⁸ Hall, D. N. (2013) The Road to Cultural Justice. *SAA Archaeological Record*, 13, 37-39.

⁹ <http://www.state.hi.us/dlnr/hpd/councils.htm>

¹⁰ Tengan, T. K. (2001) Reclaiming Space for Indigenous Anthropology: some notes from Social Science Building 345. *Public Anthropology*. Honolulu: University of Hawaii Manoa.

by the burial council “after establishing genealogical connections to Native Hawaiian ancestors who once resided or are buried or both, in the same ahupua’a or district in which certain Native Hawaiian skeletal remains are located or originated from.”¹¹ Paulette Kaleikini is one such cultural descendant, and came to the forefront of Native Hawaiian burial issues in 2011, when she sued the Honolulu Authority for Rapid Transit (HART), the Hawaii State Historic Preservation Office (SHPO), and the City of Honolulu for negligence in the federal review process. The review process was initiated in 2005, when HART’s high-capacity rail corridor (serving the Honolulu metropolitan area) was approved for federal, state, and municipal funding [see Fig. 2]. Receipt of federal funding and the location of some tracks on federal land triggered NEPA and Section 106 review.

Debated for decades, the rail project was intended to address the long-standing issue of commuter traffic from residential West Oahu to Honolulu. The rapid growth in motor vehicle activity, encouraged by the sprawling residential development introduced to house American military personnel and their families, introduced a range of serious social, economic, environmental, and quality-of-life issues to the islands. Already second only to Los Angeles in terms of traffic congestion (travel times can double or triple during peak commuting hours),

¹¹ Kaleikini v. Yoshioka, SCAP-11-0000611 (Haw. 2012)

Honolulu's island location lacks the space to adopt continued highway expansion as a reasonable solution. As it stands today, there is not even enough space to provide "TheBus," Hawaii's primary public transportation system, with dedicated lanes in order to create an effective Bus Rapid Transit (BRT) system.

The rail was a contentious proposal from the outset, with residents complaining of tax increases, insufficient capacity and route, and noise pollution. When HART decided on a heavy elevated rail system, the American Institute of Architects produced a series of renderings to demonstrate the visual impacts of such "elevated blight" on Hawaii's downtown streets and ocean views [see Fig. 3], leading to public outcry. Citing positive examples in Portland, Houston, Barcelona, and Paris, the AIA advocated for an "at-grade" rail system, which would reduce visual impacts, eliminate the need for station security guards, provide greater accessibility to the elderly or disabled, reduce excavation from several feet to several inches, and reduce cost from \$270 million per mile to \$70 million per mile.¹²

HART, however, was determined that an elevated transit system would be "faster, safer, and more reliable for on-time performance,"¹³ and the excavation-heavy project was approved by the SHPO in 2009. Unlike most other SHPO-

¹² AIA Honolulu (2010). Environmental Impacts of Elevated vs. At-Grade Rail. Honolulu, HI: American Institute of Architects.

¹³ <http://www.honolulustransit.org/rail-facts.aspx>

approved project plans, which require that an Archaeological Inventory Survey (AIS) be completed before the project can begin, HART's plan divided the route into phases and allowed construction to proceed phase-by-phase, without a complete AIS. By allowing construction to begin before the agency could review a complete picture of potentially affected archaeological resources, the possibility to explore impact-reducing alternative routes was effectively eliminated.

Paulette Kaleikini, a recognized cultural descendant of Waikiki and Native Hawaiian burial advocate, tirelessly pursued a legal case against HART and the SHPO for reaching an agreement that placed the *iwi* (and other archaeological resources) in danger. The case eventually went before the Hawaii Supreme Court in 2013, which ruled unanimously in her favor: as an incomplete picture, phased AIS did not allow the federal agency to take the full effects of its actions into account, and a new agreement had to be reached. As a result of the court's decision, all construction in West Oahu stopped as archaeologists completed the AIS of the entire twenty-mile route, instead of in the four phases originally approved by the SHPO. The new project plan provided special stipulations for the discovery of Native Hawaiian burials, including the creation of a cultural

monitor program that allowed cultural descendants like Kaleikini to be on site during AIS work¹⁴ [see Fig. 5].

In order to address future discoveries of the *iwi* (and the historical injustices suffered by Native Hawaiians) with respect, it is important to explore ways in which such controversies can be avoided. While the review process for any major federal project can be expensive, HART could have avoided substantial legal fees, and the entire AIS could have been completed in a more orderly and less contentious manner. Where did HART and the SHPO fail, and what policy changes could afford cultural resources the best chance of being considered early enough project planning that changes can be made to protect them?

Several problems inherent in the current NEPA and NHPA regulations clearly hinder review processes intended to protect cultural heritage. The federal and state agencies (including the SHPO) responsible for overseeing the studies and keeping them honest may also see themselves as being in the business of making projects go smoothly, and view compliance as merely a paperwork exercise. Systems of compliance are so esoteric and laden with jargon that they are almost totally inaccessible to citizens, resulting in few real opportunities to negotiate with project proponents before serious problems arise. Pro forma

¹⁴ Sakahara, Tim. "Cultural Monitors to Watch Over Rail Archaeological Survey." Hawaii News Now, October 2012.

public comment and public hearings are substituted for meaningful conversation with concerned parties.¹⁵ The elevated rail controversy represents a confluence of all three shortcomings: the SHPO approved a plan that was ultimately not in the best interest of Native Hawaiian heritage resources, and Native Hawaiians' concerns were largely ignored until a lawsuit was initiated. In supporting phased AIS, the SHPO effectively stood in for Native Hawaiians and made a decision on their behalf. This kind of "black box" negotiation made sense when the review process was developed half a century ago, when agencies and project proponents did not have access to as much expertise and there were fewer groups equipped to contribute to heritage management decisions.¹⁶

If heritage professionals wish to have a stake in correcting historical injustices, a review process must be developed that values inclusivity as much as it does efficient compliance—otherwise, preservation has simply become another component of a bureaucratic exercise. Part of the solution is political: the status of Native Hawaiians in relation to US state and federal agencies must be more clearly and consistently defined, as it is with other Native American tribes. Would Native Hawaiians be better served by a THPO than a SHPO alone? As there are no reservations in Hawaii, what special rights do Native Hawaiians

¹⁵ King, Thomas. (2009) *Our Unprotected Heritage: Whitewashing the Destruction of Our Natural and Cultural Environment*. Walnut Creek, CA: Left Coast Press.

¹⁶ National Trust. (2010) "Back to Basics."

have to land and to the cultural resources it contains? Other helpful steps are largely procedural, and will hinge on efficient communication and coordination between stakeholders, agencies, and project proponents. Native Hawaiian individuals (who may hold differing or even contrasting ideas about the treatment of cultural resources) and knowledgeable organizations like the island burial council must have the opportunity to provide meaningful input early on in the review process, long before a project is implemented on the ground. Continuing to negotiate the balance between inclusivity and efficient decision-making in the shadow of historical injustice is an intimidating proposal, but it is also arguably a preservationist's most important work in promoting a just society and diverse heritage for both the present and the future.

Definitions

Kapu (adj.)

forbidden [or] sacred, holy, consecrated

Kuleana (n.)

[a] right, privilege, responsibility, ownership, or jurisdiction; particularly one guided by values

Malama (v.)

to take care of, tend, attend, care for, preserve, protect, beware, save [or] maintain

All definitions taken from Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 232 (1986)

Appendix

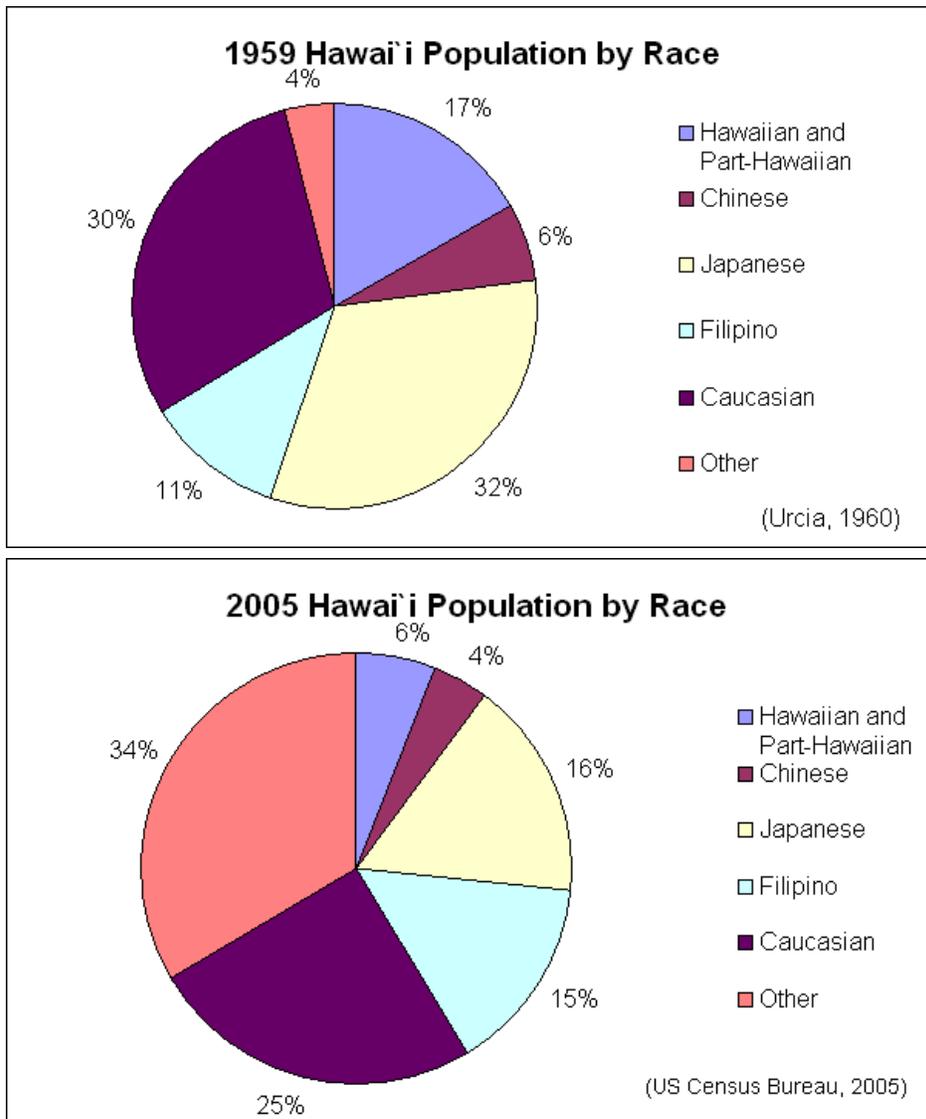


Fig. 1

20th century demographic charts. Universal suffrage at the 1959 statehood election overwhelmed the Native Hawaiian vote.

image courtesy Jose Urcia, "The Morphology of the Town as an Artifact: a case study of sugar plantation towns on the Island of O'ahu" (1960)



Fig. 4

Rendering of alternative at-grade light rail scheme, dramatically reducing visual impacts

image courtesy AIA Honolulu (2010)



Fig. 5

Paulette Kaleikini visits another cultural descendant authorized to supervise Native Hawaiian burial excavations along the rail route.

image courtesy Elyse Butler Mallams

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