

# Place the Kuleana with OHA

By **Guest Author** - June 1, 2021

By *Kēhaunani Abad and Edward Halealoha Ayau*

1 of 8 < >



*Ka'iulani Mahuka, Hank Fergerstrom and Louise Sausen negotiate with Kaua'i Police Chief Darryl Perry during a June 24, 2008, protest against the construction of a vacation home on a Kānaka 'Ōiwi cemetery at Naue, Kaua'i. - Photos: Kāi Markell*

From **years of involvement in problematic iwi kūpuna cases**, we've seen that a **persistent source of what has gone wrong is the very entity charged with ensuring that everything should be right. That entity** responsible for implementing our state burial laws and administering the Burial Sites Program **is the State Historic Preservation Division (SHPD)**.

**For the past 25 years, the SHPD has chronically:**

- Failed to support the Burial Councils and the management of Burial Council appointments, resulting currently in no councils being properly constituted to render legally binding decisions.
- Failed to provide effective training to Burial Sites Program staff and Burial Council members regarding the laws they are charged to implement, thus hindering their ability to fulfill their legal and cultural duties.
- Failed to produce consistently rigorous, timely reviews of reports required of those undertaking projects, resulting in projects going forward that should have paused for more careful study and community involvement, burials being left unidentified and impacted during construction, and descendants being stripped of opportunities to engage in the process of identifying and caring for burials.
- Failed to develop the Burial Sites Inventory to identify burials, thus protecting them from future harm and thereby providing the Burial Councils the authority to protect them.
- Failed to respect the role of Burial Council chairs to set Council meeting agendas and prohibit SHPD staff from tampering with the agendas.
- Failed to comply with all legal requirements when iwi kūpuna are inadvertently discovered.
- Failed to seek prosecution of documented burial law violations to punish violators and deter would-be violators.
- Failed to advocate successfully to obtain adequate resources to support the Burial Sites Program.

How can we ensure that these kuleana are fulfilled?

Ohana and communities have tried to work collaboratively with SHPD and, when that proved futile, we have filed lawsuits, protested, garnered media support, and sought legislative remedies. One might think that the SHPD would be partners in pursuing improvements. Instead, the SHPD has treated such initiatives adversarially.

This is not to say that individual SHPD staff have shirked their responsibilities. Quite the opposite. Amidst a problematic SHPD context where poor administrative support and political interference are normalized, many staff members have extended themselves as far as they could to fulfill their kuleana.

The problems are at a higher level, ultimately spawning from State of Hawai'i administrations that do not value Hawaiian burials and related living communities, and view both as impediments to development.

So rather than expend more effort on protests and pleas for SHPD improvement, we and a growing number of OHA beneficiaries are supporting a simple solution: Move the Burial Sites Program and its budget to the Office of Hawaiian Affairs, which, though not perfect, is a solid option because OHA has:

- A mission, vision, and strategic plan that naturally make iwi kūpuna and their burial places a high priority.
- A long history of having sought SHPD and developer compliance in cases, giving OHA a deep understanding of the past and current shortcomings of the Burial Sites Program.
- Institutional knowledge of its own lessons learned in participating in iwi kūpuna cases that have placed OHA at odds with or in harmony with its beneficiaries.
- The status as a state entity that, following revisions to Hawai'i Revised Statutes Chapter 6E, can legally authorize OHA to administer the Burial Sites Program.
- Vigilant beneficiaries who will help OHA to succeed and hold it accountable should it falter.

While OHA lacks the constitutional authority to enforce laws, SHPD has often failed to use that authority, even when pressed to do so by its own staff. Moreover, OHA, the Native Hawaiian Legal Corporation, or any group or individual citizen could file suit as private attorneys general to seek legal remedies to enforce burial law violations.

In 1989, when the burial laws were first being drafted, there was serious consideration for placing the Burial Sites Program in OHA. Though it may not have been the best place for the kuleana at the time, today the Burial Sites Program would be in far safer hands with OHA than with SHPD. The kuleana to protect our ancestral foundation should not be conferred to those who have proven uncaring and incapable.

After a quarter century of repeated and flagrant SHPD failures, we would be remiss as a lāhui to allow the Burial Sites Program to remain under SHPD's control. That kuleana is better placed in Hawaiian hands. It belongs with OHA. Ho'i hou i ka iwi kuamo'o.

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## Editor's Note

Caring for our iwi kūpuna is an important kuleana for Native Hawaiians. In recognition of this, the Office of Hawaiian Affairs has cautiously supported past proposals to house certain historic preservation functions within the agency. However, noted concerns include the need to use a substantial amount of Native Hawaiian trust funds to carry out a state responsibility that requires considerable staff time, expertise, and resources not currently available to the agency; the need to appropriately tailor the scope of OHA's jurisdiction, given that burial and historic preservation laws also cover non-Hawaiian burials and historic sites; and the need to give OHA clear site inspection and enforcement authorities, as well as the ability to independently administer and uphold protections for iwi kūpuna and associated artifacts and sites.

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