



STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
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HONOLULU, HAWAII 96813

August 29, 2007

Laura Thielen, Chairperson
Department of Land and Natural Resources
1151 Punchbowl Street
Honolulu, HI 96813

**Re: Request for Intervention, Destruction of Ancient Trail, Mudlane, Waiko`eko`e Ahupua`a,
Island of Hawai`i**

Aloha nō Chairperson Thielen,

The Office of Hawaiian Affairs has recently received an increase in beneficiary concerns emanating from the Island of Hawai`i regarding the lack of adequate historic preservation professionals to address a myriad of serious concerns regarding the proper identification, assessment, and protection of irreplaceable historic and cultural properties. The latest concerns arise over the current and ongoing destruction of what is believed to be components of an ancient paved trail, possibly associated both with an ancient Waipi`o Valley to Waimea transit as well as important and notable *ali`i o ka po`e kahiko*.

OHA is requesting immediate intervention by the Department of Land and Natural Resources (DLNR), in conjunction with the County of Hawai`i, to properly identify and protect this significant historic property which is being bulldozed as we write.

OHA is obligated to work towards the betterment of native Hawaiians and Hawaiians, and to serve the needs and interests of a wide and diverse beneficiary group. OHA must also ensure that other agencies, on the State and County levels, uphold their constitutionally, statutorily and judicially mandated obligations to the native Hawaiian and Hawaiian people.

Section 10-3(4), HRS, states that a core purpose of OHA shall be:

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.

Section 10-1(b) states that:

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs. [L 1979, c 196, pt of Section 2]

In light of these statutory provisions, OHA takes guidance from Article XII, Section 7, of the Constitution of the State of Hawaii which states:

TRADITIONAL AND CUSTOMARY RIGHTS, Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

The right of our Hawaiian beneficiaries to access and traverse the *ala* of their *kūpuna*, and to reconnect with their ancestors and *‘aumakua* for guidance, is a traditional and customary practice, protected by the Constitution of the State of Hawai‘i.

Judicial Affirmance and Guidance

Notwithstanding the strong Constitutional mandates and statutory obligations set forth to recognize the duties of the State of Hawai‘i and its sub-agencies to protect the traditional and customary rights of native Hawaiians and Hawaiians, the Hawaii Supreme Court has set forth judicial guidance and interpretation in this regard as well.

In *Public Access Shoreline Hawai‘i vs. Hawai‘i County Planning Commission (PASH)*, 79 Hawai‘i 425 (1995), hereinafter PASH, the Hawaii Supreme Court, recognizing over 150 years of court decisions validating the existence of Native Hawaiian traditional and customary rights as part of the state’s common law, reiterated that:

The State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians.

In *Ka Pa‘akai O Ka ‘Āina v. Land Use Commission*, 94 Haw. 31 (2000), hereinafter *Ka Pa‘akai*, the Hawaii Supreme Court, again noting it was clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians, to the extent feasible, noted the findings of the Hawaii State Legislature in 2000 that:

[T]he past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture

and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture. Act 50, H.B. NO. 2895, H.D. 1, 20th Leg. (2000).

The Ka Pa'akai court also noted:

With regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawai'i." Pele Defense Fund v. Paty, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), certiorari denied, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993).

The Ka Pa'akai court also set forth an analytical framework, in that instance for the LUC to adhere to, but in the spirit and intent of the law, a framework that all State and County entities should follow, which is espoused as follows. The proper analysis of cultural impacts should include:

1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the (agency) to reasonably protect native Hawaiian rights if they are found to exist.

This framework, as set forth by the Hawaii Supreme Court, is a good beginning to address the obligations of the State of Hawai'i and its agencies, to properly identify, consider, and mitigate adverse impacts to the traditional and customary rights of Hawaiians which we are all obligated to protect.

The State of Hawaii Historic Preservation Laws are modeled after the National Historic Preservation Act of 1966 and the National Park Service National Register of Historic Places presents certain standards for criteria in considering whether a historic property is eligible for listing on the National Register as follows:

Criteria for Evaluation

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- A. That are associated with events that have made a significant contribution to the broad patterns of our history; or*
- B. That are associated with the lives of persons significant in our past; or*
- C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or*
- D. That have yielded or may be likely to yield, information important in prehistory or history.*

The Role of OHA in Historic Preservation

The State of Hawai'i Historic Preservation Program sets forth criteria based upon the National Park Service standards with a very critical additional criteria added to address the concerns of the native Hawaiian population. Section 13-284-6, Hawaii Administrative Rules (HAR) sets forth the criteria for significance evaluations as follows:

§13-284-6 Evaluation of significance. (a) Once a historic property is identified, then an assessment of significance shall occur. The agency shall make this initial assessment or delegate this assessment, in writing, to the SHPD. This information shall be submitted concurrently with the survey report, if historic properties were found in the survey.

(b) To be significant, a historic property shall possess integrity of location, design, setting, materials, workmanship, feeling, and association and shall meet one or more of the following criteria:

(1) Criterion "a". Be associated with events that have made an important contribution to the broad patterns of our history;

(2) Criterion "b". Be associated with the lives of persons important in our past;

(3) Criterion "c". Embody the distinctive characteristics of a type, period, or method of construction; represent the work of a master; or possess high artistic value;

(4) Criterion "d". Have yielded, or is likely to yield, information important for research on prehistory or history; or

(5) Criterion "e". Have an important value to the native Hawaiian people or to another ethnic group of the state due to associations with cultural practices once carried out, or still carried out, at the property or due to associations with traditional beliefs, events or oral accounts--these associations being important to the group's history and cultural identity.

A group of sites can be collectively argued to be significant under any of the criteria.

Furthermore, Section 13-284-6 (c), HAR, states:

(c) Prior to submission of significance evaluations for properties other than architectural properties, the agency shall consult with ethnic organizations or members of the ethnic group for whom some of the historic properties may have significance

under criterion "e", to seek their views on the significance

evaluations. For native Hawaiian properties which may have significance under criterion "e", the Office of Hawaiian Affairs also shall be consulted.

The State of Hawaii's addition of criterion "e" pertaining to an additional significance of an evaluated cultural site as having an "*important value to the native Hawaiian people*" and the duty to consult with the Office of Hawaiian Affairs regarding these significance assessments appears to have been wholly lacking in the Mudlane project's historic preservation review process.

Neither the developer's paid archaeological consultant nor the State Historic Preservation Division possess the capacity to determine whether any historical site found and evaluated, meets the criteria for having an "*important value to the native Hawaiian people.*" Thus the obligation to meaningfully consult with the Office of Hawaiian Affairs so that the Hawaiian people can determine what is valuable to them.

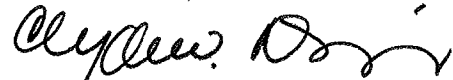
To see so many discovered cultural resources meeting only one or two criteria and designated for destruction via "*no action*" or "*data recovery*" which is essentially the same as destruction, further magnifies the harm of the failure to adhere to the spirit and intent of Chapter 6E, HRS. In the case of Mudlane, to have lack of consultation during the critical identification phase of the historic preservation review process is even more negligent in upholding the public trust responsibilities. What little cultural, natural and historical resources left become increasingly important and crucial to the traditional and customary native Hawaiian practices that exist there due to the catastrophic loss of these resources in the larger areas throughout the island and the rest of the State of Hawai'i.

In addition, where surface structures are severely eroded, altered or destroyed, the likelihood of finding sub-surface cultural deposits, such as ancestral burial sites or important cultural layers, dramatically increases, especially along traditional trails which have slowly been expanded over time into larger pathways, and eventually paved over as roads. The temporary and permanent habitation areas associated with trails and paths often provide areas of greater significance in finding historic properties.

We look forward to intervention by your department, in conjunction with our office, and the County of Hawai'i to uphold the public trust responsibilities to protect the historical legacy of Hawai'i, and prevent irreparable loss such as may be the case with Mudlane and the *ala a na kūpuna ali'i*.

Thank you for your attention to this important and sensitive matter.

'O wau iho nō, me ka ha'aha'a,



Clyde W. Nāmu'o
Administrator

- c. OHA BOT
Harry Kim, Mayor, Hawai'i County
Chris Yuen, Planning Director, Hawai'i County