

BASIC FACTS RELATING TO HUI MĀLAMA AND THE KAWAIHAE BURIAL CAVES COMPLEX

Why was Hui Mālama I Nā Kūpuna O Hawai'i Nei established?

Hui Mālama was formed in 1989 in response to over 1,000 Hawaiian burials being unearthed during the construction of the Ritz Carlton Hotel in Honokahua, Maui. Its purpose is to protect burials and to rebury iwi (bones) and moepū (funerary objects) that were taken from burials.

What has Hui Mālama done to care for burials?

- Played a significant role in establishing federal and state laws protecting unmarked burials.
- Reburied 3,500 Hawaiian individuals disturbed by development, looting, or scientific studies.
- Repatriated iwi and moepū from 95 institutions in Hawai'i, the US, Australia, Canada, and Britain.
- Worked in successful partnership on repatriation cases with more than 20 Native Hawaiian organizations and even more Hawaiian families.

What is NAGPRA?

NAGPRA stands for the Native American Graves Protection and Repatriation Act. This federal law allows for iwi, moepū (funerary objects), and a very limited set of other cultural objects in federal agencies and US museums receiving federal funds to be returned to lineal descendants, Native American tribes, and Native Hawaiian organizations when the federal agencies and museums cannot prove that they have the legal right to own and control them. For more information, see the US Department of Interior National Park Service website: <http://www.cr.nps.gov/nagpra/FAQ/INDEX/HTM>

Who can submit a claim to museums for items covered by NAGPRA?

For remains and objects originating in Hawai'i, claimants can either be lineal descendants or Native Hawaiian organizations. A lineal descendant claimant must prove an unbroken genealogical link between a named individual whose remains, funerary objects, or sacred objects are held by the museum.

Any Native Hawaiian organization may be a claimant in a NAGPRA case. The Federal Register Vol. 60, No. 232, Part 10, Subpart A, Chapter 10.2(b)(3)(i)-(ii) defines "a Native Hawaiian organization" as "any organization that:

- (A) Serves and represents the interests of Native Hawaiians;
- (B) Has a primary and stated purpose the provision of services to Native Hawaiians; and
- (C) Has expertise in Native Hawaiian affairs.

(ii)The term *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. Such organizations must include the *Office of Hawaiian Affairs* and *Hui Mālama I Nā Kūpuna 'O Hawai'i Nei.*"

Does NAGPRA apply to the Kawaihae Caves Complex items?

Yes, because the Bishop Museum does not have a legal right to own and control them. The items were stolen goods. In 1905, David Forbes, William Wagner, and Friedrich Haenisch broke into the caves and looted them, violating explicit laws of the Territory of Hawai'i. J. Everett Brumaghim did the same in 1935, and Keith Jones and Kenneth Emory followed suit in 1939. The items they stole from the caves (including iwi and the objects in immediate proximity to the iwi) were eventually sold, exchanged and/or donated to the Bishop Museum and the Hawai'i Volcanoes National Park. (The Hawai'i Volcanoes National Park still maintains physical custody of five items from the Forbes Cave, despite Hui Mālama's repeated attempts to have these repatriated through NAGPRA.)

What are moepū?

Moepū are objects placed with the dead. Two authoritative sources describe Hawaiian practices relating to moepū and offer important information against which the Kawaihae case can be compared. Mary Kawena Pūku'i's description of burial practices, as recorded in *The Polynesian Family System in Ka'u, Hawai'i* (p.152), notes that deceased family members were often taken to "burial caves" and that "the various belongings [that the deceased] loved in life were buried with him."

Samuel M. Kamakau, in *The People of Old* (p. 40), records that "burial caves, disposal pits, and caverns (*ana huna lua huna, nupa*) were important from Hawaii to Kauai. Very often ...objects with supernatural force (*mana kupua*) were placed in them, with watchmen of *kupua* powers to take care of them." Expanding on the significance of objects placed with individuals in their burials, Kamakau (p. 40-41) continues with the following:

"There were very good places (*wahi maika'i loa*) in the *ana huna, lua huna, and nupa* where the corpses were laid, like men asleep, on piles of mats, with pillows, and covered nicely with kapa...'Food,' 'fish,' and all the favorite articles (*kana mau puni*) of the living person were laid there, the place [securely] screened off (*paku 'ia a pa'a*), and thus the corpses left within the *ana huna, lua huna, or nupa*. Some of the *ana huna* and the *lua huna* were blocked up (*pani*) with hewn rocks fitted together to close up the opening.

Are the Kawaihae Cave Complex items moepū?

Yes. The items were found in immediate proximity to individuals buried in the caves. David Forbes, in his 1909 *Paradise of the Pacific* article, "Hidden Treasure" records that he found human remains in each of the three cave chambers he explored, though the first chamber (Chamber "A") was absent of the types of

“treasure” he was seeking. Chambers B and C housed such items as wooden images, carved wooden bowls, gourd containers, a shark tooth knife, personal adornments, boars tusks, shells, a kōnane board, bunches of feathers, remains of a feather cape, olonā scrapers (scrapers used to acquire the inner bark of the olonā plant from which cordage was made), and glass beads (which are often found in burials occurring after 1778).

If the items were only secreted away in the caves to spare them from destruction at the time of the kapu abolition in 1819 (as Leighton Sukanuma now proposes), then why wasn't another cave that would not have intruded upon burials used for that purpose – especially given the prevailing Hawaiian belief that burials should not be disturbed and that burials are defiling and should be avoided? (For a discussion of such issues, see Samuel Kamakau's 1964 publication *The People of Old* (p. 35) and Malo's 1996 publication, *Hawaiian Traditions* (p. 53, 201)

Further, at the time of the kapu abolition, only images and heiau (traditional religious sites) were burned. Yet many other types of objects besides images were among those placed with the iwi in the Kawaihae caves. Hence, the argument of their being secreted away at the time of the kapu abolition makes no sense. Coming to the same conclusion was Bishop Museum Director William T. Brigham who was at the helm of the Museum when Forbes inquired about the Museum purchasing the items he stole from the cave complex. In the 1906 Bishop Museum publication, “Old Hawaiian Carvings Found in a Cave on the Island of Hawaii,” Brigham reports the following:

It has been suggested that [the items] form the paraphernalia of a temple and were hidden, as so many of the idols were, at the time of the general destruction of the idols in 1819 in the hope that the storm would blow over and better times ensue, but there is absolutely nothing in the collection to support such a view. The two gods or *aumakua* were household deities, the other articles might be the private property of some chief or priest, and two things, –the fan and bit of porcelain are such keepsakes as were commonly deposited with the dead to whom the articles had belonged.

Significantly, all 13 Kawaihae claimants are on record as describing the objects in question as funerary objects. In an August 4, 2001, correspondence to the Museum, Sukanuma writes on behalf of all claimants in the “Document of Truth and Agreement” that they unanimously agreed to discuss the issue of the “final disposition of the ‘human remains’ and ‘funerary objects’” involved in the case, but made no mention of any other category of items for consideration. Sukanuma, representing the Royal Hawaiian Academy of Tradition Arts, also described the Kawaihae items as “funerary objects” in a September 14, 2000 correspondence to Elizabeth Tatar of the Bishop Museum.

When Hui Mālama reburied the items, how many claimants were involved and what were their views regarding reburial?

In February of 2000, Hui Mālama reburied the 83 moepū together with numerous sets of iwi in the Kawaihae caves from which they originated. At that time, there were 4 claimants to the iwi and moepū: (1) Hui Mālama, (2) the Office of Hawaiian Affairs (OHA), (3) the Department of Hawaiian Home Lands (DHHL), and (4) the Hawai'i Island Burial Council (HIBC). At this juncture, OHA had

submitted two letters (dated March 21, 1994 and January 15, 1999) to the Bishop Museum confirming their intent to return the items to their original caves for reburial. In 1999, the Hawaiian Homes Commission had gone on record to unanimously support the same. On November 26, 1999, the Bishop Museum received a request from the HIBC to have the items specifically repatriated to Hui Mālama for reburial. In other words, when Hui Mālama reburied the iwi and objects, they had executed exactly what each claimant had stated was the desired outcome – the iwi were returned to their original burial location and the items returned to their rightful owners.

What about Bishop Museum’s loan of the 83 objects to Hui Mālama?

Two distinct concepts need to be kept in mind with regard to this discussion: (1) physical custody of an item, and (2) a legal right to own and control an item. NAGPRA was enacted to rectify the fact that museums may *not* have the right to own and control certain items even though they have physical custody of them.

In February of 2000, Bishop Museum decided to transfer the 83 items to Hui Mālama and called the transfer a “loan” (which gave Hui Mālama physical custody of the items). On December 9, 2000, Leighton Sukanuma, as the spokesperson for the expanded set of 13 claimants, informed the Museum that it should delay efforts to physically recover the loaned 83 items until the group could make a determination about their final disposition. Through the NAGPRA process, Hui Mālama and the expanded set of claimants gained the legal right to own and control the items. On August 4, 2001, the 13 claimants (through Sukanuma) reported to the Museum that they could not come to consensus regarding final disposition, and they did not indicate that final disposition required the recovery of the objects from the caves. As a result, the items have remained in the caves.

When did Nā Lei Ali’i Kawānanakoa become involved?

Nā Lei’s principal leader, Abigail Kawānanakoa was one of a comprehensive list of Hawaiians that the Bishop Museum informed in 1994 and 1995 regarding the items it possessed in its collections that might be subject to NAGPRA. From these consultations, a handful of groups, including Hui Mālama, submitted NAGPRA claims to repatriate iwi and moepū. Kawānanakoa offered no comment at that time or any later year until August of 2005 when she and Sukanuma’s Royal Hawaiian Academy of Traditional Arts (Academy) sued Hui Mālama and the Bishop Museum to force the removal of moepū from the Kawaihae caves, alleging a violation of NAGPRA.

What has occurred with regard to the lawsuit to date?

Lawsuit filed and “items” ordered to be returned. On August 19, 2005, the Academy and Nā Lei initiated the lawsuit by filing a complaint document with the U.S. District Court alleging violations of NAGPRA. Two days later on August 22, 2005, they filed a Motion for a Preliminary Injunction to require Hui Mālama to return the 83 “items” to the Museum. Judge Ezra granted the motion and required Hui Mālama to inform the parties of the location of the items, to retrieve or be responsible for making sure someone else retrieved the moepū,

and to return them to the Bishop Museum for safekeeping pending the outcome of the lawsuit.

Suspension of the order and review by a higher court. On September 2, 2005, after Judge Ezra issued his decision, Hui Mālama asked a higher court, the Appeals Court of the Ninth Circuit, to review Judge Ezra's decision. After Judge Ezra issued his written order on September 7, 2005, Hui Mālama asked the Ninth Circuit to issue a stay to suspend Judge Ezra's order. A stay was granted on September 20, 2005.

Higher court agrees with Judge Ezra. After hearing oral arguments on the matter, on December 12, 2005, the Ninth Circuit affirmed Judge Ezra's order and lifted the stay.

Precise location is ordered. On December 20, 2005, Judge Ezra held a status conference with the parties and ordered (1) Hui Mālama to provide by December 21, 2005 a detailed explanation of the precise location of each item, (2) each party to submit the names of three structural engineering firms, and (3) Mr. Fields, who assisted Hui Mālama in securing the items in the caves, to provide a statement by December 28, 2005 explaining in detail the materials, equipment and processes used.

Hui Mālama held in contempt. On December 21, 2005, statements of Edward Halealoha Ayau (sealed in part); Pualani Kanaka'ole Kanahale, Kahu Charles Maxwell, Antoinette Freitas, and William 'Ailā (i.e., Hui Mālama's Executive Director [Ayau] and its Board) were submitted to the Court. On December 22, 2005, Judge Ezra issued an Order to Show Cause summoning these individuals to court to show why they should not be held in contempt for not complying with his order. At a hearing on December 27, 2005, Judge Ezra found these individuals to be in contempt of the Court's order and took Halealoha into custody indefinitely until he either provides the precise location of the items and the names of those who know the precise location of the items, or someone else provides that information, or all of the items are returned to the Bishop Museum.

What are the next steps expected regarding the lawsuit?

At the December 20, 2005 status conference, Judge Ezra indicated that a risk assessment will be ordered to assess the risks involved in carrying out his order. Plaintiffs have recently requested that a process be put in place to accomplish the retrieval and that Hui Mālama be excluded from the process but that Mr. Fields be present for consultation purposes.

What is the impact of this lawsuit on NAGPRA repatriations nationwide?

This court action threatens the sanctity and integrity of all completed NAGPRA repatriations across the country. If a court can, prompted by one disgruntled claimant and irrespective of the unanimous agreements made by all claimants, allow a museum to unilaterally declare that a repatriation is now "incomplete" when it was otherwise considered completed for over four years, and if the

museum can belatedly recognize an additional claimant who was consulted about the items involved but who sat on his/her rights for 11 years and never offered comments during the consultation process, then *no NAGPRA related burials or items are safe from future seizure*. A museum with an agenda to avoid NAGPRA's provisions can easily manipulate a "renewed" repatriation process by choosing to recognize additional claimants, despite the passage of more than 30 days after repatriation was declared to be complete through notification of all claimants and via publication in the Federal Register.

Moreover, if left unchecked, the District Court contempt order signals that the religious/cultural beliefs of a Native people is not protected by the First Amendment, but are subordinate to a museum's interest in preserving the physical integrity of funerary objects deemed "priceless" works of art. This decision undermines the fundamental condition established by NAGPRA requiring greater respect of Native practitioner's religious/cultural beliefs over a museum's interest in maintaining physical custody of items when a museum cannot show that it has the legal right to own or control the items.