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BOARD OF LAND AND NATURAL RESOURCES

State of Hawai`i

In The Matter Of A Limited Contested)
Case Regarding A Request To Amend)
Conservation District Use Permit OA-2670) DLNR CC OA 11-02
To Construct A Marina Entrance Channel)
Located At Honouliuli, Ewa, Oahu,) DECLARATION OF
Plat (1) 9-1-012 By Haseko To Reduce The) KAI MARKELL
Size Of The Marina.)

DECLARATION OF KAI MARKELL

I, KAI ELLIOTT RAYMOND MARKELL, under penalty of perjury hereby state:

1. I am competent to testify to the matters herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.
2. I, along with my ‘ohana, have been involved with the care, protection and repatriation efforts of ancestral native Hawaiian burial sites beginning with the grave of Henry Opukahaia in Cornwall, Connecticut, in 1971, at the age of five.
3. I have learned native American cultural views from my father’s side of the family who descend from Iroquois ancestors, specifically Seneca and Mohawk affiliation.
4. I have learned native Hawaiian cultural views from my mother’s side of the family who are centrally from Moloa`a, Koloa, and Kalihiwai, on the island of Kaua`i and of the Huddy, Naea, Kapule, Kauhane, Manoa and Luahine ‘ohana.

5. I am currently employed by the Office of Hawaiian Affairs (OHA) as the Compliance Manager.

6. I began my employment at the Office of Hawaiian Affairs in September of 2004 and initially served as a Policy Advocate in Culture in the Native Rights, Land and Culture Hale of the office.

7. I was promoted to Lead Advocate in Culture in 2005;

8. In my capacity as Lead Advocate in Culture, I oversaw a multitude of responsibilities covering the review of environmental impact studies, cultural impact assessments, the drafting and implementation of the OHA Cultural Plan, addressing and implementing OHA Board of Trustees cultural initiatives, and many other culturally related duties and responsibilities.

9. I also oversaw the administration and functioning of, and provided technical expertise to, OHA's Native Hawaiian Historic Preservation Council, an advisory board to the OHA Board of Trustees, and made up of regional representatives of the native Hawaiian community who bring cultural expertise to OHA on historic preservation and related cultural matters.

10. I oversaw the assistance to OHA beneficiaries across the entire State of Hawai'i on cultural issues and matters affecting all aspects of traditional and customary practices and associated rights.

11. I most recently served as Director of Native Rights, Land and Culture after being promoted.

12. In my additional capacity as Director of Native Rights, Land and Culture, I oversaw the statutorily mandated review of environmental and cultural impacts of development projects and other initiatives, the monitoring of Federal, State and County agencies as they impact native Hawaiians and Hawaiians, and the comprehensive advocacy efforts of OHA in ensuring agency and departmental compliance with Constitutionally, statutorily, and judicially mandated protections for the native Hawaiian culture and traditional and customary native Hawaiian practices.

13. As Compliance Manager for OHA, I oversee advocacy on external compliance with existing law, statute and rule on Federal, State and County levels in the public and private sector, based upon OHA's Constitutional and statutory mandates, in the areas of Native Rights, Land and Culture, as well as Health, Housing, Human Services, Education, Economic Development and Governance.

14. Prior to my employment with OHA, I was employed by the Department of Land and Natural Resources, State of Hawai`i, in the Historic Preservation Division, and more specifically, in the Burial Sites Program, from March 1994 until June 2004;

15. From 1996 until July, 2004, I served as Director of the Burial Sites Program.

16. In my capacity as Director of the Burial Sites Program, I oversaw the care, management and protection of thousands of ancestral native Hawaiian remains and burial sites in hundreds of individual regional cases throughout the entire State of Hawai`i.

17. I participated in hundreds of meetings of island burial councils, lineal and cultural descendant meetings, departmental and inter-agency meetings on the State, County and Federal levels, and meetings with construction, development, design, engineering and legal interests of landowners and developers, to discuss issues surrounding Native Hawaiian burial sites, and I continue to participate in these activities in my current capacity on a far larger scale of comprehensive cultural issues.

18. I participated in the repatriation and reinterment of ancestral native Hawaiian remains, non-Hawaiian remains, associated and unassociated funerary goods and other Hawaiian cultural resource material and I continue to participate in these activities.

19. I co-drafted the burial administrative rules, Chapter 13-300, Hawaii Administrative Rules, with then Director of the Burial Sites Program, Edward Halealoha Ayau, Esq.

20. I administered the functioning of the five island burial councils which included setting up meetings, making agendas, coordinating agendas, working with landowners and archaeological consultants to bring their matters for council determination or recommendations, working with lineal and cultural descendants to obtain input into the burial treatment process, and flew to various islands to attend and staff island burial council meetings.

21. Prior to the regular attendance of Deputy Attorney Generals at island burial council meetings, I rendered legal advice in procedural matters and law and rule interpretation to the island burial council members and public-at-large due to necessity.

22. I regularly communicated with attorneys representing landowner and developer interests in carrying out the functions of the Burial Sites Program and island burial councils;

23. I have worked with Burial Sites Program genealogists in their review and recommendations of descendency applications for island burial council review and recommendations.

24. I have been involved with the implementation and compliance issues with archaeological inventory surveys, reconnaissance surveys, data recovery plans, archaeological monitoring plans, burial preservation plans and burial treatment plans;

25. I have conducted hundreds of site visits on all islands to view unmarked burial sites and other cultural sites in varied circumstances – in very remote burial sites, lava tubes, graveyards large and small, coastal, beach and tidal zones, mountains and cliffs, and the highest density, urbanized developed areas.

26. I have participated extensively in burial site identification, testing, protection, mitigation, stabilization, excavation, recovery, curation and reinterment.

27. I have worked with professional cultural resource management personnel relating to burial sites and human skeletal remains in the laboratory and in the field.

28. I have had the ongoing opportunity to review a large amount of written resource material ranging from archaeological survey reports, environmental and cultural impact statements and studies, oral history and ethnographic studies, scholarly publications, historical documents and other written material pertaining to the Hawaiian culture with a focus on burial customs and practices, and I continue to review and utilize these resources in my current capacity.

29. In 2002 and 2003, I served as Acting Branch Chief for the History and Culture Branch of the State Historic Preservation Division of the Department of Land and Natural Resources.

30. I developed both personal and professional relationships with hundreds of individuals, including knowledgeable and respected kūpuna, spiritual and religious leaders, and cultural practitioners throughout the Hawaiian community and across the entire State of Hawai`i and on the continental United States.

31. I was fortunate to be able to discuss and learn about varied cultural practices, views on culture, and beliefs regarding death, dying, and treatment of ancestral human skeletal remains, from a wide and diverse cross-section of the native Hawaiian population across the State of Hawai`i, and I continue to learn in my current capacity.

32. I had the professional opportunity to review a large amount of written resources material ranging from archaeological inventory survey reports, environmental and cultural impact statements and studies, oral history and ethnographic studies, scholarly publications,

historical documents and other written material pertaining to the Hawaiian culture with a focus on burial customs and practices.

33. In February of 2003, I primarily authored and oversaw the production of an “Assessment of Traditional Cultural Practices Related to Burial Sites” for the Hokuli`a Project in South Kona, Island of Hawai`i, pursuant to a request by Judge Ronald Ibarra of the 3rd Circuit Court.

34. In 2005, I participated in a contested case hearing on the Island of Molokai, in which native ahupua`a tenant, Wilma Grambusch, challenged the adequacy of a cultural impact study of a proposed fencing project by the Nature Conservancy in Kawela, Molokai.

35. I was qualified as an expert testimony to give my opinion on the adequacy of the cultural impact study.

36. In March of 2008, I similarly provided expert testimony on the impacts of development on unmarked burial sites in Pao`o, North Kohala, in the Matter of a Contested Case Hearing Regarding Conservation District Use Application (CDUA) HA-3269, for Mr. Jonathan Cohen’s Request to Construct a Single-Family Residence at Pao`o, North Kohala, Island of Hawai`i.

37. The Fifth Circuit Court qualified me as an expert witness in *Brescia v. Huff*, Civil No. 08-1-0107.

38. I have regularly participated in consultations and implementation of Federal laws pertaining to native Hawaiian burial sites, human skeletal remains, burial goods and their management, care, protection and treatment through the Native American Graves Protection and Repatriation Act of 1990 and have attended numerous meetings of the NAGPRA Review Committee to address burial site treatment.

39. While I was employed at the SHPD in the Burial Sites Program, I regularly and personally made hundreds of decisions to either preserve-in-place or recover and relocate hundreds of ancestral native Hawaiian and non-Hawaiian remains in a myriad of environments, circumstances, conditions and stressors.

40. Decisions regarding the treatment of the remains of human beings are extremely sensitive and highly emotive.

41. In the Hawaiian culture, ancestral human skeletal remains are extremely sacred and precious and according to noted Hawaiian scholar and renowned Hawaiian cultural expert, Mary Kawena Pukui, our “*most cherished possession*” as a people.

42. The significance of bones, or iwi, in the Hawaiian culture is well documented throughout Hawaiian oral history and written history.

43. Iwi is a manifestation of the person once living and contains the spiritual power, or mana, of the individual.

44. Hawaiians protected the iwi of loved ones and ‘ohana to prevent them from being desecrated, mistreated or destroyed.

45. Hawaiians on the verge of passing from this life, especially those of high rank, would often give a command, or kauoha, to care for, conceal, and inter their iwi, to entrusted family members or companions.

46. There are a myriad of ways Hawaiians prepared the body of the deceased and how they provided final disposition of the body.

47. Based upon my training and experience, I can say that one of the critical tenets of Native Hawaiian traditional and customary practices is the obligation to ensure that iwi remain undisturbed and protected; and that they receive proper care and respect as a vital and integral connection to the ancestors and ancestral guidance.

48. Protection of iwi in place by ‘ohana acting as kahu, and prevention of disinterment, relocation, disturbance, or desecration, is a traditional and customary practice of Native Hawaiians who inhabited the islands prior to 1778.

49. Disturbing or moving iwi is not tolerated except in extraordinary circumstances and at the direction and discretion of the ‘ohana or kahu.

50. It is an established traditional and customary Native Hawaiian practice to visit burial sites and engage in various religious and cultural practices such as offering ho`okupu and pule, and seeking advice from, and communicating with, deceased ancestors, through their iwi.

51. Desecration or injury to iwi perceived to be ‘ohana or ancestral native Hawaiian kūpuna can create and manifest real harm in living descendants and Native Hawaiians in the form of ‘eha (hurt, pain, suffering), kaumaha (burdened, sorrowful), mānewanewa (grief, sorrow, mourning), uē (lamentation, crying), na`auauā (extreme visceral grief) and are injurious to the

‘uhane, the spirit, of the living person who has accepted the kuleana to care for and protect the iwi of the ancestors.

52. This harm is irreparable because there is no possibility of monetary compensation that could justify such disturbance.

53. Moreover, the individual injury suffered by Hawaiians is also a collective one jointly felt and experienced amongst those who feel the call to protect iwi kūpuna and the mana they contain.

54. In my professional and personal experiences, the threat of irreparable physical, emotional and spiritual harm to the iwi kūpuna and Native Hawaiians witnessing such harm is extremely high especially when ground disturbing activity directly and destructively impacts burial sites.

55. Based upon my training and experience, I can say that in general burial sites that are classified as “inadvertent” are more likely to be disturbed and relocated than those burial sites designated as “previously identified.”

56. In the past, despite the legislative scheme designed to encourage the identification of burial sites before construction starts, the SHPD has allowed and followed interpretations of the law that frustrates the objective of identifying burial sites before land use permits are issued.

57. This unfortunate pattern too often leads to the discovery of burial sites during construction which proper archaeological review and comment by the SHPD might have led to an earlier identification of those same burial sites during the permit review period.

58. In the course of reviewing possible approval of a land use permit, SHPD reviewers and contract archaeologists hired by a land developer rely too often on the notorious practice of requiring simple archaeological monitoring of project construction, as a poor substitute for standard practices which would require more rigorous demands for archaeological testing and sampling at a project site early in the process.

59. Based upon my training and experience, archaeological monitoring does not avoid, minimize, rectify, or reduce impacts to the Hawaiian cultural practice of protecting iwi.

60. Rather, archaeological monitoring is a means by which a developer can avoid the oversight of the applicable burial council of “previously identified” burial sites which could have been reasonably found with the reasonable application of standard archaeological testing and

sampling. By avoiding burial council review, the developer can obtain speedier approval to relocate any burials.

61. I participated in extensive meetings, site visits and other discussions in 1998 regarding issues surrounding the adequacy of the archaeological survey work at One`ula and the reported existence of unmarked burial sites in the area of Haseko, `Ewa, Inc., proposed `Ewa Marina and development.

62. I attended meetings of the O`ahu Island Burial Council in 1998 whereby the issue of “underground burial complexes” was raised.

63. Around 1999-2000, I was informed by a Native Hawaiian that there were underground cave complexes at One`ula which contained running water and that `ohana could visit their ancestors who were placed on shelves within the cave system.

64. That I was particularly interested in cave interments at the time because of my involvement with cave and lava tube burial sites in South Kona during the Hokuli`a Development and controversy regarding among other issues, the identification and treatment of underground cavities and lava tube burials.

65. That I was present in January of 2001 when the State Historic Preservation Division responded to the discovery of human skeletal remains at One`ula in the area of the proposed `Ewa Marina entrance channel.

66. That this was the same general area in which another set of human skeletal remains had washed out in 1992 during Hurricane Iniki.

67. That along with SHPD staff, Sara Collins, Elaine Jordane, Kala`au Wahilani, I saw the site of the original interment and spoke with the man who discovered the iwi and notified the SHPD and the Honolulu Police Department.

68. That the set of remains were uncovered a few days later during archaeological investigation by Sara Collins and Elaine Jordane and that a full report was produced which was maintained in the files of the SHPD.

69. That the individual discovered was a high status female as evidenced by her extensive burial goods and artifacts.

70. That neither Sara Collins or Elaine Jordane possessed the authority pursuant to Chapter 13-300, Hawaii Administrative Rules, to authorize permanent relocation of the inadvertent discovery of the Ali`i wahine burial.

71. That the excavation was based upon “imminent danger” and fell under temporary recovery pursuant to Section 13-300-40(k) which authorized temporary protective custody until a final decision could be rendered in accordance with Chapter 6E, HRS and Chapter 13-300, HAR.

72. The ali‘i burial site found in January of 2001 has not had a formal decision of either preservation in place or relocation by the SHPD.

73. That on June 28, 2007, a set of human skeletal remains eroded out of the beach at One‘ula and I responded to a site visit while working for OHA.

74. This discovery was about 100 yards East of the marina entrance channel discoveries.

75. In April of 2008, I, along with OHA Native Rights Advocate Jerome Yasuhara, visited the SHPD iwi room located at 33 South King Street in the Mezzanine level with SHPD Burial Sites Program staffer Linda Kaleo Paik, for the sole purpose of checking on the welfare of the as of yet unidentified One‘ula Ali‘i wahine burial.

76. That I was shocked at that time to see and hold her two lei niho palaoa which were “tongue” shaped in the style of Moku o Keawe, and not “opu‘u” or “bud shaped” as in the style of the O‘ahu chiefs.

77. Since 2001, I was under the belief that the two lei niho palaoa were of the “opu‘u” variety having seen and held two opu‘u palaoa when the remains of the Ali‘i wahine and her burial artifacts were transferred from the SHPD office in Kapolei to the iwi curation room at 33 South King Street in early 2001.

78. I now interpret this occurrence as a hō‘ailona and akaka kū, or standing vision.

79. Following this visit to the iwi room, on Wednesday, April 16, 2008, the very next week, an OHA staffer had a hō‘ailona and aka kū on the 5th floor of OHA offices whereby Kuhina Nui Ka‘ahumanu appeared, along with her retainers, and issued a command, or kauoha, to “protect” One‘ula and the remains of the Ali‘i wahine.

80. That OHA took possession of the remains of the Ali‘i wahine in June of 2009 for protective custody.

81. In April of 2010, two OHA beneficiaries, both kāula, or seers, were present in my office, including the Petitioner, Michael Kumukauoha Lee, when one kāula, was able to communicate with the remains of the Ali‘i wahine.

82. She eventually identified herself as well as parts of her story.

83. Her name is Kaomileika‘ahumanu and she died from blood loss giving birth to twins.

84. She was the Chiefess of Kalanikūpule, King of O‘ahu.

85. She gave birth to twins, the female twin being La‘amea and the male twin being Kauikeaouli, commonly known as Kamehameha the III.

86. Kaomileika‘ahumanu is the true mother of Kauikeaouli, not Keopuolani, as commonly thought by historians.

87. That Kamehameha is the father of Kauikeaouli (Kamehameha III).

88. One‘ula is a Royal burial area and a Leina a ka ‘uhane where souls ascend into the next world.

89. Other well known ali‘i buried at One‘ula, include, but are not limited to, Ka‘eokūlani, Kalanikūpule, Kuali‘i, Pele‘ioholani, Keali‘iahonui, and others associated with the O‘ahu line of ruling chiefs as well as Maui and Kaua‘i.

90. When asked if other iwi kūpuna were present in the area of her discovery, the proposed ‘Ewa Marina entrance channel, Kaomileika‘ahumanu responded in the affirmative.

91. On April 14, 2010, the O‘ahu Island Burial Council (OIBC) voted unanimously to recognize an ali‘i burial complex at One‘ula and recommended to the SHPD that this area be identified and protected.

92. That as of today, June 20, 2011, the SHPD has not affirmatively acted upon this recommendation of the OIBC.

93. I have commenced a recruitment effort at OHA to hire an archaeologist to assist with a testing program of One‘ula to help SHPD identify and verify the existence of the ali‘i burial complex, or what is left of it since so much ground disturbing activity has taken place in the area for the marina and infrastructure construction.

94. The Native Hawaiian cultural practices of communicating with the deceased, especially ancestors, is well documented through the practices of ulaleo, hō‘ailona, akaka kū, ‘ike papa lua, moe ‘uhane, and other documented practices as outlined in the Nānā I Ke Kumu series by Mary Kawena Puku‘i.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, June _____, 2011.

KAI ELLIOTT RAYMOND MARKELL

1.