

December 1, 2025

MEMO TO: David Raatz, Director of Council Services

F R O M: Ellen McKinley, Legislative Analyst *EBM*

SUBJECT: **NATIVE HAWAIIAN LAW TRAINING** (PAF 25-010(6))

This report summarizes the Native Hawaiian Law training by Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai'i at Mānoa, on April 29 and May 1, 2025. The course is offered periodically to State and county decisionmakers, focusing on their trust obligations regarding Native Hawaiian natural and cultural resources to help make informed, culturally-sensitive decisions.

The keynote was delivered by former United States Representative Kaiuli'ī Kahele. He stressed decisionmakers' duty to steward the land and kuleana to understand Native Hawaiian rights and their sources, including the Hawai'i State Constitution; Chapters 10 and 10H, Hawai'i Revised Statutes; Native Hawaiian ancestral history; and case law.

Public Land Trust

HRS Section 10-3(1) requires a pro rata portion of all funds derived from the State's Public Land Trust to be held and used by the Office of Hawaiian Affairs for the benefit of Native Hawaiians. There are ongoing issues regarding the amount of trust revenue OHA should be receiving. According to the presenters, OHA should be getting more than \$78 million annually but is only getting \$15.1 million.

The Hawai'i Supreme Court held that the 1993 Apology Resolution is only conciliatory and does not require the State to turn over lands to Native Hawaiians, but it acknowledged that unrelinquished claims exist, and there can be no sale of public trust land until those claims are resolved. The public can access the State's Public Land Trust Information System (<https://pltis.hawaii.gov/>), a web-based inventory of State and county-owned lands and encumbrances to see if any property is a public trust land.

Traditional and customary Native Hawaiian rights

HRS Section 1-1 provides broad protection for traditional and customary rights, and HRS Section 7-1 protects the right to gather enumerated items including firewood, house-timber, and ki leaf.

Only subsistence, cultural, and religious rights are protected, not commercial use in most cases. Constitutional protections do not apply to commercial fishing, but, for example, because native Hawaiians were growing and trading citrus before 1892, protections of traditional and customary rights for commercial citrus sales may be protected in some areas.

The “western concept of exclusivity” in private property is not universally applicable in Hawai‘i, and traditional and customary rights are not limited by concepts of tenancy or land ownership. The State and its agencies must protect the reasonable exercise of Native Hawaiian rights, but native tenants must exercise their rights reasonably as to time, place, and manner of access.

Water and the Public Trust Doctrine

The importance of *wai*, fresh water, to Native Hawaiians’ worldview cannot be overstated. A common proverb, or ‘ōlelo no‘eau, is “ola i ka wai -- water is life.” Waiwai means wealth. Kānāwai means law, and the law developed around water. It is everyone’s kuleana to conserve our fresh water resources.

Historically, water in Hawai‘i could not be owned. Resources were not the king’s private property; they belonged to the chiefs and the people in common.

Water was taken for private profit when massive irrigation systems were developed for sugar production. Maui is now attempting to address the consequences, including cultural harm, drought, and fire, by returning the water to the streams.

Sources of Hawai‘i water law include:

- The Hawaii Constitution, Article XI, Sections 1, 7, and 9.
- The State Water Code, HRS Chapter 174C.

- Administrative, appellate, and Hawai‘i Supreme Court decisions.

The public trust doctrine applies to all water resources and guarantees public rights to all water regardless of its immediate source. Protected “trust purposes” include resource protection, Native Hawaiian rights and practices, appurtenant rights, and domestic water, particularly drinking water. Appurtenant rights attached to water rights at the time of the Great Māhele and are afforded the highest level of protection. Appurtenant rights are not limited to Native Hawaiians; the ‘āina may have rights.

Traditional and customary Native Hawaiian rights include growing kalo and gathering resources in the streams and marine areas for subsistence, cultural, and religious purposes.

The public trust relating to water resources embodies a dual mandate to protect water resources and maximize its reasonable and beneficial uses. There is a presumption in favor of trust purposes; the burden is on State and commercial users to justify their proposed uses.

The State Commission on Water Resource Management must incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian Home Lands. There are additional restrictions on developing land, requiring ensuring water resources are sufficient and will be sustainable.

Decision makers should carefully examine their body’s mandates and how they impact fresh water resources. They should use the public trust as a framework for their analysis, applying the presumption in favor of public trust purposes, and holding applicants to their burden of proof.

Laws relating to iwi kūpuna (Native Hawaiian Burials)

Traditional native Hawaiian burial beliefs and practices are central to the physical and spiritual well-being of native Hawaiians. Mana (spiritual or divine power) is inherited from one’s ancestral past and affirms connection to the ‘āina. Iwi kūpuna contain mana, and protecting burials from disturbance is very important.

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The Hawai'i Supreme Court has recognized that preservation and care of Native Hawaiian burials are constitutionally protected cultural and religious practices under Article XII, Section 7 of the Hawai'i Constitution.

Federal Law bases for burial protection include:

- The United States Constitution.
- Native American Graves Protection and Repatriation Act.
- Code of Federal Regulations.
- Case law interpreting the laws listed above.

State sources for preservation of cultural resources include:

- Article IX, Section 9 of the Hawai'i State Constitution.
- HRS Chapter 6E.
- Hawai'i Constitution.
- Hawai'i Administrative Rules.
- Case law interpreting the above.

The State must hold known burial sites located on lands or under waters owned or controlled by the State in trust for preservation or proper disposition by lineal and cultural descendants. The Department of Land and Natural Resources, State Historic Preservation Division, Archaeology Branch and History and Culture Branch carry out most iwi-related tasks.

Thank you for the opportunity to attend this informative training. If you have any questions or would like more information, please contact me at ext. 7661.

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cc: Deputy Director of Council Services