

KIA'I KANALOA
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March 31, 2021

Senator Brian Schatz
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Aloha e Senator Schatz,

Subject: Request to Convene Roundtable Discussions between our Kia'i Kanaloa and Hawai'i Congressional Delegation to Address and Resolve the Adverse Impacts to Kānaka Maoli in the Implementation and Enforcement of the Marine Mammal Protection Act which has been used Unjustly as a Punitive Tool to Criminalize Native Hawaiian Traditional and Religious Kanaloa Practitioners

We, the undersigned, in our capacity as members of the Kia'i Kanaloa Network, ask that your office convene a series of roundtable discussions with representatives of our Network and appropriate subject matter experts to begin a dialogue on how to address and remedy the National Oceanic and Atmospheric Administration's (NOAA's) use of the Marine Mammal Protection Act (MMPA) to criminalize the exercise of traditional, customary, and religious rights of Kānaka Maoli (Native Hawaiians). While our ultimate goal is to work on an amendment to the language of the MMPA, we understand that will take time. In the interim, we wish to work with your office to address the outstanding concerns we have with NOAA's Pacific Islands Regional Office on the issues associated with cetacean stranding responses.

THE KUMULIPO AND THE GENESIS BEHIND OUR WORK AS KIA'I KANALOA AND OUR PILINA (RELATIONSHIP) TO CETACEANS AND OTHER MARINE SPECIES

Ola i ke au a Kanaloa - life to the realms of Kanaloa. In order to understand why our Kia'i Kanaloa respond to cetacean strandings we must contextualize this by discussing the beginning of all things for Kānaka Maoli as provided in the Kumulipo. This is the Hawaiian genealogy chant that links us, as Kānaka Maoli, to all of creation. From the sacred words of the Kumulipo we learn not only of the birth of all life on earth but also of our role as humans in the story of creation. The kilo (keen observations) of Hawaiian ancestors that are recorded in this chant reflect the traditional practice of kilo, the intimate study of the environment. The practice of kilo is evident in every Hawaiian cultural practice that continues to this day, as practitioners continue this careful study of an ever-changing environment that directly impacts the health and well-being of all kānaka.

In the Kumulipo, there are sixteen wā (eras, epochs, periods of time) in which different species are born. The first eight wā are in Pō (darkness; the realm of the gods; divine origin; the infinite potential of all things yet made manifest), and the second eight periods are in Ao (light; physical earthly realm). We refer to cetaceans as "kinolau o Kanaloa," body forms or physical manifestations of the ocean god, Kanaloa. There are other kinolau of Kanaloa (e.g., sharks, turtles, monk seals, stingrays, manta rays, octopus, the Hawaiian hoary bat, etc.) and the Kia'i generally refer to this collective of species as Kanaloa.

Cetaceans were born in the time of Pō in the second wā and are a part of the early creation process. They are therefore of both physical and divine consciousness, able to exist in both the realm of Pō and Ao. These Kanaloa beings chanted Kānaka Maoli into existence within the Ao, when light came into the world. In the Ao, time, space, and the physical world as we know it today takes form. The Kumulipo teaches us to have respect and reverence for the Kanaloa, such as the whales who came before mankind and helped to usher this time and space into being. Thus, the direct genealogical connection of Kānaka Maoli to these Kanaloa dictate the kānāwai (statutes) of guardianship.

According to Kanaloa practitioners, Kanaloa species are revered as sacred beings for many reasons. The koholā (humpback whale) sings the songs of creation, the palaoa (sperm whale) deepens our knowledge and understanding, and the nai'a (dolphins) serve as divine messengers. The Kanaloa hold the migration stories of Kānaka Maoli and are tied to the wa'a (canoe, voyaging) tradition. Even in the Ao, this earthly realm, the Kanaloa manifest their creatorship through bringing nutrients from the sea depths up to the surface. The mass of hūpē (mucus) of the koholā serves as a kind of outer placenta for the incubation of the fertilized eggs of the manini (a type of fish known as the "convict tang"). When the hūpē of the koholā moves along the currents and make landfall, the 'ōhua or young, translucent pua ("fish hatchlings") are released along the safety of the shoreline and tidepools. When the Kanaloa hala (die, pass away), their remains serve as oases for marine life to flourish.

An important 'ōiwi (native) perspective of creation is that all species of land, sea, and sky are paired with one another as parallel forms. Parallel forms are inextricably intertwined and reflective of each other, giving Kānaka Maoli an understanding of their condition, growths, and cycles. In the Kumulipo the 'aoa (sandalwood tree) is paired with the whale. What happens to one, happens to the other. The sandalwood trade and whaling activities in the 1800s and 1900s occurred simultaneously, ushering wide-scale deforestation of Hawai'i's native forests and the decimation of whale populations.

During the 1800s and 1900s when whaling was prevalent, these Kanaloa literally brought light into the world, as the oil harvested from their bodies ushered in and fueled the Industrial Revolution. The niho (tooth) of the palaoa (sperm whale) was also greatly prized. It represents the deep 'ike (knowledge), na'auao (wisdom), and mana (spiritual power) that comes from the realm of Pō. In order to care for the niho palaoa one must also possess mana and pono (upright character, righteousness) to lead and govern wisely. Bearing the niho palaoa requires one to be

able to handle this sacred kuleana (responsibility). Ali‘i (royalty) were often buried with lei niho palaoa to reflect their chiefly stature, and so, they are also considered moepū (funerary objects).

Pō also connotes the depths of the sea to which the whales dive to die and return to the primordial realm. Thus to kanu (bury) iwi Kanaloa (cetacean bones) at sea is important to complete their spiritual life cycle. “Lele i ka pō” or “jumping into the pō” is vital and necessary to complete the transition, as Kanaloa are recognized as some of the deepest divers of the ocean’s depths. It is important that the iwi Kanaloa are buried back in the ocean to restore the balance, bring nutrients to the ocean, and feed the waters. In Hawaiian understanding, the iwi is the most sacred so Kanaloa remains must be treated with great care and respect.

The Kumulipo teaches us about man’s role and responsibility. Humans are not superior to other life forms but rather are dependent upon them; and so, our role is to live in balance and harmony with them. When a species becomes extinct the process of creation begins to unravel -- impacting all life, including humankind whose very existence is dependent upon those species. Humanity’s birthright does not include the right to invoke de-creation. We must remember our beginning and our responsibility as to our ocean family as well as all life, so that balance becomes the norm instead of being the anomaly.

It is important to note that the Kumulipo is not static. Creation continues to unfold and it is the responsibility of Kānaka alongside Kanaloa to serve as co-creators and guardians. This underscores the importance of caring for the iwi (bones, remains) of the Kanaloa. The iwi contain mana (power, life force) and memory. Part of that memory includes the laws of creation for which we must be able to uphold and access through the maintenance and restoration of our pilina (relationship, connection) to the Kanaloa and in the reverence and respect for which we care for their iwi. Thus, once any post-mortem research conducted on the Kanaloa is concluded, it is important for Kia‘i Kanaloa to receive their remains and to be able to return them to the realm of Pō. Further, our chiefs adorned themselves with lei niho palaoa (whale tooth pendant) as a symbol of their authority to lead with pono (righteousness).

Our ali‘i were often buried with lei niho palaoa as moepū (funerary objects). There are Kānaka Maoli practitioners today who would like to be able to perpetuate the carving traditions associated with working with niho and iwi Kanaloa. However, under the current law they would be criminalized for doing so.

There are companion federal laws such as the Native American Graves Protection and Repatriation Act (NAGPRA), the Religious Freedom and Restoration Act (RFRA), and the Admissions Act that respectively protect sacred objects and cultural patrimony, recognize Native Hawaiian traditional and religious practices, and impose certain fiduciary responsibilities on the part of the federal government towards Native Hawaiians on ceded lands, including submerged lands (state waters). We believe productive discussions with our Hawai‘i congressional delegation are necessary to further detail how we can best integrate these federal laws alongside the implementation of the MMPA without unreasonably restricting Native Hawaiian traditional and religious practices and exposing Kānaka Maoli to unfair prosecution in the pursuance thereof.

CRIMINALIZATION OF KIA‘I KANALOA BY THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA)

More than six years ago, on June 10, 2014, a fisherman noticed a melon-headed whale, named Wānanalua, in distress and attempting to beach herself at Kawaihae Harbor on Hawai‘i Island. The fisherman contacted the National Oceanic and Atmospheric Administration (NOAA) to report this unusual behavior. NOAA then requested the assistance of the West Hawai‘i Marine Mammal Response Network, part of a network of volunteers authorized to respond to strandings of marine mammals on NOAA’s behalf. Additionally, Roxane Keli‘ikipikāneokolohaka

(formerly Roxane Stewart) and Kealoha Pisciotto, two Kānaka Maoli who are the founders of Kai Palaoa committed to protection and conservation of the sea and all life therein were contacted by members of the community to mālama this whale in distress and in a coma state. These women had also cultivated a professional relationship with NOAA to integrate cultural protocols in the agency's and volunteers' response work. They were also members of NOAA's Hilo Marine Mammal Response Network and responded to the stranding of Wānanalua with the training they received from NOAA as volunteers and in ceremony as Kanaloa religious practitioners providing comfort and support to the whale while in her distressed state. Despite these collaborations and volunteer work with NOAA, NOAA elected to prosecute Kealoha and Roxane under the MMPA for having allegedly committed a "take" and illegal "transport" under the act during the course of performing a traditional burial rite of Wānanalua at sea after she expired. These claims appeared far-reaching. Normally these types of violations are understood within the context of killing or harassing marine mammals and transporting marine mammal parts for sale and use in the black market.

The case against Roxane and Kealoha was brought before an Administrative Law Judge (ALJ) for NOAA. While technically a civil case, the alleged MMPA violations exposed Roxane and Kealoha to potential punitive fines at a maximum threshold of \$20,000 each and/or up to one year in jail. While the ALJ found the practitioners' beliefs to be sincere, she erroneously opined that she could not rule on constitutional issues related to free religious exercise and public trust obligations imposed under the federal Admissions Act and the State Constitution. Using a strict liability analysis of the MMPA, the ALJ concluded that Roxane and Kealoha had violated the takings and transport clauses of the act. On appeal to the Department of Commerce, the Assistant Secretary issued an order to remand the matter back to the ALJ to assess the protection of religious freedoms under RFRA and the trustee role the federal government through the Admissions Act to Native Hawaiians; namely, to acknowledge and accommodate Kānaka Maoli traditional, religious practices and rights exercised on ceded lands. Upon the order to remand, NOAA elected to drop the charges against Kealoha and Roxane and the case was officially dismissed without prejudice. Unfortunately, the dismissal without prejudices leaves these women vulnerable to prosecution in the future. Additionally, a final resolution on this matter continues to perpetuate the threat of criminalizing Native Hawaiian kia'i exercising mālama of Kanaloa.

What NOAA clearly demonstrated in the actions taken against Kealoha and Roxane is that it can and will use the Marine Mammal Protection Act ("MMPA") as a means to criminalize Kānaka Maoli when we attempt to practice our traditional and religious rights in the course of responding to cetacean strandings. This threat remains real today, more than 6 years after this litigation. This case also demonstrates that there are no existing exceptions for Kānaka Maoli who wish to respond to cetacean strandings, engage in traditional practices and/or seek the return of iwi Kanaloa held by NOAA. The term 'take' is broadly defined by the MMPA to include harass, hunt, capture, or kill, or an attempt to harass, hunt, capture, or kill any marine mammal. Furthermore, the many incidental take authorizations granted by NOAA for activities such as military sonar and training exercises and oil and gas development juxtaposed with the hardline prosecutorial approach NOAA has taken against Kānaka Maoli religious practitioners, who are caring for and expressing reverence towards Kanaloa, seems arbitrary and capricious at best.

We understand that Congress passed the MMPA to address concerns that certain species and population stocks of marine mammals could be in danger of extinction or depletion as a result of human activities. A plain reading of the MMPA reveals an express goal of reducing the impact of commercial fishing on marine mammal populations and removing marine mammal products from trade. However, our practices do not threaten to diminish nor endanger marine mammal stocks in any way. Yet Kānaka Maoli practitioners, like Kealoha and Roxane, still face severe penalties under Section 1375 of the MMPA, including a fine of \$20,000 per violation, imprisonment for one year, or both, if they are found to have knowingly violated the act.

INDIGENOUS CO-MANAGEMENT AGREEMENTS WITH ALASKA NATIVES AS A STARTING POINT FOR REFRAMING NATIVE HAWAIIAN CO-MANAGEMENT

Despite the outdated language of the MMPA, certain provisions provide valuable guidance. For example, pursuant to Section 119, a Memorandum of Agreement was executed between the National Marine Fisheries Service and the Indigenous People's Council for Marine Mammals. This particular memorandum gives Alaska Native Organizations a co-management role in determining proper interactions with protected Marine Mammals in Alaska. It seeks to provide full and equal participation by Alaska Natives in decisions affecting the subsistence management of marine mammals. Federal agencies and Alaska Native Organizations are directed to communicate and cooperate closely in developing individual agreements and to consider traditional and native knowledge along with the best available scientific information when making decisions regarding Alaska marine mammal co-management.

The co-management approach to marine mammal management given to Alaska Natives can be a helpful starting point in discussions between NOAA and the Kia'i Kanaloa Network. Our hope is to gain greater parity for Kānaka Maoli in our interactions with NOAA; to ensure that we can serve in a co-management and co-trustee role in mālama Kanaloa; to bridge and combine the best of conventional science and our native knowledge and practices into management; and to foster an atmosphere of cooperation and respect in our local and indigenous communities.

In consideration of the issues presented above, and in order for NOAA to substantiate its commitments to Kānaka Maoli in relation to marine mammals, we ask that your office convene a series of roundtable discussions to begin a discussion on how to better incorporate Kānaka Maoli practices in Hawai'i's marine mammal stranding response work; necropsies and research; final disposition, care, and repatriation of iwi Kanaloa; and to address and remedy NOAA's criminalization of the exercise of traditional and religious rights of Kānaka Maoli under the MMPA.

Ola i ke au a Kanaloa,

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