

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII  
**Electronically Filed**  
**Intermediate Court of Appeals**

STATE OF HAWAII,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

**11-DEC-2012**

**04:41 PM**

APPEAL FROM THE FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS FILED APRIL 26,  
2012

FIFTH CIRCUIT COURT  
STATE OF HAWAII

HONORABLE KATHLEEN N.A.  
WATANABE, JUDGE PRESIDING

**ROBINSON FAMILY PARTNERS AND GAY & ROBINSON,  
INC.'S AMICUS CURIAE BRIEF**

**DECLARATION OF ERIC A. JAMES AND EXHIBITS A-B**

**DECLARATION OF KEPA MALY AND EXHIBIT A**

**DECLARATION OF BRUCE ROBINSON**

**DECLARATION OF ALAN ROBINSON**

**CERTIFICATE OF SERVICE**

CARLSMITH BALL LLP

ERIC A. JAMES	2023
TIM LUI-KWAN	2271
MITCHELL D. WEBBER	9688
ASB Tower, Suite 2200	
1001 Bishop Street	
Honolulu, HI 96813	
Tel No. 808.523.2500	
Fax No. 808.523.0842	

Attorneys for Movants  
ROBINSON FAMILY PARTNERS and  
GAY & ROBINSON, INC.

## TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT .....	1
A. Factual Background and Procedural Posture .....	2
B. The Robinson Family's Interest and Position.....	3
II. ISSUE PRESENTED.....	5
III. ARGUMENT .....	5
A. Wild Pig Hunting Without The Landowner's Permission Is Not A Customary Or Traditional Native Hawaiian Practice .....	5
1. Hunting Feral Pigs Is Not A Native Hawaiian Custom Or Tradition .....	6
2. Hunting Has Never Been Permitted Without The Permission Of The Landowner .....	10
a. In Hawai'i .....	10
b. On the Subject Property .....	12
B. The Balance Of Interests Favors State Regulation Of Pig Hunting On Private Property .....	13
C. The Circuit Court Order Promotes Lawlessness.....	14
IV. CONCLUSION.....	15

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Cases</u></b>	
<i>Curtis v. Dorn</i> , 123 Hawai‘i 301, 234 P.3d 683 (Haw. Ct. App. 2010).....	5
<i>Davis v. Green</i> , 2 Haw. 367, 1861 WL 3462 (Haw. Kingdom 1861) .....	10
<i>King v. Manu</i> , 4 Haw. 409, 1881 WL 7881 (Haw. Kingdom 1881) .....	11
<i>McBryde Sugar Co., Ltd. v. Robinson</i> , 55 Haw. 260, 517 P.2d 26 (1973) .....	4
<i>Oni v. Meek</i> , 2 Haw. 87, 1858 WL 4829 (Haw. Kingdom 1858) .....	4
<i>Peck v. Bailey</i> , 8 Haw. 658, 1867 WL 3505 (Haw. Kingdom 1867) .....	4
<i>Public Access Shoreline Hawaii v. Hawai‘i Cnty. Planning Comm’n</i> , 79 Hawai‘i 425, 903 P.2d 1246 (1995).....	3
<i>State v. Hanapi</i> , 89 Hawai‘i 177, 970 P.2d 485 (1999).....	3, 4, 5
<i>State v. Pratt</i> , 127 Hawai‘i 206, 277 P.3d 300 (2012).....	passim
<i>Territory v. Gay</i> , 31 Haw. 376, 1930 WL 2888 (Haw. Terr. 1930).....	2, 12
<b><u>Statute &amp; Rules</u></b>	
Haw. R. App. P. 28(g).....	1
Haw. Rev. Stat. § 183D-26.....	3, 5, 6, 12
Haw. Rev. Stat. § 7.1 .....	14
Haw. Rev. Stat. § 708-815 .....	2

**TABLE OF AUTHORITIES**  
**(continued)**

	<u>Page</u>
<b><u>Other</u></b>	
1874 Laws of His Majesty Kalakaua, chapter XXVII, Section 1 .....	11
1892 Laws of Her Majesty Lili‘uokalani, chapter LXXVII .....	11
Kepa Maly, Benton Keali‘i Pang, and Charles Pe‘ape‘a Makawalu Burrows, “Pua‘a (Pigs in Hawai‘i, from Traditional to Modern,” (2007).....	7, 8, 9

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

CR. NO. 11-1-0116

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

**ROBINSON FAMILY PARTNERS AND GAY & ROBINSON, INC.'S  
AMICUS CURIAE BRIEF**

Pursuant to Hawai'i Rule of Appellate Procedure 28(g), and this Court's October 23, 2012 Order Granting Movants Robinson Family Partners And Gay & Robinson, Inc.'s September 27, 2012 Motion For Leave To File An *Amicus Curiae* Brief, *amicus curiae* Robinson Family Partners and Gay & Robinson, Inc. (collectively, the "**Robinson Family**"), submit this brief in support of the State of Hawai'i's appeal from the Findings of Fact, Conclusion of Law, and Order Granting Defendant's Motion to Dismiss filed in the Circuit Court of the Fifth Circuit on April 26, 2012 (the "**Circuit Court Order**").

**I. PRELIMINARY STATEMENT**

Hunting feral pigs is not and never has been a customary or traditional native Hawaiian practice. Hunting game without the permission of the landowner has never been a customary or traditional native Hawaiian practice. Indeed, a statute from the Kingdom of Hawai'i—the best evidence of what was and was not native Hawaiian practice—made it a misdemeanor to “take or destroy any kind of game without first having obtained permission from the owner or occupier of such land.” Simply put, something that was illegal during the Hawaiian monarchy *cannot* be a constitutionally protected traditional or customary native Hawaiian practice.

This is particularly true on Robinson Family lands. Game hunting without permission of the landowner has not been allowed on Robinson Family lands since Elizabeth Sinclair, the great-great-grandmother of Bruce Robinson, acquired title to the lands in the 1860s.

Even if game hunting without the landowner's permission were a traditional or customary practice, the Circuit Court Order, if affirmed, would mark an unprecedented expansion of the "traditional and customary practices" doctrine. It would be the first time that Hawai'i courts have authorized the use of *violence* on other people's property based on a claim—utterly meritless in this case—that the violent activity was a native Hawaiian custom or tradition. By asking that this court reverse the Circuit Court Order, the Robinson Family seeks to protect the safety and property rights of private landowners, their tenants and guests, and the safety of even those, such as Appellee Kui Palama, who would illegally enter the property to poach wild animals.

**A. Factual Background and Procedural Posture:**

On January 17, 2011, Mr. Palama is alleged to have hunted, killed, and gutted two wild pigs on Kupo Ridge (the "Subject Property"). *See* Docket No. 11, Record on Appeal ("R.A.") at 13. Kupo Ridge is located in the *ili* of Manuahi, which, together with the *ili* of Koula,<sup>1</sup> is owned by Robinson Family Partners and leased by Gay & Robinson, Inc. and which make up the *mauka* portion of the *ahupua'a* of Hanapepe<sup>2</sup> on the island of Kaua'i. On March 2, 2011, the Kaua'i County Department of the Prosecuting Attorney issued a complaint against Mr. Palama for simple trespass, in violation of Hawai'i Revised Statutes ("H.R.S.") § 708-815, and for

---

<sup>1</sup> Both the *ili* of Koula and the *ili* of Manuahi, are *ili kupono*, or *ili ku*, which are divisions of land that are "wholly independent of the ahupuaa within whose outer boundaries [they are] situated and that [they] owed no tribute to the konohiki of the ahupuaa and that its konohiki was subservient directly to the king." *Territory v. Gay*, 31 Haw. 376, 380-381, 1930 WL 2888, at \*3 (Haw. Terr. 1930).

<sup>2</sup> *Id.* at 378, 1930 WL 2888, at \*1.

hunting on private lands without permission of the owner, in violation in H.R.S. § 183D-26 (the “**Complaint**”). R.A. at 13-14. Mr. Palama moved to dismiss the Complaint on the grounds that his trespass and hunting activities on Robinson Family property were protected activities under Hawai‘i’s “traditional and customary practices” doctrine. R.A. at 50-93. The Circuit Court for the Fifth Circuit of Hawai‘i held a hearing on Mr. Palama’s motion to dismiss on March 13 and April 5, 2012 (the “**Circuit Court Hearing**”), and on April 26, 2012, issued the Circuit Court Order dismissing the charges against Mr. Palama. R.A. at 146-151.

The State appealed the Circuit Court Order, and on September 12, 2012, filed its opening brief. Dkt. Nos. 1, 19. On September 27, 2012, the Robinson Family moved for leave to file the instant *amicus curiae* brief, and the court granted the motion on October 23, 2012. Dkt. Nos. 21, 27. Mr. Palama filed his answering brief on November 12, 2012. Dkt. No. 31. The State filed its reply brief on November 26, 2012. Dkt. No. 44.

#### **B. The Robinson Family’s Interest and Position:**

In *State v. Hanapi*, 89 Hawai‘i 177, 970 P.2d 485 (1999), the Hawai‘i Supreme Court held that a defendant claiming a traditional and customary practices privilege to engage in otherwise criminal activity must, “at minimum,” prove that (1) the defendant is “native Hawaiian” according to the criteria established in *Public Access Shoreline Hawaii v. Hawai‘i Cnty. Planning Comm’n*, 79 Hawai‘i 425, 442, 903 P.2d 1246, 1263 (1995); (2) the claimed privilege is “constitutionally protected as a customary or traditional native Hawaiian practice[,]” and (3) the conduct occurred on undeveloped or less than fully developed land. *Hanapi*, 89 Hawai‘i at 185-86, 970 P.2d at 493-94 (affirming defendant’s conviction for trespass). The Supreme Court recently stated in *State v. Pratt*, 127 Hawai‘i 206, 277 P.3d 300 (2012), that the three-part test of *Hanapi* is *only the minimum* showing that a defendant must make to successfully assert the privilege against a criminal charge. *Pratt*, 127 Hawai‘i at 207, 277 P.3d at

301. Once a court finds that the three *Hanapi* factors are satisfied, the Supreme Court stated that the court must then “consider[] the totality of circumstances” “by *balancing the respective interests and harm* once it is established that the application of custom has continued in a particular area.” *Pratt*, 127 Hawai‘i at 214, 277 P.3d at 309 (emphasis in original; citation omitted).<sup>3</sup>

Mr. Palama could not have satisfied the second prong of the *Hanapi* test because, as described below, (i) hunting feral pigs is not a customary or traditional native Hawaiian practice, (ii) hunting game without the permission of the landowner is not a customary or traditional native Hawaiian practice, and (iii) the Robinson Family has never allowed anyone to hunt on its lands without its permission.

The ancestors of the current owners of the Robinson Family have continuously owned and operated the Subject Property and the surrounding lands for generations,<sup>4</sup> and therefore the Robinson Family has direct, first-hand knowledge of the native Hawaiian practices traditionally and customarily exercised on the Subject Property. *See Declaration of Bruce Robinson*, dated December 5, 2012 (“**B. Robinson Decl.**”) at ¶ 3-5. The ancestors of the Robinson Family were the *konohiki*<sup>5</sup> of the Subject Property, and the surrounding lands they owned, during the period of

---

<sup>3</sup> The Circuit Court Order was entered on April 26, 2012, before the Supreme Court issued its decision in the *Pratt* case on May 11, 2012, so the Circuit Court did not have the benefit of the Supreme Court’s ruling when it decided this case.

<sup>4</sup> The *ili* of Koula was conveyed to Elizabeth Sinclair by deed dated July 7, 1865, recorded in Book 20, page 121 of the Bureau of Conveyances of the State of Hawai‘i (“**Bureau**”). The *ili* of Manuahi was conveyed to Elizabeth Sinclair by deed dated February 15, 1878, recorded in the Bureau in Book 53, page 459.

<sup>5</sup> The Hawaiian title of the *konohiki* originally referred to an agent or person in charge of a substantial tract of land, such as an *ili* or an *ahupua‘a*, on behalf of the king. Later, the term came to refer to certain rights of the chiefs, or their successors-in-interest, receiving awards of “*konohiki lands*” following the Great Mahele. *See generally Peck v. Bailey*, 8 Haw. 658, 1867 WL 3505 (Haw. Kingdom 1867); *Oni v. Meek*, 2 Haw. 87, 1858 WL 4829 (Haw. Kingdom 1858); *see also McBryde Sugar Co., Ltd. v. Robinson* (“*McBryde II*”) 55 Haw. 260, 264 n.2, 517 P.2d 26, 28 n.2 (1973) (Levinson, J., dissenting).

the Hawaiian Monarchy. Since that time, the Robinson Family has continued to act as the steward of these lands, and has preserved the conservation and agricultural uses of these properties. B. Robinson Decl. at ¶¶ 5-6. At no time during the Robinson Family’s stewardship of the Subject Property and their surrounding lands has the Robinson Family allowed anyone to enter the land to hunt wild pigs without its permission. B. Robinson Decl. at ¶ 7.

In addition to speaking directly to the second prong of the *Hanapi* test, the Robinson Family submits this brief to express its concerns and experiences regarding poaching so that they may be taken into account as part of the “totality of circumstances” balancing test mandated by *Pratt*. The Circuit Court Order in this matter did not even articulate the State’s interests in prohibiting hunting on private property without the permission of the landowner, as codified in H.R.S. § 183D-26, let alone balance the State’s interests against those of Mr. Palama. For this reason alone, the case must be remanded to the Circuit Court to conduct the proper balancing analysis. *See Curtis v. Dorn*, 123 Hawai‘i 301, 303, 234 P.3d 683, 685 (Haw. Ct. App. 2010) (“[R]emand is appropriate” where the circuit court applied the incorrect legal test).

## **II. ISSUE PRESENTED**

The issue presented is whether hunting wild pigs on the Subject Property without the owner’s permission is a constitutionally protected traditional and customary native Hawaiian practice, and the effect of such activity on the Subject Property and its owners.

## **III. ARGUMENT**

### **A. Wild Pig Hunting Without The Landowner’s Permission Is Not A Customary Or Traditional Native Hawaiian Practice.**

Mr. Palama’s sole expert witness, Dr. Jonathon Osorio, did not introduce or reference a single piece of documentary evidence claiming that wild pig hunting is a traditional or customary Hawaiian practice. Indeed, the available scholarship on this subject makes clear that feral pig

hunting absolutely was *not* a Native Hawaiian custom or tradition but is of relatively recent vintage in Hawaii with methods derived directly from western practices.

There also is no recognized traditional or customary practice in Hawaii that allows anyone to hunt feral pigs *without permission of the landowner*. The current owners, whose family has held the Subject Property for almost 150 years, have never tolerated poaching. All hunting on the Subject Property, of pigs or any other ungulates, was allowed only with permission of the landowner. The predecessor to the current H.R.S. § 183D-26, first adopted during the Kingdom of Hawai‘i, expressly prohibited hunting on private lands without the owner’s consent.

This court has the authority to review and reverse the Circuit Court’s findings as to whether a certain activity constitutes a traditional and customary native Hawaiian practice. In his concurring opinion in *Pratt*, Justice Acoba confirmed that the recognition of an activity as a traditional and customary native Hawaiian practice is “of constitutional import” and therefore an appellate court may “exercise [its] own *independent* constitutional judgment.” *Pratt*, 127 Hawai‘i at 231, 277 P.3d at 325 (Acoba, J., concurring in part and dissenting in part) (emphasis in original; citation omitted). Therefore, this court is not bound by the Circuit Court’s determination that Mr. Palama’s pig hunting on the Subject Property constituted an established native Hawaiian customary or traditional practice, and it should reverse that erroneous conclusion. R.A. at 149.

1. Hunting Feral Pigs Is Not A Native Hawaiian Custom Or Tradition.

Despite Dr. Osorio’s claims to the contrary, ancient Hawaiians did not hunt pigs for subsistence. Dr. Osorio claimed to base his expertise on written records identifying Hawaiian cultural traditions in the 19th century. When asked how he was able to opine as to “what activity does or does not constitute a Hawaiian custom or tradition,” Dr. Osorio answered:

I do this based on, you know, what is in the written record, and the written record really includes documents that have only been in existence since the 1820's and 1830's, most of them in Hawaiian. Hawaiians wrote copiously in the 19th Century as they became literate, and they wrote about all kinds of cultural practices.

Docket No. 7, Transcript of Motion to Dismiss Hearing, March 13, 2012 ("TT1") at 13-14.

When asked "how long have pigs been hunted in the ahupua'a system" Dr. Osorio answered, "I don't know there was a time when they were not hunted." TT1 at 29-30. Soon after, Dr. Osorio was asked:

**Q.** Would you say that Mr. Kui Palama's actions were customarily and traditionally practiced the way he hunted the pig?

**A.** Yes. You know, I would say that the hunting of pigs, regardless of what sort of tools he was using, would be traditional because it's—essentially, it's the cultural practice of understanding that the pig is a competitor for the resources; the pig must be managed, and the pig is food, and it has been that way for more than a thousand years.<sup>6</sup>

TTI at 33-34.

And yet Dr. Osorio did not cite to a single written source—not one diary, ledger, treatise, history, or even a myth—in support of his opinion that hunting feral pigs is a customary Hawaiian practice. Dr. Osorio's failure to cite any sources is not surprising, because the scholarship on this question directly contradicts Dr. Osorio's testimony. In a recent article collecting and summarizing scholarship on Hawaiian pigs, three scholars of Hawaiian culture trace the history of pigs in Hawai'i and their relationship to the native Hawaiian population. *See* Kepa Maly, Benton Keali'i Pang, and Charles Pe'ape'a Makawalu Burrows, "Pua'a (Pigs) in Hawai'i, from Traditional to Modern," (2007), (Research article prepared for the Cultural Impact Assessment and Environmental Assessment for the Alakai Protective Fence Project, Waimea and

---

<sup>6</sup> Unless otherwise indicated, all emphases are added.

Wainiha Ahupua‘a, Waimea and Hanalei Districts, Island of Kaua‘i, The Nature Conservancy in Hawai‘i, Kaua‘i Program, 2008), (“Pua‘a in Hawai‘i”), attached hereto as Exhibit A to the Declaration of Kepa Maly, dated December 12, 2012.

The article notes that pigs brought to Hawai‘i by Polynesian people were genetically different from pigs living in the forests today: “Skeletal remains of pigs and recorded traditional knowledge sources indicate that *pua‘a* (the Polynesian pig) was a much smaller animal than the feral pigs of today,” whereas “today’s feral pigs are largely derived from animals introduced after western contact.”<sup>7</sup> *Id.*

The article further explains that, in pre-contact Hawai‘i, commoners were not even allowed in the higher forest regions. “As intensely sacred places, the forests of the *wao akua* [upland forest] were not entered except for very specific purposes, and then only by small groups of spiritually and culturally prepared individuals.” *Id.* While it is true that, before western contact, pigs were “both highly valued and carefully managed sources of protein,” they did not roam wild in the upland forest region: “[t]raditional and historic evidence indicates that these animals remained largely domesticated... because in pre-contact time, native Hawaiian forests were devoid of large alien fruits such as mangos and guava, and major protein sources, such as non-native earthworms, that would eventually support the large feral populations of pigs today.” *Id.* Pigs “were an integrated part of Hawaiian households, and the common presence of *pa pua‘a* (pig pens) reflects the controlled, physically compartmentalized nature of pig management in traditional Hawai‘i.” *Id.*

---

<sup>7</sup> Dr. Osorio correctly noted that “early Polynesians brought pigs to Hawaii,” TT1 at 28, but he failed to point out that today’s feral pigs are not the same Polynesian pigs whose ancestry has been genetically traced back to the wild Asiatic swine.

Taken together, the evidence shows that native Hawaiians did not *hunt* pigs, either for sport or for sustenance:

**[Plugs were never hunted game for ancient Hawaiians.** The Polynesian interaction with these animals was one of near-complete domestication. Despite references to hunting rats with bow and arrow, **no historic or traditional knowledge sources describe ancient Hawaiians hunting pigs for either food or recreation.** Even in the legend of *Kamapua'a* where the demi-god is pursued by man, he is sought so that he might be punished for his mischievous actions, not for sport or sustenance.

*Id.*

The article explains that wild pigs have only been hunted in Hawai‘i for the past 150 years, and that, along with the animal itself, the *manner* of hunting is entirely imported, derived directly from *western* or European practices. Recreational hunting of feral pigs only evolved “as native Hawaiians assimilated western traditions in the context of these [including pigs] introduced game animals.” *Id.* Since then, pig hunting has become “a cherished **modern practice** for island sportsmen, including some whose subsistence depends to greater or lesser extent on wild game.” *Id.* Western pig hunting:

is usually accomplished with the use of dogs, and the required training, feeding and care for these animals can be a difficult and expensive task. The dogs locate, chase, grab, or bay the game, which is then typically dispatched by the hunter with a gun or knife. **These techniques are derived directly from western and European pig hunting practices. . . .**

*Id.* This description of pig hunting, “derived directly from western and European pig hunting practices,” *id.*, is entirely consistent with Mr. Palama’s description of his hunting practices: “I let the dogs go find the pigs, find the pigs. [They] grab it, hold it, until I get there. And then I cut them with the knife.” *See* Docket No. 9, Transcript of Motion to Dismiss Hearing, April 5, 2012 (“**TT2**”) at 42.

In short, it is a misconception that pig hunting was a common practice in ancient Hawai‘i. It was not. There is no evidence for Dr. Osorio’s claim that ancient Hawaiians hunted pig for subsistence purposes, let alone that they have done so for the past thousand years, and quite a bit of evidence—anthropological and genetic—that they did not do so.

2. **Hunting Has Never Been Permitted Without The Permission Of The Landowner.**

a. **In Hawai‘i:**

Both prior to and following the Great Mahele, hunting was only permitted with the consent of the *konohiki*, and permission to hunt was usually conditioned upon the hunter providing some benefit to the *konohiki* in return for the right to hunt. Tenants performed work for the *konohiki* of the *ahupua‘a* in which they lived in exchange for the privilege to live and gather from that *ahupua‘a*. Non-residents (those from another *ahupua‘a*) passing through the area would negotiate with the *konohiki* or his representative for the privilege to take certain natural resources found within the *ahupua‘a*. As Dr. Osorio conceded, “a *konohiki* or a chief, ali‘i, would be appointed to basically regulate the resources of [the] *ahupua‘a* and the maka‘ainana who lived in it,” and all tenants’ privileges were “subject to the kapu of the chiefs.” TT1 at 26.

Hawaiian Kingdom caselaw and statutes from the period show that hunting without the owner’s consent simply was not a permissible practice. For example, in *Davis v. Green*, 2 Haw. 367, 1861 WL 3462 (Haw. Kingdom 1861) the Supreme Court made it clear that the defendant had no right to enter the plaintiff’s land to recapture even the defendant’s own cattle:

[W]e wish it therefore to be distinctly understood that while we hold that neither the plaintiff, nor others, have a right to take and convert those cattle, because found upon their land, [the defendant] or his agents have no right to enter upon those lands, for the purpose of capturing cattle under his grant . . . without the consent of the owners of the lands, nor to take and convert the cattle of

private owners, because found unbranded upon the lands leased by him.

*Id.* at \*8.

Kingdom Law specifically identified wild pigs as a type of animal that is owned by the landowner of the property on which the pigs roamed. The Laws of 1874 codified the rule that pigs and other animals, though apparently wild, belong to the landowner or lessee of the land:

All cattle, horses, mules, donkeys, sheep, goats and swine, over twelve months of age, not marked or branded according to law, and which may have been running wild or at large for six months or over, upon any of the land of this Kingdom, shall belong to and be the property of the owners or lessees of the land on which they said animals may be found running.

1874 Laws of His Majesty Kalakaua, chapter XXVII, Section 1, attached hereto as Exhibit A of attached hereto as Exhibit A to the Declaration of Eric A. James, dated December 12, 2012 (the “James Decl.”); *see also King v. Manu*, 4 Haw. 409, 1881 WL 7881, at \*2 (Haw. Kingdom 1881) (“This Act makes these enumerated animals, in the described circumstances, property, and therefore the subjects of larceny.”).

Subsequently, on December 28, 1892, Queen Lili‘uokalani approved an act “To Prevent Hunting and Shooting on Private Grounds”:

It shall not be lawful for any person or persons to enter upon any land belonging to or occupied by another, for the purpose of hunting with dogs, or to shoot, kill, take or destroy any kind of game without first having obtained permission from the owner or occupier of such land.

1892 Laws of Her Majesty Lili‘uokalani, chapter LXXVII, Section 1, attached hereto as Exhibit B of the James Decl.<sup>8</sup> It is impossible for Mr. Palama to credibly claim that hunting

---

<sup>8</sup> A version of this law has been in force in Hawai‘i since its passage in 1892. *See* Revised Laws of 1925, Section 745; Revised Laws of 1935, Section 316; Revised Laws of 1945, Section 1168; Revised Laws of 1955; Section 21-156; Hawai‘i Revised Statutes, 1976 Replacement Volume, Section 191-18; Hawai‘i Revised Statutes, 2007 Replacement Volume, Section 183D-26.

wild animals on another's property is a recognized native Hawaiian custom or tradition when Hawaiian law from the time of the Hawaiian Kingdom to the present makes clear that such behavior is criminally proscribed.

b. On the Subject Property:

The Robinson Family's stewardship of its lands on which Mr. Palama was caught hunting is entirely consistent with the traditional and legal systems that prohibited hunting without permission of the owner.

The Robinson Family has unique familial knowledge of native Hawaiian practices, as exercised within the *ili* of Manuahi where the Subject Property is located, since it has been under the continuous ownership of the Robinson Family since its original purchase by the present owners' great-great-grandmother. *Territory v. Gay*, 26 Haw. 382 (Haw. 1922).<sup>9</sup> The Robinson Family currently owns more than 50,675 acres of land on southwest Kauai, and members of the Robinson Family also own the island of Ni‘ihau. *See* B. Robinson Decl. at ¶ 4. The ancestors of the Robinson Family began acquiring these lands in 1864. *Id.* On Ni‘ihau, members of the Robinson Family continue to preserve a traditional way of life for the native Hawaiian community, including the continued use of the Hawaiian language and cultural practices. *Id.* at ¶ 6. The Robinson Family, as descendants of the *konohiki* of the Subject Property, has preserved the conservation and agricultural uses of their properties. *Id.* at ¶ 5.

From the initial purchase of the Subject Property until the present time, the Robinson Family has *never* allowed hunting on its land without first providing permission. *Id.* at ¶ 7. Such permission is and always has been granted on a discretionary basis, usually in exchange for services rendered, and typically to tenants living on the land. *Id.* As such, H.R.S. § 183D-26,

---

<sup>9</sup> *See also* Footnote 4, *supra*.

which proscribes hunting on private lands without permission of the owner, is entirely consistent with the customary practices on the Subject Property as long as the Robinson Family and its ancestors have held title. Indeed, the Robinson's can show a consistent practice and pattern of pressing charges against those who trespass on their land. *Id.* at ¶ 8. And the Robinson Family certainly has never consented to Mr. Palama hunting on the Robinson Family land. *Id.* at ¶ 9.

Should this matter be remanded to the Circuit Court, the Robinson Family is eager to assist the State in proffering evidence as to both the traditional nature—or, in this case, lack thereof—of wild pig hunting in Hawai‘i, as well as the practices on the Subject Property upon which Mr. Palama was caught poaching.

**B. The Balance Of Interests Favors State Regulation Of Pig Hunting On Private Property.**

Even if hunting feral pigs on private property without the owner's permission were a traditional or customary native Hawaiian practice—and it most certainly was not—the practice still would not be constitutionally protected because the interests of the State in prohibiting such activity outweigh those of Mr. Palama in practicing pig hunting. Though the Circuit Court recognized its obligation to “balanc[e] the State’s interest in regulating the exercise of [the claimed] rights,” it entirely failed to do so. *See RA* at 146-151. In fact, the Circuit Court Order is devoid of any discussion of the State’s interest in prohibiting hunting on private lands without the permission of the landowner. *Id.* The Robinson Family is confident that, based on the finding in *Pratt* that the State’s health and safety interests in regulating *unauthorized camping on public property* outweighs the interests of the defendant to camp without permission, 127 Hawai‘i at 218, 277 P.3d at 312, there is no question that the State’s interest in prohibiting

*unauthorized hunting of game mammals on private lands* outweighs any interests Mr. Palama may have in hunting on private property without permission.<sup>10</sup>

**C. The Circuit Court Order Promotes Lawlessness.**

This matter presents dangers beyond Mr. Palama's isolated trespass and hunting excursion. There would be far-reaching consequences if this court were to affirm that anyone can come onto the Robinson Family's land to hunt wild game without the its permission, under the guise of exercising native Hawaiian cultural and traditional practices.

The Robinson Family already has a number of neighbors who treat Robinson Family property as if it were not private property at all. Mr. Palama himself testified that he does not recognize the Robinson Family's title to the Subject Property:

For me, it doesn't—it's not Gay & Robinson property. It's—that's our backyard. . . . So I guess, in the State's eyes, they think it's Gay & Robinson property. . . . The State understands it belongs to Gay & Robinson, but I don't understand it belongs to Gay & Robinson.

TT2 at 45. Mr. Palama further claimed that he did not need permission from the Robinson Family to hunt on its land:

What we need permission, to go in our backyard to go catch couple of pigs so we can go down and make—make some kalua pig and lau lau's and sausage? We gonna get permission to survive here? So no, I didn't—we didn't get permission. I didn't get permission.

TT2 at 47.

The attitude expressed by the defense at the Circuit Court Hearing also has manifested itself in various dangerous and threatening behaviors directed at the Robinson Family.<sup>11</sup>

---

<sup>10</sup> Hunting animals on private property is qualitatively different from peacefully gathering wild plants on private property. Although H.R.S. § 7.1's enumeration of access and gathering privileges is not exhaustive, there is good reason that the statute provides for the gathering of crops, water, and wood, but not of game mammals.

#### **IV. CONCLUSION**

Hunting wild game on private property without the landowner's permission is not a traditional or customary native Hawaiian practice, and it cannot be practiced in a reasonable, nonviolent manner. The Circuit Court Order seeks to take "traditional and customary practices" in a new and dangerous direction, far afield from the peaceful gathering and religious practices that have, up until now, been the sole province of the native practices doctrine.

For the reason stated above, the Robinson Family respectfully requests that the court reverse the Circuit Court Order and remand the matter for further evidentiary hearings concerning Mr. Palama's motion to dismiss the Complaint.

DATED: Honolulu, Hawai'i, December 11, 2012.

/s/ Eric A. James

ERIC A. JAMES  
TIM LUI-KWAN  
MITCHELL D. WEBBER

Attorneys for Movants  
ROBINSON FAMILY PARTNERS and  
GAY & ROBINSON, INC.

---

<sup>11</sup> At least two other members of Mr. Palama's family have been arrested for hunting on Robinson Family land. B. Robinson Decl. at ¶ 8. Also, in October of this year, a person believed to be another relative of Mr. Palama left two threatening voice messages for Alan Robinson, instructing him: "don't mess with my family what not and you will be safe" and "you messed with the wrong family." *See* Declaration of Alan Robinson, dated December 5, 2012, at ¶¶ 3-5.

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

CR. NO. 11-1-0116

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

**DECLARATION OF ERIC A. JAMES**

I, Eric A. James, do declare as follows:

1. I am an attorney with Carlsmith Ball LLP, am duly admitted to practice law in the State of Hawaii and before the Intermediate Court of Appeals of the State of Hawaii, and am counsel for

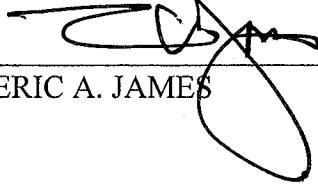
2. I make this Declaration in support of the Robinson Family Partners and Gay & Robinson, Inc.'s amicus curiae brief based on my personal knowledge and would be competent to testify to the statements contained herein.

3. Attached as **Exhibit A** is a true and correct copy of the 1874 Laws of His Majesty Kalakaua, chapter XXVII.

4. Attached as **Exhibit B** is a true and correct copy of the 1892 Laws of Her Majesty Lili'uokalani, chapter LXXVII.

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

DATED: Honolulu, Hawai'i, December 11, 2012.



---

ERIC A. JAMES

379

LAWS  
OF  
HIS MAJESTY KALAKAUA,  
KING OF THE HAWAIIAN ISLANDS,  
PASSED BY THE  
LEGISLATIVE ASSEMBLY,  
AT ITS SESSION, 1874.

PUBLISHED BY AUTHORITY.

HONOLULU :  
BLACK & AULD, PRINTERS.  
1874.

EXHIBIT A

5 of Chapter 17 of the Penal Code, relating to violation of letters and postal laws.

SECTION 2. This Act shall take effect and become a law from and after the date of its passage.

Approved this 18th day of July, A. D. 1874.

KALAKAUA R.

## CHAPTER XXVII.

### AN ACT

TO AMEND SECTION 1, OF AN ACT ENTITLED AN ACT DESIGNATING THE OWNERS OF CATTLE, HORSES, MULES, DONKEYS, SHEEP, GOATS, AND SWINE, NOT MARKED OR BRANDED ACCORDING TO LAW, AND WHICH MAY BE RUNNING WILD, AND AT LARGE, ON THE LANDS OF THIS KINGDOM, APPROVED ON THE 18TH DAY OF JULY, A. D. 1870.

*Be it Enacted by the King and the Legislative Assembly of the Hawaiian Islands in the Legislature of the Kingdom assembled.*

SECTION 1. That Section 1 of an Act designating the owners of cattle, horses, mules, donkeys, sheep, goats and swine not marked or branded according to law, and which may be running wild and at large on the lands of this Kingdom be, and the same is hereby amended by inserting certain words, so that the Section as amended shall read as follows:

"SECTION 1. All cattle, horses, mules, donkeys, sheep, goats, and swine, over twelve months of age, not marked or branded according to law, and which may have been running wild and at large for six months or over, upon any of the lands of this Kingdom shall belong to, and be the property of the owners or lessees of the lands on which the said animals may be found running."

SECTION 2. All laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

Approved this 13th day of July, A. D. 1874.

KALAKAUA R.

## CHAPTER

A

### RELATING TO ORDERS OF CON- TATE BY ADMINIST

*Be it Enacted by the King at  
Hawaiian Islands in the Le*

SECTION 1. For the property by administrators the order of confirmation of istrator or guardian shall be istrator of Conveyances in H guardian, within thirty days

SECTION 2. This Act sha from and after the date of i

Approved this 18th day o

## CHAPTER

A

### TO AMEND SECTION 651 OF

*Be it Enacted by the King an  
Hawaiian Islands in the Leg*

SECTION 1. That Section same is hereby amended, to

"SECTION 651. Every ma vessel, who shall convey out having a passport, shall be s and be liable for all debts w unpaid in this Kingdom ; and and debts, such vessel shall b

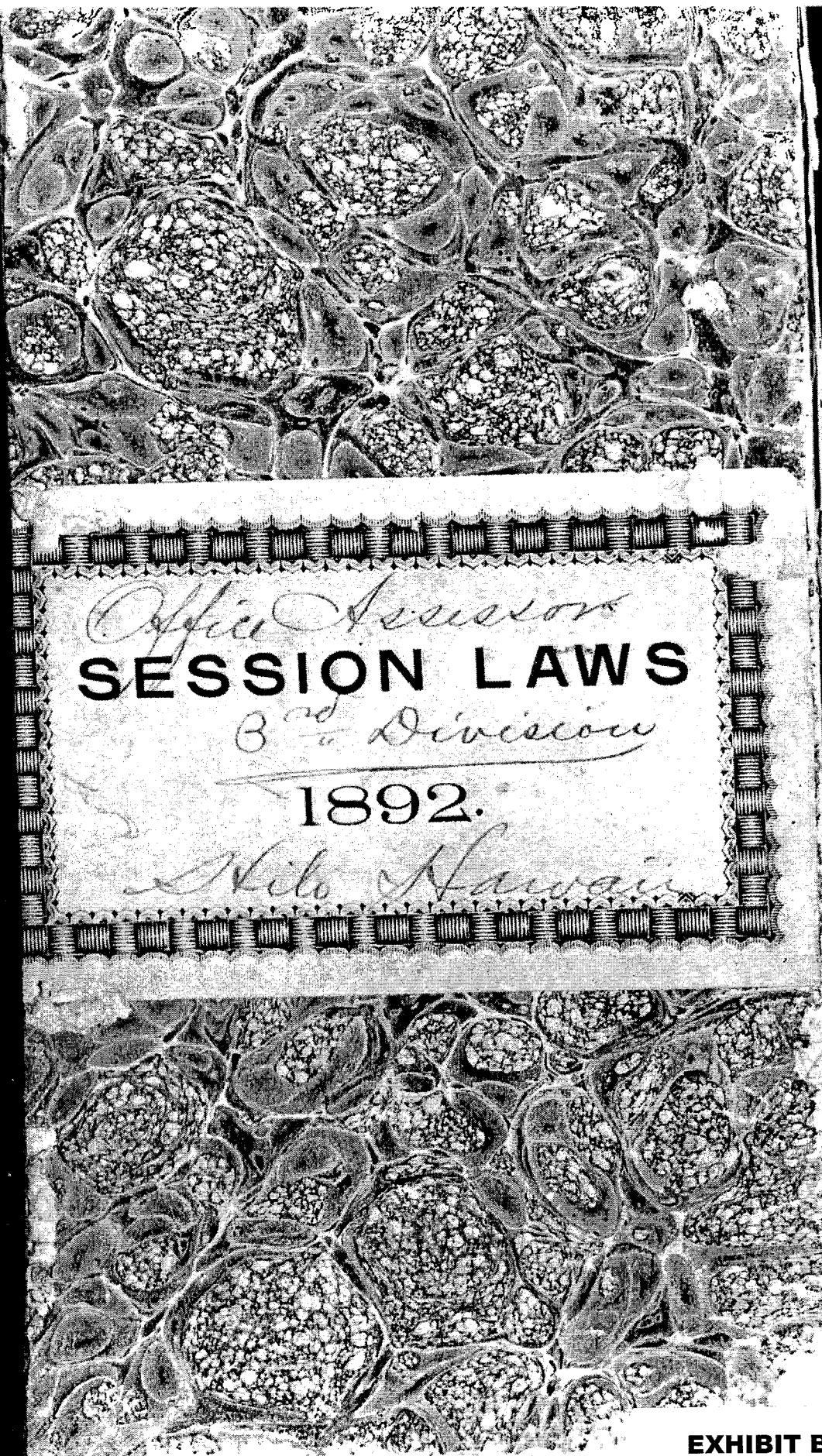


EXHIBIT B

disability of the Chief Justice, by any Associate Justice of said Courts."

SECTION 5. This Act shall take effect and be a law on and after the first day of January, A. D. 1893, and all laws and parts of laws in conflict herewith are hereby repealed.

Approved this 23d day of December, A. D. 1892.

LILIUOKALANI R.

BY THE QUEEN:

G. N. WILCOX,

*Minister of the Interior.*

---

## CHAPTER LXXVII.

### AN ACT

#### TO PREVENT HUNTING AND SHOOTING ON PRIVATE GROUNDS.

*Be it Enacted by the Queen and the Legislature of the Hawaiian Kingdom:*

SECTION 1. It shall not be lawful for any person or persons to enter upon any land belonging to or occupied by another, for the purpose of hunting with dogs, or to shoot, kill, take or destroy any kind of game without first having obtained permission from the owner or occupier of such land.

SECTION 2. Any person who shall violate the provisions of this Act shall be deemed guilty of a misdemeanor, and shall be punished upon conviction by a fine of not less than five dollars nor more than twenty-five dollars; provided however, that no prosecution shall be had under the provisions of this Act, except upon the sworn complaint of the owner or

occupant of the lands so trespassed upon, or his legal representative.

Approved this 28th day of December, A. D. 1892.

LILIUOKALANI R.

BY THE QUEEN:

G. N. WILCOX,

*Minister of the Interior.*

## CHAPTER LXXVIII.

### AN ACT

MAKING SPECIAL APPROPRIATIONS FOR THE USE OF THE GOVERNMENT DURING THE TWO YEARS WHICH WILL END WITH THE THIRTY-FIRST DAY OF MARCH, IN THE YEAR A. D. 1894.

*Be it Enacted by the Queen and the Legislature of the Hawaiian Kingdom:*

SECTION 1. The following sums, amounting to \$2,811,430.20, are hereby appropriated to be paid out of all moneys in the Treasury received from all the current receipts of the general revenue of the Kingdom for the biennial fiscal period commencing with the first day of April, A. D. 1892, and ending with the thirty-first day of March, A. D. 1894.

#### CIVIL LIST.

Her Majesty's Privy Purse: From March 31,

1892, to November 30, 1892 . . . . . \$13,332 00

From Nov. 30, 1892, to March 31, 1894 . . . 20,000 00

—————\$ 33,332 00

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

MOVANTS ROBINSON FAMILY  
PARTNERS AND GAY & ROBINSON,  
INC.'S MOTION FOR LEAVE TO FILE  
AN *AMICUS CURIAE* BRIEF

**DECLARATION OF KEPA MALY**

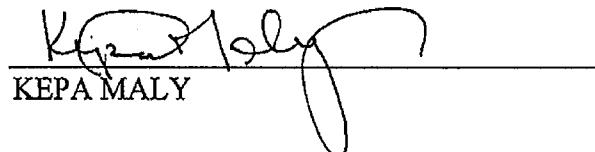
I, Kepa Maly, do declare as follows:

1. I am a cultural ethnographer and a principal in Kumu Pono Associates LLC, together with my wife, Irmalee Onaona Pomroy-Maly.
2. We have conducted a number of research projects and written extensively on the cultural history of many areas throughout the Hawaiian islands, including the island of Kaua'i, through our company, Kumu Pono Associates LLC.
3. I make this Declaration in support of the Robinson Family Partners and Gay & Robinson, Inc.'s *amicus curiae* brief based on my personal knowledge and would be competent to testify to the statements contained herein.
4. Attached as Exhibit A is a true and correct copy of an article authored by myself, Benton Keali'i Pang, and Charles Pe'ape'a Makawalu Burrows entitled "Pua'a (Pigs) in Hawai'i, from Traditional to Modern." The article was prepared in 2007 based on our research conducted on behalf of The Nature Conservancy in Hawai'i, Kaua'i Program for the Cultural Impact Assessment for the Alaka'i Protective Fence Project, Waimea and Wainiha Ahupua'a, Waimea and Hanalei Districts, Island of Kaua'i, March 2008.

5. The 2008 Cultural Impact Assessment was subsequently incorporated in and made a part of the Final Environmental Assessment (FEA) approved by the State Department of Land and Natural Resources (DLNR) and filed in February 2009 with the Office of Environmental Quality Control for the project.

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

DATED: Honolulu, Hawaii, December 12, 2012.



KEPA MALY

## Pua‘a (pigs) in Hawai‘i, from Traditional to Modern

Charlie Kalehuakona Isaacs, Treasurer, ‘Ahahui Mälama I Ka Lökahi  
Kepā Maly, Cultural Historian & Resource Specialist, President, Kumu Pono Associates LLC  
Benton Keali‘i Pang, U.S. Fish & Wildlife Service, Ecological Services

July 2007

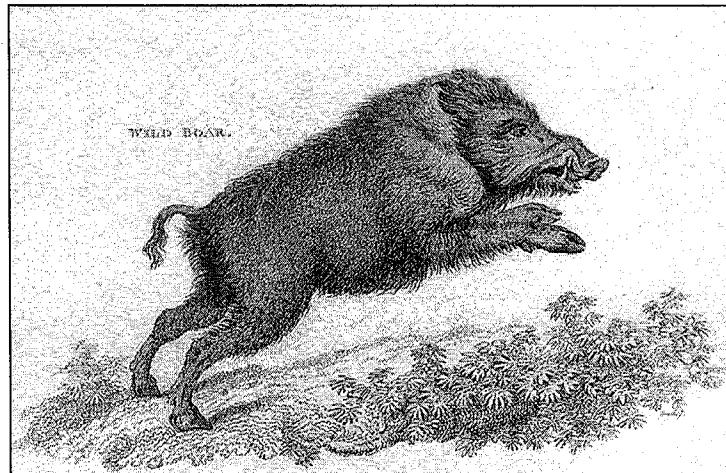
It is well documented that feral pigs ranging through Hawaii’s upland forests today bear little physical or cultural resemblance to the smaller, domesticated pigs brought to the islands by voyaging Polynesians. It remains a popular misconception that pigs are native to Hawaiian forests and that pig hunting was a common practice in ancient Hawai‘i. This paper will briefly compare the traditional role of pigs in Hawaiian culture with the largely western practice of hunting feral swine in modern Hawai‘i today.

### Origins and traditional relationships

Pigs are not native to Hawai‘i. The first pigs were brought to the Hawaiian Islands by Polynesians as early as the fourth century A.D.<sup>i</sup> Skeletal remains of pigs and recorded traditional knowledge sources indicate that *pua‘a* (the Polynesian pig) was a much smaller animal than the feral pigs of today.<sup>ii</sup> Historical evidence and genetic studies trace the ancestry of these animals to wild Asiatic swine (*Sus scrofa* subsp. *vittatus*).<sup>iii</sup>

Originally, *pua‘a* enjoyed a close relationship with their human families and rarely strayed far from the *kauhale* (family compound).<sup>iv</sup> Well developed taro and sweet potato agriculture in ancient Hawai‘i was incompatible with uncontrolled pigs, and there is every indication that pigs were both highly valued and carefully managed sources of protein. *Pua‘a* were an integrated part of Hawaiian households, and the common presence of *pa pua‘a* (pig pens) reflects the controlled, physically compartmentalized nature of pig management in traditional Hawai‘i.<sup>v</sup>

Notwithstanding, small populations of loosely controlled and free-roaming animals existed in ancient times. Traditional and historic evidence indicates that these animals remained largely domesticated, living mainly on the periphery of *kauhale* and extending into lowland forests. They continued to rely largely on the food and shelter provided by the *kauhale*.<sup>vi</sup> This is because in pre-contact times, native Hawaiian forests were devoid of large alien fruits such as mangos and strawberry guava, and major protein sources, such as non-native earthworms, that would eventually support the large feral populations of pigs today. Without such fodder, these early roaming populations would have been chiefly dependant on people for their survival.



## Western introductions and spread of feral pigs

In contrast, today's feral pigs are largely derived from animals introduced after western contact. Cook, for example, brought European pigs during his first voyage to Hawai'i, and many other introductions of European and Asian swine followed.<sup>vii</sup> Over time, the Polynesian *pua 'a* interbred with and were mostly displaced by these larger animals.<sup>viii</sup>

As feral pig populations grew on all islands, they began ranging more freely in the forests. Concurrent but independent introductions of earthworms and introduced alien plant species, such as mango and guava, provided reliable protein and carbohydrate food sources and helped expand their range.<sup>ix</sup> Omnivorous and without any non-human predators, pigs began to thrive in the native forest and successfully established large populations. Within only a few generations, any escaped domesticated pigs reverted to a feral form, retaining the large body size of European swine, but severing their dependence on human beings.<sup>x</sup>

With the advent of large-scale cattle ranching and sugarcane agriculture in the 19<sup>th</sup> century, much of Hawaii's lowland forests were converted into canefields or pasture, and feral pigs began moving further upslope.<sup>xi</sup> Expanding development and agriculture throughout the 20<sup>th</sup> century further accelerated this process, reducing mid-elevation habitat and forcing feral animals into the pristine upland forests. Some areas, like the high elevation forests of the West Maui mountains, remained pig-free until as recently as the 1960s. Today, however, feral pigs are found throughout the main islands, including most of the remote native forests of Kaua'i, O'ahu, Maui, Moloka'i, and Hawai'i.<sup>xii</sup>

## Cultural implications

Clearly, domesticated *pua 'a* carried strong cultural value in traditional Hawai'i. Aside from being an important possession and food source, oral tradition describes the adventures of *Kamapua 'a* (the pig child), a powerful demi-god who ranged over the islands and into the sea.<sup>xiii</sup> Even the name of the traditional land management system, *ahupua 'a*, refers directly to the *pua 'a* and highlights the animal's importance among the variety of resources that were collected and offered during the annual *mahakiki* tributes.<sup>xiv</sup>

However, pigs were never hunted game for ancient Hawaiians. The Polynesian interaction with these animals was one of near-complete domestication. Despite references to hunting rats with bow and arrow, no historic or traditional knowledge sources describe ancient Hawaiians hunting pigs for either food or recreation.<sup>xv</sup> Even in the legend of *Kamapua 'a* where the demi-god is pursued by man, he is sought so that he might be punished for his mischievous actions, not for sport or sustenance.<sup>xvi</sup>

To understand the relationship between Hawaiians and pigs further, it is useful to examine the relationship between ancestral Hawaiians and their environment. Far more important than domesticated *pua 'a* were the thousands of native plants and animals who represent the *kinolau* (physical forms) of the *'aumakua* (ancestral deities). Ancient Hawaiians believed they were the familial descendants of the *akua*. The upland forest, or *wao akua* (realm of the gods), was held sacred, considered inhabited by the *kini akua* (myriad gods). As a result, these forests were kept

religiously and physically distinct from the lowlands, or *wao kanaka* (the realm of people). In the *wao akua* dwelled such storied deities as *Ka-uluhe-nui-hihi-kolo-i-uka* (The great tangled mats of uluhe ferns crawling in the uplands – a body form of Hina), *Hina-uluhōhi'a* (Hina-‘ōhi‘a-grove), *Lono-i-ka-‘owāli‘i* (Lono-in-the-‘owāli‘i -fern), *Kumu-hea*, (the caterpillar god of Ka‘ū), *Kū-‘ōhi‘a-Laka* (Kū-of-Laka’s-‘ōhi‘a-tree), *Kū-pulupulu-i-ka-nahele* (Kū-treefern-wool-in-the-forest), and *Kū-‘ālana-wao* (Kū-[of the]-upland-offering), among the myriad *akua*.<sup>xvii</sup>

As intensely sacred places, the forests of the *wao akua* were not entered except for very specific purposes, and then only by small groups of spiritually and culturally prepared individuals. Following strict traditional protocol, these groups would enter the forest for specific purposes, as to gather medicinal plants, fell carefully selected trees for voyaging canoes, or capture forest birds to harvest ceremonial feathers. In the native Hawaiian experience, human-reared *pua‘a* were considered denizens of the *wao kanaka* and alien to the sacred upland forests. Until the last 150 years, they were also largely absent from them.

### Other ungulate introductions and impacts

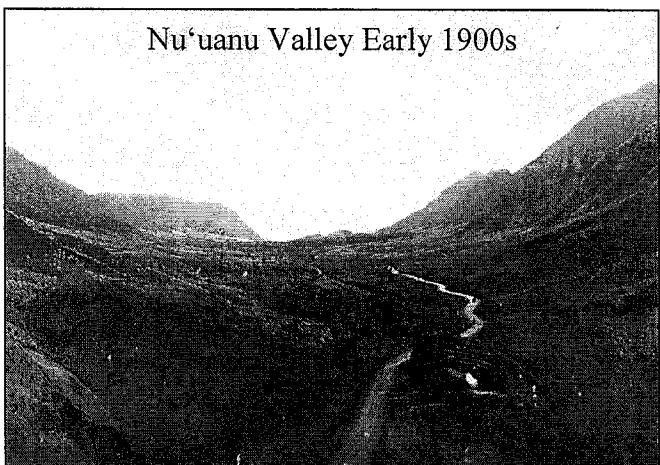
Goats were introduced in Hawai‘i nearly simultaneously with the European pig, followed shortly thereafter by sheep, cattle, horses and donkeys. Introduction of this working stock accelerated the spread of western agriculture in the islands. This change, along with a growing westernization of traditional concepts of property rights and the decline of the Hawaiian population helped contribute to the collapse of traditional Hawaiian land management systems.<sup>xviii</sup>

Other non-native ungulates were to follow. Axis deer were introduced on Moloka‘i in the mid-19<sup>th</sup> century and reproduced so rapidly that, by 1898, the population of axis deer on Moloka‘i was estimated at 7000 animals and hunters were brought in from California to cull the herd.<sup>xix</sup> On Moloka‘i and elsewhere, Hawai‘i residents soon began to note the deleterious effects of large populations of cattle, pigs, goats, and deer. These introduced animals browsed, trampled, and rooted up sensitive native plant

#### Ungulate introductions to Hawai‘i (Tomich 1986)

- Polynesian pig – ca 400 AD
- European swine – 1778
- Goat – 1778
- Sheep – 1791
- Cattle – 1793
- Horse – 1803
- Donkey – 1825
- Axis deer – 1868
- Mouflon sheep – 1954
- Pronghorn – 1959\*
- Mule deer – 1961

\* Now extirpated



Nu‘uanu Valley Early 1900s

species, converting rich native forest into pasture land or worse. Together with unsustainable ‘iliahi (sandalwood) harvests, this animal-induced degradation of native forests took its toll and predicated the watershed crisis of the late 19<sup>th</sup> century.

Widespread fencing, feral animal control and forest restoration were undertaken in an attempt to reverse the damage. On June 22, 1878, King Kalākaua himself led a party to the headwaters of Nu‘uanu Stream to plant trees.<sup>xx</sup> On April 25, 1903, the Territorial Legislature created Hawaii's forest

reserve system. Surprisingly, despite these visionary early control efforts, state-sponsored game animal introduction resumed in the mid-20<sup>th</sup> century when the Department of Forestry was reorganized to create a game management division. Soon thereafter, mule deer, pronghorn antelope, and mouflon sheep were introduced on multiple islands for recreational hunting. Today there are six introduced species of game mammals.

### **Modern hunting: Incorporating western traditions**

The custom of recreational hunting evolved as native Hawaiians assimilated western traditions in the context of these introduced game animals. The earliest descriptions of western-style hunting occur in the opening decades of the 19<sup>th</sup> century, when outings were organized to control wild herds of cattle that threatened agriculture, residences, and forest resources.<sup>xxi</sup> The practice increased in frequency and in popularity, with island hunters playing a key role in the state's response to the watershed crisis of the late 19<sup>th</sup> century. These state-sponsored control efforts resulted in the removal of over 170,000 introduced mammals in the first half of the 20<sup>th</sup> century.

Although hunting is not widely practiced in contemporary Hawaiian society – only two percent of the state's residents obtain a hunting license – it is a visible and common occurrence across the state. Pig hunting, in particular, is a cherished modern practice for island sportsmen, including some whose subsistence depends to greater or lesser extent on wild game. Pig hunting in heavy cover is usually accomplished with the use of dogs, and the required training, feeding and care for these animals can be a difficult and expensive task. The dogs locate, chase, grab, or bay the game, which is then typically dispatched by the hunter with a gun or knife.<sup>xxii</sup> These techniques are derived directly from western and European pig hunting practices, incorporated over the last 150 years in Hawai'i, and passed down through family generations.

### **Striking a balance**

The *pua'a* plays an important role in Hawaiian history; from their early position as a domesticated food source and important cultural symbol, to their more recent role in recreational and subsistence hunting, they have become part of local culture. As we move forward in conservation, it is important that we understand this historical and cultural context to maintain a proper place for the *pua'a* in modern society. As with all resources, proper management and application is the key to maintaining balance.

Today we face the continued destruction of native forest, and risk losing an irreplaceable natural and cultural resource. Since the onset of human arrival, more than half of Hawaii's native forests have been lost. Feral pigs are widespread in the world, and in no danger of extinction. *Pua'a* were valuable cultural resources, but in ancient times were kept away from the *wao akua*, which held so much more value to Hawaiians than a single species such as a pig. As we strive to strike a balance between protecting native Hawaiian plants and animals and our dwindling native forests and the more recent practice of game hunting, we need to reassert the value represented by the *wao akua* to protect it and the *kini akua* for the future generations.

## Sources

---

<sup>i</sup> Kirch, 1981, p. XX

<sup>ii</sup> Personal communication, SG reference

<sup>iii</sup> Diong, p. 50-51; Clarke et al. p. 9; Giffen (1977)

<sup>iv</sup> Maly, Kepa. 1998. Nā Ulu Lā'au Hawai'i (Hawaiian Forests), Kumu Pono Associates, p. 5.

<sup>v</sup> Maly, p. X; Gon; but see "In the pre-European contact era, Polynesian man-pig interaction was essentially a loose one... pigs were never contained by any method. They were 'never confined in sites, but range about in search of food' (Ellis 1831, Vol. I p. 71). The pigs herded with dogs (Cook 1784, Vol. III p. 118) acted as scavengers, and were left unattended to roam freely and without restraint." (Diong p. 70)

<sup>vi</sup> Diong, p. 73; See also: "Cook observed that pigs were abundant, formed an important part of the natives' culture, and 'were sometimes found wild in the mountains.'" (Diong p. 61)

<sup>vii</sup> Beaglehole, 1967, p.

<sup>viii</sup> Tomich, p. 123; Stone, p. 143; Diong, p. 61

<sup>ix</sup> Stone, C.P. 1990, Feral Pig (*Sus scrofa*) Research and Management in Hawaii, pub info

<sup>x</sup> Need citation discussing reversion to feral status

<sup>xi</sup> Stone, p. 142; Diong

<sup>xii</sup> Hess?

<sup>xiii</sup> Kamapua'a lit.

<sup>xiv</sup> Maly, Kepa. 'Āina a me ke Kai: Hawaiian Land And Ocean Use Practices, Kumu Pono Associates website: <http://www.kumupono.com/mahele.htm>, accessed 08 March 2007.

<sup>xv</sup> Maly

<sup>xvi</sup> Kamapua'a publications by Kahiolo, Charlot, Kame'eleihiwa, akana-Gooch, etc.

<sup>xvii</sup> Maly, unpublished historical notes, Pukui & Elbert Glossary of Hawaiian Gods 1973.

<sup>xviii</sup> Osorio 2002 Dismembering Lahu.

<sup>xix</sup> Dorman, *History of Axis Deer in Hawaii*, 1996. University of Hawaii, website:

<http://www.botany.hawaii.edu/bot350/1996/Dorman/dorman.htm>, accessed 11 March 2007.

<sup>xx</sup> Cox, Thomas R. *The Birth Of Hawaiian Forestry: The Web Of Influences*, 1991, Hawai'i State Division of Forestry and Wildlife website: <http://www.state.hi.us/dlnr/dofaw/pubs/history.html>, accessed 01 March 2007.

<sup>xxi</sup> Maly, p. 4

<sup>xxii</sup> State of Hawai'i, Department of Land and Natural Resources, Division of Forestry and Wildlife. *Technical Report No. 07-0: Review of Methods and Approach for Control of Non-native Ungulates in Hawai'i*, 01 March 2007.

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

MOVANTS ROBINSON FAMILY  
PARTNERS AND GAY & ROBINSON,  
INC.'S MOTION FOR LEAVE TO FILE  
AN *AMICUS CURIAE* BRIEF

**DECLARATION OF BRUCE B. ROBINSON**

I, Bruce B. Robinson, do declare as follows:

1. I am Chairman of the Board of Gay & Robinson, Inc. and Chairman of the Management Committee of Robinson Family Partners.
2. I make this Declaration in support of the Robinson Family Partners and Gay & Robinson, Inc.'s *amicus curiae* brief based on my personal knowledge and would be competent to testify to the statements contained herein.
3. Kupo Ridge, where Kui Palama was caught hunting on January 17, 2011, is located in the *ili* of Manuahi ("Subject Property") which, together with the *ili* of Koula make up the *mauka* portion of the *ahupua'a* of Hanapepe on the island of Kaua'i. My family purchased the *ili* of Koula in 1865 and the *ili* of Manuahi in 1878.
4. The Robinson Family currently owns more than 50,675 acres of land on southwest Kauai, and members of the Robinson Family also own the entire island of Ni'ihaupolu. The ancestors of the Robinson Family began acquiring these lands in 1864.



5. During the period of the Hawaiian Monarchy, my ancestors were the *konohiki* of their land holdings on Kaua'i and Ni'ihau. Since that time my family, as their descendants, has continued to act as the steward of these lands. We have sought to preserve the conservation and agricultural uses of these lands.

6. On Ni'ihau, members of the Robinson Family continue to preserve a traditional way of life for the native Hawaiian community, including the continued use of the Hawaiian language and cultural practices.

7. At no time during my family's stewardship of the Subject Property and the surrounding lands we own, have we allowed for anyone to enter the land without permission and hunt wild pigs. My family has granted permission to hunt game on our property on a discretionary basis. We have usually allowed others to hunt on our property in exchange for something from the prospective hunters, most of whom are tenants on our properties.

8. We have consistently sought to have arrested and prosecuted anyone found hunting on our land without our permission. For example, on or about July 13, 2011, Gay & Robinson, Inc. employees caught two other members of the Palama family hunting on Robinson Family property. We alerted the police and the poachers were arrested and charged with criminal trespass.

9. Neither I nor anyone else associated with the Robinson Family has ever consented to allow Kui Palama to hunt on any properties owned by the Robinson Family.

[Balance of page intentionally left blank.]



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

DATED: Kaumakani, Kauai, Hawaii, December 5, 2012.



BRUCE B. ROBINSON

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

MOVANTS ROBINSON FAMILY  
PARTNERS AND GAY & ROBINSON,  
INC.'S MOTION FOR LEAVE TO FILE  
AN *AMICUS CURIAE* BRIEF

**DECLARATION OF ALAN ROBINSON**

I, Alan Robinson, do declare as follows:

1. I am a vice president of Gay & Robinson, Inc. and a partner in Robinson Family Partners.
2. I make this Declaration in support of the Robinson Family Partners and Gay & Robinson, Inc.'s *amicus curiae* brief based on my personal knowledge and would be competent to testify to the statements contained herein.
3. I have known Kimo Palama, Kui Palama's uncle, since 1988, and have spoken with him on a number of occasions.
4. On October 16, 2012, I received a voice message from a person whose voice I recognized as that of Kimo Palama. In the voice message, Kimo Palama stated, among other things, that "we got nothing to lose" and "don't mess with my family what not and you will be safe."

5. Later on October 16, 2012, Kimo Palama left another voice message for me in which he said, among other things, "I'm going to tell you this one more time . . . you messed with the wrong family."

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

DATED: Kaumakani, Kauai, Hawaii, December 5, 2012.

  
\_\_\_\_\_  
ALAN ROBINSON

S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

CR. NO. 11-1-0116

Plaintiff-Appellant,

vs.

KUI PALAMA,

Defendant-Appellee.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing documents has been duly served either electronically or by U.S. mail, postage prepaid, to the last known address on the date indicated below.

JUSTIN F. KOLLAR, ESQ.  
Prosecuting Attorney  
3990 Kaana Street, Ste. 210  
Lihu‘e, HI 96766

and

JOHN H. MURPHY, ESQ.  
Deputy Prosecuting Attorney  
3990 Kaana Street, Ste. 210  
Lihu‘e, HI 96766

Attorneys for Appellant  
STATE OF HAWAI‘I

DANIEL HEMPEY, ESQ.  
Hempay & Meyers LLP  
3175 Elua Street, Suite C  
Lihu‘e, HI 96766

Attorney for Defendant-Appellee  
KUI PALAMA

DATED: Honolulu, Hawaii, December 11, 2012.

/s/ Eric A. James

ERIC A. JAMES  
TIM LUI-KWAN  
MITCHELL D. WEBBER

Attorneys for Movants  
ROBINSON FAMILY PARTNERS and  
GAY & ROBINSON, INC.