

WRITTEN TESTIMONY OF LE'A MALIA KANEHE, ESO.
SUBMITTED TO THE STATE OF HAWAII BIOPROSPECTING COMMISSION

**C/O OFFICE OF HAWAIIAN AFFAIRS
NATIVE RIGHTS, LAND AND CULTURE DIVISION**

For the Inaugural Meeting of the Commission

March 16, 2007

9:30am – 2:00pm

Office of Hawaiian Affairs Board Room

711 Kapi'olani Blvd., Suite 500

Honolulu, HI 96813

Aloha Commissioners,

Please accept this written testimony for the record of your inaugural public hearing.

Let me begin by congratulating all of you on your nominations and appointments to this very important Bioprospecting Commission. As commissioners you have a vital role to play in the protection of Hawai'i's greatest natural resource, our biodiversity.

I would also like to take this opportunity to express my thanks to the Office of Hawaiian Affairs for generously offering to host this Commission and provide the necessary staff and resources to accomplish the administrative needs of the Commission. This effort by OHA should not just be seen as an initiative by a state agency to facilitate the work of the Commission on behalf of other state agencies for the benefit of Native Hawaiians and the general public, but it should be seen as a show of good faith by the Native Hawaiian peoples for whom OHA serves as trustee over our monetary, real estate and other trust assets.

It is important at the outset to recognize that the establishment of this Commission is the result of dedication by Native Hawaiian organizations and individuals who worked tirelessly with very little financial and human resources. My utmost mahalo and respect goes to them for having the vision, commitment and passion for this issue. I also wish to acknowledge those legislators who have supported the various bioprospecting bills over the past few years and especially those who brought HCR 193, H.D. 1 (2006) to fruition and established this Commission. Due acknowledgement and thanks also goes to Governor Lingle for her support and efforts to ensure that the appointments of Commissioners and her commitment to see the mission of this body is fully executed.

Thank you for this opportunity to submit written testimony as I am unfortunately unable to appear in person. My name is Le'a Malia Kanehe. I am Kanaka Maoli born and raised in Honolulu, however my genealogy on my father's side is from Wainiha, Kaua'i and Kohala, Hawai'i. I am a graduate of Punahou School (1994), the University of Hawai'i-Manoa Kamakakuokalani Center for Hawaiian Studies (B.A. 1998), UH William S. Richardson School of Law (J.D. 2001), and University of California-Berkeley Boalt Hall

School of Law (LL.M. 2003). Although I resided nearly all my life in Honolulu, since October 2004 I have lived and worked on the Pyramid Lake Paiute Tribe's Reservation in Northwestern Nevada (near Reno). I moved to Pyramid Lake to work on issues of biopiracy, including bioprospecting, Indigenous knowledge protection, genetic engineering, and genetic research on Indigenous peoples. I work as Legal Analyst for the Indigenous Peoples Council on Biocolonialism (IPCB), which is a non-profit organization created to assist Indigenous peoples in the protection of their genetic resources, Indigenous knowledge, and cultural and human rights from the negative effects of biotechnology.

Prior to my move and work with IPCB, I did legal advocacy work and legal research with Kanaka Maoli community organizations on issues of Native Hawaiian land rights, self-determination and genetic material and traditional knowledge protection. In 2002, I drafted the first resolution introduced by the Waikiki Hawaiian Civic Club to the Association of Hawaiian Civic Clubs, which was adopted at Convention calling for a moratorium on bioprospecting in the State of Hawai'i. I served as the Association's first chairperson of its Bioprospecting Taskforce. I worked on the Native Hawaiian bioprospecting lobbying campaign at the legislature during the 2003 and 2004 legislative sessions, including during employment as a staff attorney at Native Hawaiian Legal Corporation.

I have advocated in a number of international forums for the protection of Indigenous peoples' rights to their genetic material (human and non-human) and traditional, indigenous knowledge, including at meetings of the Convention on Biological Diversity, the World Intellectual Property Organization, and the United Nations Permanent Forum on Indigenous Issues. I have also done independent legal consulting work for North American tribes, indigenous organizations and Pacific regional organizations on issues related to biopiracy, access to genetic resources, and Indigenous knowledge protection. I am currently a fellow at the Center for Excellence in Native Hawaiian Law at the UH School of Law developing a course on biocolonialism to be taught in the near future at the law school. With these opportunities and experiences in Hawai'i, in the United States, and internationally I have become very familiar with many of the issues related to bioprospecting, and in particular, the problems Indigenous peoples face in protecting their rights and interests.

In my work I have undertaken research, writing and teaching related to biocolonialism – the extension of the forces of colonization to both human and non-human biological resources and associated traditional knowledge. Globally, within the United States, and locally in Hawai'i, Indigenous peoples are concerned about the appropriation, genetic modification, and privatization of genetic samples taken from humans, plants, and other living organisms within their territories. This growing global phenomenon has been called "biopiracy." The Convention on Biological Diversity (CBD) was created as the first international, multi-lateral environmental treaty with a primary objective to address and prohibit biopiracy. However, what the CBD has done is to facilitate access to Indigenous peoples' traditional territories and the vast biodiversity and genetic resources therein.

Under the guise of prohibiting biopiracy and regulating bioprospecting, nation states are in the midst of negotiating new international laws to govern the buying and selling of non-human genes (the technical name is "International Regime on Access and Benefit Sharing"). Furthermore, the World Intellectual Property Organization is developing new standards for cultural property and traditional knowledge in a commercial context. The CBD and WIPO atmosphere is compounded by international trade agreements such as the Trade-Related Intellectual Property (TRIPS) agreement of the World Trade Organization (WTO), which requires the patenting of genes. Although the United States is not a party to the CBD, it remains the major player in the international legal arena on access to genetic resources. U.S. intellectual property laws are being harmonized around the world through the WTO-TRIPs Agreement. In the U.S. there is no federal law or regulations governing bioprospecting in areas under state jurisdiction, therefore states have the right, and I would argue, responsibility, to protect the genetic resources within their boundaries.

Of more than 22,000 known species that inhabit the Hawaiian islands, 8,850 are found nowhere else in the world. Within our biodiversity, researchers are interested in everything from microorganisms that grow in deep sea vents of Lo'ihi, to volcano vents at Kilauea, from the medicinal properties in plants to the properties within fish that allow them to function in extremely cold, deep sea environments. This makes Hawai'i a prime target for bioprospecting. And it also means Hawai'i is in crucial need of bioprospecting legislation to regulate the research and industry and ensure protection of Native Hawaiian rights, as well as the rights and interests of the general public and the State.

Any time bioprospecting is undertaken there is the risk and very strong probability that the genetic material accessed and utilized will be privatized. This situation creates a scenario where holders of biodiversity are pressured to sell the genetic material and any associated traditional knowledge. While there is a possibility of some economic development, the real beneficiaries of any bioprospecting benefit sharing arrangement are the research institutions and biotech corporations and their shareholders.

Privatization of genetic material is not much different than privatization of land. Once it's sold it is permanently alienated. As a result of the 1848 Mahele and 1893 Overthrow of our sovereign kingdom, Native Hawaiians have been largely dispossessed of their rights and interests in our lands. The last thing we need is a genetic resources and traditional knowledge mahele, which is what bioprospecting legislation could be in its worst terms. It is essential that this Commission ensure that a second mahele is not perpetrated on the Native Hawaiian people.

The following recommendations are provided as essential first steps for this Commission to undertake in its future work.

Recommendations

1. Conduct expert training for the Commissioners on all aspects of bioprospecting, including but not limited to:

- A review of international, U.S., and Hawai'i laws related to access to and utilization of genetic resources;
 - Indigenous peoples' rights relevant to genetic resources and Indigenous knowledge;
 - Understanding the process of research and development from initial collection to a possible final product;
 - Intellectual property rights; and
 - The unique issues and circumstances of marine bioprospecting.
2. Conduct an inventory of bioprospecting in Hawai'i, including on any past, present and planned activities undertaken by the University of Hawai'i, the State of Hawai'i, and private corporations operating with permission of the State or in cooperation with any state agency or entity, including the University of Hawai'i. The purpose of this inventory is to provide a possible scope for future regulation by gaining an accurate account of what types and extent of activities might be subject to future regulation.
 3. Hold public hearings on all islands, with at least 2 on Kaua'i, O'ahu, Maui, and Hawai'i, in order to provide all Native Hawaiians and the general public with the opportunity to provide testimony about their views on bioprospecting in Hawai'i and make recommendations to the Commission.
 4. Invite all relevant state agencies and commissions to participate as official observers of the Commission, including the Kaho'olawe Island Reserve Commission. There are certainly other state entities that are not represented on this Commission who could provide expertise and advise on issues under their jurisdiction that relate to bioprospecting.

Mahalo for your consideration of this testimony and recommendations for the future work of the Commission.

Aloha,



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