

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

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

Submitted April 25, 2007
For the Second Meeting of the Commission
April 27, 2007
10:00am – 12:00pm
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 second meeting.

I have prepared a list of issues that reflect key concerns that should be fully researched and discussed by the Commission (see Appendix). These issues are organized according to the five areas of policy development set out in HCR 193 HD1 (2006), which the Commission has been requested to prepare recommendations regarding, namely:

- (1) Prior informed consent;
- (2) Equitable benefit-sharing;
- (3) Bio-safety protocols;
- (4) A permitting and licensing process; and
- (5) Cultural rights for the use of Hawaii's biodiversity.

I have included a "Miscellaneous" category for issues that do not clearly fall within any of the areas set out by the Legislature. Many of the issues in this category are not, however, just tangential issues. In many respects, they are among the most fundamental and crucial issues that need discussion and resolution by all the rights holders and stakeholders.

As you will surely recognize, the issues are numerous and in many cases complex. I base these issues on my experience both in Hawai'i, the U.S., and internationally. These are issues that nation-states, local governments, and Indigenous peoples are grappling with around the world. The answers are not easy. Hawai'i is unique in many ways, but not so different in other ways to other places dealing with bioprospecting. There are experiences and models that have been developed elsewhere that could provide some ideas for policy development in Hawai'i. Similarly, there are laws, and regulations that have been developed by governments and Indigenous peoples elsewhere that could be applicable to Hawai'i's situation. In the end, Hawai'i will require a *sui generis* approach

that addresses our unique circumstances, including the public trust and Native Hawaiian rights.

As I mentioned in my testimony submitted for your first meeting, public hearings are an essential means to gather information and further discussion on these issues.

Mahalo for taking this testimony and the list of issues into consideration during your continuing deliberations.

APPENDIX

List of Key Issues for Consideration in Policy Development on Bioprospecting in Hawai'i

Note: These issues below are divided into the five categories that the Legislature of the State of Hawai'i created in HCR 193 HD1 (2006) for the Temporary Advisory Commission on Bioprospecting to address. A sixth category of "Miscellaneous" has been included for issues that do not clearly fall within any of the legislatively proscribed categories.

(1) Prior informed consent

1. Who has the right to prior informed consent?
2. Do the Native Hawaiian peoples want to sell genetic material? Should they?
 - If so, what rights do they give up?
 - Will Hawaiian customary law, principles, values and practices be used to inform decision making about whether or not to commodify genetic material or Indigenous, traditional knowledge?
3. What rights, both procedurally and substantively, do Native Hawaiians have in an informed consent process?
4. What rights, both procedurally and substantively, does the general public have in an informed consent process?
5. How will other rights holders in transboundary genetic material and traditional knowledge be addressed in the regulatory process?
 - How will genetic material derived from indigenous species be regulated (found in Hawai'i, but also across the Pacific region such as noni, kava, taro, etc.)?
 - What rights do Pacific Island nations, territories and Indigenous peoples have in those indigenous species and or Indigenous, traditional knowledge? What if they've been hybridized? What if there are different varieties that share some genetic makeup, but not all?
 - How will marine genetic material be regulated given that it can traverse across international boundaries and international national boundaries?

(2) Equitable benefit-sharing

1. Will the State share in benefits derived from the utilization of the genetic material bioprospected in the State?
2. Who will be parties to a benefit sharing agreement?

- State and corporation? UH and corporation? State, OHA, and corporation? Corporation and Indigenous, traditional knowledge holder(s)?
3. Who will be beneficiaries to a benefit sharing agreement?
 4. Will the Native Hawaiian peoples share in benefits derived from the utilization of the genetic material bioprospected in the State?
 5. Will the Native Hawaiian peoples share in benefits derived from the utilization of their Indigenous, traditional knowledge?
 6. Monetary benefits, such as upfront payments, milestone payments, royalties, designated funding to support conservation efforts in the State?
 7. Nonmonetary benefits, such as collaborative research opportunities, training for State and UH scientists, scholarships and/or internships for UH students, technology transfer, tuition waivers for Native Hawaiians, land title or land management secured for the Native Hawaiian people?

(3) Bio-safety protocols

1. Will “bioprospecting” include genetic material that may be sought for genetic engineering/genetic modification purposes?
2. If so, will genetic engineering be subject to state EIS laws? Will cultural impacts be considered?
3. Will endemic and indigenous species of Hawai`i be prohibited from genetic engineering?
4. What measures will be taken to protect the environment from release?
5. What public health measures will be taken to protect humans?
6. Will genetic engineering sites be disclosed to the public?

(4) A permitting and licensing process

1. Where will regulation apply?
 - *In-situ* collecting:
 - a. All state lands, submerged lands, and waters?
 - b. “Ceded lands”?
 - c. Lands where title is held by the University of Hawai`i?
 - d. Hawaiian Home Lands?
 - e. Kaho`olawe Island Reserve?
 - f. Private property?
 - *Ex-situ* collecting:
 - a. State *ex-situ* collections? (i.e, collected in Hawai`i, but held in UH collections)
 - b. Private *ex-situ* collections? (i.e, botanical gardens and/or green houses where collections are from State lands, but are now maintained *ex-situ*)
 - What is the relationship between lands and waters under federal jurisdiction (i.e, national parks, military, EEZ beyond state jurisdiction, NWHI) and state

lands and waters? Will an agreement be entered into between the State and Federal government delegating authority to the State and assigning rights to derive benefits?

2. Which state agency should have regulatory authority?
 - DLNR? DBEDT? OHA? An interagency authority? A new regulatory agency?
 - How will regulations be enforced?
3. What regulatory processes and measures will be used?
 - Permitting process (i.e, prohibited unless permit issued? Under what conditions would a permit be issued?
 - Material transfer agreements (MTA)?
 - Benefit sharing agreements?
 - Certificates of origin/source/legal provenance?
 - Will there be a mechanism for input from Native Hawaiians?
 - Will there be a mechanism for input from the general public?

Cultural rights for the use of Hawai`i's biodiversity

1. How will the rights of the Native Hawaiian peoples be recognized and protected?
 - As equitable title holders in "ceded lands" (including submerged lands)?
 - As Indigenous, traditional knowledge holders related to the genetic material ?
2. Will the Native Hawaiian peoples have rights in genetic material even where there is no clear link to Indigenous, traditional knowledge (i.e, such as a microorganism dredged from the seafloor/submerged lands)?
3. Will the Native Hawaiian peoples have rights in genetic material where there is Indigenous, traditional knowledge related to the area in which the genetic material is sought for access/obtained? (i.e, scrapping a sample from the sides of a volcano vent?)

Miscellaneous Issues

1. How should bioprospecting be defined? What activities should it cover?
 - Should it only cover commercial activity?
 - Should it cover academic research?
 - Will it cover activities that are seeking to isolate genetic traits and apply these to pharmaceutical, chemical, or other industrial uses?
2. Can bioprospecting occur without patenting (exclusive ownership of) life forms?
3. What would the scope of legislation cover?
 - Nonhuman genetic material (plant, animal, microorganism)?
 - Human genetic material?

- Indigenous, traditional knowledge?
 - Will it cover bioprospecting for food and agriculture uses?
 - Should it cover use of nonhuman biological material used for natural products and supplements (i.e, ground `awa root, pressed noni juice, ground mamake leaves)?
 - Will it include research into Indigenous, traditional knowledge related to the medicinal or other use of indigenous and endemic species?
4. How will intellectual property rights to the genetic material, products and/or derivatives be vested?
- In the bioprospector? (Corporation? UH?)
 - Held by the bioprospector and licensed to the State?
 - What about data derived from the genetic material?
5. How will intellectual property rights to Indigenous, traditional knowledge, products or derivatives be vested?
- Will the Native Hawaiian people remain the owners/custodians?
 - Will individual Native Hawaiians who share Indigenous, traditional knowledge hold intellectual property rights?
 - Will the Native Hawaiian people be required to release all rights to any future commercial use of the knowledge?
 - Will they license use of the knowledge?