

*Na Wai E Ho‘ōla i Nā Iwi? Who Will Save the Bones*¹:
Native Hawaiians and the Native American Graves
Protection and Repatriation Act

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*Kapu ka haloa ku ma ka pe‘a*²

The Haloa that grow by the edge of the patch became sacred.³

Kanu ia Haloa ulu hahaloa

¹ See MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 104 (rev. ed. 1986).

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² MARTHA WARREN BECKWITH, THE KUMULIPO: A HAWAIIAN CREATION CHANT 233 (1951).

³ KEAULUMOKU, THE KUMULIPO: A HAWAIIAN CREATION MYTH 69 (Liliuokalani trans., Pueo Press 1978) (1897).

Plant the Haloa, the leaves will grow tall;
O ka lau o Haloa i ke ao la
 So grew the sprout of Haloa in the day and
Pu—ka—
 Thrived.

INTRODUCTION

According to the Kumulipo,⁴ a sacred creation chant of the Native Hawaiian people, the first burial was of Haloanaka, the stillborn son of the gods Wakea and Ho‘ohokukalani.⁵ In Hawaiian, the word *kanu* means “to bury and to plant,”⁶ and from Haloanaka’s burial

grew the first *kalo* (taro), our staple food. Their next son was also named Haloa and it is from him that Native Hawaiians, *kānaka ‘oiwi* (people of the bone), descend. This *mo‘olelo* (story)⁷ establishes the interconnection, the interdependent relationship between the gods, the land, and the people.⁸

The union of *mana* (divine power)⁹ that derived from the burial of ancestors brought physical and spiritual growth.¹⁰ Native Hawaiians

⁴ *Kumulipo* means origin genesis, source of life, mystery. PUKUI & ELBERT, *supra* note 1, at 182.

⁵ See also KEPELINO, KEPELINO’S TRADITIONS OF HAWAII 192 (Martha Warren Beckwith ed., Bishop Museum Press, rev. ed. 2007) (c. 1830-1878); SAMUEL MANAIKALANI KAMAKAU, RULING CHIEFS OF HAWAII 241 (Kamehameha Schools, rev. ed. 1992) (c. 1815-1876); DAVIDA MALO, KA MO‘OLELO HAWAI‘I: HAWAIIAN TRADITIONS 185 (Malcolm Naea Chun trans., First Peoples’ Productions, 2006); Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 36 (2002); MARY KAWENA PUKUI ET AL., NĀNĀ I KE KUMU: LOOK TO THE SOURCE 3 (1972); *contra* SAMUEL MANAIKALANI KAMAKAU, TALES AND TRADITIONS OF THE PEOPLE OF OLD: NĀ MO‘OLELO A KA PO‘E KAHIKO 131 (Mary Kawena Pukui trans., Bishop Museum Press, reprint 1991) (1865) (naming the first man as Kāne-huli-honua).

⁶ EDWARD HALEALOHA AYAU, ROOTED IN NATIVE SOIL *in* IMPLEMENTING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT 53, 53 (Roxana Adams ed., 2001); see also Nihipali, *supra* note 5, at 36.

⁷ *Mo‘olelo* is a story, tale, myth, history, tradition, literature, legend, journal, log, yarn, fable, essay, chronicle, record, article. From *mo‘o ‘ōlelo*, succession of talk; all stories were oral, not written. PUKUI & ELBERT, *supra* note 1, at 254.

⁸ Nihipali, *supra* note 5, at 36 (emphasis and internal citations added).

⁹ *Mana* means supernatural or divine power, mana, miraculous power. PUKUI & ELBERT, *supra* note 1, at 235.

¹⁰ Edward Halealoha Ayau, *Restoring the Ancestral Foundation of Native Hawaiians: Implementation of the Native American Graves Protection and Repatriation Act*. 24 Ariz. St. L.J. 193, 216 (1992).

believe that a person's *mana* was contained in the *iwi*¹¹ (bone) even after death.¹² Thus, the “bones of the dead were guarded, respected, treasured, venerated, loved or even deified by relatives; coveted and despoiled by enemies.”¹³ The role of *iwi* as central to Native Hawaiian identity are embodied in the words *kulāiwi*¹⁴ (homeland) and ‘*ōiwi*¹⁵ (native).¹⁶ In fact, the people's right to their homeland was customarily considered perpetual because their ancestors were buried within the land.¹⁷

This paper will argue that although the application of the Native American Graves Protection Act (“NAGPRA”) in Hawai‘i is problematic, it is imperative that Native Hawaiians include the care of ancestral remains and cultural objects as integral components of their cultural and political assertion of sovereignty. Section I demonstrates two events where

¹¹ *Iwi* means bone. PUKUI & ELBERT, *supra* note 1, at 104.

¹² EDWARD HALEALOHA AYAU & TY KĀWIKAWIKA TENGAN, KA HUAKA ‘I O NĀ ‘ŌIWI: THE JOURNEY HOME in THE DEAD AND THEIR POSSESSIONS: REPATRIATION IN PRINCIPLE, POLICY AND PRACTICE 170, 177 (Cressida Fforde et al. eds., 2002); *see also* EDWARD HALEALOHA AYAU, NATIVE HAWAIIAN BURIAL RIGHTS in NATIVE HAWAIIAN RIGHTS HANDBOOK 245, 247 (Melody Kapilialoha MacKenzie ed., 1991) (“The manifestation of immortality was in *nā iwi*. Only *nā iwi* survived and remained the lasting embodiment of an individual.”).

¹³ PUKUI [ET. AL], *supra* note 5, at 107.

¹⁴ *Kulāiwi* means native land, homeland; native. PUKUI & ELBERT, *supra* note 1, at 179.

¹⁵ ‘*Ōiwi* means native, native son. *Id.* at 280.

¹⁶ AYAU, NATIVE HAWAIIAN BURIAL RIGHTS, *supra* note 12, at 177; *see also* Kelikokauaikekai R. Hoe, S.E.K. Papa‘ai: A Study of the Survival of Maoli Beliefs in Mele of the Nineteenth Century (May 2004) (unpublished M.A. thesis, University of Hawai‘i) (on file with author); Nihipali, *supra* note 5, at 34, 36.

¹⁷ KAMAKAU, RULING CHIEFS OF HAWAII, *supra* note 5, at 376 (emphasis added) (“According to the opinion of learned men the land belongs to the common people, and property rights are to be vested in the commoners. In old days the inheritance of the family burial place, the caves and secret burial places of our ancestors was handed down from these to their descendant, so that wherever a death occurred the body was conveyed to its inheritance. These immovable barriers belonged to burial rights for all time. The rule of kings and chiefs and their land agents might change, but the burial rights of families survived on their lands. Here is one proof of the people's right to the land. With this right of the common people to the land is connected an inherent love of the land of one's birth inherited from one's ancestors, so that men do not [willingly] wander from place to place but remain on the land of their ancestors.”); *see also* Native American Grave and Burial Protection Act (Repatriation); NATIVE AMERICAN REPATRIATION OF CULTURAL PATRIMONY ACT; HEARD MUSEUM REPORT: HEARING BEFORE THE S. SELECT COMM. ON INDIAN AFFAIRS, 101st Cong., 2nd Sess. 81, 82 (1990) (statement of Clarence Ching, Trustee, Office of Hawaiian Affairs) (“Within the Hawaiian culture, human bones are a metaphor for the sacred bond of place and family, of mortal strength and sacred power. Hawaiian expressions of kinship and linkage to the land—*Na ‘Oiwi and Ke Kula Iwi*—refer directly to the bones and to family connections with particular areas as the Bone Land.”).

iwi were used to affirm sovereignty, thus suggesting that *iwi* is intrinsically tied to the political sovereignty of Native Hawaiians. Section II describes the history of the Native Hawaiian repatriation movement and the insertion of Native Hawaiians into NAGPRA. Sections III, IV, and V presents data relative to NAGPRA's application to museum collections, military lands, and tribal lands in Hawai'i, respectively. Section VI documents two case examples that reveal the special challenges of applying NAGPRA in the state of Hawai'i.

I. A MO'OLELO OF TWO QUEENS

Notably, the *iwi* of the king and other high-ranking chiefs were the seat of sovereignty because they housed the religious, political, and social power of the entire Hawaiian kingdom. In the wake of King Kamehameha's death, his favorite wife, Ka'ahumanu, seized the opportunity to exercise a new political power—the sovereign power of a woman. “[S]he was never centrally in control in a world where women were *noa* (nonsacred). No matter how strong her family or superior her bloodlines, she was not allowed to communicate with the gods. So she abolished the gods. Soon afterwards she was introduced to a single god who would speak directly to her . . . She created for herself a ruling role where power was hers and not the king's”¹⁸ As such, following her conversion to Christianity, Ka'ahumanu, ordered the *collection, removal, relocation, and burning* of the bones of deified chiefs from the ancient royal mausoleums of Hale o Keawe and Hale o Liloa.¹⁹ One missionary commented on Ka'ahumanu's zeal, which was directed “not to mingle her adorations with her early contemporaries and predecessors to the relics of departed mortals, but for the purpose of removing the bones . . . and consigning them to oblivion.”²⁰ Burning *iwi* was an ultimate act of desecration,²¹ traditionally reserved for defeated enemies,²² lawbreakers,²³ and outcasts. So, as “the most important convert”²⁴ in the eyes of the

¹⁸ JANE L. SILVERMAN, KAAHUMANU: MOLDER OF CHANGE 2 (1987).

¹⁹ ROGER ROSE, RECONCILING THE PAST: TWO BASKETRY KĀ 'AI AND THE LEGENDARY LĪLOA AND LONOIKAMAKAHIKI ix, 24 (1992) (“These . . . were the “remaining bones” Ka'ahumanu had caused to be destroyed by fire[.]”); *see also* KAMAKAU, RULING CHIEFS OF HAWAII, *supra* note 5, at 285 (“She went to Hawaii to dismantle Hale-o-Keawe, had the chiefs' bones burned, the house broken down, and the hidden bones of the chiefs brought out and shown publicly.”).

²⁰ ROSE, *supra* note 19, at 23.

²¹ *Id.* at 24 (“In pre-Christian times the burning of chiefly bones was a desecration considered by some a supreme insult.”).

²² PUKUI ET AL., *supra* note 5, at 109; *see also* TONI L. HAN, MOE KAU A HO'OILO: HAWAIIAN MORTUARY PRACTICES AT KEŌPŪ, KONA, HAWAI'I 16 (1986).

²³ MALO, *supra* note 5, at 46.

²⁴ ROSE, *supra* note 19, at 23.

colonizing missionaries, Ka‘ahumanu’s “unthinkably sacrilegious”²⁵ actions proved more than just her commitment to her newfound Christian faith; it was evidence of a new form of sovereignty. “Her name was heaped with abuse for this deed”²⁶ because it “struck right at the heart of Hawaiian society.”²⁷ For “at the level of the ali‘i nui (ruling chief), the ability to maintain the tranquility of the kingdom was dependent upon the degree to which the ali‘i cared for the akua (gods) and ‘aumakua”²⁸ within *kapu*²⁹ places like Hale o Keawe and Hale o Liloa. By burning the *iwi* of *ali‘i nui*, Ka‘ahumanu exercised her female *mana* and embraced Euro-American ways of thought and practice. In fact, one could argue that her *collection, removal, relocation, and burning* of the *iwi* was similar to traits of archaeology and destructive DNA analysis, scientific “instrument[s] of Western ideology . . . [that] has contributed to the exploitation . . . of Native Hawaiian people and culture.”³⁰

Just as defiling the royal bones signified Ka‘ahumanu’s abandonment of the old ways³¹ and assertion of feminine sovereignty, preserving them became a mission for Queen Lili‘uokalani following the overthrow of the Kingdom of Hawai‘i in 1893. Understanding that the *iwi* of the ruling chiefs represented the seat of sovereignty, Lili‘uokalani strived to preserve them. Currently, Mauna ‘Ala is the royal mausoleum that houses the bones of Hawaii’s highest ranking *ali‘i*.³² It stands separately as the only legally sovereign space for Native Hawaiians today. Protecting the *iwi* was so important to the Queen that she worked with “political rival”³³ Robert Wilcox to have Mauna ‘Ala withdrawn forever from all federal land laws via a 1900 joint resolution of Congress.³⁴ “It is

²⁵ M.J. HARDEN, VOICES OF WISDOM: HAWAIIAN ELDERS SPEAK 82 (1999).

²⁶ KAMAKAU, RULING CHIEFS OF HAWAII, *supra* note 5, at 322.

²⁷ ROSE, *supra* note 19, at 23.

²⁸ ‘Aumakua were family or personal gods, deified ancestors. PUKUI & ELBERT, *supra* note 1, at 32; AYAU & TENGAN, *supra* note 12, at 179.

²⁹ *Kapu* means sacred, holy, consecrated; taboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; no trespassing, keep out. PUKUI & ELBERT, *supra* note 1, at 132.

³⁰ Kathleen Leinani Kawelu, A Sociopolitical History of Hawaiian Archaeology: Kuleana and Commitment (2007) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

³¹ “She was a newly converted Calvinist who now abhorred the idea of ancient temples that deified long-dead *ali‘i*.” HARDEN, *supra* note 25, at 82.

³² *Ali‘i* means chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander. PUKUI & ELBERT, *supra* note 1, at 20.

³³ DON CHAPMAN, MAUNA ‘ALA: HAWAI‘I’S ROYAL MAUSOLEUM 12 (2004).

³⁴ *Id.* at 9; see S.J. Res. 28, 56th Cong., 38 Cong Rec. 1648, 31 Stat. 718 (1900) (reserving Mauna ‘Ala “forever for the purpose [as a royal mausoleum] to which the said

the only sovereign land in the state of Hawai‘i . . . It is sacred where they’re buried.”³⁵ Unlike other public facilities where the American flag must be displayed, Mauna ‘Ala flies the flag created by Kamehameha—the flag of the nation of Hawai‘i.³⁶ Queen Lili‘uokalani used the very laws of the government that usurped her Kingdom in order to preserve a space to contain the bones of the ruling chiefs and their families; a sovereign space that serves as a symbol of hope for, perhaps, the future restoration of the Hawaiian nation.

Indeed, Ka‘ahumanu’s acts of defilement of the chiefly bones circa 1829 and Queen Lili‘uokalani’s efforts to protect them nearly seventy years later emphasized that “[w]herever our Hawaiian ancestors are buried, an island of sovereignty exists.”³⁷ Unfortunately, as in the case of Native Americans, the United States “took our nation, prohibited our spiritual beliefs and practices, substituted our diet, banned our language, desecrated our burial grounds, stole our iwi and moepu and sapped our mana.”³⁸ With the sovereignty of the Kingdom of Hawai‘i usurped, “[t]he imposition of foreign concepts and practices in the nineteenth century served to alienate native Hawaiians from such things as spiritual beliefs, connection to land, and rights to self governance.”³⁹ American imperialism abruptly interrupted cultural traditions such as the proper care and treatment of *iwi kupuna*.⁴⁰ “When there was peace in the kingdom, the people were buried properly; when there were treacherous rulers, the bones were dug up.”⁴¹ With colonization came chaos for *iwi kupuna*.

Therefore, when NAGPRA⁴² was signed into law by U.S. President George H.W. Bush on November 16, 1990, it was an attempt by

lands have been heretofore dedicated and for which they have been heretofore used.”).

³⁵ HARDEN, *supra* note 25, at 78 (statement of Lydia Namahana Mai‘oho, the late caretaker of the Royal Mausoleum); *see also* BOB DYE, HAWAI‘I CHRONICLES II 361 (2004) (statement by Lydia Namahana Mai‘oho) (“This is also the only piece of land in Hawai‘i that is totally sovereign already. The federal legislation creating this 3.7-acre site stated that no flag but the Hawaiian flag could fly above this property and that even the federal government could place no claim on this land.”).

³⁶ *See also* CHAPMAN, *supra* note 33, at 9.

³⁷ DANA NAONE HALL, “Sovereign Ground,” in THE VALUE OF HAWAI‘I: KNOWING THE PAST, SHAPING THE FUTURE 195, 196 (Craig Howes & Jon Osorio eds., 2010).

³⁸ NIHIPALI, *supra* note 5, at 34.

³⁹ KAWELU, *supra* note 31, at 60.

⁴⁰ *Kupuna* means ancestor, grandparent, relative or close friend of the grandparent’s generation. Hence, *iwi kupuna* means ancestral bones. PUKUI & ELBERT, *supra* note 1, at 186; AYAU & TENGAN, *supra* note 12, at 179 (“The disturbance of our burials is intimately tied to colonialism . . .”).

⁴¹ *Id.*

⁴² 25 U.S.C. §§ 3001-3013 (2011).

Congress to correct the historical trauma of colonialism against native peoples.⁴³ “[F]undamentally a form of human rights legislation, the law is largely redressive in intent: it provides a legal framework within which Native Americans⁴⁴ can seek the protection of graves on federal land and the repatriation of human remains and certain cultural objects from federally funded institutions.”⁴⁵

II. THE NATIVE HAWAIIAN REPATRIATION MOVEMENT

“Repatriation, in its basic sense, is the act of returning something to its native country.”⁴⁶ Using this broad definition, the first written account of repatriation in Hawai‘i occurred on May 6, 1825, when the mahogany caskets containing King Kamehameha II (“Liholiho”) and Queen Kamamalu were repatriated from England to Hawai‘i at the behest of King George IV, following their untimely death in London from measles.⁴⁷ In a contemporary context, the narrative regarding the Native Hawaiian repatriation movement would not be complete without mentioning Hui Mālama I Nā Kūpuna ‘O Hawai‘i Nei (Group Caring for the Ancestors of Hawai‘i)⁴⁸ (“Hui Mālama”), particularly the efforts of one of its controversial leaders, Edward Halealoha Ayau. But for Ayau, inclusion of Native Hawaiians in NAGPRA would not have occurred.

The Battle of Honokahua was the critical event that spurred Native Hawaiian participation in repatriation efforts. This battle ensued when archaeological excavations began in September 1987 within the sand dunes overlooking Honokahua Bay⁴⁹ to make way for a proposed 450-room luxury resort, which is now the site of the Ritz-Carlton Kapalua Hotel on the island of Maui. “Fourteen months of archaeological

⁴³ NATIVE AMERICAN GRAVE PROTECTION ACT (REPATRIATION); NATIVE AMERICAN REPATRIATION OF CULTURAL PATRIMONY ACT; AND HEARD MUSEUM REPORT; HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 101st Cong., 2nd Sess. 1-2 (1990) (statement of U.S. Senator Daniel K. Inouye) (noting that “[o]ur discussion this afternoon is therefore not about the validity of museums or the value of scientific enquiry. Rather, this discussion is about human rights . . . it is all the more offensive that the civil rights of America’s first citizens have been so flagrantly violated for the past century . . . We are here today to seek a restoration of rights that have for so long been denied.”).

⁴⁴ *Id.* § 3001(9) (emphasis added) (defining “Native American” as a means of, or relating to, a tribe, people, or culture that is indigenous to the United States); *see also* 43 C.F.R. § 10.2(d) (defining “Native American” as a means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii).

⁴⁵ GREG JOHNSON, SACRED CLAIMS: REPATRIATION AND LIVING TRADITION 4 (2007).

⁴⁶ JOE EDWARD WATKINS, SACRED SITES AND REPATRIATION 14 (2006).

⁴⁷ CHAPMAN, *supra* note 33, at 27.

⁴⁸ NIHIPALI, *supra* note 5, at 27.

⁴⁹ KAWELU, *supra* note 31, at 93.

excavations, on a one acre section of the proposed 13.6 acre project area, had unearthed more than 870 native Hawaiian burials, with no signs of waning.”⁵⁰ While this was going on in Hawai‘i, “a young Hawaiian man, Edward Halealoha Ayau, was completing law school at the University of Colorado, at Boulder. His schooling included intensive study of federal Indian law and work with the Native American Rights Fund.”⁵¹ The countless excavations of ancestral Native Hawaiian burials compelled Ayau to return to Hawai‘i,⁵² and Hui Mālama was born “from the anguish of Honokahua.”⁵³ Native Hawaiians responded *en masse* to Hui Mālama’s call and they protested in anger and disapproval. They conducted twenty-four hour vigils at the Hawai‘i State Capitol in Honolulu, on the island of O‘ahu, complete with prayer, chanting, and the beat of the *pahu* (drums) on the hour.⁵⁴ Native Hawaiian Governor John Waihe‘e intervened and the “State paid the [private landowner] \$5.5 million for a preservation and conservation easement, protecting the land from future development, and another \$500,000 for the reburial of the human remains, and restoration of the site.”⁵⁵

The events at Honokahua coincided with Congressional consideration of NAGPRA legislation, and resulted in the inclusion of Hui Mālama and the Office of Hawaiian Affairs in NAGPRA as examples of a “Native Hawaiian organization.”⁵⁶ Ayau inserted Native Hawaiians into the national language of repatriation using his strategic position at the Congressional office of Hawai‘i Senator Daniel Inouye, then-chairman of the Senate Select Committee on Indian Affairs.⁵⁷ “As a young attorney working for Senator Daniel Inouye, [Ayau] used his knowledge of Indian law and applied it to Hawaiian peoples.”⁵⁸ Ayau was “instrumental in drafting the NAGPRA federal provisions requiring consultation with native Hawaiians” and also “drafted the state statutes, rules and regulations adopted by the [Hawai‘i] state legislature and implemented by the statewide [Island] Burial Councils.”⁵⁹ Thus, Ayau’s response to the

⁵⁰ *Id.*

⁵¹ NIHIPALI, *supra* note 5, at 28.

⁵² *Id.* at 29.

⁵³ AYAU, *supra* note 6, at 53.

⁵⁴ NIHIPALI, *supra* note 5, at 28.

⁵⁵ KAWELU, *supra* note 31, at 94; *see also* ROGER C. ECHO-HAWK & WALTER R. ECHO-HAWK, BATTLEFIELDS AND BURIAL GROUNDS: THE INDIAN STRUGGLE TO PROTECT ANCESTRAL GRAVES IN THE UNITED STATES 35-36 (1994).

⁵⁶ KAWELU, *supra* note 31, at 95.

⁵⁷ *Id.* at 95-96.

⁵⁸ NIHIPALI, *supra* note 5, at 29.

⁵⁹ *Id.*

Battle of Honokahua, coupled with the “critical mass [activism of Native Hawaiians] at the right time and the right place,”⁶⁰ propelled Native Hawaiians more visibly into the repatriation movement on the American continent. “This change marked a radical departure from the status quo of development and cultural politics [for] Hawaii.”⁶¹

III. NAGPRA AND MUSEUM COLLECTIONS

NAGPRA’s applications to natives in Hawai‘i, Alaska, and the American continent share certain similarities, but also stark distinctions, especially as applied in the Aloha State. Since its passage more than twenty years ago, the implementation of NAGPRA has yielded significant results. Museums and federal agencies, through the National NAGPRA Program Manager, are mandated to publish Notices of Inventory⁶² Completion⁶³ and Notices of Intent to Repatriate⁶⁴ in the *Federal Register* to notify and provide an opportunity for interested parties to participate in consultations to determine disposition of cultural items. In terms of success, none can refute the statistics. With respect to museum collections throughout the nation, as of March 31, 2011, a total of 1,974 notices have been published since NAGPRA’s inception, accounting for 41,278 minimum number of individuals (human remains⁶⁵), 1,019,890 associated funerary objects,⁶⁶ 148,782 unassociated funerary objects,⁶⁷ 4,321 sacred

⁶⁰ JOHNSON, *supra* note 47, at 33.

⁶¹ *Id.* at 34.

⁶² 25 U.S.C. § 3003 (defining “inventory” as an item-by-item description of human remains and associated funerary objects); *see also* 43 C.F.R. § 10.2 (g)(2).

⁶³ 25 U.S.C. § 3003(d); *see also* 43 C.F.R. § 10.9(e).

⁶⁴ 43 C.F.R. § 10.8(f).

⁶⁵ 43 C.F.R. § 10.2(d)(1) (defining “human remains” as the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony must be considered as part of that item”).

⁶⁶ 25 U.S.C. § 3001(3)(A) (defining “associated funerary objects” as objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects); *see also* 43 C.F.R. § 10.2(d)(2)(i).

⁶⁷ 25 U.S.C. § 3001(3)(B) (defining “unassociated funerary objects” as objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the

objects,⁶⁸ 962 objects of cultural patrimony,⁶⁹ 1,217 sacred objects or objects of cultural patrimony, and 292 culturally unidentifiable items.⁷⁰ Notably, as of October 2012, approximately seven percent of the culturally affiliated human remains and less than one percent of the associated funerary objects inventoried by 461 museums and Federal agencies pertain to the state of Hawai‘i.⁷¹

IV. NAGPRA AND THE MILITARY IN HAWAI‘I

In addition to its repatriation application to federally funded museums and their collections, NAGPRA also applies to cultural items excavated or inadvertently discovered on Federal land.⁷² To show compliance, federal agencies provide the National NAGPRA Program with published Notices of Intended Disposition (“NID”) so that potential consulting parties can have information on cultural items excavated or removed from federal or tribal lands. Unfortunately, federal agency compliance with respect to the inadvertently discovered and intentionally excavated cultural items provision in NAGPRA is abysmal in comparison to compliance by federally funded museums. A July 2010 report by the

objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe); *see also* 43 C.F.R. § 10.2 (d)(2)(ii).

⁶⁸ 25 U.S.C. § 3001(3)(C) (defining “sacred objects” as specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents); *see also* 43 C.F.R. § 10.2 (d)(3).

⁶⁹ 25 U.S.C. § 3001(3)(D) (defining “objects of cultural patrimony” as objects that have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group); *see also* 43 C.F.R. § 10.2 (d)(3).

⁷⁰ 43 C.F.R. § 10.9 (e)(2) (defining “culturally unidentifiable” as items for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined); U.S. DEP’T OF THE INTERIOR, NATIONAL NAGPRA PROGRAM FY2011 MIDYEAR REPORT 14 (2011), *available at* <http://www.nps.gov/nagpra/DOCUMENTS/INDEX.htm#Reports> (last visited Dec. 13, 2011).

⁷¹ National NAGPRA Online Databases: Culturally Affiliated (CA) Native American Inventories Database (2012), *available at* <http://www.nps.gov/history/nagpra/ONLINEDB/index.htm> (last visited Oct. 29, 2012); *See* E. Sunny Greer: Burying Tradition: NAGPRA in Hawai‘i (2012) (unpublished Ph.D. thesis, University of Hawai‘i) (on file with author) (providing further information specific to Hawai‘i).

⁷² 43 C.F.R. §§ 10.3-10.4.

U.S. Government Accountability Office, however, revealed that “[d]espite the fact that key federal agencies have had almost 20 years to comply with the act, they still have not fully complied.”⁷³ Moreover, only fifty-five percent of the human remains and sixty-eight percent of associated funerary objects that were published in Notices of Inventory Completion have been repatriated as of September 30, 2009.⁷⁴ Apparently, there is a huge disconnect between cultural items that are ready for repatriation and those that have been actually repatriated.

For federal land excavations as of 2010, only 111 NID have been published nationwide, accounting for 978 minimum number of individuals (human remains), 8,708 associated funerary objects, sixty-four unassociated funerary objects, and three objects of cultural patrimony.⁷⁵ The statistics for Hawai‘i up to October 2011 are even more appalling, with only six NID published, which included human remains representing a minimum number of only twenty individuals.⁷⁶ These numbers are very low, in spite of federal officials who claimed to “place a higher priority on compliance with NAGPRA section 3 (new or inadvertent discovery and intentional excavations) versus sections 5 and 6 (historical collections).”⁷⁷

Unlike other states, NAGPRA’s application to federal lands⁷⁸ is critical to Hawai‘i, considering that the U.S. military is Hawai‘i’s second largest industry after tourism.⁷⁹ Notably, the Department of Defense (“DoD”) has 119⁸⁰ sites⁸¹ throughout Hawai‘i, with real property interests

⁷³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT 153 (2010), *available at* <http://www.gao.gov/products/GAO-10-768> (last visited Dec. 13, 2011).

⁷⁴ *Id.* at 44.

⁷⁵ U.S. DEP’T OF THE INTERIOR, *supra* note 73, at 14.

⁷⁶ *See* NOTICES OF INTENDED DISPOSITION DATABASE, <http://grants.cr.nps.gov/nid/index.cfm> (last visited Dec. 13, 2011).

⁷⁷ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 77, at 28 n.42.

⁷⁸ *See* 25 U.S.C. § 3001(15)(c); *see also* 43 C.F.R. § 10.2(f)(2)(iii) (noting that NAGPRA also applies to “tribal land,” of which include the lands administered by the Department of Hawaiian Home Lands).

⁷⁹ KATHY E. FERGUSON & PHYLLIS TURNBULL, “The Military,” in *THE VALUE OF HAWAII: KNOWING THE PAST, SHAPING THE FUTURE* 47 (Craig Howes & Jon Osorio eds., 2010).

⁸⁰ *See* DEP’T OF DEF., BASE STRUCTURE REPORT FISCAL YEAR 2011 BASELINE (A SUMMARY OF DOD’S REAL PROPERTY INVENTORY) 28 (2011), *available at* www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf (last visited Dec. 13, 2011) (identifying the following sites by military component as follows: Army (28), Navy (62), Air Force (20), and Marine Corps (9)).

⁸¹ *Id.* at 4 (defining “site” as a physical (geographic) location that is or was owned by, leased to, or otherwise possessed by a Department of Defense (“DoD”) Component and explaining that each site is assigned to a single installation. A site may

in 230,622 acres statewide,⁸² occupying a staggering twenty-one percent of the entire island of O‘ahu alone.⁸³ The miniscule total of NID published in Hawai‘i is inexcusable in light of the fact that the largest number of individuals excavated in Hawai‘i was on a military base, the Marine Corps Base Hawai‘i on the island of O‘ahu.⁸⁴ The data suggests that compliance with NAGPRA is not a priority for the DoD, which appears to be the national trend for most federal agencies. After all, NAGPRA nor its implementing regulations allow for any federal agency or entity to ensure compliance by federal agencies.⁸⁵ “The civil penalties established in section 9 of NAGPRA do not apply to federal agencies; only to museums. Absent such tools, there are limited options for holding agencies that are not in compliance with the act accountable.”⁸⁶ In a state where 73.3 percent of the total amount spent in military prime contracts were for construction and service projects,⁸⁷ perhaps Congress needs to strongly consider enacting enforcement mechanisms for NAGPRA compliance by federal agencies. Sadly, NAGPRA lacks “teeth” on federal lands, which is disturbing for the state of Hawai‘i, where the military has a strong presence.

V. NAGPRA AND “TRIBAL LANDS” IN HAWAI‘I

Similar to its application to federal lands, NAGPRA applies to human remains and other cultural items inadvertently discovered or excavated on tribal lands. Lands administered by the State of Hawai‘i Department of Hawaiian Home Lands (“DHHL”) are considered “tribal lands” under NAGPRA.⁸⁸ This means that NAGPRA expressly authorizes

exist in one of three forms: (1) land only, where there are no facilities present; (2) facility or facilities only, where there the underlying land is neither owned nor controlled by the government; and (3) land and facilities).

⁸² *Id.* at 54 (noting that this amount includes the total number of acres owned by the Federal Government, as well as acreage of public land, land owned by other federal agencies, and acreage of foreign land used by the DoD. Of the 230,622 acres allotted for the DoD, the total number of acres owned by the Federal Government is 177,475 acres (seventy-seven percent)).

⁸³ Matthew Petrich, *Litigating NAGPRA in Hawai‘i: Dignity or Debacle?* 22 U. HAW. L. REV. 545 (2000).

⁸⁴ KAWELU, *supra* note 31, at 99-100.

⁸⁵ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 77, at 72.

⁸⁶ *Id.*

⁸⁷ DEP’T. OF BUS., ECON. DEV. & TOURISM, FEDERAL ECONOMIC ACTIVITY IN HAWAII 6 (2009), *available at* http://hawaii.gov/dbedt/info/economic/data_reports/federal/ (last visited Dec. 13, 2011).

⁸⁸ 25 U.S.C. § 3001(15)(c) (stating that “tribal lands” include lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Pub. L. 86-3; 73 Stat. 6)); *see also* 43 C.F.R. § 10.2(f)(2)(iii).

DHHL to exercise similar privileges and responsibilities as Indian tribes with respect to federal historic preservation activities within their land holdings. In other words, DHHL is *not* subject to Hawai'i state burial laws. Furthermore, it can establish its own Tribal Historic Preservation Office, designate its own Tribal Historic Preservation Officer ("THPO"), and apply for THPO grants authorized under the National Historic Preservation Act ("NHPA"). Specifically, DHHL can assume any or all of the functions of a State Historic Preservation Officer ("SHPO") with respect to DHHL lands, including but not limited to (1) developing a culturally appropriate comprehensive cultural resource management plan for DHHL lands; (2) identifying properties eligible for the National Register through the incorporation of Native Hawaiian values and methodologies; (3) conducting a comprehensive survey of cultural resources on DHHL lands; and (4) assisting other agencies in carrying out their preservation responsibilities, and providing culturally appropriate information, training and education to the public.⁸⁹

Even without federal recognition as a political entity or sovereign nation, DHHL interestingly has express authority under NAGPRA to exercise specific historic preservation activities on their lands; the same activities afforded to federally recognized Indian tribes on their reservations. To date, in spite of the opportunity to be a "model" for the existing Hawai'i SHPO or a future sovereign Hawaiian nation, DHHL has not notified the Secretary of the Department of Interior of any intention to assume duties of a SHPO pursuant to the NHPA, nor is it listed as a THPO on the National Association of Tribal Historic Preservation Officers.⁹⁰ Instead, DHHL has registered itself as merely another "Native Hawaiian organization" for consultation purposes under NAGPRA.⁹¹ Indeed, DHHL has not reached its full potential in terms of adequately protecting the cultural resources within its own tribal lands.

VI. A TALE OF TWO NAGPRA CASES IN HAWAI'I

Undoubtedly, NAGPRA "helped pave the way for repatriation journeys"⁹² of *iwi kupuna* and other cultural items. The process has provided Native Hawaiians in the repatriation movement with opportunities to rediscover and relearn their native cultural identity, spirituality, protocols, language, as well as experience and rely upon

⁸⁹ See 16 U.S.C. § 470a(b)(3) (listing specific functions of a SHPO under the National Historic Preservation Act).

⁹⁰ See NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS, http://www.nathpo.org/THPO/state_list.htm (last visited Dec. 10, 2011).

⁹¹ See THE NATIVE AMERICAN CONSULTATION DATABASE, <http://grants.cr.nps.gov/nacd/index.cfm> (last visited Dec. 10, 2011).

⁹² AYAU & TENGAN, *supra* note 12, at 172.

Native Hawaiian methods of indigenous knowledge and understanding.⁹³ NAGPRA's application in Hawai'i, however, has been "a double-edged sword. It has been healing and contentious, helpful and conflicting."⁹⁴ Some call it a "disaster"⁹⁵ and believe that "NAGPRA fails"⁹⁶ in Hawai'i.

One need only review the record of disputes and litigation regarding Native Hawaiian cultural items to come to the conclusion that NAGPRA is problematic when applied to Hawai'i. Of the total disputes where recommendations have been issued by the NAGPRA Review Committee⁹⁷ up to June 2011, fifty-eight percent involved Native Hawaiian cultural items.⁹⁸ From this percentage, eight-six percent of the disputes were brought to the NAGPRA Review Committee by Hui Mālama,⁹⁹ a Native Hawaiian organization¹⁰⁰ expressly recognized as such under the Act.¹⁰¹ Hui Mālama members consider themselves "the

⁹³ *Id.* at 172, 185; *see also* AYAU in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 12, at 264 n.39; AYAU, *supra* note 6, at 55; NIHIPALI, *supra* note 5, at 29.

⁹⁴ NIHIPALI, *supra* note 5, at 37.

⁹⁵ Vicki Viotti, DECISION TODAY ON HAWAIIAN ARTIFACTS, HONOLULU ADVERTISER, Mar. 15, 2005, <http://the.honoluluadvertiser.com/article/2005/Mar/15/ln/ln07p.html/?print=on> (statement of NAGPRA Review Committee member, Garrick Bailey) ("The law doesn't even work that well with the eastern tribes . . . And it's even more of a disaster with the Hawaiians.").

⁹⁶ PETRICH, *supra* note 87, at 548.

⁹⁷ 25 U.S.C. § 3006; *see also id.* §§ 3003-3005 (establishing the NAGPRA Review Committee as an advisory committee. The Committee is subject to the Federal Advisory Committee Act, and has authority to monitor and review the implementation of the inventory and identification process and repatriation activities under. The National NAGPRA Program provides staff support to the Review Committee).

⁹⁸ *See* NAGPRA Review Committee Findings and Recommendations, *available at* http://www.nps.gov/history/nagpra/REVIEW/Find_and_Rec.htm (last visited October 9, 2012).

⁹⁹ *Id.*

¹⁰⁰ 25 U.S.C. § 3001(11) (defining "Native Hawaiian organization" as any organization which serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has expertise in Native Hawaiian affairs, and shall include the Office of Hawaiian Affairs and Hui Mālama I Nā Kupuna O Hawai'i Nei).

¹⁰¹ *See* Haw. Admin. R. § 13-300-2 [1996] (expressly listing Hui Mālama in Hawaii state burial laws as an "appropriate Hawaiian organization." A report by the Hawaii State Auditor recommended that Hui Mālama be removed "as the only example of an appropriate organization because it suggests singularity and places an official imprimatur on its behavior and practices. Statutory law should avoid references to private organizations"); *see* The Auditor State of Hawaii, Rep. No. 04-15, Investigation of the Department of Land and Natural Resources' Process for Developing Recommended Candidate Lists for Appointment to the Island Burial Councils 42 (2004), *available at* <http://hawaii.gov/auditor/Years/2004reports.htm> (last visited Dec. 13, 2011).

enforcers of NAGPRA”¹⁰² because they were instrumental in drafting NAGPRA provisions regarding Native Hawaiians, as well as state burial statutes, rules, and regulations in Hawai‘i.¹⁰³ Notwithstanding, the NAGPRA Review Committee statistics reveal “how much of its energy has been devoted to mediating Native Hawaiian disputes.”¹⁰⁴ Thus, it is no surprise that “Native Hawaiians have been involved in federal court proceedings more than any other group”¹⁰⁵ regarding issues arising under NAGPRA. In fact, Native Hawaiians are infamously known in the repatriation movement as being “the only group that has had one of their members incarcerated for his repatriation activities.”¹⁰⁶ An analysis of the following two Hawai‘i cases underscores the reality that NAGPRA “fails to effectively address the distinct cultural and legal differences . . . [of] Native Hawaiians[.]”¹⁰⁷

The *Na Iwi O Na Kupuna O Mokapu v. Dalton*¹⁰⁸ (“Mokapu”) reveals the disconnect between the “express intent of Congress and the laborious, some would say humiliating, process of repatriation.”¹⁰⁹ The Mokapu sand dunes on the island of O‘ahu (also known as the Mokapu Burial Area) holds the morbid distinction of being the most heavily disturbed burial site in the Hawaiian archipelago for the excavation and relocation of 1,582 individuals from Mokapu to the Bishop Museum.¹¹⁰ Upon the passage of NAGPRA, the U.S. Marine Corps Base Hawai‘i, which acquired the Mokapu Peninsula in the early 1940s, requested that Bishop Museum perform an inventory as mandated by the Act.¹¹¹ Hui Mālama made repeated repatriation requests following the consultation process, but claimed they “were either ignored or rejected for being technically improper or incomplete.”¹¹² They filed a lawsuit against the Secretary of the Department of Navy and the Bishop Museum and alleged that the Navy “failed to return expeditiously the Mokapu remains”¹¹³ and

¹⁰² NIHIPALI, *supra* note 5, at 35.

¹⁰³ *Id.* at 29.

¹⁰⁴ JOHNSON, *supra* note 47, at 28.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Craig W. Jerome, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, and Hawai‘i* 29 U. Haw. L. Rev. 163, 168 (2006).

¹⁰⁸ MOKAPU, 894 F. Supp. 1397 (D. Haw. 1995).

¹⁰⁹ PETRICH, *supra* note 87, at 568.

¹¹⁰ KAWELU, *supra* note 31, at 99-100.

¹¹¹ *Id.* at 100-101.

¹¹² PETRICH, *supra* note 87, at 556.

¹¹³ MOKAPU, *supra* note 112, at 1403-04.

“conducted additional scientific research on the Mokapu remains”¹¹⁴ in violation of NAGPRA. This was the first lawsuit brought under NAGPRA in Hawai‘i and the second NAGPRA case in the country since the Act’s passage.¹¹⁵

A second case, *Na Lei Alii Kawanānakoā v. Bishop Museum*¹¹⁶ (“Kawaihae”), involved a “loan” from Bishop Museum to Hui Mālama of eighty-three cultural items, which the museum had acquired in 1905 after Judge David Forbes and two others found the entrance to and robbed a cave system in Kawaihae on the island of Hawai‘i.¹¹⁷ Hui Mālama reburied numerous sets of human remains and the eighty-three cultural items near their original location without the consent of the other claimants. Subsequently, additional claimants came forward, challenged the repatriation process, and alleged that the loan was improper.¹¹⁸ The NAGPRA Review Committee facilitated dispute hearings, agreed with the competing claimants, and recommended that the cultural items be retrieved and returned to Bishop Museum to continue the repatriation process. Hui Mālama refused to return the artifacts, resulting in a lawsuit filed by some of the opposing claimants. The court ordered Hui Mālama to (1) provide a full inventory of all eighty-three items, (2) reveal the precise reburial location of the cultural items, and (3) disclose the names and contact information of anyone who had knowledge of the items’ location, which the group ignored.¹¹⁹ The judge found the Hui Mālama Board of Directors in contempt of court for “not includ[ing] the precise location of each and every item loaned to it by the Bishop Museum”¹²⁰ and Ayau was jailed for his silence.¹²¹ The group eventually disclosed the reburial location and authorities returned the items to the Bishop Museum, culminating with a final settlement that required Bishop Museum and Hui Mālama to jointly pay \$330,000 for costs incurred to retrieve the cultural items from the cave.¹²²

¹¹⁴ *Id.* at 1404.

¹¹⁵ PETRICH, *supra* note 87, at 558.

¹¹⁶ See JEROME, *supra* note 111 n.4 (citing Order Finding Edward Halealoha Ayau, Pualani Kanaka‘ole Kanahēle, William Aila and Antoinette Freitas in Contempt of Court at 2-5, *Na Lei Alii Kawanānakoā v. Bishop Museum*, No. 05-00540 DAE-KSC (D. Haw. Dec. 28, 2005)).

¹¹⁷ KAWELU, *supra* note 31, at 102-03.

¹¹⁸ *Id.* at 103.

¹¹⁹ See Order to Show Cause, at 2, *Na Lei Alii Kawanānakoā v. Bishop Museum*, No. 05-00540 DAE-KSC (D. Haw. Dec. 22, 2005).

¹²⁰ *Id.* at 3.

¹²¹ JEROME, *supra* note 111, at 187.

¹²² KAWELU, *supra* note 31, 104.

Both cases revealed critical flaws in the law that will continue to impede repatriation efforts in Hawai‘i unless they are addressed. Firstly, Native Hawaiians are subsumed under the definition of “Native American” under the Act,¹²³ which is a point that is culturally inappropriate and factually incorrect. One Native Hawaiian remarked, “we are not Native American people. We are native to Hawai‘i. We are Kanaka ‘Oiwi. We are not geographically or genetically American. We just happen to be under the same yolk of the United States occupation.”¹²⁴

Secondly, although they are considered “Native American” under NAGPRA, Native Hawaiians are not legally recognized as a distinct political entity akin to an Indian tribe. This issue is perhaps the most significant impediment to successfully implementing NAGPRA in Hawai‘i. “[N]o one Native Hawaiian organization even represents a majority of Native Hawaiians”¹²⁵ and “the fractured political situation in Hawaii thus makes repatriation requests particularly susceptible to extended delay.”¹²⁶ The court in *Mokapu* emphasized this fact in its decision, which ruled that in spite of being expressly recognized in the Act, “nowhere does Hawaiian law acknowledge Hui Malama as the sole guardian for all Native Hawaiian human remains.”¹²⁷ NAGPRA and the mechanism of federal Indian law in general, operates primarily on issues of political organization via a semiautonomous government that is “federally recognized,” which Native Hawaiians lack.¹²⁸ The absence of a federally recognized Native Hawaiian government includes the absence of an agreed-upon internal tribal leadership necessary to resolve disputes between Native Hawaiians. As such, the lack of a central political voice results in a difficult and oftentimes lengthy consultation process that stalls repatriation until such time that an agreement is met.

Thirdly, because Native Hawaiians do not have comparable political status to Indian tribes, a Native Hawaiian claimant under NAGPRA must either be a “lineal descendant”¹²⁹ or a “Native Hawaiian organization.”¹³⁰ Due to colonization and the resulting displacement from

¹²³ 43 C.F.R. § 10.2(d)

¹²⁴ Nihipali, *supra* note 5, at 37-38.

¹²⁵ Petrich, *supra* note 87, at 560.

¹²⁶ *Id.*

¹²⁷ MOKAPU, *supra* note 112, at 1408.

¹²⁸ JOHNSON, *supra* note 47, at 31.

¹²⁹ 43 C.F.R. §10.2 (b)(1) (defining “lineal descendant” as an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descentance [sic] to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations).

¹³⁰ 43 C.F.R. §10.2 (b)(3) (defining “Native Hawaiian organization” as any

their ancestral lands, proving direct and uninterrupted ancestry to a burial is extremely difficult, if not rare. Thus, Native Hawaiians have no other recourse but to bring forth NAGPRA claims as a “Native Hawaiian organization,” which is culturally inappropriate and contrary to customary practices. Traditionally, only blood-related kin, close family members, and retainers were allowed to handle *iwi*.¹³¹ “Thus, claimants who base their claim to [human remains and] artifacts on genealogy, but are unable to conclusively establish their claims, are often given no preference within the [NAGPRA] process over organizations with no genealogical ties to the [cultural items] in question.”¹³² Furthermore, the definition of “Native Hawaiian organization” is “overly-broad”¹³³ and lacks provisions requiring a Native Hawaiian organization to demonstrate knowledge or experience in traditional burial practices.¹³⁴ Such a broad and inclusive process encourages and allows for multiple claimants and competing claims, where the museum or federal agency is unable to determine which claimant is the “most appropriate” claimant for repatriation purposes. Under such circumstances, NAGPRA authorizes the museum or federal agency to retain the disputed items “until such time as the requesting parties mutually agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to [NAGPRA] regulations or as ordered by a court of competent jurisdiction.”¹³⁵

VII. CONCLUSION

Interestingly, both of the aforementioned cases were tried before the same judge. Perhaps due to his experience in the *Mokapu* case, U.S. District Court Judge David Alan Ezra provided the claimants with opportunities to employ Native Hawaiian dispute resolution processes, particularly *ho‘oponopono*.¹³⁶ Judge Ezra publicly stated it was “an issue

organization that serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has expertise in Native Hawaiian affairs.)

¹³¹ PUKUI ET AL., *supra* note 5, at 134.

¹³² JEROME, *supra* note 111, at 194.

¹³³ NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 103rd Cong., 1st Sess. 45, 50 (1993) (statement of Kina‘u Boyd Kamali‘i, Trustee, Office of Hawaiian Affairs) (noting that “a difficulty which we have encountered and bring before you without a clear recommendation for resolve is the overly-broad definition of ‘Native Hawaiian organization’ contained in this act”).

¹³⁴ JEROME, *supra* note 111, at 195.

¹³⁵ 43 C.F.R. §10.10(c)(2).

¹³⁶ *Ho‘oponopono* means to “correct.” PUKUI & ELBERT, *supra* note 1, at 82.

for Hawaiians [not the courts] to decide.”¹³⁷ Unfortunately, the exercise failed because there was a strong disagreement between Native Hawaiians who favored reburial versus preserving them at the Bishop Museum for the education and benefit of future Hawaiians.¹³⁸ “In addressing cross-cultural disputes, ho‘oponopono faces the same difficulties as does litigation. A tool that is steeped in the values and understandings of one culture cannot adequately address the needs of the other culture.”¹³⁹ This begs the question how NAGPRA should be revised or how the Native Hawaiian community can be empowered to help better address issues of repatriation in Hawai‘i.

The most ideal solution is political sovereignty for Native Hawaiians. Whether it be in the form of federal recognition, total independence, or the like, “Native Hawaiians themselves [must] retain the final decision-making authority”¹⁴⁰ when it comes to the disposition of their *iwi kupuna*. Amending existing definitions to better facilitate Native Hawaiian traditions ignores the obvious: “NAGPRA frames repatriation claims in purely Western legal terms, thereby reaffirming the hierarchy of the dominant Western, legal, social, and cultural order.”¹⁴¹ Investing energy and resources into the same processes that continually perpetuate imbalances of power most likely will yield the same results.

Still, until such time that Native Hawaiians obtain their political sovereignty, the state agencies whose legal mandates involve the betterment of Native Hawaiians (e.g. the Office of Hawaiian Affairs and Department of Hawaiian Home Lands) should be held accountable for their federal repatriation activities, especially if the agencies are expressly mentioned in NAGPRA.¹⁴² In addition, philanthropic “*ali‘i* trusts” (e.g. Kamehameha Schools, Queen Emma Foundation, Queen Lili‘uokalani Trust, and Lunalilo Trust), should also consider emulating the actions of Queen Lili‘uokalani. Without the vast resources of the organizations aforementioned, she fulfilled her *kuleana*¹⁴³ to her ancestors and her people by working together with her political rival. “Her kingdom was taken from her, but she preserved a bit of it for all time at Mauna ‘Ala,

¹³⁷ JEROME, *supra* note 111, at 189.

¹³⁸ *Id.* at 179.

¹³⁹ PETRICH, *supra* note 87, at 567.

¹⁴⁰ JEROME, *supra* note 111, at 207.

¹⁴¹ PETRICH, *supra* note 87, at 564.

¹⁴² GREER, *supra* note ____ (providing a detailed analysis of the legal mandates and repatriation activities of the Office of Hawaiian Affairs, Department of Hawaiian Home Lands, and Hui Mālama).

¹⁴³ *Kuleana* means “right, privilege, concern, responsibility.” PUKUI & ELBERT, *supra* note 1, at 179.

using the laws of the nation that helped to steal her throne.”¹⁴⁴ Because of her efforts, the seat of Hawaiian sovereignty, Mauna ‘Ala, was reserved as the ancestral foundation to restore the Hawaiian nation.

*Na wai e ho‘ōla i nā iwi? Who will save the bones?*¹⁴⁵

¹⁴⁴ CHAPMAN, *supra* note 33, at 13.

¹⁴⁵ CHAPMAN, *supra* note 33, at 13 n.1.