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U.S. SENATE COMMITTEE ON INDIAN AFFAIRS – OVERSIGHT HEARING ON “THE
LONG JOURNEY HOME: ADVANCING THE NATIVE AMERICAN GRAVES
PROTECTION AND REPATRIATION ACT’S PROMISE AFTER 30 YEARS OF
PRACTICE”

February 2, 2022

Aloha e Chairman Schatz, Vice Chairman Murkowski, and the Members of the U.S. Senate Committee on Indian Affairs.

Mahalo nui loa (Thank you very much) for inviting me to testify on behalf of the Office of Hawaiian Affairs (OHA) and our beneficiaries – the Native Hawaiian community. Over the years, this Committee has consistently been comprised of dedicated, intuitive individuals that collectively and sincerely examine problems unique to the Native American, Native Hawaiian, and Alaskan Native peoples. Most importantly, you have listened and proposed legislation to overcome these identified problems. OHA again recognizes Chairman Schatz for your work on behalf of our families in Hawai‘i. Your work here empowers the Native community to continue exercising true self-determination in all aspects of our lives.

One of the many ways that we seek and claim such self-determination is through the return and reburial of our Native ancestors who were unjustly disinterred and taken away to institutions and facilities – both here at home, and abroad all over the world. The Native American Graves Protection and Repatriation Act (NAGPRA) established in 1990 solidified the ability for Native peoples to make these claims in the U.S. and work towards healing past injustices that violated the sanctity of the grave. The road to NAGPRA was a difficult one, but an important battle for human rights. Mahalo to this Committee for walking this road with us.

Background on OHA and its standing to represent Native Hawaiians

Established by our State’s Constitution,¹ the Office of Hawaiian Affairs is a semi-autonomous State agency that was created after a Constitutional Convention in 1978 for the betterment of Native Hawaiians. Guided by a board of nine publicly elected trustees, all of whom

¹ HAW. CONST., art. XII, §5 (1978).

are currently Native Hawaiian, OHA fulfills its mandate through advocacy, research, community engagement, land management, and the funding of community programs.

Much like occurrences in the Continental U.S. during the latter half of the 20th century, Hawaiians too were pushing back against rapid development out of a sense of survival to preserve cultural sites, burials, and resources as economic stimulus packages that followed the Great Depression and World War II were being pushed as part of political agendas and to feed a rapidly growing American population. Further, increased militarization contributed to desecrations as thousands of Hawaiian burials were exposed during the 1940s and beyond, with the development of the Marine Corps Base on the Mōkapu peninsula. Sadly, to this day, these iwi kūpuna (ancestral Hawaiian remains) have not been laid to rest; yet, remain closer than ever to a final rest due to the unending love and tireless work of their descendants.

Notably, the latter half of the 1970s is looked at by some as a “Hawaiian Renaissance” or “Reawakening”. In Hawai‘i, displaced farmers (i.e., Kalama Valley Farmers, Waiahole-Waikane Farmers) and cultural practitioners found a sense of unity in their struggles as Hawai‘i was rapidly changing in the 1970s with continued urban expansion. With the success of environmental protest in the 1960s, social and cultural activists were following suit in the 1970s all across America and other parts of the globe (e.g., New Zealand, Australia). In some ways, the creation of OHA was one of the crowning achievements of this era in Hawai‘i as OHA has since been around to effectively advocate for Native Hawaiian rights and resources. This is especially true at the federal level. OHA is specifically enumerated within NAGPRA because of its expertise in Hawaiian affairs and repatriation.

As NAGPRA was coming to be, laws were changing in Hawai‘i as iwi kūpuna were consistently being desecrated during development projects for hotels, resorts, and condominiums – many of which were located along the shoreline and sandy dunes, where many generations of Hawaiians chose to bury their dead. We must not forget that in 1986, over 1,100 of our iwi kūpuna consisting of men, women, children and infants, were systematically disinterred in Honokahua, Maui, during the construction of the Ritz Carleton hotel at Kapalua. As the number of exposed iwi continued to climb, it was only through public outcry, and ultimately executive action, via former Governor John Waihe‘e, that the project was halted. Ultimately, the resort was moved inland in avoidance of the massive burial ground and a burial preserve was established via an agreement document with OHA and Hui Alanui ‘o Makena in 1988.

Furthermore, the situation at Honokahua further prompted the creation of Hui Mālama I Na Kupuna ‘o Hawai‘i Nei, another key Native Hawaiian organization (NHO) specifically mentioned in NAGPRA and the National Museum of the American Indian Act. Additionally, OHA established a Native Hawaiian Historic Preservation Task Force in 1989 that led to the recommendation for the State to create five Island Burial Councils (IBC) to oversee the disposition of Hawaiian burials. Honokahua was the genesis of Act 306 in 1990 which amended our historic preservation law (Chapter 6E, Hawai‘i Revised Statutes), and which established both the IBCs and State Historic Preservation Division procedures for the care, management and protection of unmarked burial sites in the islands regardless of ethnicity. These tools have been invaluable for the protection of iwi kūpuna, yet much work remains.

Collaborative NAGPRA Work and Successes Over the Last 30 Years

Over the years since the very beginnings of NAGPRA, the Office of Hawaiian Affairs has participated in domestic and international repatriations in partnership with other NHOs, families, and beneficiaries. In many cases, beneficiaries bring information to OHA about filing a repatriation claim and OHA assists them through the process to provide the necessary resources to carry it out. For decades, OHA partnered with Hui Mālama I Na Kūpuna, the only other NHO specifically called out in NAGPRA with OHA, as well as other NHOs, including various IBCs as co-claimants. Together, we were able to successfully repatriate thousands of iwi kūpuna from all across the world in over 120 repatriation efforts, and here at home in the islands as well. While Hui Mālama is now dissolved, OHA still works closely with community members who are former members and identified as traditional religious leaders.

In the 1990s, OHA worked with NHOs to assist in the successful repatriation of thousands of remains, not only from institutions on the Continent, but right here at home with the Bishop Museum. An estimated 3,000 individuals from Marine Corps Base Hawai'i development work at Mōkapu were held at the Bishop Museum for over 50 years. The museum's island of O'ahu Collection alone contained over 1,000 individuals collected over a span of almost 90 years. When disagreements arose during these early years of NAGPRA, OHA was there to assist fellow Native Hawaiians with taking disputes to the NAGPRA Review Committee for consideration. For a time, Native Hawaiian cases were the most heard by the Review Committee.

Some of our most recent successes alongside community leaders include the repatriation of ancestral remains from Berkeley and Case Western Reserve University in early October. Notably, this effort also saw the return of a lei niho palaoa (whale tooth necklace suspended with human hair) from the Cleveland Museum of Natural History. At present, a team of dedicated Native Hawaiians working closely with OHA are enroute to Germany and Austria to recover ancestral remains on OHA's behalf. While international efforts are not covered under NAGPRA, institutions abroad often choose to follow our domestic repatriation process and increasingly are requiring that repatriations be coordinated with U.S. Embassies located in that particular country. Thus, the wisdom of NAGPRA and the expertise of the U.S. Department of Interior extends far beyond our national borders, thus enabling the return of our iwi kūpuna from across the globe.

It is these kinds of partnerships that make repatriations work. Repatriation work can be costly and very technical at times. OHA serves Native Hawaiians by taking action in these situations and providing much needed education. As part of the interactive repatriation process, OHA has provided informational presentations about NAGPRA to potential claimants by explaining the process and their role in it. In 2018, OHA's Compliance team flew to Kona to provide a series of PowerPoint presentations and workshops to the families of Hōnaunau to repatriate an ancestral effigy taken from the Hale o Keawe (a chiefly mausoleum) in 1825 that now resides in the Chicago Field Museum. Unfortunately, the Chicago Field Museum has challenged the families' interpretation of the effigy as being funerary in nature and Hale o Keawe as constituting a burial site.

While it may be possible for these individuals and NHOs to apply for NAGPRA grants on their own, some of these individuals work two jobs and don't have the technical expertise to submit

a competitive grant. In this regard, OHA's assumption of the repatriation related costs (inclusive of travel, reburial fees, paperwork) lessens the financial burden to these Native Hawaiian claimants. OHA serves as a mentor and guide while also empowering these families and NHOs with the knowledge and expertise to advocate for themselves and share what they have learned. As a result, a community network and coalition of family members is now able to take on the responsibility of culling through museum holdings in search of their ancestral remains. It is heartening to see these Native Hawaiians well informed and able to effectively advocate on their own for the return of their Native Hawaiian ancestors.

Priorities for NAGPRA Improvement

Despite the many successes and improvements NAGPRA has enabled in the care and return of our Native Hawaiian ancestors, we know there will be challenges ahead. In an effort to improve an already seminal and vital NAGPRA statute, we offer the following amendments to: 1) the definition of a NHO; 2) the composition of the NAGPRA Review Committee; 3) the protection of confidential information disclosed as part of the NAGPRA process; and, 4) the extension of certain NAGPRA requirements to collections on loan. A fifth and final suggestion is made regarding improvements to statutes that go beyond NAGPRA – 1) lowering the *mens rea* for NAGPRA trafficking crimes, and 2) creating a framework insulating private individuals from criminal liability when they voluntarily return NAGPRA objects and Native American human remains.

1. Definition of a NHO (25 USC § 3001)

The definition of NHO should be updated to require that NHOs consist of Native Hawaiians in substantive policymaking decisions. This change would further ensure better consistency across federal laws and policies affecting Native Hawaiians. The current NAGPRA statute definition does not require that a NHO actually consist of Native Hawaiians in decision-making roles despite the familial importance of repatriation to Native Hawaiians. In contrast, the NHO definition within the Native Hawaiian Education Act (25 USC § 7511) does in fact require Native Hawaiians to be in policymaking positions. NAGPRA merely requires that a NHO have a mission to serve Native Hawaiians.

The current language has historically been contentious and previously presented as problematic in testimony to the Committee in 2004.² In the past, a museum receiving federal funds with a stated mission to serve Native Hawaiians believed they could qualify as a NHO to claim human remains and funerary objects under their own control. Allowing this would have presented a clear conflict of interest and undermined the intent of NAGPRA. Fortunately, this museum withdrew their attempts to qualify as a NHO after further consideration and public objection. To eliminate this problem, we suggest the definition include a requirement that a NHO consist of Native Hawaiians in substantive policymaking positions within the organization in the way that NHO is defined in other federal laws and policies.

² See December 8, 2004, Oversight Hearing before the Committee on Indian Affairs, 108th Congress, to receive testimony on the application of the Native American Graves Protection and Repatriation Act in the State of Hawai'i.

2. Composition of the NAGPRA Review Committee (25 U.S.C. § 3006)

Current statute requires that the NAGPRA Review Committee consist of seven members, two of which must be traditional Indian religious leaders. OHA questions why this language only requires two traditional Indian religious leaders on the Review Committee with no mention of an explicit requirement for a traditional Native Hawaiian or Alaskan Native religious leader. The existing definition of a traditional religious leader does not subdivide Native Hawaiian and Tribal leaders into separate categories and there is no rational reason why Native Hawaiian religious leaders should be treated any differently than Tribal religious leaders when it comes to their ability to serve on the Review Committee. Native Hawaiian religious leaders need parity with Tribal religious leaders when it comes to the composition of the Review Committee. While OHA does not believe the original intent of the language was meant to be exclusionary, OHA has received recent complaints that traditional Hawaiian religious leaders have been deliberately excluded from being on the Review Committee. OHA is concerned that Native Hawaiian religious leaders may have been unfairly excluded from serving on the Review Committee in the past. OHA believes these concerns merit amendments to the existing statute to include a Native Hawaiian religious leader as part of the three religious leaders designated to serve on the Review Committee, especially since many of our most ardent and knowledgeable NAGPRA advocates are Native Hawaiian religious leaders – much in the way that Indian and Alaskan religious leaders are involved in NAGPRA claims.

3. Protection of Confidential Information Disclosed as Part of the NAGPRA Process

As part of the NAGPRA process, often times sensitive genealogical or burial location information must be disclosed by potential claimants as part of the process. In a recent claim with the Chicago Field Museum, families from Hōnaunau provided entire genealogies from each member of their NHO to show a lineal connection to the great Hawai'i Island Chief Keawe. In other cases, recorded or notated consultations may possibly discuss reburial locations. OHA is concerned that this kind of sensitive information disclosed as part of the NAGPRA process may not be protected if a request for such information is made pursuant to the Freedom of Information Act (FOIA). To eliminate intrusion into our sacred genealogies and places of our Native claimants, an exemption is needed within NAGPRA to protect this kind of sensitive information from being subject to FOIA requests.

4. Extension of Certain NAGPRA Requirements to Collections on Loan

With NAGPRA having been in force for over 30 years, one would think that museums holding ancestral remains would by now have posted all inventories required by law. However, OHA has observed situations where collections on long-term loan have been forgotten or overlooked by a Federal agency or museum that is actually in control of the human remains; thus, resulting in a situation where the agency or museum in actual control was not aware that they should comply with NAGPRA. In the last 3 years, OHA has experienced this problem with 2 institutions in Ohio and 1 in California. Fortunately, these

institutions were able to expedite the repatriations once learning that they held our ancestors, without having to resort to lengthy NAGPRA penalty processes.

OHA believes that a museum holding a loaned collection from either a Federal agency or museum has an ethical responsibility to report non-compliance with NAGPRA or at least to notify the Federal agency that retains control of the human remains about NAGPRA requirements. To reduce gaps in NAGPRA compliance, OHA recommends including statutory language requiring museums that hold collections on loan to report NAGPRA non-compliance or at least to advise the Federal agency or museum retaining control that they must comply with NAGPRA's inventory requirements.

5. Beyond NAGPRA: 1) Lowering the *Mens Rea* for NAGPRA Trafficking Crimes; and, 2) Creating a Framework Insulating Private Individuals from Criminal Liability When they Voluntarily Return NAGPRA Objects and Native American Human Remains

Despite existing criminal enforcement mechanisms within 18 USC § 1170 pertaining to the trafficking of NAGPRA objects and Native American human remains, OHA still sees Hawaiian ancestral remains, funerary objects, and sacred objects being sold at auction within the U.S. by unscrupulous collectors that disregard our humanity. OHA frequently receives alerts from the Association of American Indian Affairs about the online sale of NAGPRA objects and Native American human remains. Most recently, a seller attempted to sell a Native Hawaiian fishhook allegedly made of human bone in an April 2020 online auction. Fortunately, we were able to reclaim that fishhook with help from the Association of American Indian Affairs, Federal Bureau of Investigation, and the Bureau of Indian Affairs.

The fact that these online sales are still ongoing suggests that traffickers of Native human remains and NAGPRA protected objects are either not deterred by existing criminal enforcement statutes or completely naïve to the crimes they are committing. The claim of naivete by some offenders has further allowed them to avoid prosecution as the *mens rea* under 18 USC § 1170 only requires that offenders knowingly commit a crime.

Further, within the last decade, OHA has responded to several inquiries from families on the mainland that discovered they are in possession of ancestral Hawaiian remains. NAGPRA does not currently cover ancestral remains that are in private possession, nor is there any guidance or amnesty from NAGPRA trafficking laws afforded to these individuals. OHA believes that many private individuals in this situation would want to do the right thing and return ancestors that are discovered in their possession, yet are fearful they may be prosecuted if they do so.

While OHA is aware that private possession and criminal penalties for trafficking NAGPRA objects are beyond the scope of NAGPRA, we do acknowledge that Chair Schatz and Vice Chair Murkowski were co-sponsors of the yet-to-be-enacted Safeguard Tribal Objects of Patrimony (STOP) Act in 2020. We commend this action and hope that the provisions within the STOP Act become law. OHA supports the intent of the STOP

Act as it would increase the maximum penalties under 18 USC § 1170, would require an export certification system for cultural objects, and would create a framework for the voluntary return of NAGPRA objects by private parties. These provisions would discourage online sales of NAGPRA objects and would encourage private individuals to voluntarily return human remains in their possession. However, the *mens rea* requirement under 18 USC § 1170 is problematic because a seller is required to know their actions are illegal in order for criminal liability to attach. We recommend that these *mens rea* requirements be reviewed and amended so as to more effectively deter illegal trafficking.

Closing Remarks

In closing, the repatriation of our ancestors is part of a healing process and a humanitarian matter at its core. Even after retrievals are complete, healing continues as reburials are coordinated and ceremonially conducted by Native Hawaiian claimants. As famed Hawaiian scholar Mary Kawena Pukui has stated, iwi are our most cherished possession. We must never lose sight of this and continue to persevere.

I wish to express my appreciation and gratitude to both the Chairman and the Vice Chairman for taking on this responsibility. It has been an honor to have had this opportunity to address you and your Committee members. OHA's very capable and knowledgeable staff and I stand ready to assist you in accomplishing this most important work, both now and in the future.

A hui hou. Until we meet again.

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