

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM MONET, RUBELLITE KAWENA
JOHNSON, and FRANK PALANI NOBRIGA)

Civil No. 96-00006-ACK/BMK

Plaintiffs-Appellants,)

vs.)

UNITED STATES OF AMERICA,)
STATE OF HAWAI'I, JOHN DOES 1-100)
and JANE DOES 1-100)

STATEMENT OF RUBELLITE KAWENA
JOHNSON AS ADDENDUM TO OPENING
BRIEF;

Defendants-Appellees.)

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D.C. CV-96-00006-ACK/BMK

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Statement of Nahoa 'Olelo o Kamehameha

By Rubellite Kawena Kinney Johnson

Pro Se

(1) ~~Regarding the Honorable Judge David Ben Ezra decision in the Matter of the Mokapu Bones Repatriation~~

The recent decision of the United States District Court in Hawaii in CV-96-00006-ACK/BMK [Sam Monet, Rubellite Kawena Johnson, and Frank Palani Nobriga, Plaintiffs-Appellants, vs. United States of America, State of Hawai'i, et. al.] recognizes the right and responsibility of the military, Navy and Marine Corps, in charge of the Kaneohe Marine Air Base in Kaneohe, to determine the "rightful recipient" of the Mokapu bone collection and to repatriate the bones from the Bishop Museum to a site yet to be determined. The Ezra decision of 1996 has thus clarified that the military is unequivocally the federal agency to make these determinations. Until this case was heard in court without benefit of a jury, the military was still subject to the Review Committee's recommendations under NAGPRA, Native American Graves Protection and Repatriation Act of 1990, amended 1993, 1995, and more recently, after this case went to court, in July of 1996.

The rules have been changed to admit the Island Burial Councils, which and who are not claimants, into the negotiations to determine who has right to custody, who has the closest cultural affiliation, and where the bones should be reinterred.

The problem with that should be obvious. NAGPRA recognizes State of Hawaii agencies, i.e., the Office of Hawaiian Affairs and now the Island Burial Councils under the Department of Land

and Natural Resources as Native Hawaiian organizations, but their role is strictly as functionaries in the process of reinterment. Until the Mokapu Bones question appeared, there has never been a necessity to determine which Hawaiians have rights to the bones and other objects unearthed by archaeological excavation on Mokapu. Until this event all other repatriations have been from federally funded national museums and collections on the mainland United States. In this case, the collection is already to a large degree "at home" in a local museum on O'ahu and only over the mountain ten miles away.

The island of Kaho'olawe is also in Hawaii, and it is only a half-day away by boat, minutes by plane. Kaho'olawe is an example of a federal military area that was relinquished in order for Native Hawaiians to recover the entire island for religious practice. History will show that the return of Kaho'olawe happened because of the Free Exercise Clause, First Amendment to the United States Constitution; Article XII, Section 7 of the State of Hawaii Constitution, and in particular, the American Indian Religious Freedom Act [AIRFA], which states:

"[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites..." [42 U.S.C. 1986 (1982)].

The return of Kaho'olawe to the Kaho'olawe 'Ohana as the recognized "kahu" caretaker of the island during the time when the Department of the Interior is cleaning the island of undetonated bombs indicates that the constitutional separation of church and

state was properly observed and there should be no difference in the determination of who has right of custody to Mokapu bones, who has the closest cultural affiliation and has taken the time to present documented evidence and history of that part of the NAGPRA recognition process, and where the ancestral bones of legitimate claimants shall be reinterred. Since the Office of Hawaiian Affairs and the Island Burial Councils are State of Hawaii agencies, their role is by statute limited to repatriation under the "right of custody" clause of the NAGPRA legislation. They may assist in having temporary custody but not "rightful" custody under both NAGPRA and traditional Hawaiian custom and practice, viz:

(1) "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage..." [State of Hawaii Constitution],

Burial rights in pre-contact Hawaii concern "individuals", in that one's individual inheritance (ho'oilina) to which one was an "heir" (ho'oilina) is, by denotation, determined by the 'burial place/location' ('ilina, 'cemetery', burial ground'), from 'ili as in 'ili 'āina, a subsection of cultivated land within the larger subdivision called the ahupua'a. Individuals were "heirs" (ho'oilina) to the 'ilina as part of their 'ili kupono rights not to be deprived by any land-title-holding chief (ali'i 'ai ahupua'a, ali'i 'aimoku, ali'i nui) of right to be buried in the 'ilina.

The Office of Hawaiian Affairs and the Island Burial Councils are not "heirs" in the context of Hawaiian custom as established by traditional Hawaiian usage in determining "right", as to

the 'ilina inheritance, therefore, none of these may supercede Native Hawaiian organizations claiming from the position of either lineal descent or historical and actual, i.e., residential, genealogical, and other area-connected cultural affiliation to Mokapu 'ilina. This has been observed by qualified experts in Hawaiian archaeology drawing upon the representation by qualified Native Hawaiian scholars [Samuel M. Kamakau], viz:

"Burial Location. Through archaeological evidence we have learned that burial locations were both centralized and dispersed throughout the islands of the Hawaiian archipelago. Locations are, in large part, based on the residence of an individual (Bowen 1961:141). Kamakau (1961:374) summarizes the system well:

'In the 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 descendants without the intrusion of a single stranger unless by consent of the descendants, so that wherever a death occurred the body was conveyed to its inheritance. These immovable barriers belonged to all times'...' [Han et.al., Moe Kau a Ho'oilo: Hawaiian Mortuary Practices at Keopu, Hawaii (1986:14), Dept. of Anthropology, Bishop Museum, Report 86-1).

Nahoa has, therefore, in the prior deliberations and also in the court presentation [CV-96-00006-ACK/BMK] insisted that DNA analysis, which had been planned upon but disallowed by the NAGPRA process of repatriation without scientific study, be allowed, since Nahoa is in a position^{as ho'oilina to so recommend,} by traditional Native Hawaiian custom and practice as a lineal heir to both Peleioholani, high chief (ali'i nui) of O'ahu and whose residence was at Mokapu, and Kamehameha I, to whom the na'i aupuni mo'i title was given by the O'ahu chiefs after the successful conclusion of the Battle of Nu'uauu in 1795. By Hawaiian custom and usage heirs (ho'oilina) who are descendants of the residential 'ilina, as individuals, may give such consent

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to "strangers", which may also be extended to scientists who can effect the mitochondrial DNA analysis to find the genetic motifs.

Nahoa requests the Ninth Circuit Court of Appeals of the United States to uphold the Peleioholani and Kamehameha descendants heirs' rights under the reversionary custom of the ho'oilina tradition, given the precedent by Hawaiian usage which the Constitution of the State of Hawaii upholds [Article XII, Section 7, intra. page 2].

Nahoa also supports the same ho'oilina status for plaintiff Sam Monet whose genealogy indicates descent from the same genealogical background reaching back from Peleioholani.

Native Hawaiian organizations, such as Hui Malama i Na Iwi Kupuna and the inclusive Ka 'Ohana Nui [Ka Lahui, Office of Hawaiian Affairs] would prefer that the broad category of "Native Hawaiian" be used to establish "cultural affiliation" without genealogical or historical and/or residential 'ilina inheritance, and therefore, their general disregard for DNA analysis reflects the political motive to categorically rule out all such scientific proof of relationship. Nahoa submits that this resistance to reason and to knowledge through scientific study is also a refutation of the kahuna lapa'au practice of examining bodies, performing medical autopsies to study human diseases, and in mummifying and body preparation for burial by removing the bones for partial burial, as in some instances bones were preferred as utilitarian in tool-making, as for fishhooks, in kahili handles, and sometimes kept by the family in an accessible place.

The Office of Hawaiian Affairs, Hui Malama i Na Iwi Kupuna,

and Native Hawaiian organizations averse to DNA studies and analysis of the Mokapu bones represent a point of view which is alien to established kahuna lapa'au medical and mortuary practices which supported the accumulation of knowledge which could be learned from bones and bone study.

The Island Burial Councils' position is reflected in the published statements of its leaders, exemplifying the hostility to the kahuna position of learning as much as we can through scientific studies, respectfully done:

"Stop digging, *handling*, destroying, studying and documenting our ancestral bones," [Phyllis Coochie Cayan, Oahu Burial Council, in Mark Matsunaga, "Hawaiians Endorse New Burial-Site Proposals", Honolulu Advertiser, 1/16/95].

Nahoa's position reflects the opinion derived from its kahuna priesthood lines of descent:

(a) From the priesthood of 'Ohule, of Moloka'i and Kaneohe/He'eia/Kailua priesthoods, related to the priesthood lines and konohiki of the Po'ohina group;

(b) From the Kaiakea priesthood of Moloka'i; Kaiakea was also married to the daughter [Kalanipo'o] of Peleioholani and his sister, Kukuiaimakalani; and

(c) From the priesthood of Kalawe, of Puna, Hawaii.

There would be enormous benefit to the world if the NAGPRA law would not be construed as anti-DNA analysis of bones, for many reasons, such as learning more about the identity, for example, of four skeletons unearthed from the Mokapu KEFM Site which have been described as non-Polynesian and representing a time level between 1400 and 1700 A.D. . Were they Europeans or Asians or even

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North/South American Indians? Why does NAGPRA deny me, a kahuna priesthood descendant, the right to know?

The study of mitochondrial DNA at Pennsylvania State by Himla Soodyall, in molecular evolutionary biology, traced the incidence of a Polynesian genetic motif in Madagascar Malagasy-speaking populations directly to the Maanyan language area in the Barito River region of south central Borneo [See Appendix, 8-9].

The above DNA analysis supported linguistic theories that had demonstrated a migration out of Indonesia into Madagascar at a time when migrations were also moving out of Indonesia into Polynesia.

Nahoa submits that the NAGPRA halt to mitochondrial DNA analysis of the single most critical collection of Hawaiian bones is not purely a violation of the right of humankind to know, but a retreat from reason and knowledge, an established kahuna practice of professional wisdom and power, to the darkest of ages.

Finally, because the Office of Hawaiian Affairs and the Burial Councils are not organized kahuna priesthoods which, by traditional Hawaiian custom, practice the religion within the membership as such, they cannot effect the same degree of close cultural affiliation required by NAGPRA. The only male kahuna priesthood with those recognized credentials that is also a registered claimant is the Temple of Lono (Frank Nobriga), that it would also be a violation of the constitutional separation of church and state to allow non-Hawaiian-priesthood (kahuna) agencies of the state, to preempt the Lono priesthood order which has for many years practiced Hawaiian rituals in the Ko'olauloa/Ko'olaupoko [Kualoa to Waimanalo] area.

Further affiant sayeth naught. 7

Sublette Kawena Johnson
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FROM DISCOVER MAGAZINE, February 1996 issue,
p. 27 "Breakthroughs":

GENETICS

Out of Indonesia

THOUGH MADAGASCAR LIES ONLY 250 miles off the African coast, linguistic and archeological evidence suggest that its first settlers—who arrived in about 400 A.D.—hailed not from Africa but from Indonesia, more than 3,000 miles to the east. All 13 million of Madagascar's present-day people speak Malagasy, which, though it contains some African Bantu words, is most closely related to the Maanyan language of the Barito River region of Borneo. Africans are not thought to have arrived in Madagascar until much later; exactly when is unknown.

To check the accuracy of this long-established linguistic evidence, Himla Soodyall, a molecular evolutionary biologist at Penn State, turned to the techniques of modern genetic analysis. She has found that some Malagasy have a genetic kinship with Polynesians, of all people—indicating that Polynesia and Madagascar may have been settled by the same population of seafaring Indonesians.

Soodyall compared the incidence of a genetic marker known as the Polynesian motif among groups of people from Polynesia, Papua New Guinea, Indonesia, Southeast Asia, Africa, and Madagascar. The Polynesian motif is found within

Breakthroughs

the mitochondrial DNA, which is usually passed unchanged from mother to daughter. (Mitochondria are the cell's energy-producing "batteries.")

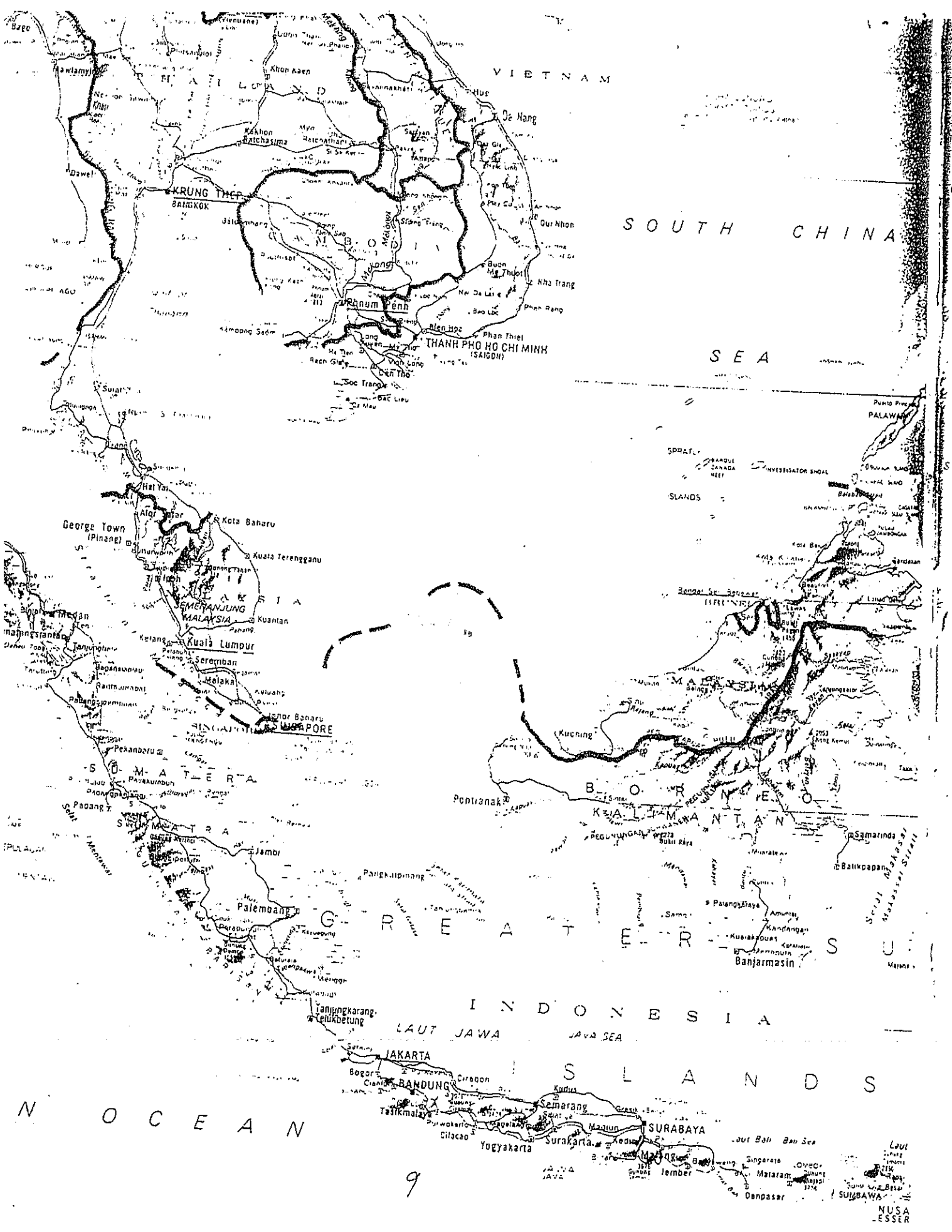
The motif was common, she found, in Hawaii, Samoa, Easter Island, and coastal Papua New Guinea. But 18 percent of the Malagasy in Soodyall's study group also carried the motif. It was rarer among the people of eastern Indonesia and southern Borneo, less than 5 percent of whom carried it, and absent completely from the Africans sampled.

Modern Polynesians, Soodyall points out, are themselves the descendants of Indonesian seafarers, so the linguistic evidence and the genetic evidence are not necessarily at odds. Both could be true if Polynesians and Malagasy are descended from the same population of Indonesian ancestors. Although the genetic motif is rare among Indonesians, if it happened to be present in those who went down to the sea in ships, it would have become more prevalent in the new populations they founded to the east and to the west. "My gut feeling is that when these people were moving out of Indonesia, maybe one boat caught the wrong wind and steered west toward Africa," says Soodyall. "They must have all started going off together, and one just got lost."

Mitochondrial DNA:

Barito River, Maanyan
language, Borneo

Hawaii
Samoa
Easter Island
Coastal Papua New Guinea
18% Malagasy (Madagascar)



SOUTH CHINA SEA

CHRISTMAS ISLAND

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