

**STATE OF HAWAI'I  
OFFICE OF HAWAIIAN AFFAIRS  
560 N. NIMITZ HIGHWAY, SUITE 200**

**COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT  
MINUTES**

**August 13, 2015 10:00 a.m.**

**ATTENDANCE:**

Chairperson John Waihe'e, IV  
Vice-Chairperson Peter Apo  
Trustee Lei Ahu Isa  
Trustee Dan Ahuna  
Trustee Rowena Akana  
Trustee Haunani Apoliona

**EXCUSED:**

Trustee Hulu Lindsey  
Trustee Robert Lindsey  
Trustee Colette Machado

**BOT STAFF:**

Capsun Poe  
Claudine Calpito  
Crayn Akina  
Davis Price  
Dayna Pa  
Kanani Souza  
Lady Elizabeth Garrett  
Laurene Kaluau-Kealoha  
Lehua Itokazu  
Liana "Ani" Pang  
Louise Yee Hoy  
Melissa Wennihan  
Reynold Freitas  
U'ilani Tanigawa  
William Arenivas

**ADMINISTRATION STAFF:**

Kamana'opono Crabbe, Ph.D., Pouhana / CEO  
Lisa Victor, Pou Nui  
Derek Kauano, ADV-GOV  
Ernest Kimoto, CC  
Jim McMahan, ADV  
Jocelyn Doane, PUBL  
John Rosa, OTR  
Kamakana Aquino, RES  
Kawika Riley, ADV  
Keala Nichols, ADV  
Keopulani Reelitz, ADV-GOV  
Mehana Hind, COO  
Momilani Lazo, CEO  
Natashja "Wahine" Tong, RES  
Sarah Antone, ADV-GOV  
Sterling Wong, PUBL

**GUESTS:**

James Anaya  
Keali'i Makekai  
Robert Williams  
Rodney Lee  
Vanessa Mauricio

**I. CALL TO ORDER**

**Chair Waihe'e** calls the Committee on Beneficiary Advocacy and Empowerment for Wednesday, August 13, 2015 to order at **10:05 a.m.**

**Chair Waihe'e** notes for the record that **PRESENT** are:

MEMBERS			AT CALL TO ORDER (10:05 a.m.)	TIME ARRIVED
CHAIR	JOHN	WAIHE'E, IV	PRESENT	
TRUSTEE	LEI	AHU ISA	PRESENT	
TRUSTEE	DAN	AHUNA	PRESENT	
TRUSTEE	ROWENA	AKANA	PRESENT	
TRUSTEE	HAUNANI	APOLIONA	PRESENT	
VICE-CHAIR	PETER	APO	PRESENT	Arrived at 10:18 a.m.

At the Call to Order, **FIVE (5) Trustees are PRESENT**, thereby constituting a quorum.

EXCUSED from the BAE Meeting are:

MEMBERS			COMMENT
TRUSTEE	CARMEN "HULU"	LINDSEY	MEMO – REQUESTING TO BE EXCUSED
TRUSTEE	ROBERT	LINDSEY	MEMO – REQUESTING TO BE EXCUSED
TRUSTEE	COLETTE	MACHADO	MEMO – REQUESTING TO BE EXCUSED

**II. APPROVAL OF MINUTES**

**A. July 8, 2015**

Trustee Ahuna moves to approve the minutes of July 8, 2015.

Trustee Ahu Isa seconds the motion.

Chair Waihe'e asks if there is any discussion. There is none.

Chair Waihe'e asks if anyone votes NO or ABSTAINS. There are no replies.

							10:06 a.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEI	AHU ISA		2	X			
DAN	AHUNA	1		X			
ROWENA	AKANA			X			
VICE-CHAIR PETER	APO						Arrived at 10:18 a.m.
HAUNANI	APOLIONA			X			
CARMEN HULU	LINDSEY						EXCUSED
ROBERT	LINDSEY						EXCUSED
COLETTE	MACHADO						EXCUSED
CHAIR JOHN	WAIHE'E			X			
<b>TOTAL VOTE COUNT</b>				<b>5</b>	<b>0</b>	<b>0</b>	<b>4</b>

**MOTION: [ X ] UNANIMOUS [ ] PASSED [ ] DEFERRED [ ] FAILED**

Chair Waihe'e notes for the record that all members present vote 'AE (YES) and the **MOTION CARRIES.**

### III. COMMUNITY CONCERNS\*

None

### IV. NEW BUSINESS

- A. **OHA Contract #3002 – Discussion of contract on the rights of Native Hawaiians, between the Office of Hawaiian Affairs and The Law College Association of the University of Arizona**

Chair Waihe'e turns it over to Ka Pouhana Kamana'o pono Crabbe.

**Pouhana Crabbe:** Mahalo Chair Waihe'e and good morning trustees. Before I bring up our guest presenters, may I kindly ask the permission of the BAE committee to allow me to introduce our new Pou Nui. It's a great day for OHA, and my honor to introduce our new Pou Nui / Chief Operating Officer. She comes from Kaiser Permanente where she spent her time working in day-to-day operations with a staff of 170 people. She has 25 years of experience in technology; specifically in I.T. healthcare systems and strategic development. She has served as the Director of Information and Technology Application Development and Technology Consultant. For the past 6 years, she was the Senior Director of Strategic Planning, Service Delivery Planning, and Business Development. Please welcome Lisa Victor. I have asked her to share a few words, and we will be making appointments with each trustee, so we can have a one-on-one meet-and-greet.

**Pou Nui Victor:** Aloha, I am so honored and privileged to be a part of OHA. It's been my dream to work here and to work with the groups and the programs, so I thank you. I'm going to do the best job I can do. With all of your support, we can and will perform and deliver all that we have to do to make OHA a better place. Mahalo for the amazing welcome and I look forward to moving-forward.

**Pouhana Crabbe:** It's an honor and privilege to introduce our two presenters. This was an endeavor borne almost two years ago when we started talking about nation building. It relates to the complexity of the issues that this board has confronted over the past 20 years plus, regarding the different models of governance and so forth. With respect to what our rights as Native Hawaiian people are under federal law and international law, our efforts sought to see how they (the different models at each level of law) complement and/or how they conflict with each other. These are questions that have been pending for a while and I think we need to have some clarity and clarification.

We've had a number of consultants that have come in. I'd like to acknowledge Chief Advocate Kawika Riley for leading this effort and finding experts in both arenas to inform and educate the board, as we move forward in this nation building process. One thing that has prevented us from moving forward with this particular conversation is that when we've heard from experts, their background was limited to either the U.S. system or the International system.

So today we have two presenters with experience in both, which will provide great knowledge and insight into our situation as Native Hawaiians. The first speaker I'd like to introduce is James Anaya.

He is the former U.N. Special Rapporteur of the Rights of Indigenous Peoples, and now Regents Professor at the University of Arizona, where he teaches Human Rights Law and Indigenous Peoples Law.

I'd also like to welcome Robert Williams. Mr. Williams is a Professor of Law and American Indian studies at the University of Arizona and the author and co-author of several of the Seminole texts used in the study of Indigenous Law and Policy and Indigenous Studies. Together they are the co-chairs of the Indigenous People's Law and Policy Program at the University of Arizona. We have included their report in your packet, and thank them very much for taking time to come here to speak to us.

**Professor Anaya:** Aloha and good morning. Thank you for that introduction. It is an honor to be here to share the research we have done and share the report that we have produced over the past several months.

It has been requested from OHA that we address these points:

First - the extent to which the U.S and its political sub-divisions are obligated to Native Hawaiian by the U.N. Declaration of the Rights of Indigenous Peoples at an international level;

Second - the implications of the proposed Federal Administrative Rule in relation to the fulfillment of U.S. obligation under international law;

Third - overview of relevant international procedures, by which Hawaiian people could pursue remedies for violations of their rights; and

Fourth - overview of experiences in other parts of the world where indigenous have found responses to their claims / comparative practices in other parts.

---

We have been asked to present a report of 50 pages, single-spaced in 30 minutes. So we really would like to entertain and emphasize questions and comments as well as hear from you on what you want to know. This is a very complex subject matter and of course a very important topic for you.

The first point: *What are the rights of the Native Hawaiian people under Contemporary International law by the U.N. Declaration of Rights of Indigenous Peoples?*

The question has to do with examining Contemporary International law having to do with these people which has been developed over the past several years or decades grounded within the international system to protect human rights. We are going to examine the contemporary regime of indigenous rights grounded under the international system. We are going to importantly draw a contrast between the regime of indigenous rights with two other theories of approaches at the international level used and advanced as addressing claims. One of these other approaches is decolonization, correlation with international regime for decolonization of territories under classical colonial rule/power as opposed to sit the territory being integrated into an independent state.

The third approach is that of restoring the monarchy under the presumption that the U.S. is an illegal occupier. Mainly as a way of comparing it to contemporary rights regime on the indigenous that is what we were asked to do, but as this is very important, it is also essential to distinguish this regime from other approaches.

First, with regards to this regime, the U.N. declaration of the rights of indigenous was adopted by the U.N. general assembly in 2007 as a product of over two decades of discussion. Prompted by indigenous peoples' demands from all-around the world, people from Hawai'i participated in this and put forth proposals that eventually resulted in the text and the adoption of it. The declaratory assembly affirms rights like: human rights principles, equality, independence, self-determination, self-governance powers, culture, and rights having to do with land; this also includes customs and traditions - one of the obligations of government.

This importantly calls on states to remedy the injustices that are affecting and disadvantaging their positions that have occurred before; this is seen as a remedial instrument. Keeping into account the oppression, highlighting obligations to remedy those historical injustices, and of course one can see how this can directly relate to indigenous Hawaiian people, assumes the existing sovereignty of the nation state over indigenous as a general condition, and hence places the obligation upon states within the framework to specific measures to provide for all these rights within this framework. It does not foreclose the possibility of indigenous to become independent, but it assumes the normal circumstances that countries will remain with their sovereignty intact, but change their administrative practices and their laws necessary to protect and respect these rights and enact the remedies that require them to address historical injustices.

The declaration isn't a stand-alone document, it relates to a broader system of human rights within the international system. So we see a number of treaties to which the U.S. is party that speak to indigenous peoples situations and it provides recourse for indigenous peoples. Two treaties in particular are the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all forms of Racial Discrimination where the U.S. is a party and therefore has obligations under those treaties.

The International Covenant on Civil and Political Rights affirms the rights of self-determination of peoples and that has been understood to apply to indigenous peoples generally, as well as other peoples. It also affirms cultural rights of minority peoples. That has been understood to provide rights to most indigenous peoples, including protecting all aspects in their distinct culture, including relation to lands, resources, and economic activities.

Again, the other treaty is the International Convention of the Elimination of all forms of Racial Discrimination. This establishes for states an international obligation to eradicate all those aspects of internal laws and policies that are racially discriminatory. The relevant U.N. institutions have interpreted that general norm of non-discrimination in particular ways, saying that for indigenous peoples, racial discrimination has occurred throughout their history. For example, the committees have identified the taking of lands and suppression of indigenous self-governance institutions, as forms of racial discrimination. Hence, the relevant U.N. bodies who eliminate racial discrimination are calling upon states to: eradicate these legacies of racial discrimination, restore indigenous peoples' lands, and remedy other aspects of historical racial discrimination. These are treaty obligations that the U.S. has with regard to indigenous people with a broader human rights framework.

Then there is the Inter-American system. Even though geographically, Hawai'i is not within the Americas, it is formally considered under U.S. law, part of the United States (I understand the controversy around that statement). Nonetheless, under U.S. Constitution Law, it's part of the United States. Hence, the American Human Rights System applies with regard to the archipelago of Hawai'i, in ways that benefit, specifically indigenous peoples, and that imposes obligations on the United States with regard to indigenous peoples under its jurisdiction, including Native Hawaiian people.

There are various instruments to note here including:

- The OAS (Organization of American States) Charter which is a treaty that obligates the United States to protect and promote human rights, including with regard to indigenous peoples; and
- The American Declaration of Rights and Duties of Man – is a declaration that elaborates upon the OAS charter. It includes provisions regarding property that have been interpreted to apply specifically to indigenous peoples. It imposes upon states, including the U.S., the obligation to restore those lands to indigenous people that were illegitimately taken and provide some forms of remedies for that. These norms have been elaborated upon by the Inter-American Commission on Human Rights, which is one of the main institutions of the OAS system to protect and promote human rights.

The other main institution is the Inter-American Court of Human Rights which also interprets the Inter-American Instruments in ways specific to indigenous peoples, particularly with regard to land rights. We see that the Inter-American system like the U.N. system establishes, articulates, and promotes a series of norms favorable to indigenous peoples that reflect obligations on the part of the United States toward indigenous peoples, including Hawaiian peoples. There are other sources with the International Human Rights system relating to indigenous peoples that establish states' obligations. Some of these other sources apply directly to the U.S., others more indirectly.

For instance, the ILO (International Labor Organization) convention 169 - this is a multilateral treaty the U.S. has ratified. It reinforces the international norm and is said to reinforce the standard of custom international law that is obligatory for the U.S. We see the U.S. is obligated in regard to indigenous peoples and obligated to remedy historical injustices with regard to lands, resources, self-governance and so forth. These obligations emanate from the international system, from the protection of human rights, and articulated most specifically in the U.N. Declaration on the Rights of Indigenous Peoples. The fulfillment of the U.S. duty to respect and protect the human rights of Native Hawaiian people under the regime requires the development of policies, laws, and institutional mechanisms to protect these rights.

In the case of the Hawaiian people, the obligation requires the U.S. to do so in cooperation with the Native Hawaiian people. The U.S. is not to laterally impose its solutions or its remedies, but to do so in a way that's in cooperation with the Hawaiian people and your representatives. A central part of this obligation is the recognition of the Hawaiian people and their own represented government institutions, as defined by the Hawaiian people. That is a central part of this obligation emanating from this international system for the protection of indigenous peoples' rights. It's important to understand that while the obligation applies to the U.S. as such as a corporate whole, it is implemented through the various relevant political subdivisions of the U.S., including the State of Hawai'i. The state may exercise functions relevant to the Hawaiian people and other agencies of the government. Example agencies being: the State Department, Department of Interior, Agriculture Department, and so forth to the extent they touch up on indigenous people concerns or Hawaiians concerns. This obligation is to be effectuated through those agencies.

So, the State of Hawai'i has a role to play, to the extent they have functions that touch upon indigenous peoples' rights. Obviously the State does, and that those functions are exercised through OHA as I understand it; many of them at least. OHA and the State of Hawai'i have a role to play in effectuating these obligations that the U.S. has, as well as the institutions of the federal government itself. Now, again as I said, we wanted to draw a connection or contrast to this *Indigenous Rights Regime* that I just talked about. This is founded in the international system for the protection of human rights, with other regimes or norms within the International Law or International System that are relevant in one way or another.

Another one of these regimes with particular relevance to Hawai'i is the Decolonization Regime grounded in Article 73 of the U.N. charter. Now the United Nations was founded in 1945 and the U.N. Charter is in essence the constitution of the U.N. and establishes the organization and structure of the U.N. as well as certain ground rules or basic obligations by the U.N. member states. One of these is articulated in Article 73 and this is the obligation of countries that were exercising authority over colonial territories to advance the self-government under those territories. All of these countries that had colonies in Africa, for example, were obligated under Article 73 to advance the self-government of those African territories. That ultimately led to the independence in most cases of those countries.

The U.S. was obligated with regard to territories under its administration in a colonial sense. *What was the obligation in particular terms?* That obligation was to allow the people of those territories the choice of integration:

- territories could become part of the colonial power;
- territories could be associated in some kind of compact; or
- territories could choose to become independent states

The important thing was - it was the choice of the people concerned. In the case of Hawai'i as you know, the way the U.S. implemented its obligation was by a referendum offering the people living in the territory of Hawai'i the choice between; the status-quo or statehood. Independence was not offered. Thus, there was a lot of controversy over the way the U.S. implemented its obligation in Article 73 and whether it was valid. That is a good question that raises a number of issues that need to be considered. In any case, to re-open the decolonization issue would require the cooperation of the U.S. That's the way it works under the U.N. system. It's an obligation to implement by the country concerned; by the administering power.

We point to certain examples for other territories that have been able to open up colonization and decolonization after the country thought it was all settled. For example, French Polynesia, they had been successful in opening up the question again and having the U.N. say "*okay, France you have to go back to the drawing board*" but still it is up to France to do it. So, it is partly-legal, partly-political; that's what one needs to understand. There is a great deal of politics involved in getting the U.N. to send the message to the country that they need to reopen the process. That is ultimately up to that country to redo the process; so that needs to be considered. It's important to keep in mind, that independent from this decolonization regime there are still these obligations under the indigenous rights regime that we talked about before. So no matter what happens under the colonization whether or not it is re-opened, the U.S. is obligated to respect the rights of the Hawaiian people under the U.N. declaration and relevant sources of authority.

---

The other approach that we want to draw comparison to is the one represented by the argument for the restoration of the historical sovereignty of the Hawaiian monarchy. This approach includes the argument that the U.S. presence is illegal, because the annexation was illegal and under this argument the U.S. is an illegal occupier; so its sovereignty is not valid. What is called for under this approach is the de-occupation by the U.S. Of course, this argument can find some support in the 1993 congressional apology which acknowledges the illegal overthrow of the monarchy and the acknowledgement in that congressional apology for remedy. We do have authority establishing that the annexation was illegal under international law of the time and that there is required a remedy.

However, if one looks carefully at Contemporary International Law, a remedy that is present for the taking of indigenous sovereignty generally is this Indigenous Rights Regime. We don't see readily this available under Contemporary International Law, as we study this carefully.

I'm not saying this is the way we want it to be, but we described this on the basis of an objective look at Contemporary International Law and that the kinds of remedies that are available under International Law are not readily seen as simply the de-occupation of a territory that was illegally taken a long time ago.



There are all kinds of reasons for that, but it has to do with international relations; the way those relations configure, and the way they affect contemporary rights and responsibilities of sovereigns. With most of the countries of this world, virtually all recognize in their relations with the U.S., the United States' sovereignty over Hawai'i. International law, even when it recognizes a wrong, it looks to remedies that do not upset stability and order governance; so one should have that in mind. It deals with what would happen when we are declaring illegality and require de-occupation in terms of stability for all concerned. Then settled expectations in the rights of those innocent third-parties who were here, have to be taken into account. Where we are with this argument is that we can see there's a lot of support for the basic proposition that yes it was illegal; that annexation. However, the question is *what is the appropriate remedy?* It also deals with what Contemporary International Law does not provide for. From our assessment, and I welcome a discussion about this, it does not provide readily a remedy of de-occupation or restoration of the monarchy.

What it does provide are these indigenous rights that require redress for lands, restoration of culture, and some form of self-government that's appropriate to the conditions of the Hawaiian people today. Implications surround the proposed federal administrative rules for the reestablishment of a Hawaiian governing entity and the federal recognition of a Hawaiian governing entity; the proposed federal rule that you are familiar with.

The question is, *to what extent is the proposed federal rule compatible with U.S. obligations under international law?* Now, it's hard to tell because it's in such an embryonic state. This proposed federal rule, if you read it, it's just basically asking for comment for what the proposed federal rule will provide. The answer depends on how a rule actually develops. It could be a step in the U.S. moving towards compliance with its international obligations under the Indigenous Rights Regime, to the extent it supports the development of self-governance that then establishes the basis for land rights or redressing land claims. This could form the basis for restoring cultural rights and providing a foundation for healing among the Hawaiian people in the face of the historical oppression.

---

Then it could be in furtherance of the U.S. obligation under the Contemporary Indigenous Rights Regime. Now, it would of course not resolve all of these claims under any of these different regimes: Indigenous Rights Regime, Decolonization, or the De-occupation argument. It wouldn't resolve them as a whole, but it could be a step towards it. It would still leave a lot unresolved. So a question is: *would it prejudice these other claims or would it affect these other claims?* The short answer is *no*.

It could be a step toward addressing these claims, but it really can't be seen as prejudicing these claims. We have all kinds of examples where indigenous peoples and colonized peoples have pursued steps, however minimal, toward addressing concerns, but those do not foreclose other claims down the road, including perhaps the restoration of full sovereignty. The only way that would happen is if there was some type of clear waiver of those other rights. If the Hawaiian people said *okay we're going to pursue this route and we waive our claims to all these other things* or their acquiescence was deemed to be such a waiver. If the Hawaiian people make clear that *we are not foregoing these other claims as we pursue this remedy*; that would not prejudice these other claims in our estimation. It would be very hard for the U.S. to make that argument where that would prejudice the claims; there is precedence out there that would make it hard for that argument to prevail.

So, that is my part of the presentation and now my colleague Rob Williams is going to talk about specific procedures at the international level that are available for pursuing implementation of these rights that we have talked about.

**Professor Williams:** Aloha and thank you for the privilege of working on this very important research project. Again, following-up on the chairman's comments, our basic position is that the pursuit of remedies should be occurring both at the international and at the domestic level. Also, that is the best strategy for the Native Hawaiian people to achieve their self-determining goals. Whether the model is independence, decolonization, or a government-to-government relationship; all must use both international law and domestic law. They both mutually reinforce each other and strengthen the arguments for the recognition of human rights.

With that said, one of the tasks that I had major responsibility for in the report was to research and discuss the relevant international forms and procedures to pursue remedies for historical and ongoing violations of the rights of Native Hawaiian people under international law. A couple of points to make, these forms and procedures do not displace state authority; meaning U.S. authority. However, they function to promote actions by states to provide remedies in accordance with obligations under international law. When I teach students and talk to tribal leaders around the world, one of the points I'm always making is that - *the point of international law is really to put itself out of business*. We would not need international law when all states honor their human rights and international law obligations. So the point is to use international law to leverage states to amend their constitutions, to pass new laws, and to implement administrative regulations that reinforce, recognize, and protect these human rights.

One calls on international law when the state itself has failed to honor its obligations. Then international legal systems and these remedies try to get the state to get it right; to make the necessary changes.

Another important point with international law, its most effective use by advocates for human rights is to raise awareness of alleged human rights violations. What I often times tell indigenous peoples is that the language of human rights and international law gives you another way of framing your rights that domestic law often does not. For example, federal Indian tribes are on what's called the Doctrine of Discovery and it is the only legal doctrine that U.S. law recognizes, and it's based on racial inferiority of indigenous peoples. The doctrine has been widely condemned in international law. So international law gives you another effective way of reaching the hearts and minds of influential opinion-makers and allies in the struggle for your rights. The point that I make is that you turn to international law when the domestic forms have denied the validity of your claims, are violating your rights, and you need a more effective language that can build alliances and put pressure on domestic decision-makers to do the right thing.

Finally, the mechanisms capable of issuing decisions or specific and targeted recommendations have the potential to engage states directly. Native Hawaiians and indigenous peoples have been very effective for example in going to the U.N. Permanent Forum in New York or the Expert Mechanism that meets in Geneva. Those procedures, those mechanisms are important, but we feel it's more important to focus a strategic human rights campaign on those mechanisms that actually issue specific decisions and targeted recommendations that directly engage the state. We have a number of examples of those within our report.

Let's talk about at least a couple of those procedures that do have that ability to engage the state with really firm standards under international law.

First, the U.N. human rights council; it's the principle U.N. inter-governmental body responsible for human rights. Two of the council mechanisms in particular are discussed at length in the report and they can be used to obtain a specific decision or recommendation for redress under international human rights standards. One of those was instituted by my colleague while he was U.N. Special Rapporteur on the Rights of Indigenous Peoples and that is the communications procedure which has been used by Native Hawaiian Human Rights Advocates. As Jim just described, a specific inquiry was made of the United States with respect to its policies involving Native Hawaiians and the state department engaged and actually responded. So again, it's an excellent way to use these procedures to highlight issues for international officials to get them into official reports and recommendations as well as circulated and used to put pressure on domestic actors.

Secondly is the Human Rights Council Confidential Complaint Procedure for systemic violations of human rights. Again, the ability of any U.N. body to say *we have made a finding and you have violated Native Hawaiian rights, now get your act together*, is not the way the system works. No one can really force a sovereign state in the absence of signing a binding treaty to change the domestic policies, but the world opinion of these types of procedures and mechanisms build collective weight and pressure. Often times, officials simply take another look at their policies and that could be very important for engaging the state.

---

Jim mentioned some of the U.N. treaty monitoring bodies. The most important one, because the U.S. has actually signed on to this treaty, is the U.N. CERD (Committee on the Elimination of Racial Discrimination) which monitors the compliance of the treaty for the elimination of all forms of racial discrimination. Here again, CERD's ability to tell the U.S. what to do is very limited because the U.S. has limited its own responsiveness to CERD's recommendations. However, CERD does have an urgent action early warning procedure that has been used very effectively by a number of indigenous rights groups; particularly the Dann Sisters Western Shoshone tribal members in the U.S. That early warning procedure is designed to prevent existing problems from escalating into conflict and it does focus attention on what is going on in a particular country in a way that might not be available through domestic forms. Under this procedure, indigenous peoples and organizations submit information to CERD about pending conflicts or imminent threats. One of the most important aspects of this procedure is that these requests can be submitted to CERD at any time. You don't necessarily have to wait for CERD's regularly scheduled sessions; they can take action.

Again, because of CERD's own reputation for Human Rights Enforcement, these urgent action / early warning procedures can be very effective to get these issues on the table. The inter-American human rights system has been extremely responsive to indigenous peoples' rights issues. In fact, if you ask human rights experts which body has had the most influence on the development of the jurisprudence of indigenous peoples' rights under international law; it's the decisions by the Inter-American System and the Inter-American Court of Human Rights. If you think about it, it's just the large numbers of indigenous peoples who live in the countries represented by the OAS; these are urgent issues and quite developed jurisprudence. The Inter-American Commission is tasked with protecting the fundamental human rights enumerated in the primary instruments of the OAS human rights instruments. The U.S. is not a party to the American convention, but the American declaration applies to it by virtue of its membership in the OAS. What is most important and our program (IPLP) has filed a number of petitions before the Inter-American Commission which as they wind their way through the process generates reports which add to the jurisprudence of indigenous people's rights. It also gives the indigenous peoples who have brought those petitions a written report and a very complicated in-depth series of findings and evidentiary issues, direct engagement with the state at a hearing before the Inter-American Commission in Washington D.C. This is a great mechanism for indigenous peoples to use to get their issues in front of an adjudicated body that can take an independent look.

Finally, one of the issues we looked at was the exhaustion of domestic remedies through pursuit of any of these four international mechanisms. For example, *should Native Hawaiians ultimately decide on a government-to-government relationship with the U.S., or decide on another remedy?* The point to understand about international law is you don't turn to any of these bodies until you have exhausted your domestic remedies and that tie-in with the principles that I was trying to emphasize earlier. The reason international legal bodies want you to exhaust your domestic remedies is that they want to give the state the opportunity to get it right. So typically, the exhaustion doctrine will apply to judicial action and does not apply to the types of procedures that we have been discussing here, except, the Inter-American Commission issue of its report. Those sorts of formal adjudicatory findings would be subject to exhaustion. For example, the complaint procedure of the special rapporteur that I mentioned and some of the other procedures would not be subjected to exhaustion issues.

Jim did mention the decolonization process that's worth looking at. We spent a lot of time going through some of the examples of the U.N. decolonization process under Article 73, specifically with some of the very prominent cases involving indigenous peoples. A prominent example is French Polynesia and if you track the history of French Polynesia with Hawai'i there are some very remarkable similarities. Hawai'i was originally considered by the general assembly to be a non-self-governing territory under the U.N. decolonization regime. Then after 1946, France simply stopped complying with the reporting requirements and simply delisted French Polynesia off of the non-self-governing territories list.

Through political activism, the Kanak indigenous peoples over the course of 30 years, some of it quite strident, some of it very sophisticated in terms of making alliances with other Pacific countries over vigorous French objections, were able to get the General Assembly to relist French Polynesia as a non-self-governing territory. That position of France was supported by the U.S. Here we had two superpowers that were not able to stop the momentum that had been built up through a very carefully calibrated strategy of combining domestic-legal-political pressure along with international procedures to create that momentum to move to the General Assembly.

One of the important things to recognize about any of these strategies is that the international community wants to see a capacity for self-governance. You're not going to get international actors to agree to independence or to decolonization unless the entity pushing it can show some ability for self-governance. So when you read our report, one of the points we try to make is that any sort of self-governance mechanism that is developed and agreed upon by the Hawaiian people is an important step toward getting that legitimacy within the international arena for the broad range of claims that you might want to make. Without that self-governing capacity, you have literally nothing to stand on. You really can't show them that you have the ability – you can talk-the-talk but they want to see if you can walk-the-walk and actually do it.

Important in this process is the engagement in nation-building and the focus on those types of self-governing initiatives. There's an extensive section on comparative practices. We were asked to look at some other approaches that have been used by other indigenous peoples. We could literally write a book about different approaches used by indigenous peoples to recognize their rights, particularly their rights to self-determination. The ones that we chose were carefully selected and detailed in our report.

**Trustee Ahuna:** Before we go any further should we address the blood quantum issue?

**Professor Williams:** The blood quantum issue is the single most divisive issue confronting America. I think you need a constitution and those issues are best addressed as constitutional issues because you're dealing with fundamental rights and cultural identity and benefit. So that has to be hashed out in a constitution. I can promise you that that will be the most difficult. It's the most contentious and most angry issue you're going to confront, but it has to be done. We've been working with the San Carlos Apache tribe for 20 years on a constitutional amendment to their blood quantum requirement because within three generations there will be no San Carlos Apache left, because of outer-marriage issues.

**Pouhana Crabbe:** This has been a great presentation and discussion. Professors Anaya and Williams will be doing a Brown Bag to OHA staff in a few minutes, where we will have more time for questions and discussion. We will have time to review their report and continue the dialogue about it moving forward. The intent today was to get these individuals, who have experience at the international level, with the United Nations, and familiar with the plethora of examples regarding Native American tribes and recognition domestically, to give greater insight to the Board. I think the report provides excellent content for us to continue incorporating the findings in OHA, as we move forward.

**VIII. ADJOURNMENT**

**Trustee Apoliona moves to adjourn the BAE meeting.**

**Trustee Akana seconds the motion.**

**Chair Waihe'e asks if there is any discussion. There is none.**

**Chair Waihe'e asks if any members vote NO or ABSTAIN. There are no dissenting votes.**

						11:42 a.m.	
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEI	AHU ISA			X			
DAN	AHUNA			X			
ROWENA	AKANA		2	X			
VICE-CHAIR PETER	APO			X			
HAUNANI	APOLIONA	1		X			
CARMEN HULU	LINDSEY						EXCUSED
ROBERT	LINDSEY						EXCUSED
COLETTE	MACHADO						EXCUSED
CHAIR JOHN	WAIHE'E			X			
<b>TOTAL VOTE COUNT</b>				<b>6</b>	<b>0</b>	<b>0</b>	<b>3</b>

**MOTION: [ X ] UNANIMOUS [ ] PASSED [ ] DEFERRED [ ] FAILED**

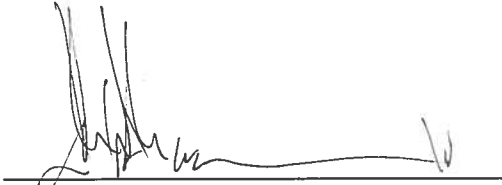
**Chair Waihe'e adjourns the BAE meeting at 11:42 a.m.**

Respectfully submitted,



Melissa Wennihan  
Trustee Aide  
Committee on Beneficiary Advocacy and Empowerment

As approved by the Committee on Beneficiary Advocacy and Empowerment on October 7, 2015.



Trustee John Waihe'e, IV  
Chair  
Committee on Beneficiary Advocacy and Empowerment

ATTACHMENT(s):

- Notice of Excused Absence (3)
- Community Sign-In Sheet dated August 13, 2015 (1)