



Nā Koa Ikaika o Ka Lāhui Hawai'i

PO Box 6377 Hilo, Hawaii, 96720

Convener: Mililani B Trask email: mililani.trask@icllchawaii.com

July 28, 2016

To: President Barrack Obama

The White House

1600 Pennsylvania Ave, N.W.

Washington D.C. 20500

From: Mililani B. Trask

Convener, Na Koa Ikaika Kalahari Hawaii

ECO-SOC Affiliate to Indigenous World Association

Melissa Moniz

President, Kai Ulla Ponto's Hawaiian Civic Club of Texas

Re: Proposed Expansion of the US Northwest Hawaiian Islands Marine Monument

Aloha Mr. President,

Our organizations filed objections with the United States and the World Heritage Committee (WHC) when the US proposed establishing the Papahānaumoku Monument. Our objections were based on the fact that the Monuments rules and regulations deprive native Hawaiians and Hawaiians of their fishing rights, commercial and subsistence, while allowing unlimited sustenance fishing for the US Military and the International tourism industry.

These limitations were unilaterally imposed by the United States and the WHC without consultations with Hawaiians and without our Free, Prior and Informed Consent. The area of restriction lies within the boundaries of the State of Hawaii. These are not international waters. When Hawaii was admitted into the Union, the U.S. imposed a trust obligation to utilize State ceded lands and submerged lands "to better the conditions of native Hawaiians". Since that time, the United States has had a unique trust relationship with our peoples and an obligation to ensure that Hawaiian trust assets, including State marine resources in State waters, are used to "better the conditions of native Hawaiians". The imposition of these restrictions not only violates specific provisions of the UN Declaration on the Rights of Indigenous Peoples, but also threatens our food security and that of the entire State of Hawaii.

In addition to fishing, Hawaiians have cultural rights to gather cultural resources and to worship at the many sacred heiau located within the Monument. These rights are enshrined in the United Nations Declaration on the Rights of Indigenous peoples, which you supported.

We want to bring to your attention the findings of the **Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples in its Report on the Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage**



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dated 11 May 2015 (A/HRC/EMRIP/2015/2) which confirms these problems within WHC sites including the Monument. It states in part:

1.

“56. The establishment of World Heritage sites, or other forms of protected areas, often has a negative impact on indigenous peoples because, often, their ancestral rights over their lands and territories are not respected or protected. In many nature-protected areas, including areas inscribed on the World Heritage List, narrow restrictions are imposed on traditional practices and activities, such as hunting, gathering, farming or animal husbandry, in violation of the cultural and subsistence rights of indigenous peoples. To be included on the World Heritage List, sites must be of “outstanding universal value”, a concept that can lead to management frameworks that prioritize the protection of those heritage aspects at the expense of the land rights of indigenous peoples or one specific interpretation of the site to the detriment of other interpretations. As a result, the protection of world heritage can undermine indigenous peoples’ relationship with their traditional lands, territories and resources, as well as their livelihoods and cultural heritage, especially in sites where the natural values are deemed to be of outstanding universal value but the cultural values of indigenous peoples are not taken into account.”

The Hawaiian Community is overwhelmingly opposed to the Expansion of the Monument as evidenced by the opposition of the Hawaiian Civic Clubs. We read with interest the letter forwarded to you by Senator Schatz dated March 23d 2016 that stated that it was “critical” that your administration “commence direct and meaningful engagement with Hawaii stakeholders who have an interest in this special place and its surrounding waters.” To date, neither your administration nor Mr. Schatz have held consultations with our Hawaiian fishermen & Hawaiian communities.

We oppose the expansion of the Monument and reiterate our request that the United States convene a Consultation with our peoples on this initiative here in the State of Hawaii. We request your administration listen to the perspective of the US WESPAC, the body directed by federal law to work with communities to protect and manage fisheries.

We forward herewith our Objection to the initial declaration of the Monument and incorporate this Objection by reference.

Regards,

Convener, Na Koa Ikaika o Ka Lāhui Hawai'i

2.

Page #1. Objections and Claims of NaKoa Ikaika KaLahui Hawaii and The Koani Foundation to the Nomination of the Northwest Hawaiian Islands Marine Monument (NWHI) to the UNESCO World Heritage List & to the UNESCO/WHC Pacific Action Plan:

Objections:

1. Petitioners object to the nomination of the “Papahānaumoku” (NWHI) Monument to the UNESCO/World Heritage List by the USA and the State of Hawaii. The US/State nomination constitutes a breach of trust and violation of State Constitutional law that requires that the territories and resources of the NWHI are held in trust for the “betterment of conditions of native Hawaiians”. In addition, Petitioners object because of violations of international law set forth herein and because we and other indigenous Hawaiians have not been afforded our right of consultation, and are negatively impacted by Federal processes which abridge our rights to sustenance, and to economic, cultural and social development in the NWHI. Petitioners and other Native Hawaiians have not given their free, prior and informed consent to the listing of the NWHI as a World Heritage Site. The management plan proposed by the United States abridges Indigenous rights, does not meet the criteria for WH listing and contains numerous misrepresentation and omissions.

2. Petitioners object to the UNESCO/WHC processes and procedures that have had the effect of excluding petitioners and other Native Hawaiians from the nomination and evaluation process and which have been undertaken in secret and in violation of petitioners’ human rights set forth herein;

3. Petitioners object to the UNESCO/WHC Pacific Action Plan and to the UNESCO/WHC processes and procedures that have excluded the indigenous peoples of the Pacific from meaningful participation in the Plan, and subjected their lands, territories and resources to increased State and international control.

EXECUTIVE SUMMARY

The Koani Foundation and NaKoa Ikaika KaLahui Hawaii (Petitioners) are indigenous Hawaiian Organizations who are objecting to the World Heritage nomination of the “Papahānaumoku” Monument by the United States and the State of Hawaii. They have a long history of interfacing with the United Nations System and have attended and actively participated in UN work relating to the Declaration on the Rights of Indigenous Peoples, as well as many meetings of various UN bodies which address indigenous issues, and numerous international meetings under various Conventions including the Convention on Biological Diversity, the UN Framework Convention on Climate Change, the World Heritage Convention, and the Human Rights Conventions.

NaKoa/Koani object to the nomination on two grounds: 1) the NWHI Monument is part of the Ceded Lands Trust created as part of the Hawaii Statehood Compact “for the betterment of conditions of native Hawaiians”. It is a trust asset which the State of Hawaii manages pursuant to strict fiduciary responsibilities which are constitutionally prescribed, and which have been the subject of significant statutory and juridical interpretation; 2) NaKoa/Koani also object as traditional owners of the NWHI with human rights to the lands, territories and resources which comprise the ‘Monument’ and which were “federalized” by Presidential Proclamation of George W. Bush in 2006 to facilitate the nomination. In the process, Native Hawaiian human rights and beneficiary rights and entitlements to their trust lands have been terminated. For example, sustenance fishing is now only allowed to fishermen as long as they agree not to bring home fish for their families! In addition, the Bush Proclamation exempted all US Military activities in the Monument from the requirements of federal environmental law. These uses include military maneuvers and missile launching which petitioners do not support as part of the Conservation Management plan under WHC guidelines.

Nakoa/Koani objections are based in part on the exclusionary processes, which the United States utilized in the nomination, which did not include broad and transparent consultations with the beneficiaries of the trust but were limited to participation of a few individuals who were federal advisors and in some cases federal employees, and paid contractors. Petitioners object to the denial of their rights including their right to freely pursue their economic, cultural and social development in the Monument and the lack of procedures to accommodate their sustenance rights and cultural practices.

Nakoa/Koani refer to ongoing State Court Litigation that is challenging the refusal of the State of Hawaii to apply State environmental law to numerous activities being “permitted” by the USNOAA in the Monument, including numerous permits for extraction research. In addition, they document the introduction of coral diseases into the pristine waters of the Monument by USNOAA permit holders, and the ongoing failure of the USNOAA to monitor and enforce biosafety standards in the Monument. Petitioners support this litigation and do not believe that the nomination of the USA should be addressed by the World Heritage Committee before the Court delivers its ruling on the issues before it which directly relate to environmental and conservation management of Native Hawaiian trust assets in the Monument.

NaKoa/Koani also object to the taking of the sacred name “PAPAHANAUMOKU” and to its use by the United States to designate the monument as it is clearly the collective intellectual property and heritage of the Native Hawaiian peoples.

Nakoa/Koani question the Advisory Bodies’ (ICOMOS and IUCN) capacity to be independent (IUCN) and object to the processes followed by the site evaluators who are supposed to meet with all stakeholders including indigenous peoples who are practitioners, fishermen etc. This did not occur although the evaluators spent nearly a month in Hawaii during which time they flew to Hilo to tour the volcano and visit the Museum, had dinner on a replica of the Hokulea, had a 2 ½ week “cruise” of the NWHI, and met with Native Hawaiians who are “cultural advisors” of the USA.

Petitioners also object to the UNESCO/WHC Pacific Action Plan that was drafted and developed without the meaningful participation of indigenous peoples who are customary landowners and still exert control over 90% of the territories of independent Pacific States. Nakoa/Koani refer to several UN human rights reports and documents, including the World Heritage Committee's own Operational Guidelines, that impose upon UNESCO and the WHC (and its advisory bodies) an affirmative obligation to implement the provisions of the UN Declaration on the Rights of Indigenous Peoples in their work. Nakoa/Koani cite specific examples of how World Heritage designations on the lands of indigenous peoples have created serious human rights problems and in some cases resulted in the relocation of indigenous peoples.

RECOMMENDATIONS:

1. Regarding the World Heritage nomination of the NWHI ("Papahānaumoku"):

- a. NaKoa/Koani recommend that the UNESCO/WHC defer action on the nomination of the NWHI and request that the Obama Administration consult with PETITIONERS to resolve issues relating to the rights of indigenous Hawaiians to access their trust resources in the NWHI (including sustenance rights), and to provide a fair process for Hawaiians to obtain permits for cultural and other uses of their resources in the NWHI.
- b. Nakoa/Koani recommend that the UNESCO, WHC, ICOMOS and IUCN (incl. TILCEPA) agree to send representatives to attend a consultation in Hawaii, hosted by Nakoa/Koani, at which time data, information and personal testimonies of practitioners and fishermen will be provided to them.

2. Regarding the procedures and processes utilized by UNESCO/WHC and their failure to integrate the human rights protections contained in the UN Declaration on the Rights of Indigenous Peoples or adopt internal policies relating thereto:

- a. Nakoa/Koani recommend that the UNESCO/WHC immediately convene a Working Group of Indigenous Experts, including experts from the Pacific, the Special Rapporteur on the situation of human rights of indigenous people (Jim Anaya), representatives of the UN Permanent Forum on Indigenous Issues, and others.
- b. Tasks of the Working Group will be 1) to draft an overarching policy on Indigenous Peoples (Model Policy) to guide the work of UNESCO and the WHC, incl. the work on the Pacific Action Plan; and 2) to create a framework for meaningful consultation between UNESCO/WHC and indigenous Pacific Peoples on the Pacific Plan.

3. Regarding the UNESCO/WHC Pacific Action Plan:

The UNESCO/WHC should defer adoption of the Pacific Action Plan until it has adopted a framework policy on indigenous peoples (referred to in 2 above) and a process for consultation. Thereafter, UNESCO/WHC should initiate consultations with all indigenous Pacific peoples in order to ensure their involvement in the conservation and management of their heritage and the inclusion of protective measures to ensure that their human rights, including their rights to fish, are acknowledged, preserved and integrated into the plan.

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Section I:

Claims of Petitioners and violations of the Human Rights of Hawaiians whose lands territories, resources and trust assets in the Northwest Hawaiian Islands are being expropriated by the United States and the UNESCO/WHC.

I.1. Petitioners:

Na Koa Ikaika KaLahui Hawaii and The Koani Foundation (Nakoa/Koani) are indigenous Hawaiian NGO's who have participated in the work of the United Nations for several years in the areas of human rights standard setting, in forums such as: the UN Working Group on Indigenous Populations (WGIP), the Intersessional Working Group on the Draft UN Declaration on the Rights of Indigenous Peoples, the Convention on Biological Diversity (CBD), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the UN Human Rights Council. Nakoa Ikaika is an affiliate of the Indigenous World Association which holds an ECOSOC credential (consultative status) under UN procedure. Petitioners have monitored the UNESCO/WHC Pacific processes consistently for 8 years during which time petitioners have also participated in efforts by the USA to impose "Sanctuary" status on the North West Hawaiian Islands (NWHI) through the public hearing process until it was terminated by 'Presidential Proclamation' #8031 by President George W. Bush. Nakoa/Koani membership support the litigation initiated in 2009 against the State of Hawaii for failing to enforce State environmental laws in the context of US Military activities and extraction research being undertaken in the Northwest Hawaiian Island Marine Monument referred to as "Papahānaumoku".

I.2. Petitioners Interest:

NaKoa/Koani are NGO's whose membership consists of native Hawaiians and their descendants. Several of the members of Nakoa/Koani are also members of Kahea, the Hawaiian Environmental Alliance (Kahea) and the Ilioulaokalani Coalition. These organizations are collectives of Hawaiians that advocate for environmental conservation and human rights for indigenous Hawaiians.

NaKoa/Koani are beneficiaries of the lands, territories and oceanic resources of the Northwest Hawaiian Islands, and hold equitable legal title to these territories. Hawaii is the only State in the US where all 'public' lands are held in trust for the 'public' and for "...the betterment of conditions of native Hawaiians". In all other States, the public lands and resources are held in trust only for the public. The special trust obligations of the State and Federal government have devolved because of the status of Hawaii as an independent Nation prior to the overthrow of its lawful government by armed forces of the US in 1893. As a result of these historic events, Hawaii was inscribed as a Non Self-Governing Territory by the United Nations in 1946. In 1959 when US Statehood was imposed on the territory of Hawaii, a special arrangement was memorialized in the Statehood Admissions Act that impressed upon all of the public land and oceanic (submerged lands) areas a trust specifically for indigenous Hawaiians. This was a condition of Statehood.

NaKoa/Koani raise objections to the nomination of the United States in 2 respects:
As indigenous peoples who have owned, used and occupied the lands, territories and resources of the NWHI from time immemorial and whose human rights elucidated in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) are being violated.
We also raise objections as beneficiaries of the Ceded Lands Trust established pursuant to Section 5(f) of the State of Hawaii Admissions Act. The territories and resources, which are subject to the US nomination, are trust assets of the Native Hawaiian peoples bringing these objections.

[Note: The rights of Native Hawaiians to their lands and resources are founded upon laws of the Kingdom, Hawaiian custom and usage, several provisions of the State Constitution, and innumerable statutes and county ordinances. They have been the subject of multiple judicial interpretations in State and Federal court. All information relating to these Hawaiian rights has been omitted from the US Nomination. Nakoa/Koani will present these legal underpinnings and cases to the UNESCO/WHC at the Consultation referred to in Section VI herein.]

I.3. Human Rights of Native Hawaiians violated by the ‘Papahānaumoku’ World Heritage Nomination

NaKoa/Koani are Polynesian indigenous peoples of the Pacific. From time immemorial, we and our ancestors have used, occupied and developed the Oceanic resources of the Hawaiian Archipelago, including the Northwest Hawaiian Islands. Nakoa/Koani claim the abridgment of the following human rights, collectively and for individual Hawaiians, as set forth in the United Nations Declaration on the Rights of Indigenous Peoples with respect to the nomination of the NWHI to the UNESCO/WHC for listing in the WH List:

1. Petitioners have the right of Self Determination, to determine their political status and freely pursue their economic, social and cultural development. We have the right to be consulted about any activity impacting our lands and resources and to give our free, prior and informed consent to such activities (Articles 3, 4, 18, 19, 32 UNDRIP and Article 1 ICESCR). We have not been consulted on the US nomination of the NWHI which has terminated our collective and individual rights to fish and pursue our economic, cultural and social development on our trust resources in the NWHI.

2. With respect to our lands, territories and resources: we state that our lands and resources in the NWHI have material, cultural and spiritual dimensions for our peoples, that we are inextricably tied to, and our survival and economic sustainability are dependant upon maintaining our rights to use, occupy and develop our land and Ocean based resources, including the territory of the North West Hawaiian Islands. We claim that these rights are vested in our peoples collectively by reason of our traditional ownership and traditional occupation of these territories as well as through Western trust law. We have a right to strengthen and maintain our distinct spiritual relationship with our lands and resources, including waters and coastal seas, and to uphold our responsibilities to future generations in this regard (Articles 25, 26, 27, 28, 29 UNDRIP).

With respect to our natural resources, including our resources in the Northwest Hawaiian Islands: Nakoa/Koani raise the US/Hawaii Statehood Compact under which the Ceded

Lands Trust, including the Northwest Hawaiian Islands, was established and set aside for the “betterment of conditions of native Hawaiians”. Petitioners note that the US is not the owner of these Oceanic resources but that the State of Hawaii holds these resources for Hawaiian people who are members of the “public” and for native Hawaiians. State authority over these waters is verified in the Federal Register referencing the monument. 50 CFR Part 404, Doc No. 060824225-6225-01.

Petitioners also claim ownership of these resources under international human rights law as set forth in the UN Declaration on the Rights of Indigenous Peoples by virtue of our traditional ownership, use and control of these territories. Therefore we assert our right to be secure in our means of subsistence (including sustenance fishing and gathering) and development and to engage freely in all Hawaiian traditional and economic activities in the waters of the monument. In keeping with our cultural practices and traditions set forth in the Paoakalani Declaration (Exhibit 1), we assert our right to consent to or approve and permit or license in the NWHI relating to extraction, extractive research in our territorial waters, resource assessment, prospecting and all other scientific, academic government or private sector undertakings. (Arts. 20, 25-32 UNDRIP, ILO Convention No. 169, Art. 15-19, CBD Art. 8j, UNDG Guidelines on Indigenous Peoples’ Issues)

3. With respect to the Environment and Conservation: we state that we individually, and our peoples collectively, have the right to the conservation and protection of the environment and the productive capacity of our territories and resources, and the right to participate directly in the design and implementation of conservation on our lands, territories and resources. The United Nations Development Group’s (UNDG) Guidelines on Indigenous Peoples’ Issues specifically state in this regard: “The spiritual relationship of indigenous peoples to their lands and territories and environmentally sustainable practices have been recognized and conservation efforts on indigenous lands, including the establishment of new and management of existing protected areas, have to take place with the free, prior and informed consent and full participation of the communities concerned”. The exclusionary process utilized by the USNOAA and the UNESCO/WHC have denied us our right to give our free, prior and informed consent to activities on our lands and to ensure that our lands and resources are managed in a sustainable and culturally appropriate way.

4. With respect to exempted military activities and US approved extraction research we assert that the United States failed and continues to fail to take effective measures to ensure that no storage or disposal of hazardous materials takes place in our territories (Art. 29 UNDRIP). The USNOAA allowed and permitted research that transported coral diseases into the pristine coral beds of the NWHI and failed to impose and monitor biosafety protocols in the NWHI. We oppose any military activities that take place on our lands, including the ceded land trust assets of the Northwest Hawaiian Islands, without effective consultations with us (Art. 30 UNDRIP) subject to our free, prior and informed consent. In addition, petitioners object to ongoing US military activities in the Monument which have not been subject to scientific assessment under an environmental impact statement.

5. With regards to our traditional knowledge, intellectual property, intangible heritage and cultural expressions in the NWHI: Nakoa/Koani assert all rights set forth in the Paoakalani Declaration (Exhibit 1) and under international law, including our collective right to maintain, preserve protect and utilize all cultural manifestations including sacred knowledge, chant, oli mele, as well as the use and preservation of geographical areas (NWHI) and geophysical features (mountains, waters etc.).

Petitioners claim collective ownership of the sacred place names and all sacred places in the NWHI, & associated knowledge including the name of our sacred mother, PAPA HANAUMOKU – Papa, Mother of the earth who birthed our island homeland. (Article 31 UNDRIP, see also Convention on Cultural Expressions, Art. 7; Convention on Safeguarding Intangible Cultural Heritage; Art. 15; CBD Arts. 8j, 10c and 15, and International Covenant on Civil and Political Rights, Art 27.) This sacred name has been taken by the US Government and used in its official reports on the NMHI as well as attached to the Monument. The US should relinquish this sacred name and revert to the original name, the NWHI.

Section II:

Concerns relating to the UNESCO/WHC Pacific Action Plan

The designation of Papahānaumoku is part of a larger effort on the part of the UNESCO/WHC to expand the number of world heritage sites in the Pacific.

Petitioners have tracked the UNESCO/WHC effort to expand World Heritage sites in the Pacific since the publication of the Report of the 2005 meeting on a “Thematic Framework for World Cultural Heritage in the Pacific” in Port Vila, Vanuatu. This tracking was initiated because the report identified Hawaiian sacred sites located in French Occupied Polynesia, most notably Te Po, Taputapuātea. In addition the report targeted certain sites of interest to the WHC including ‘places of the dead’, ‘religious places’, ‘ceremonial places’, ‘horticultural sites relating to taro’ and ‘associative cultural landscapes’. No sites or areas within the State of Hawaii were identified at that time, but sites that are sacred to Hawaiians and part of the Hawaiian culture and history located outside the boundaries of the State were included.

NaKoa/Koani monitored the outcomes of the Vanuatu meeting in 2005 that discussed and decided the thematic framework for the Pacific Action Plan. In 2008, at the Pacific World Heritage Workshop in Cairns Australia, the direct involvement of indigenous peoples in management of marine sanctuaries was discussed but no concrete action was taken to integrate participatory process for indigenous Pacific people in the evolving plan. No Hawaiians were included in these meetings nor was any mention made of the designation of the Northwest Hawaiian Islands.

In early 2009, the UNESCO and the WHC posted Internet notices regarding a State meeting in Maupiti in November 2009. The purpose of the meeting was to finalize the Pacific Action Plan, and receive input on progress made by States. The postings indicated that the Pacific Plan would be finalized in Maupiti and thereafter nominations would be

voted on by the World Heritage Committee at its meeting in Brazil in July/August 2010. Following the meeting in Maupiti, the WHC Internet posting stated that the gathering had “resulted in a Pacific World Heritage Action Plan (to be posted soon)” and mentioned that the “local authorities” had “promoted during the Workshop the elaboration of an “Ocean Declaration” which was being appended to the Action Plan.

In April 2009 NaKoa/Koani received the graphic report issued by the UNESCO World Heritage Center entitled “Progress Against the Pacific 2009 Action Plan”. This 14-page graph set out in detail the activities being undertaken by various UN bodies to implement the Action Plan as well as an implementation timetable. The Progress graphic made no mention of and had no reference to the inclusion of the indigenous customary landowners or indigenous Peoples of the Pacific in the planning or management process for WH sites, and did not mention or include consultation with indigenous peoples of the Pacific in its timetable or list of activities. In addition, email correspondence with indigenous peoples from areas in the Pacific that were being ‘explored’ by UNESCO/WHC revealed that none of the peoples were being included in the ongoing efforts of the WHC relating to the ‘Pacific Action Plan’. It was clear that Pacific indigenous peoples were being excluded from the Plan.

On November 14, 2009 Petitioners received a global email from Sen. Tuheiava in Maupiti distributing “The Maupiti Declaration on Oceans”, which he represented as the outcome document of the official meeting of indigenous representatives in Maupiti that was to be attached to the Pacific Action Plan as a supporting document. No copy of the Plan was attached. In later emails Tuheiava admitted that neither he nor any of the State appointed delegates to the Maupiti meeting actually had a copy of the Plan. Senator Tuheiava referred Petitioners to Bill Aila (USNOAA Honolulu) who did not have the Plan but who referred us to Giovanni Boccardi (UNESCO), who referred us to the US National Park Service, which in then recommended we contact USNOAA!

From November 2009 to April 2010 Petitioners sought to obtain a copy of the Pacific Action Plan in order to review the Plan and prepare comments to the WHC and States on the Plan before it is acted upon by the States in Brazil in 2010. Petitioners contacted UNESCO, the “local authorities” (Senator Tuheiava), the US National Oceanic and Atmospheric Administration (NOAA), and Hawaiian Cultural Advisors to the USA who attended the Maupiti meeting. However, no one had a copy of the plan or the outcome documents of the meeting, and none was ever posted.

After months of emailing for clarification to the USNOAA, UNESCO and Sen. Tuheiava, Petitioners finally received an email from UNESCO staff member Giovanni Boccardi on April 20th, 2010 admitting that the Maupiti meeting was a State meeting attended by State representatives some of whom ... “....considered themselves indigenous..”. Boccardi also noted that the Maupiti Declaration was not a UNESCO document, and that it also was not part of the Pacific Plan.

The Maupiti Declaration is a thinly veiled effort on the part of the UNESCO/WHC effort to make it appear that the indigenous peoples of the Pacific supported a Pacific Plan that

they never saw and never consented to. The delegates that went to Maupiti did not represent their peoples or communities but were State employees and cultural advisors who were on a cultural junket paid for by States and UNESCO in order to facilitate and fabricate indigenous support for the UNESCO/WHC Pacific Action Plan.

As of May, 2010 Petitioners have been unable to obtain a copy of the current Pacific Action Plan.

Section III:

Concerns relating to the ‘Papahānaumoku’ World Heritage Nomination

III.1. Background and History of the US Effort to Federalize the Northwest Hawaiian Islands:

a) The expansion of “Protected Areas” and increasing violations of Human Rights:

The situation in Hawaii relating to the taking of Hawaiian trust lands and resources is a small part of a much larger global problem, the designation and federalizing/nationalizing of indigenous territories ostensibly for environmental and conservation purposes. This problem was identified as one of the most significant “Emerging Issues” in the recently published UN report on the State of the Worlds Indigenous Peoples (Secretariat of the Permanent Forum on Indigenous Issues, 2010). The Report notes:

“The expansion of protected areas has grown phenomenally. In 1962 there were 1,000 official protected areas worldwide; in 2003, there were 102,102 protected areas in the world, covering 12 per cent (or 18.8 million square kilometers) of the Earth’s surface, an area larger than the continent of Africa and equal to half of the world’s cultivated land.” (p. 227)

Numerous authors have documented the negative impact of the establishment of nature protected areas on the human rights of indigenous peoples. (See, for instance, Marcus Colchester’s book “Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation” from 2003, and Mark Dowie’s book from 2009, “Conservation Refugees: The Hundred-Year Conflict between Global Conservation and Native Peoples”). Several of the negative examples mentioned in these publications are protected areas that have been recognized by UNESCO as World Heritage sites.

What is more, as research by Stefan Disko shows, in several cases the World Heritage designation *itself* has facilitated the loss of indigenous peoples’ control over their territories and resources, and consequently over their economic, cultural and social development. Some of the World Heritage sites where indigenous land owners have no role in management or are routinely marginalized in decision-making processes relating to their lands are the Dja Faunal Reserve in Cameroon, the Ngorongoro Conservation Area in Tanzania, or the Thungyai-Huai Kha Khaeng Wildlife Sanctuaries in Thailand. (See S. Disko’s forthcoming articles, both expected in 2010, “World Heritage sites in Indigenous peoples’ territories: ways of ensuring respect for Indigenous cultures, values and human rights”, in: M.-T. Albert and D. Offenhäuser (eds.), World Heritage and Cultural Diversity, German UNESCO Commission / BTU Cottbus; and “World Heritage sites and Indigenous communities:

the importance of adopting a human rights-based approach”, in: M. Albert, M. Richon, M. Vinals and A. Witcomb (eds.), *Community Development at World Heritage Sites: Issues and Potential*, UNESCO: World Heritage Paper Series). There are even cases where indigenous peoples have been “physically removed from protected areas as a way of justifying inscription of an area on the World Heritage list as a place of natural importance devoid of what is perceived as the negative impact of local inhabitants,” as Sarah Titchen has observed! (S. Titchen, 2002, “Indigenous peoples and cultural and natural World Heritage sites”, www.dialoguebetweennations.com/N2N/PFII/English/SarahTitchen.htm). An example where indigenous peoples have been removed from their lands to accommodate the World Heritage process is Bwindi Impenetrable National Park in Uganda (Dowie, 2009, p. 67). In the case of the Thunguyai-Huai Khaeng Wildlife Sanctuary, the World Heritage nomination document itself announced that the remaining Karen villages inside the sanctuary were “now being moved”!

Protected Areas are not just being established on land, but in the seas and Oceans as well. Throughout the Pacific, the United States has designated numerous marine sanctuaries. In recent years, under the Bush Administration, an effort was initiated which has resulted in the federalizing of an area exceeding 50% of the Pacific Basin, all of which comprises the lands, territories and resources of Kanaka Maoli (indigenous Hawaiians) and other Pacific Indigenous Peoples. Indigenous peoples of the Pacific territories under US jurisdiction are opposing these efforts, and reporting human rights violations. (See section III. 3(d) herein for statistics relating to the expansion of US Protected Areas in the Pacific and the negative impacts on indigenous Samoans and Chamorro).

It is important to note that IUCN members (whether States, government agencies or NGOs) facilitated and supported the nomination and designation of many of the Protected Areas where indigenous peoples’ lands and resources are being expropriated.

b) The Pew/Bush Strategy:

For many years before the Bush Proclamations were issued, Native Hawaiians and Conservationists had worked together to establish some form of environmental plan for the preservation and wise management of the NWHI. Successive US Presidents had supported ‘reserve’ and ‘sanctuary’ status of the area, but there had always been acknowledgment of the trust status of the NWHI and the application of State and Federal Environmental laws as well as Hawaiian rights. This changed under the Bush administration.

The strategy to expropriate the Hawaiian peoples’ trust resources and territories in the NWHI and to prevent Hawaiians from exercising our economic (sustenance and commercial) and other human rights was initiated by the PEW Foundation acting in concert with the IUCN and the Bush Administration in the USA. The WHC and UNESCO were integrated into this strategy at a later stage in order to obtain international legitimacy for the effort to expand US military activities in the Pacific Region under the guise of Conservation.

The Pew Trusts/Foundation is a wealthy environmental group with political ties to the Republican Party and President Bush. They receive and disburse million of dollars gifted

to them from the oil industry. They are a powerful member of the IUCN family and for years have used the IUCN and its meetings as a platform to gain support and exposure for their initiatives. The Pew Foundation also funds several small environmental groups who are members of the IUCN and who receive grants from PEW.

In Bush's last term the Pew Foundation initiated a project called the Bush Ocean Blue Legacy. According to the Pew website, the goal was to establish 3-5 "world class no-take marine monuments" for the protection and preservation of threatened and over fished marine ocean resources. From the outset, the objective was to prevent Native Hawaiians and the public from fishing in their trust waters. This decision was not science based. There was no room to consider indigenous fishing rights or sustenance needs of others because the PEW Trust's "no-take" scheme meant that all fishing had to be prohibited. The Bush administration was eager to support the initiative and to establish a legacy for the Republican President, and the Pew Foundation made it easy for them by agreeing that they would not object to, or publicize, the exemption of all US military activities as well as the accommodation of extraction research in the NWHI. A comparative review of the Pew media and press releases as well as their Internet postings reveals that PEW never made public the actual uses (military and extraction research) contemplated for the NWHI once 'Monument' status was achieved.

In Hawaii, Pew approached Republican Senator Fred Hemmings for support and received significant assistance from Republican governor Linda Lingle. Lingle was personally involved in lobbying efforts with the White House and the effort was taken to the White House counsel for the Council on Environmental Quality. These facts have been personally verified by Senator Fred Hemmings.

PEW initiated a similar strategy in the Indian Ocean to establish the Chagos Archipelago Monument with the UK. Indigenous ownership and human rights were ignored while military activities were exempted from environmental legal requirements. (See David Vine, Environmental Protection of Bases? Foreign Policy Focus, April 26, 2010). Pew was also successful in getting the USNOAA to adopt the Pew strategy to impose 'catch share' restrictions on fishing. NOAA began to initiate the Pew 'catch share' proposal in 2009 before the Obama Administration took office. (See NOAA Takes Steps Toward New Direction, Pacific Island Fisheries News, PIFN, Winter 2010.) Pew praised USNOAA for its conservation planning when they accepted the PEW 'catch share' restrictions and issued national press releases that were of good use when NOAA went to the Congress seeking financing from taxpayers for the PEW "Ocean Legacy" campaign.

c) The Media Campaign:

To progress the Pew/Bush plan, Pew initiated a multi-million dollar media campaign to convince the public and Congress that the establishment of a Marine Sanctuary was the only way to stop increasing threats to endangered marine life brought about by fishing. No mention was made of the Pew/Bush deal that military activities, including anti-ballistic missile launching would be exempted from environmental review and environmental impact statement requirements under Federal law, or that the US had agreed to facilitate extraction research for the military and private sector through the

University of Hawaii which was simultaneously transformed into a “UARC” by the US Department of Defense – a university dedicated to Military Research.

The US Western Pacific Regional Fishery Management Council (WESPAC) documented PEWs “unusually wide-ranging and aggressive advocacy campaign” for the NWHI monument as providing the blue print for the Pew’s campaign in the Commonwealth of the Northern Mariana Islands (CNMI). In both campaigns the human rights of indigenous peoples were ignored along with issues of food security. (See PIFN Winter 2008, and Anatomy of an Advocacy Campaign, August 2006 MPA News <http://depts.washington.edu/mpanews/MPA77.htm#Reichert/>). Pew also initiated a strategy to create marine sanctuaries and monuments in Samoa, the outlying Pacific Islands, and a Coral campaign in Australia. Local Marine publications published information criticizing Pew for distributing oil money to splinter groups to get their support for their “non-science-based” anti-fishing (pro-military) agenda, and documenting the critical response Pew was getting from science based conservationists. (See Pew Slammed over “bully boy” tactics, Marine Business, 16 March 2010).

Much of the PEW media strategy was based on misinformation and misrepresentation. A good example of this can be seen with the manipulation of data and allegations raised by PEW relating to the Hawaiian Monk Seal. Pew launched an “aggressive” campaign to stop all harvesting of lobster in the NWHI because, according to PEW, the data showed that lobsters were an important part of the seal diet and that the lobster fishery was declining.

Federal studies and statistics published in Marine Biology in 1998 found that lobster was only 5.7% of the monk seal diet and that 78.6 % of the diet came from finfish. (See “Study Debunks Myth of Lobster Importance In Monk Seal”, PIFN Spring 2007.) These data were supplemented with research undertaken by Jeff Polovina, Chief Scientist of the Ecosystem and Oceanography division of the US National Marine Fisheries Service (NMFS) that found that overfishing was not the cause of the declining lobster fishery, but was attributable to a phenomenon known as the “Aleutian Low”. (See The Case of the Missing NWHI Lobsters PIFN Summer 2009, and Searching for Lobsters, on the Internet at <http://www.animal-dino.com/lobster.html>.) Pew never corrected their allegation that fishing was to blame but continued to claim that overfishing was the cause and to demand that all fishing be terminated.

Hawaiians and Conservationists alike rejected the US NOAA Draft Management Plan for the NWHI, authored by NOAA employee Aulani Wilhelm. The Plan terminated Hawaiian and commercial fishing, failed to provide a workable and culturally appropriate process for Hawaiian cultural practice, excluded the Hawaiian community from participating in conservation and management, but it did accommodate increased tourism and military activities including missile launching!

Problems arose when the BUSH/Pew agenda was not accepted by other environmental groups and Native Hawaiians who insisted that all activities in the area would have to conform to State and Federal law by conducting an Environmental Impact Statement (EIS) before a use permit could be issued by the State or the USNOAA for activities in

the NWHI. Native Hawaiian groups came together to form a coalition, to attend hearings and submit testimony, calling for a real conservation plan as well as the protection of Native Hawaiian human rights. The process dragged on for 5 years, and over 100,000 testimonies were submitted. (Kahea v DLNR, Civ.No.09-1-1684-07, First Circuit Court, State of Hawaii, Complaint/Summons pg. 5-6). These testimonies supported responsible conservation (the EIS process) and Hawaiian right, not a complete closure to fishing. Additionally, a National opinion poll conducted in 2009 found that US residents supported fishing in National forests (80%), National Parks (78%), wilderness areas (72%), and agreed (72%) that some change to biodiversity was acceptable if it was linked to harvesting food for the food supply. The results showed that 89% of those polled felt it was important for the US to maintain its ability to feed its own residents rather than relying on imports. (See PIFN Summer 2009, and the National Opinion Poll conducted by Responsive Management, Virginia, www.alliancefisheries.com/pub_html/html/Reports.html).

When it became evident that federal data from the WESPAC did not support the PEW/BUSH plan, PEW launched a media and Congressional attack on the WESPAC claiming that the agency was rife with fraud, conflict of interest and ineptitude. The record indicates that some of the environmental groups raising the allegations were PEW affiliates and IUCN members. These allegations were later proven to be false by the US Government Accountability Office (GAO) but PEW never acknowledged the truth in their media campaign.

On the eve the NWHI EIS report was due, PEW announced that Presidential Proclamation #8031 had been signed imposing 'Monument' status on 139,795 thousand acres of Hawaiian ceded land trust assets, known as the NWHI. The Bush Proclamation also designated the United States as the final arbiter of Hawaiian Cultural values and practices under a new "PONO" rule published in the Federal Register. Only Hawaiians who qualified under the Bush cultural criterion would be allowed to practice their cultural tradition in the Monument. The Bush Proclamation terminated the public review process thereby ending any right of participation for Hawaiians and the public.

d) The Bush Presidential Proclamations Target the Pacific:

The Bush Proclamation (#8031) and accompanying Federal Regulations put management of the Monument under the US National Oceanographic and Atmospheric Agency (NOAA) and the US Fish and Wildlife Service (USFWS). It sidelined the Western Pacific Regional Fishery Management Council (WESPAC) that was established in 1976 to "manage marine resources and maintain opportunities for sustainable domestic fishing in the US exclusive economic zone waters and high seas around Hawaii, American Samoa, Guam, the Commonwealth of the Northern Marianas and the 8 remote Pacific Islands." (PIFN Winter 2010) WESPAC holds regular meetings with the Pacific Island peoples under their jurisdiction and conducts and maintains federal records, data and research relating to the numerous species in the NWHI. For years WESPAC has reported on issues relating to the NWHI and Pacific peoples in the Pacific Islands Fishery News (PIFN), and is the only US federal body that regularly consults with and documents the concerns of Pacific Peoples under US jurisdiction. It is the primary body that initiates and assesses fishery data in the NWHI.

Four areas in the Pacific were targeted by PEW, and 4 Proclamations were issued by BUSH: Proc. #8031 for the NWHI, Proc. #8335 Marianas (US took 95,216 square miles including the seabed in the waters around Guam, The CNMI), Proc. # 8336 (American Samoa, Rose Atoll US took 13,451 square miles) and Proc. # 8837 Remote Pacific (86,888 square miles Wake, Jarvis, Kingman Reef, Howland, Baker and Johnston Atoll). [Total: 195,555 square miles WESTPAC PIFN Summer 2009]. No effort was made by the US or the PEW Foundation to consult with Hawaiians or other indigenous Pacific peoples during the several years that the Bush Ocean Legacy initiative was being implemented.

When the WESTPAC Council reviewed the BUSH Proclamations on Rose Atoll and CNMI, they recommended that the Council staff work together with the US National Marine Fisheries Service (NMFS) and the governments of Guam, American Samoa and CNMI to develop regulatory definitions for the terms ‘sustenance’, ‘subsistence’ ‘traditional indigenous’ and other definitions as appropriate for fisheries management in the newly established Monuments. Their recommendations, which were intended to protect indigenous rights, were ignored by the Bush Administration and the USNOAA, thereby ending any right of participation for Hawaiians and the public.

Proclamation # 8331 that federalized the NWHI Hawaiian Trust resources on 139,795 square miles of Hawaiian Trust lands, territories and resources without compensation to the Trust or its beneficiaries. The Proclamation exempted all US military activities in the Monument from the requirements of environmental law. The Proclamation and Management Plan say that Hawaiian Cultural uses will be permitted and “sustenance” fishing allowed. In reality, however, no Hawaiian fishing is allowed and few cultural uses have been approved.

III.2. The Pending Court Case – Violation of State Environmental Laws by NWHI management.

Native Hawaiians and their NGO’s have tried for 4 years to interface with the Monument system, but our efforts have failed and our people’s human rights continue to be abridged. Although the Bush Proclamation exempted military activities from federal environmental laws, it did not invalidate the State of Hawaii Environmental Protection Act (HEPA) which does require EIS studies before uses are permitted in Hawaii. Attached is the Complaint (Exhibit 2) filed in State Court, Civil Action # 09-1-1684-07, Kahea, The Hawaiian Environmental Alliance vs. DLNR filed on July 21, 2009 (the Case). This action raises issues relating to the States breach of its trust obligations to Hawaiians and failure of the State to enforce Hawaii’s HEPA laws in the NWHI. The case is still pending in the State Court System.

The evidence in the case demonstrates that the alleged Conservation Management Plan and NOAA permitting process endanger and threaten our unique and precious resources in the NWHI and do not meet WHC criteria for listing. The WHC should not circumvent the judicial process by making a premature decision on the US nomination while these issues are still before the court.

a) Introduction of Coral Diseases into the NWHI and Extraction Research:

Attached hereto is the testimony of Kahea that was submitted to the Federal Coral Reef Task Force in 2007, the year after the NWHI monument was proclaimed (Exhibit 3). It documents the introduction of imported coral diseases into the pristine waters and coral beds of the NWHI, lack of bio-safety standards and inspections, and USNOAA' efforts to cover it up and support issuance of another permit for the same researcher. A third request is pending. US NOAA asserts that as of yet, there is no visible evidence that the diseases are killing the coral, however NOAA is not conducting scientific monitoring of the area. Also documented are several extraction activities allowed by permitting; the USNOA and State DLNR have approved hundreds of permits to date. The legal pleadings also raise the exemption of US Military activities (including the launching of anti ballistic missiles over the Monument). These activities are not conservation management and do not meet criteria for WHC listing. The importing of coral diseases now threatens the last pristine coral area in the Pacific, it will require years of monitoring and an action plan to address signs of contamination. UNESCO and the IUCN did not know about these issues until they heard the oral intervention of Petitioners at the UNPFII in April 2010.

b) Extraction Research and Military Activities:

The legal case also contests hundreds of permits that have been allocated by the US for extraction research in the NWHI. The US plan fails to address the impacts of exempted military activities on the flora and life forms in the NWHI. NaKoa/Koani do not believe that activities such as missile launching and gunboat maneuvers have no negative impact on our unique resources in the NWHI. We do not believe that the criteria for WH listing can be met with a State Conservation Management Plan that allows such activities without addressing the environmental impacts of these activities in an area designated a World Heritage Site.

III.3. Hawaiian Sustenance and Fishing Rights & Food Sovereignty:

a) Hawaiians and the Pacific Ocean:

From time immemorial Hawaiians have been tied to the Ocean. The Kumulipo, the Hawaiian creation chant, traces the beginnings of life on the earth to the stirrings of life in the Ocean. Hawaiian oral tradition recounts that the islands themselves were 'fished up' from the Ocean by the demi-god Maui who pulled them up with a hook and line, traditional Hawaiian fishing implements. Many Hawaiians are linked to the sea by their family 'aumakua' (guardian spirits) and claim oceanic guardians like mano, the shark as their guardian. From the Ocean sprang the great Hawaiian traditions of voyaging and international sports including surfing, canoeing and diving. The ancient voyagers sailed by the star constellations following the great fishhook in the sky, manaiakalani, (the fishhook of Maui). There is a great proliferation of Hawaiian hula and mele dedicated to and describing the Ocean and the creatures therein. In fact, in Hawaiian tradition it is said that the Hula was created by Hopoe who danced at the shore trying to mimic the movements of the Ocean. The Pacific Ocean has always provided the economic, physical, and sustenance basis of Hawaiian society and culture

b) Indigenous Fishing Rights – International Law:

International human rights law not only supports the right of indigenous Hawaiians to fish, it also supports Hawaiian peoples rights to “special measures” to protect and ensure their rights to fish including the designation of areas reserved exclusively for indigenous fishing, or measures to limit non-indigenous fishing. This is the conclusion of the expert paper submitted to the UN Permanent Forum on Indigenous Issues in 2010 that outlined provisions of the UN Declaration on the Rights of Indigenous Peoples and also addressed General Comment 23 (1994 Human Rights Committee) interpreting the application of ICCPR Art. 27 that specifically references indigenous rights relating to fishing practices. (Report on fishing rights in the seas with case studies in Australia and Norway, E/C.19/2010/2, 8 January 2010.)

c) Hawaiian Fishing Rights & Practices:

Hawaiian fishing practices in traditional and modern times have been extensively documented. The record memorializes not only inshore and deep-sea practices but practices in the NWHI as well. In 2003 the Nature Conservancy and the Kamehameha Schools published a detailed multi-volume research project titled A History Of Fishing Practices and Marine Fisheries Of The Hawaiian Islands by Kumu Pono Associates. This report affirmed the findings and research done earlier by Iverson but was much more comprehensive in that it contained many more detailed statements relating to fishing practices, and a significant number of oral histories obtained by personal interviews conducted with Hawaiian fishermen and women. The oral history interviews confirm a long and continuous history of Hawaiian fishing from ancient times to the present, with the exception of the 8 years President George W. Bush was in office.

During this period of time, all Hawaiian commercial fishing licenses were denied by the US Fish & Wildlife Service on direction of the Bush Administration which was advancing the position in the federal courts that Hawaiians were not federally recognized Indians and so could not have rights to their lands, territories or resources. (At the same time the US State Department was also opposing the UN Declaration on the Rights of Indigenous Peoples on similar grounds.) The Bush administration stopped all commercial fishing permits to Hawaiians in order to undermine the legal research done by Iverson that found that evidence of a “continuous use” would provide a basis for preferential fishing rights for Hawaiians. Because Hawaiians had been prevented from obtaining a commercial license for 8 years, the USNOAA and PEW group would later argue that the Hawaiian use was not “continuous” and therefore Hawaiian fishing rights could be summarily terminated by the Bush Presidential proclamation.

(See also PIFN Winter 2010, End Of An Era, Aloha Northwest Hawaiian Islands Bottomfish Fishery, which refers to the 10% of commercial fishing permits reserved for Hawaiians and emails from Charles Kaai, USNOAA-WESPAC employee dated March 26, and April 2, 2010, confirming that the US Fish and Wildlife Division of USNOAA had approved commercial licenses for all races/ethnic groups of fishermen, but not for Native Hawaiians because they did not want to have problems with Hawaiian fishing rights in the sanctuary or monument, later the issue became moot because all fishing was

terminated in the Monument. These mails also confirm the direct involvement of the Bush White House Council on Environmental Quality.

USNOAA and other Federal Agencies in Hawaii were well aware of Hawaiian fishing rights. As PIFN commented, “In the NWHI, a well documented Hawaiian cultural practice was the catching of fish and other marine resources from the area to bring back to Kauai, Niihau and other islands for community sharing, ceremonial use and other purposes. However this practice is prohibited under NWHI monument rules as resources harvested under a Native Hawaiian practice permit may not be taken out of the Monument” (See PIFN Winter 2008).

d) Marine Protected Areas: Stealing Traditional Fishing and Sustenance Rights: Implications for Regional Food Security

As of Summer 2009, there were 225 Marine Protected Areas (MPAs) in the US. Before the taking of Rose Atoll, the N. Marianas and the Pacific Remote Islands by the Bush Administration, the US Pacific Islands accounted for 78% of the area in U.S. MPAs. In addition, nearly all of the area in “NO-TAKE” MPA’s is in the Pacific. The Bush/Pew NWHI Proclamation added another 139,797 square miles of NO-TAKE areas to the US MPAs, the other 3 Proclamations took another 195,555 square miles. (See New Marine Monuments Close More Commercial Fishing Grounds, PIFN, Summer 2009 pg. 4-5.) All total, the Bush Administration removed an additional 335,352 square miles of Pacific under 4 Proclamations.

The Bush Proclamations had a devastating impact on the indigenous peoples of Hawaii, Guam, and CNMI. “At public meetings held in November 2009 in the Manu’a Islands near the monument, chiefs said the ban will keep fishermen from selling all their catch and will be a burden to their families...”. (See American Samoa Fishery Reels from Tsunami, Federal Actions. PIFN Winter 2010).

In 2007, the WESPAC held a round of consultations in the Marianas, Guam, American Samoa and Honolulu with its Regional Ecosystem Advisory Committees (REACs). The REACs represent not only local and State government but also NGO’s and private sector businesses with responsibility or interest in land-based non-fishing activities that potentially affect the marine environment. As reported by PIFN Spring 2007,

“An overarching concern expressed by communities in all island areas is the deterioration of traditional and cultural practices.... Guam fisherman John Taitano said shoreline access is continually being restricted either by the government through marine preserves or by beachfront hotels wanting exclusive use of the beaches for the tourism industry. More and more of the customary traditional fishing grounds used by the elders and children are now off limits....If the elders cannot get access to the fishing areas, who is going to teach our children how to fish?...”

Genevieve Cabrera, a Chamorro historian from CMNMI said that prohibition of more and more traditional practices continues the annihilation of the Chamorro culture.

“...Other concerns expressed by the island communities to the REAC include the lack of adequate enforcement of fishing laws as well as lax restrictions ...over non-fishing activities that negatively impact the ocean environment such as tourism...”.

The situations in Guam and Hawaii demonstrate how federal fishing restrictions and rules are outlawing traditional fishing practices by mischaracterizing them as illegal western practices. In Guam and Hawaii the traditional throw net has been classified as an “illegal gill net” which is outlawed in inshore marine reserves. In Guam, federal regulations allow Chamorro fishermen to use the net from the shore, but they are prohibited from entering the water to retrieve their nets with the fish they have caught! . In December 2007, two Chamorro fishermen were arrested when they demonstrated their traditional throw net fishing practices. They were charged with illegal gillnetting. (See Fishermen Break Preserve Rules to Demonstrate Cultural Rights, PIFN Winter 2008). This is similar to the sustenance fishing rights given to Hawaiian fishermen in the NWHI where sustenance fishing is allowed in the NWHI as long as the Hawaiian fishermen do not bring home any fish for their families!

The regulations regarding sustenance fishing in the NWHI were written to allow the USNOAA cultural advisors to fish while conducting their federally approved protocols. The cultural advisors consume everything in the monument and do not bring any fish home for their families.

WESPAC also reported about efforts of the PEW Foundation’s Global Ocean Legacy director to pressure the government of the Commonwealth of the Northern Mariana Islands into supporting the PEW conservation plan. PEW proposed that a large undersea water park should be created that would focus international attention on CNMI by attracting international tourism. (See letter from PEW Foundation Global Ocean Legacy director Jay Nelson to Gov. Benigno Repeki Fitial, received December 20, 2007). Noting that Monument designation might increase tourism, PIFN pointed out that this would preclude CNMI its Northern fisheries in the future and “immediately restrict certain cultural fishing practices from developing, as it has in the NWHI.”

The PEW Foundation and Bush administration’s agenda to stop fishing and facilitate US military expansion in the NWHI paralleled the Bush/PEW initiative in CNMI. While the PEW Ocean Legacy director was urging the governor of CNMI to forego food security for an underwater tourist theme park, the US was moving to expand their military training areas in CNMI. The Bush military initiative was supported by the US Navy and called for increasing closure of fishing areas that would be transformed into military training areas. In its comments to the US Draft Environmental Statement, WESPAC noted that the military plan did not address seasonal fishing patterns and that the US Navy already controlled the best fishing areas. WESPAC noted that the US Navy had not conducted community consultations and did not include community participation in management. (See Navy Proposes CNMI Training Area Expansion Around FDM, PIFN Summer 2009).

e) US Gunboat Diplomacy & Regional Food Security

In Guam, Chamorro Fishermen complain about sudden closures for US Military maneuvers without providing adequate notice to fishermen who find themselves exposed to dangerous conditions. (See PIFN, *ibid.*) They have good reason to be afraid.

On March 4, 2010 the Honolulu Star Bulletin reported that the US Navy military had begun conducting joint military activities with the US Coast Guard, the goal of which was not counter-terrorism, but protecting what the US determined was “*their exclusive rights to the natural resources*” in the US Exclusive Economic Zones (EEZ’s). The patrol area covers 3.4 million square miles of the “*most fertile fishing grounds in the Pacific*”. Technically the US Navy is not allowed to conduct fisheries patrols but the Navy has been bending the rules by allowing Coast Guard personnel to ride along on US warships out of Pearl Harbor. Coast Guard Rear Admiral Manson Brown called the mission a “*Fight For Fish*” and explained that partnering with the Navy was the best way to “*maintain a persistent presence in the Pacific*”. Navy Admiral Patrick Walsh commander of the US Pacific fleet said that “*Illegal commercial fishing disrupts economic prosperity, which can destabilize many small countries that depend on this industry for their economy.*” According to Walsh “*History demonstrates that economic instability can lead to larger security threats.*” The US Gunboats are now patrolling several areas in the Pacific near Guam, the Philippines, and FSM, and covering 16 million square miles of Ocean near Hawaii. (See US Coast Guard and Navy join forces to wage a ‘Fight for Fish’, Honolulu Star Bulletin, Thursday 3/4/10, pg 10).

III.4. The US Nomination: Omissions, Misrepresentations and Illusions:

The US nomination and supporting documents including the Presidential Proclamation contain significant omissions, misrepresentations and illusions. For example, the nomination document states that the US and the State of Hawaii have ownership and jurisdiction over the NWHI, which is inaccurate. The US and State of Hawaii hold the NWHI in trust for Native Hawaiians pursuant to State and Constitutional law which recognize native rights including sustenance rights which are not specifically provided for in the Management Plan.

In addition, the US Nomination and supporting documents do not contain reliable federal data on the state of the NWHI fisheries. This data is collected and compiled by the US WESPAC, an agency that was purposefully excluded from the federal process by Bush. The USNOAA nomination uses PEW data relating to overfishing to justify the need for continuing closure of the NWHI crustacean fishery, this is false. The crustacean fishery was closed because of uncertainties in the population assessment model that was used to select a harvest guideline for the fishing year (PIFN summer 2009). WESPAC data relating to the NWHI have verified that the fisheries in the NWHI are not depleted but healthy and able to sustain sustenance and commercial fishing activities of Native Hawaiians. (PIRN Winter 2010: NWHI Bottom fish by the Numbers, Hawaiian Bottomfish Assessment for 2008, Brodziak, J.R. Moffit, G. DiNardo.)

The Nomination and Management plan as well as the Bush Proclamation contain references to the protection and inclusion of Hawaiian culture and cultural practitioners. The documents refer to a process for permitting Hawaiian cultural uses, non-extractive “special ocean uses” and other purposes. These representations look good on paper but are in fact not operative. A review of the actual permitting process for cultural access illustrates the reality that Hawaiian cultural practitioners are facing in Hawaii.

a) The Case of Kimokeo Kapahulehua and the “USA PONO” Rule:

Kimokeo Kapuaehua is a Hawaiian and a voyager. He traces his genealogy back to Mokumanamana in the NWHI. He has dedicated his life to sharing his extensive knowledge of the Pacific Ocean with others and to supporting educational endeavors that teach Hawaiian values and preserve Hawaiian Oceanic and Voyaging traditions. In 1999 Kimokeo was the recipient of the USNOAA Jones Award for Excellence in Promoting Cultural & Ethnic Diversity. His award was given in acknowledgment of his “effectiveness in integrating cultural or ethnic diversity into ocean management programs, efficiency in increasing public awareness of coastal issues and his use of innovative approaches, techniques and programs to advance the goals of environmental justice.” (See USNOAA, NOAA Jones awards for Excellence).

Kimokeo is the President of the Hawaiian Outrigger Canoe Voyaging Society, he and his crew sailed the Hawaiian Islands in 2003, and the NWHI in 2004 & 2005. In 2006 Kimokeo and members of his crew applied for a cultural permit for their next voyage to the NWHI. Because the Bush Monument had been proclaimed, he was required to first obtain a permit from the State Dept. of Land & Natural Resources and later to obtain a federal permit from the USNOAA. On July 2006 Kimokeo went to the Department of Land and Natural Resources (DLNR) hearing on his permit with members of his crew, they brought with them a Hawaiian language teacher from Punanaleo Kauai who had come to testify about the teachers sailing with Kimokeo and creating a Hawaiian language curriculum for their school. He was shocked when the USNOAA staff, Aulani Wilhelm showed up to oppose the permit. She had brought with her members of an elite federally selected group referred to as the ‘Cultural Advisors’, the ‘Cultural Working Group’ or ‘the KUMU’s’. They objected to the permit for various reasons including the posting of information on the voyage on a news sports page which proved he was engaging in “extreme sports”, and his inclusion of persons who were not ethnically Hawaiian on his voyaging canoes. He had failed the USA PONO Rule and was not allowed a cultural permit! Because the USNOAA objected, the State DLNR could not give him a ‘cultural permit’ but they did grant him an “educational” permit. It was the last permit he and his crew would receive; all other subsequent permit requests were denied. (See Minutes of the meeting of the State of Hawaii Department of Land and Natural Resources, July 28, 2006 Agenda Item # F-2, pg 2-5.) All records of the Cultural Working Group meeting at which it was decided that the Group would oppose his DLNR permit cannot be located.

b) The USA PONO Rule – Federal regulation of cultural practices:

The federal regulations governing the awarding of cultural permits in the NWHI Monument were published in the Federal Register Vol.71, No. 167, Tuesday August 29, 2006 at page 51139. Public permits must meet 10 criteria, indigenous permits must meet 15 criteria. Indigenous permit holders are explicitly prevented from engaging in any commercial activity. In order to receive a “cultural permit”, an applicant must show that

“...the purpose and intent of the activity are appropriate and deemed necessary by traditional standards in the Hawaiian culture (pono) and demonstrate an understanding of and background in the traditional practice, and its associated values and protocols.” (See section 404.11e).

This criterion is being applied by the United States when it decides which Hawaiians can get a cultural permit to practice their religion or culture in the NWHI. Because the Secretary of Commerce and USNOAA did not know Hawaiian protocols, traditional practices etc., the USNOAA designated a group of natives whose job it is to determine whether other Hawaiians’ beliefs and practices are “PONO”. Some of these people are also paid consultancies of the USNOAA. If the elite group says the person and their practice is PONO, then they get a permit. If the elite advisors question the “purpose and intent” of the Hawaiian, or their practice, then the permit is denied because the applicant is not PONO. This process was developed by the USNOAA and its Cultural Advisors before the Bush Proclamation was signed, and was designed to prevent Hawaiians from obtaining cultural permits to the NWHI.

III.5. The US Nomination: Lack of Consultation with Indigenous Hawaiians:

The US nomination was prepared following the issuance of the Bush Presidential Proclamation which terminated the public review process of the USNOAA Management Plan for the NWHI. Public and Native Hawaiian community concerns relating to military uses, the application of environmental law and procedures for Hawaiian rights were thereafter ignored by the USNOAA, which then proceeded to utilize the same plan in their nomination to the UNESCO/WHC. Subsequently, the USNOAA dealt only with a handpicked group of Native Hawaiians, no open meetings or community consultations were held to provide indigenous Hawaiians with the opportunity to participate meaningfully in conservation or management of the NWHI or the processes and procedures for access to accommodate Native Hawaiian beneficiary uses, including cultural and sustenance uses.

A review of the record reveals that the Native Hawaiian community, including practitioners and fishermen, has been excluded from the process for 10 years. As noted in the US Management Plan, the visioning effort for federalizing the NWHI began in 2000. It quickly devolved into an academic research-oriented effort with a collaborative agreement and research funding for the Center for Hawaiian Studies (CHS). Members of the faculty of the CHS were also designated cultural advisors of the USNOAA and Monument Management group. This is reflected in section 3.1.2 of the Plan under Native Hawaiian Culture and Historic Action Plan. The Native Hawaiian Community

Involvement Action Plan in section 3.5.3. reveals that there never was a real plan to involve the Native Hawaiian people, instead the outreach and involvement was through the State Office of Hawaiian Affairs. This plan then references community partnerships with Hawaiian groups and cites the Center for Hawaiian Studies Research effort. (See Management Plan Volume 1, sections 3.1.2. and 3.5.3) In reality, the USNOAA cultural advisors include the same people getting the research grants who then approve their own cultural permit applications so they can qualify for USNOAA and UDFWL grants to pay for their trips to the NWHI as “cultural practitioners” and “researchers”. In 10 years there has been no involvement or consultation with the Hawaiian peoples, practitioners and fishermen.

There is no criterion established for persons designated by the USNOAA as ‘Cultural Advisors’, nor is there any standard for determining how these people assess applications for cultural permits under the USA ‘Pono’ Rule. Meetings of these people are not publicly noticed, nor is there a regular record kept of the deliberations of the Cultural Working Group, and who actually attends. What is known about this group is that they have approved several permits for themselves.

Following the US/State Nomination of the NWHI, the UNESCO/WHC process was initiated, implemented and is still being maintained in secrecy. Following the Proclamation, the USNOAA, UNESCO and the WHC co-sponsored the Regional Forum For Oceania on Marine Managed Areas and World Heritage in Honolulu (Jan. 29 - Feb. 2, 2007). A costly and high profile media event announced its goals “...to provide a catalyst for building partnerships and strengthening capacity to address the distinct heritage and marine management needs of island communities.” Many Native Hawaiians tried to attend, fishermen and others involved in marine issues and heritage protection were interested. They were not allowed to attend any of the sessions but were invited to the ‘public reception’ where their photos were taken and later used as a media propaganda tool showing the large amount of Hawaiian community attendance at the event. The US WESPAC requested twice to be admitted but was denied entrance.

The WHC Operational Guidelines require the participation of local communities in the nomination of World Heritage sites. Nominations of cultural landscapes are to be prepared “in collaboration with and the full approval of local communities” (Annex 3, para. 12). The UN Declaration on the Rights of Indigenous Peoples requires States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources” (Art. 32). In the case of the World Heritage nomination of the NWHI, none of these requirements have been met. There was almost no consultation with indigenous Hawaiians and we were not provided the opportunity to give (or withhold) our approval or our informed consent.

Section IV: Concerns relating to the UNESCO/WHC Process for Evaluating the US Nomination – Secrecy, Bias & Conflicts of Interest

The UNESCO/WHC review process proceeds in 5 steps. After a State has created an inventory of sites for its “tentative” list (step #1) and chooses a site for nomination (step#2), the nomination file is sent for review to 2 NGO’s, the IUCN and the ICOMOS. These bodies are tasked to make recommendations to the WHC following their own research/review and ‘on site” visits. Their work and review of a State nomination is supposed to be ‘independent’ (step #3). In reality there is the danger for the IUCN and ICOMOS evaluations to be biased in favor of States because the States control all data and all interviews during the on-site visits. The IUCN and ICOMOS assessments are then forwarded to the WHC for consideration and action by the larger body (steps #4 & #5). World Heritage status and the IUCN and ICOMOS Reports are widely used for tourism and tourist related activities that the WHC has always prioritized and supported, but never regulated. Because of tourism some precious and rare island World Heritage Sites (Galapagos Islands) have been irreparably damaged and destroyed.

IV.1. Reservations regarding the Advisory Body Evaluations by ICOMOS and IUCN

Petitioners have repeatedly tried to obtain copies of the IUCN and ICOMOS reports on the US nomination (“Advisory Body Evaluations”) in order to review them, but have been told by UNESCO staff and WHC staff that these reports were “confidential”.

a) ICOMOS Reports and On-site visits:

NOTE: The ICOMOS General/Regional Report prepared for the Pacific Plan addressed Cultural Landscapes of the Pacific Islands (“Cultural Landscapes of the Pacific Islands”, 2007). It was posted on the USNOAA site with the nomination documents. Petitioners were directed to the data by USNOAA Honolulu. Petitioners are not aware of any other report or supplement to the report posted and have been unable to obtain any record of the Advisory Bodies’ on-site visit to Hawaii which occurred in August of 2009 (except for an itinerary).

The ICOMOS evaluation process includes consultation and expert missions for on-site evaluations. Protection and Management are specifically assessed pursuant to the following criteria:

“There must be adequate protection and management systems to ensure a property’s safeguarding. Very high standards are required in this area. The Inspectorate looks closely at legal framework, designation, ownership, commitment of resources, management philosophy, effectiveness, on-the-ground measures and public access”
(Department of the Environment, Heritage and Local Government, Ireland, www.environ.ie/en/Heritage/WorldHeritage/NominationtotheWorldHeritageList).

The Thematic Study “Cultural Landscapes of the Pacific Islands” (2007) prepared by Anita Smith, Susan Dyer and Kevin Jones is generally a compilation of western

archeological and historical data on the Pacific. It traces Pacific peoples' interconnectedness with the Ocean and each other, and it reflects generally the true situation relating to land ownership & management in the Pacific:

“Overall, in the independent Pacific Island nations around 90% of land continues to be held in traditional ownership the highest proportion in any geo-cultural region in the world. This has meant continuation of traditional systems of authority have continued in many areas alongside Western style democratic governments established during the decolonization period. This has several implications for the present study:

- *Most Pacific Islanders retain as strong traditional social, economic and cultural associations with the landscape;*
- *Oral traditions remain authoritative sources of information about place, the history, development and traditional use of the landscape;*
- *Intergenerational transfer of traditional stories associated with the origin of the land and sea and landscape features continues;*
- *The evolving cultural landscapes are continuing landscapes.”* (p. 27).

The Thematic Study emphasizes:

“Customary land management is... of primary importance in maintaining all the forms of cultural landscape and seascape identified in this thematic study. To sustain it and to ensure its continuity may need partnerships between local communities and national governments...” (p. 120).

Given the findings and the data in the ICOMOS Thematic Study, it is difficult to understand why so few efforts have been made these many years by UNESCO, the WHC, the ICOMOS or the IUCN to involve and consult with all of the customary indigenous landowners and peoples in the Pacific Region whose cultural property and cultural heritage are being impacted and assessed by the UNESCO/WHC system. In addition, at some point in time, IUCN and ICOMOS reviewers came to Hawaii to conduct a site visit in secret. They did not provide notice of their visit to the Hawaiian Community. The reviewers only met with persons selected by the USNOAA. The dates of their visits were secret, as were their names and contact information. Was an effort made to verify the representations provided by the State ‘Cultural Advisors’, or the data from the USNOAA, by meeting with other Federal Agencies, Conservation NGOs or indigenous Hawaiians?

Under WHC criteria the report should consider legal issues as well as ownership issues and should also address the soundness of the management plan proposed by the USA. We are concerned that these critical things may not have been properly assessed by the Advisory Bodies. Consequently we are afraid that the WHC may not be aware of the serious conservation issues and the trust issues that are now before the State Court in Hawaii. The legal case directly relates to the violation of State conservation law in the NWHI, and breach of trust obligation owed to Native Hawaiians who are the beneficiaries of the trust assets of the NWHI.

It should be noted that the pending legal case was prepared at around the time of the ‘secret’ site visit of the IUCN/ICOMOS evaluators in Hawaii in the summer of 2009. The

reviewers had a responsibility to inquire into the conservation and management plans, the permitting procedures, and research that were transpiring in the NWHI. This did not happen to the extent necessary because the UNESCO/WHC process did not include or require notice to or consultation with indigenous peoples or other stakeholders. (According to Annex 6 of the *Operational Guidelines for the Implementation of the World Heritage Convention*, States Parties “are requested to ensure that ICOMOS evaluation missions are given a low profile so far as the media are concerned”!) By failing to be transparent and inclusive, the WHC System abridges the rights of indigenous peoples and customary landowners to participate meaningfully in decisions affecting their lands, territories and resources, and to provide their free, prior and informed consent to activities undertaken by States and the WHC System on their lands and resources.

Petitioners refer to Annex 6 of the Operational Guidelines that suggest and recommend that States give the on-site visit a low profile to ensure the media is not informed and there is no “embarrassment” to the State or WHC. Trying to avoid “embarrassment” because of conflict of interest, bias and misrepresentation is no reason to conduct the evaluation of indigenous cultural resources in secret. If States and the WHC System operated in a transparent way that was inclusive of indigenous peoples and their communities and incorporated a human rights-based approach, they would not have to fear exposure and embarrassment.

Critique of ICOMOS Thematic Study:

Indigenous reviewers of the ICOMOS Thematic Study “Cultural Landscapes of the Pacific Islands” (2007) had criticisms of the document in two respects: It refers to the period of indigenous voyaging and initial human settlement as the first period of ‘human colonization’, later distinguishing it from the second period of Colonization and decolonization. This characterization of Pacific history is no longer appropriate given the passage of the UN Declaration on the Rights of Indigenous Peoples and widespread recognition that colonialism violated indigenous human rights; it is more acceptable to describe periods of indigenous migration as a period during which “indigenous human settlement” was pursued.

The second critique of the report is of more concern. The Report states at page 42:

“There is a wealth of oral tradition and historical documentation including records of the missionaries, reports, diaries and publications of naval officers, traders and travelers and records of the colonial governments that are useful in reconstructing the pre-colonial land tenure systems. However the landscape itself provides the tangible heritage of these systems and their substantial change through time from initial colonization of the islands until the present.”

These types of records are not primary or reliable sources of Hawaiian oral tradition. Hawaiian history is replete with examples of lies and misinformation about Hawaiians and our cultural practices from missionary diaries and the records of the US military, including US Naval Reports. These sources are often racist and should not be used as the main resources in any report relating to indigenous peoples in the Pacific or their land tenure systems.

b) IUCN - Conflict of Interest:

Petitioners have not been able to obtain a copy of the IUCN Advisory Body Evaluation. Petitioners have strong reservations about the WHC/IUCN contract and about any report prepared by the IUCN on the Pacific Plan or the NWHI Monument Nomination because of the extensive conflict of interest of the IUCN and their failure to consult with Petitioners.

The IUCN is a huge conglomeration of conservation and environmental NGOs, some of which are small community groups with little or no funding, and others of which are huge non-profit corporations funded by oil dollars from transnational corporations. The larger wealthier conservation NGOs (BINGOs) wield great influence in the IUCN by funding grants and partnership arrangements on their own projects.

For many years the PEW Trust has figured prominently in the IUCN business and meetings, and has used the IUCN to further its Bush Ocean Blue Legacy initiative. IUCN by its own operating rules acknowledges that it is a membership driven organization and that it actively supports its members' campaigns. The PEW Trusts/Foundation is a member of the IUCN (National NGO #723) and exercises considerable influence because of its ability to buy media and financially contribute to environmental campaigns.

The IUCN Advisory Body Evaluations prepared for States and the WHC are prepared in secret. In Hawaii, only informants identified by the USNOAA were involved. The procedure does not explicitly require that indigenous peoples be given the opportunity to review, critique or supplement the IUCN Reports, although the lands and resources being assessed are in fact their property, and the (holistic) natural and cultural heritage being considered is their heritage.

The IUCN is also in a conflict because it receives direct and significant funding from the USA. These monies come from 2 sources: USAID, which generally funds US initiatives in developing States, and the US State Department, which generally funds US initiatives in the foreign policy area (See IUCN Web Site under; Donors & Partners). Neither of these federal funding sources generally funds environmental or conservation work. Receipt of funding from these US sources indicates a political and military priority for the USA.

For years the IUCN has been aware of problems arising from the establishment of 'Protected Areas' on the territories of Indigenous peoples. The IUCN membership has actively supported the establishment of these areas and 'reserves' and has also been aware of the murder of indigenous hunter/gatherer's in these areas as 'poachers'.

Within the IUCN there has been an ongoing effort to inform conservationists about the UN Declaration on the Rights of Indigenous Peoples, and to establish a human rights framework for IUCN work globally. This effort, which has been the initiative of TILCEPA, has resulted in the adoption of several good IUCN Resolutions relating to Indigenous Peoples, their human rights in protected areas and the importance of including them in resource and conservation management of traditional lands which have become protected areas. Some of these IUCN Resolutions address issues relevant to the seas and

oceans, including fisheries etc. (See Resolutions adopted at the World Conservation Congress, Barcelona Spain, October 2008). The problem is that these Resolutions are not enforceable and are regularly ignored by the BINGOs (Big Conservation NGOs) including the PEW Foundation, who are able to influence the IUCN and its diverse membership with financial, media and political support in exchange for their endorsement of PEW programs such as the Bush Ocean Legacy.

Section V:

The UNESCO, World Heritage Committee, IUCN and ICOMOS have an affirmative obligation to integrate the human rights protections and standards contained in the United Nations Declaration on the Rights of Indigenous Peoples into their work

V.1. Obligations of UN bodies and Specialized Agencies

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya in his report of 11 August 2008 A/HCR/9/9 outlined the obligations of the UN System, including Specialized Agencies and their affiliates, to Indigenous Peoples as follows:

“ The United Nations system

60. In its twentieth preambular paragraph, the Declaration emphasizes, “The United Nations has an important and continuing role in promoting and protecting the rights of indigenous peoples”. The United Nations special role had previously been affirmed by the General Assembly with the solemn proclamation of the International Year of the World’s Indigenous People in 1993, and subsequently, with the proclamation of the First Decade of the World’s Indigenous Peoples (1994-2004) and the Second Decade and plan of action.

61. In view of this special role, the Declaration in article 41 explicitly calls upon the organs and specialized agencies of the United Nations system “to contribute to the full realization” of the Declaration, including, inter alia, through the mobilization of “financial cooperation and technical assistance”. Article 42 further underlines the role of United Nations bodies and specialized agencies, calling on them to “promote respect for and full applications of the provisions” of the Declaration and provide “follow-up” for its effective application. ...

Specialized Agencies

70. The specialized agencies and United Nations programmes and funds are explicitly considered by the Declaration as important actors for the implementation of the Declaration. The Declaration specifically calls for the engagement of the specialized agencies in the fields of “financial cooperation and technical assistance” (art. 41), and further calls upon the mainstreaming of Declaration into the agencies’ action at the local level (art. 42). In addition, the Declaration requires that the work of the agencies should ensure the “participation of indigenous peoples on issues affecting them” (art. 41).

71. ... As seen, the important role of specialized agencies in promoting the rights of indigenous peoples is underlined by the establishment of the Permanent Forum with a particulate mandate entrusted to it by the Economic and Social Council to interact with

United Nations agencies in the mainstreaming of indigenous issues within the United Nations system.... .

72. Once the Declaration was adopted, the Permanent Forum called upon the specialized agencies to “review their policies and programmes in order to comply with the provisions contained in the Declaration”, with a particular emphasis on ensuring respect for the rights to self-determination and free, prior and informed consent...

73. The implications of the Declaration for the work of the specialized agencies were analyzed by the former Special Rapporteur in his report on the human rights-based approach to development (A/HRC/6/15). He identified international agencies as distinct duty-bearers in this regard, calling upon them to “refrain from supporting programmes and projects which, either directly or indirectly, are or could be conducive to the violations of the rights of indigenous peoples” (Para. 72)....

Indigenous Peoples

77. ... indigenous peoples are called upon to exercise responsibilities for the preservation, exercise and development of their cultural heritage and expressions. The Declaration further acknowledges indigenous peoples’ inter-generational responsibilities, including environmental stewardship, with regard to their traditional lands, territories and resources (arts. 25 and 29).

78. In exercising their rights and responsibilities under the Declaration, indigenous peoples themselves should be guided by the normative tenets of the Declaration. Implementation of the Declaration will invariably require indigenous peoples’ good faith, active participation in a spirit of mutual cooperation, when States consult as they must with indigenous peoples on matters affecting their rights with a view to obtaining their free, prior and informed consent. The objective for both parties in such consultations should be to reach a mutual agreement that builds harmonious partnerships.”

V.2. Obligations of UNESCO as a member of the IASG

UNESCO as a member of the UN Inter-Agency Support Group on Indigenous Issues (IASG) has an obligation to promote the effective implementation of the Declaration in performing its mandate.

Thirty-one UN specialized agencies are represented in the IASG. The IASG has emphasized that the adoption of the *Declaration* constitutes a crucial opportunity ... “according to Article 42 of the Declaration, to promote respect for and full application of its provisions and follow-up its effectiveness. The IASG pledges to advance the spirit and letter of the Declaration within our agencies’ mandates and to ensure that the Declaration becomes a living document throughout our work.” [IASG Statement on the UN Declaration, Annual Meeting – 2007]

V.3. Obligations of UNESCO as a member of the UN Development Group (UNDG)

UNESCO is also a part of the United Nations Development Group (UNDG) that adopted the UNDG Guidelines on Indigenous Peoples’ Issues in February 2008. The Guidelines link key development and conservation issues to indigenous human rights and further elucidate the complete meaning of the right of self-determination. The guidelines verify that indigenous peoples have not only the right of consultation, but also the right to

subsistence practices including fishing and gathering, to access traditional territories including the waters and oceans, and to their “cultural heritage” and all associated traditional knowledge.

V.4. Obligations of the World Heritage Committee as a UNESCO body

In an email communication we were told by a staff member of the World Heritage Centre that “In the framework of the WH Convention, there are no specific policies or procedures that concern specifically indigenous peoples”, thereby implying that the 1972 Convention does not require any consultation with indigenous peoples. This is incorrect as a matter of fact and policy.

UNESCO and the WHC are required to take a human rights-based approach to their mandates. UNESCO specifically has committed itself to “...integrating a human rights-based approach into all of UNESCO’s programmes...[and] into all phases of the programming process” (UNESCO Strategy on Human Rights, 2003 paras. 10 & 13). This means in practice “that all activities should contribute to the realization of human rights. It implies that basic human rights principles ... [and] standards should guide the elaboration, implementation and evaluation of all programmes” (UNESCO 2006, “Strategy on Human Rights”, SHS -2007/WS/15, p.2). Similarly, UNESCO’s Medium-Term Strategy for 2008-2013 declares – under the heading “Priorities” – that “...the Organization will pursue in all its fields of competence a human rights-based approach to programming” (para. 6), and that UNESCO will, inspired by its ethical mandate, “respond with priority to the needs of disadvantaged and excluded groups, as well as the most vulnerable segments of society, *including indigenous peoples*” (para. 5, emphasis added).

V.5. Obligations under the World Heritage Convention

The WHC Operational Guidelines apply in the case of the indigenous Hawaiian Peoples. The WHC as a mandate holder under the World Heritage Convention, and its affiliates, are required by their own Operational Guidelines and Strategic Objectives to ensure the participation of indigenous peoples in the World Heritage nomination procedures.

The Operational Guidelines require State parties to “ensure the participation of a wide variety of stakeholders including... local communities, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination and protection of World Heritage properties” (para. 12). In regard to cultural landscapes they further state that “nominations should be prepared *in collaboration with and the full approval of local communities*” (Annex 3, para. 12, emphasis added). In 2007 the WH Committee adopted the Fifth Strategic Objective... “To enhance the role of communities in the implementation of the World Heritage Convention” (see Operational Guidelines, para. 26). The underlying reason for this Fifth Strategic Objective, according to the WH Committee, was the recognition of the “critical importance of involving indigenous, traditional and local communities in the implementation of the Convention.” (Decision 31 COM 13A). This is clearly a specific policy that concerns indigenous peoples.

Under the terms of the United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples have the right to choose their own representatives to represent their own interests. The practice of the UNESCO, WHC and States to limit participation to a few appointed/designated Native persons who are either employed by States, recipients of governmental grants or hired as ‘Cultural Advisors’ by States does not conform to the human rights standards set forth in the Declaration.

Periodic Reporting: In 2008 the WHC adopted a new format for the periodic reports that State Parties have to submit every 6 years. The new format requires States to explicitly address involvement of indigenous peoples in the nomination, management and monitoring of World Heritage sites. It also requires reporting on the impacts of World Heritage status on the quality of life of indigenous peoples etc. This is a specific procedure and specific reporting requirement of the WHC that is intended to ensure – at least implicitly – that indigenous human rights are respected and protected in the WH processes.

Section VI:

Conclusions and Recommendations

When the States passed the World Heritage Convention in 1972, no thought or consideration was given to the simple fact that the cultural and natural heritage referred to in the Convention would in fact often be the cultural and natural heritage of indigenous peoples. For 22 years, while the UN system struggled to incorporate and adopt human rights standards for the protection of the rights of indigenous peoples, the WHC and UNESCO continued to function in a vacuum refusing to acknowledge problems and issues relating to indigenous peoples whose lands, territories and resources were being tapped for conservation and protected areas, Reserves, Sanctuaries and Monuments.

The Convention put in place a review process involving NGOs such as the IUCN, ICOMOS and the ICCROM, but did not require transparency, inclusivity or cultural diversity. No one anticipated that indigenous peoples would eventually be successful in establishing human rights standards which would not only affirm their rights to land, but which would elucidate standards and rights for the protection of their indigenous cultures and heritage and all associated traditional knowledge and indigenous intellectual property. But this is what has occurred.

Subsequent to the passage of the United Nations Declaration on the Rights of Indigenous Peoples in 2007, States and all agencies and specialized bodies of the United Nations were directed to incorporate human rights standards into their work, and to take a human rights-based approach to their mandates. UNESCO and the WHC have refused to comply with this human rights commitment and have refused to draft or adopt policies relating to indigenous peoples, or appropriate procedures to provide for consultation with indigenous peoples when UNESCO/WHC activities impact their lands, territories and resources. As a consequence, the undertakings, processes and procedures of the

UNESCO and WHC operate in a manner that violates the human rights of indigenous peoples.

For many years the WHC has pursued a strategic plan that targets the Pacific Region with the goal of obtaining more State signatories to the Convention and establishing more World Heritage Sites in the region. This strategic plan was initiated, supported and developed by the UNESCO and the WHC without obtaining the free, prior and informed consent of the indigenous peoples whose cultures tie them inseparably to their lands and Oceanic resources. (See Erica-Irene Daes, *The Protection of Indigenous Heritage*, Study Series No. 10/1997; *Indigenous Peoples and their Relationship to Land*, Final Working Paper, UN Doc. E/CN.4/SUB.2/2001/21).

The Pacific Action Plan of the UNESCO and WHC identifies sacred sites that are the cultural heritage of all Pacific indigenous peoples such as Te Po, Taputapuātea, but it neglects to provide clear language recognizing the right of Pacific indigenous peoples who do not reside in French occupied Polynesia to access this sacred area for religious and cultural purposes. The Pacific Plan and its supporting documents (which have been withheld from indigenous review), including the initial ICOMOS report, refer to Pacific Voyaging traditions, but the Plan does not explicitly provide for or acknowledge the right of Pacific Peoples to Voyage beyond State boundaries. It is ironic that the UNESCO commercialized indigenous knowledge on Pacific voyaging by the creation of a UNESCO DVD on voyaging, but never followed through with copies in the traditional languages of the Pacific for educational uses of the children of the Pacific.

The UNESCO/WHC Pacific Action Plan was not developed with the participation of the indigenous customary owners of the territories and resources which are the subject of the plan, and UNESCO and the WHC are called upon to acknowledge this omission and begin a good faith effort to work with indigenous peoples of the Pacific to address the human rights violations being perpetrated by the exclusion of indigenous peoples from their nomination and review processes.

Petitioners received the itinerary of the IUCN/ICOMOS visit from the Office of Hawaiian Affairs on May 16th, 2010. It verifies that the USNOAA did not arrange for meetings with the community (Hawaiian practitioners, fishermen), WESPAC or any experts competent in providing them information on the entitlements and rights of the native Hawaiians beneficiaries to the ceded land trusts. All meetings were arranged by the USNOAA with their Cultural Advisors who were presented as representatives of the community. The representatives of IUCN and ICOMOS would have had time to meet with other 'Stakeholders' in Hawaii from August 3-7, but instead were sailing and dining on a replica of the Hokulea, going to museums, visiting the Volcano, hiking to Makapuu Lighthouse, and attending receptions in their honor. Following this they departed for what the itinerary calls a "2 week cruise" throughout the NWHI, all expenses paid by the USA.

The Advisory Bodies to the UNESCO/WHC did not meet with Native Hawaiians or fishermen. They did not inform themselves of the legal rights of Hawaiians whose trust

assets include the vast territories of the Northwest Hawaiian Islands. They did not meet with or consult with the federal agency (WESPAC) that collects the data relating to the status of the fisheries in the Northwest Hawaiian Islands. The Advisory Bodies have been willing partners in an effort undertaken by the Bush Administration and a powerful Republican conservation group to prevent a public review process of the management plan proposed by the United States which extinguishes Native Hawaiians' rights to fish and freely pursue their cultural, economic and social rights, while allowing military activities and extraction research to occur on Indigenous trust lands without the requirement of Environmental Impact Statements required by State and Federal law.

NaKoa Ikaika KaLahui Hawaii and the Koani Foundation believe that indigenous human rights, conservation and the protection of cultural heritage can be accommodated through a framework based on the UN Declaration on the Rights of Indigenous Peoples, and processes and procedures which provide for the meaningful participation of indigenous peoples in the mandate of the UNESCO and WHC. To this end we propose the following recommendations:

RECOMMENDATIONS:

1. Regarding the nomination of the NWHI by the State of Hawaii/USA to the UNESCO World Heritage List:
 - a. NaKoa/Koani recommend that the UNESCO/WHC defer action and request that the Obama Administration consult with petitioners NaKoa/Koani regarding the nomination in order to address issues and omissions in the Bush nomination. (The United States has indicated it is reviewing the Bush Administration's position on the UN Declaration on the Rights of Indigenous Peoples, and we believe that President Obama will take a more enlightened view of Hawaiian rights to the Ceded Lands Trust and the NWHI.)
 - b. NaKoa/Koani recommend that the UNESCO/WHC, IUCN (TILCEPA) and ICOMOS send representatives to participate in a 2-3 day consultation in Hawaii to be hosted by Nakoa/Koani, in order to receive information including the following:
 - 1) Data presented by the US WESPAC relating to the conditions of the fisheries of the NWHI and their agency position against nomination of the Monument; 2) Data presented by members of the Native Hawaiian Bar Association on the legal title of Native Hawaiians to the NWHI and trust obligations of the State and the US to Native Hawaiians and Hawaiians, Constitutional and statutory basis of the rights of Native Hawaiians to the NWHI, and the law relating to their rights to special measures in the NWHI; 3) Data from Hawaiian Fishermen who have fished the NWHI and who assert rights there; 4) Data from a Pacific Expert on their human rights obligations under international law and procedure; 5) Data on the legal case pending in State court and concerns of the Kahea regarding the conservation and management plan of the USA; 6) Data on the prejudicial permitting process utilized by the USNOAA and their 'cultural advisors' from the

perspective of Hawaiian practitioners who have been denied cultural access; and
7) other pertinent information relating to the US Nomination.
Nakoa/Koani request consultation with high level representatives of UNESCO/WHC, ICOMOS and IUCN (TILCEPA). The consultation will facilitate balanced and accurate reporting to the UNESCO/WHC in the event the US nomination proceeds following petitioners' discussions with the Obama Administration.

2. Regarding the procedures and processes utilized by UNESCO/WHC and their failure to integrate the human rights protections contained in the UN Declaration on the Rights of Indigenous Peoples or adopt internal policies relating thereto:

a. Nakoa/Koani recommend that the UNESCO/WHC immediately convene a Working Group of Indigenous Experts, including experts from the Pacific, the Special Rapporteur on the situation of human rights of indigenous people (Jim Anaya), representatives of the UN Permanent Forum on Indigenous Issues, and others.

b. The Tasks of the Working group will be: 1) to draft an overarching policy on Indigenous Peoples (Model Policy) to guide the work of UNESCO and the WHC, including its work relating to the Pacific Action Plan, and 2) to create a framework for meaningful consultation between UNESCO/WHC and indigenous Pacific Peoples on the Pacific Plan.

3. Regarding the UNESCO/WHC Pacific Action Plan:

The UNESCO/WHC should defer adoption of the Pacific Action Plan until it has adopted a framework policy on indigenous peoples (referred to in 2 above) and a process for consultation. Thereafter, UNESCO/WHC should initiate consultations with all indigenous Pacific peoples in order to ensure their involvement in the conservation and management of their heritage and the inclusion of protective measures to ensure that their human rights, including their rights to fish, are acknowledged, preserved and integrated into the plan.