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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

NA LEI ALII KAWANANAKOA, a	)	CV 05-00540 DAE-KSC
Hawaii non-profit corporation;	)	
and ROYAL HAWAIIAN ACADEMY OF	)	Honolulu, Hawaii
TRADITIONAL ARTS, a Hawaii	)	January 5, 2006
non-profit corporation,	)	2:30 P.M.
	)	
Plaintiffs,	)	Status Conference
vs.	)	
	)	
BISHOP MUSEUM, a Hawaii non-	)	
profit corporation; HUI MALAMA	)	
I NA KUPUNA O HAWAII NEI, a	)	
Hawaii non-profit corporation,	)	
et al.	)	
	)	
Defendants.	)	
<hr/>		)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAVID ALAN EZRA  
UNITED STATES DISTRICT JUDGE  
BEFORE THE HONORABLE KEVIN S. C. CHANG  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	SHERRY P. BRODER, ESQ. Davies Pacific Ctr. 841 Bishop St., Ste. 800 Honolulu, HI 96813
For the Defendant Bernice Pauahi Bishop Museum:	LINDALEE K. FARM, ESQ. DONNA H. KALAMA, ESQ. Goodsill Anderson Quinn & Stifel LLP Alii Pl. 1099 Alakea St., Ste. 1800 Honolulu, HI 96813
For the Defendant Hui Malama I Na Kupuna O Hawaii Nei:	ALAN T. MURAKAMI, ESQ. Native Hawaiian Legal Corp. Finance Factors Ctr. 1164 Bishop St., Ste. 1205 Honolulu, HI 96813

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25 Proceedings recorded by machine shorthand, transcript  
produced with computer-aided transcription (CAT).

1 THURSDAY, JANUARY 5, 2006 2:35 O'CLOCK P.M.

2 THE CLERK: Civil 05-540 DAE-KSC, Na Lei Alii  
3 Kawanakoa, et al., versus Bishop Museum, et al. This  
4 case is called for a Status Conference.

5 Counsel, please state your names for the record.

6 MS. BRODER: Good afternoon, Your Honors.

7 Sherry Broder for the plaintiffs.

8 JUDGE DAVID EZRA: Good afternoon.

9 MR. MURAKAMI: Good afternoon. Alan Murakami  
10 for defendant Hui Malama.

11 JUDGE DAVID EZRA: Yes. Good afternoon.

12 MS. FARM: Good afternoon. Lindalee Farm and  
13 Donna Kalama for Bernice Pauahi Bishop Museum.

14 JUDGE DAVID EZRA: All right. Good afternoon.

15 Thank you. You may be seated.

16 I want to thank Judge Chang for lending us his  
17 courtroom this afternoon. My courtroom is being used, and  
18 so that's the reason we're down here in Judge Chang's  
19 courtroom. And I want to again thank him for allowing us  
20 to do that.

21 The purpose of today's hearing is as a status  
22 conference, and a status conference is called in a matter  
23 such as this for several purposes. The first purpose is  
24 to place upon the record, the public record, what is going  
25 on in the case because much of what is happening or has

1 happened happens behind the scenes. And in a case such as  
2 this of high profile it is my view -- and I know Judge  
3 Chang shares my view -- that we ought to be as, as they  
4 say in the media, transparent as possible so that there is  
5 no suggestion that something is happening behind the  
6 scenes or out of public view because I very much believe  
7 that in our country we should have open and public  
8 hearings, and, except in cases where that is not possible  
9 because of grand jury proceedings or something like that,  
10 we ought to do that.

11           Secondly, the law requires me to inquire of the  
12 contemtor from time to time as to whether he wishes to  
13 maintain his current position or whether he wishes to  
14 comply with the order -- and I need to do that today as  
15 well -- and also to bring you up to speed on some matters  
16 that Judge Chang at my request has been working toward,  
17 things that Judge Chang and I have discussed actually from  
18 the very beginning of these proceedings. This is not  
19 something that has just kind of popped up. This is  
20 something that Judge Chang and I have discussed even  
21 before the last hearing.

22           Now, before we go any further I know that there  
23 are many -- I shouldn't say "many." There's many fewer.  
24 But there are a number of individuals in the audience who  
25 are supporters of Mr. Ayau and/or his cause. And I am

1 certainly happy that you are here. You have every right  
2 to be here. We have open, public courts. However, I want  
3 to again remind everyone here that in a federal court we  
4 not only request order, we demand it. That's for  
5 everybody who participates here. Everyone has a right to  
6 be here, but they have no right to disrupt the  
7 proceedings. And anyone who does will be held in contempt  
8 of court.

9           Now, I reluctantly had to place one gentleman in  
10 contempt of court at the last hearing. I could have  
11 placed many more in contempt of court because the outburst  
12 was, quite frankly, shameful and was not productive.  
13 Besides all of that, I gave him about the most lenient  
14 sentence I've ever given anybody who's been in contempt of  
15 court. Although, I must say that the gentleman who was  
16 put in contempt subsequently, I understand, called the  
17 Marshal Service and indicated to them that he had been  
18 treated with great respect and dignity and that he  
19 appreciated the fact that he had been treated with dignity  
20 and further that he understood why the court had to take  
21 the action that it did. So I thank him for that. Even  
22 though I'm sure he doesn't agree with me, at least he was  
23 a gentleman enough to acknowledge that you just can't  
24 engage in those kinds of activities in a courtroom and  
25 expect to walk out without consequences.

1           Now, I mentioned that Judge Chang has been  
2 working with the parties, and I'm going to turn the matter  
3 over briefly to Judge Chang so that he can mention to you  
4 something that occurred today at a status conference  
5 between the parties and Judge Chang.

6           JUDGE KEVIN CHANG: Judge Ezra, let me take this  
7 opportunity to report that I met with the attorneys for  
8 the parties this morning and informed them that the  
9 federal court is open to methods of Hawaiian alternative  
10 dispute resolution, such as the use of kupuna, or  
11 respected elders, as facilitators, Hawaiian mediators,  
12 retired Hawaiian judges, and ho'oponopono. I told the  
13 attorneys or asked the attorneys to discuss this matter  
14 with their respective clients and directed them to inform  
15 the court whether their respective clients are willing and  
16 agree to participate in Hawaiian alternative dispute  
17 resolution with an intention to settle the case. The  
18 attorneys are to report back to the court on January 9th  
19 at ten o'clock in the morning.

20           Let me also say that Judge Ezra and I are  
21 working together, and this case will proceed on parallel  
22 tracks. There will be an immediate effort to resolve the  
23 case. However, if the parties are unwilling to  
24 meaningfully participate in Hawaiian alternative dispute  
25 resolution or any other settlement process, are unable to

1 agree on critical details, or the process results in undue  
2 delay or is not fruitful, the court will continue to  
3 address the case in accordance with the law and proceed to  
4 take appropriate action to enforce court orders.

5 JUDGE DAVID EZRA: Thank you very much, Judge  
6 Chang. Anything else that you'd like to add?

7 JUDGE KEVIN CHANG: No.

8 JUDGE DAVID EZRA: All right. Essentially, what  
9 Judge Chang has just put on the record is the fact that in  
10 an effort to attempt to be as sensitive as possible to the  
11 interests of the various groups of native Hawaiians who  
12 were involved in this -- and again I have to track the  
13 fact that, in spite of every time I say it I seem to get  
14 mocked by somebody, this is not a case of the federal  
15 court versus native Hawaiians. This is a case of native  
16 Hawaiians versus native Hawaiians.

17 This court didn't go out and file the lawsuit.  
18 It was assigned to me on a random assignment, and it was  
19 assigned to me after a lawsuit was filed. I didn't file a  
20 lawsuit. I didn't encourage anybody to file a lawsuit.  
21 It was filed by groups of native Hawaiians who feel that  
22 Hui Malama's practices and their methods are contrary to  
23 their own personal practices and methods and religious  
24 beliefs.

25 Now, I understand that Hui Malama members

1 disagree with them. I understand they disagree with Hui  
2 Malama members. I'm not interested in getting in the  
3 middle of that. I don't know who's right or wrong. It's  
4 not for me to say. And I'm not trying to impose upon  
5 anyone my personal beliefs. What I am trying to do,  
6 however, is, as much as possible, make this case a healing  
7 rather than a divisive circumstance for the Hawaiian  
8 community.

9           Somebody suggested that what is happening now is  
10 bringing Hawaiians -- splitting them apart. I'm worried  
11 about that, quite frankly, as is Judge Chang. I have said  
12 many times in other contexts that a divided Hawaiian  
13 community is an ineffective Hawaiian community. If you  
14 wish to press for reparations, if you wish to press for  
15 rights to which you are, in my view, undoubtedly due in some  
16 circumstances, you can't do it by being splintered into  
17 fragments. And just coming together once a year to march  
18 up and down Kalakaua Avenue is not going to do it. That  
19 doesn't work.

20           My old friend Napua Stevens, who I knew for  
21 many, many years before she passed away, used to imbue in  
22 me the concern that she had about the fragmentation of the  
23 Hawaiian community. And, sure enough, it hasn't really  
24 gotten any better. And this case, I think, is an exemplar  
25 of how it hasn't gotten any better.

1           So, if I were interested in jamming this case  
2 down somebody's throat, I can assure you this court has  
3 the power and the authority to do that. What I'm  
4 interested in doing, however, as is Judge Chang, is to  
5 provide to the parties to this case a method by which they  
6 can resolve their differences without having direct court  
7 involvement.

8           The concern is, as I understand it, that some  
9 Hawaiians object to federal judges making these decisions.  
10 Well, I couldn't agree more. I don't think federal judges  
11 ought to make these decisions. When I handled the Felix  
12 case, which required the State of Hawai'i to finally  
13 provide children, including many native Hawaiian children,  
14 with the services they were entitled to under the  
15 Constitution of the United States, I did not think that  
16 the federal court ought to have to do that. But because  
17 the State of Hawai'i wasn't doing it, I had to do it.

18           And when they were providing -- and Judge Chang  
19 worked very closely with me -- substandard mental health  
20 services out to individuals, mostly poor, at the Hawai'i  
21 State Hospital, I didn't think that the federal court  
22 ought to be doing that, and neither did Dr. Chang. But we  
23 did it because we had to do it because the state wasn't  
24 doing it and because the Justice Department brought it  
25 into our court. We're in the same position here.

1           What we would like to see, if at all possible,  
2 is the parties rectify their differences, come to some  
3 means or method by which this case could be resolved  
4 within the framework of Hawaiian tradition. It's never  
5 been done in a federal court before, but I'm willing to  
6 see it done here, if it will resolve this case.

7           Now, Mr. Ayau is not untrained in the law. He  
8 graduated from the University of Colorado law school.  
9 He's a member of the bar, and he's a member of the bar of  
10 this court. Mr. Ayau may not remember, but I'm the judge  
11 who presided over his swearing in in 1989.

12           So Mr. Ayau fully understands what the law is,  
13 and he knows what the requirements are. He knows that his  
14 being where he's at is not a personal matter with me. I  
15 have nothing personal against Mr. Ayau. But I'm put in an  
16 intolerable position. A federal judge -- and Mr. Ayau  
17 understands this -- cannot step back when someone openly  
18 defies a court order. I just simply can't.

19           But there is a way around this problem. Judge  
20 Chang is very experienced. He was a state court judge for  
21 many, many years, and he's been an excellent United States  
22 Magistrate Judge. He's born and raised here. Like me, he  
23 shares an understanding and a concern for these issues.  
24 We've worked closely together before. They said the state  
25 hospital case could not be settled. It was. They said

1 that Felix could not be resolved. It was. And those are  
2 only a few of the cases we've worked on together over the  
3 years.

4 Now, what's going to be happening now is that  
5 we're going to hope, and Judge Chang is going to conduct  
6 further efforts with the parties, to try to resolve this.  
7 These are not going to be public efforts. We're not going  
8 to have a big hearing in a courtroom where we're going to  
9 get people around the table and attempt to resolve these  
10 differences because the whole idea here is to take this  
11 out of the courtroom and to put it back in the hands of  
12 Hawaiians, which is what I would like to see done. I  
13 would like to see this matter resolved.

14 Let me say this also: There's been some  
15 suggestion that Judge Chang and I are somehow anti-Hui  
16 Malama. Nothing could be further from the truth. Judge  
17 Chang and I both support NAGPRA. We both recognize that  
18 Hui Malama has through the years played a significant role  
19 in not only the development of that law but the  
20 repatriation of ancient Hawaiian bones and remains. Both  
21 Judge Chang and I applaud Hui Malama's efforts in that  
22 regard. We are not anti-Hui Malama any more than we're  
23 anti-the plaintiffs. But we are the forum under the law  
24 where these things must be resolved, and we need to move  
25 forward.

1           Now, the last thing I want to have happen is to  
2 have Mr. Ayau spend the next months or years in federal  
3 custody. I just don't want it. Neither does Judge Chang.  
4 But I have no choice at the point that I'm at here. And  
5 Mr. Ayau, being, if we will, a western-trained lawyer,  
6 understands exactly where I'm at.

7           So I have given Judge Chang a considerable  
8 amount of leeway, principally because Judge Chang and I  
9 have worked so closely together over the years that I have  
10 a great deal of faith in him and in his heart. He and I  
11 know where we want this to be.

12           The last thing I want to have happen is to have  
13 Hui Malama bollixed up in this thing for so long that it  
14 loses its authority to further participate in NAGPRA.  
15 That would be a real shame. And I certainly don't want to  
16 see Mr. Ayau lose his law license. He's worked hard for  
17 that. He should be able to keep it. What I want to see  
18 is this resolved.

19           So I understand what your response is probably  
20 going to be, Mr. Ayau, but the law, as you know, requires  
21 me to ask you anyway. Are you going to be changing your  
22 answer to my previous question as to whether you wish to  
23 disclose the exact location of the artifacts or the  
24 individuals who placed them upon the -- within the caves?

25           MR. AYAU: No, Your Honor.

1           JUDGE DAVID EZRA: All right. Thank you. You  
2 know that I have to ask you that question.

3           MR. AYAU: (Nods head.)

4           JUDGE DAVID EZRA: All right. So Mr. Ayau, of  
5 course, is going to have to return to custody. But I hope  
6 that the parties will follow up in a spirit of goodwill as  
7 Hawaiians, understanding that while you may not agree on  
8 everything -- you may not even agree on many things, and  
9 there may be longstanding disputes that go way back --  
10 that, nonetheless -- nonetheless, your interests lie in  
11 compromise. I'm not saying to compromise the most  
12 fundamental of your views and beliefs or your religion.  
13 I'm saying to compromise within each other to provide a  
14 way to attempt to resolve this.

15           I wish I knew what the answer was. Boy, do I  
16 wish I knew what the answer was. But I am the first to  
17 tell you that while I have studied Hawaiian law -- and  
18 every time I say that somebody writes in and says, "How  
19 can this possibly be? This ha'ole judge?" Well, I have  
20 studied Hawaiian law. I am not Hawaiian. I don't pretend  
21 to be native Hawaiian. I never have held myself out as a  
22 native Hawaiian and neither has Judge Chang. I don't have  
23 that ancestry. But I have a great admiration for it and a  
24 great respect for it.

25           So this is where we are. This is what is going

1 to happen in the near future. I believe that Judge Chang  
2 has worked out a timetable with the parties, and he's  
3 going to be working with them carefully. He's going to be  
4 talking to me on a daily basis. We will be going forward  
5 on dual tracks because we can't let the thing sit, but I'm  
6 hoping that we can slow down one of the tracks so that the  
7 other track can proceed as long as it appears that we are  
8 making some progress.

9 Now, does counsel wish to add anything to what I  
10 have said? Mr. Murakami.

11 MR. MURAKAMI: I do, but, if there's an order  
12 you wish to follow, I will just --

13 JUDGE DAVID EZRA: No, there's no order.

14 MR. MURAKAMI: All right. Your Honor, I  
15 understand the court's desire and the power that you have  
16 to enforce your orders, and my clients respect that. I  
17 want to make that very clear.

18 We also respect your attempt to try to get the  
19 parties to come together in a more traditional fashion to,  
20 as you say, find a way to rectify this conundrum that  
21 we're currently in, and we welcome that as well. And I  
22 think after our meeting tonight we will officially affirm  
23 that recognition and engage in that alternative dispute  
24 resolution.

25 However, I do want to make something for the

1 record since we are proceeding on parallel tracks, and I  
2 think my client would like to make a record as to what we  
3 would like to see as well on that separate track. So,  
4 having said that, I would also ask that this court attempt  
5 to find, as it appears that you are trying to find, the  
6 least restrictive way to enforce your order. And I would  
7 like to make a pitch today that that less restrictive way  
8 is not to incarcerate Mr. Ayau for a variety of reasons.  
9 But, if that has to be, the main one of which is, I  
10 believe, Your Honor, that we are going to be at  
11 loggerheads whether it's today or next week or next month  
12 or further down the line. I'm not sure that the necessity  
13 for incarceration is going to lead to the compliance this  
14 court sees. I think that it's more productive or more  
15 positive to move in a direction that Judge Chang is  
16 hopefully going to lead us into in order to resolve the  
17 underlying issues in a more positive fashion.

18           With that comment I would ask that -- one of  
19 either two things, Your Honor. With all due respect I  
20 understand your position, but I ask Your Honor to  
21 understand ours. And we would like to ask that you  
22 reconsider this contempt order in order to enforce your  
23 order because we believe that these other means that  
24 you've mentioned will lead to a more positive and  
25 long-lasting resolution of the issues without the

1 restrictions of having Mr. Ayau's liberty deprived of him  
2 in the process, and he can, in fact, participate in the  
3 process, as he should, with the parties with Judge Chang's  
4 help.

5           Short of that, I think that it would be also  
6 appropriate for this court to perhaps fashion -- again  
7 with all due respect, Your Honor -- to fashion some other  
8 means by which we can ask for some relief for Mr. Ayau's  
9 current incarceration perhaps in the form of an  
10 alternative petition that we could pose to a judge of this  
11 district other than yourself to review that decision so  
12 that we have as transparent a process as possible. And I  
13 would ask that only because we are in a very unusual  
14 circumstance. There's not necessarily any particular rule  
15 I can cite to. But given the circumstances and given the  
16 stakes, I think it would be appropriate for that  
17 extraordinary type of procedure to be allowed.

18           And I just ask the court to look at this  
19 possible alternative as a means to kind of remedy the  
20 situation we find ourselves in and give Mr. Ayau the  
21 proper role that he can serve in trying to help Hui Malama  
22 work with the other parties as they tried to do four years  
23 ago when they entered into the consultations under NAGPRA  
24 in an attempt to resolve this very issue. And I think  
25 without his participation we will be deprived of an

1 element that was very critical in that discussion four  
2 years ago.

3 So I would ask the court of either one of those  
4 two alternatives so that Mr. Ayau could participate in a  
5 more positive fashion than would be if he sat in jail.

6 JUDGE DAVID EZRA: Okay. You can be seated.  
7 Thank you.

8 Let me address your -- and I'll give Miss Broder  
9 an opportunity and also counsel for Bishop Museum an  
10 opportunity to respond as well. But let me address your  
11 two concerns.

12 First of all, with respect to your concern about  
13 having Mr. Ayau released from custody at this time the  
14 answer is no. I'll be honest with you. I'm not going to  
15 pussyfoot around. Mr. Ayau is in substantial breach not  
16 only of my order but also the order of the Ninth Circuit  
17 Court of Appeals, which is the answer to your second  
18 question about having my order reviewed. You already had,  
19 essentially, my order reviewed because the Ninth Circuit  
20 Court of Appeals is made up of judges who understand what  
21 the next shoe is that's going to drop.

22 When an injunction is filed and somebody doesn't  
23 comply with it, as was the case at the time this thing was  
24 heard, they know that what will follow will be a contempt  
25 order and then someone being taken into custody. One of

1 the judges on the panel, Judge Trott, was the head of the  
2 Criminal Division of the United States Department of  
3 Justice; so he was well-aware of what the next shoe was.

4           Having said that, let me say this: I said  
5 before that it is not my desire to keep Mr. Ayau in  
6 custody any longer than is necessary. Some of the people  
7 in this audience have very short memories, others may be a  
8 little longer, but several years ago Mr. Dennis Bumpy  
9 Kanahale was being held in custody -- not under my order  
10 but under an order from a different judge -- and the  
11 matter came up for appeal in front of me. And in looking  
12 at Mr. Kanahale's circumstances and in trying to provide  
13 him with the full protections of the law and his rights, I  
14 ordered Mr. Kanahale released from custody and I ordered  
15 that he be allowed to remain in home confinement under  
16 certain restrictions, something that Mr. Kanahale was  
17 absolutely compliant with.

18           If I see that progress is being made and that we  
19 are achieving our goals and that Mr. Ayau and the people  
20 that he deals with are acting in good faith -- and I'm  
21 very hopeful that will be the case -- I will be more than  
22 happy to entertain a motion at an appropriate time to  
23 review Mr. Ayau's circumstances. I'm not taking a  
24 take-it-or-leave-it approach to this. I'm not suggesting  
25 that Mr. Ayau has to stay in jail until the very last

1 artifact is recovered. That has not been my position and  
2 never has been my position and it isn't my position now.

3 I understand Mr. Ayau is newly married to a very  
4 lovely person, and I understand he'd like to be back with  
5 his family. And I can assure you I would like to see him  
6 back with his family.

7 So let's see how we go. Let's see how this  
8 thing works out. Lets see if we can be put in a situation  
9 where I can be free.

10 I am restrained to a certain degree,  
11 Mr. Murakami. You made a choice to take the matter to the  
12 Ninth Circuit, and I now am not only bound by my own  
13 order, but I'm bound by theirs. And I understand that  
14 that was a tactical decision, and I don't think it was a  
15 bad one. Although, it didn't work out for you. The fact  
16 of the matter is that we now have the Court of Appeals,  
17 the second highest court in the land, saying that I was  
18 right. And so now I can't simply walk out on that order.  
19 I have to have some justification: some difference, some  
20 change in circumstances. And right now there isn't any.  
21 I'm hoping there will be. If there is, then I can modify  
22 my order. And if I can, I will.

23 MR. MURAKAMI: Your Honor --

24 JUDGE DAVID EZRA: Yes.

25 MR. MURAKAMI: -- just so the record's clear I

1 guess what we're talking about is whether or not the  
2 December 21 order can be construed to be the same as or an  
3 extension of the September 7th order because the  
4 September 7th order was appealed; the December 21 order  
5 was not. So the Ninth Circuit has not seen that  
6 particular order.

7 JUDGE DAVID EZRA: No, but that -- that order is  
8 not interlocutorily appealable.

9 MR. MURAKAMI: I understand. All I'm saying is  
10 that there is a difference in why -- Mr. Ayau is being  
11 incarcerated because of violating the December 21 order.

12 JUDGE DAVID EZRA: No, but what I -- what I was  
13 telling you, though, is, when you have an injunction that  
14 mandates that somebody does something and they don't, and  
15 the Court of Appeals knows that, if they affirm that order  
16 and somebody doesn't do something, which is what the  
17 indication was during the argument because I listened to  
18 it, they know that the next shoe to drop is that that  
19 person is going to be held in contempt.

20 And, normally, in a case like this the court has  
21 one of two avenues. The first one is to fine the  
22 organization a lot of money. And that would bankrupt Hui  
23 Malama. It would probably bankrupt the members of Hui  
24 Malama. They would lose their homes. The court could go  
25 after them individually, if I chose to do so, because

1 they're individually in contempt, those members who are in  
2 contempt. And they could be hit with massive fines, lose  
3 their homes, lose their property. I don't want to do  
4 that. I absolutely don't want to do that.

5           And so people had all kinds of speculation, "Why  
6 Mr. Ayau? Why not bring in the others and throw them in  
7 jail?" You know, it's not my purpose to put everybody in  
8 jail or to take away people's homes or their property. I  
9 don't want to do that. I'm trying to use the least  
10 restrictive means within my control and attempt to get  
11 this resolved.

12           Now, I've said all that I can say on this,  
13 Mr. Murakami, and you aren't going to change my mind. I'm  
14 doing the best I can.

15           MR. MURAKAMI: I understand, Your Honor. I just  
16 wanted to remind Your Honor that we do have two pending  
17 motions that have new information that might bear on this  
18 very issue, and that is why I ask this court initially to  
19 consider that first. But be that as it may, Your Honor --

20           JUDGE DAVID EZRA: Mr. Murakami, I've looked at  
21 those motions. They're going to be heard -- they're going  
22 to be decided by the court without any oral argument  
23 because many of those issues have already been argued. I  
24 have all of the papers, I have all of the material, and I  
25 will decide those motions at the appropriate time.

1           MR. MURAKAMI: Your Honor, I think at this point  
2 it would be appropriate for me to at least inform the  
3 court that, being that we are on parallel tracks here and  
4 we fully are in line with trying to comply and participate  
5 and cooperate with Judge Chang in that parallel  
6 proceeding, but I do want to inform the court that we are  
7 investigating whether we can have any avenue to petition  
8 the Ninth Circuit for emergency relief.

9           JUDGE DAVID EZRA: Mr. Murakami, look --

10          MR. MURAKAMI: Thank you.

11          JUDGE DAVID EZRA: -- let me say I sit on the  
12 Ninth Circuit Court of Appeals from time to time. I  
13 believe in that process. I had no objection to you  
14 appealing the first time, and, if you can find an avenue  
15 to appeal, be my guest. I don't care if you appeal. I'm  
16 happy to have you appeal, if you do it legally. If you  
17 file an appeal that's frivolous or doesn't comply with the  
18 law, then you're going to be in big trouble yourself, and  
19 Mr. Ayau is going to be in worse trouble. But not from  
20 me, from the Ninth Circuit. So you've got to be real  
21 careful what you're doing here.

22          MR. MURAKAMI: Yes, Your Honor. And I'm not --  
23 just to be clear I'm not necessarily speaking of a direct  
24 appeal but a potential petition for writ of habeas corpus.

25          JUDGE DAVID EZRA: Oh, well. Okay. Well, good

1 luck.

2 MR. MURAKAMI: Thank you, Your Honor.

3 JUDGE DAVID EZRA: Miss Broder.

4 MS. BRODER: Well, Your Honor, I guess I'll say  
5 somewhat what I said the last time, which I think this is  
6 unfortunate, but I think nobody is above the law. And I  
7 do believe, as Your Honor has characterized it, that you  
8 have bent over backwards and that there were many people  
9 who could be subject to your orders, and you only picked  
10 one person. And so I think that, given the situation in  
11 front of Your Honor, you did bend over backwards.

12 In terms of the September 7th order, I mean,  
13 even there you bent over backwards because that was  
14 supposed to have been complied with on December 16th. And  
15 all you did on December 21st was give them another week to  
16 comply, which they didn't do. So I don't see that there's  
17 any new order or anything. That's just an implementation  
18 of your September 7th order.

19 So again I say, Your Honor, this is indeed  
20 unfortunate, but we understand and agree, I think, with  
21 your analysis.

22 JUDGE DAVID EZRA: Miss Farm.

23 MS. FARM: The museum has nothing to add, Your  
24 Honor. Thank you.

25 JUDGE DAVID EZRA: All right. The museum is

1 kind of in a bad situation here, I think, kind of in a  
2 no-win situation here, so to speak.

3 All right. Judge Chang, do you have anything  
4 else to add?

5 All right. Judge Chang, fortunately for most  
6 people here, is a man of much fewer words than I am, as my  
7 students at the law school will tell you.

8 I do truly hope that this will be worked out. A  
9 federal court in this country has never, to my knowledge,  
10 been willing to allow this kind of a proceeding. And that  
11 doesn't mean it's not the right thing to do. We have  
12 unique circumstances here that don't exist in many other  
13 places. And given those unique circumstances, I'm willing  
14 to follow a procedure that is appropriate.

15 I mean, several years ago I had a case involving  
16 some Samoan families. And they have a very -- Samoans  
17 have a very rich culture, and they have a very unique way  
18 of working out their differences. And I was able to work  
19 with them to resolve a matter within their Samoan culture,  
20 and I just don't see why that can't happen here. And it  
21 should happen. And if it doesn't, I will be very sad  
22 indeed because it means that I have to take a different  
23 approach, and it's not an approach that I relish or want  
24 to take under any circumstances.

25 I will say again that the State of Hawai'i has

1 been very cooperative, and they have indicated to the  
2 court that they will cooperate in any way that we can use  
3 their cooperation. But I don't want any strong-arming  
4 here, and they've not suggested they would do that. What  
5 I want is a resolution.

6 Now, obviously, it's up to the parties. And if  
7 we can't get a resolution, then the only way in this  
8 country to get a resolution is to have the case resolved  
9 in court. And I don't want to have that happen. I want  
10 it to have the other happen: the Hawaiian mediation  
11 process, which has worked for native Hawaiians for  
12 hundreds and hundreds and hundreds of years.

13 But, as Hui Malama has suggested, they have  
14 constitutional rights, too, you know, as do Miss Broder's  
15 clients and as do the Bishop Museum. So you can't come in  
16 here on the one hand and say we're outside of the western  
17 court system, but we want our constitutional rights,  
18 which, of course, are part of the western court system. I  
19 only have one way of operating, and that is to give  
20 everyone due process. And that's what I intend to do is  
21 to give everyone due process.

22 So I hope we can reduce the temperature a little  
23 bit of the rhetoric maybe and see if we can't allow the  
24 elders in the Hawaiian community -- who are respected by  
25 all sides. Not people chosen by Judge Chang and I or

1 people chosen by the plaintiffs or people chosen by the  
2 Bishop Museum, but people chosen together. There must be.  
3 I'm sure there are. And let those people look at this  
4 carefully and see if we can't find a resolution that will  
5 work.

6           Okay. If there's nothing else before the court,  
7 then the court will stand in recess.

8           (Court recessed at 3:13 P.M.)

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COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter,  
United States District Court, District of Hawaii, do  
hereby certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled  
matter.

DATED at Honolulu, Hawaii, January 6, 2006.

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DEBRA KEKUNA CHUN  
RPR, CRR