

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII**

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KELI'I AKINA, <i>et al.</i> ,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	Civil Action No.: 15-00322
v.	)	
	)	
THE STATE OF HAWAII, <i>et al.</i>	)	
	)	
<i>Defendants.</i>	)	
_____	)	

**DECLARATION OF GAIL HERIOT**

Gail Heriot, for her declaration, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am over the age of 18 and I am fully competent and authorized to make this declaration.
2. I am a citizen and resident of the State of California.
3. I am Professor of Law at the University of San Diego School of Law, where I teach and publish in the area of civil rights law.
4. I have been a Commissioner of the United States Commission on Civil Rights (“USCCR”) since 2007.
5. I sit on the board of directors of the National Association of Scholars and the California Association of Scholars. My scholarly work on civil rights has been published in legal journals such as the Michigan Law Review, the Virginia Law Review, and the Harvard Journal on Legislation. My writing frequently appears in magazines and newspapers, including the Wall Street Journal, the National Review, the Los Angeles Times, and the San Diego Tribune.

6. I have testified on civil rights issues related to Native Hawaiians before the United States Commission on Civil Rights.
7. Attached as Exhibit A is a true and correct copy of my CV, which describes in fuller detail the information I provided above.
8. On September 16, 2013, I, along with three other members of the USCCR, sent a letter to President Obama advising the President against implementing provisions of the proposed Native Hawaiian Government Reorganization Act (also known as the "Akaka bill") through executive action. This letter is attached hereto as Exhibit B. I stand by the contents of that letter and incorporate those comments as part of my declaration.
9. In that letter, I and my colleagues explained that neither Congress nor the President has the power to create a tribal entity anew, vesting it with attributes of sovereignty, when that entity either never existed or else has ceased to exist as a polity. The only types of tribes Congress may recognize (not create) are existing tribes defined by a political structure and the maintenance of a separate society. A tribe may not be recognized or established based on an assessment of a common bloodline of a group of individuals. Federal regulations defining Indian tribes do not award tribal status based on the quantum of Indian blood possessed by any particular group of individuals; rather, the regulations focus on the cohesiveness of the group, and evidence of a functioning polity of long duration to establish that a tribe exists.
10. The effort to have Native Hawaiians designated as an Indian tribe amounts to an attempt to create a tribe out of race. The Native Hawaiian Roll Commission ("NHRC") was created by the Hawaii legislature in an attempt to identify Native Hawaiians to register to vote in an election. The fact that this event was not a spontaneous effort by Native

Hawaiians, but was instead an action by the state government of Hawaii, demonstrates that Native Hawaiians lack the cohesion and separate polity required to be recognized a tribe.

11. As noted, the efforts to create a Hawaiian tribe are in large part an effort to preserve unconstitutional race-based privileges for Native Hawaiians in the wake of the Supreme Court's decision in *Rice v. Cayetano*. However, these efforts are misguided. Rewriting history to create a tribe out of the Native Hawaiian race would create a dangerous precedent that could lead other groups of Americans to seek to separate themselves in some way from the rest of our society. For instance, Cajuns are an identifiable ethnic group in Louisiana who have had continuous presence there for over two hundred years. Their ancestors likely opposed Napoleon's sale of the lands of the Louisiana Purchase to the United States, and they had no opportunity to assert sovereignty. Should Cajuns be allowed to seek tribal status? Should the Amish of Pennsylvania or the Hasidic Jews of New York be allowed to seek tribal status? Both groups have far more cohesiveness as a group and evidence of a functioning polity than do Native Hawaiians.
12. On August 1, 2014, four sitting United States Senators wrote to Secretary Sally Jewell at the United States Department of the Interior in opposition to the Advanced Notice of Proposed Rulemaking regarding the reestablishment of government to government relations (the "Senate Letter"). The Senate Letter is attached hereto as Exhibit C.
13. In the Senate Letter the Senators confirm that the creation or re-constitution of a tribal entity out of a racial group would be unconstitutional. They also state that even if one were to assume that Native Hawaiians could constitutionally qualify for recognition, the process for recognition is controlled by Congress, not by the Department of the Interior,

and “Congress has refused to adopt legislation that would recognize a Native Hawaiian government or reestablish an administrative path for doing so.” Further, the Senate Letter reiterates the fact that Native Hawaiians are unlikely to satisfy the current test for federal tribal recognition. By using ancestry as a proxy for race in place of cohesiveness and polity, the Department of Interior is using a process “likely less stringent than” the process currently established to recognize Indian tribes.

14. I agree with the sentiments expressed by these Senators in paragraph 13.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 8, 2015

  
Gail Heriot