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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAI'I

Keli'i Akina, et al.,)	
)	Civ. No. 15-cv-00322 JMS BMK
Plaintiffs)	
)	
Vs.)	NOTICE OF ABSENCE OF
)	NECESSARY AND INDISPENSIBLE
State of Hawai'i, et al.,)	PARTY; EXHIBIT 1; CERTIFICATE
)	OF COMPLIANCE; CERTIFICATE
Defendants)	OF SERVICE
_____)	

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I. INTRODUCTION

On October 2, 2015, this Honorable Court issued an invitation to the United States Department of Interior (DoI) to file an *amicus* brief in this case by October 14 2015. The basis for that invitation is the DoI issuance of a proposed rule relevant to this case. "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community." 80 Fed. Reg. 59113 (October 1, 2015) (Hereinafter "Fed. Reg.")

That rule sets the procedures and criteria by which the DoI would decide whether to grant recognition to a Native Hawaiian governing entity, if such an entity applied for federal recognition. Id.

If an application for recognition is approved,

[t]he government-to-government relationship with the Native Hawaiian Governing Entity would have very different characteristics from the government-to-government relationship that formerly existed with the Kingdom of Hawaii.

Ibid. 59126.

One process for creating such a Native Hawaiian Governing Entity is the subject of the litigation in this case.

The King and Kingdom of Hawai'i herein provide notice that this Honorable Court lacks jurisdiction over this case because a necessary and indispensable party is absent -- the Kingdom of Hawai'i.

II. The Kingdom is a Necessary and Indispensible Party.

In determining whether the Kingdom is a necessary party to this proceeding, the Court must determine whether the Kingdom is indispensable "so that 'in equity and good conscience' the suit should be dismissed." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

It is impossible to read the history and not find the continued existence of the Kingdom and the right of the Kingdom Government to be restored to be matters in which equity and good conscience are at issue.

United States President Grover Cleveland's Message to Congress, December 18, 1893:

As I apprehend the situation, we are brought face to face with the following conditions: The lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.

But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed. But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.

But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government

building.

And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens' recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.

Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the provisional government.

But in the present instance our duty does not, in my opinion, end with refusing to consummate this questionable transaction. It has been the boast of our government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory.

By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.

The provisional government has not assumed a republican or other constitutional form, but has remained a mere executive council or oligarchy, set up without the assent of the people. It has not sought to find a permanent basis of popular support and has given no evidence of an intention to do so. Indeed, the representatives of that government assert that the people of Hawaii are unfit for popular government and frankly avow that they can be best ruled by arbitrary or despotic power. The law of nations is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized state are equally applicable as between enlightened nations. The considerations that international law is without a court for its enforcement, and that obedience to its commands practically depends upon good faith, instead of upon the mandate of a superior tribunal, only give additional sanction to the law itself and brand any deliberate infraction of it

not merely as a wrong but as a disgrace.

A man of true honor protects the unwritten word which binds his conscience more scrupulously, if possible, than he does the bond a breach of which subjects him to legal liabilities; and the United States in aiming to maintain itself as one of the most enlightened of nations would do its citizens gross injustice if it applied to its international relations any other than a high standard of honor and morality.

On that ground the United States cannot properly be put in the position of countenancing a wrong after its commission any more than in that of consenting to it in advance.

On that ground it cannot allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform; and on the same ground, if a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.

A century later, the United States Congress passed and President Clinton signed the Apology Resolution, Public Law 103-150, 107 Stat. 1510.

http://kingdomofhawaii.info/wp-content/uploads/2015/01/kingdomofhawaii.info_United-States-Public-Law-103-150.pdf

That document apologizes for the United States role in destroying the legitimate Kingdom of Hawai'i Government and acknowledges that the Hawaiian people never relinquished their inherent sovereignty or their claims to their national lands.

Surely the unlawful overthrow of a nation by a foreign power is a matter that raises equitable concerns when the rights of the victims of that illegal action are being considered. Equity, at a minimum, requires the participation of some representative of the victims' interests in any proceeding determining those rights.

In this case, there is no party representing the interests of the Kingdom of

Hawai'i.

All of the Defendants and the Department of the Interior are United States institutions collaborating in a process designed to extinguish the Kingdom of Hawai'i once and for all. None of the Plaintiffs claim to represent the Kingdom.

The "inquiry is a practical one and fact specific." *Makah, supra*. The Court must first determine whether the absent party is necessary. *Id.*

The Kingdom asserts that the Kingdom still exists and has a functioning, though handicapped, government.

Were the Kingdom a party herein, the Kingdom would argue that the actions of the United States Minister in 1893 constituted an act of war against the Kingdom and violated the treaties between the Kingdom and the United States, which recognized the Kingdom as a sovereign nation.

The Kingdom would further argue that the United States President at the time, clearly acknowledged the act of war and the right of the Kingdom Government to be restored. *Supra*. at 2-4,

The fact that the United States failed to correct the actions of its minister and restore Queen Lili'uokalani to her throne only furthered the injury of the initial act of war. That failure did not confer any legitimacy on the subsequent governments created by the traitors.

Nor did it confer legitimacy on the actions of the United States Government based on accepting the results of the initial act of war.

The two failed attempts to ratify a treaty of annexation would not have been legitimate had they succeeded because the government usurpers in Hawai'i had no

legitimate authority to relinquish the sovereignty of the Kingdom or alienate the lands of the Kingdom.

When those two failed attempts led to the joint resolution “annexation,” the list of illegal actions simply grew by one more. No internal resolution passed by one nation can change the status of another independent nation.

Were the Kingdom a party, the Kingdom would present the ruling of the Kingdom Supreme Court, which extensively addressed the many issues raised by the initial acts of war and treason.

<http://kingdomofhawaii.info/wp-content/uploads/2015/06/Order-Kaulia-signed.pdf>

The Kingdom would present the extensive evidence, including the Supreme Court ruling, that the Kingdom Government is an operating government. See www.KingdomofHawaii.info.¹

¹ While the United States Government official position at this time is that the Kingdom does not exist, **the evidence available at this website has never been addressed by either the Executive Branch or the Judicial Branch of the United States Government.** If the Kingdom was a party, the Kingdom would present an extensive evidentiary record of the actions taken by the restored Kingdom of Hawai'i Government demonstrating recognized attributes of sovereignty. That presentation would satisfy the objections of previous courts that evidence of the existence of the Kingdom was not produced. See *State v. Lorenzo*, 883 P.2d 641.643-644 (1994), 77 Haw. 219 (Haw. App 1994) (“[T]here is no clear consensus that the Kingdom does continue to exist. Consequently, it was incumbent on Defendant to present evidence supporting his claim. ... Lorenzo has presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature. (emphasis added); *State v. French*, 77 Haw. 222, 228, 883 P.2d 644, 649 (Ct. App. 1994).

If the United States Executive or Judicial Branch did conclude that the Kingdom does not exist and/or that the Kingdom Government does not meet the standards to qualify as a government, that determination would not be binding on other nations. That determination, however, could impede Kingdom efforts to secure international

The failure of the annexation efforts; the legally ineffective Admissions Act that sought and failed to seize the Kingdom and abrogate the treaties signed by the Kingdom; and the legally flawed statehood plebiscite that did not offer independence as an option, as required by international law, trace a long trajectory of illegal and immoral actions that should be before this Honorable Court and are not.

While the Na'i Aupuni effort pretends to be about self-determination, that self-determination does not extend to all those descended from Kingdom subjects nor to all possible options. The DoI proposed rule reveals the true nature of the joint State and Federal effort to extinguish the Kingdom.

On October 2, 2015, the King sent a letter to President Obama exposing the United States Department of Interior process for "reestablishing" a "government-to-government" relationship between Native Hawaiians and the United States Government as a fraud and an assault on the Kingdom. Exhibit 1.

Subsequently, the King's letter was incorporated into a broader analysis that takes a deeper look at the deception.

<http://kingdomofhawaii.info/wp-content/uploads/2015/10/The-False-Narrative.pdf>

Such analysis demonstrates that there is a false narrative that is attempting to submerge the truth about the Kingdom of Hawai'i. In that false narrative, people of original Hawaiian ancestry are an "indigenous people," whose future should be addressed through laws, institutions, and programs that address indigenous rights.

recognition. The Kingdom, therefore, has an interest when such a determination is being made, as is the case with the DoI proposed rule.

The Office of Hawaiian Affairs (OHA) commissioned a paper to promote that point of view. <http://tinyurl.com/ptqrrx3>.

In the false narrative, the indigenous people are separate from the governing structure of the broader society. The question of the “indigenous people’s” relationship to the broader society is a separate political question. That relationship might be an independent nation for the “indigenous,” a nation-within-a-nation, or assimilation. That relationship is a separate question from the “indigenous” rights questions which Defendants seek to impose on those of original Hawaiian ancestry.

Were Hawaiians an “indigenous people” before the United States act of war?

When Captain Cooke arrived, only the original Hawaiian people lived in the islands. They governed themselves. The Hawaiians were not an “indigenous people” separate from some other population in the islands.

They were, however, a nation of immigrants. Waves of immigration brought Hawaiians, Tahitians, and others to the islands. They all practiced a common faith and manifested a similar civilization.

After the establishment of the Kingdom, all of the rulers prior to the overthrow – from Kamehameha I to Queen Lili’uokalani – were of original Hawaiian ancestry. Beside the monarch, people of original Hawaiian ancestry filled many places within both the Executive and Legislative branches of Kingdom government. **There was no separation between those of original Hawaiian ancestry and all the other subjects of the Kingdom.**

The DoI promotes the false “indigenous” narrative through straightforward lying.

“Congress's recognition of a single Native Hawaiian community reflects the fact that a single centralized, organized **Native Hawaiian government** was in place prior to the overthrow of the Hawaiian Kingdom.” ≈

Fed. Reg. 59121 (emphasis added).

Sometimes the DoI is so anxious to deceive that it twists itself into a pretzel.

Issue: Some commenters opposed Federal rulemaking on the basis that the Kingdom of Hawaii had evolved into a **multicultural** society by the time it was overthrown, and that any attempt to reorganize or reestablish a “native” (indigenous) Hawaiian government would consequently be race-based and unlawful.

Response: The fact that individuals originating from other countries lived in and were subject to the rule of the Kingdom of Hawaii does not establish that the Native Hawaiian community ceased to exist **as a native community exercising political authority...**

To the extent that these comments suggest that the Department must reestablish a government-to-government relationship with **a government that includes non-Native Hawaiians as members**, that result is **precluded by longstanding Congressional definitions of Native Hawaiians**, which require a demonstration of descent from the population of Hawaii as it existed before Western contact.

Fed. Reg. 59119; see also Ibid. 59126.

“Multi-cultural?” It is questionable whether a single comment suggested that Hawai’i evolved into a “multi-cultural” society. Numerous comments were filed noting that when the Kingdom adopted a constitution that opened citizenship beyond Native Hawaiians, Kingdom citizenship became multi-national, i.e. included people whose ancestry was United States, Japanese, French, British, etc. DoI uses “multi-cultural” to avoid the issue of nationality and evade the true description of the Kingdom.

Contrary to the DoI response, the Native Hawaiian community did cease to exercise “political authority” as an independent body when the Kingdom became a

constitutional monarchy. The political authority (Kingdom) had subjects, elected representatives, and officers from numerous ancestries, including Native Hawaiians.

Because the DoI offer is only for Native Hawaiians, the options for the Native Hawaiians are limited to ones that apply only to Native Hawaiians. Having defined the path as limited to “indigenous,” there is no opportunity to adopt restoration of the Kingdom as the resolution of the injury created by the 1893 act of war.

The act of war did not create an “indigenous people.” The overthrow stole an entire nation from its legitimate government. **Those opposed to restoring Kingdom independence will never mention the subjects of the Kingdom, who were not of original Hawaiian ancestry and who also lost their nation. To acknowledge that group would expose the lie of the false narrative.**

The confusion in the Apology Resolution, where sometimes the references are to the Native Hawaiians and sometimes to the Kingdom of Hawai’i, is a direct result of efforts to conflate being indigenous with being the citizenry of the Kingdom. The opening clause of the Apology Resolution demonstrates the effort.

http://kingdomofhawaii.info/wp-content/uploads/2015/01/kingdomofhawaii.info_docs_apology_resolution.pdf (“To acknowledge the ... overthrow of the **Kingdom of Hawai’i**, and to offer an apology to **Native Hawaiians** on behalf of the United States for the overthrow of the **Kingdom of Hawai’i**.”) (emphasis added).

No apology was given to the other subjects of the Kingdom.

The challenge to the false narrative is, therefore, the question: When did the people of original Hawaiian ancestry become “indigenous?” Answer: Never.

The United States Department of the Interior is proposing to “re-establish” a government-to-government relationship between Native Hawaiians and the United

States. That proposal raises a related question: Exactly how and when was a government-to-government relationship established between Native Hawaiians and the United States Government? Answer: Never.

The false analysis extends to the question of territory. There was no territory less than the Archipelago under the jurisdiction of Native Hawaiians prior to the arrival of the European foreigners. The jurisdiction of the Kingdom extended over the same territory. How then would a smaller territory be defined for a Native Hawaiian subordinate state to the existing State of Hawai'i? Why would the "indigenous" claim be anything less than all the lands, if the indigenous perspective is to be the resolution. After all, the Apology Resolution acknowledges that "the indigenous Hawaiian people never relinquished their claims to inherent sovereignty as a people or over their national lands to the United States" *Ibid.* §31.

Of course, **all** the subjects of the Kingdom never relinquished their claim to sovereignty and the national lands, not just "indigenous Hawaiian people."

The DOI proposition to "re-establish" a government-to-government relationship with Native Hawaiians is a perfect example of the false narrative.

The use of the term "re-establish" is literally false. The DOI cannot reestablish a relationship that never existed; the relationship was between the Kingdom of Hawai'i Government and the United States Government, not Native Hawaiians and the United States Government, as the DOI pretends.

The use of the term government implies a sovereignty that is not intended; the authority of the Native Hawaiian Government will be restricted and subject to

approval by the DOI. There will certainly not be nation-to-nation relations through the United States State Department.

A subset of the false narrative is that what is being offered is somehow self-determination. The false narrative is worded as follows:

Under the new proposal, the Native Hawaiian community – not the Federal Government – would decide whether to reorganize a Native Hawaiian government, what form that government would take, and whether it would seek a government-to-government relationship with the United States.

See Fed. Reg. 59119, 59123.

The DOI denies the descendants of the other subjects of the Kingdom -- those who are not of original Hawaiian ancestry -- any participation. Ibid. 59122, 59126. The contrast is then drawn as between a decision made by the Native Hawaiians and a decision made by the Federal Government to give the appearance of self-determination.

The actual DOI proposal repeatedly gives the lie to the self-determination characterization.

-- The DOI proposed rule **specifically excludes restoration of the Kingdom as an outcome of the process.** Ibid. 59120. The self-determination conversation ends before it ever begins. The Kingdom's interests are excluded from consideration.²

² The fact that DOI perceives itself as barred from considering the Kingdom's interests does not negate the existence of those interests.

The Kingdom also has a financial interest in this case. OHA says that once the new governing entity is created, OHA will turn over all its funds to that entity. One major source of those funds is revenue from lands that belong to the Kingdom. The Kingdom's interest in those funds is not represented in this case.

-- Non-Hawaiians are excluded from participating in the new entity. If the convention chooses to allow non-Native Hawaiians to be members of the new governing entity, then DoI will deny recognition. Ibid. 59126.

-- The DOI rule allows the exclusion from the new entity of Native Hawaiians with less than 50% Native Hawaiian ancestry. Such a provision adopted in a United States law would surely be struck down as unconstitutional discrimination. DoI, however, gives permission to the Native Hawaiians to exclude even members of their own family, who may have less than 50% Hawaiian ancestry. Id.

That positive acceptance by DoI explicitly creates a scenario in which Native Hawaiians of less than 50% ancestry participate in the election of a convention that then ends up creating a government that excludes them from membership.

Injecting the blood quantum issue into the discussion is just a further attempt to achieve separation within the Native Hawaiian community and the Kingdom.

-- The new government must include and maintain the unique status and separate rights of Hawaiians eligible for the Hawaiian Homes Commission Act (HHCA). Ibid. 59120. The key eligibility criteria is having 50% Hawaiian ancestry or higher (blood quantum). The United States, with a fourteenth constitutional amendment that says everyone is entitled to equal protection of the law, would require the new Hawaiian entity to set apart one group for special privileges. While the Kingdom might well adopt laws based on the historical promises made to the HHCA-eligible

subjects, that is an internal matter to be resolved by real self-determination, not foreign dictates.

-- In a referendum on the proposed governing document, the HHCA eligible voters would have their votes counted separately with a majority of those votes required for approval of the referendum question. Ibid. 59120, 59124.

The DoI proposal, therefore, gives a veto over the whole process to the HHCA-eligible voters. No matter how many people vote or how many affirmative votes there are, the proposition will only pass if the majority of HHCA-eligible voters approve and turn out in sufficient numbers to meet the DoI test for community acceptance.

The elimination of the Kingdom option will lead to numerous voters not participating in the referendum.

DoI compensates for this potential by setting the thresholds for acceptance very low. The low threshold for affirmative votes enables a tiny minority of Native Hawaiians to create the new entity.

-- The Native Hawaiian Tribe will not qualify for any benefits or programs available to Native Americans. Ibid. 59123. The subordinate position of the Native Hawaiian entity within the State of Hawai'i will be mirrored by a subordinate position compared to other United States tribes. Second class/second class citizenship is the DOI plan for Native Hawaiians.

-- The DOI proposal rules out any change in the title, jurisdiction, or status of any Federal lands, other than Kahoolawe, a sacred island bombed

continuously for decades by the United States military. Ibid 59126.

The United States will make no contribution to establishment of a land base for the Native Hawaiian entity. Given that the Kingdom still exists and has jurisdiction over all lands in the Archipelago, this miserly offer by the United States Government is ludicrous and affirms the lack of a serious intent to create even a sustainable Native Hawaiian entity.

A rewording of that earlier paragraph from the Kingdom perspective illuminates the fundamental difference.

Under the new proposal, the Kingdom – not the United States Government – would decide whether to create institutions, adopt policies, and allocate funding to assist Native Hawaiians in preserving and enhancing their spiritual, cultural, economic, social, and political practices.

The DOI separatist proposal addresses the Kingdom issue by an attempt to divide the Kingdom subjects into Hawaiians and non-Hawaiians and then extinguish the unity of the Kingdom by creating a separate quasi-governmental entity for the Hawaiians. The relationship with the United States will be basically the same relationship that the Native Americans have with the United States Government, ibid. 59126, absent any benefits the Native Americans now have. Ibid 59123.

The cure for a false narrative is first to recognize its existence and then articulate the truth.

Based on the truth of the original act of war, the **only** remedy for the wrong is the restoration of the government that was destroyed by that act of war. If the people of original Hawaiian ancestry are to be addressed as an indigenous people, the only proper way to do that is to restore the Kingdom of Hawai'i Government first and leave the question of indigenous people to the Kingdom government to

address, i.e. the issue of indigenous people is an internal issue to the Kingdom and not the United States.

The proposed Department of Interior process clearly fails to address the illegal overthrow of the Kingdom of Hawai'i and **attempts to prevent any prospect of the Kingdom's restoration by separating Native Hawaiians from the rest of the Kingdom subjects.**

As the King said in a recent letter to President Obama:

Many of the other conditions or restrictions are so patently offensive and intrusive that I suspect their real goal is to have some proposal emerge from the convention that is defeated, so that the United States can say Hawaiians had their chance and failed to take advantage of the generous offer of tribal citizenship from the United States. Your government can then wash its hands of any responsibility to respond to the initial act of war and the 120 plus years of abuse since that act.

On the other hand, should the new governing entity be created, the United States will be portraying that action as resolving the question of Hawaiian independence. The new "governing" entity will then enter into years of discussions about what it can and cannot do, with the DoI always having the upper hand.

Exhibit 1.

The Kingdom has herein presented this Honorable Court with a clear delineation of the many issues that the Kingdom would raise, were the Kingdom a party to this proceeding. No other party will raise any of these issues. The Kingdom is a necessary and indispensable party to this proceeding.

III. Conclusion

As a sovereign, the Kingdom does not agree to submit itself to the jurisdiction of this Honorable Court. This pleading is an appearance solely to provide notice to this Honorable Court of the missing indispensable party and provide this Honorable Court with sufficient evidence to conclude that, given the absence of that party, this Honorable Court lacks jurisdiction and must dismiss the case. *Makah, supra*.

Respectfully Submitted,

/s/Lanny Alan Sinkin
LANNY ALAN SINKIN
Ali'i Mana'o Nui (Chief Advocate)
By appointment of
Edmund K. Silva, Jr.
Ali'i Nui Mō'i (High Chief/King)

October 8, 2015