



Alan Murakami <almurak@nhlchi.org> on 09/22/2000 11:36:20 PM

To: "Edward_K_Thompson@os.doi.gov" <Edward_K_Thompson@os.doi.gov>
cc:

Subject: FW: Reactions to draft DOI/DOJ report on reconciliation

Here is NHLC's response:

<<Response to DOI and DOJ Draft Report.doc>>

We also mailed a hard copy today.

Alan T. Murakami
Native Hawaiian Legal Corporation
1164 Bishop St. #1205
Honolulu, HI 96813
Email: almurak@nhlchi.org
Tel: 808 521-2302
Fax: 808 531-8308 (daytime only)
Alternate Fax: 808 537-4268
email: "alanmurakami@yahoo.com".



- Response to DOI and DOJ Draft Report.doc

**Native Hawaiian Legal Corporation
1164 Bishop St.
Suite 1205
Honolulu, HI 96813**

**Comments on Recommendations in
From Mauka to Makai: The River of Justice Must Flow Freely
Draft Report on the Reconciliation Process
Between the Federal Government and Native Hawaiians**

September 22, 2000

While we generally concur with the recommendations of the draft report, and note that these recommendations are consistent with measures¹ currently pending in Congress that would establish a process for organizing a Native Hawaiian government and provide federal recognition to that government, we believe that the recommendations could be strengthened in several respects.

However, the report appears to be deliberately restricted to the confines of existing federal law, explicitly disclaiming possible remedies under our current constitutional framework:

This report is intended to address only policy issues relating to Native Hawaiian self-determination within the framework of Federal law and does not address the full nature and extent of the rights and obligations that Congress could consider in legislation to formally extend Federal recognition, self-determination, and self-governance to Native Hawaiians.

...

This report is intended to apply in the domestic context in furtherance of the United States' special relationship with American Indians, Alaska Natives, and Native Hawaiians, and is not intended to have any implications for any right or duty under international law.

This office understands the constraints under which federal officials labored to produce this report and commend the courage and dedication with which it was developed. However, confining the outcome to remedies that can only be fashioned from a strict reading of our system of laws may be ill-suited to comprehensively address the uniqueness of the diplomatic relationship Hawai'i

¹ S. 2899 and H.R. 4904 (106th Congress, 2d Sess.)

enjoyed with the U.S. prior to 1893 as well as the political history of Hawai'i and the United States' role in it.

While the framers of the constitution accounted for the role that the federal government would play in dealing with the 550 tribes it ultimately recognized as living within its territorial reaches, the fact remains that the nation of Hawai'i has a political history quite distinct from those of these Indian tribes and bands. It is undeniable that Hawai'i was once a sovereign independent nation with which the U.S. had treaties and exchanged diplomatic representatives. Moreover, in 1993, the U.S. formally conceded that the 1893 insurrection against the Queen of the Kingdom of Hawai'i was an "illegal overthrow" in which the U.S. participated without proper authority, P.L. 103-150. Accordingly, the federal government should not use its past political dealings with Indians as an exclusive model for achieving reconciliation with Hawaiians.

In fact, much of the scholarly debate has been restricted the proper application of the Indian Commerce Clause to fashion relief for Hawaiians. There is much room for a reasonable application of the constitutional principles once only relevant to Indians to the status of Hawaiians. However, we do not believe its analysis of achieving the reconciliation sought by Congress in P.L. 103-150 should be exclusively restricted to such an analysis, given other options that might fit the Hawai'i situation more appropriately.

Notwithstanding the novelty of any such approach, the Hawaiian people deserve redress and acts of reconciliation for the federal government's historical role in the denial of their inherent right to self-determination. These evolving options include recourse to international forums and an honest, good faith effort to pursue the implementation of recently ratified United Nations conventions that address critical issues of race discrimination and the inherent rights of indigenous people. As one Hawaiian scholar has noted, this issue cannot be isolated in the confines of traditional constitutional analysis, but is better addressed in a series of pointed questions that bear repeating:

What are the appropriate remedies adequate to address the initial wrong and the resulting injuries? Is the remedy of according appropriate civil rights protections adequate? Are American Civil Rights remedies limited to the internal/domestic arena of the United States while the actual controversy is really one of an international nature, thus requiring an international remedy? Is the right of divorce "on the table"? Is it part of the discussion - in view of the fact that the Hawaiian side never willingly engaged in the marital relationship in the first place? If it is not part of the discussion, then, is the U.S. government truly acting in good faith, really wanting to achieve a remedy appropriate to the injustice?

Quoted from Poka Laenui's website: <http://www.goihi.com/sovereignty/framework.htm>.

In this context, we offer the following suggested actions in the hope that it will supplement the otherwise useful recommendations already proposed in the draft report and recommendations:

International Law. While the draft report indicates that its recommendations are limited to issues that apply within the domestic context of furthering the United States' special relationship with its native peoples, including Native Hawaiians, P.L. 103-150 recognizes that the "indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through the monarchy or through a plebiscite or referendum . . ." Consequently, we believe that the United States ultimately must address the international law questions surrounding the annexation of Hawai'i and Hawai'i's subsequent admission as a State. For example, the U.S. should forthrightly address the question of whether Hawaiians should be given the option of relisting Hawai'i on the List of Non-Self Governing Territories.

Therefore, we recommend that the ONHA meet with Hawaiian political leaders and representatives of the state of Hawai'i to review options for restoring nationhood to Native Hawaiians, including models for establishing a government-to-government relationship other than domestic dependent nationhood as allowed for Indian tribes and village corporations for Alaskan native villages - e.g., Commonwealth, federation, etc. These preliminary discussions should not prejudice the final options that the reorganized Hawaiian Nation may consider.

Trusteeship. During the period when Native Hawaiians are developing their membership roll, electing an interim governing council, drafting organic governing documents, and generally exercising their self-governing rights, measures should be put in place to immediately protect the ceded lands and Hawaiian home lands trusts. Consequently we recommend that the U.S.:

- a) Establish a trusteeship in the federal government for the holding of title to any lands set aside for the reorganized Hawaiian government over which it would exercise political control and dominion, so long as such an arrangement is required to prevent the alienation of land under current law.
- b) The Office of Native Hawaiian Affairs (ONHA) should hold at least semi-annual meetings with appropriate Hawaiian organizations and individuals and report on the progress of investigating problems reported to ONHA, including the status of any discussions, negotiations, arbitrations, or litigation commenced to resolve outstanding issues.

Enforcement of the Public Land Trusts. Major issues regarding breaches of the Hawaiian home lands and ceded lands trust have not been resolved. ONHA

should be responsible for identifying, investigating, and making recommendations to Congress for the payment of damages and design of appropriate injunctive action to redress instances of:

- a) breaches of trust committed by federal officials in charge of administering the Hawaiian home lands trust prior to the statehood; and
- b) the failure of state and federal agencies to pay compensation for the use of, or allow private use of, ceded lands to the extent such uses are not covered by HRS chapter 673 or current state redress efforts now underway to compensate the Office of Hawaiian Affairs for identical claims.

In addition, ONHA should draft and recommend legislation to allow for the enforcement of the ceded lands and Hawaiian home lands trusts in federal court, including a right of action and a waiver of sovereign immunity for breaches of those trusts by federal and state officials.

Damages Redress for Uncompensated Use of Former Kingdom Lands.

The recommendations do not mention paying the Native Hawaiian people or the Native Hawaiian government for past and current uses of ceded lands.

Consequently, we suggest that the federal government establish an escrow account, for the benefit of the reorganized Native Hawaiian government, into which the U.S. should begin to make immediate payment for the use of all military bases, national parks, and other federal facilities that operate on ceded lands. This gesture of good faith is the clearest way the federal government can communicate its sincerity in devising effective strategies for reconciliation.

Enhancing Self-Determination Opportunities. The recommendations should urge that Native Hawaiians and Hawaiian organizations be granted the right to contract with federal agencies to assume programmatic responsibility for implementing and administering federal legislation adopted for their benefit. This policy would follow the model set by the Indian Self-Determination Act, 25 USC § 450f, which allows tribal governments to administer federal programs on Indian lands by creating a rebuttal presumption that Indians can administer such programs under contract with the Secretary of Interior.

Increasing Prominence of Hawaiian Issues at the Highest Administration Levels. In addition, we recommend the creation of:

- a) An advisory committee on indigenous rights within the State Department. This committee would coordinate inter-agency policy and activities related to rights of all indigenous people in U.S. The Secretary of State should appoint members of this committee from the ranks of Native Hawaiians, Alaskan Native and American Indian leaders, as well as experts in the fields of human rights, foreign affairs, international law, environmental and natural resources law, treaties, federal Indian law, Native Hawaiian

rights, insular affairs and constitutional law. The committee should be responsible for advising the Secretary of State on all issues related to, *inter alia*, the exercise of Native Hawaiian self-determination as it may affect the operations and policies of the State Department. The committee shall be knowledgeable and familiar with all activities of the United Nations in its dealing with the rights of indigenous people, and coordinating U.S. policy on the UN Draft Declaration of the Rights of Indigenous People. They will assure that the Secretary is informed fully on the role that United States can play in enforcing the cultural and traditional rights of indigenous people in accordance with international principles and policies adopted for their benefit. The Committee shall also work to assure fairness and consistency in the application of laws related to all indigenous people in the United States; and

- b) A special advisor for indigenous rights on the Domestic Policy Council at the White House. The person filling this position will coordinate the flow of information and recommendations from all federal and state agencies dealing with indigenous rights, including all Native Hawaiian issues and concerns, to the White House. As a part of his duties, this advisor will establish formal liaisons with the officials appointed to the aforementioned positions above. He/she will coordinate their activities by forming a Hawaiian Task Force made up of at least the officials mentioned below and conducting regular periodic reviews of the actions of each official. This office shall produce an annual public report of its actions and accomplishments.

We hope that these suggestions are seriously considered to strengthen the substance of the draft report. Including them as additional steps toward reconciliation will demonstrate the resolve with which we believe the United States should be approaching the long-standing injustices Hawaiians have encountered over the past century.