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December 15, 2009

The Honorable Nick J. Rahall, II, Chair
The Honorable Doc Hastings, Ranking Minority Member
House Committee of Natural Resources
1324 Longworth House Office Building
Washington, D.C., 20515

Re: Native Hawaiian Government Reorganization Act of 2009 (H.R. 2314)

Dear Chair Rahall and Ranking Minority Member Hastings:

We write in response to the letter of Mark Bennett, Attorney General for the State of Hawaii, dated December 15, 2009, in which he expressed his opposition, and that of Hawaii Governor Linda Lingle, to two of the proposed changes to the Native Hawaiian Government Reorganization Act (H.R. 2314). The changes, introduced by Congressman Neil Abercrombie of Hawaii, concern Native Hawaiian self-government (Section 9(b)(3)) and Native Hawaiian claims (Section 9(c)). They were made to clarify the basic self-governance rights of the Native Hawaiian governing entity and to prevent the extinguishment of Native Hawaiian claims prior to the negotiation process called for in the Reorganization Act. They were designed to treat Native Hawaiians the same as other native governments that have been recognized and reorganized under Federal law.

We were disappointed to learn of the State's opposition. Governor Lingle has testified twice on prior versions of the Act and she has consistently described the Act as "a matter of simple justice," Senate Hearing 108-27, and a matter of "equality and equal treatment under the law." Senate Hearing 109-13. She testified:

> [The Act] is ending discrimination against one group of indigenous people. Alaska Natives, American Indians, who we admire and respect and who are indigenous to this country, have recognition. It is only the Native Hawaiians, they are the only indigenous people who have not been so recognized. So … [i]t is ending discrimination against the indigenous people of Hawaii. Senate Hearing 108-27.

As discussed in more detail below, the proposed changes to H.R. 2314 are designed to provide Native Hawaiian government with the exact same rights and protections afforded other native governments in prior Federal reorganization legislation. To pass H.R. 2314 without these changes would be to continue the pattern of discrimination opposed by Governor Lingle and others.

Native Hawaiian Self-Government

Historically, when the Federal government has enacted legislation allowing for the reorganization of native governments, it has recognized that the native governments are vested with the inherent powers of native self-government under existing Federal law. *See* Indian Reorganization Act of 1934, 25 U.S.C. § 476(e); and Composite Indian Reorganization Act for Alaska (1936), 25 U.S.C. § 473a. *See also* Oklahoma Indian Welfare Act (1936), 25 U.S.C. § 503.

There is no justification for treating Native Hawaiians differently than other native governments that have been the subject of reorganization legislation. Yet, under H.R. 2314, without Congressman Abercrombie's amendment, the Native Hawaiian government would start out with no recognized authority. The Act prohibits the Native Hawaiian government from exercising any power that is currently exercised by the Federal or state governments. *See* Section 8(b)(3). This would include every aspect of governmental authority. The Native Hawaiian government would have to negotiate with the United States and the State of Hawaii for any authority. *See* Sections 8(b)(3) and 9(e).

Prior versions of the Native Hawaiian Government Reorganization Act, including S. 2899 and S. 147, did not restrict or eliminate the Native Hawaiian government's inherent authority. S. 2899 was introduced in 2000 and supported by the Clinton Administration. (This was before the commencement of Governor Lingle's Administration in 2001.) S. 147 was introduced in 2005 and was strongly supported by Governor Lingle.

The change proposed by Congressman Abercrombie—set forth in Section 9(b)(3)—affirms the inherent authority of the Native Hawaiian government and puts it on an equal footing with other Native American governments. It insures that the Native Hawaiian government will start out with the same basic powers of self-government that are possessed by other native governments, subject to further negotiation with the State of Hawaii and the Federal government, as described in Section 9(b)(1). Section 9(b)(3) states that:

> The Native Hawaiian governing entity shall be vested with the inherent powers and privileges of self-government of a native government under existing law, except [the right to conduct gaming activities] as set forth in section 10(a). Said powers and privileges may be modified by agreement between the Native Hawaiian governing entity, the United States, and the State pursuant to paragraph [9(b)](1), subject to the limit described by section 10(a). Unless so agreed, nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law or authorize the State to tax or regulate the Native Hawaiian governing entity.

The "inherent powers and privileges of self-government of a native government under existing law," as described in the Act, include: the power to determine the form of the native government; the power to determine membership in the native government; the power to operate the native government, including governmental services and programs; the power to approve or veto any disposition of native assets; the power to determine domestic relations; and the power to

exercise (misdemeanor) criminal authority and enforce native laws within Indian country, as defined in 18 U.S.C. § 1151.

Some of these powers are exclusive by nature, such as the power to determine the form of native government, the power to operate the native government, and the power to operate native governmental services and programs. Other powers can be exercised concurrently by the native, state, and Federal governments. In the case of the Native Hawaiians, the scope and contours of concurrent jurisdiction will be determined in the negotiation process called for under Section 9(b)(1) of the Act.

These powers of native self-government were recently affirmed in the recognition legislation for the Lumbee Tribe of North Carolina, H.R. 31, §§ 2 & 3, 111th Cong., 1st Sess, (2009), and the Virginia tribes, H.R. 1385, §§ 103, 203, 303, 403, 503 & 603, 111th Cong., 1st Sess. (2009).

The proposed change to Section 9(c)(3) guarantees meaningful self-government to the Native Hawaiians. Instead of leaving these matters to the negotiation process, the Act guarantees that they will have certain inherent powers of native self-government that are recognized under existing Federal law. It is important for the United States to treat the reorganized Native Hawaiian governing entity with same dignity and respect accorded to other recognized American Indian tribes and Alaska Native villages under existing Federal law.

Two final points are worth highlighting:

First, the proposed change specifies that, "nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law." Thus, although native rights of self-government are recognized, neither Federal nor state law is preempted or displaced.

Second, upon its reorganization, the Native Hawaiian governing entity will not have any land recognized as "Indian country" under Federal law. *See* 18 U.S.C. § 1151. Its acquisition of such land will depend, in large part, on the negotiation process set forth in Section 9(b)(1) of the Act. Native criminal jurisdiction and civil jurisdiction over nonmembers are limited to Indian country, as defined in 18 U.S.C. § 1151.[1] Without Indian country, the Native Hawaiian government's authority will focus largely on the regulation of internal relations among members, the disposition of native property and assets, and the provision of native governmental services.

[1] With respect to criminal authority, native governments have misdemeanor criminal jurisdiction over Indians, but they do not have felony jurisdiction over Indians and they lack any inherent criminal authority whatsoever over non-Indians. *See* Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Native civil jurisdiction over non-Indians is similarly limited. Native governments generally do not have civil authority over non-Indians, even within Indian country, except in limited circumstances. *See*, *e.g.*, *Montana v. U.S.*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

Against this backdrop, it is hard to understand the State's grievance. This is a significant departure from the Governor's strong support of S. 147, which did not limit the inherent authority of the Native Hawaiian government.

Native Hawaiian Claims

Nothing in the Native Hawaiian Government Reorganization Act—or the changes proposed by Congressman Abercrombie—waives the sovereign immunity of the State of Hawaii or the United States in respect to any claims that may be brought by Native Hawaiians, the Native Hawaiian governing entity, or anyone else.

The proposed change to Section 9(c) contains a neutral savings clause. It provides, among other things, that nothing in the Act, "creates, enlarges, revives, modifies, diminishes, extinguishes, waives, or otherwise alters any claim or cause of action against the United States or its officers or the State of Hawaii or its officers, or any defense (including the defense of statute of limitations) to any such claim or cause of action."

This provision is closer to the version contained in the Native Hawaiian Reorganization Act of 2005, S. 147, which Governor Lingle supported. That bill stated: "Nothing in this Act serves as a settlement of any claim against the United States." *See* S. 147, § 8(c)(1). This provision is also closer to the version contained in the bill introduced during, and supported by, the Clinton Administration. *See* S. 2899, § 10 (2000) (stating that "[n]othing in this Act is intended to serve as a settlement of any claims against the United States …").

In prior Native American reorganization legislation, the Federal government preserved Native American land and trust claims. In the Indian Reorganization Act of 1934, such claims were neither impaired nor prejudiced. *See* 25 U.S.C. § 475 ("Nothing … shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States…."). Historically, the Federal government has not extinguished or limited native land claims without resolving the claims on their merits. Even in the so-called "Termination Era" statutes, native land claims were preserved. *See* 25 U.S.C. § 750 ("Nothing … shall deprive any Indian tribe … of … the right to pursue claims against the United States …"). The United States must provide the same level of consideration to Native Hawaiian land claims. There is no reason to require the Native Hawaiian people to relinquish their claims in order to reorganize their native government.

The Act, as amended, does not create or extinguish any causes of action. Nor does it waive the State's sovereign immunity or that of the Federal government. It simply preserves Native Hawaiian claims for the negotiation process set forth in Section 9(b)(1) of the Act.

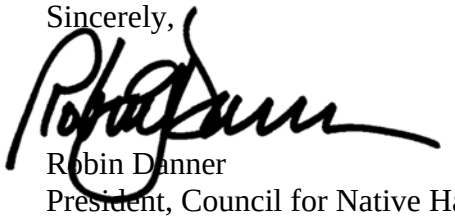
Conclusion

The proposed changes to H.R. 2314 are consistent with prior versions of the Native Hawaiian Government Reorganization Act, including S. 147, which Governor Lingle strongly supported. The changes are also consistent with prior Federal reorganization legislation. The changes guarantee a minimum measure of self-government for the Native Hawaiian people. They do not preempt state or Federal law. Further, Congressman Abercrombie's amendments

guarantee that Native Hawaiian claims will not be extinguished prior to the negotiation process set forth in the Act. There is no waiver of state or Federal sovereign immunity in the Act.

Congressman Abercrombie and the Hawaiian delegation have worked hard to provide meaningful reconciliation to the Native Hawaiian people. They have successfully achieved that with the help and support of the Obama Administration. It appears that the State of Hawaii prefers to have language that protects its interests at the expense of Native Hawaiians and what is equitable in terms of Federal Indian policy. We urge you to reject the State's overtures and to pass the substituted amendment as introduced by Congressman Abercrombie without additional amendments.

Sincerely,



Robin Danner
President, Council for Native Hawaiian Advancement

Cc: Members of the House Committee on Natural Resources
The Honorable Neil Abercrombie, Congressman
The Honorable Mazie K. Hirono, Congresswoman
The Honorable Daniel K. Inouye, Senator
The Honorable Daniel K. Akaka, Senator
The Honorable Linda Lingle, Governor, State of Hawaii
The Honorable Mark J. Bennett, Attorney General, State of Hawaii