

## **Inherent Sovereignty, Sovereign Immunity and the Native Hawaiian Government Reorganization Act**

### **Inherent Sovereignty**

America's democracy – our constitutional form of government – is built upon a foundational principle – that our governments – Federal, State, and Native governments – derive their authority from the people. It is this principle of sovereignty – inherent in the people – that is reflected in the Preamble to the U.S. Constitution – “*We the people* of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

The inherent sovereignty of Native governments is also derived from the people – sovereignty is not conferred upon Native governments by the Federal government – rather the United States recognizes the inherent sovereignty of the Native people and has entered into treaties with Native nations on the basis of their retained inherent sovereignty. In Public Law 103-150, better known as the Apology Resolution, the United States acknowledged that “the Native Hawaiian people never directly relinquished to the United States their claims *to their inherent sovereignty as a people* over their national lands”.

The U.S. Constitution reflects this status of Native governments as possessing inherent sovereignty, and confers upon the Congress the authority to “regulate commerce with foreign nations, and among the several States, and with the Indian Tribes”. What these three categories – foreign nations, states and Indian tribes – have in common is their sovereignty.

The sovereignty of Native governments is generally construed to include such governmental powers and authorities as the right of the people to determine the criteria for citizenship in the government, the right of a Native government to regulate the internal affairs of the government and its citizens and to provide for the common welfare of the citizenry, including the protection of the health, safety and welfare of the people, and the right of the people's government to be immune from lawsuits against the government.

The Native Hawaiian Government Reorganization Act (NHGRA), also known as the “Akaka bill” named after the bill's primary sponsor, Senator Daniel K. Akaka, recognizes the inherent sovereignty of the Native Hawaiian people and their right to reorganize a Native government as an expression of their inherent sovereignty. The Act is an exercise of Congress' constitutionally-vested plenary authority to enact legislation

addressing the political and legal relationship – the government-to-government relationship -- that the United States has with Federally-recognized Native governments.

- Under the House-passed version of H.R. 2314, the Native Hawaiian governing entity is vested with the inherent powers and privileges of self-government of a native government under existing law upon the enactment of H.R. 2314 into law.
- Later, following recognition of the Native Hawaiian governing entity by the United States, the U.S. will recognize the Native Hawaiian governing entity's inherent power and authority to determine its own membership criteria and to determine its own membership.
- Earlier versions of the NHGRA addressed the inherent powers and privileges of self-government as part of the Federal recognition by the United States of the political and legal relationship between the Native Hawaiian governing entity and the United States.

### **Sovereign Immunity**

The immunity of sovereign governments to legal actions brought against them has its origins in British law which provided that in the Crown's own courts, the "King could do no wrong". Under British law, the Crown's courts could not award damages against the Crown unless the government agreed that the courts had this authority.

This principle was incorporated into American law and today, it is still typical that someone injured by the Federal government, a state government, or a Native government cannot recover damages against that government unless he or she can demonstrate that the government has waived its sovereign immunity with respect to the claim being asserted. In the United States, the courts have consistently held that a waiver of sovereign immunity must be clearly and unequivocally expressed.

Indian tribal governments have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign governments. This aspect of tribal sovereignty is subject to the plenary control of the Congress, but in the absence of congressional authorization or the waiver by a Native government of its sovereign immunity, it is well settled that Indian nations are exempt from suit.

H.R. 2314, currently provides that:

*"Consistent with the policies of the United States set forth in section 4(a)(4), 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 as set forth in this Act.”*

It is this provision of H.R. 2314 that has been interpreted to mean that amongst its inherent powers and privileges of self-government, the Native Hawaiian governing entity will have the same sovereign immunity to suit that is exercised by other Native governments.

Sovereign immunity may be extended to the officers or employees of a government when those officers or employees are acting within the scope of the government’s authority that has been delegated to them. Sovereign immunity *does not* extend to the citizens or members of a government to protect those citizens or members from suits brought against them.

With these principles in mind, the NHGRA either expressly or implicitly provides that the Native Hawaiian governing entity, and its officers and employees acting within the scope of their governmental authority, shall be –

- immune from suit by any other government, except the United States,
- immune from suit by any corporation, entity, or organization, and
- immune from suit by individuals, except citizens of the Native Hawaiian governing entity whose basic rights are protected by the NHGRA’s requirement that the Native Hawaiian governing entity and the Interim Governing Council shall be subject to the Indian Civil Rights Act.<sup>1</sup>

However, H.R. 2314 makes clear that members of the Native Hawaiian governing entity shall continue to be subject to the civil and criminal jurisdiction of Federal and State courts, and that the State of Hawaii will continue to have legislative, regulatory and taxation authority over individuals who are citizens of the Native Hawaiian governing entity or over property owned by those individuals.

In addition, any governmental (non-business, non-commercial) activities of the Native Hawaiian governing entity (NHGE), or by a corporation or entity that is wholly-owned by the NHGE, will not be subject to the taxation or regulatory authority of the State of Hawai’i, but the State’s taxation and regulatory authority will apply to all commercial or business activities of the NHGE, including the governing entity’s commercial or business activities conducted on real property owned or leased by, or subject to the control of the NHGE.

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<sup>1</sup> The Indian Civil Rights Act extends many of the protections of the U.S. Constitution to the citizens of Indian tribal governments.

In summary, the Native Hawaiian Government Reorganization Act provides that during the period between the Federal recognition of the special political and legal relationship between the United States and the Native Hawaiian governing entity, and the subsequent enactment of legislation to implement the agreement or agreements negotiated by the United States, the State of Hawaii, and the Native Hawaiian governing entity, the governmental powers and authorities to be exercised by the Native Hawaiian governing entity shall be the same as those self-governing powers and authorities of other Native governments, and shall include the Native Hawaiian governing entity's immunity from suit as described above.

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**In summary:**

- All governments in the United States, Federal, State, Local and Native governments - receive their basic inherent sovereignty from the people.
- Sovereignty, described in paragraph four above, includes the right of native governments to define their citizenry, ensure protection of native rights, protection of the health, safety and welfare of citizenry and more.
- Under the House-passed version of H.R. 2314, the Native Hawaiian governing entity is vested with the inherent powers and privileges of self-government of a native government under existing law upon the enactment of H.R. 2314 into law.
- Later, following recognition of the Native Hawaiian governing entity by the United States, the U.S. will recognize the Native Hawaiian governing entity's inherent power and authority to determine its own membership criteria and to determine its own membership.
- Native sovereignty, like the sovereignty of our state and Federal governments, includes sovereign immunity - the right of the people's government to be protected from legal action in carrying out its government functions. Governments may waive their sovereign immunity for specific purposes, but the Supreme Court has held that a waiver of sovereign immunity must be clear and unequivocally expressed.
- The sovereign immunity recognized in the NHGRA is not sovereign immunity for individual Native Hawaiians but sovereign immunity for the Native Hawaiian governing entity. The sovereign immunity of the Native Hawaiian governing entity recognized in the NHGRA generally applies when the Native Hawaiian governing entity is carrying out governmental functions.