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**COMMENTS OF THE OFFICE OF HAWAIIAN AFFAIRS  
IN SUPPORT OF ACTION TO REESTABLISH A GOVERNMENT-TO-  
GOVERNMENT RELATIONSHIP WITH THE NATIVE HAWAIIAN GOVERNMENT**

Aloha mai kākou. The Office of Hawaiian Affairs (OHA) expresses its thanks for this historic and long-overdue discussion about reestablishing a government-to-government relationship between the United States and the Native Hawaiian community. OHA is a quasi-autonomous governmental agency established by state law to manage Native Hawaiian trust assets until a free-standing Native Hawaiian government is formed to assume that responsibility. OHA also has a legal duty to advocate for the protection and advancement of Native Hawaiian benefits and rights, including millions of dollars in federal funding and federal legal rights to consultation and self-determination.

As fiduciary of the Native Hawaiian trust, OHA's Board of Trustees has determined that the reestablishment of a government-to-government relationship between the United States and the Native Hawaiian community is the most viable action that could be taken to protect and expand existing trust assets, federal programmatic funding, federal consultation rights and other self-determination rights under federal law.

Moreover, as a matter of justice and equity, this opportunity should be available for the Native Hawaiian community to pursue. We should not be denied the basic self-governance rights afforded all other major indigenous groups in the nation. We have suffered through colonization and the dispossession of our lands, resources and culture, and the hearts of our people continue to be burdened by these historic injustices, as recent oral testimony made clear. Our community cannot heal until the federal government shows meaningful respect for our dignity by engaging us as a sovereign Native nation under federal law. The issue of further reconciliation through international redress is a separate question for a different forum that will not, as a legal matter, be affected by Native Hawaiians' status under federal law.

Therefore, OHA **STRONGLY SUPPORTS** the accelerated promulgation of a federal rule, or the taking of other federal action, such as a Secretarial or Assistant Secretarial Order, that would reestablish a government-to-government relationship with the official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll, upon that Native Hawaiian government's affirmative request for such a relationship. In accordance with this position, OHA respectfully offers the following specific comments:

## RESPONSES TO GENERAL QUESTIONS

### **1. Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community?**

**Response to Question No. 1:** OHA strongly supports the accelerated promulgation of a federal rule, or the taking of other federal action, such as a Secretarial or Assistant Secretarial Order, that would reestablish a government-to-government relationship with the official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll, upon that Native Hawaiian government's affirmative request for such a relationship.

**A. *As a Matter of Justice and Equity, Native Hawaiians Should Be Afforded At Least the Same Basic Right as Other Indigenous Peoples to Reestablish a Government-to-Government Relationship With the United States.***

Native Hawaiians, the Kanaka Maoli (genuine or true people), are the aboriginal, indigenous people who settled the Hawaiian archipelago, founded the Hawaiian nation and exercised sovereignty over the islands that subsequently became the Hawaiian Kingdom and Constitutional Monarchy, the Republic of Hawai'i, the Territory of Hawai'i and the State of Hawai'i.<sup>1</sup> Every legitimate form of historical methodology, documentation and archaeological investigation, including Hawaiian oral histories, chants and genealogies, substantiates this fact.<sup>2</sup>

As a distinct and unique indigenous people with a historical continuity to the original inhabitants of Hawai'i, Native Hawaiians have a special political and trust relationship with the United States that is based on the same federal legal principles that govern the trust relationship between the United States and other indigenous peoples, including Native American and Alaska Native peoples. As Secretary Jewell reaffirmed, Congress has recognized and implemented the federal government's special political and trust relationship with the Native Hawaiian community for nearly a century through more than 150 statutes. Notably, despite changes in party leadership and individual membership in Congress, every Congress over the last 40 years has passed at least one Act addressing the conditions of Native Hawaiians.

In 1993, through Public Law 103-150 (the "Apology Resolution"), Congress called upon the United States, and the Executive Branch specifically, to reconcile with the Native Hawaiian people, after it issued a formal apology for the United States' role in the admittedly illegal overthrow of the Hawaiian Kingdom. Responding to that call in 2000, the Interior and Justice Departments sought recommendations from Native Hawaiians and the broader Hawai'i community and compiled a reconciliation report entitled "Mauka to Makai, the River of Justice Must Flow Freely," which recommended as its top priority that "[a]s a matter of justice and

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<sup>1</sup> See Attachment A, *A Brief Summary of the History of Native Hawaiian Governance in Hawai'i* (July 2013).

<sup>2</sup> *Id.*

equity . . . the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes.”<sup>3</sup>

**B. *The Executive Branch Has Been Called Upon to Take The Lead in Securing Native Hawaiians’ Basic Right to Reestablish a Government-to-Government Relationship With the United States.***

As stated above, through the Apology Resolution, Congress specifically urged the Executive Branch to support reconciliation efforts between the United States and the Native Hawaiian people. In 2004, the Ninth Circuit Court of Appeals in *Kahawaiolaa v. Norton*,<sup>4</sup> also expressed its preference that the Department of the Interior resolve the question of the status of Native Hawaiians, “[w]e would have more confidence in [Interior’s exclusion of Native Hawaiians from its Part 83 Indian recognition process] if the Department of Interior had applied its expertise to parse through history and determine whether Native Hawaiians, or some Native Hawaiian groups, could be acknowledged on a government-to-government basis.”<sup>5</sup> The position of Congress and the Judiciary is consistent with legal and policy precedent.

Specifically, the Executive Branch has legal authority to establish government-to-government relationships with other governments, whether foreign states or Native nations.<sup>6</sup> Whether the Executive’s authority to recognize the governments of the indigenous peoples of the United States flows from Article II’s grant of executive power, or from an essentially unlimited delegation of Congress’ Article I power through 25 U.S.C. §§ 2 and 9, or some combination of the two, is primarily of academic interest. What is clear is that, as a practical matter, the Executive Branch has historically exercised a nearly unfettered authority to establish government-to-government relationships with indigenous peoples residing within the asserted boundaries of the United States, and it could properly do so again in the Native Hawaiian context.

OHA’s independent legal and policy analysis indicates that this Executive authority to reestablish a government-to-government relationship with the Native Hawaiian people may be exercised directly by the President, Secretary or designated Assistant Secretary through an order, memorandum or other similar document, without the need for an administrative rule. While a direct route such as this is OHA’s first choice, the mechanism currently being suggested by the federal government is an administrative rule. Accordingly, OHA strongly supports the accelerated promulgation of a federal rule, or the taking of other federal action, such as a Secretarial or Assistant Secretarial Order, that would reestablish a government-to-government relationship with the official Native Hawaiian government formed by the qualified Native

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<sup>3</sup> DEP’T OF INTERIOR AND DEP’T OF JUSTICE, *The River of Justice Must Flow Freely; Report on the Reconciliation Process Between the Federal Government and Native Hawaiians* (Oct. 23, 2000).

<sup>4</sup> 386 F.3d 1271 (2004).

<sup>5</sup> *Id.* at 1283.

<sup>6</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 9 (1831). *See also, Worcester v. Georgia*, 31 U.S. 515, 557-558 (1832) (the Federal power over “external sovereignty” encompassed the authority to recognize both foreign nations and sovereign indigenous groups, and “passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America”).

Hawaiians on the certified base roll, upon that Native Hawaiian government's affirmative request for such a relationship.

An administrative rule that reestablishes a government-to-government relationship between the United States and the Native Hawaiian community must be specifically tailored to take into account the unique history of Hawai'i and, therefore, should acknowledge a single, official Native Hawaiian government, rather than multiple "tribes," confederacies or other government structures that are inconsistent with Native Hawaiian governance. Moreover, OHA supports the promulgation of a rule that:

- Directly and immediately reestablishes a government-to-government relationship with the single official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll upon that Native Hawaiian government's affirmative request for such a relationship;
- Ensures participation of Hawaiian Homes Commission Act beneficiaries in the government reorganization process through practical and achievable standards;
- Is effective, efficient and economical;
- Does not limit the inherent sovereign rights of the reorganized Native Hawaiian government; and
- Opens a path for reestablishment of a government-to-government relationship that will not, as a legal matter, affect paths for international redress.

**2. What role, if any, should the Department of the Interior—exercising the authorities described in 25 U.S.C. 2, 25 U.S.C. 9, 43 U.S.C. 1457, and other statutes—play in facilitating the reestablishment of a government-to-government relationship with the Native Hawaiian community?**

**Response to Question No. 2:** The Department of the Interior should quickly promulgate a federal rule or take other federal action, such as a Secretarial or Assistant Secretarial Order, to reestablish a government-to-government relationship with the single official Native Hawaiian government to be formed by the qualified Native Hawaiians on the certified base roll, upon that Native Hawaiian government's affirmative request for such a relationship. Furthermore, if requested by the organizers of the Native Hawaiian government, the Department should also provide advice to ensure that the single official Native Hawaiian government reorganized by the qualified Native Hawaiians meets legal standards confirming its legitimacy. The Department of the Interior should ***not***, however, directly facilitate the reorganization process. Consistent with federal law and policy applicable to Native governments, the Native Hawaiian community should be afforded the opportunity to exercise its inherent sovereign right to reorganize itself in accordance with its traditional cultural values and contemporary collective will, with limited involvement from external governments, including the state and federal governments. This is especially true in light of the fact that the reorganization process is already underway, as explained more fully in OHA's response to Question No. 3, below.

**3. Should there be a reorganization of a Native Hawaiian government in order to reestablish and maintain a government-to-government relationship between the Native Hawaiian community and the United States?**

**Response to Question No. 3:** Yes.

**A. *The Reorganization of a Single Native Hawaiian Government Is Essential to the Effective Reestablishment and Maintenance of a Government-To-Government Relationship Between the Native Hawaiian Community and the United States.***

Since the overthrow of the Hawaiian Kingdom, there has not been a central, organized Native Hawaiian government that has represented the Native Hawaiian people as a whole. Instead, the Native Hawaiian people have preserved and exercised self-governing authority in other ways through political, civic and benevolent organizations in order to provide for the well-being of the Native Hawaiian people and to protect Native Hawaiian lands, rights and trust assets. Unfortunately, this arrangement makes clear and effective advocacy, negotiation and advancement of common goals a challenge. The reorganization of a single Native Hawaiian government empowered by the Native Hawaiian community to speak on its behalf is essential to the effective reestablishment and maintenance of a government-to-government relationship between the Native Hawaiian community and the United States.

**B. *The Reorganization of the Native Hawaiian Government Should Be an Expression of the Native Hawaiian Community's Inherent Sovereign Right to Determine Its Own Form of Governance With Limited Involvement From External Governments, Including the State and Federal Governments.***

The process of government formation is inherently and fundamentally a process of people, the governed, ceding their personal autonomy to the collective will of the government. It is thus not a "top-down" process, but rather a "bottom-up" process that does best when left to individual choice. This is particularly true in the case of Native government formation. As the Solicitor for the Department of the Interior has opined:

Since any group of men, in order to act as a group, must act through forms which give the action the character and authority of group action, [a Native community] must, if it has any power at all, have the power to prescribe the forms through which its will may be registered. **The first element of sovereignty, and the last which may survive successive statutory limitations of [Native governmental] power, is the power of the [Native community] to determine and define its own form of government.** Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest the authoritative character of acts done in the name of the [Native community].<sup>7</sup>

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<sup>7</sup> CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES, VOL. V. LAWS, (COMPILED FROM DECEMBER 22, 1927 TO JUNE 29, 1938) 786 (1941).

Accordingly, any federal process to reestablish a government-to-government relationship between the United States and the Native Hawaiian community should give appropriate deference to the Native Hawaiian community’s inherent sovereign right “to determine and define its own form of government” in accordance with its traditional cultural values and contemporary collective will.

**C. *The Office of Hawaiian Affairs Has Committed \$3.971 Million in Native Hawaiian Trust Assets to Support the Native Hawaiian Community’s Independent Reorganization of a Native Hawaiian Government.***

The Office of Hawaiian Affairs has committed itself to serving the Native Hawaiian people by working with a broad base of other Native Hawaiian institutions and organizations to support a process through which Native Hawaiians independently reorganize a Native Hawaiian government that comes from, consists of, and represents Native Hawaiians, through an election that utilizes the official base roll certified by the Native Hawaiian Roll Commission. OHA will support the election of delegates by Native Hawaiians to convene a gathering of delegates at a Governance ‘Aha that would provide a forum for delegates to propose the form, scope and principles that would guide the official Native Hawaiian government, for the approval of Native Hawaiians. OHA has committed to working with that official Native Hawaiian government, if created, to empower and assist it in ways that are consistent with OHA’s statutory responsibilities and fiduciary obligations to its beneficiaries.

The tentative timeline for the government reorganization process is as follows:

2014										2015						
Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	July
Registration				Delegate campaigns						Elec- tion	Governance ‘Aha and education efforts			Referendum and education efforts		
Education efforts				Education efforts												

**D. *OHA Supports Use of the Base Roll Certified By the Native Hawaiian Roll Commission as the Basis for Eligibility to Participate in the Reorganization of the Official Native Hawaiian Government.***

OHA supports use of the base roll certified by the Native Hawaiian Roll Commission as the basis for eligibility to vote or run in the delegate elections, and to vote in any referendum on the official Native Hawaiian government’s form, scope and principles. Every registrant whose name appears on the official base roll will be certified by the Native Hawaiian Roll Commission as an individual who has documented his or her Native Hawaiian ancestry and demonstrated a significant connection to the Native Hawaiian community.

While the Roll Commission will make the final certifications according to its own established standards, it is OHA’s position that each registrant transferred by OHA to the Roll Commission for inclusion on the official base roll has demonstrated a clear and significant civic

connection to the Native Hawaiian community by being registered as a verified Native Hawaiian with the Office of Hawaiian Affairs.

**E. *Building Upon the Ongoing Reorganization Effort Is Advisable, Both As a Matter of Respect for Inherent Native Sovereignty and As a Matter of Fiscal Responsibility.***

As stated above, reorganization of a single, representative Native Hawaiian government is needed to reestablish and maintain a government-to-government relationship between the Native Hawaiian community and the United States. However, the process for that reorganization should be the community-driven process described above, which relies upon a certified base roll of Native Hawaiians—defined and recognized as the indigenous kanaka maoli people of Hawai‘i—who would elect representatives to a constitutional convention wherein organic governing documents would be developed for ratification by the Native Hawaiian people. This reorganization process would be instilled with openness to all Native Hawaiian perspectives on governance and would respect the will of the people. The Native Hawaiian community is fully capable of rising up to meet the challenge of creating its own government that would decide whether seeking reestablishment of a government-to-government relationship is a path it desires.

In addition, because this process is already being implemented pursuant to input from many meetings in the community through OHA’s outreach, and is well known and established, it makes much more sense to use the process as the basis for reestablishing a government-to-government relationship, rather than expending federal dollars and other resources to duplicate efforts. To illustrate, based on OHA’s experience, it would likely take several years and millions of dollars just to create a new base roll of qualified Native Hawaiians. The subsequent administration of a government reorganization process involving hundreds of thousands of enrolled members would likely cost the federal government millions more and take several more years. OHA would prefer to see these federal resources directed toward rebuilding and fortifying the government-to-government relationship once it is reestablished.

**4. If a Native Hawaiian government is reorganized, under what conditions should the Secretary federally acknowledge it and thus reestablish a government-to-government relationship?**

**Response to Question No. 4:** The Secretary should only reestablish a government-to-government relationship with the single official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll, upon that Native Hawaiian government’s affirmative request for such a relationship. In addition, the Secretary should require that the organic governing documents of that reorganized Native Hawaiian government be ratified by a plurality vote of those Native Hawaiians, *including* Hawaiian Homes Commission Act beneficiaries, who are certified by the Native Hawaiian Roll Commission as qualified Native Hawaiians **and** who vote in the ratification election.

The Secretary should not require that the organic governing documents be approved by a majority of all registered “qualified Native Hawaiians,” because such a requirement is unrealistic, unachievable and has no parallel in modern U.S. election law requirements. Likewise, the alternative proposal that the organic governing documents be approved by a

majority of all registered qualified Native Hawaiians **and** a separate majority of “qualified Native Hawaiians who are potentially eligible under the Hawaiian Homes Commission Act” is even more unrealistic and unachievable. OHA knows of no state that requires the approval of referenda by a majority of “eligible voters” (those voters 18 years of age and older in a given state who meet applicable residency requirements), or even a baseline predicated on “registered voters” (those voters appropriately registered to vote in an election under applicable state law).

OHA strongly agrees, however, that the unique rights and interests of Hawaiian Homes Commission Act (HHCA) beneficiaries must be given proper consideration throughout the government reorganization process. Therefore, the Secretary should require that the single official Native Hawaiian government demonstrate that it has taken reasonable steps to assure the rights of Hawaiian Homes Commission Act beneficiaries during the government reorganization process.

Any additional conditions beyond those expressly listed above would constitute an inappropriate and unnecessary interference with the internal Native Hawaiian government reorganization process. The sole function of the proposed rule should be to verify that the Native Hawaiian government reestablishing the government-to-government relationship with the federal government is the official Native Hawaiian government authorized by qualified Native Hawaiians to act and speak on the community’s behalf. All other details about how the official Native Hawaiian government will function or interact with the state and federal governments should be negotiated between the affected parties at the appropriate point in time as an exercise of the government-to-government relationship. In particular, OHA strongly objects to any attempts to limit the inherent self-governing rights of the reorganized Native Hawaiian government before the government has an opportunity to form and advocate on its own behalf.

Hawai‘i’s uniqueness guarantees that any set of one-size-fits-all conditions will not favor the successful reestablishment of a government-to-government relationship between Native Hawaiians and the federal government. Native Hawaiians have waited 117 years for self-determination and political recognition. Any proposed conditions or regulations should not prolong the realization of those goals, and they should be achievable in a timely, cost-effective, prompt and even urgent manner.

**5. What features, including any within 25 CFR parts 61, 62, 81, and 83 or other regulations, should the Secretary incorporate in a proposed administrative rule addressing potential reorganization or acknowledgment of a Native Hawaiian government?**

**Response to Question No. 5:** Given the unique history and characteristics of the Native Hawaiian community, there are no features included within 25 CFR parts 61, 62, 81 or 83 that OHA believes should be incorporated in a proposed administrative rule to reestablish the government-to-government relationship with the community. Features that should be incorporated include:

- A clause providing for the immediate reestablishment of a government-to-government relationship with the single official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll upon that Native

Hawaiian government's affirmative request for such a relationship and its demonstration that:

- Its organic governing documents are ratified by a plurality vote of those Native Hawaiians, including Hawaiian Homes Commission Act beneficiaries, who are certified by the Native Hawaiian Roll Commission as qualified Native Hawaiians and who vote in the ratification election; and
- It has taken reasonable steps to assure the rights of Hawaiian Homes Commission Act beneficiaries during the government reorganization process; and
- Provisions ensuring that the reestablishment is implemented effectively, efficiently, economically and in good faith.

The proposed administrative rule should not prospectively attempt to limit the inherent sovereign rights of the reorganized Native Hawaiian government that inure to it under U.S. domestic law. Likewise, the rule should open a path for reestablishment of a domestic government-to-government relationship that will not, as a legal matter, affect paths for international redress.

[Question Nos. 6-18 are not applicable given OHA's position that the Native Hawaiian community should independently reorganize the Native Hawaiian government.]

### **RESPONSE TO QUESTION REGARDING FEDERAL ACKNOWLEDGMENT OF AN ALREADY REORGANIZED NATIVE HAWAIIAN GOVERNMENT**

**19. Should reorganization of a Native Hawaiian government occur through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, rather than through a Federal process? This non-Federal process would have to be consistent with Federal law and satisfy conditions established by the Secretary as prerequisites to Federal acknowledgment. We seek views on each of the following as a potential condition for Federal acknowledgment of a Native Hawaiian government that has already been reorganized through a community-established, State-facilitated process:**

- **Acknowledgment by the State of Hawaii.**
- **A Native Hawaiian constitution (or other governing document) that—**
  - **Safeguards the civil rights and liberties of Natives and non-Natives alike, as guaranteed in the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. 1301-1304;**
  - **Has been ratified by a majority vote of “qualified Native Hawaiians,” as defined in Haw. Rev. Stat. 10H-3(a) (2013); and**
  - **Has *also* (and perhaps simultaneously) been ratified by a majority vote of “qualified Native Hawaiians” who are potentially eligible under the HHCA, as amended.**
- **Any other criterion that should be included as a condition for Federal acknowledgment of an already reorganized Native Hawaiian government.**

**Response to Question No. 19:** Yes. The reorganization of the Native Hawaiian government should occur through the community-driven process described above, rather than through a federal process. The Secretary should rely on the Native Hawaiian community to work

through its own government reorganization process because: (1) the government that emerges will be the official choice of the Native Hawaiian people; and (2) only one government will be formed in the process and, therefore, only one official government will seek recognition from the federal government. There is no place for direct facilitation by the State of Hawai‘i.

In particular, formal acknowledgment by the State of Hawai‘i should **not** be a condition for federal acknowledgment of a reorganized Native Hawaiian government. However, use of the official certified base roll, acknowledged by Hawai‘i state law as the operative list of qualified Native Hawaiians, should be a condition for federal acknowledgment, along with the other conditions expressly listed above.

The federal government should provide guidance as requested to ensure that the Native Hawaiian government reorganization process comports with federal law and will satisfy the required elements of federal acknowledgment. As explained fully in OHA’s Response to Question No. 4, above, the sole function of the proposed rule should be to verify that the Native Hawaiian government reestablishing a government-to-government relationship with the United States is the official Native Hawaiian government authorized by the Native Hawaiian community to act and speak on its behalf. Therefore, the only prerequisites to federal acknowledgement should be that:

- The acknowledged Native Hawaiian government is the single official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll;
- The organic governing documents of the single acknowledged Native Hawaiian government are ratified by a plurality vote of those Native Hawaiians, including Hawaiian Homes Commission Act beneficiaries, who are certified by the Native Hawaiian Roll Commission as qualified Native Hawaiians and who vote in the ratification election; and
- The acknowledged Native Hawaiian government can demonstrate that it has taken reasonable steps to assure the rights of Hawaiian Homes Commission Act beneficiaries during the government reorganization process.

## **CONCLUSION**

OHA **STRONGLY SUPPORTS** the accelerated promulgation of a federal rule, or the taking of other federal action, such as a Secretarial or Assistant Secretarial Order, that would reestablish a government-to-government relationship with the official Native Hawaiian government formed by the qualified Native Hawaiians on the certified base roll, upon that Native Hawaiian government’s affirmative request for such a relationship. This is the most viable action that could be taken to protect and expand existing trust assets, federal programmatic funding, federal consultation rights and other self-determination rights under federal law. Therefore, we urge the Department to move forward swiftly and boldly, encouraged by the guiding wisdom that our beloved Queen Lili‘uokalani left with us shortly before her passing:

I could not hold back the time for the political change, but there is still time to save our heritage. You must remember never to cease to act because you fear you may fail. The

way to lose any earthly kingdom is to be inflexible, intolerant, and prejudicial. Another way is to be too flexible, tolerant of too many wrongs and without judgment at all. It is a razor's edge. It is the width of a blade of pili grass. To gain the kingdom of heaven is to bear what is not said, to see what cannot be seen, and to know the unknowable—that is Aloha.

Mahalo for the opportunity to comment.