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**IN THE DISTRICT COURT OF THE SECOND CIRCUIT
WAILUKU DIVISION
STATE OF HAWAII**

STATE OF HAWAII)
)
) Case No.: 2P106-02017
vs.)
) Case No.: 2P106-02018
NELSON KUUALOHA ARMITAGE,)
_____) Case No.: 2P106-01909
)
RUSSELL KAHOOKELE,) Trial Date: Not Set
_____)
) (proposed) FINDINGS OF FACT;
HENRY MAILE NOA.) CONCLUSIONS OF LAW;
) CERTIFICATE OF SERVICE
Defendants.)
)
_____)

FINDINGS OF FACT

- . 1. HAR § 13-261-10 (2005) prohibits entry onto the Kaho’olawe Island Reserve, or within its waters, without first obtaining a permit from the Kaho’olawe Island Reserve Commission, or its authorized representative.
- . 2. That on or about July 31, 2006 Defendants Armitage, Kohookele, and Noa traveled to Kaho’olawe as elected representatives and citizens of the Reinstated Kingdom of Hawai’I for the purpose of exercising and proclaiming the Reinstated Kingdom’s property rights in the Kaho’olawe Island Reserve and its adjacent waters, to build an ahu, and to offer a prayer on the island.
- . 3. Defendants were cited with violations of HAR § 13-261-10, for attempting to enter, or remain within, the Kaho’olawe Island Reserve without being specifically authorized to do so by the commission or its authorized representative, and thereby charged with committing the offense of Entrance Into the Reserve.
- . 4. Defendants filed a Motion to Dismiss based on their assertions that under international law, federal common law, and the laws of the State of Hawaii, specifically HRS § 6K-9 (2005), which provides that upon recognition by the federal government and the state of Hawaii, the management and control of the resources and waters of Kaho’olawe shall be transferred by the State of Hawaii to

the sovereign native Hawaiian entity.

- . 5. Defendants' Motion to Dismiss further asserts defenses based upon privilege, the rule of lenity, and that HAR § 13-261-10 is unconstitutionally void for vagueness, in that violation of the rule carries with it upon conviction the potential of facing incarceration.
- . 6. Defendants offered expert testimony that the Kingdom of Hawaii was recognized as a sovereign nation by the international community of nations prior to its illegal overthrow by the United States in 1893. The State did not rebut this testimony.
- . 7. Defendants offered expert testimony that the Kingdom of Hawai'i's monarch, Queen Liliuokalani preserved in perpetuity the Kingdom of Hawai'i's right to reestablish, or re-instate itself once again as the sovereign native Hawaiian entity. The State did not rebut this testimony.
- . 8. Defendants offered expert testimony that federal common law denominates Native American tribes as domestic dependant nations, and not sovereign nations or entities. The State did not rebut this testimony.
- . 9. Defendants offered expert testimony that the Reinstated Kingdom of Hawai'i is not an Indian tribe, but rather stands apart from, and in distinction to, the federal Indian law model of domestic dependant nationhood. The State did not rebut this testimony.
- . 10. Defendants offered expert testimony that the Reinstated Kingdom of Hawai'i qualifies as a sovereign nation under international law. The State did not rebut this testimony.
- . 11. Defendants offered expert testimony that the Reinstated Kingdom of Hawai'i was democratically created through free and fair elections, and have undertaken various steps to reinstate the Kingdom of Hawai'i, such as the drafting and adoption of its constitution, maintaining and updating citizenship rolls, holding regularly scheduled governmental conventions, passing and adopting ordinances, producing citizenship documents, and reestablishing diplomatic communications with several nation states. The State did not rebut this testimony.
- . 12. Defendants offered expert testimony that it is necessary for a nation, or a people, to assert rights to its territories under international law whether it has formally been recognized by the international community, or by the nation within which its territory currently is occupied. The State did not rebut this testimony.
13. Defendants' expert testified that Defendants' entry onto Kahoolawe was a necessary step in their quest for nation status. The State did not rebut this testimony.
- . 14. Defendants offered expert testimony that contemporary international law and norms are based upon the principles of peaceful relations and the right to self determination, and that all peoples under international law are entitled to exercise the right to self determination. The State did not rebut this testimony.
- . 15. Defendants offered expert testimony that native Hawaiians qualify as a people under international law. The State did not rebut this testimony.

16. Defendants offered expert testimony that an entity does not cease to be a sovereign entity even though it is temporarily occupied by a foreign power or has lost control of its territory temporarily. The State did not rebut this testimony.
17. Defendants conduct, in entering Kahoolawe, is properly considered political speech within the meaning of the 1st amendment to the U.S. constitution.
18. Defendants offered expert testimony that no process exists, nor is contemplated, under state or federal law, to establish or recognize a true, Native Hawaiian sovereign entity.
19. Defendants offered expert testimony that a sovereign nation is different than a domestic dependent nation.
20. Defendants offered expert testimony that prior to the illegal 1893 overthrow, that the Kingdom of Hawaii was a member of the International Community of Nations. TR (7/27/07) p 69 l 17.
21. Defendants offered expert testimony that the “permission requirement” of HAR §13-261-10 is inconsistent with the right of a sovereign Hawaiian entity to access Kahoolawe.
22. Defendants offered expert testimony that measures taken by the federal government since 2000 to create a procedure for recognition, such as the “Akaka Bill”, are not intended to recognize a sovereign Native Hawaiian entity, but rather would recognize in essence another manifestation of a domestic dependent nation, or Indian tribe. The State did not rebut this testimony.
23. Defendants offered expert testimony that “self-determination,” is a legal term of art in international law which refers to the collective right of a people to determine for themselves the right to live under the Government, live under the laws they establish to protect their land and natural resources to promote the preservation of their language and to protect the territory that they occupy. TR (7/27/07) p 19 l 18.
24. Upon landing on Kahoolawe the defendants undertook a traditional ceremony. “In our traditional practice, in our culture, it is well understood that when you have an event, be it a small event, or large event, you always pay respect to your ancestors, to your various Gods that our religion has or just to Akua itself. TR (1/25/08) p 104 l 6.
25. The State elicited testimony that the Island of Kahoolawe may be unsafe, due to unexploded ordinance on the island. Defendants claimed that the administrative regulations were not narrowly tailored to meet that State interest.
26. Defendant Noa, and his expert each testified that Native Hawaiians traditionally and customarily managed and controlled the island of Kahoolawe prior to 1893. . TR (1/25/08) p 107 l 10. See also TR (7/27/07) p 79 l 6. The State did not rebut this testimony.
27. Defendants are Native Hawaiian, within the meaning set forth in Hawaii state law.

The land on Kahoolawe is undeveloped.

CONCLUSIONS OF LAW

- . 1. HAR §13-261-10 provides that “No person or vessel shall enter or attempt to enter into or remain within the reserve unless such person or vessel: (a) Is specifically authorized to do so by the commission or its authorized representative as provided in section 13-261-11; or, (b) Is specifically authorized to do so through a written agreement approved by the commission; or (c) Is trolling in zone B, in compliance with section 13-361-13(b)(3); or (d) Must enter the reserve to prevent probable loss of vessel or human life, provided that: (1) Prior to entering the reserve and at such reasonable intervals thereafter, such person shall make every reasonable effort to notify the commission staff or the United States Coast Guard that loss of vessel or human life is probable; (2) All fishing gear shall be stowed immediately upon entering the reserve; and (3) Such person shall vacate the reserve immediately after the threat of probable loss of vessel or human life has passed.”
- . 2. Section 5 of the Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959) established that all lands held in the public trust are managed for the beneficiaries of the trust, namely Native Hawaiians and the general public.
- . 3. Article XII Section 4 and Article XVI Section 7 of the Hawaiian Constitution established that Native Hawaiians are beneficiaries of the public trust and are owed “high fiduciary duties” by the State, and must be permitted to access public lands for their benefit, use, and enjoyment.
- . 4. HRS § 6K-9 (2005) established that the island of Kaho’olawe shall be held in the public land trust, until a Native Hawaiian sovereign entity is recognized by the United States and the State of Hawaii.
- . 5. HRS § 6K-9 (2005) expressly contemplates the State’s transfer of management and control of Kaho’olawe to the sovereign Native Hawaiian entity, thereby creating a future fee simple property interest of its waters and resources for the Defendants.
- . 6. HRS § 6K-3 (1) (2005) intends that as beneficiaries under the public land trust, Defendants must be allowed to utilize Kaho’olawe to “practice all rights customarily and traditionally exercised,” and that Defendants’ visit to Kaho’olawe was within those rights statutorily recognized.
- . 7. HAR § 13-261-10 and § 13-261-11 are unconstitutionally void for vagueness in that the terms “authorized representative,” and “cultural practitioners” are not defined, therefore preventing a reasonable person of ordinary intelligence from knowing what conduct is prohibited.
- . 8. Defendants’ assertion of privilege to enter the Kaho’olawe Island Reserve meets the three prong test articulated in State v. Hanapi, 970 P.2d 485, 493-494, 89 Haw. 177, 186 (1998), in that they are Native Hawaiians, that their claimed rights are constitutionally protected as customary and traditional Native Hawaiian practices, and that the exercise of their rights occurred on under-developed, or less than fully developed property.

- . 9. Article XII, section 7 of the State of Hawaii Constitution places an affirmative duty on the State to “preserve and enforce traditional rights exercised by descendents of Native Hawaiians for subsistence, cultural, and religious purposes.”
- . 10. Under State v. Lorenzo, 883 P.2d 641 (App. 1994) this Court finds that it has the authority to recognize, and hereby does recognize the Reinstated Kingdom of Hawai'i “exists as a state in accordance with recognized attributes of state’s sovereign nature.”
- . 11. Under State v. Lorenzo, and by the evidence admitted and attested to by the Reinstated Kingdom of Hawai'i's Prime Minister Henry Noa, this Court holds that the Defendants have met their burden of proof that they are among the democratically elected officers of the native Hawaiian sovereign entity, and have demonstrated that, inter alia, they have a “defined territory, a permanent population, under the control of its own government, and that it engages in, or has the capacity to engage in, formal relations with other entities.”
- . 12. Under Cherokee Nation v. Georgia, 30 U.S. 1 (1835), this Court finds that the Reinstated Kingdom of Hawaii is not correctly denominated to be a domestic dependent nation or American Indian tribe, but rather has distinguished itself as the native Hawaiian sovereign entity entitled to recognition.
- . 13. This Court finds that the Law of Nations is contemporarily predicated upon the law of treaties, the Charter of the United Nations, as well as the contemporary norms of self-determination and peaceful relations among nation states.
- . 14. This Court finds that it may consider international law as proper authority to correctly determine the veracity of the Reinstated Kingdom of Hawaii's lawful existence.
- . 15. This Court finds that the citizens of the Reinstated Kingdom of Hawai'i are representative of the Native Hawai'ian people, and that as a people they are entitled to the right of self-determination under international law.
- . 16. This Court finds that the right to self-determination is guaranteed to all peoples under the Universal Declaration of Human Rights, the Charter of the United Nations, the International Covenant of Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, and that the United States, as a signatory party, is legally bound to uphold the terms contained within these international treaties.
- . 17. Under Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i, No. 25570, in an appeal to the Supreme Court of the State of Hawai'i from the First Circuit Court, (CIV. NO. 94-4207) January 31, 2008, the Hawai'ian Supreme Court held that the Apology Resolution, P.L. 103-150 (1-7 Stat. 1510) and its sections are part of the laws of the State of Hawai'i.
- . 18. Courts can make determinations of nationhood. See, Lorenzo, infra, and Cherokee Nation v. Georgia 30 U.S. 1 (1835).
- . 19. The uncontradicted evidence in this case demonstrates that defendants have satisfied the three part test in State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw.

- 177, 186-86 (1998). Defendants are native Hawaiian; the land is undeveloped, and management and control of Kahoolawe was traditionally and customarily provided by the sovereign Hawaiian entity prior to 1893.
20. HAR §13-261-10, applied to this case, is not narrowly tailored to serve the government's interest in protecting citizens from unexploded ordinance. See Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989).
 21. In 1993, Congress passed, and the President signed, the Religious Freedom Restoration Act ("the Act"). 24 U.S.C.S. § 2000bb. In the case at bar, application of HAR §13-261-10 would burden defendants' religious practices. The government has not demonstrated that the current statutory structure is narrowly tailored, or least restrictive to protect religious activity there – and thus, this prosecution violates 24 U.S.C.S. § 2000bb.
 22. Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity. See State v. Kaakimaka, 84 Hawai'i 280, 292, 933 P.2d 617, 629 ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (Quoting Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980).)), reconsideration denied, 84 Hawai'i 280, 933 P.2d 617 (1997); State v. Auwae, 89 Hawai'i 59, 70, 968 P.2d 1070, 1081 (App.1998). The 'rule of lenity' applies [] where there is ambiguity in or conflict between statutes." State v. Arnold (1991), 61 Ohio St.3d 175, 178.
 23. In the case at bar, imposition of criminal penalties by the application of HAR §13-261-10, would conflict with protected rights enjoyed by defendants, specifically the right to organize and form a sovereign Hawaiian Nation.
 24. Because defendants' protected rights are in conflict with the application of HAR §13-261-10, in this case, the criminal charges against these defendants must be, and are hereby, DISMISSED.

SO ORDERED

Date

Honorable Simone Polak
Judge of the Above Entitled Court

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HENRY MAILE NOA.)	
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Defendants.)	
)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fof/col were duly served upon the following counsel via U.S. Mail, postage prepaid:

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Dated: Lihue, Hawai'i, May 27, 2008.

By _____
Daniel Hempey