

OUR VIEW

NATIVE HAWAIIANS

Rejecting call to stop 'aha' was right call

POSTED: 1:30 a.m. HST, October 25, 2015

"Federal recognition" can be a contentious term within sectors of the Native Hawaiian community, but on Friday, Hawaii's indigenous people received a form of it from the courts.

In rejecting a motion seeking to block the election of delegates to an aha, or constitutional convention, U.S. District Court Judge J. Michael Seabright underscored the rights of all people to assemble and organize in this way. And as an act by a private entity, the election did not constitute a violation of government's constitutional protections.

He went on to affirm what has been clear in a century of case law, state constitutional provisions and statutes. The state and the federal government have maintained a special trust relationship with Native Hawaiian people since the overthrow of the monarchy and Hawaii's annexation, one that should support the quest for self-determination.

It's unquestionably good news for the private entity, the nonprofit Na'i Aupuni, which is organizing the aha delegates election in November, but a final chapter in this legal fight remains.

The plaintiffs, whose appeal is imminent, include non-Hawaiians who were excluded from the voter roll, and Hawaiians who objected to affirmations required in the most recent enrollment process.

The clock is ticking to file before the 9th Circuit Court of Appeals, but the attorneys will have to wait a bit. Seabright's carefully reasoned decision issued from the bench will be followed by a written ruling aimed at bolstering the arguments at the appellate level.

The core of the ruling is that the aha is a private assembly, one in which the government is simply not a player. This means there was no compelling public interest in stopping the election.

One of the charges in the complex case was that the Hawaiian-only election violated the 15th Amendment of the U.S. Constitution.

Quoting another ruling, Seabright said that provision precludes discrimination against voters in "elections to determine public governmental policy or to select public officials, not in private elections to determine private affairs."

Seabright correctly concluded the aha election by itself would not change public law, so there was no basis to intervene.

The complainants contended that the funding of the election process through a grant from the state Office of Hawaiian Affairs made it public. Seabright noted that the grant contract included a clause barring OHA's involvement in Na'i Aupuni's work -- which he said was enough separation to mean the activity of organizing the aha election was private.

Plaintiffs also challenged the pledges signed by about a third of the electorate -- those who enrolled through Na'i Aupuni. These enrollees had to affirm their agreement that Hawaiians had not relinquished sovereignty. The rest, enrolled in earlier initiatives by OHA, only had to prove they were Native Hawaiian.

However, Seabright was impressed neither by that argument, nor by the protest of those non-Hawaiians who were excluded. Those unwilling to agree with the extra statements could have joined the voter roll through other initiatives, he said, and could have withdrawn from the roll, so there was no First Amendment free-speech violation.

And if the state requires non-Hawaiians to have access to every private assembly, he said that essentially bars Native Hawaiians from ever being able to organize at all. And as Native Hawaiians are the only remaining indigenous group in the U.S. that has been precluded from establishing its own government, that would constitute an injustice.

Many historical events have led to this juncture. Former U.S. Sen. Daniel Akaka worked unsuccessfully to kickstart a process through Congress that would end in the federal recognition of Native Hawaiians as a political entity.

Other native groups have followed an alternative, administrative route to "nation within a nation" status, one that could be enabled now for Native Hawaiians. The Obama administration, sympathetic to the cause, has laid out a way a Native Hawaiian entity could seek such recognition through the U.S. Department of the Interior.

Whether or not the aha will lead to that point is uncertain. The Native Hawaiian community is split, even bitterly so, on whether sovereignty means any relationship with the U.S. at all.

That's a decision for another day. It's unrealistic to expect that the disagreements of this community can melt away and that Hawaiians, or any people of diverse opinion, could speak with one voice.

For now, the community can, and should, unite around the prospect of gathering in about a month's time to begin exercising that voice -- whatever the message ultimately will be.