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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 THE UNIVERSITY OF HAWAI'I AT HILO'S **SUBSTANTIVE JOINDER** IN SUPPORT OF PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES' **MOTION TO SET THE ISSUES FILED JULY 18, 2016** [DOC. 99]; DECLARATION OF COUNSEL; EXHIBITS "1" - "2"; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO'S SUBSTANTIVE JOINDER IN SUPPORT OF PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES' MOTION TO SET THE ISSUES FILED JULY 18, 2016 [DOC. 99]

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**") substantively joins and supports Perpetuating Unique Educational Opportunities' ("**PUEO**") *Motion to Set the Issues,* filed on July 18, 2016 [Doc. 99] ("**Motion**"). The University files this Joinder in PUEO's Motion to provide additional arguments supporting PUEO's Motion and to respond to the arguments raised by Temple of Lono's ("**Temple**") *Opposition to PUEO Motion to Set the Issues,* filed on July 20, 2016 [Doc 119].

I. INTRODUCTION

On July 18, 2016, PUEO filed its Motion, which requests that the Hearing Officer set the issues to be briefed and adjudicated in this contested case hearing proceeding. This proceeding concerns the Conservation District Use Application ("**CDUA**") for the Thirty-Meter Telescope project ("**Project**"); and, as set forth in the Motion, should be limited accordingly. Land uses in a Conservation District are permissible only by a permit granted by the Department of Land and Natural Resources ("**DLNR**") and, in some cases such as this, by the Board of Land and Natural Resources ("**Board**"). HAR § 13-5-30(b). The legal standard for evaluating a CDUA and determining whether or not to grant a Conservation District Use Permit ("**CDUP**") is whether the proposed land use comports with the criteria set forth in Hawai'i Administrative Rules ("**HAR**") § 13-5-30(c) (referred to as the "**Eight Criteria**").

On July 20, 2016, the Temple filed its Opposition to PUEO's Motion on the grounds that: (1) the Motion is premature and seeks to reopen the deadline for intervenors; (2) the Motion is unsupported by existing law; (3) the Motion is a violation of due process because it seeks to eliminate issues over which the Hearing Officer has jurisdiction; (4) the Board erred in admitting PUEO as a party; (5) the Hearing Officer can make a finding that as a matter of law, the Kingdom of Hawai'i still exists; (6) the Hearing Officer can determine whether or not competing land claims exist and therefore refuse to issue the permit if she finds that competing land claims do exist; and (7) the Hearing Officer has jurisdiction over competing land claim issues. The Temple further argues that the Hearing Officer can answer the following three questions:

1. Does the Kingdom still exist as a matter of law?
2. If the Kingdom still exists, does the Kingdom arguably have some claim to the national lands that belonged to the Kingdom prior to the overthrow?
3. Do the lands in question in this proceeding fall within the national lands that belonged to the Kingdom prior to the overthrow?

Temple Opp. at 8-9.

As set forth below, PUEO's Motion and the relief it requests are appropriate and within the jurisdiction of the Board. In contrast, the Temple's positions are inapposite, wrong on the law, and inconsistent with the consideration of the Eight Criteria to be reviewed in this proceeding.

II. ARGUMENT

A. PUEO'S MOTION SHOULD BE GRANTED BECAUSE THE REQUESTED RELIEF IS SQUARELY WITHIN THE BOARD'S JURISDICTION

Under HAR § 13-1-29.1, the Board "may deny a request or petition or both for a contested case ***when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board***[.]" (Emphasis added.) It is well-established law that administrative agencies only have the powers given to them by the Legislature.[1] The scope of the Board's powers and jurisdiction is set forth in Hawai'i Revised Statutes ("**HRS**") § 183C-3 and provides that the Board shall:

> (1) Maintain an accurate inventory of lands classified within the state conservation district by the state land use commission, pursuant to chapter 205;
>
> (2) Identify and appropriately zone those lands classified within the conservation district;
>
> (3) Adopt rules, in compliance with chapter 91 which shall have the force and effect of law;
>
> (4) Set, charge, and collect reasonable fees in an amount sufficient to defray the cost of processing applications for zoning, use, and subdivision of conservation lands;
>
> (5) Establish categories of uses or activities on conservation lands, including allowable uses or activities for which no permit shall be required;
>
> (6) Establish restrictions, requirements, and conditions consistent with the standards set forth in this chapter on the use of conservation lands; and
>
> (7) Establish and enforce land use regulations on conservation district

[1] *Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (Haw. 2004) ("An administrative agency can only wield powers expressly or implicitly granted to it by statute. However, it is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.") (citations and quotation marks omitted); *Public Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001) ("The basic rule is that a state administrative agency has only those powers that the Legislature expressly confers upon it."); *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536, 545-46 (2002) (providing that a while an agency's grant of power may be express or implied, "the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective").

> lands including the collection of fines for violations of land use and terms and conditions of permits issued by the department.

HRS § 183C-3.

This contested case was requested by certain parties at the Board's hearing on the CDUA on February 25, 2011. Under the Board's Rules of Practice and Procedure, HAR Title 13, Chapter 1 and the Sunshine Law, HRS Chapter 92, the Board may only consider those matters placed on the agenda for the meeting. HRS § 92-7(a) ("The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting[.]"). At the Board's meeting on February 25, 2011, the only item placed on the agenda for the CDUA and the Board's consideration was limited to the CDUA itself. *See* Exhibit 1 at 4; *see also* Staff Report Regarding Conservation District Use Application HA-3568 Thirty Meter Telescope at 45-60 (providing the conservation criteria under which the CDUA is evaluated)] [DOC. R-7].

Board action considering the CDUA and whether or not the CDUA is consistent with the Eight Criteria, and issues that directly relate to the Board's consideration of the Eight Criteria, are all squarely within the jurisdiction of the Board. The Board is also authorized by HRS § 183C-3 and its rules to limit the issues for its consideration to those matters within its jurisdiction. HAR § 13-1-29.1. The Hearing Officer also has the inherent authority to do so under the rules. HAR § 13-1-35(a).

As PUEO's Motion outlines, the vast number of parties in this case, each with the right to cross-examine witnesses, warrants expressly limiting the issues to be briefed by the parties up front so that all parties know how to properly focus their efforts, arguments and evidence on those matters to which the Hearing Officer and the Board have jurisdiction to consider. Other considerations that support expressly limiting the issues in this proceeding to those that actually deal with the CDUA include judicial economy and fairness. Moreover, while the Applicant in this proceeding has the burden of proof on whether or not the CDUA meets the Eight Criteria, the University, as the Applicant, should not have to shoulder the burden of addressing every conceivable grievance related to the Mauna Kea lands, including those over which the University has no control and the Board and Hearing Officer have no jurisdiction to adjudicate *(i.e.,* conflicting land claims, the existence of the Kingdom of Hawai'i, claimed religious servitudes, etc.).

Furthermore, the Board's decision may be invalidated on appeal if it does not limit the issues. *See Captain Andy's Sailing, Inc. v. Dep't of Land and Natural Resources*, 113 Hawai'i 184, 193-94, 150 P.3d 833, 842-43 (2006) ("It is axiomatic that the lack of jurisdiction over the subject matter cannot be waived by the parties. And even if the parties do not raise the issue, a court *sua sponte* will, ***for unless jurisdiction of the court over the subject matter exists, any judgment rendered is invalid.***") (first emphasis in original; second emphasis added; brackets, citations and internal quotation marks omitted).

For these reasons, the University supports PUEO's Motion and requests that it be granted.

B. THE TEMPLE'S OPPOSITION DOES NOT PRESENT ANY VALID GROUNDS FOR DENYING THE MOTION

As set forth above, the Temple's Opposition to PUEO's Motion argues that: (1) the Motion is premature and seeks to reopen the deadline for intervenors; (2) the Motion is unsupported by existing law; (3) the Motion is a violation of due process because it seeks to eliminate issues over which the Hearing Officer has jurisdiction; (4) the Board erred in admitting PUEO as a party; (5) the Hearing Officer can make a finding that as a matter of law, the Kingdom still exists; (6) the Hearing Officer can determine whether or not competing land claims exist and therefore refuse to issue the permit if she finds that competing land claims do exist; and (7) the Hearing Officer has jurisdiction over competing land claim issues. These baseless arguments are addressed in turn below.

1. PUEO's Motion is Not Premature and Does Not Reopen the Process of Objecting to Intervenors.

The Temple argues that PUEO's Motion is premature because it seeks "advance rulings on issues that might or might not be raised through motions, evidence, witnesses, or any other actual act of a party." Temple Opp. at 2 [DOC-119]. The Temple states that "PUEO equates the Hearing Officer's authority to determine her jurisdiction regarding an issue once raised with some non-existent authority to issue an advisory opinion on her jurisdiction over issues or the materiality and relevance of issues not yet raised." *Id.* (emphasis in original).

This is not the first contested case on the CDUA. It is a remand for a new contested case from the first contested case. The parties therefore are able to anticipate irrelevant or frivolous arguments that will be raised, even if they have not yet been raised in this proceeding on remand.

Arguments related to ceded lands, conflicting land claims, and the existence of the Kingdom of Hawai'i are not abstract or expectant arguments that *might or might not* be raised at a later time; these arguments already have been raised in both this proceeding and in the first contested case. As the Temple acknowledges in its Opposition, such arguments were already asserted in various requests for intervention. Temple Opp. at 3. The Temple's own pleading, *Kingdom of Hawai'i Notice of Absence of Necessary and Indispensible [sic] Parties,* filed on June 22, 2016 [DOC-79] ("**Notice**") , almost a full month before PUEO's Motion, raises claims related to the existence of the Kingdom of Hawai'i, Hawaiian sovereignty and the overthrow, and various land claims. And the Temple reasserts many of those same arguments in its Opposition to PUEO's Motion.[2] Thus, the Temple's own pleadings belie its contention that these issues "might or might not be raised." Accordingly, the propriety of these issues in this proceeding should be addressed now to ensure the parties are fairly apprised of exactly what is being adjudicated, and can appropriately present their evidence and arguments on these issues, rather than forcing the parties to expend time, resources and efforts needlessly addressing issues that are not properly before the Hearing Officer and Board in this proceeding.

The Temple also asserts that PUEO's Motion "seeks to essentially reopen the process of objecting to a request to intervene in order to rule out those requests raised and possibly eliminate intervenors already admitted." Temple Opp. at 3. This is a straw man argument that is based on a mischaracterization of PUEO's Motion and argues against a position the PUEO never took in the first place. The Motion does not object to intervention by any parties; in fact, the Motion acknowledges that there are a number of parties to this proceeding. Contrary to the Temple's characterization, the Motion seeks to identify the issues that will be decided at the contested case. Each party to the contested case will have the appropriate opportunity to present evidence on and participate in the adjudication of these issues.

Furthermore, the Temple's position is inconsistent with the Hearing Officer's mandate. The Temple asserts that the Hearing Officer should not limit the issues because "[n]o conditions

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[2] In addition to its Opposition and Notice, Temple has filed two other pleadings: (1) Temple of Lono Motion to Dismiss for Lack of Jurisdiction Based on Unresolved Land Claims; Memorandum in Support, Exhibit 1, filed July 22, 2016 [DOC. 126], and (2) Temple of Lono Motion to Vacate Ruling and Supplement Response Time; Memorandum in Support; Exhibit 1 (Declaration of Lanny Sinkin), filed July 23, 2016 [DOC. 127]. Inasmuch as the arguments made in these filings are repetitive of those asserted in the Opposition and Notice, this Joinder objects to each of Temple's pleadings for the reasons stated herein.

were put on the grants of intervenor status in terms of the issues an intervenor could raise." *See* Temple Opp. at 3. In other words, the Temple argues that by being admitted into this proceeding, a party has the unfettered right to raise any issue it wishes, no matter how unrelated to the CDUA. That is impractical and defies common sense. The Board delegated its authority to the Hearing Officer to conduct the contested case hearing on whether the CDUA should be approved. Therefore, the only issue justiciable by the Hearing Officer is whether the CDUA satisfies the established requirements for approval—*i.e.*, the Eight Criteria. The Hearing Officer does not have the authority to adjudicate every grievance every intervenor has ever had against the State of Hawai'i or the Federal Government. The Temple cites to no rule or law that allows otherwise.

2. PUEO's Motion is Supported by Existing Law and Board Practice.

The Temple's attacks on PUEO's Motion as being "unsupportable by existing law" are unavailing. *See* Temple Opp. at 2. PUEO's Motion is supported by both existing law and corresponding Board practice. That the Temple disagrees with the regulatory authority underlying PUEO's Motion does not mean it does not exist. PUEO's Motion was made per the requirements in HAR § 13-1-34(a). The Board's rules allow the Hearing Officer to, *inter alia*: deny requests for a contested case when it is clear that the Board does not have subject matter jurisdiction; limit admission of testimony and evidence that is repetitive, unnecessary, immaterial or irrelevant; and hold pre-hearing conferences "***for the purpose of formulating or simplifying the issues . . . and such other matters as may expedite the orderly conduct and disposition of the proceeding*** as permitted by law." HAR § 13-1-36(a) (emphasis added); *see also* HAR §§ 13-1-29.1, 13-1-32(h), 13-1-35(a). The irony of the Temple's unfounded complaint about the lack of legal authority supporting PUEO's Motion is that its own Opposition fails to cite any authority to support its own claims. The reason for the absence of this authority is clear: there is none. However, as shown above, that is not the case for the Motion. Accordingly, the Motion is appropriate.

3. The Relief Requested by PUEO's Motion is Not a Violation of Due Process.

The Temple asserts that an order setting issues in the contested case would be a violation of due process because it seeks to eliminate issues over which the Hearing Officer allegedly has jurisdiction. Temple Opp. at 3; *see also id.* at 7. As discussed, the Motion asks to exclude only

those issues that do not directly relate to the CDUA and over which the Board/Hearing Officer does not have jurisdiction. Motion at 4-5.

The Temple cites to no authority for its allegation that excluding an issue for lack of subject matter jurisdiction before ruling on the merits is a violation of due process. Instead, the Temple argues that "[c]ertainly, if intervenors raise issues that are outside the jurisdiction of the Hearing Officer and/or [sic] irrelevant and immaterial, the Hearing Officer can so rule once the issue is actually before her." Temple Opp. at 4 (emphasis in original). However, a tribunal is competent to hear only those matters over which it has subject matter jurisdiction. And unless the tribunal has subject matter jurisdiction, any judgment rendered is invalid. *See, e.g., Captain Andy's Sailing, Inc.*, 113 Hawai'i at 193-94, 150 P.3d at 842-43. The Temple's position that the Hearing Officer's subject matter jurisdiction expands and contracts based on the issues placed before her would eviscerate well-settled jurisprudence on subject matter jurisdiction and render it meaningless.

Hawai'i and federal case law provide that a tribunal can address subject matter jurisdiction at ***any time*** on motion of any party or the tribunal may raise it ***sua sponte***. *See* Hawai'i Rules of Civil Procedure Rule 12(b)(6), 12(h)(3); *Captain Andy's Sailing, Inc.*, 113 Hawai'i at 194, 150 P.3d at 843 (providing that "the question of existence of jurisdiction is in order at ***any stage*** of the case") (emphasis added; internal quotation marks omitted); *see also Franklin v. State of Oregon, State Welfare Division*, 662 F.2d 1337 (9th Cir. 1981) ("A judge, however, may dismiss an action *sua sponte* for lack of jurisdiction. . . . if the court lacks subject matter jurisdiction, it is not required to issue a summons or follow the other procedural requirements. In addition, a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statues clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous.") (citations and internal quotation marks omitted).

In *Franklin*, the Court of Appeals for the Ninth Circuit examined whether the district court erred in dismissing a prisoner's civil right claim before the court issued a summons, which would have made the defendants parties to the action and required them to respond to the appeal. 662 F.2d at 1341. The Ninth Circuit held that an action may be dismissed on the court's own motion before the issuance of the summons when it is clear that the court lacks jurisdiction. *Id.*

at 1340, 1342. The Ninth Circuit also discussed the timing of dismissal for lack of subject matter jurisdiction compared with the timing of dismissal for failure to state a claim and explained that:

> There are, however, important differences between dismissing a case for lack of jurisdiction and dismissing for failure to state a claim. A dismissal for failure to state a claim requires a judgment on the merits and cannot be decided before the court has assumed jurisdiction. ***If the district court dismisses an action after it has addressed the merits of the case, to label the dismissal as one for lack of subject matter jurisdiction is improper.*** Dismissal for lack of jurisdiction, of course, does not operate as a judgment on the merits, and thus allows a plaintiff the opportunity to seek relief in the state courts or to assert the claim for which the federal courts have jurisdiction.

Id. at 1343 (citations omitted; emphasis added). Therefore, the Board should dismiss claims over which it does not have subject matter jurisdiction prior to hearing such claims on the merits; doing so will not run afoul of due process. However, hearing the arguments on the merits would constitute legal error on the Board's part and result in an unnecessary waste of time and resources.

4. The Board Did Not Err in Admitting PUEO as a Party.

Ironically, after taking exception to what it characterized as an effort by PUEO to "reopen the process of objecting to a request to intervene," the Temple proceeds to do exactly that—and argues that the Board erred in admitting PUEO as a party. *See* Temple Opp. at 3; *cf. id.* at 4-6. Curiously, the Temple's Opposition does not argue that PUEO falls short of the criteria set forth in the Board's rules governing mandatory and discretionary *admission* in the proceedings. *See* HAR § 13-1-29(a) and 13-1-31. Instead, the Temple uses the standards under which the *CDUA is evaluated*, the Eight Criteria set forth in HAR § 13-1-30(c), as a means to argue that PUEO's intervention was improper, ostensibly because PUEO's stated interests do not match up with the express language set forth in the Eight Criteria. If that logic were to apply, then the Temple's request to intervene also should have been denied.

As the basis of its request to intervene, the Temple (and various other parties to the contested case) asserted that the CDUA is not consistent with the Eight Criteria because the Project affects its traditional and customary practices. *See* the Temple Mot. Intervene at 2 [DOC 50]. Nowhere in the Eight Criteria is there any express mention of native Hawaiian traditional and customary practices. However, the Motion to Set Issues, the Board, and Hawai'i case law acknowledge that issues related to traditional and customary practices can, will and have been

raised during the contested case hearing on the CDUA under the fourth criterion, which evaluates whether: "[t]he proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding area, community or region[.]" HAR § 13-1-30(c)(4); *see also* Mot. at 4-5; Findings of Facts, Conclusions of Law and Decision and Order in *In re Petitions Requesting a Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve Ka'ohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015: 009, DLNR Docket No. HA-11-05*, at 58-67. Like the Temple and other native Hawaiian practitioners, PUEO's interests fall within this criterion. PUEO's members include native Hawaiians who exercise native Hawaiian traditional and customary rights on Mauna Kea and believe that culture and science can co-exist on Mauna Kea. *See* PUEO Motion to Intervene at 2, Memorandum in Support of Motion at 8 [DOC 33].

The Temple appears to believe that due process and an opportunity to be heard is reserved only for opponents of the Project, stating that:

> [PUEO's] position is that TMT is compatible with the native Hawaiian rights exercised by PUEO Board members means that those rights would not be adversely affected in any way should the CDUA be granted and ***therefore, the native Hawaiian status of PUEO's members provided no basis for an intervention. Certainly, the Board of PUEO is not "directly and immediately affected by the requested action."*** HAR § 13-1-31(b)(2).

See Temple Opp. at 6. The Temple's statement is a thinly-veiled attempt to silence and belittle those native Hawaiians who hold opinions that differ from the Temple's, by seeking to discredit anyone who supports the Project. The Temple further asserts that "[t]he fact that five guys do not find the TMT proposal to adversely affect their native Hawai'ian [sic] rights is also irrelevant as to whether or not other native Hawai'ians [sic] are adversely affected. The PUEO five guys can speak only for themselves." Temple Opp. at 6. In other words, the Temple is claiming that those native Hawaiians who do not side with the Temple to oppose the Project should not be allowed to have a voice in the native Hawaiian community or this proceeding; while those who do should apparently speak on behalf of all Native Hawaiians and, by law, be heard at this proceeding. Such rhetoric is not only divisive and harmful, but entirely unsupported by the law. Moreover, the hypocrisy of the Temple's argument is self-evident. If it is the Temple's position that opinions of select people are too narrow, limited, and irrelevant to adequately represent

Native Hawaiian interests, then that same logic applies to the Temple, and it should immediately withdraw from these proceedings.

The Board and Hearing Officer, however, are required to hear and consider ***relevant*** information from all parties, not just those that support the Temple's position. That PUEO's rights, or the rights of other parties who support the Project, are not ***adversely*** affected ***by the Project*** does not mean that the rights and interests of supporters are not "directly and immediately affected by the requested action." Indeed, their rights would be ***adversely*** affected ***by the denial*** of the CDUA and the resulting inability of the Project to go forward. Thus, their views are equally important and worthy of consideration in connection with the CDUA.

Although several parties in this proceeding assert that the Project is not consistent with traditional and customary practices, they do not speak for everyone. PUEO, however, will offer contrary testimony and evidence showing that traditional and customary practices are, in fact, able to co-exist with the Project; and that rather than impairing the Hawaiian culture, the Project will facilitate the education and elevation of the local community. Therefore, PUEO's admission as a party was appropriate under the standards for intervention. Moreover, PUEO's participation is critical to the comprehensive consideration of the Project in light of the Eight Criteria.

5. <u>The Hearing Officer Cannot Make Findings, As a Matter of Law, That the Kingdom of Hawai'i Still Exists and Cannot Determine Competing Land Claims Because the Board Does Not Have Subject Matter Jurisdiction Over Those Issues</u>.

The Temple asserts that the Board/Hearing Officer have jurisdiction to address, and should answer the following three questions:

1. Does the Kingdom still exist as a matter of law?

2. If the Kingdom still exists, does the Kingdom arguably have some claim to the national lands that belonged to the Kingdom prior to the overthrow?

3. Do the lands in question in this proceeding fall within the national lands that belonged to the Kingdom prior to the overthrow?

Temple Opp. at 6-9. The Board/Hearing Officer, however, cannot make a ruling that the Kingdom of Hawai'i still exists or make any associated rulings on land claims based on that Kingdom because those issues are ***non-justiciable political questions*** within the exclusive

jurisdiction of the executive and legislative branches.[3] Even if these were not ***non-justiciable political questions***, Hawai'i courts have never recognized the continued existence of a sovereign governing entity, but have instead held that "there is no factual (or legal) basis for concluding that the Hawaiian Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature." *State v. French*, 77 Hawai'i 222, 228, 883 P.2d 644, 650 (App. 1994) (parentheses in original; citation and brackets omitted). Accordingly, the claims advanced by the Temple in its Opposition and Notice are misplaced and fundamentally erroneous—the Kingdom of Hawai'i is not an indispensable party because there is no existing entity or party recognized as the Kingdom of Hawai'i. *See* Temple Opp. at 9. Similarly, because there is no existing Kingdom of Hawai'i, there are no potentially competing land claims by the Kingdom that would affect this proceeding.

The Board has rejected the notion that the State of Hawai'i is not a part of the United States, or that there is any cloud on the State's title to the lands within the State. *See* Minute Order No. 14 at 2 [DOC. 124]; *see also Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). Therefore, as set forth in PUEO's Motion, sovereignty claims and land disputes as between the State and the Kingdom of Hawai'i should be excluded from this contested case proceeding the Board does not have jurisdiction over such claims, and it has ruled that it cannot

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[3] *See Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over a disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."); *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005) (for the proposition that a nation's sovereignty is a political question); *Sai v. Clinton*, 778 F.Supp.2d 1 (D. D.C. 2011), *aff'd sub. nom.*, *Sai v. Obama*, 2011 WL 4917030, at *3 (D.C. Cir. Sept. 26, 2011) ("Since its annexation in 1898 and admission to the Union as a State in 1959, Hawaii has been firmly establish as part of the United States. The passage of time and the significance of the issue of sovereignty present an unusual need for unquestioning adherence to a political decision already made.") (citations omitted); *Williams v. United States*, CIV. No. 08-00547 SOM-KSC, 2008 WL 5225870 (D. Haw. Dec. 15, 2008) (dismissing plaintiff's claims challenging the legality of the overthrow for lack of subject matter jurisdiction); *Algal Partners, L.P. v. Santos*, Civ. No. 13-00562 LEM-BMK, 2014 WL 1653084, at *2-3 (D. Haw. Apr. 23, 2014) (declining jurisdiction over assertion that the Hawaiian Kingdom continues to exist); *Yellen v. U.S.*, Civ. No. 14-00134 JMS-KSC, 2014 WL 2532460 (D. Haw. June 4, 2014) (granting State of Hawai'i's motion to dismiss plaintiff's claims that the overthrow of the Hawaiian Kingdom was wrongful and that Hawaii is not a valid state for lack of subject matter jurisdiction under the political question doctrine).

Citation to unpublished dispositions are permitted pursuant to Hawai'i Rules of Appellate Procedure Rule 35(c)(2). Copies of the unpublished cases are attached hereto as Exhibit 2.

offer any relief on those claims. *See* Minute Order No. 14. Evidence and arguments on those issues is fundamentally immaterial and irrelevant to the issue before the Board and Hearing Officer here—that is, whether the proposed land use in the CDUA satisfies the Eight Criteria. Accordingly, the Hearing Officer should not permit such evidence or arguments to be presented. *See* HAR § 13-1-35(a) (providing that the Board may reject "immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice").

The Temple also asserts:

> If resolving the contested claim requires the Hearing Officer to determine national sovereignty over the land, then the question is a political question that the Hearing Officer cannot resolve. The Hearing Officer's incapacity to decide that question precludes her recommending the granting of the permit application precisely because she cannot resolve the contested land claim issue and determine the rights of the Kingdom. Under those circumstances, the Hearing Officer must dismiss the case.

Temple Opp. at 9. The Temple's assertions that the conflicting land claims prevent the Board from making a decision on the CDUA are incorrect as a matter of law. As discussed, the United States Supreme Court has determined that there is no cloud on title to the State's lands. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. at 176. The Hearing Officer lacks the authority and jurisdiction to revisit or overturn the Supreme Court's ruling. Moreover, the Board's decision on the CDUA does not require it to resolve national sovereignty or disputed land claims. The Board's stated authority and decision power is limited by statute and implementing rules to whether or not the CDUA is consistent with the Eight Criteria.

The Board's legislative mandate to manage the State's cultural and natural resources is grounded in the established principle that Hawai'i is a part of the United States, and there is no cloud on the title to the State's lands. If the Temple's arguments were adopted, the Board could not act on permits related to any lands where there were conflicting land claims, and as a result, the Board could not exercise powers explicitly granted to it by the Legislature. The Legislature would not have given the Board powers that would be meaningless and useless. Instead, the Legislature gave the Board the specific authority to (1) promulgate rules to regulate land uses in a Conservation District, and (2) grant permits for uses in the Conservation District. The Hearing Officer, having been delegated authority by the Board, is the proper tribunal to conduct the contested case hearing on the CDUA.

III. CONCLUSION

PUEO's Motion was timely filed by the July 18, 2016 deadline set by the Hearing Officer at the hearing on June 17, 2016 and by Minute Order No. 13 [DOC. 115]. For the reasons articulated herein and in PUEO's Motion, the University respectfully submits that the Motion should be granted.

DATED: Honolulu, Hawai'i, August 1, 2016.

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 DECLARATION OF COUNSEL; EXHIBITS "1" - "2"

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am an attorney with Carlsmith Ball LLP, counsel for Applicant University of Hawai'i at Hilo ("**University**") in the above-captioned matter.

2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the *Agenda for the Meeting of the Board of Land and Natural Resources* (Feb. 25, 2011), that was obtained from the Department of Land and Natural Resources website, located at http://dlnr.hawaii.gov.

4. Attached hereto as **Exhibit 2** are a true and correct copies of the following unreported decisions obtained from Westlaw: *Williams v. United States*, CIV. No. 08-00547 SOM-KSC, 2008 WL 5225870 (D. Haw. Dec. 15, 2008); *Algal Partners, L.P. v. Santos*, Civ. No. 13-00562 LEM-BMK, 2014 WL 1653084, at *2-3 (D. Haw. Apr. 23, 2014); and *Yellen v. U.S.*, Civ. No. 14-00134 JMS-KSC, 2014 WL 2532460 (D. Haw. June 4, 2014).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, August 1, 2016.

IAN L. SANDISON

EXHIBIT 1

AGENDA
FOR THE MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES

DATE: FRIDAY, FEBRUARY 25, 2011
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

A. MINUTES

1. December 1, 2010 – Amended Minutes

2. December 9, 2010 – Amended Minutes

3. January 13, 2011 – TO BE DISTRIBUTED.

4. January 27, 2011 – TO BE DISTRIBUTED.

5. February 11, 2011 – TO BE DISTRIBUTED.

C. FORESTRY AND WILDLIFE

1. Request for Approval of Grant of Two Access and Utility Easements by the Maui Coastal Land Trust Over a Portion of Tax Map Key (2) 3-2-010:001, Situate at Waihee and Waiehu, Wailuku, Maui, which is Encumbered by a Conservation Easement; Possible Executive Session Pursuant to Hawaii Revised Statutes Section 92-5(a)(4)

2. Request for Approval of Incidental Take License and Habitat Conservation Plan for Kauai Island Utility Cooperative, Island of Kauai

3. Request for Approval of Incidental Take License and Habitat Conservation Plan for the Construction of the Advanced Technology Solar Telescope at the Haleakala High Altitude Observatory Site, Maui, Hawaii

D. LAND DIVISION

1. Issuance of Right-of-Entry Permit to United States Department of Agriculture (USDA), Forest Service for Data Collection Purposes on State Lands at Puna, South Hilo, Laupahoehoe, North Kohala, South Kohala, and Kau, Island of Hawaii, Tax

10. Amend Prior Board Action of December 1, 2010, Item D-3, Designation of Certain Select Properties for Income Generation to Support the Management of Lands under the Jurisdiction of the Board and Department of Land and Natural Resources; relating to various TMKs on the Islands of Oahu, Maui, Hawaii and Kauai as articulated in Exhibit B attached hereto and incorporated herein.

F. AQUATIC RESOURCES

1. Request for Approval to Enter into a New FY 12 Federally-Funded ($330,000) Contract Between the Department of Land and Natural Resources (DLNR) and the University Of Hawaii (UH) for the Collaborative Administration of the Hawaii Fish Aggregating Device (FAD) System

2. Request for Approval to Add Federal Funding ($385,291) and Extend through FY12 the Department of Land and Natural Resources (DLNR)/University of Hawaii (UH) Contract No. 55137 for the Project Titled Evaluating the Effectiveness of Restricted Fishing Areas for Improving the Bottomfish Fishery

3. Request for Approval to Add Federal Funding ($52,000) and Extend through FY12 an Existing Project Agreement (Contract No. 52851) between the Board of Land and Natural Resources (BLNR) and the Research Corporation of the University of Hawaii (RCUH) for the Division of Aquatic Resources' Ulua Tagging Project

4. Request for Approval to Add Federal Funding ($336,561) and Extend through FY12 a Project Agreement (Contract No. 58627) between the Board of Land and Natural Resources (BLNR) and the Research Corporation of the University of Hawaii (RCUH) for the Division of Aquatic Resources' Maui/Oahu Marine Resources Assessment Project

5. Request for Approval to Enter into a New FY12 Federally Funded Project Agreement for $465,000 between the Board of Land and Natural Resources (BLNR) and the Research Corporation of the University of Hawaii (RCUH) for a Division of Aquatic Resources Project Titled "Investigation of Estuarine Habitats"

6. Request for Approval to Enter into a New FY12 Project Agreement for $678,000 ($543,750 Federal, $134,250 Commercial Fisheries Special Fund) between the Board of Land and Natural Resources (BLNR) and the Research Corporation of the University of Hawai'i (RCUH) for the Division of Aquatic Resources' Hawai'i Marine Recreational Fishing Survey Project

7. Request for Approval to Temporarily Close the Bottomfish Fishing Season for All State Marine Waters in the Main Hawaiian Islands and to Delegate Authority to the DLNR Chairperson to Set This and Future Closure Dates

8. Request for Approval of Special Activity Permit 2011-54 for Dr. Donald Kobayashi, Pacific Islands Fisheries Science Center, NOAA, to Conduct Research on State Regulated Deep-7 Bottomfish in the Main Hawaiian Islands

J. BOATING AND OCEAN RECREATION

1. Petition of Seabird Cruises, Inc. for Waiver of Minimum Gross Receipts Requirement for Reissuance of Commercial Use Permit for Maalaea Small Boat Harbor, Maui

K. CONSERVATION AND COASTAL LANDS

1. Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope by the University of Hawaii at Hilo, at Mauna Kea Science Reserve, Ka`ohe Mauka, Hamakua District, Island of Hawai`i, TMK: (3) 4-4-015:009

2. Request Decision-making by the Board (a) On its Own Motion to Hold a Contested Case Hearing or Grant Requests by Mauna Kea `Anaina Hou, Fred Stone, KAHEA Environmental Alliance, Kukauakahi (Clarence Ching), and Sierra Club for a Contested Case Hearing, and (b) Appoint a Hearings Officer and Delegate to the Chairperson the Authority to Select Said Hearings Officer to Conduct All Hearings for One (1) Contested Case Hearing, with Respect to Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope by the University of Hawaii at Hilo, at Mauna Kea Science Reserve, Ka`ohe Mauka, Hamakua District, Island of Hawai`i, TMK: (3) 4-4-015:009

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

ALL MATERIALS LISTED ON THIS AGENDA ARE AVAILABLE FOR REVIEW IN THE DLNR CHAIRPERSON'S OFFICE OR ON THE DEPARTMENT WEBSITE THE WEEK OF THE MEETING AT: http://hawaii.gov/dlnr/chair/meeting/index.html

INDIVIDUALS REQUIRING SPECIAL ASSISTANCE OR ACCOMMODATIONS ARE ASKED TO CONTACT THE CHAIRPERSON'S OFFICE AT (808) 587-0400 AT LEAST THREE DAYS IN ADVANCE OF THE MEETING.

EXHIBIT 2

C
Only the Westlaw citation is currently available.

United States District Court, D. Hawai'i.
Joseph Ken WILLIAMS, Plaintiff,
v.
UNITED STATES of America, et al., Defendants.

CIV. No. 08–00547 SOM–KSC.
Dec. 15, 2008.

West KeySummary**Constitutional Law 92 ⚿ 2580**

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)5 Political Questions
92k2580 k. In general. Most Cited Cases

Constitutional Law 92 ⚿2588

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)5 Political Questions
92k2588 k. Foreign policy and national defense. Most Cited Cases

An inmate's § 1983 claim presented nonjusticiable political questions. The complaint challenged the legality of the overthrow of the Kingdom of Hawaii in 1893 and Hawaii's admission to the Union in 1959. Since these were issues constitutionally committed to Congress, the court lacked jurisdiction to consider the claim. 42 U.S.C.A. § 1983; Article IV, Section 3 of the Constitution.

Joseph Ken Williams, Aiea, HI, pro se.

ORDER OF DISMISSAL

SUSAN OKI MOLLWAY, District Judge.

*1 On December 4, 2008, pro se Plaintiff Joseph Ken Williams ("Plaintiff"), a prisoner incarcerated at Halawa Correctional Facility in Aiea, Hawaii, filed a prisoner civil rights complaint pursuant to 42 U.S.C. § 1983, as well as an application to proceed *in forma pauperis*. Plaintiff names the United States of America, the State of Hawaii, former President William McKinley, Robert Wilcox, former Governor of the State of Hawaii Sanford Dole, the White House and the Office of the Governor for the State of Hawaii as Defendants. Plaintiff seeks compensatory damages in the form of cash, gold, and property including a hotel in Las Vegas. For the following reasons, Plaintiff's Complaint and action are DISMISSED.

LEGAL STANDARD

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.*; 28 U.S.C. § 1915A(b)(1), (2).

The court must construe pro se pleadings liberally and afford the pro se litigant the benefit of any doubt. *Morrison v. Hall*, 261 F.3d 896, 899 n. 2 (9th Cir.2001); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir.1990). "Unless it is absolutely clear that no amendment can cure the defect ..., a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir.1995); *see also Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir .2000) (en banc).

DISCUSSION

Plaintiff's Complaint is not a model of clarity and is nearly incomprehensible. Although Plaintiff sets forth three grounds for relief, each count is

composed of nonsensical rambling, save for one or two comprehensible sentences. For this reason, Plaintiff's Complaint is subject to dismissal.

Giving Plaintiff the benefit of every doubt and very liberally interpreting the Complaint, to the court concludes that Plaintiff is attempting to challenge the lawfulness of the overthrow of the Kingdom of Hawaii in 1893 and Hawaii's admission to the Union in 1959. These claims, however, present nonjusticiable political questions. Thus, to the extent Plaintiff makes these claims, his Complaint is dismissed for lack of jurisdiction.

A. Plaintiff's Complaint Fails to State a Claim Under 42 U.S.C. § 1983.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of law. *West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Plaintiff fails to identify any right secured by the Constitution or law of the United States that was violated by any Defendant acting under color of state law. In short, Plaintiff has failed to allege any violation of his civil rights. Plaintiff's Complaint, therefore, fails to state a cognizable claim under § 1983. Plaintiff's Complaint is DISMISSED for failure to state a claim pursuant to 28 U.S.C. § 1915A.

B. Plaintiff's Complaint Fails to Comply with Rule 8 of the Federal Rules of Civil Procedure.

*2 Rule 8 of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones v. Cmty. Redev. Agency,* 733 F.2d 646, 649 (9th Cir.1984). "The Federal Rules require that averments 'be simple, concise and direct.' " *McHenry v. Renne,* 84 F.3d 1172, 1177 (9th Cir.1996) (quoting Fed.R.Civ.P. 8(e)(1)). Simply put, "[a] ll that is required [by Fed.R.Civ.P. 8(a)] is that the complaint gives 'the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.' " *Kimes v. Stone,* 84 F.3d 1121, 1129 (9th Cir.1996) (quoting *Datagate, Inc. v. Hewlett-Packard Co.,* 941 F.2d 864, 870 (9th Cir.1991)).

The court is aware of its duty to construe the pleadings of a pro se plaintiff liberally. *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir.2002). This rule of liberal construction is particularly important in civil rights cases. *Ferdik v. Bonzelet,* 963 F.2d 1258, 1261 (9th Cir.1992). In giving liberal interpretation to a pro se civil rights complaint, however, the court is not permitted to "supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska,* 673 F.2d 266, 268 (9th Cir.1982).

The court is unable to discern the underlying facts of Plaintiff's claims sufficiently to even liberally construe any claim as identifying a constitutional violation, or more importantly, indicating that any named Defendant, three of whom are deceased, is responsible for such a violation. Plaintiff's Complaint consists entirely of incoherent sentences, without providing sufficient specific facts for the court, or Defendants, to have notice of who did what to Plaintiff, and how any of Defendants' actions allegedly violated the Constitution or any law. As Plaintiff fails to allege sufficient facts to state a claim against any Defendant, his claims are DISMISSED.

C. Plaintiff Presents Nonjusticiable Political Questions.

As noted, giving Plaintiff the benefit of every doubt and very liberally interpreting the Complaint, the court reads the Complaint as challenging the legality of the overthrow of the Kingdom of Hawaii in 1893 and Hawaii's admission to the Union in 1959. To the extent Plaintiff makes these claims, he presents nonjusticiable political questions.

"Federal courts are courts of limited jurisdiction." *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1218 (D.Haw.2002). If a case presents a political question, the federal court lacks subject matter jurisdiction to decide that question. *Corrie v. Caterpillar, Inc.,* 503 F.3d 974, 981 (9th Cir.2007); *see also Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies ... the political question doctrine [ ]."). The landmark case of *Baker v. Carr* developed the political question doctrine. *Baker,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). *Baker* outlined six independent tests for determining whether courts should defer to the political branches on an issue:

> *3 Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Plaintiff's claims raise nonjusticiable political questions because they involve matters that have been constitutionally committed to Congress. Under Article IV, Section 3 of the Constitution, "[n]ew States may be admitted by the Congress into this Union[.]" U.S. Const. art. IV, § 3. By an act of Congress, Hawaii was admitted to the Union in 1959. This court, therefore, lacks jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood. Thus, as to Plaintiff's claim challenging the lawfulness of the overthrow of the Kingdom of Hawaii in 1893, the Intermediate Court of Appeals for the State of Hawaii aptly stated, "Whatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawaii in 1894, and the Territory of Hawaii in 1898, the State of Hawaii ... is now, a lawful government." *State v. Fergerstrom,* 106 Hawai'i 43, 55, 101 P.3d 652, 664 (Haw.App.2004).

Adjudication of Plaintiff's claims would essentially place this court in the shoes of Congress. Thus, this court lacks jurisdiction over said claims. Accordingly, Plaintiff's claims are DISMISSED.

CONCLUSION

Plaintiff's pleading fails to set forth allegations from which the court can find that any Defendant deprived him of a protected right. In addition, Plaintiff fails to allege sufficient facts to state a claim against any Defendant pursuant to Rule 8 of the Fed.R.Civ.P. Plaintiff's claims are, therefore, **DISMISSED** for failure to state a claim. *See* 28 U.S.C. § 1915A.

Although the court must construe pro se pleadings liberally and afford the pro se litigant the benefit of any doubt, this court is unable to determine how any amendment to this pleading could be anything but futile. The court concludes that Plaintiff's apparent challenges to the legality of the overthrow of the Kingdom of Hawaii in 1893 and Hawaii's admission to the Union in 1959 are nonjusticiable political questions. Accordingly, Plaintiff's claims are **DISMISSED** for lack of jurisdiction. Leave to amend is not granted. All pending motions before the court are **DENIED.** The Clerk of Court is **DIRECTED** to enter Judgment and close this action.

*4 IT IS SO ORDERED.

D.Hawai'i,2008.
Williams v. U.S.
Not Reported in F.Supp.2d, 2008 WL 5225870 (D.Hawai'i)

END OF DOCUMENT

2014 WL 1653084
Only the Westlaw citation is currently available.
United States District Court,
D. Hawai'i.

ALGAL PARTNERS, L..P., a Delaware limited partnership, Plaintiff,

v.

Jon Freeman Eleu SANTOS, aka Sir Jon Freeman Eleu Santos, aka Jon Santos, Defendant.

Civil No. 13–00562 LEK–BMK.

Signed April 23, 2014.

Attorneys and Law Firms

David Dana Day, William C. McCorriston, McCorriston Miller Mukai MacKinnon LLP, Honolulu, HI, for Plaintiff.

Jon Freeman Eleu Santos, Kahului, Maui, HI, pro se.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I OF THE COMPLAINT AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON DEFENDANT JON FREEMAN ELEU SANTOS, AKA SIR JON FREEMAN ELEU SANTOS, AKA JON SANTOS'S COUNTERCLAIM FILED ON JANUARY 14, 2014; *AND DENYING DEFENDANT'S MOTIONS TO DISMISS*

LESLIE E. KOBAYASHI, District Judge.

*1 Before the Court are: (1) Plaintiff Algal Partners, L.P.'s ("Plaintiff") Motion for Partial Summary Judgment on Count I of the Complaint and Motion to Dismiss, or in the Alternative, for Summary Judgment on Defendant Jon Freeman Eleu Santos, AKA Sir Jon Freeman Eleu Santos, AKA Jon Santos's Counterclaim Filed on January 14, 2014 ("Plaintiff's Motion"), filed January 22, 2014; [dkt. no. 9;] (2) pro se Defendant Jon Santos's ("Defendant") Motion to Dismiss Complaint, filed January 31, 2014 ("Defendant's 1/31/14 Motion"); [dkt. no. 13;] and (3) Defendant's Motion to Dismiss, filed February 18, 2014 ("Defendant's 2/18/14 Motion," collectively "Defendant's Motions") [dkt. no. 24]. Defendant filed his memorandum in opposition to Plaintiff's Motion on February 18, 2014, and Plaintiff filed its reply on February 20, 2014. [Dkt. nos. 20, 23.] Plaintiff filed its two memoranda in opposition to Defendant's Motions on March 17, 2014, and Defendant filed two documents on that same day, which the Court construes as a supplemental memorandum in support of Defendant's Motions and a supplemental memorandum in support of his opposition to Plaintiff's Motion. [Dkt. nos. 30–33.]

The Court finds these matters suitable for disposition without a hearing pursuant to Rule LR7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawai'i ("Local Rules"). After careful consideration of the motions, supporting and opposing memoranda, and the relevant legal authority, Plaintiff's Motion is HEREBY GRANTED and Defendant's Motions are HEREBY DENIED for the reasons set forth below.

BACKGROUND

Plaintiff, a Delaware limited partnership, filed its Complaint on October 28, 2013, asserting diversity jurisdiction against Defendant, a Hawai'i resident, related to Defendant's claim of title to property that Plaintiff allegedly owns on and near Kalanikahua Lane in Haiku, Maui ("the Property"). [Complaint at ¶¶ 1–2, 11–17, 25–26.] Plaintiff alleges that on June 18, 2012, it listed the Property, comprised of two parcels ("Parcel 1" and "Parcel 2"), for sale. [*Id.* at ¶¶ 23–24.] Subsequently, Defendant, who at one time did construction on the Property, recorded or caused to be recorded a "Notice of Ownership" of each Parcel ("Notice 1" and "Notice 2") as "representative and agent for the Hawaiian Kingdom Nation".[1] [*Id.* at ¶¶ 25–27.] Plaintiff alleges that, on or about September 20, 2013, it learned of the Notices when its agent received certified copies of them from Defendant, along with a two-page handwritten letter, entitled, "A message to you as owner of the land." [*Id.* at ¶¶ 32–34.]

Plaintiff further alleges that, on or about October 14, 2013, a prospective buyer made an offer on the Property for the asking price of $9.9 million, but subsequently, during negotiations, Defendant's Notices "proximately caused Prospective Buyer to choose not to purchase the Haiku Property." [*Id.* at ¶¶ 24, 35–36.] Plaintiff has not been

able to find another buyer and has incurred expenses to "counteract the effect of Defendant's slanderous publications" and to maintain the Property. [*Id.* at ¶¶ 37–40.] In preliminary title reports from October 2013, Title Guaranty of Hawai'i, stated its belief that Defendant's Notices do not have any legal effect on Plaintiff's title to either parcel. [*Id.* at ¶¶ 41–42 (citing *id.*, Exhs. E, F (reports)).]

*2 The Complaint alleges the following claims: quiet title ("Count I"); preliminary injunction/permanent injunction ("Count II"); slander of title ("Count III"); and punitive damages ("Count IV").[2] Plaintiff seeks the following relief: quiet title as to the Property; preliminary and permanent injunctive relief; special, general and punitive damages; attorneys' fees and costs; and any other appropriate relief.

In his Answer to Complaint and Counterclaim ("Counterclaim"), filed January 14, 2014, Defendant appears to allege that the Property belongs to the Hawaiian Kingdom of King Kamehameha I ("the Kingdom"), and thus Defendant, as the Kingdom's representative, is the proper owner and is due all rents on the Property. [Dkt. no. 8, at pgs. 22–23.]

DISCUSSION

I. *Defendant's Motions*

The Court first turns to Defendant's Motions, which challenge the Court's jurisdiction. All of Defendant's filings consist of short legal statements, interspersed with long paragraphs of Hawaiian words and their apparent translations that amount to un-punctuated narratives that appear to have little to do with the Property or the specific facts of this case. Since Defendant is pro se, however, the Court construes his filings liberally. *See Welsh v. Wilcox Mem'l Hosp.*, Civil No. 12–00609 LEK–KSC, 2012 WL 6047745, at *1 (D. Hawai'i Dec. 4, 2012) ("[P]ro se litigants are held to less stringent standards than those of their legal counterparts." (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Jackson v. Carey*, 353 F.3d 750, 757 (9th Cir.2012)); *see also, e.g., Ogeone v. United States*, Civil No. 13–00166 SOM/RLP, 2013 WL 3807798, at *3 (D. Hawai'i July 19, 2013) ("A pro se litigant's filings must be read more liberally than those drafted by counsel." (citations omitted)).

Taken together, Defendant's Motions appear to contend that this Court does not have jurisdiction over the present case because it concerns land belonging to a foreign sovereign, the Kingdom, and seeks judgment against a foreign subject, Defendant. These arguments against federal court jurisdiction have been repeatedly rejected by this district court and others that have considered them.

First, Defendant argues, by citing lengthy materials authored by David Keanu Sai, Ph.D., that "the Hawaiian Kingdom continues to exist and is under a prolonged and illegal occupation by the United States." [Mem. in Supp. of Def.'s 2/18/14 Motion, at 11.] This Court, however, does not have jurisdiction to rule on this political question. As this district court explained,

> Plaintiff's claims raise nonjusticiable political questions because they involve matters that have been constitutionally committed to Congress. Under Article IV, Section 3 of the Constitution, "[n]ew States may be admitted by the Congress into this Union[.]" U.S. Const. art. IV, § 3. By an act of Congress, Hawaii was admitted to the Union in 1959. This court, therefore, lacks jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood. Thus, as to Plaintiff's claim challenging the lawfulness of the overthrow of the Kingdom of Hawaii in 1893, the Intermediate Court of Appeals for the State of Hawaii aptly stated, "Whatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawaii in 1894, and the Territory of Hawaii in 1898, the State of Hawaii ... is now, a lawful government." *State v. Fergerstrom*, 106 Hawai'i 43, 55, 101 P.3d 652, 664 (Haw.App.2004).
>
> *3 Adjudication of Plaintiff's claims would essentially place this court in the shoes of Congress. Thus, this court lacks jurisdiction over said claims.

Williams v. United States, CIV. No. 08–00547 SOM–KSC, 2008 WL 5225870, at *3 (D. Hawai'i Dec. 15, 2008) (alterations in *Williams*). Moreover, courts have rejected these same arguments made by Dr. Sai in other cases. *See e.g., Sai v. Clinton*, 778 F.Supp.2d 1, 6 (D.D.C.) ("Plaintiff's claims present this Court with a nonjusticiable political question."), *aff'd sub nom. Sai v. Obama*, No. 11–5142, 2011 WL 4917030 (D.C.Cir. Sept. 26, 2011). Since this Court does not have the jurisdiction to adjudge foreign affairs constitutionally delegated to

Congress, it may not rule on whether the United States "[i]llegally usurp[ed] Hawaiian sovereignty." *See* Mem. in Supp. of Def.'s 2/18/14 Motion at 8. It does, however, have jurisdiction to quiet title to land situated in the State of Hawai'i. *See United States v. Byrne,* 291 F.3d 1056, 1060 (9th Cir.2002) ("The federal district courts' jurisdiction over actions concerning real property is generally coterminous with the states' political boundaries.").

Second, insofar, as this Court has jurisdiction to resolve disputes between citizens of diverse states, *see* 28 U.S.C. § 1332, it has jurisdiction over Defendant. "Federal cases have also rejected claims based on the argument that a person is a member of the Kingdom of Hawaii." *Kupihea v. United States,* Civ. No. 09–00311 SOM/KSC, 2009 WL 2025316, at *2 (D. Hawai'i July 10, 2009) (citations omitted). Specifically,

> the Ninth Circuit, this district court, and Hawai'i state courts have all held that the laws of the United States and the State of Hawai'i apply to all individuals in this State. *See United States v. Lorenzo,* 995 F.2d 1448, 1456 (9th Cir.1993) (holding that the Hawai'i district court has jurisdiction over Hawai'i residents claiming they are citizens of the Sovereign Kingdom of Hawai'i); *Kupihea v. United States,* 2009 WL 2025316, at *2 (D.Haw. July 10, 2009) (dismissing complaint seeking release from prison on the basis that plaintiff is a member of the Kingdom of Hawai'i); *State v. French,* 77 Hawai'i 222, 228, 883 P.2d 644, 649 (Haw.App.1994) ("[P]resently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.") (quotations omitted).

Moniz v. Hawaii, No. CIV. 13–00086 DKW, 2013 WL 2897788, at *2 (D. Hawai'i June 13, 2013) (alterations in *Moniz*); *see also Rice v. Cavetano,* 528 U.S. 495, 524 (2000) ("The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii."). Defendant admits the allegation that he is a United States citizen and/or domiciliary of the State of Hawai'i. [Answer at ¶ 3.] Thus, whether or not Defendant maintains that he is also a citizen of the Kingdom of Hawai'i, this Court has jurisdiction over him. For the foregoing reasons, Defendant's Motions, arguing that this Court lacks jurisdiction over Plaintiff's claims, are DENIED.

II. *Plaintiff's Motion*

*4 Since this Court finds that it has jurisdiction to hear Plaintiff's claims, it now turns to the merits of Plaintiff's Motion.

A. *Partial Summary Judgment*

On January 22, 2014, along with its Motion, Plaintiff filed its Concise Statement of Facts in Support of Plaintiff's Motion ("Plaintiff's CSOF"). [Dkt. no. 10.] Although Defendant did file a memorandum in opposition to Plaintiff's Motion, [dkt. no. 20,] he did not file his own concise statement of facts. According to Local Rule 56.1(g), "material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party." Thus, the material facts set forth in Plaintiff's CSOF are deemed admitted for the purposes of Plaintiff's Motion.

Plaintiff argues that there is no genuine issue of material fact that it owns the Property in fee simple, and that Defendant has no interest in the Property, and thus Plaintiff is entitled to judgment as a matter of law on its quiet title claim against Defendant. *See* Fed.R.Civ.P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

Haw.Rev.Stat. § 669–1 governs quiet title actions in Hawai'i, and states, in pertinent part, "[a]ction may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim." Plaintiff argues that it owns the Property outright and that Defendant has no interest in the Property in spite of the Notices.

The Hawai'i Supreme Court has explained the burdens in a quiet title action:

> In an action to quiet title, the burden is on the plaintiff to prove title in and to the land in dispute, and, absent such proof, it is unnecessary for the defendant to make any showing. *State v. Zimring,* 58 Haw. 106, 110, 566 P.2d 725, 729 (1977)

> (citations omitted). The plaintiff has the burden to prove either that he has paper title to the property or that he holds title by adverse possession. *Hustace v. Jones,* 2 Haw.App. 234, 629 P.2d 1151 (1981); *see also Harrison v. Davis,* 22 Haw. 51, 54 (1914). While it is not necessary for the plaintiff to have perfect title to establish a prima facie case, he must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. *Shilts v. Young,* 643 P.2d 686, 689 (Alaska 1981). *Accord Rohner v. Neville,* 230 Or. 31, 35, 365 P.2d 614, 618 (1961), *reh'g denied,* 230 Or. 31, 368 P.2d 391 (1962).

Maui Land & Pineapple Co. v. Infiesto, 76 Hawai'i 402, 407–08, 879 P.2d 507, 512–13 (1994). A plaintiff may prove a substantial interest in a property by offering a deed.

> Recitals of fact in a deed purporting to establish an interest in real property are admissible to prove that such an interest existed "unless the circumstances indicate lack of trustworthiness." *See* [*Maui Land & Pineapple,* 76 Hawai'i at] 406–07, 879 P.2d at 511–12; Haw. R. Evid. 803(b)(15). For instance, in *Maui Land & Pineapple,* the Supreme Court held that the circuit court did not abuse its discretion in considering a recital in a deed that a grantor of real property was "lawfully seized in fee simple" and that the property was "clear and free of all encumbrances." 76 Hawai'i at 406–07, 879 P.2d at 511–12 (internal quotation marks omitted).

*5 Here, in the February 1912 Deed, S. Hakuole and O.H. Hakuole declared that they were "lawfully seized of the [Subject Property]" and that they had "a good and lawful right to sell the same[.]" Appellants do not address these statements, and nothing in the record indicates that they are untrustworthy; S. Hakuole and O.H. Hakuole share the same last name as H.W. Hakuole, leading to a reasonable inference that they inherited an interest in the Subject Property. As Makila claims paper title through mesne conveyances arising from the February 1912 Deed, Makila has made a prima facie showing that it has a substantial interest in the Subject Property.

Makila Land Co., LLC v. Dizon, No. 30294, 2013 WL 1091721, at *2–3 (Hawai'i Ct.App.2013) (some alterations in *Makila Land*).

To rebut a plaintiff's showing of a substantial interest in the property, the defendant must prove that its title is superior to the plaintiff's. However, at summary judgment, defendant need not prove perfect title. *Alexander & Baldwin, Inc. v. Silva,* 124 Hawai'i 476, 487, 248 P.3d 1207, 1218 (Ct.App.2011). "[I]n an action to quiet title, only the relative interests of the parties to the action may be considered." *Omerod v. Heirs of Kaheananui,* 116 Hawai'i 239, 268, 172 P.3d 983, 1012 (2007) (citations omitted).

Here, Plaintiff has offered undisputed evidence that it owns the Property in fee simple. The Property is comprised of two parcels of abutting land in Haiku, Maui, with a residence ("the Haiku House"). [Pltf.'s CSOF at ¶¶ 2–4, 6; *id.*, Exh. A (warranty deed describing parcels, including metes and bounds) at 301–05.] On October 18, 1989, First American Title Insurance Company issued a Policy of Title Insurance on behalf of Alham, Inc., insuring that Alham, Inc. had a fee simple estate in the Property. [*Id.* at ¶ 7; *id.*, Exh. E (policy).]

On November 29, 1989, Alham, Inc. conveyed by warranty deed all right, title and interest in the Property to Plaintiff, covenanting that it "is seized of the said premises in fee simple, and has good right to convey the same." [*Id.* at ¶¶ 8–9; *id.*, Exh. A at 299.] Plaintiff recorded the deed with the Land Court on December 19, 1989 as Liber Number 24018, page 298. [*Id.*, Exh. A .] These facts alone are sufficient under *Maui Land & Pineapple* and its progeny to prove a substantial interest in the Property. *See, e.g.,* 76 Hawai'i at 406–08, 879 P.2d at 511–13; *Makila Land,* 2013 WL 1091721, at *2–3.

In addition, to support its substantial interest, Plaintiff provides undisputed evidence that: the Property is "a cherished family retreat for members of Plaintiff's [President's] family[;]" [Pltf.'s CSOF at ¶ 10;] Plaintiff has paid property taxes every year since it acquired the Property; [*id.* at ¶ 11;] no one (including Defendant) has ever asserted that the warranty deed was invalid or that it did not convey title to Plaintiff; [*id.* at ¶ 12;] and Title Guaranty of Hawaii prepared a Preliminary Report on January 6, 2014 showing that Plaintiff is the fee simple owner of the Property [*id.* at ¶¶ 13–14].

*6 Similarly, there is no genuine issue of material fact that Defendant's alleged interest in the Property is inferior to Plaintiff's substantial interest. His sole claim to the Property is the Notices. In both notices, which are identical except for the land descriptions, Defendant claims "[a]ll Right, Title, and Interest" in the Parcel "as a representative and agent for the Hawaiian Kingdom Nation With his Executive Authority[.]" [*Id.* at ¶¶ 16–17; *id.*, Exhs. B (Notice 1), C (Notice 2).] The Notices, however, likely have no valid or enforceable effect on title, as stated by Title Guaranty of Hawaii. [*Id.* at ¶ 20; *id.*, Exh. D (preliminary report) at 2–3.]

Further, Defendant has admitted that he does not own the Property. On or about April 1, 2011, Defendant contacted Plaintiff's agent and stated that his company was interested in *renting* the Haiku House on behalf of his company's senior executives.[3] [*Id.* at ¶ 15.] Further, Defendant addressed Plaintiff as the "owner of the land" in the handwritten letter he included with the certified copies of Notice 1 and Notice 2 received by Plaintiff on or about September 20, 2013. [*Id.* at ¶¶ 18–19.] These facts, which are deemed admitted, show that Defendant's alleged interest in the Property is inferior to Plaintiff's, and that Defendant has no interest in the Property.

These undisputed facts are consistent with Defendant's filings. Although he clearly feels strongly about Hawai'i and its history, Defendant does not state once, in the hundreds of pages he has filed, a single connection between himself and the Property that would give him a basis for a claim of a legally recognizable interest in the Property.[4] Even viewing the evidence in the light most favorable to Defendant, there is no dispute that Defendant has no legal interest in the Property. *See Crowley v. Bannister,* 734 F.3d 967, 976 (9th Cir.2013) (holding that at summary judgment, the test is, "viewing the facts in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact") (citations and quotation marks omitted)).

Since there is no genuine issue of material fact that Plaintiff owns the Property in fee simple, and that Defendant has no interest in the Property, the Court GRANTS Plaintiff's Motion to the extent it seeks summary judgment as to Count I of the Complaint.

B. ***Dismissal of Defendant's Counterclaim***

In his Counterclaim, Defendant states, in part,

> 2. Property has been Established as under the Hawaiian Kingdom of Kamehameha I.
>
> Property was wrongfully Transferred.
>
> Ownership and Title to property should be held in the Name of Hawaiian Kingdom of King Kamehameha I of Monarch
>
> Defendant its Representative and Agent Jon Santos Prays as Follows:
>
> A. That Judgment he [sic] entered in Favor of Defendant its Representative and Agent Jon Santos.
>
> B. Defendant its Representative and Agents Jon Santos Claims Ownership and Titles to its Rightful Owner as Heir upon the Heavens as His Principality of this Hawaiian Kingdom of King Kamehameha I of Monarch.
>
> *7 C. That all Cash that resides as Rent Occupying of this Property be Awarded to the Defendant who's has the Executive Power and Authority of the Representative and Agent of this Hawaiian Kingdom of King Kamehameha I as Monarch.

[Answer at pgs. 22–23.[5]] Even construing this pleading liberally, *see Ogeone,* 2013 WL 3807798, at *3, Defendant's argument is essentially the same as in his other filings: that the Property actually belongs to the Kingdom and, more particularly, to its agent—Defendant. As discussed above, whether the Kingdom has a right to the Property is a nonjusticiable political question, which this Court has no jurisdiction to resolve. *See Williams,* 2008 WL 5225870, at *3; *Sai,* 778 F.Supp.2d at 6. For this reason, the Court GRANTS Plaintiff's Motion to the extent that it seeks dismissal of Defendant's Counterclaim for lack of subject matter jurisdiction. The Court FINDS that amendment of the Counterclaim would be futile, and thus dismissal of Defendant's Counterclaim is WITH PREJUDICE. *See Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.,* 358 F.3d 661, 673 (9th Cir.2004) ("denial of leave to amend is appropriate if the amendment would be futile" (internal quotations and citations omitted)).

CONCLUSION

On the basis of the foregoing, Defendant's Motion to Dismiss Complaint, filed January 31, 2014, and his Motion to Dismiss, filed February 18, 2014, are HEREBY DENIED. Plaintiff's Motion for Partial Summary Judgment on Count I of the Complaint and Motion to Dismiss, or in the Alternative, for Summary Judgment on Defendant Jon Freeman Eleu Santos, AKA Sir Jon Freeman Eleu Santos, AKA Jon Santos's Counterclaim Filed on January 14, 2014, filed January 22, 2014 is HEREBY GRANTED in its entirety. Defendant Jon Santos's Counterclaim, filed January 14, 2014, is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 1653084

Footnotes

1 Although Plaintiff alleges that Notice 1 was recorded on or about June 18, 2012, there is no indication from the face of the Notice that it was recorded on that date. Notice 1 was signed twice by Defendant on August 7, 2013, notarized on August 7, 2013, and stamped as recorded by the Bureau of Conveyances on August 8, 2013 as Document Number A–49680869. The same dates appear on Notice 2, which was recorded as Document Number A–49680868.

2 The Court notes that Counts II and IV-the claims for injunctive relief and punitive damages-are remedies and not independent causes of action. *See e.g., Billete v. Deutsche Bank Nat ' l Trust Co.,* Civil No. 13–00061 LEK–KSC, 2013 WL 2367834, at *7 (D. Hawai'i May 29, 2013) (injunctive relief); *Lee v. Gov't Emps. Ins. Co.,* 911 F.Supp.2d 947, 971–72 (D. Hawai'i 2012) (punitive damages). As such, the only claims that Plaintiff makes are to quiet title and for slander of title.

3 On or about April 12, 2011 he informed the agent that his company would not rent the Haiku House. [Complaint at ¶ 22.]

4 The closest Defendant comes to stating an interest in any specific land whatsoever (and that he is not claiming right to all of the Hawaiian islands) is the following:

> There are a few pieces Aina "Land" from Maui, Lanai, Big Island, Oahu, and Kauai Ni'ihau that I must take back and be recognized under my principality, we need not all these Lands in Hawaii just a few and the rest of these lands stay as the way they are here in Hawaii.
>
> [Def.'s 2/18/14 Motion, Exh. 1 at 8.]

5 The page numbers in the Court's citation to the Answer refer to the pages as they appear in the district court's cm/ecf system.

2014 WL 2532460
Only the Westlaw citation is currently available.
United States District Court,
D. Hawai'i.

Mike YELLEN, Plaintiff,
v.
UNITED STATES of America; State of Hawaii; Neil Abercrombie; Jane/John Does 1–1000; President Barack Obama; United States Military, Defendants.

Civ. No. 14–00134 JMS–KSC. | Signed June 4, 2014. | Filed June 5, 2014.

Attorneys and Law Firms

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Deirdre Marie–Iha, Marissa Hime Iolana Luning, Department of the Attorney General–State of Hawaii, Honolulu, HI, for Defendants.

ORDER GRANTING STATE OF HAWAII AND GOVERNOR ABERCROMBIE'S MOTION TO DISMISS, DOC. NO. 9

J. MICHAEL SEABRIGHT, District Judge.

I. *INTRODUCTION*

*1 On November 15, 2013, Plaintiff Mike Yellen ("Plaintiff") filed this action against the United States, the "United States Military," United States President Barack Obama, the State of Hawaii (the "State"), and Hawaii State Governor Neil Abercrombie ("Governor Abercrombie") (collectively "Defendants"), asserting violations of the Constitution and international law committed in the overthrow of the Hawaiian monarchy in 1893 and Hawaii's subsequent annexation by the United States. Plaintiff seeks injunctive and declaratory relief (1) declaring Defendants' actions void such that the Hawaii government is restored back to the Kingdom of Hawaii; and (2) prohibiting Defendants from selling public lands within Hawaii, which were ceded by the Republic of Hawaii to the United States upon annexation.

Currently before the court is the State's and Governor Abercrombie's ("State Defendants") Motion to Dismiss, Doc. No. 9, in which they argue, among other things,[1] that the court lacks subject matter jurisdiction because the Complaint raises the nonjusticiable political question as to the validity of Hawaii as a state of the United States. Plaintiff filed an Opposition on May 20, 2014, Doc. No. 18, and State Defendants filed a Reply on May 27, 2014, Doc. No. 19. Pursuant to Local Rule 7.2(d), the court determines this Motion without a hearing, and GRANTS State Defendants' Motion to Dismiss.

II. *STANDARD OF REVIEW*

A motion to dismiss based on the political question doctrine raises the court's subject matter jurisdiction and is therefore properly viewed under Federal Rule of Civil Procedure 12(b)(1). *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir.2007) (construing motion seeking dismissal on the basis that the action raised a political question as a Rule 12(b)(1) motion).

Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways, "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004). A "facial" attack, as is the case here, accepts the truth of the plaintiff's allegations but asserts that they "are insufficient on their face to invoke federal jurisdiction ." *Id.* The court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient invoke the court's jurisdiction. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.2013).

III. *ANALYSIS*

State Defendants argue that this action raises a nonjusticiable political question—*i.e.*, whether the overthrow of the Hawaiian Kingdom was wrongful such that Hawaii is not a valid state of the United States. The court agrees that it lacks subject matter jurisdiction.

Under the political question doctrine, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative [branches] ... and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

Corrie, 503 F.3d at 982 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)); *see also Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir.1992) ("The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch."). The court does not lack jurisdiction, however, "merely because [a] decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Indeed, it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

*2 The "classic" political question case, *Luther v. Borden*, 48 U.S. 1 (1849), addressed claims under the Guarantee Clause of the Constitution,[2] where two rival governments disputed which was the lawful government of Rhode Island. *See also Massachusetts v. Laird*, 400 U.S. 886, 895 n. 4 (1970) (discussing *Luther*). *Luther* held that "it rests with Congress," not the judiciary, "to decide what government is the established one in a State." 48 U.S. at 42. *Luther* explained:

> [W]hen the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.
>
> *Id.*

The political question doctrine has since been applied to a number of different cases, and *Baker v. Carr*, 369 U.S. 186 (1962), identifies six independent factors, any one of which demonstrates the presence of a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. Determining whether a case involves a nonjusticiable political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *id.*, and an "evaluation of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211–12.

The entire basis of Plaintiff's Complaint is that the overthrow of the Hawaii Kingdom and Hawaii's annexation to the United States violated the United States Constitution and international law such that this court should declare these acts void and restore the Kingdom of Hawaii. These issues are squarely nonjusticiable political questions—as in *Luther*, "it rests with Congress," not the judiciary, to decide the governance of Hawaii, *see Luther*, 48 U.S. at 42, and both the Supreme Court and the Ninth Circuit have already determined, in a number of other contexts, that issues of sovereignty and/or recognition of foreign entities are not for the judiciary to determine. *See Baker*, 369 U.S. at 212 (stating that "recognition of foreign governments ... strongly defies judicial treatment ... and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory"); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government."); *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir.2005) ("China's sovereignty over Hong Kong (and by corollary Hong Kong's sub-sovereign status) has been resolved by the executive branch, and we do not question that judgment."); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1275–76 (9th Cir.2004) ("If the question before us were whether a remedy would lie against Congress to compel tribal recognition, the answer would be readily apparent.... A suit that sought to direct Congress to federally recognize an Indian tribe would be non justiciable as a political question.").

*3 And cases presented with this same issue—the constitutionality of Hawaii's annexation—have persuasively explained that a number *Baker* factors apply to this issue. For example, in *Sai v. Clinton,* 778 F.Supp.2d 1 (D.D.C.2011), *aff'd sub. nom., Sai v. Obama,* 2011 WL 4917030 (D.C.Cir. Sept. 26, 2011), the plaintiff sought a declaration that his Hawaii theft conviction violated federal and international law because Hawaii is not a valid state. *Id.* at 2–3. Rejecting this argument, *Sai* explained:

> Plaintiff's lawsuit challenges the United States's recognition of the Republic of Hawaii as a sovereign entity and the United States's exercise of authority over Hawaii following annexation. However, "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative —'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oe jen v. Cent. Leather Co.,* 246 U.S. 297, 302 (1918). In addition, the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. Therefore, there is a textually demonstrable constitutional commitment of these issues to the political branches. Furthermore, it would be impossible for this Court to grant the relief requested by Plaintiff without disturbing a judgment of the legislative and executive branches that has remained untouched by the federal courts for over a century. Since its annexation in 1898 and admission to the Union as a State in 1959, Hawaii has been firmly established as part of the United States. The passage of time and the significance of the issue of sovereignty present an unusual need for unquestioning adherence to a political decision already made.

Id. at 6–7.

Similarly, in *Williams v. United States,* 2008 WL 5225870 (D.Haw. Dec. 15, 2008), United States District Chief Judge Susan Oki Mollway determined the court lacked jurisdiction over an inmate's civil rights claims challenging the legality of the overthrow of the Kingdom of Hawaii and Hawaii's admission as a state to the United States, explaining:

> Plaintiff's claims raise nonjusticiable political questions because they involve matters that have been constitutionally committed to Congress. Under Article IV, Section 3 of the Constitution, "[n]ew States may be admitted by the Congress into this Union[.]" U.S. Const. art. IV, § 3. By an act of Congress, Hawaii was admitted to the Union in 1959. This court, therefore, lacks jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood.

Id. at *3; *See also Algal Partners, L.P. v. Santos,* 2014 WL 1653084, at *2–3 (D.Haw. Apr. 23, 2014) (Kobayashi, J.) (adopting reasoning in *Williams* to decline jurisdiction over assertion that "the Hawaiian Kingdom continues to exist and is under a prolonged and illegal occupation by the United States"). The court joins these cases finding that this court lacks jurisdiction to address claims challenging the legality of Hawaii's annexation.

*4 In opposition, Plaintiff argues that the political question doctrine does not apply to this action given that numerous cases have addressed the annexation of Hawaii, and the application of United States laws to U.S. territories generally. *See* Doc. No. 18, Pl.'s Opp'n at 3–4. Plaintiff confuses cases raising the validity of Hawaii's annexation (such as in *Sai* and *Williams*), with cases in which Hawaii's annexation is not itself challenged but instead merely part of the historical background of the case. *See, e.g., Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 172–73 (2009) (holding that the Apology Resolution did not strip Hawaii of its sovereign authority to alienate the lands the United States held in absolute fee and granted to the State upon its admission to the Union); *Rice v. Cayetano,* 528 U.S. 495, 505 (2000) (explaining history of Hawaii as background in determinng that limiting voting for elected Office of Hawaiian Affairs trustees to Native Hawaiians violated the Fifteenth Amendment); *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate,* 470 F.3d 827, 831 (9th Cir.2006) (discussing history of Hawaii as background for determining that private, non-profit school that receives no federal funds did not violate 42 U.S.C. § 1981 in preferring Native Hawaiians in its admissions policy).

For example, *Arakaki v. Lingle,* 477 F.3d 1048 (9th Cir.2007), rejected that the political question doctrine applied to an action challenging on equal protection grounds various state programs which gave preferential treatment to persons of Hawaiian ancestry. *Arakaki* explained: "Nothing in the claims Plaintiffs have asserted or the remedy they seek invites the district court to exercise powers reserved to Congress or to the President. The district court has not been asked to declare tribal status where Congress has declined." *Id.* at 1068; *see also Wang,* 416 F.3d at 995 ("China's sovereignty over Hong

Kong (and by corollary Hong Kong's subsovereign status) has been resolved by the executive branch, and we do not question that judgment. However, this court may examine the resulting status of Hong Kong, and decide whether the Treaty Clause applies to Hong Kong as a constitutionally cognizable treaty party."). In comparison to *Arakaki* and the cases cited by Plaintiff, the entire basis of this action is for the court to declare Hawaii's annexation null and void, which is a power not vested with the judiciary.

In sum, the court easily concludes that this action presents a nonjusticiable political question on which this court lacks jurisdiction. The court therefore GRANTS State Defendants' Motion to Dismiss. Because subject matter jurisdiction is an issue the court must raise sua sponte, *see Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1036 (9th Cir.2013), *and* Fed.R.Civ.P. 12(h)(3), and because this action presents a nonjusticiable political question as to all Defendants, this dismissal is as to all Defendants.

IV. *CONCLUSION*

*5 For the foregoing reasons, the court GRANTS State Defendants' Motion to Dismiss, and dismisses this action as to all Defendants. The Clerk of Court is directed to close this action.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 2532460

Footnotes

1 Because the court finds that it lacks subject matter jurisdiction, the court does not address State Defendants' additional arguments for dismissal.

2 The Guarantee Clause directs the federal government to "guarantee to every State in this Union a Republican Form of Government," U.S. Const. Art. IV, § 4.

End of Document

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

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