FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch, Secretary

Comments on CG Docket No. 11-41 by Alapaki Nahale-a, Chairman Hawaiian Homes Commission

June 20, 2011

Introduction

The Hawaiian Homes Commission Act, (HHCA) was enacted into law in 1920, and was later incorporated into U.S. law via Public Law 86-3, the Hawaii Statehood Act of 1959. The 200,000 acres of land set aside under the Act were transferred to the State of Hawaii upon its admission into the Union to be held as a public trust. The lands are administered by the Hawaiian Homes Commission (HHC) and the Department of Hawaiian Home Lands (DHHL) for the benefit of native Hawaiians as defined by the Hawaiian Homes Commission Act, 1920, as amended. (See attachment A regarding statutes benefiting Native Hawaiians)

This federally-created trust is the legacy of Prince Jonah Kuhio Kalanianaole (1871–1922), the Delegate to the U.S. Congress from the Territory of Hawaii, who recognized the need to preserve the dying race of native Hawaiians by returning them to the land under a homesteading program so that they could once again thrive and preserve their culture and traditions. Unfortunately, he died before the first native Hawaiian homesteader was returned to the land.

Native Nations Priority

The State of Hawaii, and its rural Hawaiian Home Lands (HHL) communities face unique hardships in accessing broadband because of the state's non-contiguous configuration and location in the middle of the Pacific Ocean. Connectivity is provided by a combination of submarine fiber optic systems and terrestrial fiber systems. Since modern fiber optic systems no longer require a regeneration point in Hawaii, fewer trans-Pacific cables are located in Hawaii. Ultimately, this reduces Hawaii's connectivity to the rest of the world and results in higher costs to users which directly impact the state and Native Hawaiians' ability to conduct advanced research, expand distance learning/education, and further the provision of tele-health services.

Native Hawaiians, like American Indians and Alaska Natives, face similar social-economic challenges. They are overrepresented in the negative indicators including income levels, health and well being, educational levels, prison populations, and homelessness.

Prioritization of Hawaiian Home Lands as a Native Community under FCC regulations governing Broadband deployment will enable public interest benefits to be realized in the areas of health, culture and economics that would otherwise not be available to the native Hawaiian community.

The members of the Hawaiian Homes Commission, as trustees, manage the Hawaiian Home Lands as a federal Trust for the benefit of native Hawaiians as defined by the Hawaiian Homes Commission Act, 1920, as amended (HHCA). It is vital that any federal program implemented on behalf of the Act's native Hawaiian beneficiaries secure the approval and support of the Commission. As leaders of HHL native Hawaiian community, the members of the Commission understand their responsibilities from both a cultural and legal point perspective

Native Nations Broadband Fund

A Native Nations Broadband Fund is important to meet the needs of broadband infrastructure developments that are constructed and/or deployed on trust lands. Hawaiian Home Lands are part of a federal trust and its lands are inalienable and therefore cannot be disposed of freely. Federal programs have been implemented on HHL trust lands with the help of special legislation and administrative action. For example Native American Housing programs administered by the U.S. Department of Housing and Urban Development (HUD) is a model to consider in terms of developing a separate fund for use on tribal trust lands. The evolution of Public and Indian Housing programs administered by HUD are based in part on the unique needs of the Native people and the trust status of native lands.

The Native Nations Broadband Fund should consider a consolidated planning approach which could enable aggregated demand for broadband services to be identified on tribal lands. The fund could also be administered by employing a block grant model involving a single grantee and multiple sub-grantees in the various designated tribal regions. The Department of Hawaiian Home Lands (DHHL) uses this model for its affordable housing development on HHL. This model enables service providers on HHL to obtain data on needs in order to better define their project proposals to address those needs, secure the necessary legal authorization for use of the land and receive funds to implement their projects. This Native Hawaiian centric model has been used successfully for projects on Hawaiian Home Lands which serve native Hawaiians and the general public in Hawaii.

Broadband is a powerful tool that can significantly assist Native Hawaiians in achieving a greater level of economic self-sufficiency, educational achievement, and cultural

awareness and pride. Access to a Native Nations Broadband fund will enable will native Hawaiian imagination, entrepreneurship, and old-fashioned hard work to drive the economy of the State of Hawaii.

Native Nations Adoption and utilization

DHHL conducts periodic studies of its beneficiaries. The objective of these studies is to provide demographic information to address housing and other planning needs, to place those needs in the context of housing and other service needs of the DHHL, and develop demographic profiles of Hawaiian Home Lands beneficiaries.

Approximately 8,200 native Hawaiian lessees currently reside on Hawaiian Home Lands, and with their families, there are more than 37,800 individuals residing on the Home Lands. Approximately 20,000 native Hawaiian applicants are on the waiting list for an assignment of a Hawaiian Home Lands lot or (parcel of land?). Forty-four percent of DHHL's applicants have incomes that are below the HUD 80% MFI threshold and 69% of the Lessees fall below 80% MFI.

Native Hawaiians are digitally literate - 72% of homes on HHL have a computer and 85% have access to the internet and are prepared to adopt and use new broadband services. There is a need for anchor institutions such as schools, libraries and health service providers to develop and deploy their services to HHL communities and the broader community. Hawaiian Home Lands are located on every island and could provide land for anchor institutions to support the broadband network. But deployment of broadband services must extend beyond Hawaiian Home Lands because many of the native Hawaiian applicants do not live on Hawaiian Home Lands.
Approximately 40% of HHL beneficiaries are 60 years and older and often have significant medical needs. Broadband will be important to provide Native Hawaiian patients with access to quality acute health care services using tele-health technology thereby eliminating the time and expense of traveling to major hospitals on Oahu. Improved technology and broadband infrastructure with community-based support systems will significantly enhance the ability of native Hawaiians to access medical services.

Broadband access and telecommunication deployment on Hawaiian Home Lands is vital to creating sustainable homestead communities. Broadband deployment on Hawaiian Home lands can serve as incubators for economic development to support technology-based businesses that hold the potential to benefit- HHL beneficiaries and the entire State of Hawaii. Through broadband and information technology, native Hawaiians can choose to live and work in their own communities where they grew up, without having to move away to support their family.

Broadband can also be used as a powerful tool in preserving Native Hawaiian culture and history. Today, old Hawaiian language newspapers are digitally scanned and placed in databases for Hawaiians and the public to explore. These newspapers, which

were printed in the Native Hawaiian language, have proven to be a valuable resource in understanding the history of the Native Hawaiian people, and in documenting the continuing efforts of Native Hawaiians to maintain their social and political institutions notwithstanding the overthrow of their government in 1893. By re-visiting history and comparing the news stories to the oral histories that have been passed down through various families a better understanding is evolving about Hawaii's unique history because it is being analyzed from a contemporary point of view using the latest digital technology. The ability to decentralize the information and enable communities to conduct their own individual reviews and research will enable a better understanding of the cultural evolution that has taken place.

Broadband educational ventures can support cultural preservation through videos, historic documents, photo files which feature Hawaiian artifacts, cultural treasures and other archival material such as tape recordings of songs and chants which will enable students and teachers to have unprecedented access to authentic Hawaiian cultural resources right in the classroom.

Defining Tribal Lands

DHHL actively manages the trust lands which are a special legal jurisdiction and maintains inventories, surveys and works with the U.S. Census Bureau to insure that the HHL geographies are maintained and accurately represented at the National level.

Hawaiian Home Lands generally lack infrastructure (water, roads, electricity, telephone, wastewater etc.) due to the remote location of the lands and the distribution of the lands on several islands. The projected estimated cost of infrastructure development is approximately $2 billion based on the current waiting list which continues to grow. The high cost of development in Hawaii is also a factor that influences infrastructure development.

DHHL works with designated telecommunications developers who offer services throughout the HHL service area and they receive universal service support through the high cost and low-income programs targeted to native Hawaiians on Hawaiian Home Lands. The tier 4 lifeline support program could provide benefits to low-income native Hawaiians both on and off of Hawaiian Home Lands. All of the development activities are subject to approval by the Hawaiian Homes Commission.

Hawaiian Home Lands works with Native Hawaiian organizations as partners to develop self-help housing, turn key housing, infrastructure development and commercial developments.

The partners are responsible for securing the capital, financing, equipment, and other infrastructure components necessary to implement their business plans and deploy their services. The Hawaiian Homes Commission retains final approval authority subject to consultation with the beneficiaries and essentially operates as a Tribal governing entity.

Hawaiian Home Lands should play an integral role in the process for designating carriers who may receive [universal service] support to serve Hawaiian Home Lands.

Innovative partnerships have enabled DHHL to develop various components of infrastructure such as water and telephone services on a pilot program basis and creative financing enables DHHL to cover the cost of the remaining roads, electric and wastewater components of the infrastructure that are necessary to settle native Hawaiians on the land.

The Department of Hawaiian Home Lands provides licenses or leases to a variety of communications businesses serving Hawaii. The businesses comply with the various federal regulations which are required by the Hawaiian Homes Commission.

Public Safety and Homeland Security

DHHL maintains an enforcement team that works with State and Federal public safety entities to serve the native Hawaiian community. More research is required to determine if a special bands, frequencies and other homeland security needs exist on the HHL and how they would be deployed to insure seamless operation under emergency conditions.

Cultural Preservation and Section 106 of the National Historic Preservation Act

As a Native Hawaiian Trust cultural preservation is a very high priority. Hawaiian Home Lands are subject to all federal laws, participate in regular reviews, and complies with all federal regulations and requirements.

The establishment of guidelines regarding what information might be appropriate for particular types of projects would be helpful in reviewing and enabling the Hawaiian Homes Commission to approve the projects. It is important to avoid duplication and the more standardization becomes the norm the easier it is for the approving agency to approve the project. Cooperative practices can work as long as the individual agency's rights to conduct their due diligence and internal review of the various projects are respected.

Satellite-Based Services

The development of satellite video and audio services will be a new opportunity for DHHL to serve native Hawaiians because satellite systems can be used to disseminate information to the public and to first responders in emergencies, including natural disasters. DHHL would need to assess the technical and economic feasibility of buying or leasing transponder capacity directly from satellite operators. We are not prepared to respond on this issue at this time but would welcome the opportunity engage in

discussions to consider accessing the Internet at speeds greater than those provided by "off the shelf" equipment because 85% of native Hawaiian families currently use computers and high speed access is important to them. The community-oriented nature of demand aggregation on Hawaiian Home Lands will require further study, and involve consultation with Native Hawaiian leaders, to determine the critical role of Native Hawaiian anchor institutions.

Given the high rates of digital literacy amongst those residing on the Hawaiian Home Lands, the potential for the use of satellite-based services is very high. The challenge will be identifying the partners to develop the services and determining the level of involvement of the Hawaiian Homes Commission in terms of undertaking risk and the use of trust assets.

Disability Matters in Native Nations

Funding subsidies for adaptive equipment are important in helping to close the technology gaps on and off of Hawaiian home Lands for people with disabilities. Funding subsidies should include native Hawaiians who do not live on Hawaiian Home Lands. 37% of Hawaiian Home Lessees are 70 years and older and could benefit from adaptive equipment.

While new studies may be required to identify the level of disability need we are certain that the results will be similar to other native communities.

Consultation and Coordination with Native Nations

The Office of Native Affairs and Policy (ONAP) and its on going consultation with the Hawaiian Homes Commission and native Hawaiian beneficiaries residing on or eligible to reside on HHL will be vital to the development of Broadband opportunities in the State of Hawaii.

The Hawaiian Homes Commission is both a regulator and developer because of the special trust imposed on Hawaiian Home lands. The Commission has developed policies involving consultation, management, and implementation. Joint consultations may be a model to address the native Hawaiian community. The Departments of Interior, Housing and Urban Development and Agriculture have engaged in these types of consultations.

It is important that ONAP also consult with the larger Hawaiian community in the State of Hawaii for projects developed off of Hawaiian Home Lands.

HHC Closing Comments

Broadband wireless communications and radio services are very important components for developing native Hawaiian communities. DHHL may be interested in applying for a radio license under the Tribal Priority program to serve a wide range of needs involving the transmission of culturally-relevant information through native Hawaiian language and English language mediums, covering public health, safety and emergency needs and other needs of the native Hawaiian Homestead community.

The creation of partnership development models to access support for and develop broadband infrastructure to build the telecommunications infrastructure on HHL will need to be undertaken as soon as possible to position Native Hawaiian businesses and the Hawaiian Homes Commission as leaders in Hawaii.

The ability for DHHL partnerships to serve communities on and near the HHL by involving multiple jurisdictions such as the counties, city or state can be initiated based on past developments that have been undertaken by DHHL involving federal program funds and the development of infrastructure for native Hawaiians residing on Hawaiian Home Lands.

Attachment A is incorporated with these comments to clarify the constitutionality of Native Hawaiian federal statutes that are adopted to benefit Native Hawaiians, and address the confusion that exists at the National level regarding the status and special political relationship that Native Hawaiians have with the U.S. Government.

Albert "Alapaki" Nahale-a, Chairman
Hawaiian Homes Commission

Attachment "A" to Comments on CG Docket No. 11-41 by Alapaki Nahale-a, Chairman Hawaiian Homes Commission June 20, 2011

"Treating Similarly Situated Peoples The Same: Why Recognizing a Special Relationship With Native Hawaiians Complies With Equal Protection," posted on www.NativeHawaiians.com.

In *Rice* v. *Cayetano*, 528 U.S. 495, 518 (2000), the Supreme Court observed in passing that "[i]t is a matter of some dispute, for instance, whether Congress may treat the Native Hawaiians as it does the Indian tribes." From this dicta, in a voting rights case decided under the Fifteenth Amendment, one scholar and some observers have concluded that the numerous statutes that have been passed by Congress providing benefits to Native Hawaiians are unconstitutional under the Fourteenth Amendment, as a violation of Equal Protection under the doctrine of *Adarand Constructors, Inc.*, v. *Pena*, 515 U.S. 200, 235 (1995). *See, e.g.*, Stuart Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 **Yale L.J.** 537 (1996). In the hands of those who seek to strip Native Hawaiians of the small amount of recompense they have received in return for centuries of deprivation at the hands of Westerners in general and Americans in particular, the conclusion that programs that recognize a special relationship between the Federal government and Native Hawaiians are unconstitutional as a violation of Equal Protection is an extremely dangerous one. It provides opponents with the ability to cry "unconstitutional" (much like the proverbial boy who cried "wolf") in an effort to stall or sink any new legislation that benefits Native Hawaiians.

Yet the Supreme Court has never reached any conclusion regarding the constitutionality of statutes benefiting Native Hawaiians, and a single paragraph of dicta in a single Supreme Court case should not be allowed to disrupt or derail ongoing attempts by the Federal Government to reconcile with Native Hawaiians. As is evidenced by the fact that even in the *Rice* decision (which provides the only clear textual underpinning for the unconstitutionality argument in the entirety of the Supreme Court's jurisprudence) Justice Kennedy, the author of the majority opinion, noted that the issue was open, the constitutional infirmity of such statutes has never been established. Certainly, had there been five clear votes for the proposition that Congress may not deal with Native Hawaiians as it has with Native Americans, Justice Kennedy could have decided the issue before the Court in *Rice* — whether or not voting for the Trustees of the Office of Hawaiian Affairs could be limited to Native Hawaiians — on that ground, rather than under the more technical grounds on which the decision in fact rests. *See Rice*, 528 U.S. at 518-22. Consequently, the strongest charge against statutes recognizing the special status of Native Hawaiians that may fairly be made is that those statutes could pose a constitutional concern grounded in the Equal Protection Clause. But a careful examination of the history of the Native Hawaiians and the Supreme Court's constitutional pronouncements shows that this concern should not be deemed so serious as to interfere with Congress' ongoing efforts to affect reconciliation with the Native Hawaiians.

Native Americans enjoy a "special relationship" with the federal government, based on their history as members of once-sovereign nations. This "special relationship" effectively insulates government programs designed to benefit Native Americans against equal protection challenges. *See, e.g.*, *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("'[T]he unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.'") (*quoting Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)); *United States* v. *Antelope*, 430 U.S. 641, 645 (1977). Accordingly, the Court has routinely upheld government programs that give preferences to Indian tribes since such classifications are rooted not in racial classifications, but in political or legal status. *See Yakima*, 439 U.S. at 501; *Antelope*, 430 U.S. at 645. Consequently, as persons similarly situated to Native Americans in all constitutionally-relevant respects, the best understanding of the principles enshrined within the Equal Protection Clause requires that they be treated similarly.

Native Hawaiians and Native Americans Share a Similar History of Mistreatment by the Federal Government:

The history of the treatment of the indigenous peoples of Hawaii at the hands of Westerners, and Americans in particular, is well-documented. Congress previously recognized, in the 1993 apology resolution, the role the American government played in divesting hundreds of thousands of Native Hawaiians of their rights to the land on which their forefathers had lived and dwelled. *See* 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993). When Captain James Cook discovered Hawaii in 1778, the eight islands had more than 400,000 native inhabitants. These Native Hawaiians lived in a thriving society, which possessed distinctive common ancestry, culture, language, and dances. *See id.* They lived under a system of chiefdoms with communal land tenure, wherein commoners cultivated the soil in return for providing a portion of the proceeds to their chief. In the late 18th Century, these chiefdoms were united under King Kamehameha I, who ruled Hawaii as a sovereign nation and negotiated many treaties with western powers, including the United States. *See* AnneMarie M. Leirmann, *Seeking Sovereignty: The Akaka Bill and the Case for Inclusion of Hawaiians in Federal Native American Policy*, 41 **Santa Clara L. Rev.** 509, 514 (2001).

Over the course of the next century, western influence in the Islands was growing steadily, while the native population was devastated by a series of Western diseases to which Hawaiians had no immunity. Some sources suggest that by 1890, the population of Hawaiian Natives had dropped from more than 800,000 to around 45,000. *See id.* Contemporaneously, small groups of westerners began influencing the communal structure of land ownership for their own profit — "the fewer than 2,000 Westerners who lived on the islands were able to obtain large amounts of acreage from the chiefs . . . and by the end of the nineteenth century they had taken over most of Hawaii's land . . . and manipulated the economy for their own profit." Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 **Yale L. & Pol'y Rev**. 95, 103 (1988). Americans also acquired control of three-fourths of all Hawaiian commerce, and began to dominate the Kingdom's political affairs. *See, e.g.*, S. Doc. No. 16, 55th Cong., 3d Sess. 3 (1898); S.Rep. No. 681, 55th Cong., 2d Sess. 78 (1898). Nonetheless, ostensible rule by a Hawaiian monarch continued until 1887, when a group of American businessmen (with U.S. military support) forced the reigning king, King Kalakaua, to sign a "Bayonet Constitution" that placed the executive powers (including the ability to appoint judges and justices) in the hands of a U.S.-dominated Cabinet. *See Lierman, supra,* at 514. The Bayonet Constitution also disenfranchised the majority of Hawaiian voters by restricting voting rights to only property owners. *See* Report On the Reconciliation Process Between the Federal Government and Native Hawaiians, *From Mauka to Makai: The River of Justice Must Flow Freely*, The Department of the Interior and the Department of Justice 26 (October, 23, 2000) ("Reconciliation Report").

In January 1893, partly as a result of a U.S.-imposed tariff on sugar, the economy of Hawaiian Kingdom declined markedly. Queen Liliu'okalani threatened to replace the Bayonet Constitution with a constitution similar to the previous Constitution, which would restore some of the Monarch's power as well as voting rights to the Native Hawaiians. 107 Stat. 1510. American business interests felt threatened by the restoration of suffrage to Native Hawaiians, as native Hawaiian voters would have significantly outnumbered the Americans (and their descendants) on the Island. *See id.* Anticipating this change, on January 14, 1893, U.S. Minister John Stevens and a so-called "Safety Committee," organized by Americans, positioned armed U.S. Marines in front of Iolani Palace. *See* Hakulei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics As Usual*, 24 **U. Haw. L. Rev.** 693, 698 (2002). Concerned for her people, the Queen "yield[ed] to the superior force of the United States," forsaking her throne but relying on the American justice system for restoration. 107 Stat. 1510. Despite devoting the remainder of her life to such efforts, under President William McKinley, America negotiated and signed an annexation treaty in 1897, notwithstanding the fact that a "Congressional fact-finding mission failed to find a Native Hawaiian who was not opposed to Annexation." *Leirman, supra*, at 515. Following the overthrow, laws suppressing Hawaiian culture and language were passed. Reconciliation Report at 1.

The annexation, and ensuing resolutions, placed all crown and government lands in the hands of the United States to be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." An Act to Provide a Government for the Territory of Hawaii, Ch. 339, 31 Stat. 141 (1900). Notwithstanding this trust, Native Hawaiians never saw any benefit from these lands. Decades later, finally beginning to recognize the dire need to fulfill its trust with the Native Hawaiians, and relying on the precedent of previous federal laws granting Indians special rights in public lands, Congress set aside 203,500 acres of these ceded lands for the purpose of providing farms and residences for Native Hawaiians, under the auspices of the Hawaiian Homes Commission. Act of July 9, 1921, Ch. 42, 42 Stat. 108. Hawaii adopted this Act and took responsibility for fulfilling the government's trust when it became a State in 1959. *See* Hawaii Statehood Admissions Act (Admissions Act), 73 Stat. 5, §4. In addition, Section 5 of the Admissions Act conveyed an additional 1.2 million acres of land to the State to be held in trust "for the betterment of the conditions of Native Hawaiians" and certain other public purposes. *See id.* However, due to a technicality in the trust that allowed the

state to spend the money on public schools instead of programs directly benefiting Native Hawaiians, "no benefits actually went to Native Hawaiians until the state constitution was amended in 1978." *See Rice* v. *Cayetano*, 146 F.3d 1075, 1077 (1998). Shortly thereafter, a legislative Act was passed requiring that 20% of the funds from the lands held by the state in trust must go to the Office of Hawaiian Affairs, to be spent for the benefit of Native Hawaiians.

Despite these efforts, today, only a small number of Native Hawaiians have received land through operation of the trusts, and benefits have been too slow to effect meaningful change in the condition of Native Hawaiians. As a result, more than two hundred years later, Hawaiians have not recovered from the destruction of their culture and suppression of their traditions. Native Hawaiians today constitute less that twenty percent of Hawaii's population. However, they are over represented in the state's prisons, public housing, poor health, substance abuse, and unemployment rolls, and more than twice as likely to live below the poverty line as other residents of Hawaii. *See* Office of Hawaiian Affairs, **Native Hawaiian Data Book** (2000). They are less likely to complete high school or college. *See id.* Native Hawaiians also possess the shortest life expectancy of all Hawaii residents — by some estimates, the extinction of full-blooded Hawaiians will occur by the year 2040. *See Leirman*, *supra*, at 515.

This treatment at the hands of the American government, including the loss of their native lands under the threat of force, binds the history of Native Hawaiians to that of Native Americans. Over roughly the same period of time, the Federal Government was making treaty after treaty with the Native Americans, mostly to dispossess them of their lands and move them westward. *See*, *e.g.*, Joseph D. Matal, *A Revisionist History of Indian Country*, 14 **Alaska L. Rev.** 283 (1997) ("Until the mid-nineteenth century, Indian removal was the primary feature of British and then American policy toward the tribes."). Over time, the federal government has recognized the wrongness of its former actions, and tried to make some effort to correct them. Using its plenary power over "Indian Tribes," Congress passed the Indian Reorganization Act of 1934, 25 U.S.C. §461 *et. seq.* (1934), and later the Alaska Native Claims Settlement Act, 43 U.S.C. §1601 *et seq.* (2000), to grant both money and lands to Native Americans and Alaska Natives, respectively.

Congress has likewise attempted to make a beginning at reconciling with the Native Hawaiians. In all, over 150 pieces of legislation have classified Hawaiians as Native Americans, and included them in a variety of Native American benefit programs. *See* Reconciliation Report at 57. Such statutes include the National Historic Preservation Act, 16 U.S.C. §470a(d)(6) (West Supp. 1998), which provides protection to property with cultural or religious importance to Indian tribes and Hawaiians; the Native Hawaiian Languages Act, 25 U.S.C. §2901-2912(1994), which accords protection to the Native Hawaiian languages and includes them in the collection of Native American languages; and the American Indian Religious Freedom Act, 42 U.S.C. §1996 (1994), which pledges to preserve Native Hawaiian faiths under a subset of religions described in the statute as "Native American."

These longstanding and ongoing efforts by Congress recognize that the Federal government stands in a special relationship with respect to the Native Hawaiians. Just as with Native Americans and Alaska Natives, Native Hawaiians were a once-sovereign nation, and have never relinquished their claims of sovereignty. Just as with Native Americans and Alaska Natives, Native Hawaiians were ravaged by western diseases and suffered massive losses of population. Just as with Native Americans and Alaska Natives, Native Hawaiians have been dispossessed of their ancestral lands with the active support of the federal government, and have never expressly relinquished their claims to their ancestral land. Just as with Native Americans and Alaska Natives, the Native Hawaiian culture became all but extinct due to the oppressive actions of white settlers and the American government. And just as with Native Americans and Alaska Natives, Native Hawaiians to this day still suffer from the effects of American expansion, far surpassing the average rates of unemployment and poverty, and far below national norms in level of education, income, and life expectancy.

Indeed, there is but a single distinction that can be drawn between the plight of the Native Hawaiians and that of their continental counterparts, and it is upon this very distinction that critics of the constitutionality of Congress's reconciliation efforts hang their entire argument. Whereas on the continent, efforts to stamp out Native American culture were never entirely successful — leaving some vestiges of tribal structure for courts to treat as a quasi-sovereign for constitutional purposes — on the Hawaiian Islands, on the other hand, all tribal structure was completely destroyed, and no vestiges of an official "tribe" which purports to represent all Native Hawaiians remains. Absent this tribal structure, one scholar has concluded, there is no "Tribe" within the meaning of the Constitution's provision of power to Congress to regulate "Indian Tribes," and such preferences must be viewed under the strict scrutiny given to preferences based solely on race. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 **Yale L.J.** 537, 558-560 (1996). For the reasons discussed below, the preponderance of the law supports the fact that Congress may regulate the affairs of Native Hawaiians as it does Native Americans despite the absence of this tribal

structure, and this small distinction between the two groups is of no constitutional importance.

Equal Protection Requires that Similarly-Situated Indigenous Peoples Receive the Same Treatment From the Federal Government:

In light of their shared history of mistreatment by the Federal Government, and their similar resulting need for the special protection of the Federal Government if their cultures, traditions, and practices are to continue to survive, it would be a strange result indeed if the constitution *acknowledged* that the federal government must assist Native Americans, while simultaneously *preventing* the federal government from enacting programs designed to preserve the existence of Native Hawaiians. It is unsurprising, then, that outside of the previously-mentioned dicta in the *Rice* decision, there is scant legal support for such a view. Even in the dicta of *Rice* itself — wherein Justice Kennedy discusses the "difficult [constitutional] terrain" that was posed by the State's argument in that case that it had the power to deal with Native Hawaiian's as an Indian tribe — Justice Kennedy's concerns seem to be much less focused on whether *Congress* has a special relationship with the Native Hawaiians (and the concomitant ability to pass beneficial laws accordingly) than whether, assuming such power existed, Congress had the ability, and had in fact, delegated such power to the State of Hawaii. *See Rice*, 528 U.S. at 518. As a consequence, the best view of the *Rice* decision may be, as one scholar has suggested, that "the decision is but a logical reaffirmation of the Court's reasoning in its recent redistricting cases, which sharply define the Constitution's strict prohibition against using race as a condition of voting," and nothing more. *See* William E. Spurill, *Case Note, The Fate of the Native Hawaiians: The Special Relationship Doctrine, the Problem of Strict Scrutiny, and Other Issues raised by* Rice *v.* Cayetano, 35 **U. Rich. L. Rev.** 149, 153 (2001). In any event, the clear weight of authority supports the idea that Congress certainly has the power to recognize a special relationship between the Federal Government and Native Hawaiians, and pass laws accordingly. Even the sole commentator on which Justice Kennedy relied to make his observation that the issue was the subject of some debate himself acknowledges that all other courts and legal commentators have reached the opposite conclusion. *See Benjamin*, *supra*, at 558.

It is difficult indeed to escape the conclusion that "in this context, the equal protection argument follows that as a group of Native Americans similarly situated, the Native Hawaiian peoples should be treated in a manner uniform with other classes of Native Americans." *Lindsey*, *supra*, at 716. In other words, since Congress has the well-established authority to create programs which benefit Native Americans as the result of having developed a "special relationship" with Native Americans — notwithstanding the fact that the programs contain what appears on its face to be a racial classification that would be subject to strict scrutiny under *Adarand* — then it must also have the authority to provide such programs to Native Hawaiians. To defeat this conclusion, the opponents of such programs can point to but a single distinction — that Native Hawaiians are not currently composed into an organized tribal entity along the lines of their mainland counterparts. *See Benjamin*, *supra*, at 558. The caselaw does not support the conclusion that this distinction is constitutionally dispositive.

"Native Hawaiians," as a group, constitute a tribe under any constitutional definition of the word that would be applied by the courts. While Congress may not "bring a community or body of people within the range of [its powers under the Indian Commerce Clause] by arbitrarily calling them a tribe," Congress's plenary power over Indian affairs must necessarily encompass the general authority to identify which communities of indigenous peoples constitute a tribe *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). Provided Congress makes a reasonable determination that a particular community is "distinctly Indian," then "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, not the Courts." *Id.* Even in absence of such deference to legislative judgments, there is no general agreement in the courts as to the qualifications a group must have in order to be considered a tribe for constitutional purposes. The Supreme Court has made at least one attempt at defining the word "tribe" in a case dealing with an unrelated issue: "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya* v. *United States*, 180 U.S. 261, 266 (1901). Native Hawaiians easily meet this definition in virtually every respect — they are a group; they are "Indians" or "Native Americans" in the sense of being peoples indigenous to the land that is now part of one of the fifty states; they are united in their community by sharing common history, traditions, culture, language, and dances; and they inhabit a particular territory, the Hawaiian Islands. The only aspect that is arguably lacking is that Native Hawaiians are no longer

a community under one leadership, or indeed any leadership at all outside of state-created entities such as the Office of Hawaiian Affairs. However, there is no reason to believe that the Supreme Court would consider this deficiency to be of any constitutional moment.

The only argument that somehow the lack of vestiges of a formal tribal structure of Native Hawaiians effectively places them beyond the reach of the special powers granted to Congress through the Indian Commerce Clause (and recognized by the Court in the *Mancari* decision) is the one advanced by Professor Benjamin. *See Benjamin*, *supra*, at 582 ("The problem with the suggestion that the history of Native Hawaiians and Indian tribes is similar in constitutionally dispositive ways is that the two groups differ in a crucial respect: American Indians remained in political organizations, but Native Hawaiians did not."). He relies on a single footnote from the *Mancari* decision itself — in which the Court upheld hiring preferences for Native Americans in place at the Bureau of Indian Affairs — which states that: "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes" and thus "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 553, n.24. Absent the vestiges of tribal leadership, so Professor Benjamin's argument goes, there is no political entity with which the Federal Government can entreat, and consequently the term "Native Hawaiian" must be understood as racial rather than political or legal. *See Benjamin*, *supra*, at 545-48. *But see*, *e.g.*, *Liermann*, *supra*, at 510 ("However, based upon case law, constitutional analysis, and policy, Hawaiians probably need not organize into a federally-recognized tribe for courts to subject legislation granting them preferential programs to a minimal standard of review."); *Van Dyke*, *supra*, at 101 (explaining "why the constitutional and decisional language upon which Professor Benjamin relies does not support his conclusion that rational basis review applies only to programs favoring federally recognized Indian tribes"); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 **Harv. L. Rev.** 1754, 1764 (1997) ("[T]he weak substructure of *Adarand* and *Mancari* cannot support the dense superstructure of analysis that Benjamin creates.").

To accept this argument, of course, would require turning a blind eye toward what at least two Supreme Court Justices have already identified as the "painful irony indeed [of concluding] that Native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government — a possibility of which history and the actions of this Nation have deprived them." *Rice*, 525 U.S. at 535 (Stevens, J., dissenting). But more importantly, the Supreme Court's jurisprudence following *Mancari* makes clear that tribal leadership is not the *sine qua non* of what may constitute a "tribe" for purposes of Congress' power under the Indian Commerce Clause. In at least two later decisions, *Delaware Tribal Business Committee* v. *Weeks* 430 U.S. 73 (1977), and *United States* v. *John*, 437 U.S. 634 (1978), the Court upheld, under deferential judicial review, programs that provided benefits to or established separate legal regimes for individual natives who had no recognizable "chief" or other symbol of tribal authority — something the Court could only have done if those who were benefited by the statute fell under the Court's understanding of an "Indian Tribe" for purposes of the Commerce Clause.

At issue in *Weeks* was the constitutionality of a statute that provided assets to the descendants of two recognized tribes, but did not require that those receiving the assets themselves be members of those tribes. *See Weeks*, 430 U.S. at 82 n. 14. While expressly recognizing that this meant that benefits would go to certain natives who were not members of a recognized tribe, the Court ruled that the statute fell within the *Mancari* test and could be sustained so long as the statute had a rational basis. *See id.* The majority concluded that Congress was free to "expand a class of tribal beneficiaries entitled to share in royalties from tribal lands." *Id.* at 84. Obviously, if the Native Americans at issue in *Weeks*, who did not swear allegiance to the tribal chief or otherwise participate in tribal life, could nonetheless be considered members of the "tribe" for purposes of the distribution of the tribe's assets, the existence of any particular political structure is not the *sine qua non* of a "tribe" for purposes of the Indian Commerce Clause. While later in the same decision, the Court also affirmed Congress's decision to exclude another group nontribal Indians (the Kansas Delawares) that sought a share of the assets, see *id.* at 85-90, taken as a whole, the decision reflects an obvious attempt by the Court to give Congress a wide latitude in deciding which particular groups of Native Americans do and do not constitute members of a "tribe" for purposes of recognizing a special trust relationship.

In *John*, the Court affirmed Congress's authority under the Indian Commerce Clause to take criminal jurisdiction over nontribal Indians who were a remnant of a tribe of Indians that had long ago moved to Oklahoma. *See John*, 437 U.S. at 653. The Court upheld the regime notwithstanding the fact that federal supervision over the Indians had not been continuous, and the fact that the Solicitor for the Department of the Interior had urged that the Indians "cannot now be regarded as a tribe." *Id.* at 650 n. 20. As the Court explained, "[n]either the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision

over them has not been continuous, destroys the federal power to deal with them." *Id.* at 653. The Court nonetheless concluded that it was appropriate for the federal government to establish separate programs for these Indians, *albeit* while noting that the federal government was nurturing a self-government process for these Indians, and the development of a more formal tribal structure was anticipated. *See id.*

Taken together, as one scholar has explained:

> The overriding themes that emerge from these Supreme Court decisions are that judgments regarding the governance of natives are political in nature, that each situation requires an individualized solution because of its unique historical context, and that the courts must allow Congress the flexibility it needs to provide rough justice to each different native group. No absolutes — certainly not the rigid limitation against aiding nontribal natives which Professor Benjamin erroneously promotes — have emerged to limit the power of Congress.

Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 **Yale L. & Pol'y Rev**. 95, 117-18 (1988). In short, the preponderance of the law supports the proposition that the decision as to which indigenous peoples constitute a "tribe" for purposes of Congress' plenary power is primarily an issue for Congress to decide, and is a decision to which courts will grant a great degree of deference. For this reason, any suggestion that proposed statutes benefiting Native Hawaiians will suffer from a constitutional infirmity, and subsequently should be amended or voted down, is egregiously misplaced.